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20 August 2009

Committee Secretary
Migration Treatment of People with a Disability Review
Joint Standing Committee on Migration
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Legal Advice Regarding UN Convention on the Rights of Person with Disabilities

The National Ethnic Disability Alliance (NEDA) is the national peak organisation representing the rights and interests of people from non-English speaking background (NESB) with disability, their families and carers throughout Australia. NEDA estimates that one in every four people with disability is a person of either first or second generation NESB, representing approximately 1 million people across Australia.

NEDA welcomes the review of the Migration Treatment on People with a Disability, and commend the Australian Government on its initiative in addressing this area of Australian law and processes.

There has been a strong community perception that current migration processes are discriminatory, create unfair barriers for refugees and migrants with disability, and are at odds with Australia's international obligations. This issue was explicitly flagged by the Joint Standing Committee on Treaties (JSCOT) in October 2008, with the following recommendation:

> "The Committee recommends that a review be carried out of the relevant provisions of the *Migration Act* and the administrative implementation of migration policy, and that any necessary action be taken to ensure that there is no direct or indirect discrimination against persons with disabilities in contravention of the Convention."

Given both the strong community concern, and the previous JSCOT recommendation, I believe that the issue of direct or indirect discrimination is relevant to the current review.

In June 2008 NEDA received legal advice from Barrister Dr Ben Saul, Director, Centre for International Law, University of Sydney, on the consistency between Australia's obligation under the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) and the *Migration Act 1958* exemption under s 52 of the *Disability Discrimination*

Act 1992. The legal advice found that the current Australian migration arrangements are unable to satisfy the equal protection obligation under article 5 of the UN CRPD.

Because of the strong relevance of this information to the present Joint Standing Committee on Migration (JSCOM) review, I wish to provide Dr Saul's legal advice as a discrete submission for the information of the Committee. The advice is attached in full below.

NEDA has no objections to allowing both the legal advice and this letter to be made publicly available on the JSCOM Review website.

Yours sincerely

Dinesh Wadiwel
Executive Officer

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15 May 2008

Dear Mr Wadiwel

Re: Advice on the UN Convention on the Rights of Persons with Disabilities

Through the Public Interest Law Clearing House, you have requested my advice on whether:

(a) There is an inconsistency between Australia's obligations under the Disabilities Convention and the Migration Act 1958 (Cth) ('*Migration Act*') exemption under s 52 of the *Disability Discrimination Act 1992* (Cth) ('DDA'); and

(b) Section 7(5) of the *Social Security Act 1991* (Cth) discriminates against migrants with disabilities in a manner inconsistent with article 28 of the Disabilities Convention.

Australia has not ratified the Disabilities Convention and is not yet bound by its obligations at international law.[1] This advice therefore considers whether the above Australian laws would be compatible with Australia's obligations under the Convention upon ratification.

It is noted that article 4(1)(b) of the Convention would require Australia as a State party: 'To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'. While reservations to the Convention are expressly permitted (article 46), those which are contrary to the object and purpose of the Convention are precluded.

[1] Even as a signatory State, Australia does, however, have a duty to refrain from acts which would defeat the object and purpose of the Convention: 1969 Vienna Convention on the Law of Treaties, article 18. In this respect the purpose of the Disabilities Convention is listed in article 1 of that Convention as being 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.

Part A: The Migration Act Exemption

(a) The Exemption

1. Section 52 of the DDA exempts from the anti-discrimination provisions of the DDA: (a) the *Migration Act* and all regulations made under it; and (b) anything done by a person in relation to the administration of the *Migration Act*. The scope of the exemption encompasses a wide range of matters arising under the *Migration Act*. Most pertinently, the exemption applies to the criteria for visas available under the Act and regulations to non-citizens seeking permission to enter and remain in Australia, as well as to the administration of those visas by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA).[2]

2. A primary purpose of the DDA exemption is to ensure that the criteria for assessing visa applicants are not discriminatory under the DDA: Productivity Commission, *Review of the Disability Discrimination Act 1992* (2004), 343. Relevantly, the DDA exemption applies to the health requirements for visa applicants under 4005-07 of Schedule 4 of the Migration Regulations 1994. Those provisions exclude an applicant who has a 'disease or condition' which would, during the applicant's proposed stay in Australia, be likely to:

   (A) require health care or community services; or

   (B) meet the medical criteria for the provision of a community service;

   and the provision of such health care or community services would be likely to:

   (A) result in a significant cost to the Australian community in the areas of health care and community services; or

   (B) prejudice the access of an Australian citizen or permanent resident to health care or community services;

   regardless of whether the health care or community services will actually be used in connection with the applicant.

3. There is provision for the Minister to waiver health requirements where an employer undertakes to meet all costs related to the disease or condition (Migration Regulation 1994, Sch 4, 4006A(2)), or where the Minister is satisfied that granting the visa would be unlikely to result in (i) 'undue cost to the Australian community' or (ii) 'undue prejudice to the access to health care or community services of an Australian citizen or permanent resident' (Migration Regulations 1994, Sch 4, 4007(2)).

4. The exemption is justified by Australia by public policy interests in minimizing public health and safety risks to Australia, containing public health expenditure, and maintaining access to health and community services for Australian residents: Productivity Commission, *Review of the DDA* (2004), 343-344.

(b) Non-Discrimination under the Disabilities Convention

5. The Convention does not confer any right upon a disabled non-citizen to enter a foreign country, nor is such a right available under general international law. During the drafting

[2] The former Government rejected Recommendation 12.3 of the Productivity Commission Review to limit the migration exemption to provisions dealing with entry and migration visas, and not to exempt administrative processes. Such processes include, for instance, the provision of information and other services (not exempted under other legislation), which might potentially hinder the right of disabled persons 'to utilize relevant processes such as immigration proceedings' under art 18(1)(b) of the Convention.

of the Disabilities Convention, a draft proposal to extend article 18 (liberty of movement and nationality) to include a right to 'enjoy on an equal basis with others the right to enter and immigrate a country other than their State of origin' was not accepted.

6. Article 4(1) of the Convention imposes a primary obligation on States Parties 'to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability'.

7. The Convention defines 'discrimination on the basis of disability' in article 2 as:

> any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

8. A literal reading of articles 4 and 2 might suggest that discrimination on the basis of disability only occurs where such discrimination is connected with impairing some other existing human right or freedom. The similarly-worded provision in article 14 of the European Convention on Human Rights has been so interpreted: *Belgian Linguistic case*, 23 July 1968, Series A, No 6 (1979-80) 1 EHRR 252, para 9. Since there is no human right to enter a foreign country, such interpretation might imply that Australia's migration exemption is not relevantly connected with the impairment of a human right and the protection of article 4 is not engaged.

9. Even if that is the correct approach, article 5 of the Convention relevantly provides further non-discrimination guarantees which are not similarly limited by the requirement of a connection to another human right or freedom:

> 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
>
> 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

10. By analogy with articles 26 and 2 respectively of the *International Covenant on Civil and Political Rights*, the equal protection provision in article 5 of the Disabilities Convention does not merely duplicate the general non-discrimination provision in article 4 of the same Convention. Rather, article 5 'prohibits discrimination in law or practice in any field regulated and protected by public authorities': *Broeks v The Netherlands*, UN Human Rights Committee, 172/84, para 12.3; see also UNHRC, General Comment 18, para 12.

11. Thus even where permission to enter a foreign country is not recognised as a human right (which might be fatal to protection under article 4), where a State chooses to legislate to provide for the entry and stay of non-citizens, such laws (including health requirements as in the Migration Regulations 1994) must comply with the non-discrimination requirements of article 5.

(c) Indirect Discrimination under the Disabilities Convention

12. Under international human rights law, equal protection and non-discrimination safeguards not only against direct discrimination, but also indirect discrimination. In *Althammer v Austria*, Communication No 998/2001, the UN Human Rights Committee observed (at para 10.2) that:

> a violation of article 26 [of the ICCPR] can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds.

13. Likewise under the European Convention on Human Rights, it is recognised that 'where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group', and where there is no 'reasonable and objective justification' for it: *Hoogendijk v The Netherlands*, European Court of Human Rights, 6 January 2005.

14. By extension of the existing accepted interpretation of equal protection and non-discrimination under general international human rights law, Article 5 of the Disabilities Convention must be seen to protect against both direct and indirect discrimination on the ground of disability enumerated in that Convention.

(d) Prima Facie Discrimination by the Health Requirements

15. The health requirements are framed in a facially neutral manner, since all visa applicants are subject to them, regardless of disability, and there is no explicit focus on disability as a basis for excluding persons. However, the health requirements may still operate to differentiate on the basis of disabilities, by giving rise to both direct and indirect discrimination: see, eg, Productivity Commission, *Review of the Disability Discrimination Act 1992* (2004), 343.

16. *Direct* discrimination may arise where additional medical tests or evidentiary requirements are specifically imposed on disabled persons once they have been identified as disabled through the health screening process. There may thus be differential treatment compared with other visa applicants (that is, the relevant similarly situated or analogous class of persons subject to regulation).

17. It might be countered that some other, non-disabled visa applicants are also subject to further medical tests, such as those with infectious diseases or temporary impairments. On that analysis, there is no differential treatment of the disabled *on account of* their disability, since there is equal treatment of the relevant similarly-situated group – visa applicants with significant health issues of any kind.

18. In practice, however, it is possible that the identification of a disability in an applicant might automatically trigger further investigation by the Department, and it might then be arguable that disability operates as a trigger for differential treatment. Empirical analysis of the operation of the health requirements may, for instance, reveal a pattern of differential treatment of the disabled by DIMIA. Some with expertise in the disability sector have previously suggested that disability discrimination occurs 'as a matter of course' in immigration health screening: Disability Council of NSW, quoted in the Productivity Commission Review (2004), 345; see also Guide Dogs Association of SA & NT, infra.

19. More information would, however, be required on Departmental practices and the facts of individual cases before firm conclusions could be drawn on this point, since it is difficult to determine in the abstract whether discrimination results from the operation of

the facially neutral health requirements. It could also be argued that discrimination does not arise because there is an individualized focus on the health impacts and circumstances of each individual, rather than any exclusion of a class based on the shared characteristic of disability.

20. *Indirect* discrimination may potentially arise where the Act sets standards of health requirements which the disabled do not or cannot meet. Since disabilities (defined as long term impairments under article 1 of the Convention) may require costly health care or community support, it is likely that a significant number of disabled migrants would either impose a 'significant cost' on the Australian community, and/or 'prejudice the access' of Australians to such services.

21. It might be countered that the health requirements capture a broad range of conditions and diseases beyond the ground of disability. In addition, various disabilities may not entail significant costs or prejudice access to health services, whether because of the nature of the disabilities (in not requiring expensive care) or because of the capacity of employers to fund their own care. Further, the ministerial discretion to waive the health requirements in individual cases ensures that special circumstances can be taken into account.

22. Following *Althammer*, it is arguable that the health requirements do not therefore 'exclusively' target the disabled, nor do they necessarily impact 'disproportionately' on the disabled relative to other persons with costly health problems. The analysis here may depend on further empirical data about what proportion of persons who fail the health requirements are disabled relative to those who have other diseases and conditions; and how many waivers of the health requirements favour the disabled relative to persons with other conditions.[3]

23. It is, however, conceivable that the Act as framed may give rise either to direct or indirect discrimination depending upon its manner of application. Differential treatment alone is not sufficient to constitution discrimination. The next question is whether there exists any objective and reasonable justification for any (direct or indirect) differential treatment arising under the health requirements.

(e) Permissible Limitations on Equal Protection under the Convention

24. The Disabilities Convention itself contains no general limitation clause setting out the scope of, or criteria for, permissible limitations on disability rights as a whole, nor is there any specific limitation clause in relation to the non-discrimination or equal protection provisions.

25. The similarly worded equal protection provision in article 26 of the ICCPR likewise contains no express limitation clause, but under international human rights law it is accepted that: '[n]ot all differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant': UN Human Rights Committee, General Comment 18, para 13; see also *Broeks v The Netherlands*, UNHRC, 172/84, para 13. The test for limitations necessarily involves a degree of subjectivity and judgment.

(f) Comparative Jurisprudence

[3] DIMIA has previously indicated that the waiver is regularly exercised, including on compassionate grounds for the disabled (Productivity Commission Review (2004), 346), but the statistics are not available.

26. There are few comparative cases directly on the point of permissible discrimination on the basis of disability in migration decisions.[4] The Canadian decision of *Deol v Minister of Citizenship and Immigration* (2000) CanLII 21099 (IRB), Canadian Immigration and Refugee Board (Appeal Division), W97-00037, 22 February 2000, provides the most recent and relevant guidance. In that case, a visa applicant was refused admission to Canada due to severe osteoarthritis in both knees, which would have required specialist care and knee replacement surgery.

27. Relevantly, section 19(1) of the Canadian Immigration Act required the refusal of admission to persons 'suffering from any disease, disorder, disability or other health impairment' which, as a result of its 'nature, severity or probable duration', 'would cause or might reasonably be expected to cause excessive demands on health or social services'. It is thus resembles Australia's health requirements, although there are important differences.

28. On appeal the applicant alleged that the statutory health requirements were unconstitutional under s 15 of the Canadian Charter of Rights and Freedoms by discriminating against him on the basis of disability. Section 15(1) is an equal protection and non-discrimination clause which is for present purposes equivalent to the protection in article 5 of the Disabilities Convention.[5]

29. While the Canadian Immigration and Refugee Board (Appeal Division) determined that the applicant's condition did not fall within the definition of a 'disability', it also proceeded to find (at p 8) that even if it did constitute a disability, such disability was not the basis of the refusal of admission. Rather:

> the basis for finding the Principal Applicant inadmissible is that he falls within a class of persons whose admission 'would cause or might reasonably cause excessive demands on health or social services.' It is not the mere existence of pathology or disability that renders the Principal Applicant inadmissible, but rather the probable excessive demand caused by the condition. It is persons whose admission to Canada would cause or might reasonably be expected to cause excessive demands on health or social services that fall into the inadmissible category.

30. In an earlier case under the 1977 Canadian Human Rights Act, a Canadian Human Rights Tribunal considered the exclusion from Canada of a non-citizen, who suffered from the physical disability of scoliosis due to childhood polio, under Canadian immigration legislation which excluded those with (inter alia) a 'disability' and whose 'admission would cause or might reasonably be expected to cause excessive demands on health or social services': *Anvari v Canada Employment and Immigration Commission*, D 18/ 88, 14 December 1988.

31. The Tribunal accepted that there was prima facie discrimination against the applicant which was directly caused by his disability, but found that the health and social services needs of Canadian society as a whole provided a bona fide justification for

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[4] A recent argument alleging disability discrimination under British immigration law in a recent case was not successful due to the failure of counsel to fully articulate the relevant arguments and because the facts were not necessarily favourable, but the UK Asylum and Immigration Tribunal indicated that the issues might otherwise have been of general importance: *NM (Disability Discrimination) Iraq* [2008] UKAIT 00026, para 19. The essential claim was that by precluding third party support to a visa applicant whose British spouse was disabled and therefore could not support her, the British legislation discriminated on the basis of disability.

[5] Section 15 of the Canadian Charter 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 race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

differentiation on the basis of disability under s 14(g) of the Canadian Human Rights Act.[6]

(g) Reasonable and Objective Justification for the Australian Exemption

32. In Canada, it has been accepted that immigration health requirements either do not involve prima facie differential treatment of the disabled (*Deol*), or that any differential treatment is justified to meet the health needs of society (*Anvari*). While such decisions are helpful, they are not determinative in Australian law; and neither decision emanates from a body of high authority (the former an immigration appeals tribunal, the latter a human rights tribunal, and neither a judicial body); and the reasoning is not comprehensive in either decision.

33. On one hand, it is clearly arguable that the State has a legitimate public policy interest in minimizing burdens imposed on public health services and expenditure by non-citizens, not only to protect general revenue but also to preserve access to health services by Australian citizens and permanent residents.[7]

34. Individualized assessment of applicants, the availability of a waiver, and the taking into account of the applicant's potential means of support may indicate that the health provisions are also *proportionate* restrictions on equal protection, since the measures are not applied in an indiscriminate, blanket or inflexible fashion, and less invasive means for achieving the policy objective are taken into account (by allowing applicants the opportunity to demonstrate other means of support).

35. On the other hand, it is arguable that there is a countervailing public policy interest in ensuring that disabled persons are not treated adversely on account of personal characteristics – permanent impairment – which are beyond their control. The immutable nature of permanent disabilities is what sets disability apart from other grounds of selection in immigration programs, such as skills, finances, or language abilities, over which individuals can exercise a greater degree of human agency.

36. The purpose of the Disabilities Convention (in article 1) includes 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'. It is arguable that the health requirements of the Migration Act, whilst not expressly targeting disabilities, present insuperable obstacles to a large number of potential migrants whose disabilities require costly treatment, and such requirements could therefore be seen as impeding respect for their dignity and the right to equal treatment at law, including under immigration law.

37. In this connection, it should be noted that disabled persons already face other obstacles in the immigration system, where, for instance, they cannot meet skills, assets or language tests on account of their disabilities, which is compounded further by the health requirements. Where disabled persons apply for spouse or family reunion visas

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[6] Note that Canadian immigration law no longer explicitly mentions 'disability' but instead provides more general health requirements under s 38(1) of the Immigration and Refugee Protection Act 2001 (Canada): 'A foreign national is inadmissible on health grounds if their health condition: a) is likely to be a danger to public health; b) is likely to be a danger to public safety; or c) might reasonably be expected to cause excessive demand on health or social services.

[7] Immigration programs generally are already highly selective and differentiate between non-citizens on a variety of bases, including skills, financial assets, and language. Requirements concerning health, labour market, social welfare, financial and government policy considerations are 'by nature and design, discriminatory' (though not necessarily on prohibited grounds as such): Productivity Commission, *Review of DDA* (2004), 348.

(rather than under skills or business programs etc), the different human right to family reunion may also be a relevant consideration.[8]

38. While the Canadian decisions concern Canadian health requirements with similar purposes to the Australian ones, they also involve important differences. Exclusion on health grounds in Canada occurs if a condition would cause 'excessive demands' on health or social services, whereas Australia imposes a lower threshold of 'significant cost' to Australia, or prejudice to the access of an Australian to health services.

39. There is therefore a stronger justification in Canada for any prima facie differential treatment, since exclusion is permitted only where a disabled person's needs impose 'excessive' demands rather than merely 'significant' costs (which may, indeed, not amount to an excessive demand). The Canadian health test is accordingly more likely to satisfy the Disabilities Convention's requirement of an objective and reasonable justification for interference with equal protection, which provides the means for balancing the competing interests of non-discrimination against the disabled and the preservation of health resources for Australians.

40. Further, the Canadian scheme is distinguishable because it requires two or more concurring medical opinions, whereas one is sufficient in Australia. In *Anvari*, while the health requirements were objectively justified, the applicant succeeded on the facts of that case because the government had failed to meet the high evidentiary threshold for exclusion on health grounds, which required the concurring opinions of at least two medical officers. The 'need for the best possible evidence to differentiate adversely against a person because of a disability' was an important factor supporting the Canadian statutory scheme.

41. Accordingly, in Australia, it is arguable that the opinion of a single medical officer about the disability condition of a visa applicant would not be sufficient to support adverse differentiation against the person on the basis of disability. Requiring two or more concurring medical opinions may be an important safeguard against arbitrary or unjustifiable differentiation against the disabled, in circumstances where medical opinions can reasonably differ on questions such as the severity of the disability and the care and treatment (and thus the expense) required.

42. While there is ordinarily an avenue of merits review in Australia through the Migration Review Tribunal, which can re-evaluate the factual basis of the decision, the Tribunal is not itself a medically-qualified body and is therefore not in a position to provide expert reconsideration of medical opinions (as opposed to the weighting and legal evaluation of that expert medical opinion).

43. The method of assessing whether a person's condition will result in 'significant cost' or 'prejudice to the access' of Australians must also be a rational one in order to satisfy the requirement that the means of achieving the legitimate objective is proportionate to the attainment of that objective. In Canada, for example, complex formulas are used in order to determine whether the medical costs of admitting a person would be 'excessive'.

44. If, for instance, the manner of quantifying the costs of particular conditions is arbitrary or not supported by demonstrable evidence (as to the likely costs of procedures, the likely need for treatment, the resource limitations in the health system etc), then it is questionable whether such exclusion on health grounds is a necessary or proportionate response to the policy objective of preserving health resources for all Australians.

[8] Article 23(4) of the Disabilities Convention requires that '[i]n no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents'.

45. Many of these matters are questions of medical opinion and thus within the professional competence of medical assessors (which is also why the Canadian approach of requiring a concurring second opinion is such a vital safeguard, since medical expertise will be beyond Departmental decision-makers). But more information may needed on the manner in which Commonwealth Medical Officers arrive at judgments that a particular person's condition would impose 'significant costs' before a conclusion could be reached on this potential ground of challenge; and in particular whether policy guidelines or instructions exist and whether those guidelines are rationally connected with the policy objective.

46. In addition, concern has been previously expressed that the focus on the cost burden of a person's condition is not balanced by consideration of the positive (financial and other) contributions which a disabled person may make to Australia if admitted: NAPWA, in Productivity Commission Review (2004), 345. Failing to weigh the competing costs and benefits to the community as a whole may case doubt on whether protection of the health system alone is a sufficiently reasonably and objective policy interest to justify differentiation on the basis of disability.

(g) Waiver of Health Requirements

47. The waiver of health requirements under Schedule 4 of the Migration Regulations 1994 is an important means of guarding against blanket differentiation against disabled persons. However, the nature of the waiver raises concerns. The waiver is available if a person's condition would not result in 'undue cost' to the Australian community or 'undue prejudice' to access to health care by Australians. By implication, exclusion on health grounds is permitted where a person's condition imposes 'significant' but not 'undue' costs on Australia, or where it would 'prejudice' access to health services by Australians, but not 'unduly' so.

48. This highlights the concern raised at paragraphs 38-39 above that the Australian threshold for exclusion on health grounds is not sufficiently high to justify any direct or indirect discrimination on the basis of disability. The low bar for exclusion interferes too readily in the purpose of the Disabilities Convention in protecting the dignity of disabled persons, and is overly protective of access to health services for Australians without adequately balancing the competing interests.

49. In this regard, if disabled persons otherwise qualify for admission into the Australian community (for example, for family reunion), they should not be subject to discriminatory treatment on account of their disability in circumstances where there is not a sufficiently strong ground for such interference. Some cost to the Australian community must be expected and tolerated; and the Canadian threshold of 'excessive' (or synonymously, 'undue') cost better balances the interests at stake than standards of mere 'significant' cost or 'prejudice'.

50. Further, the waiver is discretionary, so that even if a disabled applicant would *not* impose undue costs or cause undue prejudice, entry is not available as of right. If the legitimate public policy aim is the protection of scarce health resources, it is arguable that the exclusion of disabled persons who would not unduly burden those resources (by failure to waiver) is not objectively justified by that aim.

51. Waiver is also available where an employer undertakes to cover the medical expenses, but not where the applicant him or herself gives such an undertaking (although this is a factor taken into account in the exercise of the minister's own waiver). Nor is the applicant's own means of support (including private health insurance coverage or support by family members or others) considered in the medical cost assessment made

by the Medical Officer. Again, if the legitimate policy aim is the protection of scarce health resources, it is arguable that it cannot be a necessary and proportionate means of attaining that objective to screen out those who can fund their own treatment and therefore would not burden resources.

Part B. Social Security and Disabled Migrants

52. To qualify for the Disability Support Pension (DSP), a disabled migrant requires '10 years qualifying Australian residence' as defined by s 7(5) of the Social Security Act 1991 (s 94 of the SSA). For other types of income support, migrants are subject to a 'newly arrived resident's waiting period' of 104 weeks (two years) (SSA, s 739A). Not only is the DSP payable at a higher rate than some other benefits (such as Newstart Allowance for the unemployed), reflecting special disability needs, it is also a precondition for access to some disability services.

53. Relevantly, article 28 of the Disabilities Convention guarantees detailed rights to an adequate standard of living and to social protection:

> 1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.
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> 2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:
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> > (a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;
> >
> > (b) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;
> >
> > (c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;
> >
> > (d) To ensure access by persons with disabilities to public housing programmes;
> >
> > (e) To ensure equal access by persons with disabilities to retirement benefits and programmes.

54. Such rights particularize the general human rights to an adequate standard of living and to social security under articles 11 and 9 respectively of the International Covenant on Economic Social and Cultural Rights. As such, under article 4(2) of the Disabilities Convention, each State Party is required to undertake measures 'to the maximum of its available resources… with a view to achieving progressively the full realization of those rights' (in contrast to the 'immediately applicable' obligations on States to provide civil and political rights under the Convention).

(a) Prima Facie Interference with Article 28

55. In my view the distinction between immediately enforceable and progressively realizable rights does not materially affect Australia's ability to presently implement

article 28 in full. Decisions about the allocation of resources are obviously ones which governments are well positioned to make in the exercise of their discretionary political and economic judgment on policy matters, and those views should be accorded significant weight. But as the UN Committee on Economic, Social and Cultural Rights notes (General Comment 3 (1990), para 10):

> In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

56. Further, 'any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources' (para 9). As a developed State, Australia is sufficiently well resourced at present to immediately ensure an adequate standard of living and minimum social protection to all within its jurisdiction, including the disabled and newly arrived migrants.

57. Even so, by suspending the right to social protection for two years, the SSA prima facie interferes with the right of disabled persons (and indeed all persons under the ICESCR) to social protection. Where the predictable consequence of such suspension is the denial of an adequate standard of living to disabled persons, including adequate food, clothing and housing, the SSA further infringes that human right of disabled persons (and indeed all persons under the ICESCR).

(b) Reasonable and Objective Justification for the Interference

58. In my view, such interference would not be demonstrably justified as an objective and reasonable limitation on those rights. As noted earlier, the Disabilities Convention contains no general limitation provision, and article 28 does not specify its own particular grounds of limitation. Article 4 of the ICESCR, from which the rights in article 28 of the Disabilities Convention are partly drawn, provides a general limitation clause as follows:

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

59. There are undoubtedly legitimate public policy objectives in controlling welfare expenditure, but that policy interest cannot take precedence over the fundamental right of all persons, including the disabled, to enjoy an adequate standard of living. Moreover, the policy interest in controlling welfare expenditure is a universal one which cannot be applied in a discriminatory manner to some members of society (newly arrived migrants) but not others (the rest of the Australian community). Access to human rights such as an adequate standard of living are not contingent on one's nationality status, but apply equally to all within a State's jurisdiction.

60. Further, responding to political or public concerns about the access of new migrants to public welfare – for example, views that they have not earned it through membership of the community over time, or they are not yet sufficiently 'Australian' to deserve it – is not a sufficiently strong ground for a government to deprive a person of an adequate standard of living and to bring about their impoverishment and so undermine their essential human dignity. Finally, the waiting periods cannot be said to be removing an incentive for unemployed foreigners to migrate to Australia to obtain social security

benefits given that pre-conditions of entry generally require certain skills, assets, offer of employment, or sponsorship, and so that policy concern is addressed elsewhere.

61. Similarly, in circumstances where the denial of special disability benefits for ten years results in an inadequate standard of living for disabled persons, and constitutes a denial of social protection, there is likely to be a prima facie interference with rights under article 28 of the Convention. Despite the availability of other forms of income support after two years, such support is arguably inadequate to meet the special needs and expenses of disabled persons, which are better addressed through the higher payments of the DSP and the manner in which the DSP triggers eligibility for other disability services. Thus the standard required by the rights to an adequate standard of living and social protection must be viewed in the context of the special needs of disabled persons. Such interference would not be demonstrably justified for the reasons given in paragraph 56.

(c) Inhuman or Degrading Treatment

62. The denial of social support to migrants in circumstances where they are left destitute and/or homeless may amount to a violation of the right (in article 15 of the Disabilities Convention, and equivalent general provisions in the 1984 Convention against Torture and the ICCPR) not to be subjected to cruel, inhuman or degrading treatment or punishment. Freedom from degrading treatment is not subject to any limitations under human rights law.

63. By analogy, the House of Lords has found that UK legislation depriving asylum seekers of welfare support, in circumstances where private charities could not support them, thus rendering them destitute or homeless, amounted to inhuman or degrading treatment contrary to article 3 of the European Convention on Human Rights: *Adam v Secretary of State for the Home Department* [2005] UKHL 66.

(d) Non-Discrimination and the Waiting Periods

64. The two year waiting period for income support for all newly arrived residents is not discriminatory in that it does not differentiate on prohibited grounds against particular members of the similarly-situated class of newly arrived migrants. It may, however, have an indirect discriminatory effect on the disabled since that group might be disproportionately affected by its impact, although arguably a variety of other migrant sub-groups would also face hardship.

65. The ten year waiting period for the DSP cannot be seen to discriminate on the basis of disability since it does not apply to disabled Australian citizens or long-term residents. The relevant differentiation is between different classes of disabled persons within Australia – ‘disabled migrants’ and other disabled persons – and ‘migrant disability’ is not per se a prohibited ground of discrimination under the Disabilities Convention. As such the question whether DSP eligibility is a discriminatory barrier to accessing other disability services does not arise.

(e) Right to Health of Disabled Persons

66. Article 25 of the Disabilities Convention requires States Parties to, inter alia:

> (a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons…
>
> (b) Provide those health services needed by persons with disabilities specifically because of their disabilities…

67. Article 25(a) established a right of disabled persons to equal treatment in the provision of health care, relative to non-disabled persons. If DSP eligibility is a condition of access to health services by disabled new migrants, then article 25 may be relevant. One difficulty is that the 10 year waiting period may result in a denial of health services to some disabled persons but not others, so it is arguable that there is parity of health provision as between disabled and non-disabled Australians generally, but differential treatment only between disabled migrants and other disabled persons.

68. However, article 25(a) should be interpreted as applying to all persons with disabilities within a State's jurisdiction, regardless of immigration status, so there is still a relevant differential treatment in access to health care between at least some disabled persons (new migrants) and non-disabled Australians, constituting a prima facie breach of Article 25(a).

69. In addition, there is arguably a further prima facie breach of the obligation in article 25(b) to provide disability-specific health services where needed, which must extend to all disabled persons regardless of their migration status. If access to disability services is conditioned on DSP eligibility, then there is an arguable breach of article 25(b) during the 10 year waiting period applicable to applicants.

70. In accordance with earlier analysis, and given the high importance of health services for the disabled and the correlatively high threshold demanded to justify its displacement, in my view there is no reasonable and objective justification for the denial of disability services to new migrants for 10 years after their arrival.

Please be in touch if you would like to discuss any aspect of this advice.

Yours sincerely

Barrister-at-law

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