

Position Paper on Migration

About Down Syndrome Australia

Down Syndrome Australia is the peak body for people with Down syndrome in Australia. Our purpose is to influence social and policy change and provide a national profile and voice for people living with Down syndrome. We work collaboratively with the state and territory Down syndrome associations to achieve our mission. Our vision is an Australia where people living with Down syndrome are valued, reach their potential, and enjoy social and economic inclusion.

Summary

The purpose of this paper is to set out Down Syndrome Australia's (DSA's) position on migration for people with Down syndrome. This is the position that will be the basis for DSA's advocacy to government. It also makes specific recommendations regarding changes to Australia's migration laws.

Currently, migrants to Australia are required to meet certain health requirements which according to the Government aim to minimise the impact of migration on the health care system and community services, to prevent the spread of contagious diseases, and to protect Australia's public health.

While accepting the need to protect public health, Down Syndrome Australia believes the current migration health requirements unfairly discriminate against individuals and families living with a disability based around 'cost to the community', which is at odds with the rights of individuals with a disability. Down Syndrome Australia believes there is an urgent need to create a fair migration process that respects the rights of people with disabilities and ensures the wellbeing of families.

It is now nearly ten years since the Joint Standing Committee's Inquiry into the Migration Treatment of Disability, tabled in 2010 as the report *Enabling Australia*, was made public. Very few of its recommendations have been acted upon, even those which the government at the time accepted as reasonable and where the government committed to make changes. We recommend the government review the existing migration health requirements and the policy which supports them in light of the recommendations of the 2010 report, to determine where there are gaps in the migration health regulations, and consider how the system can change in order to treat people with a disability or health issues fairly and equally.

Background

Currently, Australia requires both temporary and permanent migrants entering the country to meet specific Health Requirements under the *Migration Act 1958* and the *Migration Regulations 1994*. The criteria of assessment for the Health Requirements are outlined in Schedule 4 of the *Regulations*, referred to as the Public Interest Criteria.

They require that an applicant:

- be free from tuberculosis or any disease or condition which may provide a threat to public health in Australia or a danger to the Australian community;
- be free from any a disease or condition which would prejudice access of an Australian citizen or permanent resident to health care or community services; and
- not require health care or community services that would impose **significant cost** on the Australian community.

A visa applicant is deemed 'not to meet' the Health Requirements if they are considered to be a threat to the public health in Australia; or where the disease or condition would result in a **significant cost** to the Australian community, currently defined as \$49,000 (over 10 years) for a permanent condition such as a disability; or prejudice the access of Australian citizens or permanent residents to scarce resources (for example in the case of someone needing an organ donation).

Health and community costs are assessed by the Medical Officer of the Commonwealth on the basis of services which would be made available to an Australian citizen or permanent resident with the same condition. The costs for services are assessed whether or not the applicant actually requires the use of those services; it is enough that their condition could meet the medical criteria for use of a service. Further, in the case of applicants for temporary residence such as visitor, students or short-term skilled visa applicants, who are **ineligible** for community services such as Medicare, pharmaceutical benefits, or state or Commonwealth disability support services, the notional costs are still attributed to them, even though these costs cannot arise in practice.

The opinion of the Medical Officer of the Commonwealth does not take into consideration the applicant's or their family's ability to contribute economically and socially to the broader community, and whether possible economic costs would be outweighed by other important factors such as the potential contribution of the person with a disability or other skilled family members whose immigration is connected to the individual with a disability¹.

When the applicant is assessed by the Medical Officer of the Commonwealth as not meeting the Health Requirements this decision, in many instances, is final. If an applicant fails to meet the Health requirements, the visa cannot be granted unless a 'health waiver' is available. Currently, a waiver of the Health Requirement is only available for certain visa subclasses and is only exercised in limited circumstances¹. Dependent on the type of visa, the applicant can provide additional information relating to the capacity of the individual or family to mitigate the notional costs, in both social and financial terms; can argue that the visa should be granted because of particularly 'compassionate or compelling' circumstances. The process of applying for the exercise of the health waiver, however, is time-consuming and expensive, usually involving lawyers' or migration agents' fees, and obtaining additional medical, financial and social evidence.

¹ Joint Standing Committee on Migration, 'Enabling Australia: Inquiry into the Migration Treatment of Disability', 2010, Commonwealth of Australia

All these costs are borne by the applicant and often all this additional evidence will not be sufficient to persuade the migration department to exercise the health waiver, in which case the visa will be refused.

Australia has signed multiple treaties that support the basic human rights of migrants, including the *Universal Declaration of Human Rights*, the *Convention and Protocol relating to the Status of Refugees*, and the *International Covenant on Civil and Political Rights*. In addition, the Australian Government signed the *UN Convention on the Rights of Persons with Disabilities (UNCRPD)* which recognises that discrimination against any person because of a disability is a direct violation of the inherent dignity and worth of the human person.

Australia's signing of the UNCRPD was made subject to the declaration that "*it understands 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.*" The implementation of this clause has been problematic.

The current operation of the *Migration Act 1958* and the *Migration Regulations 1994* means that there is little chance for a person with a disability or a health issue to meet the criteria for a visa to enter or remain in Australia. Legal protection under the *Disability Discrimination Act (DDA)* is not available to visa applicants because section 52 of that Act exempts any act permitted under the *Migration Act*. In other words, the *Migration Act* and *Regulations* and those who administer them are not bound by the DDA.

The September 2019 UN Report on Australia's Review of the Convention on the Rights of Persons with Disability (CRPD) recommended that Australia

review and amend migration laws and policies to ensure persons with disabilities do not face discrimination in any of the formalities and procedures relating to migration and asylum, especially remove the exemption in the DDA 1992 to certain provisions of the Migration Act.

Evidence

The evidence regarding the cost to the public of community and health services attributed to visa applications and migrants with a disability is limited in Australia. A review conducted by the Australian National Audit Office in 2007 highlighted the significant shortcomings in the administration of the Health Requirements of the *Migration Act 1958*² by the Department of Immigration. This included not having the appropriate technology in place, nor any adequate approaches to gathering information to determine the actual cost of the migrants who had been granted or refused visas. The review set out recommendations that would better enable the Department of Immigration to collect such data but these have not yet been put in place. It is imperative that the government put in place structures which would help quantify the financial impact of relaxing the health requirement.

² The Auditor-General, 'Administration of the Health Requirement of the *Migration Act 1958*', Audit Report No. 37 2006-2007, Performance Audit, Australian National Audit Office

In October 2017, the Canadian House of Commons Standing Committee on Citizenship and Immigration began studying the government's policies and guidelines regarding medical admissibility. Every year, approximately 1,000 permanent or temporary resident applications received a 'medical inadmissibility' finding, representing 0.2% of applicants who undergo medical screenings. In 2015, the estimated savings to provinces and territories in Canada due to the medical inadmissibility policy represented just 0.1% of all publicly funded health spending in Canada³. As a result of these findings, the Canadian government consequently reviewed its migration health requirements, and in 2018 announced changes to immigration policies to better align with contemporary national and international attitudes toward the rights of people with health and disability issues.

It is imperative that a similar audit be conducted in Australia to determine the actual costs of permitting more individuals with disabilities to enter Australia. Although cost should not be the sole determinant of policy in this area, a realistic understanding of the actual costs of migrants with disabilities in comparison with any other Australian resident, is an essential starting point for assessing the impact on Australia's health and community services and, as in Canada, would serve as a more realistic basis for setting the threshold for 'significant costs'.

DSA Position

The current Australian migration laws unfairly discriminate against people living with disabilities including people with Down syndrome.

Down Syndrome Australia recommends the government review the existing migration health requirement and the policy which supports it to determine where gaps in the migration health regulations are and how the system can change in order to treat people with a disability or health issues fairly and equally. Such a review was conducted in 2009 as the Inquiry into the Migration Treatment of Disability, and resulted in the Enabling Australia Report 2010. However, the recommendations set out in that Report have in the main been ignored by successive governments.

Down Syndrome Australia recommends:

1. **The government review the goals and objectives set out in the Enabling Australia Report 2010 and how these can be implemented to create an equitable migration system.**
2. **The *Disability Discrimination Act 1992* should be amended to remove the exemption of the *Migration Act 1958* and its scope.**
3. **The government should adhere to all the provisions of the UN Convention on the Rights of Persons with Disabilities, to which it is a signatory.**
4. **The government develop a system to collect relevant data including: the number of applicants who fail to meet the Health Requirement; the number of health waivers granted; and estimated health costs attributed to those granted health waivers and to those who are refused visas on health grounds.**

³ Standing Committee on Citizenship and Immigration, 'Building an inclusive Canada: brining the Immigration and Refugee Protection Act in step with modern values', 2017. House of Commons Canada