

Submission to the Joint Standing Committee on Migration

Inquiry into immigration treatment of disability

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This submission addresses the 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 the impact on funding for, and availability of, community services for people with a disability moving to Australia either temporarily or permanently
- 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.
- Report on a comparative analysis of similar migrant receiving countries.

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SUMMARY

In relation to the Australian migration law health requirement this submission addresses the human rights of people with disabilities. Consequently it also addresses the rights of families who have a member with a disability and carers. The main focus is on an analysis of the operation of the *Migration Act 1958* (Cth), *Migration Regulations 1994* (Cth) and related policy and case law. A comparison is drawn with the Canadian *Immigration and Refugee Protection Act 2001* and Canadian case law.

This submission begins with a reference to the past history of restriction under the White Australia policy and argues that remnants of this policy still survive in aspects of the current migration health requirement. The singular object of today's Australian statute is then compared to the more comprehensive objects of the more recent Canadian statute. The original rationale for the *Disability Discrimination Act 1992* (Cth) section 52 migration exemption is examined and it is recommended that the exemption be removed.

The submission has a specific focus on the operation of *Migration Regulations 1994* - Schedule 4 -Public Interest Criteria (PIC) 4005, 4006A and 4007. It is recommended that a waiver be introduced for visa applications assessed against PIC 4005 similar to the waiver that currently exists for certain applications assessed against PIC 4007. The discretionary aspect of decision-making at all levels in the assessment process is examined and concern is raised regarding decision-making parameters that exclude important relevant considerations. Two case studies are included that highlight the need to move beyond the current system of assessment and pay proper consideration to the human rights of people with disabilities. Attention is then paid to the parameters within which the Medical Officer of the Commonwealth's opinion is made regarding 'likely significant cost,' irrelevance of actual use of services' and 'prejudice to access.' Emphasis is placed on the problematic use of a narrow economic model and an effective disregard for the role of carers in applications assessed against PIC 4005.

Recent migration review cases are then surveyed to highlight obstacles placed in the way of people with disabilities and their families who are seeking to migrate to Australia. It is then suggested that reforms to the Australian legislation be made to reflect the Canadian approach. A straightforward solution would be to allow similar exceptions in the Australian Act to those contained in the provision regarding health inadmissibility grounds of the Canadian *Immigration and Refugee Protection Act 2001*. This would have a very positive impact on the ability to migrate of people with disabilities and their families. Exceptions analogous to those contained in the Canadian Act could also be defined to include other family members and extended family. Such exceptions would, in turn, have a balancing effect as they would limit the number of people who might need to apply for a ministerial waiver, in the event the waiver were to be extended to PIC 4005 cases and all PIC 4007 cases, or for administrative or judicial review.

The human rights of single migrants with a disability would be better protected in the Australian migration system if their personal circumstances and ability to contribute economically and socially to Australian society could be fully taken into account in visa assessment processes. A confirmed work offer is one example of a factor that should automatically be taken into consideration. Having a disability such as blindness or a visual impairment should not be a sole reason for visa refusal.

The *United Nations Convention on the Rights of Persons with Disabilities* has brought stronger protections of the substantive rights of people with a disability into international law. It is of concern that Australia's *National Interest Analysis* of the Convention came to the conclusion that Australia's immigration processes did not constitute discrimination against persons with disabilities under international law. This submission is not in agreement with that conclusion. Also of concern is Australia's declaration regarding article 18 of the Convention. However, it is encouraging that the Australian parliamentary Joint Standing Committee on Treaties recommended reform of Australian migration policy and ratification of the Protocol which has now recently occurred.

Ignoring the role of carers in the visa assessment context constitutes systemic discrimination against women. Acknowledging the role of a family carer in the migration context also brings with it policy considerations that go beyond the migration law arena including the need for governments to implement a ‘shared work-valued care’ approach as recently recommended by the Australian Human Rights Commission. Migrants with disabilities and their families should not be paying the price for the delay in implementation of a coordinated approach to ‘shared work-valued care’ across Australian society which would better share the work and cost of caring.

This submission concludes that ideally disability per se should not be a sole reason for visa refusal. The migration health requirement should arguably be used purely to protect the Australian population from health and safety risks in a quarantine sense. Economic ‘costs’ assessment that incorporates the benefits a person and/or their family may bring to the country in a broader sense may be just as difficult to assess as the current system of assessing ‘cost’ in a purely negative sense. At the minimum a waiver should be introduced for PIC 4005 cases along with an exception clause similar to that in section 38 of the Canadian *Immigration and Refugee Protection Act 2001*. It is also highly desirable that a provision similar to para 3(3)(f) of the Canadian *Immigration and Refugee Protection Act 2001*, that includes an express direction to construe and apply that Act in a manner that complies with international human rights instruments, be included in the *Migration Act 1958* (Cth). Ultimately, only a thorough review of current legislation and policy would serve to ensure observance of the human rights of people with disabilities and their families who wish to migrate to Australia. In order to observe Australia’s international human rights obligations it is also necessary to move decisively away from a paradigm that casts the interests and human rights of prospective migrants with disabilities in an oppositional relationship to the national interest.

RECOMMENDATIONS

1. That the *Disability Discrimination Act 1992* (Cth), section 52 migration exemption be repealed
2. That the sole function of the health requirement should be to protect people resident in Australia from communicable or contagious conditions, ie public health and safety risks.
3. That people with disabilities/health conditions should not be ‘costed’ as to their future demand on health and social services when the same does not occur for prospective migrants who do not have a disability at the time of a visa application.
4. That the role of family carers who care for a person with a disability/health condition who needs personal assistance is to be valued and taken into account in the assessment process for all visa applications.

If the health requirement in its current form is to stay it is recommended that the legislation, regulations and supporting policy be amended as follows:

5. That a health requirement exception clause similar to that contained in section 38(2) of the Canadian *Immigration and Refugee Protection Act 2001* be included in the *Migration Act 1958* (Cth). This should significantly reduce the number of applicants who do not meet the current health requirement while maintaining current health and safety risk standards and also reducing discriminatory effects of the current legislation.
6. That a provision similar to para 3(3)(f) of the Canadian *Immigration and Refugee Protection Act 2001* that includes an express direction to construe and apply that Act in a manner that complies with international human rights instruments be included in the *Migration Act 1958* (Cth). The inclusion of such a clause would assist in the implementation of human rights conventions ratified by Australia, such as the *United Nations Convention on the Rights of Persons with Disabilities* and the *United Nations Convention on the Rights of the Child*, and also give

departmental officers, tribunals and courts a clear international human rights reference for decision-making.

7. That the *Migration Regulations 1994* (Cth), Schedule 4 - Public Interest Criteria 4005, 4006A and 4007 be broadened, especially the restrictive parameters within which the Medical Officer of the Commonwealth (MOC) currently makes a decision on 'likely significant cost' and 'prejudice to access' to take into account the economic and social contributions to the Australian community of people with disabilities and their families.
8. That relevant supporting policy in the Department of Immigration and Citizenship's *Procedures Advice Manual 3* ('PAM3') be reviewed
9. That broader economic modelling be incorporated into the parameters for policy taking into account that funds actually expended by a state on health care or social welfare support flow back into the economy and create employment, moving away from the notion of persons with disabilities or health conditions as being a 'burden' on the state when they actually do use services.
10. That the role of family and extended family contribution to care be acknowledged and accounted for in 'estimated costs' assessments and the ability of a person with a disability to contribute to the costs for any necessary personal care or supported accommodation be taken into consideration as a relevant factor in all visa applications.
11. That the individual circumstances of applicants with a disability or health condition always be taken into consideration in decision-making.
12. That the parameters within which the departmental delegate makes a decision be reviewed and, in particular, that the direction to ignore the role of a family carer be removed.
13. That the discretionary aspects of decision-making at all levels of processing of visa applications be reviewed to ensure they do not allow negative assumptions regarding people with disability to affect decision-making.

14. That a ministerial waiver by the departmental delegate be allowed for PIC 4005 and all, not some, PIC 4007 applications. This will also serve to reduce the Minister's current workload in this area that occurs when PIC 4005 applications have gone through the merits review process and an applicant seeks the exercise of the Minister's discretion.
15. That the imposition of a high fee for access to administrative review be removed.
16. That the privative clause in the *Migration Act* be removed to allow full judicial review of administrative decisions and remove any fettering of the discretion of the Migration Review Tribunal to properly consider cases on the merits. That the possibility be considered that, under the separation of powers doctrine, the privative clause may be unconstitutional in its restrictions on the operation of Chapter III courts.
17. That the barriers to independent review of MOC and Review Medical Officer of the Commonwealth (RMOC) decisions be removed
18. That any further policy implications of the *United Nations Convention on the Rights of Persons with Disabilities*, 2007 be carefully considered.

1. Introduction - A history of restriction – the White Australia Policy

A focus on restriction characterised immigration policy in post-colonial Australia from the outset and arguably particularly continues to do so in respect to people with disabilities.¹ The *Immigration Restriction Act 1901* (Cth) that formed the basis of the infamous White Australia Policy, as well as excluding people on the basis of race and ability to write in English, was also aimed at prohibiting the immigration into Australia of persons with disabilities. Section 3 of the Act stated as follows,

[t]he immigration into the Commonwealth of the persons described in any of the following paragraphs of this section (hereinafter called “prohibited immigrants”) is prohibited, namely: -

(...)

(c) any person likely in the opinion of the Minister or of an officer to become a charge upon the public or upon any public or charitable institution;

(d) any idiot or insane person

(e) any person suffering from an infectious or contagious disease of a loathsome or dangerous character

The policy underpinning section 3 (c) of the *Immigration Restriction Act* arguably still underlies the ‘estimated costs’ criterion of the health test that is applied to assess people with disabilities seeking to migrate to Australia today. Section 3 (d) prohibited in highly discriminatory and offensive terms the immigration of persons who had an intellectual or psychiatric disability. Today the power to similarly exclude people with these disabilities

¹ This submission will not differentiate between disability and health condition as the border between these is often fluid. See also reference to use of terms in the recent submission of the Law Institute of Victoria to the Federal Parliament’s Joint Standing Committee on Migration regarding the recently released terms of reference for the Inquiry into migration and disability, available at https://www.liv.asn.au/members/sections/submissions/20090609_67/20090609_MigrationHealthRequirement.pdf; See also Section 4 of the *Disability Discrimination Act 1992* (Cth) where ‘disability’ is defined as ‘total or partial loss of the person’s bodily or mental functions’ or ‘part of the body’; ‘presence in the body of organisms causing disease or illness’ or ‘capable of causing disease or illness’; ‘malfunction, malformation or disfigurement of a part of a person’s body’ or ‘disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction’; or ‘disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.’ It includes a disability that ‘presently exists’, or ‘previously existed but no longer exists; or ‘may exist in the future’ or ‘is imputed to a person.’ ‘Associate’ is defined as ‘spouse’, another person who is living with the person in a genuine domestic basis’, relative’, ‘carer’ and ‘another person who is in a business, sporting or recreational relationship with the person.’

still survives in Australian immigration law. Section 3 (e) is an unfortunately expressed forerunner of today's 'public health risk' test and reflects attitudes to diseases such as tuberculosis which were untreatable at the time.

2. Respecting the human rights of people with disabilities

An important question needs to be raised in relation to this precedent to the current health requirement. Would it not be in the national interest to have a non-discriminatory immigration policy in relation to people with disabilities that finally expunges from federal law the last vestiges of the same enactment that created the 'White Australia Policy' and clearly demonstrates respect for the human rights of people with disabilities? Also, has how Australia has acted, and is still seen to be acting in relation to this issue, sending negative messages to the rest of the world about this nation's attitude to human rights more generally? In the light of Australia's recent ratification of the *United Nations Convention on the Rights of Persons with Disabilities*,² and the enormous symbolism of this document,³ it is arguably time to move away from this discriminatory paradigm.

3. 'In the national interest'

The sole object of Australian migration legislation, is 'to regulate in the national interest, the coming into, and presence in, Australia of non-citizens'⁴ What constitutes the

² Opened for signature 30 March 2007, ATS 12, (entered into force 3 May 2008). The Convention was ratified by Australia on 17 July 2008, and entered into force for Australia on 16 August 2008. See also National Interest Analysis [2008] ATNIA 18 (of the UN Convention on the Rights of Persons with Disabilities), Documents tabled on 2 June 2008, with attachments on implementation and consultation, <<http://www.austlii.edu.au/au/other/dfat/nia/2008/18.html>>; Joint Standing Committee on Treaties, 'Chapter 2, 'Convention on the Rights of Persons with Disabilities,' *Report No 95: Review into treaties tabled on 4 June, 17 June, 25 June and 26 August 2008*, <<http://www.aph.gov.au/house/committee/jsct/4june2008/report1/chapter2.pdf>>; Joint Standing Committee on Treaties, 'Chapter 2: Optional Protocol to the Convention on the Rights of Persons with Disabilities,' *Report No 99: Review into treaties tabled on 3 December 2008 and 3 February 2009*, <<http://www.aph.gov.au/house/committee/jsct/3december2008/report/chapter2.pdf>>.

³ See the speech by Professor Gerard Quinn, of the Irish Human Rights Commission and Director of the Centre for Disability Law and Policy at the National University of Ireland, 'Presentation to the New Zealand Parliament, 19 February 2009,' available at <http://www.humanrights.gov.au/disability_rights/convention/gerard%20quinns%20speech%20at%20parliament%20breakfast.doc>.

⁴ Section 4, (1) *Migration Act 1958* (Cth)

national interest is never defined in a positive sense, however, certain restrictions in Schedule 4 of the *Migration Regulations 1994* and related policy and procedural instructions⁵ serve to define what is considered not to be in the public interest. Here prejudice to the public interest can reduce to an arithmetical equation regarding the estimated future costs of health and/or community care services for a person with a disability who is applying for an Australian visa or who has a family member who is applying for an Australian visa, even if the actual person who has the disability is not planning to migrate to Australia.⁶ A narrow economic estimate is to be applied regardless of whether the services costed are intended to be used or will ever be used and there is no provision for incorporating into the initial approval process the economic and social benefits a person with a disability and/or their family may bring to the community. A 10 year child with cerebral palsy and therefore her entire family, a young woman with multiple sclerosis, a professional classical dancer who is HIV positive and wishes to join his Australian partner or a long term Australian citizen's elderly parents or grandparents may all, 'in the public interest,' find themselves excluded from migration to Australia alongside people who have committed heinous war crimes or pose serious security risks to the country.

The human cost of a resultant exclusion of a person with a disability from migrating, in its emotional and practical impact on individuals and families, does not enter into the equation. The object of the Australian Act is singular and narrow and appears a poor contrast to the broadly stated objectives of section 3 of Canada's more recent *Immigration and Refugee Protection Act 2001* which would be a useful model to examine if considering reform of the Australian *Migration Act*. (See Appendix A)

Even though similar objects to those expressly stated in the Canadian Act may also form part of Australian immigration policy they are significantly absent from the objects of the

⁵ See Department of Immigration and Citizenship, *Procedures Advice Manual 3: Policy and Procedural Instructions for Officers Administering Migration Law* ('PAM3'), Schedule 4 Public interest criteria -- Criteria 4005-4007 -- Sch 4/4005-4007.

⁶ This last criteria applies to all applications for permanent visas and for certain temporary visas that may lead to a permanent visa.

Australian Act. Importantly, para 3(3)(f) regarding the application of the Canadian *Immigration and Refugee Protection Act* includes an express direction to construe and apply that Act in a manner that complies with international human rights instruments. The inclusion of such a clause in the Australian *Migration Act* would assist in the implementation of human rights conventions ratified by Australia, such as the *United Nations Convention on the Rights of Persons with Disabilities*⁷ and the *United Nations Convention on the Rights of the Child*,⁸ and also give departmental officers, tribunals and courts a clear international human rights reference for decision-making.

4. A current policy of exclusion?

Currently the principal means by which the harsher effects of the health requirement may be ameliorated are through processes of ministerial waiver for only a limited number of visa types and in limited circumstances, merits review at the Migration Review Tribunal which has tightly confined jurisdiction and cannot go beyond the opinions of the Medical Officer of the Commonwealth (MOC) or Review Medical Officer of the Commonwealth (RMOC) or, finally, the exercise of ministerial discretion⁹ after all merits review channels have been exhausted. The majority of visa refusals appear to go unchallenged. It is possible for a ministerial waiver to be applied by a departmental delegate to visa applications assessed against PIC 4007, however, there is no similar waiver allowable following refusals of visas on health grounds under the item 4005 test which is the test that applies to most visa applications. Full review rights do not exist for all types of visa applications with judicial review now limited to cases of jurisdictional error only due to amendments to the *Migration Act* made by the Government in 2001.¹⁰

⁷ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, ATS 12, (entered into force 3 May 2008)

⁸ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS3, (entered into force 2 September 1990).

⁹ See section 351, *Migration Act 1958* (Cth).

¹⁰ See section 474 (1) *Migration Act 1958* (Cth), re privative clause decisions.

Limited available data indicates, for example, that in 2004-2005 a total of 4,050 visa applicants were refused on health grounds and only 150 were granted a health waiver.¹¹ This means that in that year only 3.7% of people who were refused visas on health condition or disability grounds succeeded in having economic benefits to Australia brought by their own migration and/or that of their accompanying family members, and/or humanitarian considerations and/or close family relationships taken into account in order to finally obtain a visa. In addition only a small number of cases relative to the total number of visa refusals on the grounds of the health requirement appear to go to the Migration Review Tribunal (MRT) or a federal court. The statistics do not reveal how many family members were also refused visas due to the 'one fails, all fail' policy. Nor do they reveal the many people who are discouraged from even applying for visas to enter or stay in Australia because they, or a family member, including one who may have no intention of migrating, have a disability or health condition which may deny them entry.¹²

5. The *Disability Discrimination Act 1992* exemption

When the *Disability Discrimination Act 1992* (Cth) ('DDA') was enacted by a Labor government in 1992 a *Migration Act* exemption was included in section 52.¹³ Explanations of the purpose of the exemption given in Parliament at the time described it as a means of limiting the avenues of review to those that already existed in the *Migration Act* and *Regulations* for people with a disability who sought to migrate.¹⁴ The government at the time stated it 'was prepared, however, to provide a commitment to

¹¹ See Australian National Audit Office, *Administration of the Health Requirements of the Migration Act 1958*, Audit Report No 37, 2006-07, 42, [1.10].

¹² See the submission by Dougie Herd to the Joint Standing Committee on Treaties, 'Chapter 2, 'Convention on the Rights of Persons with Disabilities,' *Report No 95*, n 2 above, [2.36].

¹³ Section 52, *Disability Discrimination Act 1992* (Cth) states that neither Division 1 of the DDA, relating to discrimination in work, nor Division 2, relating to discrimination in other areas, '(a) affect discriminatory provisions in the *Migration Act 1958* or any regulation made under that Act; or (b) render unlawful anything done by a person in relation to the administration of that Act or those regulations.'

¹⁴ See Response in Committee to a Question from the Opposition by Mr Johns (Labor Member for Petrie) (Parliamentary Secretary to the Minister for Health, Housing and Community Services), *Hansard*, 19 August 1992, See also Mr Gibson (Member for Moreton, Labor), 2nd Reading Speech *Disability Discrimination Act 1992*, House of Representatives, re migration act exemption in the DDA, *Hansard*, 19 August 1992.

reviewing the operation of these exemptions after the legislation has been in operation for two years.’¹⁵ It would be timely now to remove the DDA migration exemption as it creates a negative impression about Australia’s respect for the human rights of potential migrants with disabilities and undermines the *raison d’être* of the DDA. If the *Migration Act* were amended to allow unfettered review with express reference to international human rights conventions the rationale given for the original insertion of the DDA exemption would be unable to be sustained.

6. The health requirement

The statutory requirement that an applicant meet the health criteria is set out in s 65 of the *Migration Act 1958* (Cth). Regulation 2.25A of the *Migration Regulations 1994* (Cth) prescribes that ‘the Minister must seek the opinion of a Medical Officer of the Commonwealth on whether a person (whether the applicant or another person) meets the requirements of paragraph 4005 (a), 4005 (b), 4005 (c), 4006A (1) (a), 4006A (1) (b), 4006A (1) (c), 4007 (1) (a), 4007 (1) (b) or 4007 (1) (c) of Schedule 4’ and that the opinion of the MOC is to be taken as correct. Schedule 4 of the Regulations sets out Public Interest Criteria 4005, 4006A and 4007. (See Appendix B)

The *Procedures Advice Manual 3* (‘PAM3’) of the Department of Immigration and Citizenship (DIAC) sets out the objectives of the health requirement. These are

- to protect the Australian community from public health and safety risks;
- to contain public expenditure on health care and community services; and
- to safeguard the access of Australian citizens and permanent residents to health care and community services in short supply.¹⁶

This submission does not take issue with today’s public health and safety risk test. It is the second two criteria that will be examined here. Questions will be asked as to whether

¹⁵ See response in Committee by Johns, *ibid*.

¹⁶ PAM3, P Sch4.4005-4007.10 - Background to the health requirement; 10.1 Objectives of the health requirements.

the considerations of expenditure and access to services are too narrow as well as speculative and what might be more useful alternative models. The question will also be raised as to whether a better and less complicated solution might be to move totally away from such considerations.

The following analysis will focus on PIC 4005 (c), PIC 4006A (1) (c), PIC 4007 (1) (c) (see Appendix B) as it is these aspects of the public interest criteria that continue to place obstacles in the way of people with disabilities and their families or associates who wish to migrate and also can have a significant effect on Australian citizens and residents who wish to bring other family members to join them in Australia. PIC 4005 is the standard requirement and applies to most visa applications for which no ministerial waiver is available. PIC 4006A (that applies for visa 418/457) and PIC 4007 are same as the standard requirement but also make provision for health waivers by the Minister in PIC 4006A(2) and PIC 4007(2). There are, however, limitations on which item 4007 visa applicants may be eligible for a ministerial waiver. The 4007 waiver may only be applied for certain visa types if the applicant is applying onshore and has previously held a specified type of temporary visa. This means that the waiver cannot be applied for many offshore applicants including family members of Australian citizens and permanent residents.

7. Public Interest Criteria (PIC) 4005 (c), 4006A(1)(c) and 4007(1)(c)

Each of the three criteria state as follows.

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 (emphasis mine)

Paragraph (c)(i) of the three health PIC each begin using the language of probability, ie ‘the disease or condition is such that the person who has it *would be likely to* require health care or community services’ or ‘meet the medical criteria for the provision of a community service.’ A string of other probabilities then are built upon this first set. If the ‘provision of the health care or community services relating to the disease or condition’ is assessed by the MOC as being ‘*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’ then the applicant will fail the health requirement. However, this previous string of probabilities is then shifted linguistically into the realm of possibility only, by an acknowledgment that the services posited may not actually be used, but that nevertheless this is to be regarded as immaterial to the costs estimate. The costs estimate regarding what now becomes only a possible provision of services is to be made ‘regardless of whether the health care or community services will actually be used in connection with the applicant.’ This is arguably moving into the realm of, at the least, unreasonableness *simpliciter*. However, such language, in constituting a regulatory standard, has a powerfully negative effect on the lives and futures of individuals.

In *Robinson v MIMIA*, Siopsis J of the Federal Court interpreted PIC 4005 (c) as follows: the Review MOC assessment under PIC 4005 (c) was not to be made in the abstract but ‘on a case by case basis’ and ‘by reference to the form or level of disease or condition actually suffered by the applicant’.¹⁷ This judgment was welcomed by disability

¹⁷ [2005] FCA 1626, [57].

advocates as loosening the restrictions that had applied to that date.¹⁸ The substance of this opinion of Siopsis J appears to have now been included in the policy guidelines for the MOC. However, the effectiveness of this judicial interpretation in assisting better outcomes for people with disabilities is undermined by the problematic regulatory standard that determines how the costs estimate is made.

8. Discretion and the assessment process

It is useful to firstly examine how discretion operates during the visa assessment process. In visa applications that are assessed against PIC 4005 there are three tiers of decision makers. The application is initially assessed by a DIAC officer. Then the opinion of a Medical Officer of the Commonwealth (MOC) may be sought if the DIAC officer deems this necessary on viewing the application. Finally a Ministerial delegate decides whether to approve or refuse the visa. In applications that are assessed against PIC 4006A and 4007 there are four tiers of decision makers. These are the same as for PIC 4005 applications but there is also an additional tier in that the Minister's delegate decides whether or not to exercise the Ministerial waiver.

The scope of the discretion for each of the decision-makers varies. The DIAC officer's powers are precisely defined by the 'special significance' trigger on a visa application and a 'yes' answer to any of the questions regarding the health requirement where the officer is instructed to request a medical and x-ray examination. However, they also have some discretion to decide whether or not to look further into an applicant's health status if an applicant behaves or looks 'different' and it is suspected the applicant may have a health condition or disability. If DIAC officers have any doubts they are instructed to consult a MOC or the Health Policy Section.¹⁹ The MOC has broad discretion due to the imprecision of language of 'likely significant cost' and 'prejudice to access.' However, confusingly, the MOC has to assess within specified parameters that are arguably too narrow (to be discussed below). The delegate is bound by MOC's opinion, then decides

¹⁸ See, eg, Peter Papadopoulos, 'A door closes but a window opens' (October-December 2006) *HIV Australia* 5,2 available at http://www.afao.org.au/view_articles.asp?pxa=ve&pxs=103&pxsc=127&pxsgc=139&id=593.

¹⁹ PAM3, Sch4.4005-4007.29.

within specified parameters and in certain instances is instructed to refer cases to the Health Policy Section. The scope of the discretion exercised in the Ministerial waiver is ostensibly broad for PIC 4007 as noted in *Bui v MIMA* (see above) and narrower for PIC 4006A. The Migration Review Tribunal is also bound by the opinion of the MOC or RMOC. It is of serious concern that so at so many points of the assessment process the discretionary aspects of decision-making may allow space for negative assumptions regarding persons with disabilities to come into play while, at the same time, specified parameters (to be discussed below) exclude important relevant considerations.

9. The PIC 4006A and PIC 4007 ministerial waivers

There are also problems related to the employer's undertaking to 'meet all the costs related to the disease or condition' of an applicant or family member with a disability or health condition who has been assessed by the MOC as failing the health requirement. The undertaking is needed as a prerequisite for the exercise of a discretionary ministerial waiver in relation to PIC 4006A (for visa types *Educational 418/ Business Long Stay 457*). An applicant with a disability may have difficulty in obtaining such an undertaking from an employer. For example, for privacy reasons, an applicant, concerned about potential unfair discrimination, might prefer not to disclose their disability to an employer if they know their disability is unlikely to prevent them from undertaking the inherent requirements of a job without the need for reasonable accommodation. Also an employer may not be willing to give an undertaking for a family member with a disability they are not employing. This puts additional obstacles in the way of a person with a disability that are not imposed on someone without a disability in relation to this visa type. In addition it does not take into account the potential contribution of the applicant and family members to the Australian economy and community, including a family member with a disability.

The discretionary waiver for PIC 4007 may be exercised if 'the Minister is satisfied that the granting of the visa would be unlikely to result in (i) undue cost to the Australian community; or (ii) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.' In *Bui v MIMA*²⁰ French, North and Merkel

²⁰ [1999] FCA 18 [46]-[47].

JJ interpreted these criteria as follows: ‘likely significant cost’ was already established by the MOC and the Minister (or delegated officer) was bound by MOC’s opinion. What amounted to ‘undue cost’ and ‘undue prejudice’ were broad evaluative judgments made by the Minister which ‘may import consideration of compassionate or other circumstances’ which in turn ‘may be circumstances of a “compelling” character.’ The court emphasised the ‘discretionary element of the ministerial waiver.’ Again the question needs to be asked whether the discretionary nature of the waiver allows negative assumptions regarding disability to come into play.

10. Case study – The Kayani family

In reference to Canadian immigration and refugee protection legislation, Carasco et al have commented that ministerial discretion is the single most important source of discretion.²¹ It is important personal prejudice against people with disabilities does not interfere with the exercise of this discretion. Unfortunately in the past prejudice against people with disabilities was demonstrated by a previous Minister for Immigration, in the aftermath to Shahrzad Kayani’s tragic self-immolation outside Parliament House, Canberra in April 2001. Mr Kayani had been granted refugee status, become an Australian citizen and then sought to bring his spouse and three children from Pakistan to join him in Australia on a Subclass 202 (Split Family) Humanitarian Visa Application. However, primarily because one of the children had cerebral palsy, he had a six year battle with DIMA in which the Ombudsman had eventually intervened.²² However, a ‘cost estimate’ of \$430,000 that was then increased to \$750,000 served to exclude the 10 year old child and thus prevented Mr Kayani’s spouse and two other children from migrating to Australia. When queried by the Press about the whether the visa was likely to be granted, the Minister at the time used an ‘opening the floodgates’ argument stating publicly, in an evening television news broadcast, that if he, as Minister, changed policy

²¹ Emily Carasco, Sharryn Aiken, Donald Galloway and Audrey Macklin, *Immigration and Refugee Law: Cases and Materials*, (2007), 177.

²² Commonwealth Ombudsman, *Report on the Investigation into a Complaint about the Processing and Refusal of a Subclass 202(Split Family) Humanitarian Visa Application, August 2001* available at [http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2001_dima_visapdf/\\$FILE/DIMA-Kiane-aug01.pdf](http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2001_dima_visapdf/$FILE/DIMA-Kiane-aug01.pdf).

in response to the desperate measures Mr Kayani had resorted to, ‘handicapped’ (sic) people from all over the world would be clamouring to come to Australia. The same Minister commented several times over the ensuing week that such decisions were not going to be determined under duress. The tragic incident widely covered by the media, shocked refugee and disability advocates and the Minister’s ‘opening the floodgates’ comment sent a second shockwave through the Australian disability community causing considerable distress.²³ The incident was also reported by media around the world, particularly on the Indian sub continent, Asia, the United Kingdom and Ireland and rightfully gave a very poor impression of Australia’s attitude to human rights.²⁴

11. Case study – Dr Siyat Abdi

The recent shameful case of the initial refusal of a visa to Dr Siyat Abdi²⁵ highlights several issues relevant to this submission. Dr Abdi, who is blind, came to Australia from Kenya five years ago to undertake a PhD specialising in disabilities at Flinders University in Adelaide. He successfully completed the doctorate in three years and had recently been working with Somali youth in the community. His postgraduate study visa was due to expire in May 2009 but he found he would be unable to get a skills visa to work in Australia due to his blindness. Legal blindness alone is a reason a visa applicant may fail to satisfy the health requirement. Dr Abdi was also denied a protection visa he had applied for on the grounds he would be persecuted because of his blindness if he returned to Kenya. Although offered a senior position at Disability SA it appeared he would have to leave Australia until his case received media attention. The Minister for Immigration intervened and Dr Abdi was granted a four year temporary visa due to the contribution he would make to the community and the fact he had an offer of a job. The difficulties

²³ See Editorial opinion, “Withholding hope from refugees,” *The Age*, (Melbourne, Australia), 5 April 2001

²⁴ See, eg, ‘Australia faces flak over human rights issues’ *The Straits Times*, Singapore, 20 June 2001.

²⁵ The following details regarding Mr Abdi’s case were obtained from the following sources; ‘Dr says blindness hindering stay in Australia,’ Australian Broadcasting Commission, *Lateline* television broadcast, 11 May 2009, Reporter Karen Barlow, available at <<http://www.abc.net.au/lateline/content/2008/s2567397.htm>>; ‘Blind academic given temporary residency,’ Australian Broadcasting Commission, *Lateline* television broadcast, 28 May 2009, Reporter Leigh Sales, available at <<http://www.abc.net.au/lateline/content/2008/s2583856.htm>>.

encountered by Dr Abdi clearly demonstrated that migration barriers encountered by people who are blind or have a visual impairment need to be removed.

12. The parameters for the Medical Officer of the Commonwealth's opinion

At present the relationship between the statute, regulations and policy mean that the opinion of the MOC is of primary importance in determining whether or not an application will succeed. Therefore the parameters within which the MOC's opinion is formed are of crucial importance. Consequently it appears it is at this stage that additional considerations need to be incorporated into the assessment framework in order to give fairer outcomes to applicants with disabilities and their families/associates. The MOC has to determine the 'likely significant cost' to the health care system and 'prejudice to access' to services if a visa application is approved. The MOC is also instructed to treat as irrelevant any consideration of actual use of services. Each of these three factors will now be analysed in turn.

12.1 *'Likely significant cost'*

It is submitted that the estimate of 'likely significant cost' by the MOC can only be speculative as it cannot take into account factors such as family support available, actual future costs, the possibility of an applicant's health improving and possible future advances in treatments for certain conditions. The policy standards state that the MOC has to assess costs 'for the visa period for temporary applicants' and 'over over a 5 year period for permanent visa applicants (3 years for those over 70 years old, phased in from age 68), with the inclusion of costs that can be identified with reasonable certainty as occurring beyond that 5 year period.'²⁶ It is arguable that what constitutes reasonable certainty is not, however, definable if the other aspects referred to above are not allowed to enter into the equation. The assessment has to be speculative although the language of 'reasonable certainty' is used.

²⁶ PAM3, P Sch4.4005-7.114.2 Costs.

The policy standards also state that '[t]here is no absolute definition of the level of costs regarded as significant, but the MOC may be guided by a multiple of average annual per capita health and welfare expenditure for Australians.'²⁷ This appears to be \$20,000 over a five year period. If an applicant is deemed to be over this threshold they will not meet the criterion. However, if a health waiver is possible for the visa type an upper threshold of \$200,000 will be applied. Above this a waiver may not be granted.²⁸ The MOC also has to include 'community services' (eg 'supported accommodation, home and community care'), 'special education' and 'social security benefits' in the estimate.²⁹ However, these include costs that arguably go beyond health and welfare. 'Special education' is an education cost that any child that needs it should have access to as a member of society. 'Supported accommodation' is also not necessarily purely welfare. People with disabilities who live in supported accommodation can and do go out to work each day and may contribute to such costs based on their levels of income. This would arguably reduce the total estimated costs. Although such factors may be beyond the scope of a medical assessment, they are of relevance to a proper estimate of costs.

12.2 Narrow economic model

The overarching economic model that governs the MOC's estimate of 'likely significant cost' is a very narrow one. There is no consideration of the fact, for example, that the use of 'supported accommodation, home and community care, and special education services' feeds funds back into the economy ie by creating employment for such service providers. Social security benefits for example are also fed back into the economy as a benefit recipient buys food, goods and services, pays rent etc. In other words, any public money actually expended on a person with a disability flows back into the economy.

Again, although such factors may be beyond the scope of a medical assessment, they are of relevance to an estimate of costs. In fact it may not be appropriate to require the MOC

²⁷ Ibid.

²⁸ See Australian National Audit Office, *Administration of the Health Requirements of the Migration Act 1958*, Audit Report No 37, 2006-07, [3.36], p 74, and n77, p 74.

²⁹ PAM3 n 27 above.

to actually do the cost estimate. It is arguable that such an estimate is beyond the scope of a medical assessment process and needs to be done separately. However, problematically it is the MOC's cost estimate here that can be determinative of the outcome of the visa application as the final decision made by the delegate cannot question the MOC's assessment in this regard. If the 'significant estimated costs' criterion is to stay, there needs to be a better way of assessing this i.e. there needs to be another stage in the assessment that brings in clearly relevant factors such as those referred to above and also assessment of the potential contribution of the applicants with a disability and/or their family members to the taxation system and the economy as well as their social contribution.

12.3 'Irrelevance of actual use of services' - Ignoring the role of carers

An examination of the pro forma minute used by the case officer and/or ministerial delegate in the final assessments shows some evidence of taking into account the applicant's ability to work but a family carer's current and future commitment and contribution to the care of a person with a disability is apparently to be disregarded.³⁰ This does not take into account the realities and complexities of family life and emotional ties between family carers and those they care for. As the majority of family carers are women, this indicates a systemic bias against acknowledging the reality of the experience of women as carers. It also indicates a bias against acknowledging the experience of carers in general, whatever their age or gender. Underlying this is a general assumption that people with disabilities are only to be viewed in terms of being burdens on family or state.

PAM3 elaborates on how the actual use of services is to be assessed as irrelevant to the cost estimate.³¹ The policy states that 'MOCs do not take into account whether the applicant will actually use the identified health care or community services.'³² Also MOCs are instructed to carry out this assessment 'without regard to the applicant's

³⁰ See PAM3, P Sch4.4005-4007.99.3, Pro forma minute – 4007 health waiver.

³¹ PAM3, P Sch4.4005-4007. 114.5.

³² Ibid.

personal circumstances or any claims by the applicant that they do not intend to use the identified care or services.’

There is a marked contrast here with the situation under Canadian law, where the assessing officer must take into account ‘the support available from family’ and also ‘the personal circumstances of the individual and the availability of other support systems.’³³ Factors such as ‘the quality of family support,’ its ‘availability as an alternative to the use of social services,’ or evidence of ‘self-sufficiency’ or financial and emotional support from one’s family are all factors that need to be taken into account under Canadian law.³⁴ However, a difficulty here is that visa applicants who are less wealthy will be indirectly disadvantaged.

12.4 ‘Prejudice to access’ - How disabilities are assessed

Examples of extensive prejudice to access in PAM3 are organ transplants.³⁵ Substantial prejudice to access is stated to be a need for services such as ‘blood or blood products on a recurring basis, radiotherapy for the treatment of malignancy, haemodialysis for end-stage renal failure, interferon treatment for chronic active hepatitis or nursing home/residential care placement.’³⁶ The assessment criteria used by the MOC reveal a much broader range of conditions that may result in an applicant being recommended for refusal.

Examples of conditions assessed by the MOC include psychiatric disabilities, diabetes, thyroid disease and a past history of cancer, all these being conditions that do not necessarily preclude a current ability to work. As a point of comparison, under Canadian immigration medical inadmissibility assessment, ‘[t]he existence of a past condition is not relevant.’³⁷ In Australia, the focus of assessment for these particular conditions

³³ See Lorne Waldman, *Canadian Immigration and Refugee Law Practice*, (2007), Commentary re Division 4 – Inadmissibility, 104-105.

³⁴ Ibid, 105.

³⁵ See PAM3, P Sch4.4005-4007.114.3.

³⁶ See PAM3, P Sch4.4005-4007.114.4.

³⁷ See Waldman, n 33 above, 101.

appears to be testing to determine management and prognosis of the psychiatric or medical condition over a five or five to ten year period. In relation to these particular conditions no attention is given by the MOC to the applicant's ability to work.³⁸ Any prognosis is also, by definition, a projection or educated guess only. Yet the futures of individuals and their families may be decided on the basis of such an educated guess.

An older person's health (anyone over 70) is also assessed in negative terms eg 'Is the applicant fully capable of independent living and self-care without any assistance or family support? If assistance in the activities of daily living - bathing, dressing, mobility, cooking, cleaning, shopping, and so on - is necessary, please specify extent. Does applicant presently or will applicant soon need residential care?'³⁹ There is conspicuously no assessment of an older person's physical ability to contribute socially, or their ability (and intention) to work and contribute to the community eg many older people engage in voluntary work and some over 70 engage in paid work.

For children with disabilities/medical conditions the DIAC officer is instructed to request from applicants '[s]pecialist paediatrician and/or psychology reports' with 'full details of psychological testing, developmental milestones and a developmental age/IQ assessment' The reports are 'to address [the] need for special schooling and prognosis for independent living and future employment in adulthood.' Some of this information regarding children will be difficult for people from certain countries to obtain. It also seems quite culturally specific⁴⁰ ie what disability advocates have termed a [western] corporate approach to the management of disability.⁴¹

³⁸ See PAM3, P Sch4.4005-4007.116.3.

³⁹ See PAM3, P Sch4.4005-4007.116.4.

⁴⁰ See the argument regarding indirect discrimination in the submission by Dr Ben Saul, barrister for the National Ethnic Disability Alliance (NEDA), to the Joint Standing Committee on Treaties, 'Chapter 2, 'Convention on the Rights of Persons with Disabilities,' *Report No 95*, n 2 above, [2.39].

⁴¹ Gerard Coggin and Christopher Newell, 'Reclaiming civility: disability, diversity and human rights,' paper presented to the Activating Human Rights and Diversity: Local and Global Voices International Conference, Byron Bay, 1-4 July 2003, p 6, referring to the discussion on the corporatisation of the management of disability in Gillian Fulcher, *Disabling Policies?* (1989), <<http://tasmaniantimes.com/jurassic/reclaimingcivility.pdf>>.

In the following categories the MOC assessments take employment history into account but more in a negative sense as to whether there are restrictions: orthopaedic problems, rheumatological problems, neurological conditions, and obesity. For people with vision impairments the focus appears to be purely on physical independence ‘and the likely progress of visual impairment in the future’, not on the ability to work or study with proper supports.⁴²

The only health condition (not necessarily a disability though) where positive factors are more clearly balanced against negatives is a ‘[h]istory of drug or alcohol abuse/dependence.’ Here, as well as employment history in the last five years, the MOC is asked to assess ‘details of accommodation, interpersonal relationships and social network during the last 5-10 years’ and this is to be balanced against an estimate of management needs in next 10 years.⁴³ In comparison, in Canada, a past history of drug addiction will not result in refusal of a visa if there is no evidence of a present addiction.⁴⁴

Very limited data appears to be available regarding the nature of health conditions that lead to visa applications being refused due to a failure of the health requirement. Information regarding conditions that failed the requirement between 1 July 2005 and 28 February 2006 is available due to its inclusion in a recent ANAO Report.⁴⁵ Although 104 such conditions were found during this period the statistics available in the report only show 14 conditions in which 15 or more people did not meet health requirement. There is no information regarding ministerial health waivers and the data represents only 380 of the 800 people in this period who did not meet the health requirement. The figures are as follows: HIV – 72; mental retardation, unspecified – 44; renal disease, chronic – 40; dementia, unspecified – 29; ischaemic heart disease – 28; developmental disorder in childhood – 24; blindness and low vision – 23; hypertension – 22; malignant, breast – 20;

⁴² See PAM3, P Sch4.4005-4007.116.4.

⁴³ Ibid.

⁴⁴ See Waldman, n33 above, 102.

⁴⁵ See Australian National Audit Office, n 11 above, 132, Figure 8.2.

malignant, respiratory tract – 16; diabetes mellitus, non insulin dependent – 16; tuberculosis – 16; heart failure, unspecified – 15; and mitral valve disease – 15.⁴⁶

Noting that in a previous year only a small percentage of people who failed the health requirement were given a ministerial waiver,⁴⁷ it might be assumed that people with the above conditions wishing to migrate with or join their families can be denied entry and also the right to access health care that may help manage their condition and improve their lives if this is not available in their countries of origin. The denial of health rights to ‘outsiders’ is symptomatic of the broader problem identified by Mary Crock who warns of the danger of aligning human rights with the concept of citizenship to the exclusion of others that has been occurring in recent years in Australia.⁴⁸

13. Recent Australian migration review cases

Analysis of review cases over the last six months shows the continuing restrictions under which the Migration Review Tribunal (MRT) and the courts operate. A comparison with possible outcomes under Canadian law will be incorporated into the analysis.

In 071695331,⁴⁹ review was sought by an 84 year old man from Sri Lanka regarding the refusal of his application for an Aged Parent (Residence) (Class BP) visa on health grounds under PIC 4005. At the time of an initial health assessment in 2001 he satisfied the health requirement. However, by the time the visa processing was resumed and completed in 2006 he no longer met the requirement. He had been nominated for the visa by his son who has been an Australian citizen since 1997. Both the tribunal and the Review MOC assisted the applicant as much as possible in requesting further health documentation that was eventually received. However, the tribunal was bound by a third health assessment carried out by the RMOC which found the applicant did not meet the requirement and noted there was no waiver of criterion 4005 available. Details of the

⁴⁶ Ibid.

⁴⁷ Ibid, 42, [1.10].

⁴⁸ See Mary Crock, ‘Critique and Comment - Defining Strangers: Human Rights, Immigrants and the foundations for a just society’ (2007) *Melbourne University Law Review* 38.

⁴⁹ [2009] MRTA 396 (20 March 2009).

particular circumstances of the case are not given in the tribunal report, however, issues such as the economic and social contributions to Australian society by the applicant's younger family members could not be raised, nor could any family commitments to his care. This latter point is a direct contrast to the situation under Canadian law. Also the fact that the applicant actually satisfied the health requirement at the time of his initial application could not be taken into account. No explanation is given in the report for the long delay in processing of the application.

A case that raised many relevant issues is 071857454,⁵⁰ where review was sought on behalf of a 36 year old woman born in Sarajevo, Bosnia Herzegovina, regarding the refusal of an Other Family (Migrant) (Class BO) visa on health grounds under PIC 4005. She is a remaining relative of her brother, an Australian citizen, who was the review applicant. There are also other family members resident in Australia. She has a history of psychiatric illness, having first been diagnosed with an acute psychosis in 1992 when still a teenager (the same year as a devastating war began in her country of origin). The visa application had been lodged in 2006, and it appears her last hospital admission due to the condition was during that same year, but she was in remission in 2008 at the time of the MOC assessment. However, the MOC assessed her as in need of specialist psychiatric services as well as being eligible for income and community support services were her visa application to be approved. The RMOC came to similar conclusions. According to policy the medical assessment had to be based on a hypothetical person with the same condition and severity. Her potential contribution to Australia could not be taken into consideration by the tribunal neither could the contribution of her family members to the Australian taxation system nor the existence of strong compassionate grounds or compelling circumstances. The specific circumstances of her case and any potential family commitment to her care and support were also not factors that could be considered. The fact she was in remission appears to have been ignored. These last three factors are in direct contrast to Canadian law.⁵¹ The tribunal did note, however, that 'the

⁵⁰ [2009] MRTA 286 (4 March 2009).

⁵¹ In *Hilewitz v Canada (Minister of Citizenship and Immigration)* [2003] 2 FC 3, [2002] FCJ No 1121, 2002 FCT 844, revd [2004] 1 FCR 696, [2003] FCJ No 1677, 2003 FCA 420, revd [2005] SCJ No 58, 2005 SCC 57, the majority of the Canadian Supreme Court 'held that the specific circumstances of the individual

review applicant intended to approach the Minister as there were strong compassionate grounds and compelling circumstances.’ However, the applicant was unsuccessful in the tribunal in gaining a recommendation that the visa be approved. It is arguable that the discretion of the tribunal was fettered in this case, and in similar cases, in that, because of statutory, regulatory and policy restrictions, the tribunal now has to state it cannot take into account relevant considerations.

In *0800182*,⁵² review was sought by a United Kingdom family unit of two adults and two children regarding the refusal of Employer Nomination (Residence) (Class BW) visas for them due to the fact that one adult member (the spouse of the primary applicant and mother of the two children) suffered from spinocerebellar ataxia and therefore did not meet the health requirement under PIC 4005. It was submitted on behalf of the applicant that the material before the RMOC did not support the RMOC’s opinion and that she was ‘able to work and contribute to her family and Australian society more generally.’⁵³ It was also requested that the RMOC re-assess the medical opinion. References from professional associates were also submitted. However, the tribunal could not go beyond the parameters of the criterion that requires reference to a ‘hypothetical person who suffers from that form or level of the condition.’ To the request for a re-assessment of the RMOC opinion the tribunal replied that no further *medical* information had been supplied to warrant this. In comparison, a DIAC ministerial delegate assessing an application against the criteria for a PIC 4007 type waiver does not have to rely on the MOC report alone. Even though a DIAC ministerial delegate is able to take into account *any* evidence of an applicant’s ability to work, balanced against the information from the MOC, this could not be allowed in this case by the tribunal due to the fact that the additional evidence was not medical. The potential economic and social contribution of both adults

were relevant factors when assessing excessive demands on social services.’ See Waldman, n 34 above, 151. In *Poste v Canada (Minister of Citizenship and Immigration)* (1997), 140 FTR 126, 42 Imm LR (2d) 84, 5 Admin LR (3d) 69, [1997] FCJ No 1805 (TD), an application for judicial review of a decision was allowed on the grounds that the Minister was obliged to assess the reasonableness of a medical opinion regarding a child with an intellectual disability, and had failed to consider relevant evidence. See Waldman, n 34 above, 152.

⁵² [2009] MRTA 517 (2 April 2009).

⁵³ *Ibid*, [17].

and their children to the Australian community could not be taken into account as the current legislative and policy framework for assessing PIC 4005 cases does not permit this. All four applicants were thus unsuccessful in gaining a recommendation that the visas be approved.

It is arguable that the discretion of the tribunal was fettered in these cases, and in innumerable similar cases, in that, because of statutory, regulatory and policy restrictions, the tribunal states it cannot take into account relevant considerations. In relation to this, it also seems that the PAM3 policy guidelines are elevated to the level of legislation at times, even though they are clearly not legislative enactments by parliament.

In *Pillay v Minister for Immigration*,⁵⁴ the Federal Magistrates Court considered an application to review the decision of the MRT that affirmed a decision of a ministerial delegate not to grant an Other Family (Migrant) (Class BO) visa. The visa applicant was a 30 year old Fijian woman with Down syndrome. The visa applicant's sister, who self-represented, was the applicant in the review application before the court. This presented the court with some difficulties. However, the court noted the MRT had accepted the legitimacy of her arguments regarding humanitarian reasons for her sister reuniting with her family members in Australia but had held the consideration of such issues was beyond its jurisdiction.⁵⁵ The court also noted that the MRT was unable to inquire into the visa applicant's personal circumstances or how she managed day to day in reality, her community and neighbourhood, 'her normal duties', 'her household duties'.⁵⁶ However, these issues raised would need to have been taken into account in the Canadian legal context. Ignoring the particular circumstances of a case also goes against usual common law approach in Australia. In response to the applicant's contentions the court also noted that both the tribunal and the court had to accept the opinion of the MOC or RMOC as correct in relation to the significant cost estimate.⁵⁷ However, arguably this is

⁵⁴ [2009] FMCA 517 (2 June 2009).

⁵⁵ Ibid, [20].

⁵⁶ Ibid, [23] to [26].

⁵⁷ Ibid. [61].

problematic from a constitutional viewpoint as, due to the separation of powers doctrine, it should only be the departmental ministerial delegate (ie the executive) who has to accept the medical opinion as correct. The court also considered other contentions submitted by the applicant but dismissed the application as no jurisdictional error had been found.⁵⁸

This fettering of judicial discretion in federal courts is arguably unconstitutional, as the power of federal judicial officers to make proper decisions under the rule of law should not be interfered with by parliament.

14. The Canadian *Immigration and Refugee Protection Act 2001*

The Canadian approach suggests a direction to take on a pathway to reform. The equivalent Canadian legislation appears far less restrictive than the Australian *Migration Act*. A straightforward solution would be to allow similar exceptions in the Australian Act to those contained in section 38 of the Canadian *Immigration and Refugee Protection Act 2001* which states

HEALTH GROUNDS – (1) A foreign national is inadmissible on health grounds if their health condition

- (a) is likely to be a danger to public health
- (b) is likely to be a danger to public safety; or
- (c) might reasonably be expected to cause excessive demand on health or social services

(2) EXCEPTION – Paragraph (1) (c) does not apply in the case of a foreign national who

- (a) has been determined to be a member of the family class and to be the spouse, common-law partner or child of a sponsor within the meaning of the regulations;
- (b) has applied for a permanent resident visa as a Convention refugee or a person in similar circumstances;
- (c) is a protected person; or
- (d) is, where prescribed by the regulations, the spouse, common-law partner, child or other family member of a foreign national referred to in any of paragraphs (a) to (c).

⁵⁸ Ibid, [66].

The Canadian Act thus contains exceptions to section 38(1)(c) health inadmissibility grounds for foreign nationals who are members of the family class and who are ‘the spouse, common-law partner or child of a sponsor,’ and for Convention refugees or persons in similar circumstances who have applied for permanent visas and protected persons. Alternatively, the exception applies, as prescribed by the regulations, to ‘the spouse, common-law partner, child or other family member of a foreign national’ in any of the above three groups. Similar amendments to the Australian Act would have a very positive impact on the ability to migrate of people with disabilities and their families newly sponsored to come to Australia or family members of people already residing in Australia (whether they are citizens, permanent residents, refugees or protected persons). Exceptions analogous to those contained in s3(2)(d) of the Canadian Act could also be defined to include other family members such as siblings, elderly parents, grandparents and other extended family. This would limit the number of people who might need to apply for a ministerial waiver, eg if the waiver were to be extended to PIC 4005 cases and all PIC 4007 cases, or for administrative or judicial review.

The problems that beset the Kayani family (as referred to above), the Moellers, Robinsons and other family units⁵⁹ who have attempted to migrate to Australia when a family member has a disability or health condition would not appear to occur in Canadian visa applications under the more recent Canadian Act.

15. Single people migrating independently

The rights of single persons with disabilities seeking to migrate independently and who do not fall into the s38(2)(b) or (2)(c) Canadian categories, ie who are not Convention refugees or persons in similar circumstances who have applied for permanent visas and protected persons, appear to remain unprotected by the Canadian provision.

⁵⁹ See Jan Gothard, ‘Migrants with disabilities deserve a better deal,’ ABC Archive, Opinion and Analysis, 3 December 2008, <<http://www.abc.net.au/news/stories/2008/12/03/2436344.htm>>. She notes that there are many other applicants and families in similar situations whose cases have not received media attention.

The rights of single migrants with a disability who are not refugees or in similar categories would be better protected in the Australian migration system if their personal circumstances and ability to contribute economically and socially to Australian society could be taken into account in visa assessment processes. A confirmed work offer is one example of a factor that should be taken into consideration, just as it is with a person who has no disability.

16. United Nations Convention on the Rights of Persons with Disabilities⁶⁰

16.1. *A changing international human rights context*

Professor Gerard Quinn has observed that stronger protection of the substantive human rights of people with disabilities, which ‘goes beyond non-discrimination,’ has characterised recent developments in international law.⁶¹ Speaking to the New Zealand Parliament about the new United Nations Convention on the Rights of Persons with Disabilities, he noted,

‘[i]t innovates by ensuring that economic and social supports and services and rights – far from being the problem as in the past – are now genuinely part of *the solution*. Persons with disabilities – just like all citizens – do not want welfare or other supports as compensation for not being in the mainstream – they do not want this support simply to survive. They need social supports re-engineered so that they can lead active and productive lives.’⁶² (emphasis mine)

Professor Quinn has also highlighted the particular importance of that Convention’s innovations in implementation and monitoring and its huge symbolism.⁶³ Hopefully this drive for reform internationally as expressed in the Convention may provide the final impetus to remove the discriminatory aspects of Australian migration policy as it applies to persons with disabilities and their families or associates.

⁶⁰ The Convention was signed for Australia at New York, 30 March 2007, entered into force generally on 3 May 2008, was ratified by Australia on 17 July 2008, and entered into force for Australia on 16 August 2008. See <<http://www.austlii.edu.au/au/other/dfat/treaties/2008/12.html>>.

⁶¹ See Quinn, n 3 above.

⁶² Ibid.

⁶³ Ibid.

Articles of particular relevance to this discussion are, Article 4 (3) – Consultation; Article 4 (4) – No restriction or derogation; Article 5 – Equality and non-discrimination; Article 7 (2) – The best interests of the child; Article 18 – Liberty of movement and nationality; Article 23 – Respect for home and family; Article 25 (f) – Prevent discriminatory denial of health care or health services; Article 27 – Work and Employment; Article 29 – Participation in political and public life and also Articles 34 to 39 – UN Committee on the Rights of Persons with Disabilities, New York. Also significant is the recent election of Australian Professor Ron McCallum AO to the first monitoring Committee.⁶⁴

Article 18 is of direct relevance to migration and declares, ‘States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities: (a) Have the right to acquire and change a nationality ... (b) Are not deprived, on the basis of disability, of their ability ... to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement.’

16.2. Australia’s response

Australia’s *National Interest Analysis*⁶⁵ of the Convention commented that ‘Article 18 does not confer any additional rights on people with disability in relation to immigration processes. In particular, Article 18 does not oblige Australia to provide a favourable outcome in visa or citizenship applications.’ This is of concern as the attachment on implementation states that Australia’s immigration processes ‘would not constitute discrimination under international law.’ Also the attachment on consultation fails to take on board the submissions made by three NGOs ‘regarding the *DDA* exemption for the *Migration Act*,’ non-compliance with Article 18, a proposal ‘that blindness or vision

⁶⁴ See *United Nations Enable, Rights and Dignity of Persons with Disabilities, Declarations and Reservations*, available at <http://www.unhcr.org/refugees/enable/> (viewed 22 October 2009).

⁶⁵ National Interest Analysis [2008] ATNIA 18 (of the UN Convention on the Rights of Persons with Disabilities), Documents tabled on 2 June 2008, with attachments on implementation and consultation, available at <http://www.austlii.edu.au/au/other/dfat/nia/2008/18.html>.

impairment should not preclude a person from obtaining a temporary visa,' and that the person should not have to disclose this impairment upon entering the country.⁶⁶

Australia's declaration states that Article 18 does not '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.'⁶⁷ In so doing Australia was the *first country in the world* to demonstrate the need to make what is in essence 'a reservation' to the Convention in relation to its migration policy (a reservation not being permitted under this Convention).⁶⁸

It is encouraging that the Federal Parliament's Joint Standing Committee on Treaties (JSCOT) report on the Convention⁶⁹ contains recommendations for reform of Australian migration policy (and that the same committee's report on the protocol⁷⁰ recommended the protocol's ratification). It is very positive that the protocol has recently been ratified by Australia.

Submissions to JSCOT in relation to the Convention argued 'for a more balanced consideration of both the costs and benefits to Australia of migrants with disabilities.'⁷¹ The submission from Dougie Herd eloquently draws attention to both direct and indirect discrimination experienced by potential migrants with disabilities:

'I managed to migrate to Australia as a person with a disability despite all of the advice I was given that it was going to be impossible or nearly impossible. I think I was able to negotiate my way through the formal rights that I have because I am white, Anglo-Saxon, Protestant, middle

⁶⁶ Ibid.

⁶⁷ See *United Nations Enable*, n 64 above.

⁶⁸ More recently regarding article 18 of the Convention, the United Kingdom made a reservation, Thailand made an interpretative declaration, and the Government of the Peoples' Republic of China made a declaration in which it referred to the Hong Kong Special Administrative Region and article 18.

⁶⁹ See Joint Standing Committee on Treaties, Report No 95, n2 above.

⁷⁰ See Joint Standing Committee on Treaties, Report No 99, n2 above.

⁷¹ See Joint Standing Committee on Treaties, Report No 95, n2 above, [2.34].

class, was in a job, was confident to the point of arrogance, was a professional advocate, was trained to be someone who could negotiate their way through the mire of legal systems that they presented and have a 25-year history of working in the disability advocacy sector in Scotland, Europe and now in Australia. Not everyone comes with those sets of benefits. Many people who will come, particularly from a non-English speaking background, would find it more difficult to exercise and realise their formal rights as a consequence of the secondary indirect discriminatory forces that play upon them ...'⁷²

Both the Federation of Ethnic Communities Council (FECCA) and the National Ethnic Disability Alliance (NEDA) have argued for reforms to migration policy informed by the Convention and draw particular attention to 'Articles 4(1)(b), 5(2), 18 and 23(4).'⁷³ Dr Ben Saul, barrister for NEDA, has drawn attention to the lack of compliance with Article 5 of the Convention, the low threshold of the test, the lack of strong evidentiary requirements for decision-making, and the lack of accounting for the applicant's ability to pay for the cost of their own care. Dr Saul also draws attention to the impermissible interference with human rights posed by the ten year waiting period for the Disability Support Pension in relation to articles 28, 25 and possibly article 16.⁷⁴

It is very positive to see that JSCOT's recommendation that a thorough review be carried out of the relevant migration legislation and policy implementation guidelines with the view to implementing positive reforms to remove any direct or indirect discrimination and ensure consistency with Australia's international obligations is now occurring.

⁷² Ibid, [2.36].

⁷³ Ibid, [2.37] and [2.38].

⁷⁴ Ibid, [2.39].

17. Broader policy implications - A new approach to care and work

Acknowledging the role of a family carer in the migration context covered in this submission brings with it additional policy considerations including the need for governments to implement a ‘shared work-valued care’ approach as, ‘[a] guiding principle for approaching paid work and care issues, across the life cycle and supporting equality between men and women’ as recommended by the then Human Rights and Equal Opportunity Commission (HREOC)⁷⁵ in 2007.⁷⁶ In particular HREOC noted the need to broaden the debate regarding ‘shared work-valued care’ to include ‘governments, employers, industry leaders, unions, community organisations, service providers and individuals and their families’.⁷⁷ While acknowledging that it is migrant women who do much of the primary care in families and that ignoring the role of carers constitutes systemic discrimination against women it is important to locate an acknowledgment of the role of carers in a broader policy context that goes beyond the migration law arena. It is also important not to exclude women or men who have caring responsibilities for children or adults with disabilities from migration to Australia and the chance of improving their life prospects simply due to the fact that they are carers for a person with a disability.⁷⁸ Also not to be excluded are those women or men with disabilities who care for others with disabilities. Migrants with disabilities and their families (including, importantly, carers) should not be paying the price for the delay in implementation of a coordinated approach to ‘shared work-valued care’ across Australian society which would better share the work and cost of caring. The implications for policy here relate indirectly to the 2nd term of reference for this inquiry.

⁷⁵ Now the Australian Human Rights Commission (AHRC).

⁷⁶ Human Rights and Equal Opportunity Commission, *It’s About Time: Women, Men, Work and Family, Final Paper 2007* (2007) (‘It’s About Time’), xii.

⁷⁷ Ibid, 28

⁷⁸ See Crock, n48 above, re danger of aligning human rights with the concept of citizenship to the exclusion of others.

18. Conclusion: A new legislative and policy approach

If this analysis has exposed anything it should be that in effect disability per se should not be a sole reason for visa refusal. The migration health requirement should arguably be used purely to protect the Australian population from health and safety risks in a quarantine sense. Economic 'costs' assessment that incorporates the benefits a person may bring to the country in a broader sense may be just as impossible to assess as the current flawed and demeaning system of assessing 'cost' in a purely negative sense. Ultimately, it needs to be stated that it is highly discriminatory to require people with disabilities to be 'costed' as to their future demand on health and social services when the same is not required of prospective migrants who do not have a disability. There is clearly a need for a radical rethink of the rationale of the health requirement. Only a thorough review of current legislation and policy would serve to ensure observance of the human rights of people with disabilities and their families/associates who wish to migrate to Australia. Minor amendments would not easily eliminate discriminatory policies that appear to go to the heart of the legislative, regulatory and policy framework. In order to observe Australia's international human rights obligations it is also necessary to move decisively away from a paradigm that casts the interests and human rights of prospective migrants with disabilities in an oppositional relationship to the national interest.

Thankyou for the opportunity to make this submission

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* The subject of this inquiry is of great concern to me. My work experience in Australia has included involvement with the Human Rights and Equal Opportunity Commission National Awareness Campaign on the *Disability Discrimination Act* in 1994 when the issue of the migration exemption first came to my attention. I have also taught Adult Migrant English and Italian in Sydney, have lived and worked in the United Kingdom, Europe and the Middle East and more recently was a carer for older members of my family over a 20 year period. I am a 4th generation Australian whose family originally fled famine or land clearances in Ireland and Scotland in the 19th century looking for a better life, and wish to see Australia removing the obstacles encountered by people with disabilities and their families who seek to migrate here today.

Appendix A

Immigration and Refugee Protection Act 2001 (Canada)

Section 3

3. (1) The objectives of this Act with respect to immigration are

(a) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;

(b) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada;

(b.1) to support and assist the development of minority official languages communities in Canada;

(c) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;

(d) to see that families are reunited in Canada;

(e) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;

(f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;

(g) to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities;

(h) to protect the health and safety of Canadians and to maintain the security of Canadian society;

(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and

(j) to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society.

Objectives — refugees

(2) The objectives of this Act with respect to refugees are

(a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;

(b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;

(c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;

(d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;

(e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;

(f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;

(g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and

(h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

Application

(3) This Act is to be construed and applied in a manner that

(a) furthers the domestic and international interests of Canada;

(b) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs;

(c) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations;

(d) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;

(e) supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada; and

(f) complies with international human rights instruments to which Canada is signatory.

Appendix B

Migration Regulations 1994 (Cth)

Schedule 4 - Public interest criteria and related provisions

4005 The applicant:

- (a) is free from tuberculosis; and
- (b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
- (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; and
- (b) if the applicant is a person from whom a Medical Officer of the Commonwealth has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended residence in Australia for a follow-up medical assessment, the applicant has provided such an undertaking.

4006A (1) The applicant:

- (a) is free from tuberculosis; and
- (b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
- (c) subject to subclause (2), 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; and
- (d) if the applicant is a person from whom a Medical Officer of the Commonwealth has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended residence in Australia for a follow-up medical assessment, the applicant has provided such an undertaking.

(2) The Minister may waive the requirements of paragraph (1) (c) if the relevant employer has given the Minister a written undertaking that the relevant employer will meet all costs related to the disease or condition that causes the applicant to fail to meet the requirements of that paragraph.

(3) In subclause (2), **relevant employer** means the proposed employer (within the meaning of the relevant Part of Schedule 2) in Australia:

- (a) of the applicant (if the applicant is an applicant to whom the primary criteria apply); or
- (b) if the applicant is an applicant to whom the secondary criteria apply -- of the person:
 - (i) who meets the primary criteria; and
 - (ii) of whose family unit the applicant is a member.

4007 (1) The applicant:

- (a) is free from tuberculosis; and
- (b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
- (c) subject to subclause (2), 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; and
- (d) if the applicant is a person from whom a Medical Officer of the Commonwealth has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended residence in Australia for a follow-up medical assessment, the applicant has provided such an undertaking.

(2) The Minister may waive the requirements of paragraph (1) (c) if:

- (a) the applicant satisfies all other criteria for the grant of the visa applied for; and
- (b) the Minister is satisfied that the granting of the visa would be unlikely to result in:
 - (i) undue cost to the Australian community; or
 - (ii) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.

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