Disability and the health requirement for migrants to Australia: exercising the power of discrimination?

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Australia, like many other western countries, sets the health standard for non-citizen applicants for most visa subclasses, both temporary and permanent. This is done by imposing Public Interest Criteria (PICs) 4005 and 4007 in the *Migration Regulations 1994* (Cth), which are also known as the 'health criteria'. If a health criterion is imposed on a visa, it is mandatory for the applicant to undertake a health assessment. By assigning the case to a Medical Officer of the Commonwealth (MOC) for assessment, the Department of Home Affairs can ensure that the applicant for a visa:

> (a) is free from tuberculosis; and
>
> (b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
>
> (c) is free from a disease or condition in relation to which:
>
> (i) a person who has it would be likely to:
>
> (A) require health care or community services; or
>
> (B) meet the medical criteria for the provision of a community service;
>
> …
>
> (ii) the provision of the 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.[1]

PIC 4005 therefore aims to protect the Australian community from the spread of tuberculosis and other dangerous types of diseases that may be a threat to Australian citizens and non-citizens and may impose a burden on the Australian healthcare and community service system by either being too costly to an Australian taxpayer or creating queues for certain types of treatment and delays in the provision of health care or community services. Among such services, according to departmental policy, are organ transplants (including bone marrow transplants) and dialysis.[2] The current provisions do not consider whether the intending migrant will actually use these healthcare and support services. Applicants who fail the health test do not satisfy PIC 4005 and thus have their visas refused.

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1 *Migration Regulations 1994* (Cth) sch 4 cl 4005.

2 Department of Immigration, Citizenship and Multicultural Affairs, Australian Government, 'The Health Requirement, Prejudice to Access', *Procedures Advice Manual (PAM3)*, Sch 4, 1 October 2019.

The department's policy previously stated that the applicant's potential healthcare costs should not exceed the threshold of A$40 000.[3] These costs were calculated either for the duration of a visa period or for the lifetime if the health condition was a permanent one and it was possible to predict the way it could possibly develop.[4] This meant that, if the person was likely to require treatment of more than A$40 000 over the rest of their life, they would not meet the health requirement, regardless of whether they would access the Australian community healthcare system or not. A 'health waver' is available for some types of visas. This is prescribed by another public interest criterion — PIC 4007. Under this PIC:

> (2) The Minister may waive the requirements of paragraph (1)(c) if:
>
> (a) the applicant satisfies all other criteria for the grant of the visa applied for; and
>
> (b) the Minister is satisfied that the granting of the visa would be unlikely to result in:
>
> (i) undue cost to the Australian community; or
>
> (ii) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.[5]

The word 'significant' in PIC 4005 is substituted for the word 'undue' in PIC 4007. This enables the decision-maker to make a decision that the health requirement is satisfied with a waiver. Unlike the word 'significant', which can be determined by a specific figure — in Australia, this is done by departmental policy — the word 'undue' offers greater flexibility to the decision-maker and is less unfavorable to the applicant. *Collins Online English Dictionary* defines 'undue' as 'greater or more extreme than one thinks is reasonable or appropriate'.[6] The waiver can apply to protection visas or to a limited number of temporary and permanent visa applications.

If the department decides to exercise a waiver, this will imply that the 'significant cost threshold' will not apply to the applicant and, depending on a particular case, applicants with potentially costlier health conditions will be granted visas. In deciding whether to exercise the waiver, and whether the possible healthcare and community service costs are beyond 'reason' or 'appropriateness', the department would have regard to the individual circumstances of the applicant (or their sponsor, if applicable): their ties to Australia, connections with their home country, various compelling and compassionate circumstances, the amount of income they earn (only applicable if they or their sponsor are already in Australia) to cover the potential healthcare costs, and whether they have skills that are in demand in Australia.[7]

3 'Significant Costs', ibid, 1 October 2019.
4 Ibid.
5 'Assessing PIC 4007 Waivers for Non-Humanitarian Visas', ibid.
6 'Undue', *Collins Online English Dictionary* (Collins, 2000) <https://www.collinsdictionary.com/dictionary/english/undue>.
7 Department of Immigration, Citizenship and Multicultural Affairs, Australian Government, 'The Health Requirement, Prejudice to Access', *Procedures Advice Manual (PAM3)*, Sch 4, 1 October 2019; 'Assessing PIC 4007 waivers for non-humanitarian visas'.

No difference between a disability and a disease?

The definition of a disability is provided in the *Disability Discrimination Act 1992* (Cth):

> *'disability'*, in relation to a person, means:
>
> (a) total or partial loss of the person's bodily or mental functions; or
>
> (b) total or partial loss of a part of the body; or
>
> (c) the presence in the body of organisms causing disease or illness; or
>
> (d) the presence in the body of organisms capable of causing disease or illness; or
>
> (e) the malfunction, malformation or disfigurement of a part of the person's body; or
>
> (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
>
> (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
>
> and includes a disability that:
>
> (h) presently exists; or
>
> (i) previously existed but no longer exists; or
>
> (j) may exist in the future (including because of a genetic predisposition to that disability); or
>
> (k) is imputed to a person.
>
> To avoid doubt, a *disability* that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.[8]

Some parts of the definition use the words 'illness' or 'disease' or state that the presence in the body of some organisms that cause a disease or an illness is a disability. This definition, in the author's opinion, is out of date and does not reflect the modern understanding of disability. The *Disability Inclusion Act 2014* (NSW) gives a more modern and inclusive definition that does not 'label' people with a disability as ill, correctly focusing on the concept of impairment instead:

> Disability in relation to a person, includes a long-term physical, psychiatric, intellectual or sensory impairment that, in interaction with various barriers, may hinder the person's full and effective participation in the community on an equal basis with others.[9]

The definition emphasises that it is only because of the 'clash' between the impairment and the barriers which exist in our natural and built environment that people may not be able fully and actively to participate in the life of the community. Unlike those who are ill, they may not need treatment, but governments certainly need to take measures to adapt the environment around these individuals in a way which would enable people with disabilities fully to realise

8 *Disability Discrimination Act 1992* (Cth) s 4 ('disability').
9 *Disability Inclusion Act 2014* (NSW) s 7 ('disability').

their potential. In its definition of a 'person in a target group', the *Disability Inclusion Act 2014* also contributes to the development of non-discriminatory disability practices:

> [A 'person in a target group'] is a person who has a disability, whether or not of a chronic episodic nature, that:
>
> (a) is attributable to an intellectual, cognitive, neurological, psychiatric, sensory or physical impairment, or a combination of any of those impairments, and
>
> (b) is permanent or likely to be permanent, and
>
> (c) results in a significant reduction in the person's functional capacity in one or more areas of major life activity, including, for example, communication, social interaction, learning, mobility, decision-making, self-care and self-management, and
>
> (d) results in the need for support, whether or not of an ongoing nature.[10]

The focus of the definition is again on the word 'impairment', which is permanent, and not on words such as 'disease' or 'illness'. The definition is also important because, in the author's opinion, by identifying the areas of life in which the person's functional capacity is affected, it actually incudes the areas where a special approach, equipment or facilities may be needed so that the government can adapt these environments to the needs of a person with an impairment or provide individual support. All of these may potentially affect the government immigration policy and calculations of 'significant cost' in the policy of the Department of Home Affairs, even though the department would certainly not be guided by a New South Wales statute.

The *Disability Discrimination Act 1992* (Cth) provides a definition of the term 'discrimination' which applies to people with disabilities. It is also stated that such discrimination can be direct or indirect:

> **5 Direct disability discrimination**
>
> (1) For the purposes of this Act, a person (the *discriminator*) *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.
>
> (2) For the purposes of this Act, a person (the *discriminator*) also *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
>
> (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.
>
> (3) For the purposes of this section, circumstances are not *materially different* because of the fact that, because of the disability, the aggrieved person requires adjustments.

10 Ibid ('person in the target group').

6 Indirect disability discrimination

(1) For the purposes of this Act, a person (the *discriminator*) *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:

(a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and

(b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and

(c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.

(2) For the purposes of this Act, a person (the *discriminator*) also *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:

(a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and

(b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and

(c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

(3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.

(4) For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.[11]

On the one hand, it can be assumed that discrimination on the basis of disability is a direct form of discrimination since the Department of Home Affairs, as 'the discriminator', treats the aggrieved person — an applicant with a disability — less favourably only on the basis of their disability. On the other hand, it may be argued that this discrimination has at least some features of indirect discrimination given that the discriminator, through the Migration Regulations, requires the aggrieved individual to comply with a requirement, specifically the one relating to health. Because of their disability, the individual is not able to comply with the requirement, which disadvantages them severely.

The similarity between direct and indirect discrimination is in their reference to the concept of 'reasonable adjustments'. In the case of direct discrimination, the discriminator does not make, or propose to make, reasonable adjustments, and the failure to do so results in a discriminative treatment of the disabled individual. In the case of indirect discrimination, the aggrieved person would be able to comply with the requirement if reasonable adjustments were made by the discriminator, but the discriminator does not do so or proposes not to do so. This has a disadvantaging effect on the person with the impairment. In other words, an inclusive environment is to be created. Certain measures to improve the inclusion of people with disabilities are part of plans of some states and territories in Australia:

11 *Disability Discrimination Act 1992* (Cth) ss 5–6.

12 Requirement for disability inclusion action plans

(1) Each public authority must, from the day prescribed by the regulations, have a plan (a *disability inclusion action plan*) setting out the measures it intends to put in place (in connection with the exercise of its functions) so that people with disability can access general supports and services available in the community, and can participate fully in the community.

(2) In preparing its disability inclusion action plan, a public authority:

(a) must consult with people with disability and have regard to any guidelines issued under section 9, and

(b) may consult with individuals or other entities the authority considers appropriate, including the Disability Council.

(3) A disability inclusion action plan must:

(a) specify how the public authority proposes to have regard to the disability principles in its dealings with matters relating to people with disability, and

(b) include strategies to support people with disability, including, for example, strategies about the following:

(i) providing access to buildings, events and facilities,

(ii) providing access to information,

(iii) accommodating the specific needs of people with disability,

(iv) supporting employment of people with disability,

(v) encouraging and creating opportunities for people with disability to access the full range of services and activities available in the community, and

(c) include details of the authority's consultation about the plan with people with disability, and

(d) explain how the plan supports the goals of the State Disability Inclusion Plan, and

(e) include any other matters prescribed by the regulations.[12]

In the author's opinion, adjustments have to be made by the discriminator where it is physically possible to do so, and Australia has to do this as part of its national and international obligations not to discriminate against people with disabilities. These adjustments would be changes or adaptations to the natural and built environment, providing disabled people with better access to all kinds of public places. There would thus be no need to include so much individual support in the health assessment of a person with 'mild' and even 'moderate' disabilities.

The terms 'mild' and 'moderate' in reference to disabilities are used by the Department of Home Affairs in its booklet *Notes for Guidance for Disability Services*.[13] The booklet is used by case officers to calculate the financial implications of disabilities and consider 'prejudice to access' to services to which people with impairments need to have access. If adjustments

12 *Disability Inclusion Act 2014* (NSW) s 12.
13 Department of Immigration and Border Protection, *Notes for Guidance for Disability Services* (November 2017).

are made, some disabilities will become 'cheaper', as less government support will be necessary. Lower health costs will possibly help more people to comply with the health requirement.

It is obvious that governments are obliged to make such adjustments in any case because, if they are not made, people who are socially salient will be prevented from exercising their right to take part in a wide range of public and private spheres of interaction — for example, receiving public benefits and social services, making career and educational choices, embarking on employment opportunities, and choosing accommodation and housing.[14] It is the duty of the government to make sure that the built environment is inclusive of people with disabilities. Jonathan Wolff calls these policies 'status enhancement' for people with disabilities, implying that 'changes to social, material and cultural structure are made in order to modify the structural mediating factors between impairment and adverse consequences':[15]

> An individual's status is improved in the sense that external barriers to achievement are removed and so the person will have a wider range of opportunities … For disabled people, and especially those with mobility problems, status enhancement is also likely to take a material and cultural form. Physical access to places can be improved, technology can be adapted to meet the needs of a wider range of people, and employers, shop-keepers and other citizens can come to treat disabled people in the same way as they treat others. To the degree it is successful, status enhancement 'cancels out' impairment, turning disability into 'difference'. It is important to note that, typically, status enhancement is a collective, rather than individualized, approach, in that it can improve the opportunities of many people without acting directly on any of them.[16]

For example, under current departmental policy a prospective migrant with decreased mobility would require a high level of individual support and would be several times over the 'significant cost threshold'. They would also feel miserable because they have to comply with the 'health requirement' and are being treated differently from everyone else. In the current situation, the Australian Government 'highlights' their impairment instead of treating them seamlessly. Instead of enhancing their status, departmental policy puts them into an even more vulnerable position, amplifying the lack of mobility that makes them different from other individuals. If the infrastructure had been planned better for the people who can propel themselves in a wheelchair and more had been done to make workplaces accessible, potentially the costs would have been lower.

Similarly, for a blind person, all visual information should have been provided in sound or the Braille code so that the blind can have the same experience as the people who can see. For a deaf person, sign language should be taught to and used by operators and staff of all public and entertainment venues, and not only community service venues which assist people with that type of impairment. In other words, it is the duty of the Australian Government to design an inclusive world, because this has to be done anyway in order to improve the wellbeing and exercise of freedom of its own citizens who live with impairments. If the environment were made inclusive, the costs incurred by accepting migrants with disabilities would be lower. This view is also advanced by Douglas Mackay — an American scientist and researcher on international immigration. He gives similar advice to Canadian

14 Douglas MacKay, 'Immigrant Selection, Health Requirements, and Disability Discrimination' (2018) 14(1) *Journal of Ethics and Social Philosophy* 66.

15 Jonathan Wolff, 'Disability, Status Enhancement, Personal Enhancement and Resource Allocation' (2009) 25 *Economics and Philosophy* 51.

16 Ibid.

lawmakers (currently, Canadian immigration legislation uses the term 'excessive demand', the definition of which also includes the 'cost' element, as opposed to the terms 'significant cost' and 'undue' cost, which are used in Australian migration law):

> [T]here may be cases in which the admission of a prospective immigrant with a disability is likely to lead to and 'excessive demand' on Canada's health and social services only because Canada has not fulfilled its duty to ensure that people are not disadvantaged because of morally arbitrary features. For example, … a deaf prospective immigrant would satisfy the definition of 'excessive demand', but that full compliance with its duty of inclusion would require Canada to structure its social world in a way that is fully inclusive of people whose hearing is limited or absent, eg, by requiring all citizens to learn sign language. In this case, admission of a deaf prospective immigrant would only be likely to result in an 'excessive demand' on Canada's health and social service programs — ie, require certain forms of assistance, — because Canada has not complied with its duty of inclusion. If Canada had done so, the prospective immigrant in question — as with deaf Canadians — would not require any form of assistance to live and work. [17]

The author shares Mackay's opinion. If any government that accepts foreign migrants took all the measures to create an inclusive environment for its own citizens with impairments as well as for prospective migrants, this would make a substantial contribution to non-discriminatory practices. This is exactly what people with disabilities expect from decision-makers: an egalitarian manner of assessment. To do this, the impediments that prevent disabled people from being able to look after themselves, subsist and be productive should be removed. Furthermore, where necessary, proper infrastructure should be created:

> Canada would have available a nondiscriminatory means of preventing the admission of such immigrants from resulting in an 'excessive demand' on its health and social service programs — namely, designing its social world in an inclusive way, and this redesign would not require the imposition of an undue burden on Canada since Canada would have a duty of justice to carry it out anyway.[18]

Similarly, should all the conditions to deliver an inclusive world be created fully by the Australian Government for the benefit of both its citizens and new arrivals with disabilities, which would inevitably decrease the amount of the 'cost threshold' and enable some people to meet the health requirement then, in the author's opinion, Australia would be thought to have fulfilled its non-discrimination obligations.

However, this does not mean that intending migrants should put the health and life of Australian citizens and existing permanent and temporary residents at risk. The country might then find itself in a situation where the interests of an Australian citizen might be in conflict with the interests of the non-citizen visa applicant. This mostly concerns those with disabilities who might require organ transplantation in the near future and where a donor might be sought. Whether it is a 'prejudice to access' for PIC 4005 or 'undue prejudice to access' for PIC 4007, a certain amount of discrimination against a disabled overseas person may seem lawful and morally right. If this category of individuals is not discriminated against then an Australian citizen or permanent resident would be discriminated against unjustly, and protecting one's population, including their life and health, is one of the major roles of any government, including the Australian Government.

17 MacKay, above n 14, 67.
18 Ibid.

Therefore, the norms that prevent visas from being granted to non-citizen applicants who may impose excessive pressure on medical and community services, the supply of which cannot possibly be increased quickly by better management of hospitals and the healthcare system, should remain in place. The same should apply in the case of organ transplants where organs are in short supply if the increase of such supply is unrealistic in the short term and could potentially lead to a choice between the life and health of an Australian citizen or resident and that of a foreign resident. This view is shared by a number of scientists, including MacKay, who suggests that the government should apply the same approach in Canadian circumstances:

> One might argue that this is the wrong way to compare the purposes of Canada on the one hand and prospective immigrants on the other. Instead, one might suggest, one might simply compare the interests of Canadian residents that would be promoted … with the interests of prospective immigrants that would be set back by this policy. To take a simplistic example, suppose that a prospective immigrant with end-stage renal disease wishes to be admitted to Canada because she is unlikely to secure a life-saving kidney transplant in her country of residence, and her chances are much better as a resident of Canada. Suppose that, given the limited supply of kidneys for transplantation in Canada, admitting this prospective immigrant will mean that a citizen of Canada with end-stage renal disease will be unable to secure a life-saving kidney.[19]

MacKay believes that, although in such a case the interests of the prospective migrant and the interests of the citizen may seem to be the same, priority should be given to the citizen's needs, and failure to do so is unjust. Excluding and discriminating against a non-citizen can be the only justifiable policy because it would serve the morally right purpose of safeguarding the country's own citizens:

> Canada has a right and duty of justice to fulfill its morally important purposes, whereas the prospective immigrants in question have no right or claim of justice to secure admission in Canada. When Canada admits the prospective immigrant with end-stage renal disease, knowing the consequences for its own citizens of doing so, all else being equal, it fails to realize a morally important purpose that it has a right and duty of justice to realize: promoting the health of its citizens. By not admitting the prospective immigrant in question, by contrast, Canada violates no right nor fails to fulfill some claim of justice. An injustice occurs when Canada fails to promote its citizens' health but not when it excludes a prospective immigrant who has no claim to residency.[20]

If we look at the definition of 'discrimination on the basis of disability' suggested by the United Nations *Convention on the Rights of Persons with Disabilities* in the light of MacKay's thoughts, it may seem that no discrimination takes place when the migrant is not accepted because of their disability, as they have 'no claim to residency' and accepting them is at the discretion of the Australian Government:

> 'Discrimination on the basis of disability' means 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.[21]

19 Ibid 70.
20 Ibid 71.
21 *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106 (entered into force 3 May 2008), Article 2 ('discrimination on the basis of disability').

The Convention affirms that people with disabilities should be able to enjoy the same human rights as all other people. One of those basic rights is the freedom of movement, asserted by Article 13 of the *Universal Declaration of Human Rights*:

> **Article 13.**
>
> (1) Everyone has the right to freedom of movement and residence within the borders of each state.
> (2) Everyone has the right to leave any country, including his own, and to return to his country.[22]

From the Article's wording it is obvious that individuals, including individuals with a disability, can exercise their right to free movement within the border of their own state. This does not imply that they will be able to move freely internationally. They have the right to leave their country of residence; however, this does not mean that any other country, including Australia, is under a legal obligation to accept them and grant them a visa. It should first exercise the duty of taking care of its own citizens, whose state of health may be equal to that of the state of health of the non-citizen. At the same time, Australia's international obligations require that disabled individuals have equal treatment and equal benefit of the law:

> 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.
>
> 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
>
> 4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.[23]

Currently, intending migrants with a disability cannot receive an equal benefit of the law because the Migration Regulations prescribe discriminative criteria against them. For example, a mechanical engineer with no impairment who would meet the health requirement would benefit from the law and be able to have their visa granted, while a mechanical engineer in a wheelchair would not be able to do so, although they are completely equal in satisfying all other criteria: age, a profession that is in the skilled occupation list, a skill assessment from a relevant skilled assessment authority, language proficiency, and character and other criteria. Furthermore, even if the disability was that of the child of the main applicant — that is, both the applicant and their spouse have no disability and there is no doubt about them contributing to Australia equally to all other migrants — the whole family unit would still fail to meet the health requirement because of the Australian 'one fails, all fail rule'.

The Australian Migration Regulations and the policy of the Department of Home Affairs seem to be even more punishing to people with disabilities in the light of Article 18 of the *Convention on the Rights of Persons with Disabilities* and *Optional Protocol*:

22 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), Article 13.

23 *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106 (entered into force 3 May 2008), Article 5.

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 by ensuring that persons with disabilities:

    a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;

    b) Are not deprived, on the basis of disability, of their ability to obtain, possess and 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;

    c) Are free to leave any country, including their own;

    d) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.[24]

The *Convention on the Rights of Persons with Disabilities* uses the term 'liberty of movement' instead of the term 'freedom of movement', which is used in the *Universal Declaration of Human Rights*, and, while the Declaration implies movement within the borders of the disabled people's own country, the Convention grants them the right to be an applicant in immigration proceedings to a foreign country and not to be discriminated against in such proceedings on the basis of their disability. Australia certainly acts as a discriminator in this case.

Discrimination against migrants with disabilities who have to undertake a health examination in order to satisfy the health requirement largely resides in the fact that neither the statutory provisions nor the departmental policy differentiate between people with diseases and people with disabilities, although these two groups of individuals are completely different. Treating a disability as a disease is, in the author's opinion, very much a relic of the past.

Disability is a type of impairment that may affect one or several bodily functions, yet in many cases it will still allow the individual to live a long and productive life and contribute to the society without putting excessive pressure on the community and health service system. Under current policy, a person who is deaf may be refused a visa, but it is doubtful whether a person with such a disability would incur significant treatment costs and could be considered under the same provisions as would a person with HIV or an end-stage hepatitis B.

The department in its policy uses two different terms that apply to health issues — namely, 'health condition' and 'disease', in this way implying that disability is a type of health condition and not a disease. However, the rules for calculating the 'significant cost' are, in fact, the same for both categories. The fact that decision-makers identify people with disabilities to be a burden to the Australian health system shows that decision-makers are not expected to treat these two classes of persons differently when they exercise their powers.

24 Ibid, Article 18.

MacKay, however, believes that there is a strong overlap between 'socially costly' health conditions and disabilities. At the same time, he does not deny that prospective immigrants are often discriminated against only because of their disability and suggests that the 'discrimination in question is a form of direct, or intentional discrimination'.[25] However, contrary to this argument on the interconnection of disease and disability, Australian lawmakers saw the need to recognise the difference between these two, thus making a first step towards putting an end to the discriminative treatment of individuals with disabilities, by making a recommendation as part of the Joint Standing Committee on Migration report *Enabling Australia: Inquiring into the Migration Treatment of Disability*:

> The Committee recommends that the Australian Government amend Schedule 4 of the Migration regulations 1994 (in particular Public Interest Criteria 4005, 4006A and 4007) so that the assessment of diseases and medical conditions are addressed separately from the assessment from the assessment of conditions as part of a disability.[26]

In more than nine years since the report was tabled, this and many other recommendations in it have not become part of Australian official migration policy, let alone part of the statutory framework. In the author's opinion, it is necessary to review the findings of the report, since they offer a range of ways to rethink the health assessment process and 'significant cost' calculation and mitigate the discriminative effect it has had on disabled immigrants for many years now.

The intent of Australia to discriminate against people with disabilities can be right in a very limited number of cases. It may be morally right and justified if it concerns the Australian 'prejudice to access policy', which is the equivalent to Canadian 'mortality and morbidity' concepts. Although they are phrased differently, these concepts describe the same issue — the issue which arises when the demand for a particular healthcare service, operation, treatment or organ transplant significantly exceeds its supply. This seems to be a viable argument in favour of the exclusive and discriminatory practices that both countries have in the treatment of visa applicants with disabilities.

However, it should be acknowledged that 'prejudice to access' is the only argument that can justify the discrimination against disabled people by the provisions of migration legislation. Increasing the 'cost threshold', including by making the environment more inclusive of people with different types of impairments, differentiating between a disability and a disease and assessing the potential contribution that the disabled migrant and members of their family unit could make to Australia are vital steps towards enhancing the treatment of foreign migrants and eradicating discrimination.

A humiliating experience

The cases of people with disabilities who are quite independent and can support themselves without being a burden to the system, yet are refused visas and even deported, are not rare and give rise to sympathy all over Australia. Applicants whose visas are refused while they are in Australia resort to the Administrative Appeals Tribunal to challenge decisions of the

25 MacKay, above n 14, 50.
26 Joint Standing Committee on Migration, Parliament of Australia, *Enabling Australia: Inquiring into the Migration Treatment of Disability* (2010) 58.

Department of Home Affairs.[27] In practice, however, such appeals are unsuccessful because, with the current health regulations in place, there is almost no chance for a positive appeal outcome if the person does not satisfy the health requirement prescribed by PIC 4005.

There is a glimmer of hope for those who expect a health waiver to be exercised under PIC 4007. The departmental officer might have failed to consider all compassionate and compelling factors, as well as the income and savings of the applicant or their sponsor to mitigate the potential 'significant costs' to the Australian healthcare system. This, on balance, might result in a favorable decision. However, other applicants, after the decision of the Department of Home Affairs is affirmed, have to resort to asking the Minister to make a more favorable decision under the Act.[28] Some of them admit that having to ask the Minister to act personally and grant them or their dependents a visa, attracting media attention to their case, is an emotionally draining and humiliating process.[29] For the applicants who were refused a visa while overseas and do not meet the health requirement, there are no appeal options at all.[30]

Blake and Lindauer have argued that it is necessary for a state to treat prospective immigrants in the same way as it would treat its own citizens. They believe that, by discriminating against prospective immigrants, governments do not wrong prospective immigrants, but they do wrong citizens who belong to the same socially salient group as prospective immigrants in question.[31] It may thus be argued that the way Australia treats applicants with disabilities can be an indication of a similar attitude to its own people who were born with or have acquired an impairment.

Recent minor changes introduced by the department 'silently'

It was unexpected and positive news when the Department of Home Affairs increased the 'significant cost' threshold from A$40 000 to A$49 000 per applicant for the new migration year which commenced on 1 July 2019. As strange as it may seem, most applicants found out about this change from media reports and not from departmental announcements.[32] This, however, cannot be deemed a giant leap forward in treating people with disabilities fairly.

First, an increase in the threshold was recommended in the 2010 report by the Joint Standing Committee on Migration. At the time the report was published, the threshold stood at a mere A$21 000:

27 *Migration Act 1958* (Cth) ss 347–350.
28 Ibid s 351.
29 Damian McIver, 'Two-Year-Old Boy Faces "Painful and Premature Death" as Deportation Looms', *ABC News* (online), 21 April 2019 <https://www.abc.net.au/news/2019-04-21/family-from-maldives-fight-sons-deportation-disabilty/11019598>.
30 *Migration Act 1958* (Cth) s 347(2).
31 Michael Blake, 'Discretionary Immigration' (2002) 30(2) *Philosophical Topics* 251; Matthew Lindauer, 'Immigration Policy and Identification Across Borders' (2017) 12(3), *Journal of Ethics and Social Philosophy* 280, quoted in MacKay, above n 14, 54.
32 Maani Truu, 'Exclusive: Government Quietly Relaxes Controversial Visa Policy Affecting People with Disabilities', *SBS News* (online), 5 August 2019 <https://www.sbs.com.au/news/exclusive-government-quietly-relaxes-controversial-visa-policy-affecting-people-with-disabilities>.

> The Committee recommends that the Australian Government raise the 'significant cost threshold' … to a more appropriate level. The Committee also recommends that the Department of Immigration and Citizenship quickly complete the review of the 'significant cost threshold'.[33]

Secondly, most people with the disabilities will still be over the threshold with their deemed healthcare costs and thus will be refused visas if their treatment and support costs are calculated in the way they are. Given the cost of medical and community support services in Australia, an increase in the figure of a mere A$9000 would not significantly increase the rate of visa grants to disabled individuals.

However, another change is far more significant. Previously, if the condition an individual had was a permanent and predictable one (and most if not all disabilities fell within the scope of such description), the health and support costs were calculated over the period of the expected lifetime of the person. An assessment was made of how long the person would live to make sure they did not exceed the given limit before the end of their life. Under the amended policy, the maximum period over which the costs will be calculated is 10 years.[34] This is an important step which is long overdue. Canada, for instance, has had this norm in its statutory regulations for many years.[35]

Canadian research and experience

In a 2018 article, Douglas MacKay comprehensively and meticulously looked at the legal, philosophical and societal aspects of discrimination of immigrants on the ground of disability and the extent to which such discrimination can be justified.[36] He also suggested legislative change and proposed an alternative wording for the Canadian *Immigration and Refugee Protection Act* 2002.

However, the statutory provisions for calculating the 'excessive demand' as well as the threshold itself were reviewed by the Canadian government before MacKay's article was published and it is not yet known whether other statutory changes, including the ones suggested by MacKay, will follow. It is certain, though, that even the current wording of the Canadian statutes that regulate the health requirements for migrants are less discriminative than the relevant Australian statutory provisions and departmental policy. Sections 38(1) and 38(2) of the Canadian *Immigration and Refugee Protection Act* provide:

> **Health grounds**
>
> 38(1)A foreign national is inadmissible on health grounds if their health condition
>
> (a) is likely to be a danger to public health;
>
> (b) is likely to be a danger to public safety; or
>
> (c) might reasonably be expected to cause excessive demand on health or social services.

33 Joint Standing Committee on Migration, above n 26, 58.
34 Department of Immigration, Citizenship and Multicultural Affairs, Australian Government, 'The Health Requirement, Significant Costs', *Procedures Advice Manual (PAM3)*, Sch 4, 1 October 2019.
35 *Immigration and Refugee Protection Regulations*, SOR/2002-227, reg 1 ('excessive demand').
36 MacKay, above n 14.

Exception

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

(a) has been determined to be a member of the family class and to be the spouse, common-law partner or child of a sponsor within the meaning of the regulations;

(b) has applied for a permanent resident visa as a Convention refugee or a person in similar circumstances;

(c) is a protected person; or

(d) is, where prescribed by the regulations, the spouse, common-law partner, child or other family member of a foreign national referred to in any of paragraphs (a) to (c).[37]

The provisions regarding public health and safety are very similar to the relevant Australian provisions of the *Migration Regulations 1994* (Cth). The only difference is that Australia puts additional weight on making sure that the applicant is free from tuberculosis before their visa application is approved. However, the wording of s 38(1)(c) of the Canadian Act is critically different from the relevant provisions of the *Migration Act 1958* (Cth).

The words 'might reasonably be expected' express the same modality as the Australian 'would be likely to'. However, the focus of the Canadian legislation is on a *reasonable* expectation, which certainly requires greater justification on the part of the decision-maker than the Australian mere likelihood. The Canadian concept of 'excessive demand' is an equivalent of the Australian concept of 'significant cost'. It is obvious that these have a different meaning.

'Excessive demand' means *too much, more than the system can actually bear* or *more than it is reasonable or possible to fund*, even if the state budget on health care is managed and planned in the best possible way. 'Excessive demand' inevitably exceeds reasonable expectations in a way that becomes a burden to other taxpayers in the community, not only in terms of cost but also in terms of access to the services. The Australian 'significant cost', however, seems to view the cost as an independent figure, without connection to the capacity of the system or the actual ability of the state to fund such healthcare spending to support the health and wellbeing of the intending migrant.

It is easy to change the 'significant cost' in policy. Basically, any cost can become significant in the policy of the decision-maker, whether it is A$1000 or A$10 000. It is the amount that the decision-maker considers to be significant; it is not the demand that puts pressure on the system and compromises the system's capacity to fulfil its obligations to existing users — Australian citizens and non-citizen permanent visa holders. The Canadian *Immigration and Refugee Protection Regulations* provide the following definition for the term 'excessive demand':

excessive demand means

(a) a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive

37 *Immigration and Refugee Protection Act*, SC 2001, c 27, s 38 (1), (2).

years immediately following the most recent medical examination required under paragraph 16(2)(b) of the Act, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or

(b) a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents. (*fardeau excessif*).[38]

The demand and cost of both health services and social services are taken into account and the amount is specified in a very straightforward way — the maximum limit is the total cost of average Canadian per capita health and social services over a period of five or no more than 10 years. The longer period will apply if the health condition or disability is likely to entail further provision of services over the five-year period. Interestingly, the Canadian legislation uses the Australian term 'significant costs', although in plural, to define the demand for services that is likely to persist and extend beyond the five-year period immediately after the medical examination, although it is not used to define the period of five consecutive years.

On the contrary, the Australian 'significant cost' threshold is defined by the departmental policy and not the statutory provisions. It is therefore legislatively not connected with any objective indicators like the Canadian 'per capita health and social services cost' and so acts 'on its own', without being a reflection of whether the cost would be too great to enable the Australian health and community services system to take on an intending migrant, including a migrant with a disability. Also, the Department of Home Affairs has no obligation to review the amount unless they consider it necessary.

The Canadian *Immigration and Refugee Protection Regulations* also provide a definition for 'health services' and 'social services':

health services means any health services for which the majority of the funds are contributed by governments, including the services of family physicians, medical specialists, nurses, chiropractors and physiotherapists, laboratory services and the supply of pharmaceutical or hospital care. (*services de santé*)

social services means any social services, such as home care, specialized residence and residential services, special education services, social and vocational rehabilitation services, personal support services and the provision of devices related to those services,

(a) that are intended to assist a person in functioning physically, emotionally, socially, psychologically or vocationally; and

(b) for which the majority of the funding, including funding that provides direct or indirect financial support to an assisted person, is contributed by governments, either directly or through publicly-funded agencies. (*services sociaux*).[39]

Australia, on the other hand, uses the terms 'health care' and 'community services'. 'Health care' is not defined in the regulations, but, presumably, it has the same meaning as the Canadian 'health services'. 'Community services', according to the *Migration Regulations 1994* (Cth), 'includes the provision of an Australian social security benefit, allowance or pension'. This means that an individual with a disability has an entitlement to receive money to live on because their ability to work might be affected by their state of health.

38 *Immigration and Refugee Protection Regulations*, SOR/2002–227, reg 1 ('excessive demand').
39 Ibid ('health services', 'social services').

It seems that the definition of Canadian 'social services' is much broader because, in addition to financial support (whether direct or indirect) from governments and government-funded agencies, it also involves being looked after at one's home or a residence, using individual support services, enjoying social interaction and being able to study based on one's particular needs, including those that have arisen because of the person's specific type of disability.

There may be an impression that the Canadian term 'social services' discriminates more against individuals with disabilities than the Australian term 'community services' because it encompasses all the residential, educational and social services they might take advantage of and thus might impose an 'excessive demand' on the system. However, this is not the case for two reasons. First, although it is not included in the definition provided in the Migration Regulations, community services in Australia actually include the same services that are included in the Canadian social services. Secondly, the definition of 'excessive demand' in the Canadian *Immigration and Refugee Protection Regulations* explicitly states that the 'cost threshold' is a figure obtained by multiplying Canadian health and social services per capita by five or, if the condition is likely to remain (which is the case with most types of disabilities), by multiplying Canadian health and social services per capita by 10. It is therefore obvious that disabled people are more likely not to be above the 'cost threshold' and meet the health requirement in Canada than they are in Australia:

> The new cost threshold is equal to 3 times the Canadian average for health and social services. For 2018, the value is $99,060 over 5 years (or $19,812 per year). The department will update the cost threshold every year.[40]

The cost for 10 years would be double the amount, making the figure almost CAD$200 000 and making it possible for a lot of migrants with disabilities to become admissible. This is in contrast to the revised Australian threshold of A$49 000. The Canadian statutory provisions on the health requirement reflect the changes made in 2018 and, in the opinion of the Hon Ahmed Hussen, the former Canadian Minister of Immigration, Refugees and Citizenship, are a critical step towards greater inclusion of people with disabilities.[41] The Hon Kirsty Duncan, the former Canadian Minister of Science and Minister of Sport and Persons with Disabilities, has stated she believes that the changes are long overdue and she expects they will enable more families to come to Canada.[42]

Importantly, unlike in Australia, where the department may change the cost threshold when and if they deem necessary to do so, the cost threshold in Canada is part of the concept of 'excessive demand', which is defined by a statute, relying on the 'per capita' health expenditure. Immigration, Refugees and Citizenship Canada therefore needs only to rely on the figure reported annually by the Canadian Institute for Health Information and to comply with the statutory definition.

40 Immigration, Refugees and Citizenship Canada, 'Excessive Demand: Calculation of the Threshold, 2018' (Minister of Immigration, Refugees and Citizenship, 2018).

41 Immigration, Refugees and Citizenship Canada, 'Government of Canada Brings Medical Inadmissibility Policy in Line with Inclusivity for Persons with Disabilities' (Media Release, 16 April 2018) <https://www.canada.ca/en/immigration-refugees-citizenship/news/2018/04/government-of-canada-brings-medical-inadmissibility-policyin-line-with-inclusivity-for-persons-with-disabilities.html>.

42 Ibid.

Having the cost threshold embedded in the statutory framework is much less discriminative and more unbiased than the system currently in place in Australia — that is, where the 'significant cost' is defined by the departmental policy and the department can keep to the old views on disability and inclusion. In the light of high costs of Australian health care, a change from A$40 000 to A$49 000 in the 'cost threshold' is a formality and does not principally change the approach to migrating individuals and their family members who have impairments.