

## Discrimination against migrants and refugees with disability

The Interpretative Declaration on Article 18<sup>1</sup> preserves Australia's current legislative and administrative approach to processing visa applications. The *Disability Discrimination Act (DDA) 1992* provides an exemption for certain provisions within the *Migration Act 1958*, which means that Australia's migration arrangements and treatment of disability are unable to satisfy the equal protection obligations under CRPD Article 5.

People with disability, and families who have members with disability, consistently have their visa applications denied because they are unable to meet the strict health requirement under the *Migration Act 1958 (Cth)*.<sup>2</sup> An individual or family could have been living in Australia for many years, contributing to the economic and social life of the community, but they will be deported because of a failure to meet the health requirement.<sup>3</sup>

The health requirement means that the visa applicant must be free of a 'disease or condition', which would be too costly to the Australian taxpayer, put the general public at risk, or prevent access to health care for Australian citizens. It is extremely difficult for children and adults with disability to meet the health requirement given the focus is exclusively on the perceived economic cost of the applicant's 'condition' and the perceived 'burden' this will place on public health and community resources. There is no recognition of the economic, social and cultural contributions of people with disability and their families. The only recourse for people with disability, and families who have members with disability is to seek Ministerial intervention. This relies on significant lobbying, public pressure and petitioning to achieve, and often does not result in a fair outcome.<sup>4</sup>

While the health requirement does not, on face, discriminate against persons with a disability, the provisions indirectly discriminate against people with disability. The Joint Standing Committee on Migration's Inquiry into the Migration Treatment of Disability in 2010<sup>5</sup> stated that the health requirement is discriminatory in that it sets 'standards of health requirement which the disabled do not or cannot meet'.<sup>6</sup> The discriminatory effect of the health requirement on migrants and refugees with disability has also been noted by the UN Special Rapporteur on the human rights of migrants.<sup>7</sup>

The Australia Government has made some amendments to its visa policy processes and requirements for people with disability. For example, prior to 1 July 2019, the policy underpinning the health requirement set the threshold for significant cost at \$40,000. In August 2019, the Australian Government increased this threshold to \$49,000. The formula used to calculate the cost of people with permanent disabilities or conditions seeking permanent residency has also been updated. Previously, people with permanent conditions could be rejected if the hypothetical cost of their care exceeded the cost threshold over their lifetime. Now, the hypothetical cost will be calculated over ten years.<sup>8</sup> Although these measures are welcomed by people with disability, there remains concern that key legislative and policy reform has not been undertaken. This includes reforms recommended by the Committee on Economic, Social and Cultural Rights to amend the *Migration Act 1958 (Cth)* and the *Disability Discrimination Act 1992 (Cth)* "to ensure that the rights to equality and non-discrimination apply to all aspects of migration law, policy and practice."<sup>9</sup>

The Australia Government has also not acted on the 2013 recommendation from the Committee on the Rights of Persons with Disabilities to withdraw its Interpretative Declaration to CRPD Article 18, which in effect means that Australia maintains the strict health requirement in law and policy.<sup>10</sup>

Asylum seekers and/or people with disability living in Australia on non-permanent visas are ineligible to access the National Disability Insurance Scheme (NDIS) as they do not meet residency requirements. The Age and Disability Support Pensions have a 10-year qualifying residence period,<sup>11</sup> leaving migrants with disability at an increased risk of a range of human rights violations.

Australia's asylum seeker laws, policies and practices have resulted in institutionalised, severe and routine violations of the prohibition on torture and ill-treatment; have subsequently been found to create serious physical and mental pain and suffering and continue to cause life-long disability and impairments.<sup>12</sup> More than one third of people held in detention have been diagnosed with psychosocial disability.<sup>13</sup> Female asylum

seekers/refugees experience rape and sexual abuse<sup>14</sup> yet there is no independent investigation mechanism in place, and even when incidents are reported, investigation or appropriate sanctions rarely ensue.<sup>15</sup>

## Recommendations

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That Australia:

- Remove the exemption in the DDA as it applies to the *Migration Act* to ensure that Australia's migration arrangements and treatment of disability satisfy the equal protection obligations under CRPD Article 5.
- Enhance consistency, transparency and administrative fairness for migrants and refugees with disability applying for an Australian visa.
- Remove the 10-year qualifying period for migrants to access the Age and Disability Support Pensions.
- End mandatory and indefinite detention of asylum seekers as a matter of urgency.

## Endnotes

<sup>1</sup> Australia's 'Interpretative Declaration' to CRPD Article 18: "Australia recognises the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention 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>2</sup> The health criterion applies to all visas for permanent entry into Australia.

<sup>3</sup> See for eg: McIver, D. (2019) *Two-year-old boy faces 'painful and premature death' as deportation looms*. ABC News, 21 Apr 2019. See also: Fernades, A. (2019) *Family facing deportation from Australia due to son's disability fear he could die if they leave*. SBS News, 8 August 2019. See also: McIver, D. (2019) *Boy with Down syndrome, leukaemia likely to go into foster care if Chinese mum is deported*. ABC News, 4 Jun 2019. See also: Rajan, S. (2016), 'Yet another example of disability discrimination in Australian Immigration', *The Stringer*, July 27th, 2016. See also: Ellery, D. (2016), 'Canberra family split as right to live Australia revoked', *The Canberra Times*, 19 April 2016. See also: Emery, R. (2016) 'Blind Kenyan Father ordered to Leave Australia', SBS News, 19 August 2016.

<sup>4</sup> See e.g. Nasrin Haque (2016), 'Please do not deport daughter of 2 full-time doctors because of her developmental delay', Petition to the Hon. Peter Dutton, MP.

<sup>5</sup> Australian House of Representatives, Joint Standing Committee on Migration (2010), *Enabling Australia: Inquiry into the Migration Treatment of Disability*.

<sup>6</sup> Australian House of Representatives, Joint Standing Committee on Migration (2010), *Enabling Australia: Inquiry into the Migration Treatment of Disability*. 177 noting the opinion of Professor Ben Saul.

<sup>7</sup> Francois Crepeau, 'Report of the Special Rapporteur on the human rights of migrants of Australia and the regional processing centres in Nauru', 35<sup>th</sup> sess, Human Rights Council, Agenda item 3, UN Doc A/HRC/35/25/Add.3 (24 April 2017) [92].

<sup>8</sup> Truu, M. (5 August 2019) *Exclusive: Government quietly relaxes controversial visa policy affecting people with disabilities*. SBS News.

<sup>9</sup> Committee on Economic, Social and Cultural Rights, 'Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Australia, UN Doc E/C.12/AUS/CO/4, 42<sup>nd</sup> sess, 12 June 2009, para 16.

<sup>10</sup> Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013), UN Doc CRPD/C/AUS/CO/1, 21 October 2013, paras 8-9.

<sup>11</sup> Beginning from the date the person starts residing in Australia as a permanent visa holder.

<sup>12</sup> Legislation permits children with disability from asylum seeker backgrounds to be held indefinitely in immigration detention facilities. UN General Assembly (24 April 2017) *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*. UN Doc. No. A/HRC/35/25/Add.3.

<sup>13</sup> Which is directly attributed to the harsh conditions, the protracted periods of closed detention, sexual and other forms of violence, overcrowding, inadequate health care, and fear for and about the future. See: Disabled People's Organisations Australia (DPOA)(2017) *Submission to the Committee on the Rights of Persons with Disabilities; List of issues [Australia] to be adopted during the 18th Session of the Committee on the Rights of Persons with Disabilities*.

<sup>14</sup> UN General Assembly (24 April 2017) *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*. UN Doc. No. A/HRC/35/25/Add.3.

<sup>15</sup> UN General Assembly (24 April 2017) Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru. UN Doc. No. A/HRC/35/25/Add.3.