



MEMORANDUM

HIV/AIDS Legal Centre Incorporated (NSW) ABN 39 045 530 926
AFAO Immigration Review Workshop

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BACKGROUND BRIEFING: HIV and Immigration

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Background

Context of the Review

Following the publicity surrounding the Dr Moeller case late last year, Bill Shorten Minister for Disabilities and Chris Evans Minister for Immigration announced a review of the Migration Treatment of Disability criteria. The terms of reference for the review were recently released and are listed below.

Dr Moeller's application for permanency (which was based on his skills as a medical doctor) was refused because his child had Down's syndrome, and therefore failed the health criteria. This decision was based on the 'one out all out' principle, and as a consequence of one family member failing the health criteria all members of the family applying for a visa were refused. This case attracted considerable media attention late last year. (See *Attachment A: Press Release, Minister Evans 26 November 2008*).

Terms of Reference for the Review

The Committee shall:

Report on the options to properly assess the economic and social contribution of people with a disability and their families seeking to migrate to Australia.

Report on the impact on funding for, and availability of, community services for people with a disability moving to Australia either temporarily or permanently.

Report on whether the balance between the economic and social benefits of the entry and stay of an individual with a disability, and the costs and use of services by that individual, should be a factor in a visa decision

Report on how the balance between costs and benefits might be determined and the appropriate criteria for making a decision based on that assessment.

Report on a comparative analysis of similar migrant receiving countries.

Questions for consideration

These are some questions that for consideration in the context of this Review:

- A Should there be health criteria on visas for conditions (other than threats to public health)?
- B If so, to which visas should the health waiver apply? Is a waiver system appropriate, or should there be exemptions for certain disabilities or conditions?
- C If we are to have a waiver, how should it operate: as the current model does, or differently?
- D What do other countries do on health in immigration? What models do we want to follow?

UN Convention on the Rights of Persons with Disabilities

Australia signed the UN Convention on the Rights of Persons with Disabilities on 30 March 2007, ratifying the Convention on 17 July 2008, and ratifying the Protocol on 21 August 2009. Ratifying the Convention, the Commonwealth undertakes to abide by the obligations, rights created and intentions of the convention, and conform its laws accordingly. (See *Attachment B: Extracts from the UN Convention on the Rights of Persons with Disabilities*)

Immigration law is not currently subject to the Disability Discrimination Act. For years, it has uniformly engaged discriminatory regulations against applicants with disabilities seeking entry to Australia citing health criteria. While the Department of Immigration have rationalised that they apply to the same criteria to everyone and they are not concerned with the disability but with the costs an applicant represents in terms of likely medical costs; the bare facts are the regulations single out persons with disabilities and either refuse them or make different requirements on them.

The Federal Government is looking for ways to better conform Immigration law to Australia's obligations under international conventions such as the Convention on the Rights of Persons with Disabilities. Importantly, there is no definition of disability provided in the Convention; rather, the Convention uses what is known as the 'social model' of disability in which disability is defined as a product of the way the society treats the person, rather than as an innate quality of the person. The Handbook [to the Convention] for Parliamentarians provided by bodies of the UN provides rationale for this and some guidance. (See *Attachment C: Extracts from the Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities*).

History

The current legislation as to applicants for visas meeting the health criteria set out in the Migration Act 1958 has operated from 1989 and regulations regarding health criteria for visas under the Migration Regulations 1994 have operated in substantially their current form from 1995, with the current health waiver provisions in Schedules to the Regulations being unaltered since 1999.

The current regulations mean HIV positive persons fail the health requirements and need to argue for a waiver of the requirements to be granted a visa. The waiver is based on balancing the estimated likely lifetime health costs against all other factors in favour of the visa being granted.

Applicable visas

Permanent visas

Until 2009 the health waiver was available principally for the '*family formation visas*' such as partner visas, child and adoption visas and the like.

The waiver is available for offshore humanitarian sponsored visas, where there is an Australian citizen or permanent resident supporting the application; but no waiver is available for un-sponsored offshore humanitarian visas. An automatic waiver is applied to successful onshore protection visa applicants. (This means that the health criteria is effectively not considered at all for such applicants, except as it may form part of the protection claim).

Skilled Migration Visas

Prior to 2009 there were no permanent skilled migration visas allowing the health requirements to be waived. During 2009 States and Territories have been gazetted for the purposes of four visa subclasses in the Skilled Migration stream. From 14 September 2009 only NSW and SA have not agreed to become “participating states” for the purposes of visas under the Employer Nomination Scheme, the Labour Agreement Nomination Scheme, the State/Territory Regional Established Business Visa and the Regional Sponsored Migration Scheme. This means that a person who proposes to live within the participating States and is sponsored for one of the above Skilled Visas, may now seek a health waiver to obtain a visa for themselves and members of their family unit rather than being rejected under the no waiver and “one out all out” provisions.

Temporary visas

A health waiver is available for temporary work/business visa Subclass 457, and other similar employer/institution sponsored temporary work visas, although that waiver involves the sponsoring employer etc. agreeing to meet all the health costs assessed by the Medical Officer of the Commonwealth during the period of the visa.

Health waiver is not required where the applicant does not expect to incur medical costs or require medical treatment for the duration of the visa applied for. This effectively means that no waiver is required for tourist visa applicants who are not on treatment or are bringing their own medication. Visas of less than 12 months’ duration do not require a medical examination with blood testing, unless the person intends to work or study as a doctor, dentist or paramedic.

There is no waiver for student visa applicants, meaning that many students cannot come to Australia to study if they disclose their HIV+ status, although the issue is, as always, whether there will be “significant cost” to be incurred over the period of the visa. Under the current policy of the Government, the issue of significant cost arises if the Medical Officer of the Commonwealth estimates a cost of more than \$21,000 over a 5-year period. Student visas are granted for the duration of a course of study, so unless the course is under one year long, the health requirement will apply with no waiver available.

Thus while there may be no waiver available for a visa class, where the duration of the visa is less than 12 months and/or the applicant does not expect to require medical treatment or incur medical costs they may be granted a visa as they ‘meet health requirements’ for the visa. (*See Attachment D: Current list of visa subclasses for which the health waiver may apply*)

Process

Administrative Process

The waiver process is as follows:

Basic rules:

- All visas have a health criteria
- Only a limited number visas allow for a waiver of that criteria
- An HIV+ applicant will fail the health requirement (generally, except for tourist or < 12 month visas) and require waiver of the requirement (if available) in order for the visa to be granted

Process:

- Application for a visa is made.
- The applicant attends the appointed health service (these are provided by Health Services Australia (HSA) in Australia, or an approved 'panel doctor' overseas) for the health examination including a blood test,
- The Medical Officer of the Commonwealth (MOC) will make a report indicating the applicant fails the health requirement and giving an estimated cost for the applicant's condition
- The department must consider waiving the health requirement on applicable visas.
- Consideration of a waiver for permanent visas such as the family formation visa stream, those humanitarian sponsored visas where a waiver is available and the limited number of skilled visas where a waiver is available in all but two States, the Department must exercise a general discretion as to whether to grant a waiver in the particular circumstances. This involves a balancing of whether the applicant's "significant likely cost" to Australia for health care and community services is "not undue" in all the circumstances of the application.
- The Department of Immigration, on receiving the MOC report including the opinion of the MOC that there is a "significant cost" if the visa is granted, together with a dollar estimate of that cost, must forward a copy of that to the applicant and seek a response. In the case of visas for which no health waiver is available the Department's Code requires notice to be given to an applicant but there is little capacity to alter an MOC finding as to significant cost and inevitable rejection of the visa application. In cases where a health waiver is available, in the case of employer-sponsored and like visas it is simply a question of obtaining a written undertaking from the prospective employer/sponsor about payment of the medical costs. However, even if such a letter is obtained, the granting of the waiver is not automatic. In the case of permanent visa applications where a

waiver is available the response will deal with reasons why the applicant believes that the waiver should be granted in the case of themselves or the member of their family unit

- The applicant provides submissions in response to the MOC report arguing for the waiver to be applied and the visa granted
- The Department considers the waiver submissions (first the case officer, then referred to Canberra office) and decides the application.
- If the waiver is granted the visa may be granted if all other criteria are satisfied
- If the waiver is not granted the visa will be refused and the applicant or sponsor may apply for review at the Migration Review Tribunal (MRT).
- The MRT will go through the same process, but has historically been more generous in its decisions to recommend granting the waiver, and the visa.

Assessing the cost of HIV

For the HIV positive applicant, the Medical Officer of the Commonwealth (MOC) will make a report indicating the applicant fails the health criteria and giving an estimated cost for the applicant's condition as it:

'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'.

In making its report the MOC has regard to the 'Notes for Guidance for Medical Officers of the Commonwealth of Australia: Financial implications and consideration of prejudice to access for services associated with infection with human immunodeficiency virus and acquired immune deficiency syndrome (HIV/AIDS), 9 July 2008' (See *Attachment E*)

Test and considerations for the Health Waiver

An application for a waiver of the health criteria is considered based on whether:

'the granting of the visa would be unlikely to result in:

- undue cost to the Australian community or
- undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.'

[In the case of HIV conditions, the 'prejudice to access...[to] services' is not usually relevant. In the case of Hepatitis C (e.g. liver transplants) it may be.]

The Procedures Advice Manual (an internal advisory document for the Department of Immigration) provides guidance for the processing of the permanent visa categories where a health waiver is available. It states that:

‘...officers should consider the following in making this assessment:

- the opinion of the MOC -
- any compassionate or compelling circumstances
- whether the applicant has met all other visa criteria
- the ability or potential for the applicant and their supporters to mitigate costs
- the degree of care required, and the private care and support that is available
- other relevant factors

Officers should also taken into account the information regarding costs and prejudice to access provided at section 56 The MOC assessment.’

(See Attachment F: Extract from the Procedures Advice Manual 3, “Policy and Procedural Instructions for Officers Administering Migration Law”, Department Of Immigration and Citizenship).

Analysis of current scheme

Case law refinements

Since the commencement of the current scheme of ‘health criteria’ and ‘waiver’, there have been few refinements to the scheme via case law. Notable among those are the Seligman/Robinson/Applicant Y line of cases which were directed to the validity of the MOC report.

The decisions in these cases clarified that the MOC report should give an estimate of costs based on a hypothetical person with the same state or form of the condition as the applicant. This generalises rather than personalises to the applicant the MOC estimate of progression of health condition. The report must be relevant to applicant, referring to specialist and medical reports of the applicant’s condition. It must be reasonably near in time to the decision of the delegate.

The other line is the Bui case, which clarified that considerations in the Department’s decision regarding the waiver should take into account compelling and compassionate factors including social and cultural contributions of the applicant, and is not limited to an economic calculus of costs/benefits.

The MOC report

It is clear that the MOC report, if validly made, is determinative. This means that even if it is objectionable, it cannot itself be litigated beyond an internal MOC review. Solicitors do not usually recommend that clients seek a Review of the MOC decision, as this process is expensive and rarely, if ever, successful.

The MOC, via its agents [Health Services Australia onshore, and nominated Panel Doctors offshore] does not have specialist expertise in any medical condition. Recently it has improved the process of seeking reports of specialists, particularly in the HIV field.

Historically the MOC report routinely gave an estimate of \$250,000 lifetime medical and community services costs for HIV positive applicants. Obviously there are swings and roundabouts here, as some applicants may have fewer treatment options, or have not progressed (even after many years) to requiring treatment. Notably a recent HIV 2 positive applicant received the same costing despite the very different disease and treatment trajectory of that type.

Issues:

- *Should the MOC report be legally reviewable?*
- *Is the current costing scheme appropriate and appropriately applied?*
- *Should a specialist Doctor be making the costing?*

Considerations for the waiver

The current scheme for the health waiver has existed with widely varying application. In 2005 it was routine for practitioners to advise applicants that they would be refused a waiver at first by the Departmental delegate, and would have to endure perhaps two to five or more years uncertainty and undergoing a review at the Migration Review Tribunal (MRT), where they would be hopeful of a successful outcome.

Many applicants' relationships have foundered on the uncertainty of the wait and review process. The emotional and health costs in terms of stress have often been enormous, a factor particularly detrimental to HIV positive applicants.

More recently, the experience of obtaining health waivers has been more positive in terms of outcomes and the length of the process. Fewer applicants are having to seek a review at the MRT.

Issues:

- *Can the current process and considerations be refined to improve the process and ensure this current more positive administrative approach continues?*
- *Should considerations for the waiver be further clarified or expanded?*
- *Should the dollar figure cost estimate be removed?*

The waiver balances incommensurate considerations. It weighs the MOC estimate - a dollar figure (usually \$250,000) - against other, often non-economic, factors. As inflation reduces the impact of the \$250,000 estimate, the difficulty of weighing such different factors has eased somewhat. However, it remains difficult to balance an applicant's cultural and social contributions against a large dollar figure.

There is currently no guidance for the delegate as to how they should weigh up such diverse factors. There are difficult legal and policy questions involved in determining what further prescriptive criteria can be applied for policy makers considering applying a

waiver, and whether any appropriate weighting should be given to alternative relevant matters or whether it is preferable to retain a broader discretionary role for individual decision-makers.

Issues:

- *To which visas should the waiver apply?*
- *Should it apply to offshore humanitarian visas in the same way as it does for onshore protection visas?*

While not directly covered by the current review's terms of reference the review may consider, inter alia, the visas categories to which the waiver does or should apply, and whether disability-specific exemptions to the health criteria might be made.

There have been instances of offshore non-sponsored humanitarian visa applicants being refused due to their HIV status. There is no waiver for that visa category.

Anecdotally we understand this leaves some of the most vulnerable humanitarian applicants in poorly resourced refugee camps. There are instances of improper disclosure of HIV status within the refugee camp due to the health criteria issues. Such disclosures have resulted in stigmatisation and discrimination for those persons.

For offshore sponsored humanitarian applicants, a waiver exists. However the stress and discrimination issues raised by families waiting for a humanitarian visa outcome then finding it held up by a family member being diagnosed as HIV+ is significant.

There is usually no HIV counselling, post-test and diagnosis counselling available in such circumstances. This does not comply with best practice in Australia and like countries regarding HIV testing/diagnosis.

Health considerations mechanisms in immigration laws in other countries

Internationally, there appear to be, broadly stated, three approaches to HIV immigration:

- 1. No testing, no exclusions.** This is the policy for most advanced Western states (Switzerland, England) and some rising states (India) (See *Attachment G*)
- 2. Testing and some restrictions, with waiver available.** This is the policy in conservative colonial countries (Canada, NZ) (See *Attachment H*)
- 3. Required disclosure, testing and refused entry or deportation.** This is the case in a range of different countries (China, Russia, Sudan, USA) (See *Attachment I*)

Attachment J outlines the International Travel and residence regulations for people with HIV and AIDS produced by Deutsche AIDS-Hilfe e. V. (2008-2009)

Foundational to the considerations of this review is whether the current system should be improved or scrapped. There is certainly international precedent for the health criteria to

be dropped altogether. Whether the present Government and public sentiment would allow for such a radical reform, however, is a different question?

There may be a range of positions adopted by various agencies in the HIV sector. This sector will represent merely one affected group, albeit perhaps the largest single disability group relevant to immigration. While the sector may not agree on one view in respect of the current review and its prospects for effective reform of the current immigration regulations, we may be able to agree on aspiration goals and incremental positions towards such goals.

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Attachments:

Image 1: International HIV Travel restrictions at a glance, from ‘Health related travel and residence regulations’ by David Hans-U. Haerry, European AIDS Treatment Group Lecture Clinic for Infectious Diseases, Insel University Hospital Berne/CH, Oct 6 2008

Attachment A: Press Release, Minister Evans, 26 November 2008

Attachment B: Extracts from the UN *Convention on the Rights of Persons with Disabilities*

Attachment C: Extracts from the *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities*

Attachment D: Current list of visa subclasses for which the health waiver may apply

Attachment E : *Notes for Guidance for Medical Officers of the Commonwealth of Australia*: Financial implications and consideration of prejudice to access for services associated with infection with human immunodeficiency virus and acquired immune deficiency syndrome (HIV/AIDS), 9 July 2008

Attachment F: Extract from the *Procedures Advice Manual 3, “Policy and Procedural Instructions for Officers Administering Migration Law”*, Department Of Immigration and Citizenship

Attachment G: Countries requiring no testing, no exclusions, extracted from Attachment J

Attachment H: Countries requiring testing and some restrictions, waiver available, extracted from Attachment J

Attachment I: Countries requiring disclosure, testing and refused entry or deportation, extracted from Attachment J

Attachment J :*Travel and residence regulations for people with HIV and AIDS* produced by Deutsche AIDS-Hilfe e. V. (2008-2009)