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Submission No 74

***KEPT OUT: the experience of people with disabilities and their families wanting to migrate to Australia***

***A submission to the Joint Standing Committee on Migration inquiring into immigration treatment of disability***

***Sharon Ford***

I welcome the initiative by the Minister for Immigration and Citizenship, Senator the Hon Chris Evans, and the Parliamentary Secretary for Disabilities and Children's Services, the Hon Bill Shorten to conduct an inquiry relating to the health requirement in the *Migration Act*; and I thank the Joint Standing Committee on Migration for the opportunity to make a submission to this enquiry.

**My interest in this inquiry**

My family applied to migrate to Australia in 1998 and ultimately arrived in Australia in 2000 following a lengthy and costly migration process involving the Migration Review Tribunal. My daughter Cailan, then aged 6 years old, has Down syndrome and we were refused an employer nominated permanent residence visa, based on the assessment of a Commonwealth Medical Officer (MOC) that Cailan would result in a significant cost to the Australian community. This decision was successfully overturned but the process took 18 months and caused much hardship to my family, severe disruption to the professional careers of both my partner and I, and also to the research output of the University of Western Australia/CSIRO since the research project for which my partner had been recruited was unable to proceed. Today my family are Australian citizens and I believe that we make a net contribution to the Australian community.

Since our arrival in 2000 I have engaged in informal research into the immigration treatment of people with disabilities. I have also advised countless families who have found themselves in a similar visa predicament to our own. Sadly, only very few of these have managed to secure a successful outcome to their visa application, and Australia has been denied the significant contributions that many of those families would undoubtedly have made.

This submission is based on my research, knowledge of cases and interaction with families over these past 10 years – it approaches the topic in a relatively informal and, I trust, not overly emotive way, although this is still a very emotive issue for me. I hope that the considerations presented here may assist the Committee in its task and I trust that the results achieved in this matter can finally put an end to long years of indefensible discrimination against people with disabilities and their families at the hands of the health regulations for migration to Australia.

I have no objection to this submission and my name being made publicly available.

## Summary

The main proposition of this submission is that **the presence of a disability *per se* should not be a reason to 'keep out' an individual wishing to migrate to Australia**, if all other criteria for the migration visa are satisfied. The current practice of routinely refusing visas to individuals and families on the basis of disability is quite shamelessly discriminatory and exposes as empty rhetoric statements by Australian leaders about the nation's values and social justice principles.

This submission looks at various **shortcomings of the current health criteria and health assessment process**, which I consider to be neither fair nor transparent. It discusses some **options to render the protocol for assessing applicants' suitability for migration to Australia more equitable, transparent and robust**.

The submission addresses three of the five terms of reference:

- *Report on the options to properly assess the economic and social contribution of people with a disability and their families seeking to migrate to Australia.*
- *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.*
- *Report on how the balance between costs and benefits might be determined and the appropriate criteria for making a decision based on that assessment.*

It does not deal with comparative analysis of similar migrant receiving countries and will only make brief reference to the impact on funding for, and availability of, community services for people with a disability moving to Australia.

## Remove disability as a factor in the decision-making process

Currently an individual with a disability applying to migrate to Australia will, almost without exception, be refused a visa, based on the fact that they have a disability. Whilst some might claim that the current process is non-discriminatory since it does not explicitly target people with disabilities, the application of the health criteria in the immigration process indisputably functions to more or less automatically exclude individuals with a disability. Moreover it does so in the most demeaning and base manner by dismissing a person with a disability as nothing more than a cost to society – a position which also insults every person living with a disability in Australia.

The treatment of disability within the immigration process is a moral issue. We all agree that it is wrong to discriminate against people on the grounds of a disability – not just people in Australia, but people everywhere. How then can we condone open discrimination against people with disabilities and their families wishing to migrate to Australia? It is fundamentally wrong to apply one system of values and standards within a country while upholding another for those outside it. Yet this is precisely the current situation: Australian migration regulations are specifically exempt from the Disability Discrimination

Act<sup>1</sup>. I am not a legal expert and I do not intend to discuss the legal ramifications of the situation either in relation to the rights of people with disabilities enshrined in Australia's Disability Discrimination Act nor more recently in the provisions of the UN Convention on the Rights of Persons with Disabilities<sup>2</sup>. However, I would urge that whatever legal provision is required should be introduced to bring the protection of the Disability Discrimination Act to bear on Australia's *Migration Regulations* and to ensure that Australia respects the provisions of the UN Convention to which it is a signatory.

In line with the above, the *Migration Regulations*, and specifically the health criteria, should be re-written to ensure that disability is not a deciding factor in the outcome of migration applications. In other words, if all the other criteria for a specific visa are met by the applicant, then having a disability should not *per se* preclude that individual from migrating to Australia. This would bring the assessment of migration applications in line with Australia's stated values, social justice principles and international commitments and send a clear positive message both within and outside the country about the way disability is regarded in Australia.

### **Specific shortcomings of the current health criteria**

All visa applicants must meet the health criteria set out in the *Migration Regulations*. According to these criteria, an applicant may not be a person who is likely *ever* to result in a significant cost to the Australian community in terms of health care and community services (which includes education)<sup>3</sup>. An individual with a disability, whilst they may be in excellent health, will usually fail to meet the health requirements, as they will *automatically* be judged as likely to incur significant cost based on having a disability – and irrespective of their age, actual health condition or future life prognosis. With bizarre irony, this explicitly applies irrespective of whether they might *actually ever use* any of the services for which the very fact of maybe, one day, being eligible has served to exclude them.

What's wrong with the current health criteria and associated assessments?

#### ***1. Estimating future health costs or cost to society for an individual is not possible***

Every one of us will, at some time, require health or community services – you don't need to have a disease or condition in order for this to be the case. So there is not one of us who will never incur a cost in terms of health and community services – although this seems to be the assumption of the current process – and how can any of us possibly know whether our eventual cost in these terms will be significant or negligible? Many people with a disability are no more likely to make long-term or significant use of health or community services than their peers who do not have a disability; conversely, many people who have no manifest disability or condition will ultimately make significant use of these services. As they are perfectly entitled to do. None of us can estimate the likelihood that we will not contract a terminal illness or other such serious condition after arrival in Australia. Yet people with a

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<sup>1</sup> Disability Discrimination Act, 1992, Section 52 deals with migration

<sup>2</sup> UN Convention on the Rights of Persons with Disabilities, 2006

<sup>3</sup> *Migration Regulations* 1994, Schedule 4, Public interest criteria, subpara 4005(c)

disability are singled out for, in some cases, minute analysis of their *potential significant cost* in health and community services.

A Commonwealth Medical Officer (MOC) appraises the potential future cost of the individual with a disability. In some cases this involves looking at a child with a disability, often just a few months old, and estimating his or her likely capacity to hold down a job 20 years into the future. How do you reasonably assess quantitatively either the future economic or future social cost or contribution of any individual?

If cost estimates are to continue to be applied then it should be to each and every applicant. And it must be a realistic assessment of costs based on the applicant's health and prognosis *at the time of application*, defined by standardised estimates and guidelines which are available for public scrutiny. The process of attempting to calculate the future cost of health and community services should be discontinued. It is impossible and the outcome meaningless in any real context.

I would like to raise here briefly the question of what constitutes a 'significant cost'. Medical and health services, early childhood intervention, educational support and employment support – the type of services which are commonly used to substantiate a claim of significant cost – do not seem to me to constitute a significant cost in a society in which such services are already established and routinely delivered. Moreover, immigrants with a disability who eventually use the services, and the other family members with whom (or to whom) they immigrate, will pay taxes here in the same way as other Australians who use those services.

## **2. Inconsistent appraisal and cost estimates, inconsistent outcomes**

The MOC appraises the future envisaged costs associated with applicants with a disability, yet there do not appear to be any real guidelines governing this. In some cases calculated cost estimates play a significant role in the decision process and in others there is no mention of these. Research done by Terry Wiggins<sup>4</sup> in this area suggests that, there is no proper benchmark either for estimating the impact of the disability on the individual or for estimating costs. Estimated life expectancies of people with Down syndrome used by the MOCs before the Migration Review Tribunal ranged from 40 years (re Yatim) to 65 years (re Huerta). Similarly, the estimated costs associated with individuals with Down syndrome of a similar age and with a similar 'level' of disability, ranged from \$180,000 over a lifetime to \$1,9590,000. There is apparently no accepted scale or guideline and one MOC may estimate the likely costs at a much higher level than another. Furthermore, no account is taken of varying circumstances across Australia: for example, for anyone applying to migrate to a state where schooling for children with disabilities is inclusive, the likely estimated costs of schooling a child are much lower than for a family applying to live in a state where public schooling is more likely to entail a special education facility<sup>5</sup>. Neither does there seem to be a requirement for MOCs to substantiate their cost estimates with anything other than generalised statements. In view of the lack of framework for appraisals, it seems likely that MOCs individual perspectives regarding disability may impact on their assessment of

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<sup>4</sup> Terry Wiggins (2001) *Barriers to Immigration for Applicants with an Illness or a Disability*, Queensland (unpublished paper)

<sup>5</sup> Ford, Sharon and Jan Gothard (2004) *Discrimination and immigration: an Australian (bad) example* Paper presented at World Down Syndrome Congress, Singapore, April 2004

an individual (the role of the MOC is dealt with in greater detail below) and *the final outcome of an application may quite arbitrarily depend on which MOC handles the assessment.*

The lack of transparency surrounding the protocol conducted by MOCs is problematic. The apparent absence of a consistent framework for the health assessment – including standardised cost estimates, consistency of expert information and professional sources and the requirement to publicly substantiate decision-making rationale – means that applicants have good cause to question the accuracy, fairness and objectivity of the medical assessment process by the MOC.

### **3. Disregard for the contributions made by applicants**

One of the greatest failings of the health criteria as applied to people with disabilities is that these applicants are summarily labeled as a cost and a burden on society. There is no balanced consideration of overall impact since contributions by these people and their families are not taken into account.

The UN Convention on the Rights of Persons with Disabilities, recognises disability as a *social* phenomenon, rather than an inherent attribute of an individual. It takes the view that environments and social systems which fail to acknowledge difference, disable people by impeding access and participation. Given that Australia has both signed and ratified this Convention, the view of people with disabilities applied in the Australian *Migration Regulations* is ironic in the extreme. If people with a disability are a cost burden here, the implication is that Australia needs to deal with the barriers which prevent their full economic and social participation in Australian society – barriers which are detailed comprehensively in the newly released National Disability Strategy Consultation Report<sup>6</sup>.

When given the opportunity to do so, people with disabilities contribute to their communities in the same way as everyone else. However, the current migration protocol does not seek information regarding the expected contribution, either economically or socially by an applicant with a disability. Instead, the process requires proof that the applicant *will not be a burden* on Australian services.

If analysis of this sort will continue to be applied – in which case it should apply to all applicants – it must take account both of the contribution of an applicant and the support (s)he may need, in a more qualitative assessment framework. This might include a generalised prognosis of supports and resources envisaged in order for an applicant to achieve their full potential and, in the context of that support, the expectations for the applicant's future. The assessment of the applicant's contribution to Australia would, in this way, be based on input of the applicant (or guardian) and their family, together with relevant professional and expert testimonies (including the MOCs).

### **4. Role of the Commonwealth Medical Officer**

The Commonwealth Medical Officer (MOC) currently holds a very powerful position in the migration process, since his or her opinion ultimately determines the outcome of the visa application. Not only does the MOC appraise the future for an individual with a disability but (s)he must also estimate the costs associated with that future. I would argue that this role carries a disproportionate weight of

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<sup>6</sup> Commonwealth of Australia (2009) *Shut out: the experience of people with disabilities and their families in Australia* National Disability Strategy Consultation Report prepared by the National People with Disabilities and Carer Council

authority in the decision making. It needs to be carefully scrutinised, refined and made more transparent and accountable. MOCs should be required to demonstrate comprehensive and up-to-date knowledge relating to decisions they take, and to professionally substantiate their opinions. Many MOC assessments that I have seen do none of these.

I would also argue that appropriately qualified expert advisers should routinely oversee any health assessments which may cause a visa to be denied.

In the interests of transparency, the qualifications and any areas of special interest or expertise that MOCs hold should be in the public domain.

Moreover, MOCs should not be expected to hold expertise as accountants or clairvoyants, although the role they currently perform within the migration process requires the professional skills of both.

#### ***5. Outdated information sources, stereotyping and failure to see the individual***

The main issues I wish to highlight here are the apparent use of outdated information in relation to assessment of disability and generalisations about a disability. I have already referred above to the fact that an MOC may not be appropriately qualified to make a determination in relation to an applicant with a disability. Indeed, whilst I cannot speak in reference to other disabilities on this point, in many of the cases with which I am familiar involving an applicant with Down syndrome, the MOC appraisal in relation to health prognosis, education and support requirements and adult life options does not reflect the reality of growing up with Down syndrome today in a country such as Australia. It should not be necessary to assert that these practitioners should be using current research and best practice principles to inform and substantiate their opinions.

There has also been a marked tendency, at least in the case of applicants with Down syndrome, to forward an opinion which is little more than a sweeping generalisation in relation to the disability rather than consideration of the individual.

The MOCs assessment in my own family's case illustrates this concisely. The decision reads as follows (in its entirety):

*"This 4-year old girl has Down's Syndrome. In my opinion it would be likely that she would require additional educational resources beyond mainstream education. It would be likely she would require supported employment in the future at significant cost to the Australian community."*

This rationale makes (erroneous) assumptions based on some generalised view of what it means to have Down syndrome, and apparently had nothing to do with an appraisal of our daughter. Indeed it directly contradicts the expectation of our daughter's future which we ourselves put forward in the application and which was elaborated in the additional 14 testimonies which were offered at the time of application (but were not of interest until we had pursued our case to the Migration Review Tribunal).

Whilst this type of generalisation was tested in the Federal Court in 2005 by Tracey Robinson and her family<sup>7</sup> the guidelines relating to the health criteria should make it clear that a professional opinion be formed with regard to the individual and not some generalised hypothetical person with that disability.

#### ***6. Inconsistent handling of cases, arbitrary time frames, closed procedures***

This section looks at the veil of secrecy and lack of public information which shrouds the application of the health criteria, the lack of consistency both in handling cases and in their outcomes, the lack of consistency in the time taken to process cases and the effects that all of the above may have on the applicant and family.

The current application of the health criteria is a clandestine practice and is most unfair in the wide variance with which cases are handled and in their eventual outcomes. Perhaps the only point of some consistency among cases is the rejection of the initial visa application. Although, in a small number of cases, families have been advised in advance of an imminent decision, and been given the opportunity to address the concerns of the MOC in advance of this. In at least two cases, the MOCs final decision was changed as a result of this. Most families are not given this advance notice or the opportunity to deflect an imminent visa refusal. A fair and transparent system?

The more common process is that the initial application for a permanent residence visa is rejected on the basis of the health criteria, in many cases without any real weight of consideration, and the family must apply for review of the decision via the Migration Review Tribunal if they wish to proceed further. This happens with monotonous regularity – and one could be forgiven for suspecting the existence of some informal rejection policy which governs it. This is an unjust outcome for families who are willing and able to provide substantive information about the applicant with a disability in the first stage of the process. It is similarly unfair to allow families to embark on the visa application process without offering any information about the difficulties they face in respect of meeting the health requirement. Nowhere is this made clear and neither would many families anticipate the trouble ahead from simply reading the health criteria. Hence, families currently embark on this convoluted and costly process with no idea of what they are in for, until they are dismayed to learn that their visa application has been rejected.

If the health criteria were to continue to have special relevance to applicants with a disability – and I repeat that this should not be the case – then it should be made clear to families before they embark on the application process. Families should have the opportunity to enter all relevant information pertaining to their application, and have it considered, at application stage. They should not need to pursue their case to the Migration Review Tribunal in order to receive the same consideration which others receive as a matter of course within the application process itself.

Whilst strict time limits are enforced for families wishing to appeal the rejection of their visa – a process which often entails assessments and the preparation of detailed reports by a number of different specialists – the MRT is then able to take as long as it wishes to make the review, and very little

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<sup>7</sup> Robinson v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1626 (10 November 2005).

information is available to the applicant in respect of the progress of the review or an expected time frame for a decision.

In my family's case, the Migration Review Tribunal acknowledged receipt of the application for review on February 5, 1999. It was November 19 (of the same year) when we received the news that the original decision had been overturned and our visa granted – and we had regularly contacted the administration to remind them that we were still on the case.

Whilst awaiting the outcome, my partner and I were obliged to put our lives on hold and to live in separate countries. His position in the UK had come to an end, while he had accepted a position at the University of Western Australia which he was unable to take up. We were "fortunate" that he was able to take up a temporary position in Sweden, while I remained in the UK at my job and with our two pre-school aged children. When this no longer proved viable we moved as a family to Brazil, where my partner also took up a temporary post. Meantime a research project bound by funding deadlines was standing idle at UWA because the principal researcher was unable to secure a visa. One can only wonder about the "significance" of the cost to Australia that this entailed.

I cannot overstate the stress that this whole process put my family under. It disrupted our family life completely, played havoc with my partner's academic career, and my life in general, and put our relationship under a strain that ultimately proved untenable and necessitated an interim move and a further change of job to reunite us in one place in a temporary situation. I have often since wondered what the result of all that pressure might have been on our family, had the application not ultimately been successful. Inflicting this type of endurance test on a family cannot in any way be deemed fair process.

Our case was by no means unusual in the length of processing time – indeed families wait much lengthier times, running into years, for an outcome from the MRT. Conversely, decisions *can* be made within an extraordinarily short time frame – the case of the Moeller family, which received unprecedented media attention in 2008, was determined in record time by the Migration Review Tribunal, and then it took less than 24 hours for the Minister to intervene to overturn the MRT's decision. By comparison, a family in Western Australia in similar circumstances had awaited an outcome for a number of years – and when comparisons were made in the media to the Moeller case, a positive resolution also came through with extraordinary speed for that family. Behind each of these media spotlight cases are numerous others in similar circumstances who were ultimately refused entry to Australia.

Both the application and any subsequent review process should operate within fixed time constraints which are public knowledge and consistently applied.

### ***7. One member fails the whole group***

Currently, if one person included in a visa application fails to meet the health criteria, everyone on the application is ineligible for a visa. In other words, an entire family group is refused permission to migrate because of 'guesstimated' support costs relating to the member of the group who has a disability.

Realistically though, it seems likely that the cost of supporting one person with a disability to reach their full potential, would be more than offset by the overall contribution of an entire family – it is difficult to see how most of these families do not represent a net gain for Australia.

Families are placed in sometimes heartbreaking situations as a result of the vagaries of this regulation clause. And once again, there is little consistency. Parents have been advised that leaving their child with Down syndrome out of their application – in other words, moving to Australia without this child – might lead to the visa being granted. Not only is this obviously unacceptable but it defies the provisions of the regulations anyway: these state that a health assessment is required of all family members of an applicant, regardless of whether those family members intend to apply to migrate (which seems quite pointless). One family was denied entry to Australia because the principal applicant had a child with Down syndrome from a previous relationship. The visa application did not include this young man with Down syndrome, since he lived with, and would remain living with, his mother. Yet the father, with his partner and their family were denied a visa on the basis that his son, for whom a visa was not sought, did not meet the health criteria. One can only assume that the rationale for this clause is concern that other dependants may at some future time attempt to gain entry into Australia based on family ties – but since the same dependants would at that time need to satisfy the health criteria it is difficult to see how this is an issue. How can it be defensible that a visa is denied because a person *not* included in the application does not meet the health criteria?

I hope I have illustrated that the current health criteria and assessment process are fraught with difficulty and that whatever protocol there may be in relation to their administration, it is largely hidden from public view.

#### **A robust immigration policy: some recommendations**

An immigration policy is inherently discriminatory. It is, after all, designed to control numbers of immigrants and to include some people and exclude others, according to the policy's criteria. However, in order for an immigration policy to be robust, it must surely reflect the values, standards and national and international responsibilities to which a nation has committed. In respect of the way it deals with people who have a disability, Australia's current policy and process fail hideously in this regard.

I urge this Joint Standing Committee on Migration to seek a protocol for assessing migration applications in a manner in which disability is not a bar preventing entry to Australia. A protocol which reflects Australia's stated value of and respect for difference.

It may be considered unrealistic not to vet people on the basis of what they bring to Australia. But I do not think that it can be unrealistic to assess (all) applicants based on a more holistic view of their impact on the Australian community, taking into account their particular skills, capacities *and* support requirements.

Whilst each individual in a family or migrating group may be assessed, the main consideration should be the net impact of the group for whom application is made. An application should not be rejected based on appraisal of any individual in that group viewed in isolation.

Unless costs and/or benefits are to be routinely assessed, in some way, in relation to all applicants such analysis should not be inflicted on people with disabilities and their families.

Assessments, and the process overall, need to be conducted on significantly more consistent, realistic, equitable and transparent levels than has been the case to date.

### **Conclusion**

Much of this submission discusses the existing health criteria and application process and ways to improve these. However, I would like to reiterate that there must be a significant changes to the process, so that applications for migration to Australia are no longer rejected on the basis of disability. The flagrant discrimination against and devaluing of people with disabilities that is manifest in the current process should be consigned to history in the hope that it may eventually be forgotten.

The view that people with disabilities are a cost and a burden is an insulting anachronism. People with disabilities everywhere in Australia are valued and contributing members of families and communities with the same rights and responsibilities as everyone else. It is long overdue that the application process for migration to Australia recognises this and takes the steps needed to address the unfair treatment of people with a disability and their families who wish to join Australia's diverse community.

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