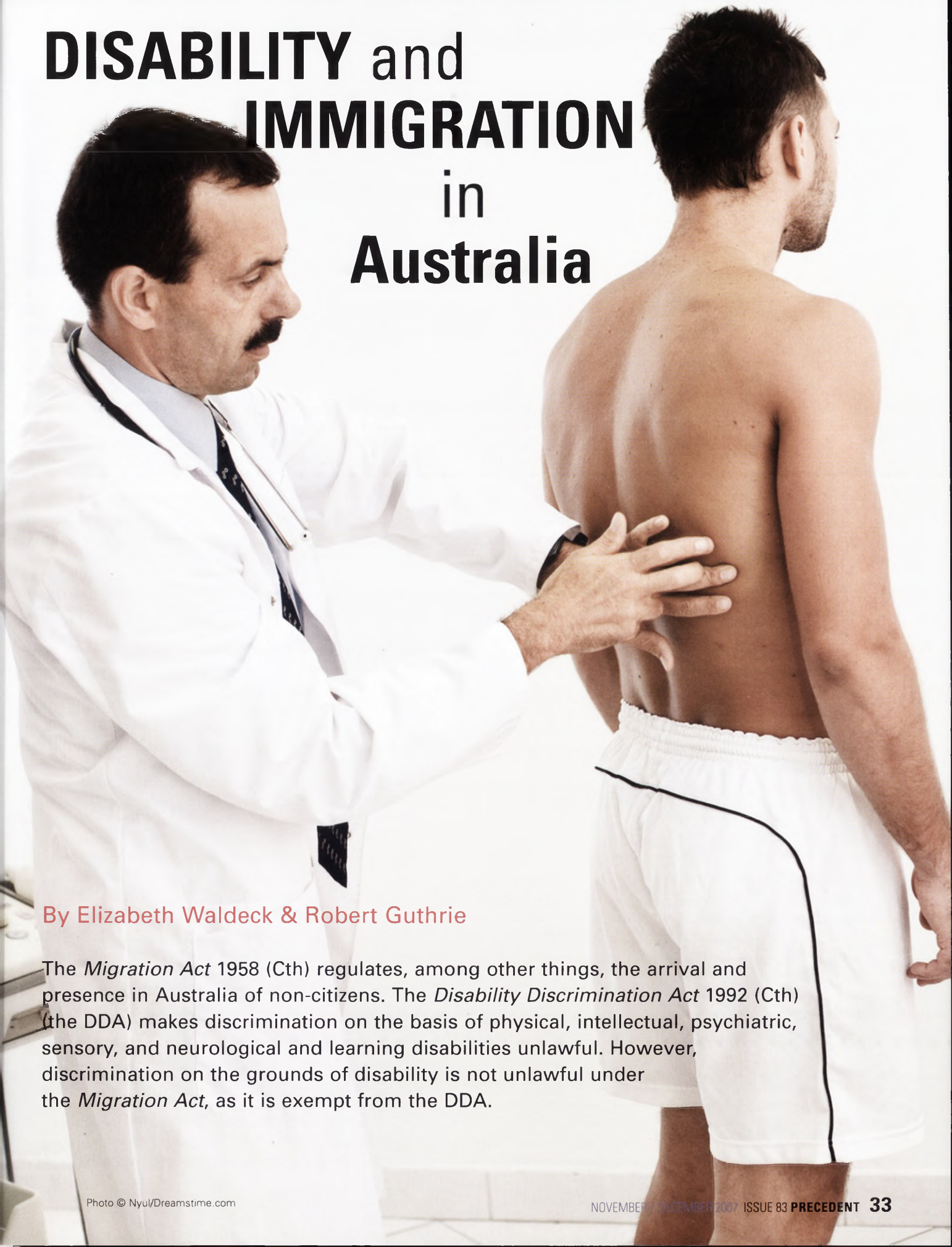
DISABILITY and IMMIGRATION in Australia



By Elizabeth Waldeck & Robert Guthrie

The *Migration Act* 1958 (Cth) regulates, among other things, the arrival and presence in Australia of non-citizens. The *Disability Discrimination Act* 1992 (Cth) (the DDA) makes discrimination on the basis of physical, intellectual, psychiatric, sensory, and neurological and learning disabilities unlawful. However, discrimination on the grounds of disability is not unlawful under the *Migration Act*, as it is exempt from the DDA.

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THE *MIGRATION ACT* 1958 (CTH)

The *Migration Act* and its regulations[1] regulate the arrival and presence in Australia of non-citizens, and the selection criteria and application processes for all visa categories. Migrants' applications for visas to come to Australia are determined by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). To obtain a visa, migrants must pass health and character checks and meet certain other entrance criteria. Migration regulations prescribe criteria for visas of specified classes.[2] Regulation 2.25A generally provides that in determining whether an applicant satisfies visa criteria, the minister must seek the opinion of a medical officer of the Commonwealth (MOC) as to whether a person[3] meets the health requirements of public interest criteria (PIC), at Schedule 4 of the regulations.

An MOC is a medical practitioner appointed by the minister for the purposes of the regulations.[4] The minister is required to accept that the opinion of the MOC on referred matters is correct, for the purposes of deciding whether a person meets a requirement or satisfies a criterion.[5] PIC 4005 states that the health requirements are satisfied if the applicant:

- is free from tuberculosis;
- does not suffer from a disease or condition that is or may result in the applicant being a threat to the Australian health system or public; and
- does not suffer from a disease or condition that is such that 'a person' who has it would be likely to require health care or community services, the provision of which would be likely to result in a 'significant cost' to the Australian community ('limb 1'), or prejudice the access of an Australian citizen or permanent resident ('limb 2'), regardless of whether the healthcare or community services will actually be used in connection with the applicant.

Section 65 of the *Migration Act* provides that if, after considering a valid application, DIMIA is satisfied that the health criteria have been met (along with other criteria), the visa is granted. If DIMIA is not so satisfied, the visa application is refused.[6] If the visa application is refused because one family member does not satisfy the health criteria, the whole family unit will not be allowed to migrate.

If a visa is refused because the applicant does not satisfy the health requirements, the applicant has the right to have the decision reviewed before the Migration Review Tribunal (MRT).[7] The MRT, like the minister, is bound to accept as correct the opinion of the MOC on prescribed matters;[8] however, it is open to the MRT to seek a further opinion from the MOC,[9] or request a complete review from a review medical officer of the Commonwealth (RMOC).

SOME KEY PRINCIPLES IN DISABILITY DISCRIMINATION LAW

Under the DDA, discrimination on the basis of disability is unlawful.[10] Section 3 of the DDA sets out the objects of the Act, which seek to eliminate, as far as possible, direct and indirect discrimination on the grounds of disability, making such discrimination unlawful in a wide range of areas including employment, education, sport, access to premises, accommodation, in the administration of Commonwealth laws and programs, and in the provision of goods, services and facilities.

Whereas discrimination on the basis of disability is unlawful under the DDA, it is not under the *Migration Act*.

Generally speaking, discrimination is any practice that makes distinctions between individuals or groups so as to disadvantage some and advantage others. In Australia, unlawful discrimination can be direct or indirect. Direct disability discrimination occurs when a person with a disability is treated less favourably, by reason of their disability, than a person without the disability would be treated in the same or similar circumstances.[11] In *Hills Grammar School v Human Rights and Equal Opportunity Commission*[12] (the *Hills Grammar School* case), the appellant school admitted directly discriminating against a student who suffered from spina bifida, by refusing to enrol her. The school attempted to make out the defence of unjustifiable hardship: that is, that the needs of a child with spina bifida would impose an unjustifiable hardship on the school. The defence failed, thereby resulting in unlawful direct discrimination. An important feature of the *Hills Grammar School* case was that the court determined that it was necessary, when considering the issue of unjustifiable hardship, to have regard to the individual needs of the particular student and the costs thereof, rather than considering the possible costs for a hypothetical student with the same medical condition as the applicant.

Indirect discrimination occurs when a requirement or condition that applies to everyone has an unfair effect on a person or a particular group of people with a disability, and the requirement is not reasonable, having regard to the circumstances of the case.[13] For example, in *Scott v Telstra Corp Ltd*,[14] Telstra had a blanket policy of providing standard handsets for telephones, but refused to provide any alternative telecommunications devices, including teletypewriters, for people with a hearing impairment. Telstra argued that the service it provided was the telephone network and that the provision of handsets was additional to that service. However, the Human Rights and Equal Opportunity Commission (HREOC) found that the service provided was more broadly communication over the network, and that the requirement that the network be accessed by standard handsets was clearly one that a disproportionate number of people with profound hearing loss could not access and was therefore unreasonable in the

circumstances. The refusal to provide those with profound hearing loss with teletypewriters amounted to indirect discrimination. Again, the key element in this decision was the importance of assessing the particular needs of the individual applicant, rather than hypothetical needs and costs. Indeed, the DDA requires the relevant court or tribunal to consider the particular circumstances of each case and the needs of each applicant.

THE HEALTH REQUIREMENTS – PRELIMINARY ISSUES UNDER THE *MIGRATION ACT*

In making a determination in relation to the health criteria, the MOC must firstly assess the applicant's disease or other health condition and then assess objectively whether 'a person' with such a disease or condition would be likely to require healthcare or community services involving significant cost to the community, or prejudice access of a citizen. Whether the applicant will actually use healthcare or community services is irrelevant.

In *Inguanti v Minister for Immigration and Multicultural Affairs,*[15] it was argued that PIC 4005 was invalid on the basis that it was illogical and unreasonable to assess the likely costs regardless of whether the care would actually be used by the applicant. However, holding the regulation to be valid, Heerey J determined that it was reasonable to expect a MOC to assess the nature of a disease or condition and its seriousness in terms of its likely objective future requirement for healthcare, but not reasonable to expect a MOC to inquire into the financial circumstances of a particular applicant. As discussed below, Heerey J was more concerned with the process adopted by the MOC in compiling the required medical opinion.

What objective test is used under PIC 4005?

Importantly, 'a person' referred to in PIC 4005 is 'not the applicant, but a hypothetical person who suffers from the disease or condition which the applicant has'.[16] In *Inguanti,* Heerey J held that the MOC's opinion was not authorised by the regulations because the MOC interpreted PIC 4005 as requiring that the *applicant's* condition, and not a hypothetical person's condition, would be likely to result in a significant cost to the Australian community.[17]

This aspect of the regulations was reviewed by Finkelstein J in *X v Minister for Immigration and Multicultural and Indigenous Affairs.*[18] Counsel for the applicant in this case submitted that the criterion under PIC 4005 indicates a broad application, in that the *nature and extent of the particular symptoms of the disease or condition* suffered by the applicant must be applied to the hypothetical person. In this case, the applicant was infected with HIV but was, according to the examining doctor who provided a report to the RMOC:

> 'a healthy man on combination treatment for which he pays and will continue to pay while he is the holder of a temporary residence visa … the costs … borne by the Australian healthcare system for the period of the visa he seeks, that being a period of only four years … is a total(ly) insignificant cost…'[19]

However, Finkelstein J, following *Inguanti*, agreed with the respondent who submitted that PIC 4005 requires the RMOC to focus upon the position of 'a hypothetical person who suffers from HIV' since, according to Finkelstein J, the terms of the provision focus on the disease or condition generally, not upon the particular condition of the applicant. This approach clearly contrasts with the approach taken in relation to cases determined under the DDA,[20] which requires a tribunal to have regard to the individual's impairment or medical condition, rather than a hypothetical individual with the impairment or medical condition.

What is 'significant cost' to the Australian community?

The minister, in having regard to the MOC's opinion as to whether a person meets the health requirements, must also have regard to the MOC's opinion as to the likelihood of significant cost to the Australian community.[21] Interestingly, at first instance in the case of *Seligman v Minister for Immigration and Multicultural Affairs,*[22] Foster J expressed surprise that a MOC is entrusted with the task of assessing the significant costs to the Australian community, rather than an appropriate member of the DIMIA.[23] There is no prescribed definition of what costs are to be regarded as significant, but the MOC may be guided by a multiple of average annual per capita health and welfare expenditure >>

Under the *Migration Act*, the individual's circumstances are not taken into account when assessing relevant costs, as they are under the DDA.

for Australians.[24] On appeal, it was held that the minister is entitled and obliged to take the opinion of the MOC as correct only if the opinion is of a kind authorised by legislation.[25]

The facts in *Seligman* were that the Seligman family applied to migrate to Australia from South Africa under a Senior Executive visa. On all points except for the health of their 22-year-old son Gregory, the Seligmans qualified for the visa. Gregory Seligman had borderline intellectual functioning and, despite positive specialist reports as to his future, an undertaking by his parents to set up a trust fund for his support, an offer of employment in Australia, and a Certificate in Personal Computer and Office Skills being held by Gregory, DIMIA refused the visa. The application was refused on the basis of a MOC report that concluded that Gregory's condition would be likely to result in a significant cost to the Australian community in the areas of healthcare and community services. The MOC prepared the report on the basis of available medical and radiological reports and stated that it would be likely that Gregory's condition would meet 'medical impairment criteria for long-term income support in Australia. This would be costly to the taxpayer…' Foster J found in favour of the Seligmans, concluding that there was no apparent evidence before the MOC that Gregory was likely to meet 'the medical impairment criteria for long term income support', which would result in significant cost to the Australian community.[26]

An appeal was dismissed by the full court in *Minister for Immigration and Multicultural Affairs v Seligman*.[27] The court stated:

> 'The assessment made by the Medical Officer of the Commonwealth that Gregory would meet medical impairment criteria for long term income support in Australia and that this would be costly to the taxpayer, appears to have been the only link in the chain between his observations as to Gregory's condition and the condition that there was likely to be a significant cost to the Australian community in the area of healthcare or community services. It is apparent on this basis that he had no regard to the actual likelihood that there would be a significant cost to the Australian community.'[28]

In other words, the MOC had applied the wrong criteria, which resulted in the opinion being outside the scope of the regulations.

The issue of how the MOC should assess significant costs was revisited recently in *Robinson v Minister for Immigration and Multicultural and Indigenous Affairs*.[29] The Robinsons, together with their son David, who suffered from a mild form of Down's syndrome, underwent medical examinations as part of the visa application process. DIMIA advised the Robinsons that David did not meet the health requirements as set out in PIC 4005, and refused their application.

The matter went on appeal to the Federal Court. Siopis J found in favour of the Robinsons, holding that the MRT had made a jurisdictional error by relying upon an RMOC opinion that was clearly invalid, because it failed to consider the actual nature and extent of David's level of impairment. Siopis J explained that both the MOC and RMOC are required by law to ascertain the exact form or level of disease or condition suffered by a visa applicant, and then assess whether the provision of health care or community services to a hypothetical person with that level of disease or condition would result in a significant cost to the Australian community. The RMOC's opinion made no reference to the fact that the level of David's Down's syndrome was 'mild', making reference only to a generic form of the condition.

Significantly, Siopis J pointed out that the regulations listed tuberculosis as the only disease that would preclude a potential migrant entry to Australia. This indicated that Parliament intended the assessment made under PIC 4005 to be done on a case-by-case basis by reference to the form or level of the disease or condition actually suffered by the applicant.[30]

The principle in *Robinson* was adopted in *Ramlu v Minister for Immigration and Anor*.[31] In *Ramlu*, the RMOC assessed an applicant who suffered from both arthritis and diabetes. In forming an opinion, the RMOC stated that the applicant did not satisfy PIC 4005. Driver FM accepted the opinion of the RMOC with respect to the arthritis, but found that the RMOC had failed to assess the diabetes in accordance with PIC 4005; namely, to determine the exact nature and extent of the diabetes suffered by the applicant before applying the objective test. Driver FM also referred to the RMOC's opinion that the applicant had renal disease, stating that there was no evidence to support that opinion and it was therefore unlikely to be taken into account under the first limb of PIC 4005. Additionally, Driver FM stated that the RMOC had not made it clear as to which disease was the one to which the public criteria related and that, significantly, the MRT did not consider this in taking the opinion of the RMOC as correct, thus resulting in a jurisdictional error. As a result, Driver FM found in favour of the applicant and remitted the matter to the MRT for re-determination according to law.

HIV and AIDS sufferers are likely to raise issues of concern in relation to the health criteria. According to Peter Papadopoulos, MOCs have generally been of the opinion that people living with HIV/AIDS (PLWHAs) do not meet the applicable health criteria as set out in Schedule 4 since, depending on their condition and length of stay, they are likely to present a significant cost to the community in terms of healthcare and/or community services. Based on *Robinson*, the opinion of an MOC or RMOC in relation to a PLWHA can be valid only where it ascertains the exact nature of

the PLWHA's condition and impairment and provides a cost assessment accordingly.[32]

CONCLUSIONS

The exemption of the *Migration Act* from the operation of the DDA allows DIMIA officials to discriminate against applicants with disabilities, on the grounds that they might burden the Australian health system and economy as a whole. In applying the relevant provisions of the *Migration Act*, it is clear that some families may suffer hardship because of this exemption.

The cases above are examples of applicant families who were able to have their cases reconsidered due to jurisdictional error on the part of the MOCs. The applicants attempted to mitigate the potential burden on the Australian health system by giving undertakings to pay the costs involved. Arguably, the *Migration Act* should be amended to allow applicants to make a case that, even where their disability may be a potential cost to the Australian community, they have the means to reduce or defray those costs.

It is also important to note the contrast between the means by which cases are assessed under the *Migration Act* and the DDA. Costs relevant to the unjustifiable hardship test under the DDA are those relating to the individual concerned, which allows their particular circumstances to be taken into account. But under the *Migration Act*, the individual's circumstances are not taken into account. Once the nature and extent of their disability has been ascertained, the costs to the Australian community are calculated against a hypothetical individual. It would be more appropriate to require DIMIA to estimate the costs of the applicant's healthcare based upon their known individual medical requirements. While this would, of course, require some projections and assumptions of costs, at least the result might bear some resemblance to the actual requirements of the specific applicant. Likewise, as noted by several judges, it appears inappropriate for the MOC to make calculations as to medical costs and the like. This should more appropriately be in the hands of DIMIA, which could obtain advice from the MOC and other competent sources. ■

Notes: **1** Migration Regulations 1994. **2** Under *Migration Act*, s31(3). **3** Dependants and family members who are included in the visa application are individually required to satisfy these requirements. If the application is for permanent residency in Australia, not only do those included in the visa application have to meet the health requirements but, also, all members of the immediate family who do not intend to migrate must meet the health requirements. **4** Reg 1.16AA. **5** Reg 2.25A(3). **6** Section 65. **7** Reg 1.03. **8** *Migration Act*, ss341(2), 341(4), 349(2), 349(4). **9** Reg 5.41. **10** The DDA at s4 provides a comprehensive definition of the term 'disability' so as to include those who currently have a disability; those who previously had, but no longer have a disability; those for whom a disability may exist in the future (for example, being a member of a family with a history of heart disease); and those to whom a disability is imputed (for example, assuming that a gay man has AIDS when he is in fact quite healthy). **11** Section 5 of the DDA. **12** [2000] EOC 93-081. **13** Section 6 of the DDA. **14** [1995] EOC 92-717. **15** [2001] FCA 1046. **16** Heerey J in *Imad v Minister for Immigration and Multicultural Affairs* [2001] FCA 1011 at 13. **17** [2001] FCA 1046. **18** [2005] FCA 429. **19** [2005] FCA 429 per Finkelstein J at 11. **20** See 'Some key principles in disability discrimination law', above. **21** *Minister for Immigration and Multicultural Affairs v Seligman* [1999] FCA 117 at 2. **22** [1998] 346 FCA. **23** Ibid at 10. **24** *DIMIA Procedures Advice Manual 3* at item 94. **25** *Minister for Immigration and Multicultural Affairs v Seligman* [1999] FCA 117 at 66. **26** This was because Gregory would be eligible for a disability support pension. It was held that the pension did not fall within the meaning of 'community services'. The regulations have since been amended. **27** [1999] FCA 117 at 18. **28** *Ibid* at 82. **29** [2005] FCA 1626 (10 November 2005, with Addendum dated 18 November 2005). **30** *Ibid* at 56. **31** [2005] FMCA 1735. **32** The Law Report, ABC Radio National, 'Visas and Health Status', 6 December 2005 at http://www.abc.net.au/rn/lawreport/stories/2005/1523415.htm (accessed 6 August 2006).

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