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Federation of Ethnic Communities' Councils of Australia

**The Federation of Ethnic Communities' Councils  
of Australia (FECCA) submission  
to the Joint Standing Committee on Migration  
Inquiry into the Treatment of Those with  
Disability during the Migration Process**

October 2009

## **Introduction**

1. The Australian Federation of Ethnic Communities' of Australia (FECCA) welcomes the opportunity make a submission to the Joint Standing Committee on Migration Inquiry into the Treatment of Those with Disability during the Migration Process.
2. FECCA is the peak national body representing the interests of Australia's multicultural communities. FECCA strongly supports multiculturalism and social inclusion and rejects all forms of discrimination and racism. In developing this submission FECCA consulted with its members.
3. As part of FECCA's broader philosophical position of promoting community harmony, social justice and human rights, FECCA has developed strategic policy directions around disability issues affecting people from multicultural backgrounds and maintains partnerships with organisations such as the National Ethnic Disability Alliance (NEDA), the national peak body for people from a non-English speaking background with disability, their families and carers; Multicultural Mental Health Australia (MMHA); and Women with Disability Australia (WWDA). FECCA's Disabilities Advisory Committee includes members from these peak bodies as well as ADEC – Action on Disability within Ethnic Communities, Australian Federation of Disability Organisations (AFDO), Disability Works Australia (DWA), Multicultural Disability Advocacy Association of NSW (MDAA), People With a Disability (PWD) and the Refugee Council of Australia (RCA). FECCA acknowledges and endorses the sector-wide position statement published on the Disability Rights Now website.

4. FECCA supports a move away from the traditional welfare/medical model to a rights based model and socially inclusive approach to people with disability, taking account of their potential contribution as well as the contribution of their families to our society.
5. In this regard, FECCA welcomed the ratification by Australia of the United Nations Convention on the Rights of Persons with Disabilities (the Convention) in July 2008. And more recently, on 20 September 2009, the coming into force of the Optional Protocol to the Convention (the Protocol). The Protocol provides a mechanism for Australians to make complaints to the United Nations Disabilities Committee in the event that all domestic remedies have been exhausted. The Attorney-General has also declared the Convention under the *Australian Human Rights Commission Act 1986* which gives the Commission the power to consider disability rights under the Convention and enables it to report to Australian Government on how the Convention is being implemented.
6. As the Hon Bill Shorten, Parliamentary Secretary for Disabilities and Children's Services, said, 'Accession to the Protocol demonstrates Australia's commitment to recognising both the rights and capacity of people with disabilities. Despite progress in the recent past, the rights of people with disabilities to full and equal participation in the community are not always respected. This change will make it easier for people with disabilities to get fair treatment.'
7. FECCA applauds the Government's commitment to enhancing human rights for all Australians, including those with a disability. As emphasised in the Governor General's launch of Carers Week on 19 October 'Anyone, Anytime Across Australia can become a carer'. Often this will be for a person with a disability.

8. Australia made a declaration upon ratification that the Convention did not 'impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.' There has been strong opposition to this interpretive declaration from both the Australian disability community and international advocates. The exemption Australia applies to visa health assessments warrants closer examination.
9. It is vital that international human rights conventions ratified or acceded to by the Government underpin Australia's human rights legislation. It is important to reinforce already existing measures undertaken to protect the rights of people with a disability in Australia. This provides a framework for positive reforms of Australian law, government policies and community attitudes into the future.
10. In this regard, from a human rights perspective, FECCA considers that if such an exemption cannot be removed there are at least strong grounds to enable visa decision-makers to take into account the positive social and economic contribution of potential migrants with a disability and the contribution of their family members.
11. At present those people seeking an Australian visa need to satisfy health requirements set out in the Migration legislation, regulations and related policy guidelines. These regulatory requirements quite rightly are designed to protect Australia from public health risks, contain public expenditure on health and community services and maintain access of Australian residents to those services.
12. Paramount among these health requirements is the need to protect Australia from public health risks. FECCA suggests that these important community health safeguards should be considered separately from provisions that apply to people

with a disability, who are clearly not a risk to public health. It is because these two areas are often conjoined by the media and confused in public debate that it has been difficult to bring about necessary reforms in the way people with a disability are treated under the visa health provisions.

13. A review of the visa health requirements conducted by the Australian National Audit Office published in 2007 in its report *Administration of the Health Requirement of the Migration Act 1958* hardly mentions disability. In setting out the background the report refers to tuberculosis and other conditions with high incidence, morbidity and mortality globally, that may incur high medical costs as well as serious health conditions, such as cardiac, pulmonary or renal disease, that may also draw heavily on hospital resources or extend long waiting lists for organ transplants. The four references to 'disability' relate to the need to provide up to date and realistic guidance to Commonwealth medical officers (Medical Officers of the Commonwealth) with Table 3.2 indicating the work required on disability required extensive rewrite which then was yet to commence.
14. FECCA is concerned that in the public mind disability is thrown in together with legitimate concerns about contagious diseases like TB and health conditions which may put a strain on hospitals or extend waiting times for treatment like organ transplants and such.
15. FECCA agrees with the statement by the Chair of the current Committee who said, 'Potential migrants with disabilities and their families are currently treated under the migration system as costs to our society, and there is little scope to take into account the contributions they might make to their community and the workplace.' FECCA is of the view that there are strong grounds for change in this area to remove existing barriers and discriminatory treatment which would have benefits for the Australian community as a whole, not only in tapping the

potential contribution and talent of individuals who happen to have a disability and of their immediate family members, but also in improving wider community attitudes to disability in this area and generally.

### **Multicultural and disability policy context**

16. The most recent Australian policy framework, *Multicultural Australia Unity in Diversity*, stated that the key to the success of Australian multiculturalism is inclusiveness, recognising the benefits of our diversity, and that all Australians have the rights to be active and equal participants in Australian society, free to live their lives and maintain their cultural traditions.
17. As a national policy these core principles were required to be incorporated into the formulation of other government policy, programs and strategies including those that impact upon the lives of people with disability from a multicultural background.
18. The Commonwealth Disability Strategy was developed in consultation with Commonwealth agencies and endorsed by the Government in late 1994. The strategy is a ten year framework to assist the Government to change the way it operates so that it better meets the needs of people with a disability. The strategy is also about ensuring that the Government fulfils the requirements of the *Disability and Discrimination Act 1992* (the DDA).
19. The DDA provides protection for everyone in Australia against discrimination based on disability. The DDA makes it unlawful to discriminate in the provision of goods, services or facilities against people on the basis that they have, have had, or may have, a disability. The DDA also makes it unlawful to discriminate against an associate of a person who has a disability.

## **FECCA concerns about 'special exemption' in immigration visa laws applying to people with disability**

20. People with a disability make up about 20 per cent of the FECCA constituency excluding carers and family members. Using data from the Australian Bureau of Statistics and the Department of Family and Community Services, Disability Services Census, it is estimated that there are about one million people from a culturally and linguistically diverse background with disability living in Australia. Unfortunately people with disability are routinely marginalised, stigmatised and dehumanised, and not afforded their legitimate human rights. They are doubly disadvantaged because they often experience discrimination on the basis of disability *and* ethnicity.
21. Whilst the provision of disability support services is the major focus there is a need for a more holistic perspective on disability policy. It is important that people with disability are not seen as a 'health problem' but rather as people first who have rights that must be respected.
22. The rate of occurrence of disability among migrants is comparable to the general community. Although there are a fewer people with a disability coming into the country, because of the health requirement, a lot of migrants come here as able bodied people but acquire a disability. There is a higher incidence of work related disability among adult migrants because a lot of them engage in lower paid jobs or manual labour. There are fewer workplace safety measures for them, so a lot of them acquire a disability.
23. The Joint Standing Committee on Treaties recommended in November 2008 that the Government review the provisions of the *Migration Act 1958* and relevant administrative procedures to ensure there is no direct or indirect discrimination

against people with disability to ensure that there was no inconsistency with Australia's obligation under the Convention.

24. The Joint Standing Committee on Treaties recommended in November 2008 that:

a review be carried out of the relevant provisions of the Migration Act and the administrative implementation of migration policy, and that any necessary action be taken to ensure that there is no direct or indirect discrimination against persons with disabilities in contravention of the Convention.

25. In so far as the current migration health requirements can contribute to the separation of migrant and refugee families, Australia's migration treatment of people with disability is also at odds with Article 3 and Article 5 of the United Nations Convention on the Rights of the Child. Leaving children with disability behind to an uncertain future is not in a child's best interest.
26. On the other hand, the 'one out all out' provision in the Migration stream can exclude a whole family unit from the grant of visas on the grounds that a single member has a disability, without necessarily giving adequate weight to the positive contributions that the person with a disability and the family unit as a whole may potentially make both socially and economically.
27. With others in the multicultural and disability sectors, FECCA believes the current migration laws are discriminatory to people with disability. Reform of migration laws and processes to prevent discrimination against refugees and migrants with disability is necessary to remove such discrimination and to be inclusive to people with disability.



28. Australia on 30 March 2007 signed the UN Convention on the Rights of Persons with Disabilities, ratifying the Convention on 17 July 2008, and ratifying the Protocol on 21 August 2009. By ratifying the convention the Australian Government undertakes to abide by the obligations, the rights created and intentions of the convention, and conform its laws in line with the Convention.
29. The interpretation by the Government to exclude visa provisions is totally opposed by the disability community. It may also potentially be an embarrassment to the Government in the international community. Australia will have to report on its compliance to the Convention.
30. It is an anomaly that immigration law is not currently subject to the DDA. Historically disabilities have been considered with health requirements to protect the community from transmittable diseases. It is time to break this nexus. Health regulations should not single out people with disability and refuse them visas or place different requirements on them. Clearly it is time to ensure that immigration law conforms to Australia's obligations under international conventions including the Disability Convention. We need to look at the way society treats a person with disability including under its visa requirements to maintain their legitimate human rights.
31. The health requirements applying to visas under the *Migration Act 1958* have been set out in regulations from 1989 and regulations under the *Migration Regulations 1994* have operated much in their current form from 1995, with the current health waiver provisions in Schedules of the Migration Regulations being unaltered since 1999.
32. We note that in light of concerns in relation to the potential discrimination that may arise in the area of migration, the Joint Standing Committee on Treaties has

- recently recommended the Government review the provisions of the Migration Act and relevant administrative procedures to ensure there is no direct or indirect discrimination against people with disability.
33. Recent Media attention to the case of Lukas Moeller and others has highlighted that current migration processes do not provide fair outcomes for people with disability and their families, and devalue the full social and economic contribution that people with disability make to their communities and to Australian society as a whole.
  34. There is strong community support in the multicultural and disability sector for change.
  35. FECCA calls on the Government to take the opportunity presented by the ratification of the Disability Convention to make positive reforms to Australian migration law. We believe the application of the *Disability Discrimination Act 1992* to the *Migration Act 1958* would remove the potential for any direct or indirect discrimination of refugees and migrants with disability.
  36. Discrimination occurs on an individual and systemic level. Due to the high level of social control experienced by people with disability, the discrimination faced is often institutional. People from culturally and linguistically diverse backgrounds, in particular those with a disability and recent migrants, experience highly regulated environments where much of the discrimination is systemic.
  37. There are many barriers facing people from culturally and linguistically diverse backgrounds with disability flowing from the lack of human rights accorded to them and lack of inclusiveness and FECCA believes that the Government should do its best to remove them.

38. The introduction of the *Racial Discrimination Act 1975* (RDA) and the *Disability Services Act 1986* (DSA) has provided protection for people from culturally and linguistically diverse backgrounds with disability. It is important to ensure that communities are aware that they have access to such protection and that the Government removes all forms of discrimination applying to people with a disability.

**The adverse effect of Australian immigration policies and procedures on those with a disability and their families**

39. As stated, Australian immigration legislation, regulations, policies and procedures are a barrier for people with disability. The exemption of the Migration Act from the DDA, and the health assessment, which repeatedly fails to make a distinction between disability and health, is used to keep immigrants with disability out of Australia ostensibly on health grounds. This process often flies in the face of the Government's publicly stated policy commitments about the value of people with a disability.

**Case study - Indian-born boy with a disability**

40. The following is an example of the inherent injustice in migration decision-making affecting people with a disability and their families. On the International Day of People with Disabilities, in December 2004 a 12-year-old boy chosen by the Department of Family and Community Services to feature in a calendar marking the event was facing possible removal from Australia. According to a transcript from the ABC AM program at the time, this was because he was disabled. Indian-born Rophin Morris had spent almost all his life in Australia, but he and his parents had their application for permanent residency turned down because Rophin was autistic. The 12-year-old child featured in the calendar for

- the month of December, Indian-born Rophin Morris, had had his bid for permanent residency in Australia for himself and his parents rejected.
41. In 2002 the family applied for permanent residency with the sponsorship of the Queanbeyan Baptist church and the members of its parish, where both parents had become highly-valued social workers, providing services in suicide prevention, and counselling young offenders and victims of domestic violence. However, their son Rophin is moderately autistic which resulted in the visa being rejected by the immigration department.
  42. The Morris family was then visited at home by Immigration Department officers, who, they say, cancelled their existing temporary visa, and issued them with a new bridging visa, which prevented the Morris family from working in Australia. They then resigned from their jobs with the Baptist church.
  43. The child's father said I hold no resentments, no bitterness against the Government. I am simply, as a father of a disabled son, requesting the Minister to intervene and to allow our son a future and a home. There was no provision for the decision-maker to resolve the case and the family had no option other than to seek Ministerial intervention on their behalf. The Minister was able to resolve the case in the families favour. However, the option of Ministerial intervention is not available to applicants with a disability not already in Australia. In FECCA's view families seeking to migrate with a member who has a disability should not have to rely on the intervention of a Minister to take account of the contribution they can make to the community and the workforce.
  44. There are many similar cases including the well-known recent cases of Dr Moeller, a rural doctor whose son had a disability, and Dr Syat Hillow Abdi, who became the first blind teacher to be registered as a teacher in South

Australia, which could only be resolved by ministerial intervention. In the Dr Moeller case where in response to the rural doctor shortage Dr Moeller and his family had moved to Horsheim in Victoria only to have their application for permanent residence refused as their 13-year old son had a disability. The only way to satisfactorily resolve the case was to seek ministerial intervention at the end of a long application and appeals process as the delegates did not have the authority to resolve the case. On 26 November 2008 the Minister for Immigration and Citizenship, Mr Evans, in announcing his decision to intervene to grant permanent residence to the doctor's family expressed his regret at the stress that the application process had caused Dr Moeller and his family.

45. The recent media attention to the cases of Dr Bernard Moeller and Dr Siyat Hillow Abdi in particular has highlighted that current migration processes do not provide fair outcomes for people with disability and their families, and devalue the full social and economic contribution that people with disability make to their communities and Australian society as a whole.
46. FECCA considers that there should be greater provision to take account of the full social and economic contribution that people with disability and their families can make.

### **Recommendations**

47. FECCA recommends that the *Migration Act 1958* be reviewed in terms of its exemption from the DDA. Such a review would ensure that as a state signatory to the UN Convention of the Rights of Persons with Disabilities fulfils its obligations as outlined in Article 4(b) of the Convention, that state parties will 'take all appropriate measures, including legislation, to modify or abolish

- existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities’.
48. Current health assessments to determine potential eligibility for a visa under the migration program fail to make a distinction between disability and health. Current immigration practice has the largest impact on families supporting people with a disability. It is not uncommon for families to immigrate, leaving behind a family member with a disability, and applying for the family members to immigrate to Australia after they arrive. This process is often extremely traumatic for the family, especially for the individual left behind. Alternatively, people with disability immigrate to Australia with their family on a visitor visa and then stay on a bridging visa without access to services or intervention while their case is considered. In the meantime their condition can greatly deteriorate. This places enormous strain not only on the individual but on their families and friends.
49. FECCA recommends that decision makers can give greater weight to the social and economic contribution that migrants with disability can make, rather than accept the categorisation people with disability as a potential cost to the community and a liability into the future.

## **Conclusion**

50. FECCA, along with NEDA and others in the multicultural community and disability sector, believes there should be greater recognition of the contribution that migrants with a disability can make to their community and to their workplace. Most importantly, the Government should do all it can to remove the potential for any direct or indirect discrimination against refugees and migrants with disability. The *Disability Discrimination Act 1992* should apply in full to the

*Migration Act 1958* health assessment to remove the potential for any direct or indirect discrimination against refugees and migrants with disability.

51. There should be improved consistency, transparency and administrative fairness for migrants and refugees with disability applying for a visa.
52. This requires the reform of the current migration legislative and regulatory provisions and policy guidelines.
53. FECCA believes all immigrants have the right to have close family relatives join them in Australia. Family reunion programs need to take into account and be inclusive of, family members with disability and acknowledge the trauma placed on families from being torn apart on the grounds of disability.
54. Finally, we would ask the Committee to consider withdrawal of the Australian interpretive declaration made upon ratification of the United Nations Government on the Rights of Persons with Disabilities in relation to non-nationals.
55. FECCA would be pleased to discuss or clarify any of the issues raised in this submission should this be required.