



Disability Discrimination  
Legal Centre (Inc.)

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Submission No 55

**Submission: Inquiry into the migration treatment of disability**

**October 2009**

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## **Endorsements**

**This Submission is endorsed by the following members of the Australian Disability Rights Network:**

**Darwin Community Legal Service**

**Sussex Street Community Law Service Inc**

**Intellectual Disability Rights Service**

**Welfare Rights QLD**

**Disability Discrimination Legal Service (VIC)**

**This Submission is also endorsed by the following other organisations:**

**Human Rights Law Resource Centre (Vic)**

**People with Disability Australia**

## About DDLC

The NSW DDLC was set up in 1994 to help people with disability to use disability discrimination laws. Our role is to provide accurate and easy to comprehend advice to people with disability in NSW who want to make a complaint of disability discrimination. We give free legal advice, run disability discrimination cases and represent people with cases of disability discrimination.

The NSW DDLC aims for a society where people will be able to participate in all aspects of life through the:

- removal of barriers;
- elimination of discrimination;
- empowerment of people with disabilities;
- promotion of awareness; and
- ability to exercise rights.

DDLC's objectives are:

- To promote community awareness of the potential to use discrimination laws to advance the rights of people with disabilities;
- To provide legal services for people with disabilities, their associates and representative organisations, who have been discriminated against;
- To ensure the effective participation of people with disabilities in the management and operation of the Centre;
- To reform laws and change policies, practices and community attitudes that discriminate against people with disabilities;
- To develop and be involved in appropriate networks; and
- To maintain the necessary infrastructures and administration systems in order to further the Centre's aims and objectives.

## Introduction

The New South Wales Disability Discrimination Legal Centre (DDLC) welcomes the opportunity to contribute to the Inquiry into the Migration Treatment of Disability. From the outset, we emphasise Australia's obligations under the *Convention on the Rights of Persons with Disabilities* (CRPD), which Australia ratified in July 2008. Australia also ratified the Optional Protocol to CRPD in August this year.

Article 18 of CRPD is of particular relevance to this Inquiry as it provides for liberty of movement and nationality. Paragraph One of Article 18 provides that people with disability have the right to freedom to choose their residence and nationality. Of equal relevance is the Australian Government's interpretative declaration in regards to Article 18, which provides "it does not create a right for a person to enter or remain in a country of which he or she is not a national, nor 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<sup>1</sup>."

This declaration was made in order to preserve Australia's current legislative approach to people with disability, which is:

Under s60 of the *Migration Act 1958 (Cth)*,

*If the health or physical or mental condition of an applicant for a visa is relevant to the grant of a visa, the Minister may require the applicant to visit, and be examined by, a specified person, being a person qualified to determine the applicant's health, physical condition or mental condition, at a specified reasonable time and specified reasonable place.*

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<sup>1</sup> Australian Government Attorney General, National Interest Analysis [2008] ATNIA 18, 4 June 2004, p15.

Section 65 of the *Migration Act 1958 (Cth)* grants the Minister power to grant or refuse visa applications on a number of grounds including whether or not the health criteria has been satisfied.

Schedule 4 of the *Migration Regulation 1994* sets out the 'Public Interest Criteria', including the health criteria for granting residence visas. This provides that the applicant:

- (c) *is not a person who has a disease or condition to which the following subparagraphs apply:*
  - (i) *the disease or condition is such that a person who has it would be likely to:*
    - (A) *require health care or community services; or*
    - (B) *meet the medical criteria for the provision of a community service; during the period of the applicant's proposed stay in Australia;*
  - (ii) *provision of the health care or community services relating to the disease or condition would be likely to:*
    - (A) *result in a significant cost to the Australian community in the areas of health care and community services; or*
    - (B) *prejudice the access of an Australian citizen or permanent resident to health care or community services; regardless of whether the health care or community services will actually be used in connection with the applicant.*

This submission argues that the current approach to assessing migrants<sup>2</sup> with disability ('the health assessment') does not adequately assess the potential contribution of migrants with disability, and their families, and is inappropriately focused on the potential costs to health and community services.

Accordingly, this submission will address the following terms of reference:

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<sup>2</sup> For the purposes of this submission, we use the term migrants to also include refugees.

1. The options to properly assess the economic and social contribution of people with a disability and their families seeking to migrate to Australia;
2. The impact on funding for, and availability of, community services for people with a disability moving to Australia either temporarily or permanently;
3. 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;
4. How the balance between costs and benefits might be determined and the appropriate criteria for making a decision based on that assessment; and
5. A comparative analysis of similar migrant receiving countries.

**1. The options to properly assess the economic and social contribution of people with a disability and their families seeking to migrate to Australia.**

**1.1 An assessment based on the social model of disability**

In order to properly assess the economic and social contribution of people with a disability and their families seeking to migrate to Australia, it is essential to make a paradigm shift from perceiving people with disability as burdens to perceiving people with disability as valued members of our society. At present, the health assessment emphasizes the medical model of disability, in that visa assessments are based solely on the health requirements on the applicant with disability and no recognition is given to the attributes of that person.

CRPD embraces the social model of disability, which makes a distinction between impairment and disability. According to Goggin and Newell “impairment is the bodily dimension, whereas disability is what society makes of someone’s impairment.”<sup>3</sup> An assessment based in the social model of disability mandates that people with disability have an inherent worth and are valued and equal citizens.

**1.2 Social Contributions**

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<sup>3</sup> Gerard Goggin and Christopher Newell, Disability in Australia, Exposing a Social Apartheid (2005), p. 28

People with disability also make important social contributions, perhaps one of the greatest being contributing to Australia's cultural and social diversity or in other words promoting social inclusion.

Not recognising the social contribution of people with disability seeking to migrate to Australia is at odds with the government's own social inclusion agenda. The aspirational principles of the social inclusion agenda concern reducing disadvantage and increasing social, civil and economic participation<sup>4</sup>.

As promoted by the current government, social inclusion has numerous social and economic benefits which include:

- A society "in which all Australians feel valued and have the opportunity to participate fully in social and economic life"<sup>5</sup>. This will enable all Australians to access education, work (including volunteering), family and caring, and being connected to people, using their local community's resources and the ability to influence the decisions that affect them<sup>6</sup>.
- Increased participation in paid or voluntary employment. It has led to reduced crime and social problems as well as reduced welfare dependence<sup>7</sup>.
- The Department of Education, Employment and Workplace Relations, in its paper: *'The Origins, Meanings and Economics of The Concept of Social Inclusion/Exclusion'* refers to the work of Barnes, Peck, Sheppard and Tickell, who state that social

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<sup>5</sup> Social Inclusion Ministers Meeting, Adelaide, Communique (18 September 2009)

<sup>6</sup> Department of Education, Employment and Workplace Relations, Social Inclusion Homepage, <http://www.socialinclusion.gov.au/Pages/default.aspx>

<sup>7</sup> Department of Education, Employment and Workplace Relations, The Origins, Meanings and Economics of The Concept of Social Inclusion/Exclusion (January 2009), p. 8

inclusion “is likely to encourage economic creativity by allowing diverse social groups and individuals to realise their potential”<sup>8</sup>.

- Social inclusion fosters a culture of reciprocity and reduces conflict<sup>9</sup>.
- The most important benefits of social inclusion for people with disability are empowerment and participation.<sup>10</sup>

Social exclusion has a profound impact on people with disability. More than half of the submissions received by the National Disability Strategy Consultation discussed the experience of social exclusion and the impact of negative social attitudes on people with disability<sup>11</sup>. The consultation report found that people with disability continued to be “segregated, excluded and ignored”<sup>12</sup>.

It was stated in one submission that;

“The greatest barrier facing people with Down Syndrome is not their intellectual disability but confronting negative attitudes, overcoming outdated stereotypes and challenging the limitations placed on them by others. What they lack is not ability but opportunity.”<sup>13</sup>

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<sup>8</sup> Barnes, J., Peck, J., Sheppard, E., Tickell, A., (2004) Reading Economic Geography, Oxford, Blackwell, pp.56-58, cited in Department of Education, Employment and Workplace Relations, The Origins, Meanings and Economics of The Concept of Social Inclusion/Exclusion (January 2009), p.8

<sup>9</sup> Department of Education, Employment and Workplace Relations, op.cit., p. 8

<sup>10</sup> Fiona Smith, Australians with disabilities and social inclusion: Getting on the agenda, in Brotherhood of St Laurence Social Inclusion Down Under Symposium Proceedings, p. 8

<sup>11</sup> The National People with Disabilities and Carer Council, Shut Out: The Experience of People with Disabilities and their Families in Australia, National Disability Strategy Consultation Report, (2009), p. 12

<sup>12</sup> ibid., p. 12

<sup>13</sup> ibid., p. 13



In failing to recognising social contributions of people with disability, the current health test is promulgating social exclusion.

### 1.3 Assessing Economic Contributions

People with disability seeking to migrate are likely to make a significant economic contribution to Australia and these contributions should be assessed in the health test.

There are many ways in which people with disability contribute to society. In recent years there has been an increase in the number of people with significant disability in paid employment<sup>14</sup>. As a result, there has been an increasing number of people with disabilities paying income tax. Many people with disability also contribute to the economy by volunteering.

Further, in assessing the potential economic contribution of people with disability, the effect of providing reasonable accommodations should be considered. As defined in Article 2 of CRPD, reasonable accommodations are:

*'necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.'*

In Australia, reasonable accommodations (or adjustments) are mandated by the *Disability Discrimination Act 1992* and the *Disability Standards for Education 2005*<sup>15</sup>. The economic benefits of providing reasonable adjustments are significant - people with disability are likely to reach greater potential if reasonable adjustments are implemented because they provide a level playing field. Therefore, when assessing economic contribution of a person

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<sup>14</sup> Physical Disability Australia, Communicate: Quarterly Newsletter of Physical Disability Australia, Volume 1, Issue 1 (January 2009) p. 6

<sup>15</sup> Section 6, *Disability Discrimination Act 1992 (Cth)*; Part 3, *Disability Standards for Education 2005*

with disability, it is important to consider education and/or employment opportunities that may be available to the applicant when reasonable adjustments. It goes without saying that if all aspects of Australian society (including education, work and transport) were fully accessible, then the economic and social potential of people with disability would be far higher.

#### **1.4 Contributions of family members**

The family members of people with disability seeking to migrate to Australia have the potential to contribute significantly to Australia, particularly, if they are skilled migrant. Excluding people with disability is likely to result in their family members not immigrating to Australia. A good example is the well known case of Dr Bernard Moller, who was initially denied permanent residency on the grounds that his son had Down Syndrome, resulting in Australia losing the services of a well respected medical practitioner. Often Australia relies on skilled migrants to fill positions in instances where roles are unable to be filled by current Australian residents.

Migrants, generally, make a significant contribution to the Australian economy. Access Economics analysed the costs that migrants impose on Australia's health system and other services such as education, in comparison with the economic benefits that migrants bring to Australia. They estimated a total benefit of \$536 million for the 2006/2007 migration program<sup>16</sup>. Further, migrants boost the economy through spending money on goods and services<sup>17</sup>. The same can be said for migrants with family members with a disability.

## **2. The impact on funding for, and availability of, community services for people with a disability moving to Australia either temporarily or permanently**

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<sup>16</sup> Australian Trades, Migration program boosts economy and eases skill shortages  
<http://www.australiantrades.com/migration-program-boosts-economy-and-eases-skills-shortage>

<sup>17</sup> Ibid.,

We acknowledge that there is an economic cost associated with disability. However, Commonwealth, state and territory governments need to look at the cost of disability as a whole systems approach rather than assessing the cost of an individual in accessing community services. Improvements to the level of funding for these services will benefit more people than just an individual migrant. All Australians with disability, including those temporarily ill, or the aged will benefit.

It is important to note that Australia is obligated to provide health and social services to people with disability regardless of cost under CRPD. In particular, Article 19 of CRPD provides for living independently and being included in the community, including access to in-home, residential and community support services, Article 20 obligates States to provide personal mobility at an affordable cost, Article 24 provides for inclusive education across the lifespan, Article 25 requires States to enable people with disability to access health services without discrimination, and Article 26 provides for habilitation and rehabilitation to enable people with disability to reach their full potential.

Further, it was highlighted in the National Disability Strategy Report there were problems with both the structure and the funding of disability support services<sup>18</sup>. Although, increased funding is only part of the solution to unmet need, it was clearly required<sup>19</sup>. This is a major theme throughout the report. Consequently, it was recommended that there be “major reform to ensure adequate funding of disability services over time”<sup>20</sup>.

- 3. 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.**

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<sup>18</sup> National People with Disabilities and Carer Council, *op.cit.*, p. 15

<sup>19</sup> *Ibid.*, p. 24

<sup>20</sup> *Ibid.*, p. 49

We acknowledge that costs and use of services by the individual with a disability seeking to migrate to Australia will be one factor in a visa decision, but submit that it should not be the only one.

Further, the current framework for assessing costs is inappropriate, for the reasons outlined below:

**a. It fails to consider the contribution of individuals**

It is important to distinguish between the cost of disability to the public and the cost of disability to people with disability<sup>21</sup>. The State only meets a proportion of the cost of disability. Therefore, in assessing the cost of migrants with disability, only the cost borne by the government should be taken into account, rather than the full cost of disability. Costs should be measured against the amount of tax the person with disability or their family may contribute.

**b. It is difficult to predict costs**

It is difficult to estimate how much the person with disability will cost the Australian government over their lifetime and currently there is substantial room for interpretation by immigration assessors.

It is almost impossible to predict the cost of disability. The person's disability may improve due to advances in medicine. They may also become more independent with advances in assistive-technology.

**c. Costs will decrease if society complies with CRPD and is fully accessible**

Referring back to the social model of disability, the cost of disability would decrease if discrimination against people with disability decreased as mandated in the *Disability Discrimination Act 1992* and the *Disability Standards*. Under s.31 of the *Disability Discrimination Act 1992*, the Minister has power to formulate standards, in relation to any

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<sup>21</sup>Australian Federation of Disability Organisations *op.cit.*, p. 40

area in which it is unlawful to discriminate against a person on the grounds of their disability. People with disability would have a greater ability to participate in education and employment if barriers to participation were removed, including addressing inaccessible buildings and public transport. The *Disability (Public Transport) Standards 2002 (Cth)* provide for incremental improvements in accessible public transport. This may, in time, reduce the need for the Mobility Allowance and the Taxi Transport Subsidy Scheme. Furthermore, people with disabilities would be able to access education more easily if education providers were more prudent in applying the *Disability Standards for Education 2005 (Cth)*.

**d. Breach of CRPD**

The current migration health test goes against Article 5 of CRPD, which promotes equal protection and equal benefit before the law<sup>22</sup>. Although health assessments do not directly discriminate against people with disability, they are more likely to be excluded due to their health care needs<sup>23</sup>. In his advice to the National Disability Ethnic Alliance on Refugees and Migrants with Disability and the United Nations Convention on the Rights of Persons with Disabilities Dr Ben Saul queries “why a strongly worded declaration was needed if it was indeed the case that Australia’s health requirements would not constitute discrimination under international law<sup>24</sup>.” One of the main discriminatory elements of the health test is that it does not take into account whether the services will be used or not, or whether the person or their family are able to cover the costs associated with the applicant’s disability<sup>25</sup>.

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<sup>22</sup> National Disability Ethnic Alliance, Refugees and Migrants with Disability and the United Nations Convention on the Rights of Persons with Disabilities (July 2008), p. 7

<sup>23</sup> ibid., p. 6

<sup>24</sup> ibid., p. 14

<sup>25</sup> ibid., p.9

Further, according to Dr Ben Saul, the health test may give rise to indirect discrimination against migrants with disability because the threshold is too low to balance discriminating against people with disability and the burden on Australia's health system<sup>26</sup>.

#### **4. How the balance between costs and benefits might be determined and the appropriate criteria for making a decision based on that assessment**

Greater emphasis should be placed on the benefits the person with disability may bring to Australia. People with disability and/or their family may be skilled migrants or be able to contribute to family life, as discussed above.

In addition, there needs to be a recognition of the potential economic and psychological costs to the government of splitting up a family unit, in the event that a family member with a disability is left behind due to Australian migration criteria.

An analysis of other migrant receiving countries should be used as a guide to determine how the balance between costs and benefits is achieved. This analysis is set out below.

##### **Canada**

Under s. 16 of the *Canadian Immigration and Refugee Protection Act 2001*, foreign nationals must submit to a medical examination on request.

Under s. 38 (1) (c): A foreign national is inadmissible on health grounds if their condition might reasonably be expected to cause excessive demand on health and social services."

The *Immigration and Refugee Protection Regulations 2002* defines 'excessive demand' as:

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<sup>26</sup> Australian Federation of AIDS Organisations Inc, Briefing Paper, United Nations Convention on the Rights of Persons with Disabilities (August 2009), p.2

- a) *a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the most recent medical examination required by these Regulations, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or*
  
- b) *a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents.*

The threshold for the average Canadian's anticipated annual need for health and social services is established by the Canadian Institute Information on Health<sup>27</sup>.

The definition of 'excessive demand' which is the test applied to assessing whether migrants are admissible to Canada, is more comprehensive than the Australian health test. It provides a more specific benchmark, in that it clearly states that the comparator is the use of health and social services by an average Canadian per capita. It also provides guidance as to the assessment of the number of years that the person is likely to require assistance. Furthermore, Canada has a system for setting a clearer and more transparent benchmark, which should be implemented by Australia. This leaves less room for interpretation.

The Canadian model assesses whether costs are excessive, whereas the Australian model assesses whether costs are significant. Excessive costs is a higher threshold than significant costs.

Canada requires two concurring medical opinions, whereas Australia requires just one<sup>28</sup>.

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<sup>27</sup> Cohen v Canada (Minister for Citizenship and Immigration), 2006 FC 804

In October 2005, the Supreme Court of Canada overruled a decision by Immigration Canada to refuse to accept a permanent resident application from two families, who each had a child with intellectual disability. The refusal was on the grounds that the children might put excessive demands on social services<sup>29</sup>. The majority stated that the focus of immigration policies on individual characteristics results in “the application of exclusionary euphemistic designations that concealed prejudices about, among other characteristics, disability<sup>30</sup>”. The court ruled that the families’ ability to support the child should be taken into account by Immigration Canada.

The Canadian approach to considering the costs and benefits is more balanced than the current criteria used in Australia. It gives greater consideration to the individual circumstances of the visa applicant and their family.

## USA

Under s. 1182 4 (A), *Immigration and Nationality Act (8 USC)* if any alien, under the opinion of the Attorney General, is likely at any time to become a public charge they are inadmissible.

In assessing whether an applicant is likely to become a public charge. The following factors are to be taken into account:

*In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's -*

(1) *age;*

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<sup>28</sup> National Disability Ethnic Alliance , *op.cit.*, p.8

<sup>29</sup> Abilities Canada, *Immigration Canada Must Allow Families to Enter Country*, [http://www.abilities.ca/social\\_policy/2006/02/16/immigration\\_canada\\_must/](http://www.abilities.ca/social_policy/2006/02/16/immigration_canada_must/)

<sup>30</sup> *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 706, 2005 SCC 57



- (II) health;*
- (III) family status;*
- (IV) assets, resources, and financial status; and*
- (V) education and skills.*

## **Conclusion**

Migrants and refugees with disability and their families have the potential to contribute significantly to Australian society both in economic and non-economic terms. This is an important consideration in terms of Australia's social inclusion agenda. Although we acknowledge that there are additional costs associated with disability, it is our position that this cost can be dissipated if the cost of disability was addressed at a systemic level.

### **Recommendation**

**We recommend that the health test be amended to include an assessment of the following:**

- **The potential social and economic contributions by the person with a disability. Such an assessment should be framed within the social model of disability and reflect principles of social inclusion;**
- **A more accurate assessment of the actual costs of disability to the government and provision to be made in the health test to cater for circumstances where it is difficult to predict the cost of disability, so that decisions are not based on inaccurate estimates;**
- **A higher threshold for the cost assessment in line with the Canadian approach, so that costs are only considered when they are assessed as being 'excessive' rather than 'significant';**

- **A clear and transparent benchmark for setting a threshold which to assess costs against, following the Canadian approach; and**
- **Consideration of family members' contributions to Australia.**