

ATTACHMENT 4

IMMIGRATION HEALTH RULES AND DISABILITY: SUBMISSION
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INTRODUCTION

The United Nations Convention on the Rights of Persons with Disabilities (hereafter the “UNCRPD”) came into force on 13 December 2006.⁷⁷ It promises an innovative approach to the treatment of persons with disabilities with respect to their general human rights, and those specifically pertaining to the freedom of movement.

This paper seeks to address the extent to which the UNCRPD obliges State parties to facilitate the full enjoyment of those rights articulated therein. It does this by comparative reference to antecedent international legal instruments which impact upon the rights of persons with disabilities including the International Covenant on Civil and Political Rights (hereafter the “ICCPR”), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (hereafter the “CAT”) and the Convention on the Status of Refugees (hereafter the “Refugees Convention”).

Part One analyses the extent to which antecedent international legal instruments adequately respected and supported the rights of persons with disabilities generally and with respect to migration. Part Two evaluates the potential of the UNCRPD to facilitate the full enjoyment of the rights of persons with disabilities in light of the findings of Part 1.

PART I. THE INTERNATIONAL LEGAL FRAMEWORK

The Domestic Model vs. the International Model

In order to appreciate the extent to which persons with disabilities have been supported under the previous international legal framework, it is essential to summarise the extent to which State domestic legislation and policy has been unaccommodating and discriminatory toward peoples with disabilities. For the most part, State domestic law and policy reflects a preoccupation or trend in State legislation and policy to adopt the “medical model” of disability.⁷⁸ According to Quinn and Degener, this model “...focuses on persons’ medical traits such as their specific impairments ... [having] the effect of locating the “problem” of disability within the person”.⁷⁹

In the context of migration, this results in the adoption of stringent laws and policies which emphasise the concerns surrounding an individual’s disability. Common law countries such as the United States of America, New Zealand, Canada and Australia in their adoption of the medical model of disability, have devised legislation and policy which acts to the exclusion of persons with a disability. Each of these States provides for exclusion of entry on the grounds of medical inadmissibility where the Applicant is likely to be either a threat to public health and safety or impose significant costs on domestic health and community

⁷⁷ United Nations Enable, *Convention on the Rights of Persons with Disabilities*, <<http://www.un.org/disabilities/default.asp?navid=12&pid=150>> accessed 15 October 2009.

⁷⁸ Quinn, Gerard and Degener, Theresia, ‘Chapter 1 – The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform’ in *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, (New York and Geneva: 2002) at 14.

⁷⁹ *Ibid.*

services.⁸⁰ Thus, domestic legislative and policy trends in key common law countries are constructed very much in terms of the disabled person's economic utility⁸¹ and not by reference to their fundamental human rights.

Comprising of binding international treaties, non-binding treaties, customary international law and a number of regional treaties⁸² the international legal framework mitigates the often stringent and discriminatory domestic legal framework of nation states. Contrary to State domestic law, the international legal framework adopts the "human rights model" of disability which:

...focuses on the inherent dignity of the human being and subsequently, but only if necessary, on the person's medical characteristics. It places the individual centrestage in all decisions affecting him/her and, most importantly, locates the main "problem" outside the person and in society.⁸³

This section seeks to highlight areas of international law which have an impact upon the migration rights of people with disabilities by conferral of both universal and specific rights. A detailed analysis of all international human rights instruments is beyond the scope of this paper. Three of the key instruments which have particular relevance to disabled peoples will be examined – the ICCPR, the CAT and the Refugees Convention.

The International Covenant on Civil and Political Rights

Entering into force on 23 March 1976, the rights contained in the ICCPR can be categorised as follows: "...(a) rights that refer to human existence, (b) liberty rights, (c) associational rights and (d) political rights."⁸⁴ Like a number of key human rights instruments, the ICCPR does not make *specific* reference to the rights of persons with disabilities. Nonetheless, the rights of disabled peoples are supported in a number of more generalised, or "universal"

⁸⁰ See Section 212 of the *Immigration and Nationality Act 1952*, <<http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=act>>, accessed 30 September 2009, Immigration New Zealand, *Immigration New Zealand Operational Manual: Administration*, <<http://www.immigration.govt.nz/NR/rdonlyres/607ED409-0193-46A1-B3FF-8496DCB2FAC7/0/Administration.pdf>> accessed 30 September 2009, *Immigration and Refugee Protection Act, S.C 2001*, s 38(1), s 38(2)(a-d), <<http://www.ijcan.org/en/ca/laws/stat/sc-2001-c-27/latest/sc-2001-c-27.html>>, accessed 30 September 2009 and *Migration Act 1958 (Cth)*, <http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/> accessed 30 September 2009, *Migration Regulations 1999*, <http://www.austlii.edu.au/au/legis/cth/consol_reg/mr1994227/> and Department of Immigration and Citizenship, *Fact Sheet 22: The Health Requirement*, <<http://www.immi.gov.au/media/fact-sheets/22health.htm>> accessed 15 October 2009.

⁸¹ Quinn, Gerard and Degener, Theresia, Chapter 1 – The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform' in *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, (New York and Geneva: 2002) at 14.

⁸² For an extensive list please see United Nations Office of the High Commissioner for Human Rights, *International Law*, <<http://www2.ohchr.org/english/law>> accessed 15 October 2009,

⁸³ Quinn, Gerard and Degener, Theresia, Chapter 1 – The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform' in *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, (New York and Geneva: 2002) at 14.

⁸⁴ Quinn, Gerard & Degener, Theresia, Chapter 4: "Disability and Freedom: The International Covenant on Civil and Political Rights" in *Human Rights and Disability: The Current Use and Future Potential of the United Nations human rights instruments in the context of disability*, (New York and Geneva: United Nations 2002) at 54.

provisions. For example, the Preamble of the ICCPR makes reference to the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family”.⁸⁵ Further, the rights of peoples with a disability are covered generally by Articles 2 and 26 which constitute the Convention’s non-discrimination provisions.⁸⁶ Article 2 provides that each State party to the Covenant is to ensure to all individuals within its territory and subject to its jurisdiction all rights contained in the ICCPR without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and is to take all reasonable steps to facilitate the realisation of these rights at a domestic level.⁸⁷ Though this provision clearly stipulates an obligation on behalf of States to ensure rights as enshrined in the Covenant to all peoples including those with a disability, it contains a clear qualification that such rights are to be realised for persons *within the territory and subject to the jurisdiction* of the State in question. Such a provision is of little benefit to potential migrants.

According to Quinn and Degener, Article 26 of the ICCPR is broader in its application and encompasses peoples with disabilities by the term “other status”.⁸⁸ Article 26 states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁸⁹

Despite the broad scope of the ICCPR it does not explicitly provide rights in the context of migration. The ICCPR does contain a term with respect to freedom of movement by way of Article 12(1). However, Article 12 is qualified by the requirement of lawful residence in a State (problematic particularly in the context of refugees and asylum seekers) and that this provision may be restricted in its application where it is necessary to protect “...public health or morals or the rights and freedoms of others”.⁹⁰ According to Joseph et al., the ICCPR therefore fails to guarantee a right to residency.⁹¹ General comments of the Human Rights Committee have affirmed this interpretation of Article 12, however, the Committee does highlight circumstances in which this interpretation will not be justified⁹²:

⁸⁵ The United Nations, *International Covenant on Civil and Political Rights*, Preamble, <<http://www2.ohchr.org/english/law/ccpr.htm>> accessed 12 October 2009.

⁸⁶ Quinn, Gerard & Degener, Theresia, Chapter 4: “Disability and Freedom: The International Covenant on Civil and Political Rights” in *Human Rights and Disability: The Current Use and Future Potential of the United Nations human rights instruments in the context of disability*, (New York and Geneva: United Nations 2002) at 54.

⁸⁷ United Nations, *International Covenant on Civil and Political Rights*, Article 2, <<http://www2.ohchr.org/english/law/ccpr.htm>> accessed 12 October 2009.

⁸⁸ Quinn, Gerard & Degener, Theresia, Chapter 4: “Disability and Freedom: The International Covenant on Civil and Political Rights” in *Human Rights and Disability: The Current Use and Future Potential of the United Nations human rights instruments in the context of disability*, (New York and Geneva: United Nations 2002) at 59.

⁸⁹ The United Nations, *International Covenant on Civil and Political Rights*, Article 26, <<http://www2.ohchr.org/english/law/ccpr.htm>>, accessed 12 October 2009.

⁹⁰ Id at Article 12(1) and (2).

⁹¹ Joseph, Sarah, Schultz, Jenny, Castan, Melissa, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, (United States: Oxford University Press, 2000) at 246.

⁹² Ibid.

The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances, an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.⁹³

Such circumstances do, however, remain subject to conditions relating to the consent of States for entry.⁹⁴ Thus, while ICCPR contains provisions of universal relevance applicable to disabled peoples, the only and specific provision relating to movement is both qualified and restrictive in its application.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The CAT prohibits the use of torture and other cruel, inhuman or degrading treatment or punishment. The CAT defines torture to include an act causing severe physical or mental pain or suffering, which is intentionally inflicted upon a person for the purposes of confession, punishment, intimidation or coercion.⁹⁵ Such acts are defined to be perpetrated at the design of or at the acquiescence of public authority.⁹⁶ The definition of cruel, inhuman or degrading treatment or punishment, however, is less clear.⁹⁷

The relevance of the CAT in the context of disability rights has significantly increased in light of the findings of the Special Rapporteur of the Human Rights Council which highlights the increased vulnerability of disabled peoples in both the public and private arena, exposing them to significant violence and abuse:

Persons with disabilities are often segregated from society in institutions, including prisons, social care centres, orphanages and mental health institutions. They are deprived of their liberty for long periods of time either against their will or without their free and informed consent. Inside these institutions, persons with disabilities are frequently subjected to unspeakable indignities, neglect, severe forms of restraint and seclusion as well as physical, mental and sexual violence.

....

In the private sphere, persons with disabilities are especially vulnerable to violence and abuse, including sexual abuse, inside the home, at the hands of family members, caregivers, health professionals and members of the community.⁹⁸

Despite clear application to disabled peoples, the CAT is limited in the extent to which disability rights are indeed supported. According to Bourke and Quinn, the CAT is

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ The United Nations, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 1, <<http://www.hrweb.org/legal/cat.html>>, accessed 11 October 2009.

⁹⁶ Ibid.

⁹⁷ Bourke, Christina and Quinn, Gerard, Chapter 6: The Integrity of the Person: The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and disability, in *Human Rights and Disability: The Current Use and Future Potential of the United Nations human rights instruments in the context of disability*, (New York and Geneva: United Nations 2002) at 135.

⁹⁸ United Nations General Assembly, Sixty third Sessions, *Note by the Secretary-General, Torture and Other Cruel, inhuman or degrading treatment or punishment*, 28 July 2008 at 8-9.

limited in a general sense on account of the definition of torture provided in the Convention which covers those acts of torture which are committed only by or at the behest of public authorities. This necessarily restricts the application of the Convention to those peoples with a disability who suffer torture or other cruel treatment at the hands of private individuals. Further, the definition of cruel, inhuman or degrading treatment or punishment has not been adequately defined, again restricting the general application to disabled peoples.⁹⁹

With respect to migration, the CAT articulates the principle of “non-refoulement”, or non-return, of peoples at risk of torture upon return to their country of origin. Article 3 states that:

1. No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Clearly relevant to disabled asylum seekers and refugees¹⁰⁰, the importance of such a provision should not be underestimated. However, Article 3 is limited in its applicability as it covers only vulnerable individuals who are both seeking asylum on the grounds of disability. It does not apply to those peoples seeking to migrate for the purposes of employment or family reunification and is therefore not broad in its application.

The United Nations Convention Relating to the Status of Refugees

Though not a constituent of the formal international human rights framework¹⁰¹, the Refugees Convention is relevant to peoples with disabilities. The reason here is twofold. It is clearly an instrument dealing specifically with human migration. Further, the scope of people to whom the Convention applies is significant in light of the prevalence of physical and mental health issues in refugee communities.¹⁰² According to the World Health Organisation, between 2.3 and 3.3 million of the world’s displaced persons live with a disability.¹⁰³

Under the Refugee Convention, an individual will be granted refugee status where the State is satisfied that due to “well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”¹⁰⁴ the

⁹⁹ Bourke, Christina and Quinn, Gerard, Chapter 6: The Integrity of the Person: The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and disability, in *Human Rights and Disability: The Current Use and Future Potential of the United Nations human rights instruments in the context of disability*, (New York and Geneva: United Nations 2002) at 135.

¹⁰⁰ Id at 150.

¹⁰¹ See Office of the United Nations High Commissioner for Human Rights, Migration – International Legal Framework, <<http://www2.ohchr.org/english/issues/migration/taskforce/standards.htm>>, accessed 23 September 2009 and United Nations Enable, Overview of International Legal Frameworks for Disability Legislation, <<http://www.un.org/esa/socdev/emable/disovlf.htm>>, accessed 11 October 2009.

¹⁰² Australian Lawyers for Human Rights, *A Human’s Worth: Putting a Price on Disability in Migration Matters*, <<http://www.alhr.asn.au/activities/2009/06/01/discussion-paper-a-human-s-worth-putting-a-price-on-disability-in-migration-matters.html>> accessed 30 September 2009 at 15.

¹⁰³ United Nations High Commission for Refugees, *People with Disabilities*, <<http://www.unhcr.org/pages/4a0c310c6.html>>, accessed 11 October 2009.

¹⁰⁴ The United Nations, Convention Relating to the Status of Refugees, Article A(1)(2), <<http://www2.ohchr.org/english/law/refugees.htm>> accessed 30 September 2009.

individual is unwilling or unable to return to their country of origin.¹⁰⁵ This definition is, in and of itself, very involved and subject to complex international jurisprudence.¹⁰⁶

The most amenable ground to the circumstances of disabled refugees in “particular social group”. This is understood in international jurisprudence to mean groups identified by an innate or unchangeable characteristic, groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association or groups innate because of past association.¹⁰⁷ Persons with a disability, if faced with persecution, may invoke the protection of states in accordance with the first head of “particular social group” being groups identified by an innate or unchangeable characteristic. Successful cases have, for example, been recorded in the United States where it has been held that disabled children constitute a “particular social group”.¹⁰⁸

Should the individual in question be able to prove persecution on the basis of their disability, then Article 33 of the Convention will be triggered. Like Article 3 of the CAT, Article 33 of the Convention on Refugees contains the obligation of non-refoulement in which states are prohibited from returning an individual to circumstances where the right to life or freedom would be threatened,¹⁰⁹ supporting the freedom of movement.

Like the ICCPR and the CAT, the Refugee Convention is also limited in its support of the rights of peoples with disabilities. Prima facie, the Convention does not apply to those people voluntarily seeking to migrate. Further, the right to freedom of movement may only be enforced where the individual has proved the requisite level of persecution and on a ground contained in the Convention before the non-refoulement provision may be invoked. Thus, its application is relevant only to those individuals who fear persecution on the grounds of membership in a particular social group, the definition of which is in and of itself, complex.

Evaluation

Prior to the advent of the UNCRPD, it is clear from the above analysis, that the rights of peoples with a disability generally and in the context of migration have been supported in a very piecemeal fashion. While each of the international instruments outlined provide for the universality of human rights, the practical application of these rights to peoples with a disability is far different. The ICCPR provides only for the freedom of movement of persons lawfully within a State and both the CAT and the Refugees Convention must first be triggered by the persecution of the individual in question before the principle of non-refoulement, and hence the unqualified movement of an individual, can be achieved. The current international legal framework therefore lacks the specificity required to adequately support and maintain the migration rights of peoples with disabilities. This sentiment is echoed by the Office of the High Commissioner for Human Rights:

There is no doubt that existing international human rights system was meant to promote and protect ... the rights of persons with disabilities. Sadly, there is also no

¹⁰⁵ Ibid.

¹⁰⁶ See for example Hathaway, James, *The Law of Refugee Status* (Canada: Butterworths Law, 1993) and Shacknove, AE ‘Who is a Refugee?’ 95 *Ethics* (1985).

¹⁰⁷ See La Forrest J in *Canada v Ward* [1993] 2 S.C.R 169 at 103.

¹⁰⁸ Bhabha, Jacqueline, Crock, Mary, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia, the US and the UK* (Annandale: Themis Press, 2007) at 166.

¹⁰⁹ The United Nations, Convention Relating to the Status of Refugees, Article 33
<<http://www2.ohchr.org/english/law/refugees.htm>> accessed 30 September 2009.

doubt that the existing standards and mechanisms [have], in practice, failed to provide adequate protection in the specific case of persons with disabilities the UN human rights treaty bodies, while having considerable potential in this field, [have] been underutilized in advancing the rights of persons with disabilities. It [is] clearly time for the United Nations to remedy this shortcoming.¹¹⁰

PART II. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PEOPLES WITH DISABILITIES

Adopted by the United Nations General Assembly on 13 December 2006, the UNCRPD and its Optional Protocol is the latest addition to the international human rights framework. Viewing disability as a “pathology of society”¹¹¹ the UNCRPD provides the requisite specificity to facilitate to realisation of the rights of persons with disabilities both generally *and* in the context of migration.

According to the United Nations Department of Economic and Social Affairs, the Office of the United Nations High Commissioner for Human Rights and the Inter-Parliamentary Union, the need for an international human rights document specific to peoples with disabilities was required as a response to the fragmented international legal framework which often saw persons with a disabilities denied their basic rights and freedoms.¹¹² The UNCRPD was devised to complement the existing international framework and in so doing, ensures the basic human rights and ability of persons with a disability to participate, engage and contribute to society in the context of equal opportunity.¹¹³

The scope of the UNCRPD is very broad, encompassing all areas of economic, social, cultural, political and legal life:¹¹⁴

...It calls for non-discriminatory treatment and equality in access to justice during institutionalization, while living independently and in the community, in undertaking administrative tasks, in treatment by the courts and by police, in education, healthcare, in the work-place, in family life, in cultural and sporting activities, and when participating in political and public life It also protects the life, liberty and security of persons with disabilities [and] their freedom of movement...¹¹⁵

The UNCRPD establishes a number of obligations upon State parties which are relevant to the rights of disabled peoples seeking to migrate. Article 4 creates an obligation upon State parties to “...adopt all appropriate legislative, administrative and other measures

¹¹⁰ Office of the High Commissioner for Human Rights, *Lunch-time briefing on “The International Convention on the Rights of Persons with Disabilities”*, 25 September 2006.

¹¹¹ UN General Assembly, *National Legislative Measures Aimed and Strengthening Rights of Persons with Disabilities Focus, As States Parties to Convention Open Session*, 2 September 2009, <<http://www.un.org/News/Press/docs//2009/hr4998.doc.htm>>, accessed 21 September 2009.

¹¹² United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights and the Inter-Parliamentary Union, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities – Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (United Nations: Geneva, 2007) at 4.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Id* at 12.

for the implementation of the rights recognised in the [UNCRPD]¹¹⁶ in addition to abolishing existing laws, regulations and practices which may impede the full enjoyment of the rights articulated by the Convention.¹¹⁷ Further, State parties are obliged to refrain from any act or practice which is contrary to the objectives of the Convention and must facilitate the elimination of discrimination on the basis of disability perpetrated by any person, organisation or private industry.¹¹⁸ States are therefore under an obligation to review, amend or abolish migration legislation and policy which is contrary to the objectives of the UNCRPD. These provisions have clear relevance for those disabled migrants who face restrictive and discriminatory laws and policies in the exercise of their right to freedom of movement.

The UNCRPD also expressly provides for the liberty of movement and of nationality of peoples with a disability. Overcoming the limitations antecedent international instruments, Article 18 of the UNCRPD states that:

1. *States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including and 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 utilize 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.*¹¹⁹ (Emphasis added)

Read with the various non-discrimination provisions of the UNCRPD, the effect of this provision is to render State health requirements onerous and discriminatory and behaving as a barrier the full enjoyment of the right of freedom of movement. Despite this, several States, including Australia, have sought to enter declarations or reservations pursuant to Article 18.¹²⁰ Upon ratification, Australia entered a reservation stating that Article 18:

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.¹²¹

Similarly, the United Kingdom expressed a reservation against Article 18 citing the need to retain control over the entry of foreigners across United Kingdom borders.¹²²

Such action is evidence in and of itself that these States clearly recognise the obligations created by the UNCRPD. Further, States are not permitted to make reservations

¹¹⁶ The United Nations, Convention on the Rights of Persons with Disabilities, Article 1(a) <<http://www.un.org/disabilities/default.asp?id=259>> accessed 30 September 2009.

¹¹⁷ Id at Article 1(b),

¹¹⁸ Id at Article 1(d) and 1(e).

¹¹⁹ Id at Article 18.

¹²⁰ United Nations Enable, Declarations and Reservations <<http://www.un.org/disabilities/default.asp?id=475>>, accessed 11 October 2009.

¹²¹ Id.

¹²² House of Lords, House of Commons, Joint Committee on Human Rights, *The UN Convention on the Rights of Persons with Disabilities: First Report of Session 2008-9* at page22.

where the reservation is incompatible with the object and purpose of the treaty in question.¹²³ The reservations of Australia, the United Kingdom and Thailand with respect to their migration laws and policies are in clear breach of the purpose of the UNCRPD being the promotion, protection and assurance of the “...full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities” and the promotion of their inherent dignity.¹²⁴

PART III: STATE MIGRATION LAWS AND THE EXCLUSIONS OF PEOPLES WITH DISABILITIES

In order to appreciate the extent to which persons with disabilities have been supported under the previous international legal framework, it is essential to highlight the extent to which State domestic legislation and policy has been unaccommodating and discriminatory toward peoples with disabilities. This section provides a brief overview of current migration law and policy utilised by common law countries, including The United States of America, New Zealand, Canada and Australia.

As the primary regulator of migration in the United States, the United States Citizenship and Immigration Services¹²⁵ lists among its core the provision of effective customer-oriented immigration benefits and the promotion of flexible and sound immigration policies and programs.¹²⁶ For disabled migrants, the reality of migration to United States is to the contrary.

The United States’ *Immigration and Nationality Act 1952* provides the USCIS the capacity to deny entry to the United States on the ground of medical inadmissibility. Section 212(a)(1)(A) stipulates the ineligibility of an applicant for the provision of a visa on several grounds including the carriage of communicable diseases and where the applicant is determined in accordance with the Regulations to have a physical or mental disorder that may result in the threat to the property, safety or welfare of the alien or others.¹²⁷

This restriction is tempered by Section 212(g). The section provides for a waiver of the health requirements where the Attorney-General is satisfied of a particular familial connection to a United States citizen¹²⁸ or on the application of certain conditions or terms (including a bond), the Attorney-General waives the requirement as an act of discretion.¹²⁹

Similar to the United States, New Zealand’s *Immigration Act 1987* and immigration policy reflect some prima facie exclusionary provisions.¹³⁰ Relevant to both temporary and

¹²³ Article 19, Vienna Convention on the Law of Treaties, <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>, accessed 11 October 2009.

¹²⁴ Article 1, UNCRPD

¹²⁵ See United States Citizenship and Immigration Services, <<http://www.uscis.gov/portal/site/uscis/menuitem.cb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2af29c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextchannel=2af29c7755cb9010VgnVCM10000045f3d6a1RCRD>> accessed 30 September 2009.

¹²⁶ Ibid.

¹²⁷ For complete details, please see Section 212 of the *Immigration and Nationality Act 1952*, available at <<http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=act>>, accessed 30 September 2009.

¹²⁸ Id at, Section 212(g)(1).

¹²⁹ Id at Section 212(g)(2)(A), (B) and (C).

¹³⁰ Immigration New Zealand, *Health Requirements* <<http://www.immigration.govt.nz>> accessed 30 September 2009.

permanent entry into New Zealand is the requirement that the applicant and those accompanying the applicant, have an “acceptable standard of health”¹³¹, interpreted to mean a standard of health that is “...unlikely to be a danger to public health, unlikely to impose significant costs¹³² or demands on New Zealand’s health services or special education services, [and demonstrates an] ability to perform the functions for which [the Applicant] is granted entry.”¹³³ The final requirement is not applicable to people applying for permanent residence on the basis of family sponsorship or refugee status.¹³⁴

New Zealand migration policy also allows for the waiver of these health requirements in limited circumstances. In the context of temporary residence, applicants may be considered for a waiver of the health requirement in circumstances including where the Applicant has applied for a working visa, where the Applicant has applied for refugee status, where they are the partner or dependent child of a New Zealand citizen.¹³⁵ Included in those factors to be taken into account in assessing whether a waiver should be granted includes the degree to which the Applicant would impose significant costs upon the health and special education services of New Zealand and whether the Applicant’s potential contribution to New Zealand will be significant.¹³⁶ This can be particularly problematic where, as the trend has been, States assess the contribution of a disabled person in terms of economic utility.¹³⁷

Applicants for permanent residence to New Zealand face even more stringent criteria if wishing to apply for a medical waiver. Applicants who suffer from certain illnesses will not be granted a medical waiver.¹³⁸ Applicants and their dependents who have recognised as refugees may apply for a health waiver.¹³⁹

Like other common law countries, Canada defines a minimum standard of health required for entry into Canada. Section 38(1) of the *Immigration and Refugee Protection Act S.C 2001* states that a foreign national will be inadmissible for entry to Canada on health grounds where their particular health condition is likely to present a danger to public health, is likely to be a danger to public safety or may be reasonably expected to cause “excessive demand on health or social services”.¹⁴⁰ In the Canadian context, those conditions thought to impose excessive demand include serious incapacity requiring extensive nursing care”¹⁴¹, characteristic of a number of disabilities.

However, unlike both United States and New Zealand migration policy, however, the Canadian legislation does not provide for a waiver of the health requirement, but an explicit inapplicability of the health conditions where the Applicant has been determined to “...be a member of the family class” and has been determined to be the spouse, partner or child of a

¹³¹ Ibid.

¹³² Immigration New Zealand, Immigration New Zealand Operational Manual: Administration, <<http://www.immigration.govt.nz/NR/rdonlyres/607ED409-0193-46A1-B3FF-8496DCB2FAC7/0/Administration.pdf>> accessed 30 September 2009.

¹³³ Immigration New Zealand, above n7. See also Immigration New Zealand above n9.

¹³⁴ Immigration New Zealand, above n9.

¹³⁵ Paragraph A4.65, Immigration New Zealand, above n9.

¹³⁶ Paragraph A4.70 of Immigration New Zealand, above n9.

¹³⁷ Quinn, Gerard and Degener, Theresia, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, (New York and Geneva: 2002) at 14.

¹³⁸ Specific illnesses include reduced kidney function in need of dialysis within 4 years of medical assessment, pulmonary tuberculosis, severe haemophilia and any physical incapacity which requires full time care. For more information see paragraph A4.60 of Immigration New Zealand, above n9.

¹³⁹ Id at A4.60.

¹⁴⁰ *Immigration and Refugee Protection Act, S.C 2001*, s 38(1) <<http://www.iijcan.org/en/ca/laws/stat/sc-2001-c-27/latest/sc-2001-c-27.html>>, accessed 30 September 2009.

¹⁴¹ Gushulak, Brian, Williams, Linda, “National Immigration Health Policy: Existing Policy, Changing Needs, and Future Directions”, *Canadian Journal of Public Health*, May-June 2004, Vol 95, at 1-28

sponsor, where the Applicant has applied for permanent residency as a Convention refugee or is a protected person.¹⁴² The latter of the criteria for health requirement inapplicability is encouraging insofar as it exempts refugees and protected persons, those people of whom often present the more severe cases of disability.¹⁴³

CONCLUSION

Prior to the advent of the UNCRPD, the rights of disabled peoples both generally and with specific regard to migration, were upheld to varying extents by a complex and fragmented international legal system. The UNCRPD weaves together the fragmented fabric of this system to promote, maintain and support the rights of peoples with a disability in a manner which requires the compliance and respect of States. Further, specific provisions relating to non-discrimination and the unqualified freedom of movement oblige States to amend current exclusionary laws and policies relating to migration. It is by these provisions that the fundamental human rights of persons with a disability will be realised. State co-operation and participation remains vital to the effective implementation of the Convention and it is with a commitment to the encouragement and facilitation of the rights of persons with disabilities that States must move forward.

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¹⁴² *Immigration and Refugee Protection Act, S.C 2001*, s 38(2)(a-d), above at n17.

¹⁴³ Australian Lawyers for Human Rights, *A Human's Worth: Putting a Price on Disability in Migration Matters*, <<http://www.alhr.asn.au/activities/2009/06/01/discussion-paper-a-human-s-worth-putting-a-price-on-disability-in-migration-matters.html>> accessed 15 October 2009.

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