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Article

Stairs, Not Ramps -- Australia's approach to migration and disability

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For years, Australia's migration laws have been discriminatory towards applicants with disabilities. In fact, the Migration Act 1958 (Cth) (the Act) is specifically exempted from the Disability Discrimination Act[1] (the DDA). The exemption means that decisions made by the Minister and delegates under the Act or Migration Regulations 1994 (the Regulations) are exempted from action under the DDA. The Department of Immigration and Citizenship (the Department) has justified its discriminatory health policies on the basis that they apply the same criteria to everyone and they are not concerned with the disability itself but with the impact upon the Australian community. However, this rationale does not detract from the fact that the health criteria predominantly affect applicants with disabilities resulting in either visa refusal or differing requirements from other applicants.

The Health Criteria for visa applicants as set out in the Act and Regulations has remained the same since 1989 and 1999 respectively, until changes in mid and late 2011. The 2011 changes were fuelled significantly by Australia becoming a signatory to the Convention on the Rights of Persons with Disabilities (CRPD) in 2007. And all signs point to more change in the next few years towards better meeting our obligations under the CRPD.

Application of the Health Criteria

Section 60 of the Act provides that where the health of an applicant is relevant to the grant of the visa, the Minister may require the applicant to undergo a medical examination as a precondition to the grant of certain subclasses of visa. For all permanent visas and many temporary visas this assessment includes an HIV test.

The Medical Officer of the Commonwealth (MOC) will form an opinion as to whether or not the applicant meets the prescribed health criteria. The Health Criteria are set out in Sch 4 of the Regulations[2] and apply to almost all visa subclasses.[3]

The MOC must assess that whether or not 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;[4] and
> (c) is free from a disease or condition in relation to which:
> (i) 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 described in subclause (2); and
> (ii) the provision of the health care or community services would be likely to:
> (A) result in a **significant cost**[5] to the Australian community in the areas of health care and community services;[6] or
> (B) **prejudice the access** of an Australian citizen or permanent resident to health care or community services;[7]
> regardless of whether the health care or community services will actually be used in connection with the applicant" (see endnotes).

In making the assessment the MOC must take into consideration all relevant information about the applicant's medical condition and reach an opinion on the basis of a hypothetical person with the same specific condition as the applicant.[8] The applicant is able to put forward any medical reports or other information demonstrating that they may meet the health criteria and the MOC must take that information into consideration. The MOC's assessment will usually be based upon the life of the visa.[9]

For temporary visas there is a list of exclusions to what will be "costed" for the purpose of determining "significant cost". These exclusions are contained in Gazette Notice IMMI 11/073.[10]

The MOC are not specialists in all areas of medicine. So as to reach an opinion they draw upon the "Notes for Guidance for Medical Officers of the Commonwealth of Australia: Financial implications and consideration of prejudice to access for services" for the specific condition. For many conditions they will also request specialist reports.

Section 65 of the Act requires that a delegate rely upon the medical opinion provided by the MOC. If, according to the MOC, an applicant fails to meet the health criteria then the delegate must refuse the visa. For applicants for permanent visas, all migrating applicants and non-migrating members of the family unit are subject to the health criteria. If the primary applicant or a member of their family unit (whether or not they are migrating) fails the health criteria then the whole application will fail. This is known as the one fails, all fail rule.

If made validly, the MOC report is determinative; therefore a s 65 delegate must take the MOC opinion to be correct.[11] A MOC opinion, presented by way of a Form 884, is valid provided that it: is for the requisite length of time; cites the correct visa subclass; and, if considering a refusal, that the medical assessment on which it is based is not more than 12 months old.[12] The structure of the legislation protects the MOC opinion as an independent arbiter preventing interminable legal dispute over such medical costs estimates.

Depending upon the visa subclass, there may be available a waiver of the health criteria for those who fail on the basis of "prejudice to access" or "significant cost".

Schedule 4 Criterion 4006A is applicable to visa subclass 457 and allows for a waiver if the employer/sponsor provides an undertaking to meet costs associated with the condition for the duration of the visa.

Criterion 4007(2) allows a waiver if:

> (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.

In determining whether or not the condition would be unlikely to result in undue cost or undue prejudice to access, the impact upon the Australian community is weighed against the compelling and compassionate factors that are applicable to the applicant.[13] This includes the social and cultural contributions of the applicant, as well as any detriment that the applicant or any other person might suffer as a result of a visa refusal. It is not limited to an economic calculus of costs/benefits.

An HIV positive applicant will always fail to meet the health criteria for a permanent visa as the estimate lifetime "costing" will be upwards from $175,000. This means that if no health waiver is available the visa will be refused.

Until 2009, the health waiver was available principally for certain "family formation visas".[14] Prior to this, there was no avenue for skilled migrants who failed the health test to obtain a permanent visa.

From 2009 until 2010 State and Territories were gazetted as "participating States" for the purposes of health waivers under the Employer Nomination Scheme, the Labour Agreement Nomination Scheme, the State/Territory Regional Established Business Visa and the Regional Sponsored Migration Scheme. This meant that applicants could seek a health waiver to obtain a visa for themselves and members of their family unit. From 1 July 2012 the options have been narrowed reducing availability of the waiver to only those skilled visa applicants who have applied under the Temporary Residents Transition Stream of the Employer Nomination Scheme (visa subclass 186) and Regional Sponsored Migration Scheme (visa subclass 187).

There is no waiver provision for any temporary visa apart from the 457 visa (see above) and therefore if the MOC determines that the applicant will be a significant cost (greater that $35,000 over five years) or will prejudice access to services, then the applicant will be unsuccessful.

UN Convention on the Rights of People with Disabilities

Australia became a signatory to the CRPD on 30 March 2007, ratifying the Convention on 17 July 2008, and ratifying the Protocol on 21 August 2009. By ratifying the Convention, the Commonwealth undertook to abide by the obliga-

tions, rights created and intentions of the convention, and conforms to its laws accordingly. Australia lodged certain caveats when becoming a party to the convention.

The article relevant to migration is Art 18 -- Liberty of Movement and Nationality:

1. States Parties shall recognise 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 and are not deprived of their nationality arbitrarily or on the basis of disability;
    b. Are not deprived, on the basis of disability, of their ability to obtain, possess and utilise documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;
    c. Are free to leave any country, including their own;
    d. Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

When Australia ratified the CRPD an Interpretative Declaration was made with respect to Art 18, which states that:

> Australia recognises the rights of persons with disability to liberty of movement, to freedom to choose their residence and to nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter[?] or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.

Despite these caveats the Federal Government is looking for ways to better conform Australia's immigration laws to Australia's obligations under international conventions including the CRPD.

In an effort to meet obligations under the CRPD, the Joint Standing Committee on Migration conducted an Inquiry into the Migration Treatment of Disability in 2009. In June 2010 as a result of this inquiry the Joint Standing Committee report made 18 recommendations for improvements to the health criteria and Senators Hanson-Young and Boyce made a further two recommendations.

A number of changes have already occurred flowing from the recommendations and it is anticipated that there are more to come. The changes have included:

1. The "significant cost" threshold has now been raised. The threshold was previously $21,000 and had been in place since 2000. From 1 July 2012 the "significant cost threshold" has been increased to $35,000, and this figure will be reviewed annually ensuring that it reflects contemporary costs of health care and community services (Recommendation 1).
2. The Department has now made the current "Notes for Guidance" publically available (Recommendation 5).
3. The MOC now provides each applicant with a detailed breakdown of their assessed costs associated with the disease or condition under the Health Requirement (Recommendation 7).
4. As of 1 July 2012 the "significant cost" test has been removed from all offshore humanitarian visas. Therefore applicants with conditions such as HIV and intellectual disabilities will most likely pass the health criteria.

In October 2012 the then Minister for Immigration and Citizenship, Chris Bowen MP, announced that "The government will now take into account all of the circumstances when assessing prospective visa applicants against the visa health requirement ... A 'net benefit' approach will allow decision makers to consider the social and economic benefits an applicant and their family bring to Australia compared to the cost of their health care."[15]

Observations

Although the recommendations made and proposed changes are steps in the right direction they are still far from meeting obligations under the CRPD. The proposed changes also don't purport to remove the need for the exemption in the DDA in order to protect decisions the Department makes from litigation.

The UN High Commissioner for Refugees' submission to the Joint Standing Committee stated that:

> "The present operation of the health requirement is discriminatory in effect and endangers a number of other human rights norms." To that extent, Australia presently falls short of its international obligations.[16]

Unfortunately despite the changes to date, we are still falling short of international obligations. Specifically in relation to HIV, where HIV is not (and never has been in Australia) considered to be a threat to public health, it is irrational and discriminatory to impose mandatory HIV testing on all permanent visa applicants, including onshore protection visa applicants where the health criteria has no impact upon them. Australia and New Zealand are alone among developed Anglo-Western States (and are in the minority when compared to all States) to have mandatory HIV testing and place restrictions on migration of people living with HIV.[17]

It is not acceptable that there is a need for an exemption in the DDA or the need for the Interpretive Declaration to Art 18 of the CRPD. The recommendation that the DDA and the impact of s 52 upon people with disabilities be reviewed is currently not supported by the Federal Government.

The only way to ensure compliance with obligations under the CRPD and to allow removal of the DDA exemption without repercussions is to remove the health criteria (with the exception of conditions considered to be a threat to public health). Removal of the health criteria would put Australia in line with many States we would like to be considered to be akin to including: United Kingdom, United States of America, Sweden, Switzerland, Canada, France and the Netherlands.

Although this is the only sure way to conform with international obligations for the removal of health restrictions, it is clear that there is no intention in the near term to do so or to remove the exemption to the DDA. For now people with disabilities and their family members will have to continue to justify their worth to the Australian Community, beyond that which is required of other migrants, and be optimistic that changes to come will be of assistance.

1 Section 52 Divs 1, 2 and 2A do not: (a) affect discriminatory provisions in: (i) the Migration Act 1958; or (ii) a legislative instrument made under that Act; or (b) render unlawful anything that is permitted or required to be done by that Act or instrument.

2 Schedule 4 of the Regulations 4005, 4006A or 4007, depending upon the visa subclass.

3 Excluding Onshore Protection visas and some subsets of Medical Treatment Visas (MTV). Onshore protection only requires that applicants undergo a medical assessment however there is no consequence of having a medical condition. MTV applicants in need of medical treatment excludes considerations under PIC4005(1)(c), therefore essentially only needing to demonstrate that they don't have TB or any other condition that could be considered a threat to public health.

4 By way of example this includes such conditions as R1N1, H1N1 and Ebola.

5 Significant cost is any cost of $35,000 over a five year period.

6 The "significant cost test" is applicable to such conditions as HIV, and intellectual disabilities.

7 Conditions, which might be considered to cause "prejudice to access", may include a person in need of a liver transplant or someone in need of dialysis.

8 *Robinson v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 148 FCR 182; [2005] FCA 1626; BC200509578.

9 A permanent visa applicant will be assessed from the date of grant for a lifetime and a temporary applicant will be assessed for the term of the visa. Exemptions to this rule are listed in Gazette Notice IMMI 12/02, Federal Register of Legislative Instruments F2012L01291. The temporary visas listed in the Gazette are those that likely lead to the grant of a permanent visa and therefore the assessment is on a permanent basis.

10 Federal Register of Legislative instruments F2011L02242 -- exclusions to the "costing" are (a) Social Security payments; (b) costs associated with issuing a Health Care Card or Pensioner Concession Card; (c) Pharmaceuticals listed under the PBS that, if ceased, would not be seriously detrimental to the applicant's life or wellbeing.

11 *Minister for Immigration and Multicultural Affairs v Seligman* (1999) 85 FCR 115; 55 ALD 374; [1999] FCA 117; BC9903865.

12 *Applicant Y v Minister for Immigration and Citizenship* (2008) 100 ALD 544; [2008] FCA 367; BC200802184.

13 *Bui v Minister for Immigration and Multicultural Affairs* (1999) 85 FCR 134; BC9905801.

14 "Family formation visas" included those such as partner, child, adoption, New Zealand Relative and offshore sponsored Humanitarian visas.

15 A fairer approach to migration for people with disability, 31 October 2012 accessed at http://www.minister.immi.gov.au/media/cb/2012/cb191379.htm.

16 UNHCR "Submission No 82 to the Joint Standing Committee on Migration Inquiry into the Migration Treatment of People with a Disability" Inquiry into Migration Treatment of People with a Disability, 2009.

17 HIV-related restrictions on entry, stay and residence, UNAIDS Human Rights and Law Team -- updated July 2012.