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**Literature Review and Jurisdictional Comparison –
Background Paper for Inquiry into Immigration
Treatment of Disability**

Disability Studies Research Centre, University of New South Wales

By Kathleen Cunningham (October 2009)

Foreword

In November 2008, Senator Chris Evans announced an inquiry to report on the assessment of the health and community costs associated with a disability as part of the health test undertaken for the Australia visa processing. (Senator Chris Evans, 2008). This paper reviews this background and provides comparative review of the relevant aspects of Canadian and UK policy in this area. In order to provide context for the comparison, a brief review of literature on migration policy is also provided. It will conclude by identifying some options worth further discussion and consideration, drawing on the observations and themes in the literature and policies in comparable receiving jurisdictions.

This project was the result of research collaboration between the Disability Studies Research Centre and the National Ethnic Disability Alliance. DSRC also acknowledges the Multicultural Disability Advocacy Association NSW for its support.

About the Disability Studies Research Centre

The Disability Studies and Research Centre (DSRC) at the University of New South Wales is a national disability studies research centre. DSRC's innovative approach to disability studies focuses on applied Australian Asia Pacific cross-disciplinary research with a critical, social perspective approach.

DSRC promotes the social perspective of disability in education and research to maximise Australia's capacity to ensure an equitable, participatory and accessible society for people with disability.

Through its cross-disciplinary education program, DSRC contributes to both undergraduate and postgraduate applied degree programs. It offers a mentoring program for researchers, particularly people with a disability.

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Background

Section 60 of the *Migration Act 1958 (Cth)* (the Migration Act) provides for a medical examination where relevant to a visa application. The health check is most strictly applied to permanent resident applicants and the family unit and refugees. The Commonwealth Medical Officer (CMO) determines whether or not the person's health status would be likely to require, or meet the criteria for health care or community services; and whether provision of the health care or community would be likely to result in a significant cost to the Australian community in the areas of health care and community services; or prejudice the access of an Australian citizen or permanent resident to health care or community services¹. In making the determination, the CMO is not to take into consideration whether or not the care or services will actually be used. Waivers are permitted when employers provide an undertaking to cover the medical costs of the employee and family members. There is also a Ministerial waiver for family and humanitarian grounds (Crock 1998 p. 61). The rules are not as strict for those under temporary migrant visas where the migrant must provide for their own medical costs and are not eligible for social benefits.

The implications of these rules are that applicants with a disability, or applicants who have a family member with a disability accompanying them, will be denied the permanent residence visa. The department has no discretion. While case law confirms that the individual diagnosis and prognosis must be considered, individual circumstances are not. The only exemption therefore must come from the Minister personally. Recent high profile cases have demonstrated the arbitrariness and discriminatory nature of the rules.²

In the 1990s the Immigration Review Tribunal (IRT) favoured, and applied, a more balanced approach (Crock 1998, pp 60-61). Crock notes that Australia considered two options in the 1990s. The first would consider the impact that a person might have on scarce community resources, but it would also consider the individual circumstances and the benefits that the person might bring. The second focussed not on the subjective circumstances, but rather on the "general burden that a person with a disease or condition posed ... weighed against the demands made by other individuals in Australia in the same diagnostic category." (1998, p. 60). She points out that contrary to recommendations in the 1992 Health Rules report, a decision was made to pursue the second approach (1998, pp. 60-61) and that since 1995 there are now fewer opportunities "for the Tribunal to "bend" the law in cases of apparent hardship or unfairness." (1998 p. 61)³

There is no relief under the *Disability Discrimination Act 1992* (the DDA), because s. 52 of that Act, amended to August 2009, does not affect discriminatory provisions in the *Migration Act 1958*.⁴

¹ See *Migration Act Rules* Schedule IV

² On September 24th 2009, it was reported that by January 2009, "2793 requests were piled up before Senator Evans". This is a significant increase from prior years. Minister Ruddock exercised the waiver 2513 times between 1996 and 2003 (see Narushima, Y 2009), prompting a Senate inquiry into the use of the waiver. See Appendix A.

³ Crock offers three examples of cases where the IRT took a more balanced approach (1998 p 61). They are *Re Lu* (IRT 207, 12 July 1991), *Re Yatim* (IRT 5157, 31 March 1995) and *Re Henry* (IRT 4935, 22 February 1995). The cases involved a family adopting a blind child, a skilled migrant applying for his wife and her child with Downs syndrome to join him, and a polio survivor confined to a wheelchair, with a good employment history, applying to join her family, all permanent residents of Australia. See Appendix C for more details.

⁴ In June 2009, the exemption was amended (*Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* s. to follow through on the Productivity Commission Report in 2004 recommendation that the exemptions should only deal with issuing entry and migration visas, but should not exempt administrative processes

Arguments for changes to the rules, better transparency, and a repeal of the DDA exemption have been made by a number of commentators and government reports. These positions are summarised in Appendix A.

It is against this backdrop that the terms of reference for the committee have been established. They are reproduced here:

The Committee shall:

- 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.

(Source: <http://www.aph.gov.au/house/committee/mig/disability/tor.htm>)

The committee website has invited comment from a broad range of civil society. A summary of the questions a submission might address is offered to assist those wishing to make a submission. An excerpt from the full text follows:

- Is the current process for assessing a visa applicant against the health requirement fair and transparent?
- What types of contributions and costs should be considered?
- How do we measure these?
- Are there additional factors that should be considered?
- Do you have personal experience of this?
- What principles should apply to the assessment of visa applications against the health requirement? Should there be exceptions?

(Source: <http://www.aph.gov.au/house/committee/mig/disability/subs.htm>)

These are difficult questions. However, Australia is a country with a strong migration history, it is multi-cultural by nature, it is economically strong, and it is a compassionate nation. This dialogue offers a chance for these positive characteristics to reveal themselves and a forum to introduce ideas on how to address the inevitable challenges. For a migration policy to be transparent and accepted there must be awareness of the facts. Such dialogue has been called for in the Human Development Report 2009 released by the UN Development Program in October 2009.⁵

under the Act and its regulations (p 348). This amendment has not changed the way in which the health criteria tests will be applied.

⁵ See proposal for a way forward on migration issues at pp. 3 -5 and c 5 beginning at p. 108

The purpose of this paper is to provide a jurisdictional comparison, the last item in the Inquiry's terms of reference. In order to provide some context for such a comparison, it begins with a brief literature review on migration policy issues. The paper concludes by identifying some options worth further discussion and consideration, drawing on the observations and themes in the literature and policies in comparable receiving jurisdictions.

Literature Review on Migration Policy

Migration policy is established by nation states and is driven by both domestic and international forces. It is not static and is constantly being adjusted to address new and evolving circumstances⁶.

Domestically, policy in most receiving nations in the developed world can be categorised into three general areas. They are:

- Economic needs for skilled and unskilled workers. Often this will include incentives for investors and those willing to establish businesses and employ nationals in the receiving nation.
- Family reunification for permanent residents and citizens.
- Population control/growth.

Internationally, nation states are bound under various humanitarian commitments including the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with a Disability, and Convention Relating to the Status of Refugees. The European Economic Area also has regulations regarding immigration.

While there is much anecdotal evidence of direct or indirect discrimination against those living with a disability or certain diseases and who are seeking asylum or residency, there is limited documented research on the challenges and/or proposals for balancing schemes such as being sought in the Australian inquiry. However, commentary on highly publicized cases in Australia and Canada offer some insight into the issues. These include:

- Applicants in highly skilled occupations, sought out and encouraged by Australia, are denied permanent residency because a child has a disability. Many cases raised in the media includes children with Down Syndrome even though the child is functioning well in their school and environment. Often the parents are employed in skilled professions.⁷
- Applicants with a disability who have achieved high levels of education and have offers of employment in high functioning roles, and contribute to other aspects of Australia's in assisting disadvantaged groups.⁸

At the Joint Standing Committee on Treaties hearings in 2008, one witness, a person with a spinal cord injury, recounted how he had to use his connections and knowledge of the system in order to secure his permanent residency.⁹

⁶ See for example the following: introductions in Carasco (2007 at p.1) and Crock (1998 p.1); the Foreward in Ardittis & Laczko at pp 7-8; Rhus (2008 at p. 403) and discussion in Klugman and Pereira 2009 at p.10. Carasco notes that Canadian policies have changed drastically from having no constraints on numbers or country of origin to one today where the "the state regards immigration policy is an integral part of government planning". The authors note that policy is influenced by high demand to immigrate to Canada and Canadian values as articulated in Act. They observe that as stresses between traditional views of state sovereignty and globalization become increasingly clear in the immigration context, Canada, like other countries, will likely continually reassess the social and economic impact of its policies within and outside Canada." (2007, p.1)

⁷ See Ford & Goddard 2004, Lunn 2008.

⁸ See 'Blind teacher spared deportation' ABC News 2009.

⁹ Joint Standing Committee on Treaties, at c 2 para 2.36

Six common themes are found in migration policy literature. They are:

- 1) Migration policy is driven by both public opinion and interest groups, including employer groups seeking qualified employees. Even those countries with more favourable attitudes will adjust policies over time in response to pressures from both perspectives.
- 2) Research on the costs and benefits of migration is incomplete and/or difficult to compare due to the unique nature of each country's policy. Most economic analyses suggest that there is a positive, or at least neutral, impact.¹⁰
- 3) Integration is a critical component for a successful migration policy. Integration has many facets as well. For example, the ability to speak the language is important for finding work and becoming part of the community. Many countries, including Australia, Canada and the UK, have programs to assist with integration. In addition, access to basic services, and education for children, is key to living a healthy life in order to participate more fully.
- 4) Selection criteria for migrants varies considerably, but the "point system" used in Canada, Australia and New Zealand, and now introduced in the UK, has been identified as one means to introduce some transparency to the decision making process.
- 5) Family reunification values figure prominently in most developed countries, but the rules for each country differ in some substantive ways. Family reunification and/or keeping families together is often an element in the migration cases that have involved people with a disability.
- 6) Nations will always have the right to control their migration policy. However, as the world becomes more global, the pressures on migration policy will continue.

The first three of these are discussed briefly below as they have implications for any migration policy which seeks to determine appropriate criteria for admitting non-nationals into their country as well as the access to benefits and other rights afforded to permanent residents and citizens. The remaining themes will be addressed in the country comparisons.

Public opinion

Research has shown that public opinion plays an important role in shaping government policy (Facchini and Mayda 2009 p.4). Public opinion also varies depending on the economic circumstances of the time, personal experience, level of education, level of job skills and age. The Human Development Report notes that concerns tend to be related to security and crime, socio-economic factors and cultural factors (2009, p 89).

Public opinion is important in the context of migration and people with disability. Although the DDA has been in force in Australia since 1992, people with disability generally still face many challenges. Public policy generally has endorsed the social model over the medical/welfare model of disability; policy in practice has not always followed. Therefore, while public expenditure to facilitate participation is quantifiable

¹⁰ Human Development Report 2009 at p. 84. For a more detailed discussion of the issues and findings, see c 4.

and visible, the corresponding contributions are not. To the extent that contribution can be quantified, it is not communicated to the public at large.

The social model of disability locates the experience of disability in the social environment, rather than impairment, and carries with it the implication of action to dismantle the social and physical barriers to the participation and inclusion of persons with disability. Embraced at international law through the provisions of CRPD people with disabilities are active bearers of rights as opposed to passive recipients of welfare (Kayess & French 2008, p.6).

Costs and Benefits

As noted, research is limited on this very important question. It is this very lack of information, and/or failure to communicate what is known about actual costs, and corresponding benefits, that fuels public perceptions about the cost immigrants generate to the taxpayer. The public is guided by media reports, perceived competition for jobs and/or health and social services. But it is not borne out by the facts.¹¹ A report commissioned by the Australian government in 2007 also concluded that the social benefits of migration far outweigh the costs.¹²

Public misperceptions are only magnified by the visible nature of a migrant with a disability who might be entitled to receive health care or social services available to Australian citizens and permanent residents. What is not visible, and what the statistics do not capture, is the numbers who do not require integration services on arrival, and/or do not access health and social services because they are not required. Also overlooked is how migrants use their experience with living with a disability, or living with a person with a disability, to help others, act as role models and generally contribute to the community¹³. Contributions of unpaid family caregivers are not recognized. Nor is the employment generated for those who provide goods and services to these individuals and their families.

There is limited literature on how to determine the medical and social service costs that a migrant may require in a host country. However, the literature and immigration policy, practice and debates highlight the many factors which may be relevant to an individual applicant's situation. These include:

- the need (or not) for language and other settlement training,
- health services required to ensure good health and ability to work,
- access to community services or other support services to facilitate education or participation in the work force,

¹¹ While a number of reports internationally suggest that there is a positive to neutral net benefit in receiving countries over time, a more concrete example can be found in the 2001 report to the Department of Immigration and Multicultural Affairs. The researchers developed a model to capture both revenues and expenses associated with migrants over a ten year period. Using a model that included migrants across visa classes, it demonstrated that, for every 1000 migrants, although in year one there was a net deficit of \$.8 million, by year two a positive surplus of \$1.6million was achieved, increasing to \$5.8 million by year 10. (Access Economics 2001 p.7)

¹² Carrington et al 2007 p.xi

¹³ Barlow 2008 notes that "Dr Abdi ... blind since birth, ... has not let that get in the way of his chosen career: looking after disabled people and mentoring troubled young Somali refugees."

- eligibility requirements for certain health and social benefits, often dependant on income, contributions to an insurance scheme, or migration rules restricting access to certain services for a period of years.

All of these factors reflect a medical or welfare model of disability. Competing with such potential costs, immediate and future, are other relevant factors which include:

- contributions to the labour force,
- taxes paid (direct and indirect),
- jobs created,
- opportunities created for a national to enter the work force (e.g. a domestic worker and mother of a child with a disability may make it possible for another mother to return to the work force sooner),
- plans within the family unit, extended family or community to support a person with a condition to ensure they will live their life to its fullest potential, and
- contributions to the community.

These factors reflect a more holistic perspective for any assessment. They also reflect a paradigm shift away from the medical/welfare model when considering disability to a social model.

Although written from a UK perspective and not in the context of migration, one of the more forward thinking articles is that by Prideaux et al (2009) offering a new approach to thinking about costs and benefits. They make the argument in the context of "self directed support schemes" for disabled people and their families. This UK model is found in similar schemes being introduced in Australia as "individual support packages" and "individual service packages".

Prideaux et al (2009) argue that research on these packages has focused on the social benefits gained by the recipient who has control of how funds received are spent in the pursuit of more independent living. They argue that research and policy needs to adopt a "more thorough and holistic analysis of the less acknowledged socio-economic costs and benefits of self-directed support systems for service users, their families, personal assistants and local/national economies." (p. 558). They suggest that as the number of users of the funds increases, they become employers and the personal assistants become employees even though the system does not recognise them as "paid employees".

The details of the argument are not required for purposes of this paper. It is introduced as an example of a paradigm shift and the type of thinking that needs to occur in the context of the immigration issues under consideration. The model has two significant elements: First, it changes the perception of the users of the funds from "benefit claimants" to "social entrepreneurs" or "active citizens" in the role of "employer". Second, it sees the use of "public funds" as enabling a broader participation and contribution to employment. It goes so far as to note that the payments come from the Department of Health as opposed to the Department of Work and Pensions or Department for Business, Enterprise and Regulatory Reform (pp. 558-559).

Integration

Issues that arise during integration of migrants also shape public opinion and experiences for both the host community and the migrant.

Countries such as Australia offer more than language training. Programs address numerous aspects of life which must be learned and/or for which guidance and assistance is required to "learn one's way around". Not all migrants require all of these services. However, once they have had the benefit of the service, they are better equipped to become contributing members of the community.

Integration also requires attention to the distribution of migrants and the impacts it can have on schools, housing and community policing. This issue is raised in the UN HDP Human Development Report 2009 (see c. 4.2.5) and is also acknowledged in the UK where programs are being established to ensure that funding and support goes to those communities where pressures are the greatest.¹⁴

These negative impacts, if not addressed, have serious impacts at two levels. First, there is a very real economic cost to those community governments that must adapt to larger influxes of migrants and, where relevant, migrants with a condition that may require access to social services. Local governments may not receive the corresponding economic benefits including tax revenues to help fund schools, special services, housing and policing, although they will benefit on the social and cultural dimensions if integration is successful. Second, where the local governments are under resourced, social tensions may arise as migrants struggle to integrate and negative social behaviours arise.

Implications for Australian Migration Policy and Disability

As Australia considers options for assessing the suitability of new migrants who may have a condition that entitles an individual to health and social services, and looks to other receiving countries for models to consider, the following points are relevant:

- The laws of every jurisdiction must be examined within the context of not only the immigration system as a whole, but also the nature and scope of social benefit schemes and relevant human rights laws, as well as the distribution of economic and social benefits that do come from migration.
- When attempting to categorise costs and benefits, care is required. Neither immediate short term costs, nor future uncertain costs, can be considered in isolation. Longer term economic, social and cultural benefits must also be factored in. These are not easily determined.
- New paradigms are possible, and are required. This is consistent with Australia's general support for social inclusion of people with a disability.¹⁵

¹⁴ On March 19th, 2009 the UK government announced a GBP70million "Migration Impacts Fund" financed by a levy that will be imposed on migrants that will be made available "quickly and directly – to local services across the country, including policing, schools and hospitals."

¹⁵ Social Inclusion for people with disability is addressed throughout government and in a variety of programs. It is the focus of a major federal initiative in cooperation with the States and Territories as is evidenced by the Social Inclusion Board. For more information see: <http://www.socialinclusion.gov.au/Pages/default.aspx>

Jurisdictional Comparisons: Discussion¹⁶

Although jurisdictional comparisons are difficult, a comparison of migration policy in the more popular receiving nations reveals some common strategies. Each of the jurisdictions reviewed for this paper contain some, if not all of these elements.¹⁷ They are:

- Control through quotas (usually within the economic migrant categories);
- Creation of immigrant categories (e.g. skilled labour, family reunification, refugees);
- Point systems used to screen applicants where points are adjusted to address current needs (usually applied to economic classes, but points may address any combination of education, skills and other attributes);
- Language requirements, ostensibly to facilitate integration¹⁸;
- Admissibility requirements related to public health risks;
- Admissibility requirements related to physical and medical conditions requiring health care, special services and social support offered at all levels of government;
- Admissibility requirements based on character, usually related to criminal background and security risk; and
- Restrictions on, or limitation of, access to benefits including health care, social services, domestic school fees; domestic post-secondary/tertiary fees (this has been referred to as “burden sharing” see Human Development Report 2009 at p 111).

As noted, a jurisdictional comparison is complicated generally. A comparison on the discreet issue currently under review for this inquiry presented challenges. Appendix B has been prepared to provide an overview of the relevant aspects of the law and policy currently in place in the United Kingdom and Canada, two popular receiving countries sharing some comparable features. A brief discussion of the highlights of the comparison follows.

All three jurisdictions have similar migrant classifications: economic, family reunification and refugee. All three now apply a points based approach to the economic migrant classes. They also provide for family members to join permanent residents and citizens. Spouses and common law partners, as well as dependent children generally receive favourable consideration. Other family members are subject to stricter rules. Applicants under both of these classes must establish that

¹⁶ The comparison that follows and the accompanying table in Appendix B is based on preliminary legal research of a general nature to identify possible alternative approaches that might be considered in Australia. It is not intended to represent a full and complete statement of the laws of the jurisdictions mentioned and the relevant implementation policies. It may contain errors or omissions and relevant, more subtle, details may not be reflected.

¹⁷ For further comparative research, see Klugman and Pereira (2009) for a summary of findings comparing 28 countries including both developed and developing countries. While individual country information is limited, the report offers aggregated comparisons of entry regimes (such as labour, family, humanitarian), access (ease of entry), entitlements and treatment, and enforcement.

¹⁸ Note: exceptions are usually available for children under a certain age and people over a certain age.

they have funds and income resources to support them during their stay. In the family class, and for others applying for permanent residency, a health check is required. In all three countries, primary concern is for public health risk. However, in Australia and Canada, potential future health and social service costs that might be incurred are relevant factors in determining admissibility. The tests have important distinctions.

Australia

In Australia, the law is relatively settled that a "condition" must be evaluated with regard to the individual's actual diagnosis and prognosis. However, when determining whether the applicant or a family member would require services or health care that would be likely to result in a significant cost to the Australian community, or prejudice the access of an Australian citizen or permanent resident to health care or community services, individual financial circumstances and/or other relevant factors which might mitigate against such costs being incurred, are not taken into consideration. Using the medical examination report and DIAC Notes for Guidance, the CMO will make an assessment which must be accepted by the Minister. The Notes for Guidance are not public documents and the reasons for the assessment are not disclosed to the applicant. While appeals or judicial review are available, they are costly and risk failing. The only option in such cases is to request a Ministerial waiver of the decision. This approach to the assessment can be contrasted to the approach in place until the end of 1995 where the Immigration Review Tribunal had the authority, and willingness, to apply a more balanced approach, taking into consideration all relevant factors.¹⁹

Canada

In Canada, the law is also generally settled although similar calls for changes to the health criteria continue.²⁰ Some important distinctions are worth noting:

- The test is whether or not the applicant, or family member, might "reasonably be expected" to cause "excessive demand" on health or social services.
- As a result of a series of cases, distinctions are made between health costs and access to health services (e.g. waitlists) on the one hand, and eligibility for and use of social services, on the other.
- These cases have established that individual circumstances must also be considered.
 - Where health costs are involved, applicants stated intention to not avail themselves of medical care to which they would be entitled as a permanent resident is not generally accepted. Similarly, the courts do not appear to accept statements that the applicant would pay for the medical care themselves, particularly if the care involves services with long waiting lists.
 - Where social services might be required, the applicant and/or family have an opportunity to provide information and evidence of plans on how they will

¹⁹ Crock 1998 p. 61. See also Appendix C for three such examples.

²⁰ See Council of Canadians for Disabilities (undated b) referencing Tibbett (2008) story on UK family refused entry to Canada allegedly because their daughter had a disability. See also website for Judy Wasylcia-Leis, an opposition member of Parliament in Canada who has advocated for removal of the "excessive demand" criteria. <http://judywl.ca/news/persons-with-disabilities>

avoid incurring excessive costs. Guidelines for assessing what might be “excessive” are publicly available and updated annually. Therefore, while the test is more individual, applicants on limited incomes may have difficulty satisfying the criteria if the assessment is not flexible enough.

- The medical report provides information on an applicant, or family member’s condition, but the decisions are made by department officials with support from Department resources.

Canada does have fees for visa applications. They range from \$150 to \$550 depending on the class and, if there is a family, age and relationships.²¹ It should be noted that the fees were reduced by approximately 50% in 2006 as a result of an election promise of the conservative government.

The United Kingdom

The UK embarked on a major change in migration and citizenship policy in 2007. Relevant elements of the major reforms include:²²

- Extension of the minimum required number of years that one must reside in the UK before applying for citizenship. The minimum for most categories is five years. It is two years for sponsored migrants on the “family route”.
- Introduction of a probationary citizenship period of three (for spouses) and five years (all others) during which time points for “active citizenship” can be established to accelerate citizenship. Volunteerism, environmental activities, and serving on local councils and committees are examples of activities contemplated. This system is undergoing consultation and is expected to be implemented in 2011. Concerns have been raised with respect to both the complexity of the new system, the delays and uncertainty it will create, the potential for abuse, and the feasibility of engaging in the contemplated activities, particularly for those with disabilities and other disadvantage, including women and people from certain ethnic groups. It should be noted that this concept of “earned citizenship” is not the same as the one discussed and rejected in 2008.²³
- Migrants will pay a levy which will be used to fund a special fund to help support local communities with costs related to integration as well as policing, housing and schools.
- Restricting access to benefits, social assistance, local authority housing, at “home rates” for higher education, homelessness assistance until one has “earned” citizenship status (or for those who cannot apply for citizenship, become permanent resident).

All applicants in the economic and family classifications categories must establish their ability to cover maintenance and accommodation for themselves and dependents such that they will not have recourse to public funds during their stay and/or for a prescribed number of years²⁴. When assessing the sponsor or

²¹ For current fees visit Citizenship and Immigration Canada at <http://www.cic.gc.ca/english/inFORMATION/fees/fees.asp>

²² For a full review, see UK Border Agency July 2008 Report: ‘The Path to Citizenship: next steps in reforming the immigration system – Government response to consultation’.

²³ See Australian Government 2008.

²⁴ Generally, entitlements are not available while “subject to immigration control” which means not yet a permanent resident or citizen. Migrants with leave to remain are usually subject to a requirement that they will not claim certain

applicant's income and other resources, the officer is entitled to consider resources of both partners. However, contributions from other family members cannot be considered. This has posed a challenge for sponsors with disabilities who are on limited incomes. For example where one spouse, already receiving the Disability Living Allowance in the UK, is sponsoring the other and lacks sufficient resources to support the spouse, they may have a child who has been and will continue to contribute to the ongoing support of both parents. However, this will not be considered. This issue is currently on appeal to the Supreme Court, the former House of Lords, and is expected to be heard in late 2009.²⁵

With respect to the health test, the UK test appears to be concerned with public health issues as well as whether or not a person has a disease or condition which may "interfere with his ability to support himself or his dependants." The Immigration Rule authorises officials to refuse leave to enter "on medical grounds". However, no further information is found in the legislation or the regulations that offers further guidance as to.

A review of the Immigration directorate instructions, available online, did not reveal any clear guidelines on how the test is applied in practice and no cases could be identified that might reveal how the rules are applied.²⁶ A review of the Entry Clearance Guidelines – Medical issues, did reveal that the medical grounds for refusal are determined by a medical referee and not the entry clearance officer.²⁷ The entry clearance guidelines do however, provide detailed guidance on what must be established to prove that one has sufficient funds for maintenance of accommodation of the applicant and/or sponsored applicants.²⁸ This assessment is carried out by the Entry Clearance Officer and would appear to be very specific to the individual's circumstances, subject to the limitations on whose resources may be considered. The general test appears to require that applicants must be able to provide for their own maintenance and accommodation without recourse to the public funds or be sponsored by an eligible sponsor who can provide maintenance and accommodation without recourse to the public funds. The Immigration Directorate Instructions define and provide guidance when making assessments involving public funds.²⁹

Other Jurisdictions

A brief review of other jurisdictions revealed no clear policy decisions on the issues which are the subject of the current government inquiry in Australia. See for example, the comprehensive 2009 Comparative Study of the Laws in the 27 EU Member States for Legal Immigration.³⁰ Within the EU there is generally free movement but entitlements to social services are still managed through entitlement requirements and the majority of countries impose conditions that require long term residents to provide proof of financial means or accommodation as well as evidence of medical insurance. Medical tests may also be applied.

benefits, tax credits or housing help paid by the UK. Public Funds are defined in paragraph 6 in the Introduction to the Immigration Rules.

²⁵ See Appendix B for details.

²⁶ See UK Border Agency 2009f Chapter 1- General in Section 8 - Medical examination.

²⁷ See UK Border Agency 2008a.

²⁸ See UK Border Agency 2009c.

²⁹ See UK Border Agency 2009f Chapter 1 – General in Section 7 – Public Funds

³⁰ International Organization for Migration, 2009

In another paper released October 2009 for the UN Development Programme, Klugman and Pereira reported on findings of 28 countries from the developed and developing world including Australia, Canada and the UK.³¹ They found that within the developed countries permanent migrants were entitled to preventative care from the outset, but less than two thirds extended similar rights to temporary migrants, although access was extended over time. The analysis did not address social services for people with disabilities.

³¹ See Klugman and Pereira 2009

Options for Australia

Having recognized that the numerous requests for waivers necessitate a new approach to assessing immigrant eligibility, Australia has an opportunity to leverage its knowledge about mainstreaming disability and strategies for social inclusion in order to take a leadership role in formulating new approaches to assessing both the costs and benefits of future migrants. Lessons might also be taken from the Immigration Review Tribunal cases prior to the changes in the rules in late 1995. (see Appendix C)

To the extent that an assessment of the costs of real or potential health care and access to services in the future remains in Australian migration law, a number of models have been identified which offer new approaches (and old). No one system is without its flaws and its issues. Therefore, any ideas which might be adopted must be considered within the Australian context, including any applicable legislation, health care options and services provided. Others involve policy decisions which may well require public consultation and debate to ensure they reflect Australian values, comply with applicable human rights legislation, and will not have any indirect unintended consequences. Bearing this in mind, factors that might be taken into consideration include:

- Whether or not the individual will be able to engage in the work force if support services are received.
- The existence of family members and extended family and evidence of plans by the individual, family members and community to assist with supporting the individual to allow full participation within society to the person's abilities.
- Consideration of consequence of returning person to a country (for example forcing families to separate, or lack of services and opportunity to realise full potential.
- Destination regions and cities.
- Contributions that the individual and family members will make over the longer term economically, socially and culturally.

Policy tools that might be considered after further consultation might include:

- A point system
- Specialized assessment team or individuals to assist in assessing applications
- Undertakings and/or bonding from a wider population with an interest in the migrant's well being
- Waiting periods

Finally it is worth emphasizing the broad nature of the migration program, and the diverse social costs and benefits that relate to immigration. Given the reports on net benefits, any actual costs should be considered in the context of the larger contribution that all migrants make to the community and the country. The reality is that any migrant might suffer a condition or accident in the future which requires access to health care or social services. For this singling out migrants and refugees with disability as 'health cost' risks is arbitrary, short sighted and discriminatory.

Appendix A

Summary of Submissions and Reports Recommending Changes to the Rules, Better Transparency, Repeal of the DDA exemption, and withdrawal of CRPD Reservation

- **The Australian Human Rights Commission** has recommended that the DDA exemption under the Migration Act 1958 be removed on a number of occasions. For example in its submission to the Productivity Commission on the Review of the DDA in 2004 it wrote:³²

Migration exemption

HREOC understands the view of this and previous governments that it is government's role and not that of the DDA to decide who comes to Australia. It is also true that there are other review mechanisms specifically established for migration and refugee decisions. But we remain concerned that the very wide immigration exception in the DDA leaves people with disabilities and their families without sufficient protection against unreasonable decisions to refuse entry to Australia because of disability.

In particular there does not seem to be sufficient protection against incorrect judgments that a person with a disability will be unable to contribute economically or otherwise to Australia and will impose an economic burden.

If these decisions are to remain exempt from the DDA HREOC would like to see improved criteria and procedures within immigration law in relation to admission of people with disabilities.

- **The Australian Lawyers for Human Rights** released a discussion paper June 1, 2009 recommending: (see p. 2)
 - That the Health Requirement be abolished. In the alternative, that the Health Requirement be reformulated in order to bring it in line with the obligations of non-discrimination and the exemplified social model of disability in the *Convention on the Rights of Persons with Disability*.
 - That the exemption of the *Migration Act 1958 (Cth)* to the *Disability Discrimination Act 1992 (Cth)* be reformulated and narrowed.
 - That Australia lift its reservation to the *Convention on the Rights of Persons with Disabilities* regarding the Health Requirement and ratify the Optional Protocol to that Convention.
 - That Australia reformulate how the Health Requirement is applied to its refugee and humanitarian programme applicants, both onshore and offshore.

³² See Australian Human Rights Commission (undated). For a sample submission (Productivity Commission 2004 Submission 143 at p.18)

- **The Auditor General Report** Audit Report on the Administration of the Health Requirement of the *Migration Act 1958* found that Department of Immigration and Citizenship (DIAC) guidelines and procedures to determine significant costs and prejudice to access were not well established, and that the Notes for Guidance for the Medical Officer for the Commonwealth were incomplete and out of date.

Recommendations were made to bring the Notes for Guidance up to date.³³ While the report did not reference this fact, it is also observed that the notes for guidance that are in use are not publicly available, making it difficult to comment on their appropriateness.

- **The 2004 Senate Select Committee on Ministerial Discretion in Migration Matters** recommended that the department “take steps to ensure that its processes are rigorous and fair to all applicants. It recommends that a system of internal and external audit be established to scrutinise the department’s decision making processes in this area [the exercise of ministerial discretion].”³⁴

Similar recommendations were made in a subsequent independent report in January 2008.³⁵

- In 2008, the **National Ethnic Disability Alliance (NEDA)** released a paper on refugees and migrants under the United Nations Convention on the Rights of Persons with Disabilities. It reported the following findings from a legal opinion with respect to the migration health assessment: (at p. 15)
 1. Health requirements under migration law are in principle permissible under human rights law in order to safeguard scarce medical resources.
 2. However, the current health assessment may give rise to unjustifiable indirect discrimination against refugees and migrants with disability, and thus does not comply with the equal protection obligation under Article 5 of the UN CRPD.
 3. Indirect discrimination against refugees and migrants with disability may occur because the threshold of the health test is set too low to adequately balance the interests of non discrimination against people with disability with the preservation of scarce health resources. Thus, in some cases the health assessment may lead to discrimination that is not proportionate to the policy objective of preserving health resources for all Australians.
 4. Indirect discrimination against refugees and migrants with disability may also occur because the evidentiary requirements are not sufficiently strong, for example in relation to accurately quantifying the future costs to the community of illness or disability.
 5. Finally, indirect discrimination against refugees and migrants with disability may occur by inadequate procedures to take into account an applicant’s ability to pay for the costs attributable to their own disability or illness.

³³ see Australian National Audit Office 2007 for details)

³⁴ see Senate Select Committee chapter 4 and summary at p xiv.

³⁵ (See Appendix A in Proust, E 2008)

- Most recently, a **sector wide position statement** endorsed by twelve organisations to date calls on the Joint Standing Committee on Migration to recommend:³⁶
 - Full application of the Disability Discrimination Act 1992 to the Migration Act 1958 health assessment to remove the potential for any direct or indirect discrimination against refugees and migrants with disability;
 - Improved consistency, transparency and administrative fairness for migrants and refugees with disability applying for an Australian visa;
 - Withdrawal of the Australian interpretive declaration made upon ratification of the United Nations Convention on the Rights of Persons with Disabilities pertaining to the health requirements for non nationals.

³⁶ 'Migration Act and Disability - Sector Wide Position Statement', 2009. Note: Australia ratified the UNCRPD in 2008 and it ratified the Optional Protocol in 2009. However, the 2008 ratification was subject to a declaration of Australia's "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." (United Nations 2008)

Appendix B: Comparison of Three Jurisdictions – Australia, Canada, United Kingdom (see footnote 16 p.12)

	Australia	Canada	United Kingdom
Immigration Law	<i>Migration Act 1958 (Cth)</i> <i>Migration Act Regulations 1994</i>	<i>Immigration and Refugee Protection Act 2001, c. 27 I-2.5</i> <i>Immigration and Refugee Protection Regulations SOR/2002-227</i>	<i>Borders, Citizenship and Immigration Act 2009 c.11</i> <i>Immigration Rules (2009)</i> Note: The UK Borders, Citizenship and Immigration Act repeals and replaces numerous statutes.
Citizenship Law	<i>Australian Citizenship Act 2007</i> <i>Australian Citizenship Act Regulations 2007</i>	<i>Citizenship Act, R.S.C. 1985, c. C-29</i> <i>Citizenship Regulations, 1993, SOR/93-246</i>	See above. Note: the UK changes have introduced a number of new concepts including: a points based approach for economic migrants as in Australia, language and "way of life" testing, a "probationary citizenship period" and "earned citizenship" criteria. Earned citizenship criterion is currently the subject of public consultation. It will be introduced in 2011. (see further explanation at UK Border Agency 2009a)
Disability Discrimination Law	<i>Disability Discrimination Act 1992</i> Note: S. 52 of the DDA exempts the Migration Act and any decisions taken under it.	n/a 1996 recommendation for a federal act has not been implemented. (see Council of Canadians with Disabilities (undated))	<i>Disability Discrimination Act 2005 c.13</i>
Other Human Rights Law	n/a	<i>Canadian Charter of Rights & Freedoms (1982)</i> S. 15(1) provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on ... mental or physical disability.	<i>Human Rights Act 1998 c.42</i> The UK Border Agency Entry Clearance Basics manual states: <u>The Human Rights Act</u> came into effect on 2 October 2000. It made it a legal duty for public authorities to act compatibly with the <u>European Convention on Human Rights</u> . <ul style="list-style-type: none"> • An Entry Clearance Officer (ECO) must take Human Rights' considerations into account when reaching a decision. • UK Ministers believe that the Immigration Rules are compatible with the Human Rights Act. Any proper decision to refuse entry clearance should not be in breach of an individual's rights.
UN Conventions			
- CESC	Ratified	Ratified	Ratified
- CPR	Ratified	Ratified	Ratified
- CERD	Ratified	Ratified	Ratified
- CEDAW	Ratified	Ratified	Ratified
- CRC	Ratified	Ratified	Ratified

Appendix B: Comparison of Three Jurisdictions – Australia, Canada, United Kingdom (see footnote 16 p.12)

	Australia	Canada	United Kingdom
- Status of Refugees	Ratified	Ratified	Ratified
- CRPD	Ratified with the following declaration: "... Australia declares its understanding that the Convention 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." (United nations 2008)	Signed	Ratified
- CPRts of Migrant Workers & Families	No	No	No
Pathways to Residency & Citizenship			
Temporary	Variety of visa classes including economic. Applies points test and is occupation focused (see Tolley 2003 in Carasco 2007 at p 339)	Business, investor, skilled migrant classes. Skilled worker points system based on human capital criteria. (see Tolley 2003 in Carasco 2007 p. 339) The current system was designed to replace an occupation focused system to "attract skilled workers with education, work experience, knowledge of English or French, and other abilities that would help them to establish themselves economically in Canada" (Carasco 2007 p.327)	A point system was introduced in 2008, modelled on the Australian system. It continues to be fine tuned. For example, the August 2009, report of the Migration Advisory Committee published its report on the points-based system for tier 2 migrants also began to look at how to address the role of dependants in the point system. Temporary visas can be generally granted for up to 5 years and can be renewed. Refugees (asylum seekers) will be granted resident permits pursuant to Immigration Rule paragraph 339Q. Permits can be renewed. Paragraph 349 permits dependants (spouse/partners and dependant children) to be granted residency permits. (See Home Office 2009 paras 146-164)
Permanent Residency	Migrants on temporary visas] are eligible to apply for permanent residency after a period of time (often 2 years). In addition, applicants in the family and refugee classes are eligible.	The following are entitled to apply for permanent residency: <ul style="list-style-type: none"> • Applicants in the skilled worker, self employed, entrepreneur and investor categories • Sponsored applicants under the Family Class • Refugees once accepted as a refugee • Other categories may be possible if criteria is met (ss 11-14 IRPA) 	The following are eligible to apply for permanent residency or citizenship. <ul style="list-style-type: none"> • Temporary economic migrants who have resided in the UK for minimum 5 years (2 for spouse) • The spouse and dependent children of a UK Citizen Permanent residency is a status granted to those who are unable to acquire citizenship. For example, they cannot hold dual citizenship.

Appendix B: Comparison of Three Jurisdictions – Australia, Canada, United Kingdom (see footnote 16 p.12)

	Australia	Canada	United Kingdom
Citizenship	<p>Ss 19G – 28 of the <i>Australian Citizenship Act 2007</i> provides for permanent residents to apply for citizenship. Requirements include a general residency requirement (4 years).</p>	<p>S. 5 of the <i>Citizenship Act 1985</i> allows permanent residents to apply for citizenship. Requirements include accumulated residency for 3 years within the 4 years immediately preceding the application.</p>	<p>Under the new rules, applicants for citizenship must have met the qualifying conditions for 5 to 8 years depending on the type of application. These can be reduced to 3 or 6 years for those who meet the "activity condition" which will be set out in regulation in the future.</p> <p>This probationary citizenship period is in addition to the minimum time required as a temporary resident which will vary depending on the category. (See Home Office 2009 paras 146-164)</p>
Medical Requirements	<p>Medical checks are required for all visas. However, for stays over 6 months, and all permanent residency applications, medical examinations are required.</p> <p>An application must be denied if the MOC determines that the person, or a family member has a disease or condition that would likely</p> <ul style="list-style-type: none"> a) require health care or community services, OR meet the medical criteria for the provision of community services, where b) provision of health care or community services would be likely to: <ul style="list-style-type: none"> 1. result in significant cost to the Australian community or 2. prejudice the access of an Australian citizen or permanent resident to health care or community services <p>regardless of whether or not the health service or community services will actually be used. (see <i>Migration Act Regulations 1994</i> Schedule IV, public interest criterion 4005-4007)</p>	<p>The IRPA provides that</p> <p>38. (1) A foreign national is inadmissible on health grounds if their health condition</p> <ul style="list-style-type: none"> (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. <p>Exception</p> <p>(2) Paragraph (1)(c) does not apply in the case of a foreign national who</p> <ul style="list-style-type: none"> (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). 	<p>Immigration Rules Part 9</p> <p>Par 320 states: "In addition to the grounds of refusal of entry clearance or leave to enter set out in Parts 2-8 of these Rules, and subject to paragraph 321 below, the following grounds for the refusal of entry clearance or leave to enter apply...</p> <p>(7) save in relation to a person settled in the United Kingdom or where the Immigration Officer is satisfied that there are strong compassionate reasons justifying admission, confirmation from the Medical Inspector that, for medical reasons, it is undesirable to admit a person seeking leave to enter the United Kingdom."</p> <p>Immigration Rules Part 1, para 37 provides:</p> <p>"Where the Medical Inspector advises that a person seeking entry is suffering from a specified disease or condition which may interfere with his ability to support himself or his dependants, the Immigration Officer should take account of this, in conjunction with other factors, in deciding whether to admit that person. The Immigration Officer should also take account of the Medical Inspector's assessment of the likely course of treatment in deciding whether a person seeking entry for private medical treatment has sufficient means at his disposal."</p>

Appendix B: Comparison of Three Jurisdictions – Australia, Canada, United Kingdom (see footnote 16 p.12)

	Australia	Canada	United Kingdom
Appeal Process	Decisions related to the medical criteria may be appealed to the Migration Review Tribunal which can substitute a decision. (s.338) Judicial review is also possible for these cases within certain constraints (ss. 239-245). The Minister has authority to personally issue a "waiver" subject to limitations with respect to certain criteria. S.351	Appeals to the Immigration Review Board are permitted. Decisions can be substituted. (ss 62-67) Judicial review is also available to have decisions set aside and/or returned for reconsideration. (ss 72-74) s. 25 of the IRPA permits relief based on humanitarian and compassionate grounds. Applications may be initiated by the department or the applicant (for a fee).	The appeal process is very limited, but sponsorship and other individual decisions can be appealed to the Asylum & Immigration Tribunal or to the courts for judicial review.
Leading Cases	Robinson v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1626 <ul style="list-style-type: none"> Family refused permanent residency due to applicant's 8 year old son having Down Syndrome Tribunal confirmed decision on appeal Judicial review quashed decision returning it for consideration based on the following: (see par 56) Parliament intended the assessment made under Public Interest Criterion 4005(c) to be made on a case by case basis by reference to the form or level of the disease or condition actually suffered by the applicant However, the court stopped short of allowing individual financial circumstances to be factored into the assessment. <p>For a recent example of the discussion of the use of Ministerial discretion, see para 66 in <i>Pillay v Minister for Immigration</i> (2009).</p>	<i>Deol v. Canada (Minister of Citizenship and Immigration)</i> , 2002 FCA 271, [2003] 1 F.C. 301 <ul style="list-style-type: none"> Permanent resident applied to sponsor father Father had arthritis in knees Person cannot waive right to have publicly funded surgery and is not possible to enforce a personal undertaking to pay for health services that may be required after a person has been admitted to Canada as a permanent resident, if the services are available without payment Total knee replacement surgery in Canada would cost about \$40,000 & is not typical for people in their late 60s. Cost is not fully reflected in the average <i>per capita</i> cost of the health services consumed by that section of the public There was also a waiting list for the surgery Key concerns: health costs and waiting lists <i>Hilewitz v. Canada; De Jong</i> [2005] 2 S.C.R. 706, 2005 SCC 57 and <i>Canada (Citizenship and Immigration) v. Colaco</i> , 2007 FCA 282 <ul style="list-style-type: none"> Decision as to whether the applicant or family member might reasonably be expected to cause excessive demand on social services, must consider the individual circumstances. <p>Officer "must consider all evidence presented by an applicant, before making a decision of inadmissibility due to excessive demand on social services including ability and intent to mitigate the cost of social services in Canada must be considered, if presented." (see Operational Bulletins 63 (CIC 2008) & 63B (Citizenship & Immigration Canada 2009)</p>	<i>AM (Ethiopa) and Others v. Entry Clearance Officer</i> [UK IAT] [2008] EWCA Civ 1082. <ul style="list-style-type: none"> Latest case on Immigration Rule 281 (v). The rule requires that the parties will be able to maintain themselves and any dependants adequately without recourse to public funds Third party support is not taken into consideration when assessing the circumstances of the sponsor and applicant under this family class application. Five cases are on appeal to the Supreme Court (formerly the House of Lords). <p>There are a number of cases on this provision. Often the application fails because they fail to show sufficient and/or convincing evidence of ability to support, employability of applicant. The sponsor is on disability and for various reasons, not always explained, is not working.</p> <p>A second series of cases relates to eligibility for disability benefits for children. Prior to introducing the "subject to immigration control" rule in the mid 1990s, parents were able to obtain certain disability support payments. They now must have permanent residence (indefinite leave to remain) status or citizenship. The cases dealt with situations where families lost the benefit until the status of the parents changed. (For example, see <i>M (A Minor v. Secretary of State</i> (2001))</p>

Appendix C

Summary of IRT Cases – An alternative approach to assessing health criteria

The following excerpts from three cases decided by the Immigration Review Tribunal (IRT) in the early 1990s illustrate some of the considerations that a new approach to assessing health criteria might include.

Re: Lu IRT # 207 [1991] IRTA 776 (12 July 1991)

This case involved an adoption of a Taiwanese child who was blind and required cataract surgery. Excerpts from the judgement provide a sense of the deliberations:

25. The Tribunal has been much impressed to date with the enormous volume of support for the Rollings family from relatives, friends, adoption support agencies and various blind institutions in Australia for their action in adopting a disabled child. The fact that this support exists is relevant to our considerations as are the personal circumstances of both the child and Mr and Mrs Rollings in determining whether the costs and/or harm to the Australian community are "undue".

26. Against the above positive aspects is the fact that the parents are entitled once the child enters Australia to apply for a child disability allowance of some \$60 per week under the Social Security Act 1947. When the child reaches the age of sixteen he would be entitled to apply for an invalid (blind) pension under section 94 of that Act which is non means tested and currently worth \$150.80 per week.

Undue harm

27. There is really no evidence of a likelihood of undue "harm" to the Australian community if a child with this disability were to enter Australia. There is no substantial waiting list for the sort of surgery the child will need and neither is he likely to require accommodation in a specialised institution which might prejudice the ability to enter of an Australian child. The real issue in this case is the question of cost.

Undue cost

28. The Tribunal must decide whether the child's disability, namely blindness, is likely to impose undue cost on the Australian community. We take this to mean financial cost and part of the process would seem to involve trying to decide just what those costs are likely to be and then weighing them against the relative economic circumstances of the child and its parents together with the compassionate or humanitarian circumstances which might be present.

29. Judging from the evidence, the child's disability will certainly pose a cost on the Australian community. That cost is likely to be significant. However, the Tribunal has received letters from outstanding members of the Australian community who suffer from blindness but who nevertheless are making significant contributions to this society, both economically and in other areas. Those persons state that the advent of modern technology together with modern training methods has had profound benefits for those with blindness particularly in their use of electronic scanning devices coupled with computers. These devices are providing many blind users with the ability to communicate and live independently at a level that was thought impossible only a few years ago. Blind people engage in a wide variety of occupations and the range is increasing with the application of adaptive equipment and the innovation of blind people themselves.

30. The future, as far as the Tribunal is able to objectively assess it, would seem to be reasonably optimistic for Australians with blindness. It is one which we believe holds reasonable grounds to hope that the particular disability which this child suffers from will become less burdensome both to the child and to the community as time goes on.

...

SUMMARY

34. Given the financial circumstances of the Rollings family and their strong emotional bonds as evidenced by the Adoption Home Study report carried out by the ACT Welfare authorities, it seems likely that the child will have a secure future and will be likely to access schooling and other facilities in Australia to bring out its best potential. The initial costs to the Australian community and even the ongoing ones should the child eventually apply for an invalid (blind) pension, have a reasonable probability of being offset by the contribution which the child could make to this country.

35. In all the circumstances, the Tribunal believes that the health waiver should be invoked as we are satisfied that undue harm or undue cost would be unlikely to result to the Australian community if the visa was granted. We are also satisfied from documents contained on the Department's file that this child meets all the other criteria for the grant of an adoption visa.

Re Yatim [1995] IRTA 5157 (31 March 1995)

This case involved an application by a permanent resident in Australia for a spouse visa. Her daughter had Down's Syndrome and congenital heart disease. At the time of the application she was one year of age and her prognosis could not be. The summary and conclusion are offered to illustrate the former system where the decision was not with the CMO. The decision itself stresses reviews the medical letters which offer good insight into the uncertainty of predicting future needs for children with this condition at such a young age. It also gives weight to the personal and emotional needs of the applicant to reunite his family while pursuing his livelihood in Australia.

.....SUMMARY AND CONCLUSION

As indicated previously, the basis of the prior refusals in this matter was the child's inability to satisfy the health criteria. Dr King has stated on several occasions that due to her Downs Syndrome condition, Sarah is likely to prejudice the access to health care of Australian citizens, although interestingly she has qualified this by adding '*prejudice to a moderate degree*'. Notwithstanding this, she refers back to her opinion of 20 April 1993 where she had stated, albeit with a degree of caution given the child's very young age at that time, that the lifelong expenses to the Australian community may well be in excess of a million dollars.

There are two points to make with respect to these findings. Firstly, as pointed out previously, the issue of prejudice to the access of health care and the matter of undue

harm and cost to the Australian community (in waiver cases) is now a matter for the Minister, and indeed this Tribunal, pursuant to Regulation 23A of the Reform Regulations. In that respect, the new provision 4007(2) clearly removes the decision relating to 'prejudice' from the CMO, and places it with the Minister, under criterion 4007(2)(c). The effect is that the Tribunal is now able to consider these waiver provisions with respect to those issues of prejudice and cost. To this extent, Dr King has erred in providing her most recent opinion on this subject matter.

Secondly, in now considering the issues of undue harm, undue cost and prejudice under the waiver provisions, the Tribunal refers to the approach set out in its decision of *Re Papiroannou* (IRT Decision No 113, 19 April 1991), where it was stated that:-

'In therefore considering whether 'undue harm or undue cost would be likely to result to the Australian community' if the visa or entry permit is granted, it would seem that decision-makers should balance their assessment of harm and/or cost that is likely to result from the granting of the application against compassionate or humanitarian considerations favouring the grant.'

In this regard, the Tribunal has received persuasive evidence from three expert practitioners. Firstly, Dr Philip Graves took issue with some of the findings of Dr King, particularly on the likely outcome of Sarah Yatim settling permanently in this country. It is significant in many areas that the costs of this occurring, according to Dr Graves, are certainly not likely to be in the order of those estimated by Dr King. As indicated, given Dr Graves' status as a specialist Paediatrician, I find this evidence persuasive. Secondly, written evidence was also submitted from two Psychiatrists, one Australian and the other American, who attested to the fact that the emotional and psychological well being of the Yatim family would be enormously disrupted and indeed jeopardised if a permanent separation were to occur. Indeed, such injury could conceivably be caused even in the event of the family, and in particular Mr Yatim, not being able to return to Australia by electing to remain in the United States. Again, I find this evidence persuasive, particularly in terms of the requirement to properly consider, as set out in *Re Papiroannou* (above), *'...the compassionate or humanitarian considerations favouring the grant'*.

In this regard, the quality of the marital relationship in this instance is not an issue. It has been accepted by the decision-makers. Mr Yatim has presented in an impressive manner as someone who is determined to make a permanent contribution to the Australian community through his developing business and other activities. In order to achieve this ambition, he quite rightly seeks to have his new and young family at his side in his new country. To foil this ambition, particularly on the basis of the in part, dubious estimates made as to the likely cost of Sarah Yatim residing permanently in Australia, would be tantamount to injustice. In this regard therefore, I am inclined to find in favour of the compassionate and humanitarian circumstances presented, when balancing them against the costs that will evidently accrue to the Australian community over time as a result of Sarah Yatim's settlement in this country. I therefore find that the granting of a visa to Ms Yatim and her daughter would be unlikely to result in undue harm or undue cost to the Australian community, or indeed undue prejudice to the access of health care or community services of any Australian citizen or Australian permanent resident, as required by clause 4007(2)(c). In the circumstances therefore, I determine that the health waiver should be exercised in this instance.

Re Henry [1995] IRTA 4935 (22 February 1995)

This case involved an application for a permanent resident's sister, Ms Henry, to come to Australia. All other family members are permanent residents of Australia. The mother continued to live in Singapore with her daughter as it was culturally inappropriate for her to live alone. Ms Henry was confined to a wheelchair having had polio as a child. The discussion in the judgement explains the rationale for ruling that the health criteria had been met. It pays particular attention to her current medical condition and her history of employment. It also notes that there is no evidence she will be applying for some of the services and entitlements she might be eligible for.

There is no doubt that Ms Henry has been left to deal with a disability arising from the effects of Paralytic Poliomyelitis at two years of age. She uses a wheelchair for independent mobility and is otherwise in good health. It is apparent that the very existence of the disease, poliomyelitis, is one of the issues in this case. There is a fundamental difference between dealing with the clinical demands of an active or closely anticipated disease or condition and its after effects. People with disabilities often deal with the after effects of a disease or condition that is spent. They are not ill or diseased, but they may confront a predisposition to conditions that may attract the concerns listed in clauses 4005 and 4006.

For Ms Henry the virus causing poliomyelitis is no longer active. In fact she does not have a disease at all. The residual issue then concerns whether the disabling after effects of polio represent a real or serious or substantial risk to her that are likely to impose resource demands on the Australian community in her particular circumstances.

In this case, there is evidence from Dr Mozoomdar on 26 August 1994, that the principal 'while holding down a full time job has remained remarkably free from chest infections and skin problems.' This is confirmed by her own doctor Dr Ng Boon Gim who has been her general practitioner since 1984. The prognostic concerns of the CMO seem to have no basis in her clinical history. Accordingly they must be treated as clinical generalisations.

Dr Lee addresses these clinical generalisations in his report saying 'unlike a paraplegic who has complete spinal cord injury, the polio victim is unlikely to have complications arising from skin breakdown'. He also points out that any argument that she is at great risk of heart and lung complications is weakened by the absence of any significant clinical history of respiratory infections. Dr Mozoomdar, who is an accredited medical examiner for the Department in Singapore, confirms this saying that: 'she is remarkably free from intercurrent respiratory infections.'

In the longer term Dr Lee concludes that: 'there is no reason why she could not continue to be as independent in her domestic, community and vocational activities as a non-disabled person living to a similar older age.'

To date Ms Henry has been consistently employed as a telephonist/ receptionist in private enterprise in Singapore. Her disability does not prevent her from undertaking open employment in Australia. Despite indications that she might clinically qualify for an Australian Disability Support Pension there is no evidence to suggest that she would satisfy the residence, means, income and functional preconditions to entitlement. Nor is there any evidence to support an assumption that she might prefer to be a welfare

recipient to earning from the sort of work that she is competent and qualified to perform in Australia.

I find that Ms Henry does not presently suffer from the disease poliomyelitis. This means that she is free from that disease. Nor can it be anticipated that she will suffer from any other disease or condition which would preclude her from satisfying the health criteria. I find that she meets the health requirements for entry to Australia.

Resources

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