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Skilled, capable, but screened out? **Disability and Australia's migration health requirement**

Presentation to the Global Forum on Disability, Migration and Forced Displacement

by

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1. Opening

Thank you for having me. As we share our knowledge, experiences and work practices within this forum, I acknowledge and pay my respects to the knowledge, cultural practices and care for Country embedded for all time within First Nations' connection to Country. Australian Federation of Disability Organisations (AFDO) acknowledges Aboriginal and Torres Strait Islander people as the First Peoples and traditional custodians of the land on which I stand today, in the country now known as Australia and which always was, and always will be, Aboriginal land. I pay my respects to all Elders past and present.

I also acknowledge people with disability, in all our diversity, particularly those individuals who have experienced or are continuing to experience violence, abuse, neglect, or exploitation, together with the families, supporters, and representative organisations of all people with disability in Australia, and express our thanks for the continuing work done by the many people supporting, protecting, and advancing the rights of people with disability.

I want to talk about a question that sits between disability policy and migration policy and rarely gets attention in either. What happens to skilled, capable people with disability, or people whose family members have disability, when they try to build a life in Australia?

I'll cover five things:

- 1 how people with disability experience the migration system
- 2 how the health requirement works and the legal framework around it, including section 52 of the Disability Discrimination Act 1992 and Australia's position on the

Convention on the Rights of Persons with Disabilities¹

- 3 what an earlier round of this debate in Australia, in 2008 to 2010, teaches us
- 4 how the requirement collides with employment and economic participation,
- 5 and what reform could look like.

2. The experience of people with disability

Let's start with the experience of a person. Grainne Sherlock took her case to the UN². She was refused a skilled temporary work visa to take up a senior executive position at Oracle because she has multiple sclerosis. Her treatment costs over four years were estimated at \$97,000, which exceeded the threshold. She was willing to cover any uninsured costs, but the Department said a private arrangement of that kind was not permitted. She had the job, the skills and the means, and the system had no way to count any of it.

Hers is one documented case, but it fits a pattern. A parliamentary committee found that skilled applicants with the required qualifications and points, and even a job offer, can be refused if they or a family member have a disability. Families are assessed as a unit, so if one member's projected costs exceed the threshold, the whole application can fail. The shorthand is "one fail, all fail". Until an October 2024 change³, a family whose child was born in Australia with a disability or medical condition could be forced to leave or separate.

What ties these experiences together is a lack of transparency. Researchers describe costing methods that are hard to see into, limited disclosure by the medical officers who make the assessment, and uneven waiver access. The result is uncertainty, and financial and emotional stress. Even when a waiver or ministerial intervention eventually succeeds, the process is costly and time-consuming.

Another group also gets less attention. Someone arrives on a temporary skilled visa, healthy, and works for years. Then they are injured, or develop a chronic condition, or their child is diagnosed with autism, for example. When they apply for permanent residence, the health test applies as if they were arriving with none of that history. Their years of work, taxes paid, and community ties are not counted. Neither is the need that exists for the skills they have. They can be forced to choose between their family and the life they have built. That is my analysis of how the settings play out, and I'll come back to it.

¹ United Nations Convention on the Rights of Persons with Disabilities, 2515 UNTS 3 (entered into force 3 May 2008), retrieved from <https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd>.

² Committee on the Rights of Persons with Disabilities, Grainne Sherlock v Australia (Communication No 20/2014, UN Doc CRPD/C/24/D/20/2014, 19 March 2021).

³ Migration Amendment (Public Interest Criteria 4005 and 4007) Regulations 2024 (Cth).

3. The health requirement and equality

How the test works

Most permanent visas, and temporary visas depending on length of stay, require a health assessment⁴. A Medical Officer of the Commonwealth estimates the cost of health care and community services attributable to the person's condition and compares it with the Significant Cost Threshold⁵, currently \$86,000, generally assessed over up to 10 years for permanent visas. Above the line, the applicant fails unless the visa has a waiver. There is also a separate public health limb, for conditions such as tuberculosis, but it is the cost limbs that catch disability. The threshold has moved: after the 2010 inquiry the government accepted raising it to \$35,000, and it is \$86,000 today. But a bigger number does not fix a test that counts only one side of the ledger.

Two features matter most. First, the estimate is hypothetical. It assumes the person will use publicly funded services, even if they intend to use private insurance or pay for support themselves. Second, look at what it leaves out. Economic contribution is not weighed against assessed health costs, and a person's or family's ability to meet those costs is not taken into account. Skills are assessed separately through the points test, so being needed does not help.

Waivers are meant to be the safety valve. Fewer than a third of visas have access to one, primarily restricted to humanitarian, refugee, partner, and child visas, alongside a very small selection of employer-sponsored skilled visas. Waivers are only exercised in limited circumstances (e.g. where the decision-maker believes that there are significant compelling and compassionate reasons to do so)⁶. The Australian Department of Home Affairs reports⁷ that in 2022–23, 60% of people who failed the requirement had access to a waiver, and most of those waivers were exercised. By simple subtraction, around four in ten had none. Without a waiver, personal circumstances cannot be considered, and people are left hoping for ministerial intervention. That route is slow, costly and uncertain.

The legal framework

Now the equality question. You would expect a rule like this to be testable under disability discrimination law. It isn't. Section 52 of the Disability Discrimination Act provides that the

⁴ Sections 60 and 65, Migration Act 1958 (Cth) and Schedule 4 (Public Interest Criteria 4005, 4006A, and 4007), Migration Regulations 1994.

⁵ Migration Health Requirement (Public Interest Criteria 4005 and 4007) Migration Regulations 1994 (Cth).

⁶ Department of Immigration and Citizenship, Submission to the Joint Standing Committee on Migration, *Inquiry into Migration Treatment of Disability* (Report, Parliament of Australia, 2010) (Submission 66), p. 5.

⁷ Department of Home Affairs, Report on the Review of the Migration Health Requirement and Australia's Visa Significant Cost Threshold (Report, Australian Government, 2024) 1

discrimination provisions of the Act do not apply to discriminatory provisions in the Migration Act or in a legislative instrument made under it. The Productivity Commission describes it as also covering anything done in administering that Act. The health requirement sits in Schedule 4 of the Migration Regulations, so it falls squarely inside the exemption. The 1992 Explanatory Memorandum for the DDA⁸ does not give a policy justification for it.

The international framework points the other way. Australia ratified the Convention on the Rights of Persons with Disabilities in 2008, with an interpretive declaration on Article 18.

Australia recognizes 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.⁹

Notice the condition. The carve-out protects only requirements that meet that standard.

It is worth stating the government's case fairly. Every visa criterion discriminates by design. The Productivity Commission said as much in 2004¹⁰, noting that visa criteria serve health, labour market, welfare and financial objectives and apply equally within each visa category. The aim of the health requirement, containing public expenditure and protecting access to scarce services for Australians, is a legitimate one. The Convention creates no right of entry, and treaty body Views are not binding in Australian law. Those are serious arguments. The reply is about means, not aims. A test can pursue a legitimate aim unreasonably, if it ignores private funds, refuses to consider contribution, and offers no case-by-case judgement.

The UN Committee says the current requirement does not meet it. It recommended in

⁸ Retrieved from <https://humanrights.gov.au/resource-hub/by-resource-type/publications/guidelines/articles/disability-rights/disability-rights-and-the-disability-discrimination-act/disability-discrimination-bill-1992-explanatory-memorandum>.

⁹ Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia), retrieved from <https://treaties.un.org/Pages/Declarations.aspx?index=Australia&chapter=4&treaty=2>.

¹⁰ Productivity Commission, *Review of the Disability Discrimination Act 1992* (Inquiry Report No 30, 30 April 2004).

2013¹¹ and again in 2019¹² that Australia review and withdraw the declaration. Australia has refused. In *Sherlock*, decided in March 2021¹³, the Committee found indirect discrimination, and recommended that private arrangements between employee and employer over health costs be taken into account. The government respectfully disagrees. It argued that Ms Sherlock was outside its jurisdiction, and pointed to a waiver in the 482 visa and the removal of the employer undertaking requirement. The Australian Human Rights Commission takes the opposite view. So the government's own declaration sets the test, and the argument is over whether the criteria meet it.

4. Lessons from the 2008–2010 debate

None of this is new. In October 2009, the Australian Federation of Disability Organisations told the Joint Standing Committee on Migration¹⁴ that the health assessments conflict with the Convention and should be removed. It relied on legal advice from Dr Ben Saul, commissioned by the National Ethnic Disability Alliance, that the health test conflicts with the equal protection obligation in Article 5 and produces unjustifiable indirect discrimination. That is the same finding the UN Committee reached in *Sherlock* twelve years later. The submission also made three practical points that still stand. The medical officers' assessments were not disclosed to the people assessed or their advocates. The officers lacked disability service expertise. And there was doubt that any real comparison of the extra cost of disability was ever done. It also observed that, because the exemption sits outside the DDA, government has never had to show that inclusion would impose unjustifiable hardship.

The submission quoted the treaties committee's 2008 report. The Attorney-General's Department had described the declaration as confirming that immigration processes were fully compliant, yet the declaration's own wording is conditional. The committee recommended a review of the Migration Act and migration policy anyway. That review became the 2010 inquiry, and the government accepted raising the threshold and promised to examine a net benefit approach.

Sixteen years on, section 52 stands, the declaration stands, and the costing is still opaque. I draw five lessons.

¹¹ UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, 10th session, (2–13 September 2013), UN Doc CRPD/C/AUS/CO/1 (21 October 2013).

¹² UN Committee on the Rights of Persons with Disabilities, Concluding observations on the combined second and third periodic reports of Australia, 22nd session, (26 August–20 September 2019), UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019).

¹³ Note 2.

¹⁴ Retrieved from https://www.aph.gov.au/~media/wopapub/house/committee/mig/disability/subs/sub006_pdf.ashx.

One: administrative adjustments without legal reform do not change the framework.

Two: the declaration's reasonableness standard is the ground to fight on.

Three: transparency has been asked for since 2009 and is still unmet.

Four: the demand for immediate removal did not produce removal. The narrower asks did, such as the threshold increase and the 2024 exemption for children.

Five: keep public health screening separate from cost, as the UK Joint Committee on Human Rights argued in 2009, warning against conflating disability with public health risk.

5. Employment and economic participation

Australia has committed, through Australia's Disability Strategy 2021-2031, to improving employment outcomes for people with disability. It also runs a migration program designed to fill skills gaps. The health requirement is where the two collide. The 2009 case was largely rights-based. What strengthens it now is the economic evidence.

First, skills and health are assessed independently, so being in demand protects no one. A qualified nurse, teacher or engineer with a job offer can fail on health grounds like anyone else. Second, the program steers permanent visas toward people already here. Budget settings direct about 70% of permanent visas to migrants already living in Australia on temporary visas. That makes sense for retaining workers. But it means the health test increasingly falls on people who have worked and contributed here for years. If a condition arises, or a child is diagnosed, before permanent residence, the pathway can end at the last step. That is my analysis of how the settings interact, not a sourced finding, and it needs data to test it. Third, waiver access is patchy. The 482 has a waiver, but that does not help someone in a permanent stream. The parliamentary committee found most skilled visas were assessed without a waiver option, and wider access for permanent skilled visas was still unimplemented as of late 2024.

There is also a data gap. I am not aware of published figures on how many skilled applicants fail the health requirement each year, in which visa subclasses, how many later succeed, or how long it takes. Without them, neither government nor advocates can say how large the problem is, or what reform would cost. The design of the test makes the cost of exclusion invisible.

The upshot is an inconsistency. We ask why employment rates for people with disability are low, while excluding people with disability who have jobs waiting. And the cost logic is one-sided. It counts projected costs, but never the taxes, spending and labour of a working person.

6. Legal and policy reform

Reform has started but is partial. Home Affairs reviewed the requirement in 2024 and proposed 11 actions. In October 2024¹⁵, children born and living in Australia were exempted from certain health criteria, but five actions remained outstanding, including wider waiver access for permanent skilled visas. The Joint Standing Committee on Migration also recommended excluding special education costs and extending waivers to all visa applicants¹⁶.

The history suggests how to sequence. Hold the principled goal of equal treatment, but pursue it through staged steps, because the steps that have moved have been narrow. Six reforms would do that:

1. **Waivers for all.** Extend the waiver to every visa class, starting with permanent skilled, employer-sponsored and onshore permanent transitions.
2. **Count the full picture.** Let decision-makers weigh private funds, insurance, employer arrangements and economic contribution. That is what the UN Committee recommended in *Sherlock*.
3. **Fix the threshold and separate the limbs.** Raise it, index it and exclude special education costs. Keep genuine public health screening distinct from cost-based exclusion. New Zealand doubled its equivalent threshold in 2022.
4. **Show the workings.** Publish the costing methods, and outcomes by visa class, including how many skilled applicants are refused on health grounds. This has been asked for since 2009.
5. **Protect acquired disability.** Add a safeguard at the permanent residence stage for people already working here when a condition arises.
6. **Repair the legal architecture.** Replace the blanket exemption in section 52 with a proportionality or unjustifiable hardship test for cost-based exclusion, so government must show the cost. Require disability impact assessments of migration settings. And either withdraw the Article 18 declaration or make its own standard meaningful, with demonstrably reasonable criteria.

These reforms sit with different decision-makers. Moving visa classes from the no-waiver criterion to the waiver criterion is a change to the Migration Regulations, which government can make itself. The threshold and its costing rules are policy, set by Home Affairs. Amending section 52 needs an Act of Parliament, and we await the government's response

¹⁵ Note 7.

¹⁶ Joint Standing Committee on Migration, *Inquiry into Migration Treatment of Disability* (Report, Parliament of Australia, 2010).

to the current review of the DDA (public submissions closed late last year). Withdrawing the Article 18 declaration is a decision for government. That suggests a sequence: start with what can be done by regulation and policy, build the evidence base, and put the legal reforms to Parliament.

Related issues raised in 2009, such as the Disability Support Pension residence wait and access to supports for migrants with disability, deserve their own review. None of this abolishes the health requirement. It makes the requirement defensible by the government's own declared standard.

7. Close

To bring it together: people with disability who have the skills and the means are being screened out by a test that counts costs but not contribution. That test sits outside disability discrimination law, and the UN Committee has found it in breach of Australia's obligations, a finding the government rejects. We have been here before. Parliament's own committees asked for a review in 2008 and again in 2010. The evidence is now stronger and the legal test is clearer. The fixes are practical and can be staged: waivers, a fuller assessment, a fairer threshold, transparency and a narrower legal exemption. Thank you.

About AFDO

Since 2003, the Australian Federation of Disability Organisations (**AFDO**) has been the pre-eminent national peak for people with disability, championing their rights through our extensive member organisation network uniquely representing both disability-specific and cross-disability population-based communities with a reach of over 4.5 million Australians. Our vision is to achieve a community where people with disability can participate in all aspects of social, economic, political and cultural life.

We are, firstly, a Disabled People's Organisation (**DPO**), led, governed, and predominantly staffed by people with disability. We are also a Disability Representative Organisation (**DRO**) funded by the Australian government. Our member organisations are national disability-specific peak bodies, other disability-specific advocacy and support organisations, and population based disabled people's organisations. This ensures that our work is informed by lived expertise and experience, truly representing our communities.

We understand that our member organisations play a key role in providing information and peer support to people with disability and their families. This role keeps them closely connected to their grass roots communities. AFDO is the forum where these views are collected and coordinated to ensure government is across issues impacting all people with disability in Australia.

Information about AFDO's members can be found on [our website](#).

Every Australian Counts

AFDO has been involved in Every Australian Counts since the beginning of the grassroots campaign that successfully advocated for the introduction of the NDIS. AFDO continues to support Every Australian Counts by auspicing the campaign, holding a position on the Steering Committee, and providing administrative, governance, marketing and communications support.

More information about Every Australian Counts, including its current priorities and activities, is available on the [Every Australian Counts website](#).

Australian Consumers & Carers Mental Health Forum

The Australian Consumers and Carers Mental Health Forum (**Forum**) is a national initiative that brings together consumer and carer perspectives to develop shared positions on mental health, suicide prevention and psychosocial disability reform. The Forum supports stronger connections between mental health and disability policy and promotes collaboration across a diversity of lived experience communities.

AFDO supports the Forum by providing administrative, coordination and organisational support as well as holding a position on its Steering Committee. More information is available at [The Forum](#).