Submission relating to the migration health rules and disability

By Nicol Szymanska

Why is Australia using the health requirements?
All non Australian citizens who are seeking for permanent or temporary stay in Australia are subject to some form of control. Such control can for instance be exercised through the health and character requirements as there has always been a limitation on admission of non-citizens that are a potential threat to the Australians in the Australian Migration Law.[1] These requirements 'are commonly known as the PIC (Public Interest Criteria)'[2] [3] and they are generally created to limit the negative impact of migration on the Australian society by not admitting people who can be a risk to Australia 'by virtue of their health or criminal propensities'.[4]

According to the Australian Department of Immigration and Citizenship the health requirements are used to maintain the high health standard since Australia has one of the best health standards in the world. Federal governments have always found screening the health of non-citizens a priority-matter.[5] More importantly the health criteria are created in order to protect the Australian community from being exposed to public health and safety risks.[6]
In addition one can think of the necessity for Australian permanent residents and citizens to have a good access to care and treatment. Disabled migrants can have a negative influence on the Australian care and treatment system and may therefore be refused a visa if 'they have a costly health condition or they require treatment, care or community services that are in short supply in Australia and the utilisation of these resources would result in Australian residents having to forego or wait longer for access'[7] [8].

However, there are some disadvantages using the health criteria. Applying these criteria has made the migration process more complicated, time consuming and demanding[9]. Short-term visitors and business visa applicants are experiencing these negative side-effects the most.
In addition, notable in regard to human rights, such as non-discrimination articles, is the fact that the health criteria make no distinction between a disease and a disability. Then, the eligibility for a Commonwealth government disability pension will be likely to result in a visa not being granted.[10] See for instance Shahraz Kiane's[11] case.

Furthermore, cases such as Imad v MIMA and Inguanti v MIMA show that MOC's find it hard to make positive recommendations in situations where applicants 'suffer from a disease

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[1] Mary Crock, *Draft Book*, Chapter 6, p. 10
[2] Vrachnas, Boyd, Bagaric, Dimopoulos, *Migration and Refugee Law in Australia: Principles and Practice in Australia Second Edition* (2007) p. 150
[3] Mary Crock, *Draft Book*, Chapter 6, p. 1
[4] Mary Crock, *Draft Book*, Chapter 6, p. 9
[5] Mary Crock, *Draft Book*, Chapter 6, p. 10
[6] http://www.immi.gov.au/allforms/pdf/1071i.pdf , page 1
[7] http://www.immi.gov.au/allforms/pdf/1071i.pdf , page 1
[8] Bagaric, Boyd, Dimopoulos, Tongue, Vrachnas, *Migration and Refugee Law in Australia: Cases and Commentary* (2005) p. 196
[9] Vrachnas, Boyd, Bagaric, Dimopoulos, *Migration and Refugee Law in Australia: Principles and Practice in Australia Second Edition* (2007) p. 150 p. 150
[10] Mary Crock, *Draft Book*, Chapter 6, p. 10
[11] Mary Crock, *Draft Book*, Chapter 6, p. 20

or condition that would see Australians in a similar state of health receiving some form of government assistance or using community resources'[12].

Who is required to meet the health criteria?
Depending on the visa class sought different health criteria must be met according to the Regulations. An exception has been made for diplomatic or short-term medical treatment applicants resulting in the fact that they do not have to meet the health-requirements.[13] People applying for a protection visa have only to be assessed and do not necessarily have to pass the health test.[14]

In nearly all permanent visa-applications all members of the family unit (meaning all applicants, spouse and dependants) must meet the health criteria. According to Section 140 of the Migration Act not doing so will lead to the rejection of the whole family unit, which I find remarkable as the applicants should be treated as 'individuals'. However, when applying for a temporary visa only the included family members must be assessed against the health requirements. In order to determine whether or not the criteria are met all permanent visa applicants must be medically examined, have an x-ray (if at least 11 year old applicant, otherwise if appropriate on clinical grounds) and undergo HIV/AIDS testing (if at least 15 year old applicant). The costs of the aforementioned examinations have to be paid by the applicants themselves.[15] Often criticized is also the fact that permanent-visa applicants have a health test 'very closely before being granted a visa'.[16]

A temporary visa applicant on the other hand, is usually not required to undergo a full health assessment. Most likely the visa will be granted when the temporary visa applicant is applying for a stay of three months or less, when he or she is in general good health, not planning to work in a 'health sensitive environment' and when he or she does not belong to a group or class that is likely to get health problems. But, at all times the government is able to cancel a visa when wrong or misleading information is provided by the applicant in regard to the health-criteria.[17]

However, even when meeting the criteria mentioned above, an applicant will have to undergo full health assessment when he or she is of 'special significance' which means that the person, while in Australia, is likely to visit places such as child care centers or is exposed to 'blood-borne' contact. In regard to the last category one can think of tattooists, sex workers, intravenous drug users and medical workers. Also parents who are planning to stay more than 6 months and pregnant woman must undergo health testing.[18]

Migration Act and Regulations

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[12] Mary Crock, *Draft Book*, Chapter 6, p. 17
[13] Mary Crock, *Draft Book*, Chapter 6,, p. 11
[14] Vrachnas, Boyd, Bagaric, Dimopoulos, *Migration and Refugee Law in Australia: Principles and Practice in Australia Second Edition* (2007) p. 150
[15] http://www.immi.gov.au/allforms/pdf/1071i.pdf, page 1
Bagaric, Boyd, Dimopoulos, Tongue, Vrachnas, *Migration and Refugee Law in Australia: Cases and Commentary* (2005) p. 195
[16] Mary Crock, *Draft Book*, Chapter 6, p. 12
[17] Mary Crock, *Draft Book*, Chapter 6, p. 11
[18] Mary Crock, *Draft Book*, Chapter 6, p. 11

Visas for non-citizens are regulated in Part 2 Division 3 of the Migration Act 1958. According to Section 29 it is the Minister who has the primary power to grant visas.

The Migration Act 1958 describes what a 'health criterion' is and Schedule 4 of the Migration Regulations 1994 lists the health criteria.

> ***health concern non-citizen*** means a non-citizen who is suffering from a prescribed disease or a prescribed physical or mental condition.
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> ***health criterion***, in relation to a visa, means a prescribed criterion for the visa that:
> (a) relates to the applicant for the visa, or the members of the family unit of that applicant; and
> (b) deals with:
> (i) a prescribed disease; or
> (ii) a prescribed kind of disease; or
> (iii) a prescribed physical or mental condition; or
> (iv) a prescribed kind of physical or mental condition; or
> (v) a prescribed kind of examination; or
> (vi) a prescribed kind of treatment.[19]

A distinction can be made between three health tests. Schedule 4 Item 4005 regulates the first test to be applied for all permanent and provisional visas in general. A few exceptions are made for interdependent, child, partner and specific humanitarian visas.
Temporary visa applicants have to use Item 4006A. However, exceptions can be made as well by the Minister as the Minister can waive a few health requirements of a 'nominated employer' if the employer 'has given the Minister a written undertaking that the relevant employer will meet all costs related to the disease or condition'[20].[21] Then, Item 4007 describes the third test to be applied for specific close family members, 13 temporary visas, humanitarian and business visas.[22]

There is a criterion that applies to all applicants which describes that all applicants should be free from prescribed diseases, which means free from tuberculosis in particular as this is the only prescribed disease mentioned in Schedule 4. In addition Schedule 4 requires the applicant to be 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[23]. Furthermore it is not allowed to have a disease or condition that would be likely to result in a:
(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.[24]

Notable in regard to these last criteria ((A) and (B)) is the last sentence added to subparagraph (c) (ii) of regulation 4005 which says: 'regardless of whether the health care or community services will actually be used in connection with the applicant'. The officer has to focus 'on

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[19] Section 5 (1) Migration Act 1958
[20] Schedule 4, Item 4006 A
[21] Mary Crock, *Draft Book*, Chapter 6, p. 11
[22] Mary Crock, *Draft Book*, Chapter 6, p. 12
[23] Migration Regulations, Schedule 4, 4005 (b)
[24] Migration Regulations, Schedule 4, 4005 (c) (ii) (A) (B)

the burden that would be posed by a person in the applicant's diagnostic category'[25] and not on the actual burden. I believe that this regulation is questionable and gives the impression of being unfair at a certain point. Does it implicate that an applicant can't have a disease that would be likely to result in a significant cost or prejudice the access to health care, even when it is certain that these services won't be used in connection with the applicant? Given the hypothetical situation where it is absolutely certain that the services won't be used, it seems strange that an applicant should fulfil these requirements.

According to Heerej J in the Imad v MIMA[26] case the criterion used in Item 4005 refers to a hypothetical situation where a person suffers from the same disease or condition as the applicant. This regulation is not supposed to predict whether the admission of an applicant will actually result in a significant cost. In fact it is a qualification of the applicants disease or condition whereupon is checked whether the disease or condition could lead to significant cost to the community.[27] 'The rules operate on theoretical costs rather than what a person will actually consume'[28].

For the purpose of deciding whether an applicant satisfies the health requirements listed in Schedule 4, the Minister is to take the opinion of the Medical Officer of the Commonwealth to be correct.[29] In practice, cases such as Seligman[30] and Blair v MIMA[31] show that it is difficult to challenge the opinion of a MOC. However, regulations 4006A and 4007 do provide the Minister the possibility to apply the 'health waiver'.[32] Item 4007 (2) explains that the Minister can waive the criteria of 'significant cost' and 'prejudice the access' if:

- all other requirements for the grant of a visa are met; and
- the Minister is convinced that 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 Bui v MIMA[33] French, North and Merkel JJ found that the waiver will only be applied when it is evident that the cost to the Australian community is likely to be significant, whereupon the Minister needs to verify that this likely significant cost 'will nevertheless not be undue'[34]. In other words, 'there is the discretionary element of the ministerial waiver'. Within this discretionary element 'compassionate circumstances' or 'compelling circumstances' may play a role.[35]

The compassionate and compelling circumstances (also addressed in PAM 3 chapter 90.3) refer to situations where in it 'may be to Australia's benefit in moral or other terms to admit a

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[25] Mary Crock, *Draft Book*, Chapter 6, p. 16
[26] [2001] FCA 1011.
[27] [2001] FCA 1011. Imad v MIMA
[28] Mary Crock, *Draft Book*, Chapter 6, p. 18
[29] Migration Regulations 2.25A,
[30] (1999) 85 FCR 115 ('Seligman').
[31] [2001] FCA 1014.
[32] Vrachnas, Boyd, Bagaric, Dimopoulos, *Migration and Refugee Law in Australia: Principles and Practice in Australia Second Edition* (2007) p. 152
[33] [1999] FCA 118.
[34] Vrachnas, Boyd, Bagaric, Dimopoulos, *Migration and Refugee Law in Australia: Principles and Practice in Australia Second Edition* (2007) p. 152
[35] Vrachnas, Boyd, Bagaric, Dimopoulos, *Migration and Refugee Law in Australia: Principles and Practice in Australia Second Edition* (2007) p. 152
[1999] FCA 118. [46] [47]

person even though it could be anticipated that such a person will make some significant call upon health and community services'.[36] See for example case *N01/04446*[37], decided by the Migration Review Tribunal, where the MOC found that the likely cost to the Australian Community of a HIV diagnosed applicant was $250.000. After examining Schedule 4 Item 4007 together with the policy guidelines in PAM3[38], the personal qualities and resourcefulness of the applicant and the consequences of the visa not being granted, Member Duignan judged that the cost for Australia would not be 'undue'.[39]

On the other side, Finkelstein J's judgement, that it would not be a burden to the Australian community, in regard to the question whether or not a 'self-funded' HIV positive applicant would be a burden to the community, got overruled on appeal.[40] The different judgements show that the matter of significant cost is unclear.

Furthermore, Siopis J describes the correct test to be applied by the MOC when deciding about Item 4005 (c) in *Robinson v Minister for Immigration and Multicultural and Indigenous Affairs*[41]. In this case the MOC decided that a child (of the applicant) with a mild Downs Syndrome would be likely to result in a significant cost to Australia whereupon the court rejected the generalised assessment made by the MOC[42] since there was no determination made of the exact form or level of the boy's Down Syndrome by the officers.[43] The court judged that such a decision has to be made on a case-by-case basis which means that the MOC has to take a closer look at the actual disease or condition in stead of looking at a generalised assessment. Furthermore the court said that a disease as Down's Syndrome is not identified by the Parliament as a prescribed disease such as Tuberculosis[44]. A person who suffers from Tuberculosis fails the health requirement only because Tuberculosis is a specifically listed disease. According to the Court, not identifying Down's Syndrome as a prescribed disease, supports the statement that the 'Parliament intended the assessment to be made on a case-by-case basis', taking into consideration 'the form or level of the disease or condition actually suffered by the applicant'[45]. In addition the court noted that the words 'free from' that are used in Item 4005 (a) mean that an applicant must be free from the disease or condition in any form. The words 'disease or condition' being used in Item 4005 (c) (i) and (ii) do not presume the aforementioned.[46]

As judged in both Imad v MIMA[47] and Inguanti v MIMA[48] it is inappropriate for a medical officer to examine a particular applicant's financial situation. An objective test must be

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[36] Vrachnas, Boyd, Bagaric, Dimopoulos, *Migration and Refugee Law in Australia: Principles and Practice in Australia Second Edition* (2007) p. 152
[37] [2004] MRTA 1772 (29 March 2004).
[38] About the PIC 4007 Health Waiver
[39] Vrachnas, Boyd, Bagaric, Dimopoulos, *Migration and Refugee Law in Australia: Principles and Practice in Australia Second Edition* (2007) p. 153
[40] Mary Crock, *Draft Book*, Chapter 6, p. 18
[41] [2005] FCA 1626 (10 November 2005).
[42] Vrachnas, Boyd, Bagaric, Dimopoulos, *Migration and Refugee Law in Australia: Principles and Practice in Australia Second Edition* (2007) p. 153
[43] Mary Crock, *Draft Book*, Chapter 6, p. 15
[44] Schedule 4, Item 4005 (c)
[45] Vrachnas, Boyd, Bagaric, Dimopoulos, *Migration and Refugee Law in Australia: Principles and Practice in Australia Second Edition* (2007) p. 153
[46] Vrachnas, Boyd, Bagaric, Dimopoulos, *Migration and Refugee Law in Australia: Principles and Practice in Australia Second Edition* (2007) p. 153
[47] [2001] FCA 1011.
[48] [2001] FCA 1046.

applied and therefore there is no error in judgement when the applicant's family financial capacity is not taken into consideration. The financial situation of the applicant or family is not relevant when applying Item 4005 of Schedule 4.[49]

I believe that, by using the words 'significant cost' the Australian government presumes that it is willing to pay some costs, as long as they are not significant. But, questionable is what 'small costs' to the Australian community would refer to. As mentioned above, a visa can be rejected on the only basis that an applicant is eligible for a Commonwealth government disability pension. Such a pension will probably not fall into the 'small cost' to the Australian community.

Determining what a significant cost is
The Procedure Advice Manual (PAM3), which is a guideline that contains the policy requirements for examination[50], sets out that the assessment of costs made by the MOC has to cover 5 years for permanent visas and the visa period for temporary visas. In practice officials will adopt the criterion of 'significant cost to the community' in a situation where the cost of applicant's treatment exceeds $20.000 over 5 years.

Migration Regulations 1.03 gives the definition of community services:
community services includes the provision of an Australian social security benefit, allowance or pension.

Conclusion:
Both the Migration Act as the Regulations contain some items that in my opinion are questionable under Australia's non-discrimination obligation under the UN Convention on the Rights of Persons with Disabilities.

In addition the following case, judged by the Human Rights Committee, may be relevant.
In this case the visas of three people where denied because of the fact that the 7 year old, in the application included child, suffered from a mild case of 'spina bifida'. On the basis of the childs 'spina bifida' it was the MOC that decided that this disease would be likely to result in significant costs to the Australian Community through 'further orthopaedic surgery, regular attendance at specialist clinics and likely long-term dependence upon income support'[51]. Also according to the Minister the costs to the Australian community would be significant. In addition it was not taken into consideration whether the person would actually use the community services.[52]

Although the committee observed that the communication was inadmissible the 'author' tried to use certain articles of the UN Covenant on Civil and Political Rights. The author made a few interesting points. His complaint was that he and his family have been discriminated (article 26 of the Covenant) as the decision was made upon ground of disability. 'Essentially, the author attacks the specific health criteria contained in the Migration Act 1958 and associated regulations, which are stated as seeking to minimize risks to public health and community services, to limit public expenditure on health and community services, and to maintain the access of Australian citizens and permanent residents to those services under

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[49] Mary Crock, *Draft Book*, Chapter 6, p. 16 - 17
[50] Vrachnas, Boyd, Bagaric, Dimopoulos, *Migration and Refugee Law in Australia: Principles and Practice in Australia Second Edition* (2007) p. 151
[51] Case CCPR/C/77/D/978/2001, 2.2
[52] Case CCPR/C/77/D/978/2001, 2.3

which the decision to refuse the applications was made.' [53] The author points out that Section 52 of the Disability Discrimination Act 1952, which proscribes discrimination upon the basis of disability, specifically excludes that Act from applying to discriminatory provisions of the Migration Act 1958.'[54]

Other relevant articles to the immigration process as mentioned in the UN Convention on the Rights of Persons with Disabilities might be general articles against discrimination such as article 4 (1) (b), 4 (1) (d) and 5 (2). Australia has done a research on whether its immigration processes comply with the UN Convention on the Rights of Persons with Disabilities articles. They concluded that the processes are 'based on legitimate, objective and reasonable criteria and would not constitute discrimination under international law.'[55]

Conclusion
In my opinion, the Australian government is not achieving its stated objectives by using some parts of the health-requirements. By using unclear criteria such as 'significant cost' it should at least take into consideration whether an applicant will actually make such costs. It is too difficult to determine whether there will be a significant cost in a particular case. The evidence of the aforementioned can be found in case law, where a few criteria had to be 'explained'.

A solution to this problem would be to no longer use the 'significant cost to the Australian community' criterion and require applicants to arrange private health insurances, even prior to their departure or stay in Australia. This may be a better option as this actually does solve the problem of 'significant costs' to the community. By making applicants take private health insurances, the government is protecting the Australian community from significant costs.

In addition, the Regulations could provide in a few more exceptions. For example, in situations where people can actually prove that they won't be a burden to the community. The Regulations do provide in a few possibilities to waive the health requirements already in situations where there is a sort of 'safeguard'. For example, Schedule 4, Item 4006 A says that the Minister can waive a few health requirements of a 'nominated employer' if the employer 'has given the Minister a written undertaking that the relevant employer will meet all costs related to the disease or condition'[56].[57]

Furthermore I have my doubts about 'taking into consideration the financial situation of an applicant'. On one hand I believe that the financial situation of an applicant must be examined as the admission of a rich applicant would never result in a significant cost to the Australian community. It seems unfair that applicants who certainly won't make any significant costs should be rejected. On the other hand it could cause discriminatory situations where 'more wealthy' people would be able to enter Australia much faster. Because of this last argument, I would not recommend to screen an applicant's financial situation.

Then, it is questionable what will prejudice the access of an Australian citizen or permanent resident to health or community services. It is all based on uncertain factors as the Minister has to make a decision about things that may apply in the future, during the stay of the

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[53] Case CCPR/C/77/D/978/2001, 3.1
[54] Case CCPR/C/77/D/978/2001, 3.1
[55] Mary Crock, *Draft Book*, Chapter 6, p. 20
[56] Schedule 4, Item 4006 A
[57] Mary Crock, *Draft Book*, Chapter 6, p. 11

applicant. On the other hand it is not always possible to 'designate monetary values' to particular disease.

An option would be to require an applicant to report on their own economic and social contribution. This could prevent the MOC from being too much focussed on the negative aspects of their entry. In addition it is not possible for the MOC to exactly determine what kind of economic and social contribution an applicant will bring. See for example Mima v Seligman[58] where 'both the talents of the child and the degree of family support'[59] would prevent the child from being a burden on the community as the child could probably bring a social contribution to the community.

In the end I believe that when applicants get their permanent visa granted, the Australian government should take care of them. By granting a visa the government has accepted the person and it's 'disabilities or diseases'. This may be different in regard to temporary-visa applicants, as their short stay could result in massive costs for Australia. The main difference is that permanent residents can bring a bigger contribution to the community. This will most likely compensate the costs that are made for the particular resident.

[58] (1999) 85 FCR 115 ('Seligman').
[59] Mary Crock, *Draft Book*, Chapter 6, p. 14