

WAITING FOR DIGNITY IN AUSTRALIA: MIGRANT RIGHTS TO SOCIAL SECURITY AND DISABILITY SUPPORT UNDER INTERNATIONAL HUMAN RIGHTS LAW

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I. INTRODUCTION

With the adoption of the Convention on the Rights of Persons with Disabilities ('CRPD')¹ in 2006, and Australia's subsequent ratification on 17 July 2008, there has been renewed attention on disability rights in Australia. Much of the focus of inquiry has rightly been on whether the 'health test' in immigration law unlawfully discriminates against migrants with disabilities, by subjecting them to health cost assessments which are difficult, if not impossible, for many people to meet.² Such a test results in a pernicious kind of social engineering which filters out disability from the natural diversity of the human population. The focus on migration law health test has, however, overshadowed the adverse impacts of an additional area of federal law on migrants with disabilities, and indeed on migrants generally: limitation of access to social security and disability benefits. Currently, all migrants must wait two years before they can access social security benefits, and there is a ten-year residence period for the Disability Support Pension ('DSP').

Since the Howard Government increased the waiting period for social security benefits from six months to two years in 1997,³ there has been considerable criticism of the adverse impacts of the restrictions on

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¹ Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, opened for signature 30 March 2007, entered into force 3 May 2008); see generally R Kayess and P French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1.

² See, eg, B Saul, 'Migrating to Australia with Disabilities: Non-Discrimination and the Convention on the Rights of Persons with Disabilities' (2010) 16 *Australian Journal of Human Rights* 63-104; JSCOT, 'Report 95: Treaties Tabled on 4 June, 17 June, 25 June and 26 August 2008' (4 June 2008) ch 2; Joint Standing Committee on Migration, 'Inquiry into the health requirements in the Migration Act 1958 (Cth)' (2009-2010).

³ See the Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Act 1997 (Cth).

migrants in need,⁴ including criticism upon human rights grounds. This article contributes a new dimension to that discussion by providing the first comprehensive analysis of whether the waiting periods can be justified under international human rights law, this will be achieved through a close examination of the relevant jurisprudence and principles.⁵

This article concludes that the two year waiting period for social security benefits, which applies to all migrants, unlawfully interferes with the rights to social protection and an adequate standard of living under the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), even when the State's discretion to 'progressively realise' socio-economic rights is duly taken into account. This article further argues that the ten year waiting period for the DSP interferes with the human rights of newly arrived migrants relating to an adequate standard of living and social protection, health, and potentially even freedom from inhuman or degrading treatment, which is contrary to articles 28, 25 and 15 respectively of the CRPD and to equivalent provisions of the ICESCR. It also examines whether these waiting periods constitute impermissible discrimination under human rights law, on the grounds of nationality, disability, or 'any other status', and concludes that it is difficult to establish at law that the waiting periods are unlawfully discriminatory.

As other commentators have noted, 'compassion towards non-citizens ranks very low in the domestic hierarchy of political values, and

⁴ See, eg, S Koller, 'Unequal Treatment for Newly Arrived Migrants under the Social Security Act' (1997) *Australian Journal of Human Rights* 10; Welfare Rights Centre, 'Waiting to Settle: The Impact of the Social Security Two Year Newly Arrived Resident's Waiting Period on Mew Migrants and Our Community' (January 1998); I Kauffman, 'Prophets Among Us: New Residents Show How Social Security Law is Creating Poverty', Paper for the Network for Safety Net Payments for New Residents (1999); M Mitchell, 'The Two Year Waiting Period for Newly Arrived Migrants' (1998) 20 *Migration Action* 8; J Taylor, 'Refugees and Social Exclusion: What the Literature Says' (2004) 26 *Migration Action* 16.

⁵ For an overview of the policy challenges concerning migration and welfare, see U Becker, 'The Challenge of Migration to the Welfare State' in E Benvenisti and G Nolte (eds), *The Welfare State, Globalization and International Law* (Springer-Verlag, Heidelberg 2004) 1.

is trumped by... “national sovereignty” and notions of social cohesion.⁶ Social security restrictions also sit uncomfortably with the movement in the CRPD away from a ‘medicalised’ model of disability, in which persons with disabilities are perceived as an economic burden and an object of charity. The more contemporary ‘social model’ of disability values persons with disabilities in their own right and as vital contributors to social diversity.⁷ This movement is scarcely reflected in Australian welfare laws, which withhold assistance from migrants with disabilities. The ratification of the CRPD provides an opportunity for Australia to reassess its approach to disability issues and to bring its social security legislation into line with its international commitments under both the CRPD and the ICESCR.

II. THE MIGRANT WAITING PERIODS FOR SOCIAL SECURITY

Since reforms by the Howard Government took effect in 1997, new migrants to Australia have been subject to a ‘newly arrived resident’s waiting period’ of 104 weeks (two years) before they can receive most forms of income support.⁸ That current waiting period is significantly longer than the six-month waiting period for key allowances introduced by a federal Labor Government in 1993. Eligibility for the ‘Special Benefit’ – the safety net for those facing serious hardship – was also restricted for new migrants to those who experience a substantial change of circumstances after their arrival that is beyond their control⁹ (typically where a sponsor’s business fails or where a sponsor reneges on a marriage).¹⁰ Mere unemployment, poverty, or even pregnancy or childbirth would not qualify.¹¹ Access to Medicare and education payments, however, remained unaffected.

To qualify for the Disability Support Pension (‘DSP’), a migrant requires ‘10 years qualifying Australian residence’ as defined by section

⁶ See T Carney and AK Boucher, ‘Social Security and Immigration: An Agenda for Future Research?’ (2009) 23 *Zeitschrift für Ausländisches and Internationales Arbeits- und Sozialrecht [Journal for Foreign and International Work and Social Rights]* 36-57.

⁷ Kayess and French (n 1) 6-8.

⁸ Social Security Act 1991 (Cth), s 739A.

⁹ Social Security Act 1991 (Cth) s 739A(7).

¹⁰ B Birrell and S Evans, ‘Recently Arrived Migrants and Social Welfare’ (1996) 4 *People and Place* 1.

¹¹ *ibid.*

7(5) of the Social Security Act 1991 (Cth).¹² DSP is payable at a higher rate than some other benefits (such as Newstart Allowance for the unemployed), reflecting special disability needs, and is also a precondition for access to some disability services. The waiting period can, however, be waived where the disability occurs after arrival in Australia. Importantly, refugees are exempt from the waiting period,¹³ reflecting the special regime of rights expressly available to refugees under the 1951 Refugee Convention.¹⁴

The essential justification for the waiting periods is that they are considered necessary to preserve scarce social security resources for the 'settled' Australian community. When the two year waiting period was introduced, the Australian Government asserted that the measure would 'ensure that taxpayers only pay for those in need' and that those who sponsor migrants should support them financially before 'any calls are made on the taxpayer'.¹⁵

At that time, the restrictions were adopted against an economic background of 8.5% unemployment and foreign debt of almost \$185 billion in early to mid-1996.¹⁶ One study found that up to 27% of migrants who arrived in 1992-93 were drawing unemployment benefits as of mid-1994.¹⁷ The Commonwealth estimated that the 1991-92 migrant intake, 111,000 people, incurred social security costs of \$251 million. The changing composition of the migration intake – more family and spouse migration from poorer countries of origin (such as Vietnam, China and the Middle East region), and lower skilled entrants – was thought likely to increase pressure on social security over time. This

¹² Social Security Act 1991 (Cth), s 94(1)(e)(ii).

¹³ Department of Families, Housing, Community Services and Indigenous Affairs, 'Submission to the Joint Standing Committee on Migration', *Inquiry into the health requirements in the Migration Act 1958 (Cth)* (2009-2010) 3.

¹⁴ Convention relating to the Status of Refugees, adopted 28 July 1951, entered into force 22 April 1954, 189 UNTS 150, articles 23 (public relief) and 24 (labour legislation and social security).

¹⁵ Second Reading Speech, Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996 (Cth), 3.

¹⁶ Bills Digest 102 1995-96: Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996, <www.aph.gov.au/library/pubs/bd/1995-96/96bd102.htm> accessed 24 October 2010.

¹⁷ *ibid.*

trend was linked to concerns about long-term welfare dependency among some migrant groups.¹⁸

The waiting periods operate by drawing distinctions between newly arrived Australian residents (of less than two years' standing) and longer-term Australian residents (of more than two years standing); and additionally between newly arrived Australian residents with disabilities (of less than ten years' standing) and longer-term Australian residents with disabilities (of more than ten years' standing). Conceptually the waiting periods rest upon a political judgment that 'new' members of the Australian community naturally possess a lesser entitlement to social security than more 'settled' members of the community. That judgment in turn rests upon a set of additional assumptions: 1) that 'full' membership of the community is 'earned' over time, rather than immediately enjoyed; 2) that new members are expected to make positive economic contributions before they are a 'drain' on the system; 3) that the immediate costs of resettlement should be borne by the migrant rather than by the Australian community; and 4) that waiting periods remove the incentive to migrate in order to receive welfare benefits.

The impact of the new waiting periods was predictably detrimental for people left without social assistance. Soon after the changes went into effect, the Welfare Rights Centre and other organizations working with people in need reported increases in adverse health effects, such as malnutrition and depressive illnesses, as a result of impoverishment. Independent migrants were hard hit because of their lack of support and family connections. Family members in need, on the other hand, could face the different problem of dependency on extended family networks,¹⁹ placing stress on some families.

The post-1996 approach has been described as an Americanisation of welfare policy which allows 'continued migration but without a commitment to help the migrants in question [to] become secure and productive citizens'.²⁰ The status of new migrants is precarious and conditional; social security is conceived of not as a human right of those in need, but as a privilege to be earned over time through

¹⁸ E Healy, 'Welfare Benefits and Residential Concentrations amongst Recently-Arrived Migrant Communities' (1996) 4 *People and Place* 20; K Betts, 'Immigration Policy under the Howard Government' (2003) 38 *Australian Journal of Social Issues* 169.

¹⁹ Welfare Rights Centre, *Waiting to Settle* (n 4), 19; see also Public Interest Advocacy Centre, 'Fact Sheet 13: Social Security Rights' (May 2004).

²⁰ Birrell and Evans (n 10).

membership of the economic and political community. This approach does not fit well with universal, rights-based approaches to welfare.

III. HUMAN RIGHTS TO AN ADEQUATE STANDARD OF LIVING AND SOCIAL PROTECTION

Social security is addressed directly and indirectly under international law in a number of ways. Under international human rights law, article 9 of the ICESCR guarantees ‘the right of everyone to social security, including social insurance’, while article 11 recognises the related ‘right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions’. In relation to persons with disabilities, article 28 of the CRPD fuses, particularizes and extends the general obligations in articles 9 and 11 of the ICESCR.

Specifically, article 28(1) of the CRPD parallels the right to an adequate standard of living in article 11 of the ICESCR,²¹ while article 28(2) sets out the right to social protection based on article 9 of the ICESCR.²² The right to social protection in article 28(2) of the CRPD is much more detailed and elaborate than the base right in the ICESCR, and includes, for instance, express rights to clean water; disability-specific

²¹ Article 28(1) provides as follows: ‘States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.’

²² Article 28(2) provides as follows: ‘States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

- (a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;
- (b) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;
- (c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;
- (d) To ensure access by persons with disabilities to public housing programmes;
- (e) To ensure equal access by persons with disabilities to retirement benefits and programmes.’

services, devices and assistance; gender-sensitive and poverty reduction programmes; State assistance with disability-related expenses; access to public housing; and equal access to retirement benefits and programs.

A number of International Labour Organization conventions also address aspects of social security for some migrants, although they are relatively narrow in scope, conditional in their protections, and limited in participation; furthermore, Australia is party to none of them.²³ Some migrants (including temporary workers) may also be covered by bilateral agreements²⁴ providing for social security assistance on a reciprocal or 'shared responsibility' basis. Australia is currently party to twenty-three such agreements, which typically equate residence periods in the foreign country with qualifying periods in Australia,²⁵ and which are generally limited to other wealthy countries with advanced social security systems. Some regional legal arrangements have also regulated social security, with particularly sophisticated developments in Europe,²⁶ but Australia is not part of any such regional arrangement in the Asia-Pacific region.

Despite guarantees of social security in international human rights law, it is estimated that up to 80% of the global population lacks access to formal social security.²⁷ While other support systems may be available – such as family, religion, charitable organizations, foreign aid and so on – it is estimated that 20% of those who lack access to formal

²³ Migration for Employment Convention (Revised) 1949 (No. 97) (49 State Parties), article 6(1)(b); Social Security (Minimum Standards) Convention 1952 (No. 102) (46 State Parties); Migrant Workers (Supplementary Provisions) Convention 1975 (No. 143) (23 State Parties), articles 9-10; Maintenance of Social Security Rights Convention 1982 (No. 157) (4 State Parties).

²⁴ UN Committee on Economic, Social and Cultural Rights, General Comment No. 19: The right to social security (article 9) (4 February 2008) E/C.12/GC/19 [56].

²⁵ Austria, Belgium, Canada, Chile, Croatia, Cyprus, Denmark, Finland, Germany, Greece, Ireland, Italy, Japan, Korea, Malta, The Netherlands, New Zealand, Norway, Portugal, Slovenia, Spain, Switzerland, United States of America: <www.fahcsia.gov.au/sa/international/ssa/currentagreements/Pages/default.aspx> accessed 24 October 2010.

²⁶ See, eg, Revised European Social Charter 1996, articles 12-14; Treaty Establishing the European Community, *Official Journal of the European Communities* 325 of 24 December 2002, article 42; European Union Charter of Fundamental Rights (7 December 2000) article 34.

²⁷ UN Committee on Economic, Social and Cultural Rights, General Comment No. 19: The right to social security (art 9) (4 February 2008) E/C.12/GC/19 [7].

social security live in ‘extreme’ poverty.²⁸ Many others live in poor conditions which deny them an adequate standard of living and opportunities to develop their full potential.

IV. THE PERSONAL SCOPE OF APPLICATION OF THE CRPD

On its face, article 9 of the ICESCR is cast in universal terms: ‘everyone’ enjoys the right to social security. Accordingly, under the ICESCR the starting point is that nationality ‘should not bar access to Covenant rights’.²⁹ The UN Committee on Economic, Social and Cultural Rights has stated further that ‘Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation’.³⁰ Article 2(3) of the ICESCR does, however, provide that ‘[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.’

The CRPD also guarantees its rights to ‘*all* persons with disabilities’.³¹ Applying the principles of treaty interpretation,³² the phrase ‘all persons with disabilities’ encompasses the whole category of persons who experience disabilities and is not conditioned by any limiting or qualifying terms, such as reference to nationality, migration status or residency.³³ No express exception is made for non-citizens or

²⁸ *ibid.*

²⁹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para 2), E/C.12/GC/20 (10 June 2009) [30].

³⁰ *ibid.*

³¹ CRPD, articles 1 (purposes) and 4 (general obligations). Reference to the phrase ‘*all* persons with disabilities’ [emphasis added] recurs throughout the CRPD (see preambular paragraph (j) and articles 5, 19, and 23).

³² In accordance with article 31(1) of the Vienna Convention on the Law of Treaties (1969), ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

³³ By analogy, it is well accepted that the obligation on States Parties to guarantee rights to ‘all individuals’ under article 2(1) of the International Covenant on Civil and Political Rights (‘ICCPR’) means that ICCPR rights ‘apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness’: see UN Human Rights Committee, General Comment No. 15: ‘The position of aliens under the Covenant’ (11

migrants in either convention in relation to social security rights, nor does the drafting record of the CRPD indicate any clear agreement that non-citizens were to be excluded from social security rights or the right to an adequate standard of living.³⁴ During the drafting, Canada openly argued that the CRPD should not discriminate against ‘non-citizens or asylum seekers’.³⁵ While neither the ICESCR nor the CRPD confer a right upon a non-citizen to enter another country,³⁶ once a person is within a State’s jurisdiction the relevant human rights provisions apply to them *prima facie*. Only in limited circumstances can the rights of certain non-citizens be restricted; generally accepted examples might include denying the right to work to non-citizens who are present without permission in a State; or limiting rights of political participation.³⁷

The CRPD does not contain any provision equivalent to article 2(3) of the ICESCR (as it applies to developing countries) or article 1(2) of the Convention on the Elimination of All Forms of Racial Discrimination 1965 (‘CERD’), which provides that the CERD ‘shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.’³⁸ To the contrary, other provisions in the CRPD indicate a wide scope of application. Preamble paragraph (p) expresses States Parties’ concern ‘about the difficult conditions faced by persons with disabilities who are

April 1986) [1]. (See similarly the reference to ‘each child’ in article 2(1) of the Convention on the Rights of the Child (‘CRC’)).

³⁴ Under article 31 of the Vienna Convention on the Law of Treaties 1969 (n 32), the drafting records of a treaty may be examined to confirm the interpretation reached according to article 31(1), or ‘to determine the meaning’ when the interpretation otherwise remains ‘ambiguous or obscure’.

³⁵ Third session of the Ad Hoc Committee, Daily Summary provided by the Landmine Survivors Network, Volume 4, No. 1 (24 May 2004) <www.un.org/esa/socdev/enable/rights/ahc3sum4.htm> accessed 24 October 2010.

³⁶ Under international law, States are generally only required to admit their own nationals (see, eg, article 12 of the ICCPR), although there may exist specific obligations in relation to refugees and asylum seekers under the Refugee Convention 1951.

³⁷ As under article 25 of the ICCPR; some other rights are specific to non-citizens, such as rights of aliens upon expulsion under article 13 of the ICCPR or in immigration proceedings under article 18 of the CRPD.

³⁸ In any event, the UN CERD Committee has stated that the provision ‘must be construed so as to avoid undermining the basic prohibition of discrimination’ and so as not to detract in any way from obligations in the ICCPR or ICESCR: General Recommendation No. 30: ‘Discrimination against Non-citizens’ (1 October 2004) para 2; General Recommendation No. 11: ‘Non-citizens (Art 1)’ (19 March 1993) para 3.

subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status'.³⁹ Article 5(1) of the CRPD is an equal protection class ensuring 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'.⁴⁰ Article 5(2) of the CRPD requires States Parties to prohibit 'all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds'.⁴¹

The Convention thus connects disability discrimination with other bases of potential discrimination under general international human rights law, including nationality/citizenship and any 'other status' (such as migration status). The CRPD is therefore mindful of protecting persons with disabilities who suffer from multiple grounds of discrimination. The object and purpose of the CRPD would be substantially impaired if it were interpreted so as not to apply to certain sub-categories of persons with disabilities, on account of some other defining personal characteristic or attribute, such as non-citizenship, migration status, or refugee status.

V. WAITING PERIODS PRIMA FACIE INTERFERE IN RIGHTS TO SOCIAL SECURITY

By suspending access to social security for defined periods of time, it is clear that the Australian waiting periods under the SSA *prima facie* interfere for such periods with the right to social security of all people (including migrants) under the ICESCR, and of all persons with disabilities under the CRPD. Where the consequence of such suspension is the denial of an adequate standard of living to persons with disabilities, including adequate food, clothing and housing, the SSA may further infringe those human rights of all people, and of persons with disabilities, under the two conventions respectively. As in the analysis of most human rights, however, the critical question is whether the

³⁹ Convention on the Rights of Persons with Disabilities, Preamble (adopted on 13 December 2006, opened for signature 30 March 2007, entered into force 3 May 2008).

⁴⁰ *ibid* Art 5(1).

⁴¹ *ibid* Art 5(2).

apparent interference in article 9, and potentially article 11, as well as the equivalent provisions of the CRPD, can be justified.

VI. THE TEST FOR LIMITATIONS ON SOCIO-ECONOMIC RIGHTS

Article 4 of the ICESCR provides a general ‘limitation clause’ for assessing the lawfulness of any restrictions on economic and social rights, as follows:

‘The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.’⁴²

While the CRPD does not contain any comparable general limitation clause, its rights are likely to be subject to similar limitations analysis; the drafting record does not indicate any intention to make CRPD rights absolute or to depart from the general principles common in the application of human rights in international conventions.

In relation to social security, the UN Committee on Economic, Social and Cultural Rights has observed that the coverage of social security schemes should generally be universal, non-discriminatory (including on grounds of nationality) and extend to the most disadvantaged and marginalized groups.⁴³ Yet, that UN Committee acknowledges that reasonable and non-arbitrary restrictions on social security coverage may be lawful⁴⁴ and waiting periods evidently constitute a form of restriction on universal coverage.

The lawfulness of migrant waiting periods has not yet, however, been squarely confronted in the international jurisprudence. The UN

⁴² The Disabilities Convention contains no general limitation provision, and article 28 does not specify its own particular grounds of limitation, but the general test of limitation is likely to be considered applicable.

⁴³ UN Committee on Economic, Social and Cultural Rights, General Comment No. 19: The right to social security (art 9) (4 February 2008) E/C.12/GC/19 [23].

⁴⁴ *ibid* [9].

Committee has conceded that some waiting periods may be lawful, by asserting in General Comment 19 (on the right to social security) that any qualifying periods, including for non-nationals, ‘must be reasonable, proportionate and transparent’.⁴⁵ Qualifying periods for social security have a long pedigree under International Labour Organization Conventions dealing with migrant workers⁴⁶ and they are a feature of social security systems in some migration receiving countries comparable to Australia. The UN Committee has not, however, indicated the circumstances in which qualifying periods might be permissible, such as which aims might be considered legitimate, what duration would be reasonable, and which groups, if any, may have their entitlements restricted.

In this context, the Committee’s recent Concluding Observations on Australia in 2009 expressed concern at the ‘conditionalities’ imposed by Australia’s social security system, which impacted negatively on disadvantaged and marginalized groups.⁴⁷ The Committee recommended that Australia ‘take additional measures... to ensure universal coverage of the social security system so as to include asylum seekers, [and] newly arrived immigrants’ and further recommended that ‘social security benefits, including unemployment benefits, old age pensions and youth allowance enable recipients to enjoy an adequate standard of living’.⁴⁸ Those observations followed a finding by the same Committee in 2000 that the two-year waiting period may infringe the right of new migrants to an adequate standard of living,⁴⁹ although the Committee did not comment upon whether the right to social security was also impaired by the waiting periods.

Unfortunately, as is too often the case, the Committee’s observations in 2009 provided little further legal analysis or reasoning concerning social security rights. Based upon NGO submissions made to the Committee, it is apparent that the migrant waiting periods partly underlay the Committee’s concerns about Australia’s social security

⁴⁵ *ibid* [24] and [37].

⁴⁶ See, eg, Social Security (Minimum Standards) Convention 1952 (No. 102) (46 State Parties, not including Australia), article 1(1)(f), 11, 17, 23, 29, 42, 43, 51, 57, 63;

⁴⁷ UN Committee on Economic, Social and Cultural Rights, Concluding Observations on Australia (12 June 2009) E.C.12/AUS/CO/4, [20].

⁴⁸ *ibid* [20].

⁴⁹ UN Committee on Economic, Social and Cultural Rights, Concluding Observations on Australia, UN Doc E/C.12/1/Add.50 (2000), [32].

system, indicating that the UN Committee likely perceives Australia's current waiting periods as neither a 'reasonable' nor 'proportionate' restriction on access to social security. This substantive conclusion is arguably correct, but it does require substantially more legal justification than was provided by the UN Committee or by NGO submissions.

In assessing whether the waiting periods are lawful under human rights law, central to the analysis is the proportionality principle. British courts have summarized the use of the proportionality principle, in the context of the European Convention on Human Rights, as requiring that: (a) the legislative objective must be sufficiently important to justify limiting the right; (b) the measures adopted must be rationally connected to that objective; and (c) the means used must be no more than that which is necessary.⁵⁰ The UN Committee on Economic, Social and Cultural Rights has similarly affirmed that the proportionality principle requires that 'the least restrictive alternative must be adopted where several types of limitations are available'.⁵¹ The test for limitations necessarily involves a degree of subjectivity and judgment, yet there are still legal criteria which constrain political judgments about the lawfulness of a particular socio-economic policy.

Against these criteria, it is clear that controlling welfare expenditure is a legitimate policy objective of any prudent government which seeks to properly manage public spending. Social security and welfare accounted for almost 33% of federal government expenditure in 2009-2010 (\$111 billion),⁵² and a further \$51 billion will be spent on health during the same period. Medical treatment for certain disabilities is expensive; Australia already spends around \$20 billion per year on the disability welfare system – in addition to the 2.5 million family members and carers who provide unpaid support to persons with disabilities.⁵³ The Australian Government's Disability Investment Group estimates that the cost of care will rise 5-10% annually, while there are unmet

⁵⁰ *de Freitas v Permanent Secretary of Ministry of Agriculture* [1999] 1 AC 69, 90.

⁵¹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 14, E/C.12/2000/4, 11 August 2000, [29].

⁵² Commonwealth of Australia, 'Budget 2009-2010, Appendix G: Australian Government Taxation and Spending', <http://www.budget.gov.au/2009-10/content/overview/html/overview_40.htm> accessed 24 October 2010.

⁵³ M Davis, 'Disability levy needs to collect \$2.5b', *Sydney Morning Herald* (4 December 2009).

needs (including rehabilitation and training) which require additional funding.⁵⁴

Additionally, limiting the eligibility of certain categories of people (such as new migrants) for social security or disability support is a measure which is rationally related to the aim of controlling welfare expenditure. By limiting the application of the measures to those groups and not others, and for relatively limited periods (two and ten years) rather than indefinitely or for more protracted periods, it might be argued that in relation to the proportionality of the waiting periods such measures do no more than is necessary to preserve scarce public resources.

It may be countered, however, that alternative less restrictive measures are reasonably available to Australia in order to achieve the same end of preserving scarce public resources. It is not hard to think of examples: one might start by trimming what has become known as ‘middle class welfare’, such as ‘baby bonuses’, family payments, or ‘first home buyer’ grants which are not means-tested and thus result in a transfer of scarce welfare resources to the relatively wealthy – for reasons unrelated to maintaining human dignity. There is a strong argument that the burden of conserving resources should not fall exclusively on a vulnerable group such as newly arrived migrants, but instead ought to be spread more evenly across multiple groups. Welfare payments could be reduced across the board; the extension of waiting periods to a wider range of groups could enable the reduction of waiting periods for all such groups; and waiting periods could be adjusted annually to take into account the annual federal budget.

It is clear that that the current migrant waiting periods are only one measure among many possible solutions which could potentially reduce welfare expenditure in Australia. The crux of the matter is the manner by which human rights law either permits or denies one policy choice over another, and to whom human rights law allocates authority to make such choices – bearing in mind the context of the highly politicized fields of social security and government expenditure. In Hong Kong, for example, the courts have afforded the legislature or executive a ‘discretionary area of judgment’⁵⁵ on questions of social or economic

⁵⁴ *ibid.*

⁵⁵ *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690 [117] (Hartman J).

policy, allowing decision-makers a margin of appreciation when selecting alternative means to accomplish a policy objective, including restrictions on social security for new migrants.

If the relevant standard required is merely the existence of a rational connection between the measure and the aim, and that the measure should do no more than is necessary to achieve the aim, then the law would permit far more interference with a particular right than if the standard involved a more intensive requirement of the ‘reasonableness’ of the measure. Here, some conflict arises between the international and comparative jurisprudence. As discussed below, it is necessary to consider how the proportionality principle operates in the context of the ‘progressive realization’ of socio-economic rights under both the CRPD and ICESCR.

VII. ‘PROGRESSIVE REALIZATION’ OF SOCIO-ECONOMIC RIGHTS

Framing the provision of socio-economic rights to migrants, including persons with disabilities, is the issue of the ‘progressive realization’ of rights. Under article 4(2) of the CRPD, for instance, each State Party is required to undertake measures ‘to the maximum of its available resources ... with a view to achieving progressively the full realization of those rights’⁵⁶ (in contrast to the ‘immediately applicable’ obligations on States to provide civil and political rights under the ICCPR). Such provision stems from a similar condition in article 2(1) of the ICESCR, which has long been a source of controversy in relation to the protection of particular rights in certain countries. The UN Committee on Economic, Social and Cultural Rights has previously elaborated upon the principle as follows:

‘... the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the

⁵⁶ Convention on the Rights of Persons with Disabilities, Art. 4(2) (adopted on 13 December 2006, opened for signature 30 March 2007, entered into force 3 May 2008).

overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.⁵⁷

The UN Committee has noted further that:

‘In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.’⁵⁸

There is thus ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party’.⁵⁹ Moreover, whereas article 2(3) of the ICESCR allows *developing* countries to ‘determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals’, no such concession is permitted to *developed* countries. Further, ‘any deliberately retrogressive measures... require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources’.⁶⁰

At first blush, it is arguable that the distinction between immediately enforceable and progressively realizable rights does not materially affect Australia’s ability to implement article 28 in full. As a developed State, Australia is sufficiently well-resourced to immediately ensure minimum social protection and an adequate standard of living to all people within its jurisdiction, including new migrants and migrants with disabilities. This is particularly the case given that Australia relies on a large-scale annual migration program to increase economic growth and

⁵⁷ UN Committee on Economic, Social and Cultural Rights, General Comment 3 (1990), [9]-[10].

⁵⁸ *ibid* [10].

⁵⁹ *ibid*.

⁶⁰ *ibid* [9]-[10].

meet domestic labour shortages. In such circumstances, Australia can be reasonably expected to absorb the social costs which accompany the resettlement and integration of economic migration. The increase in the length of the waiting period in 1996 must also be regarded as a 'deliberately retrogressive measure' which requires greater justification than an ordinary claim by a State that it is unable to meet its minimum obligations.

Further, even if it accepted that Australia faces acute social security resource scarcities, the UN Committee has pointedly emphasised that the principle of progressive realization does not justify targeting vulnerable groups: 'even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances'.⁶¹ The UN Committee has drawn special attention to the situation of 'vulnerable members of society', who can and indeed must be protected by the adoption of relatively low-cost targeted programmes'.⁶² In the specific context of persons with disabilities, the Committee has stated as follows:

[t]he obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.⁶³

⁶¹ *ibid* [11].

⁶² *ibid* [12].

⁶³ UN Committee on Economic, Social and Cultural Rights, General Comment No. 5: 'Persons with disabilities' (9 December 1994) [9].

The UN Committee's approach – requiring a minimum core of rights to be protected, and the safeguarding of vulnerable groups – nonetheless accords a considerable margin of discretion to States in their progressive implementation of socio-economic rights. Courts in Hong Kong, for instance, have taken the view that the courts must afford discretion to governmental authorities in matters of socio-economic policy. The Hong Kong Government has accordingly argued that it is not required to pursue other measures, such as lowering the general population's quantum of welfare payments, before restricting the coverage of social security (by imposing waiting periods only for new residents).⁶⁴

For the reasons above, it is arguable that the Australian waiting periods do not meet the minimum requirements of the ICESCR or CRPD. It is, however, worth contrasting the UN Committee's approach with the higher standards imposed by the South African Constitutional Court in its jurisprudence on socio-economic rights, particularly migrant rights to social security. This comparison provides an alternative – and arguably more fruitful – way of analysing the interests in question, including the degree of deference which should be given to the executive concerning socio-economic policy.

VIII. A 'REASONABLENESS' APPROACH TO SOCIO-ECONOMIC RIGHTS

In the South African Constitutional Court decision of *Grootboom v Oostenberg Municipality and Others*,⁶⁵ a case involving housing rights, it was held that the critical question in the assessment of socio-economic rights is whether a measure is 'reasonable', when viewed within the social, economic and historical context, the available resources and the institutional capacity of government. The Court stated:

⁶⁴ Hong Kong Health Welfare and Food Bureau/Department of Justice, LegCo Panel on Welfare Services, Subcommittee to study issues relating to the Comprehensive Social Security Assistance and Social Security Allowance Schemes, 'Compliance of the seven-year residence requirements for Comprehensive Social Security Assistance and Social Security Allowance with the ICESCR as applied to Hong Kong', Paper No. CB(2)1616/03-04(02) (March 2004) [21]-[22].

⁶⁵ *Grootboom v Oostenberg Municipality and Others*, 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC).

‘[a] court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.’⁶⁶

At the same time, the Court in *Grootboom* set an outer limit on the State’s policy discretion by finding that ‘[a] programme that excludes a significant segment of society cannot be said to be reasonable’.⁶⁷ Thus ‘[t]hose whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right’.⁶⁸ The Court observed that ‘reasonableness’ must be understood in the context of South Africa’s constitutional bill of rights as a whole, under which ‘society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality’ and ‘everyone must be treated with care and concern’.⁶⁹ On the facts of that case, the State’s housing programme was found to be unlawful because it ‘failed to provide for any form of relief to those desperately in need of access to housing’.⁷⁰ The Court did not, however, determine that a person has an individual right ‘to claim shelter or housing immediately upon demand’.⁷¹

While the standard of ‘reasonableness’ in *Grootboom* derived from the peculiar language of the South African Constitution, it drew upon some international jurisprudence⁷² and provides a principled approach to the complex problem under which international human rights law balances individual claims to socio-economic resources against the

⁶⁶ *ibid* [41]; see also *Kbosa Others v Minister of Social Development and Others*, CCT 12/03, 4 March 2004 [48].

⁶⁷ *Grootboom* (n 65) [43].

⁶⁸ *ibid* [44].

⁶⁹ *ibid*.

⁷⁰ *ibid* [95].

⁷¹ *ibid*.

⁷² *ibid* [30].

State's expertise and democratic responsibilities in formulating public policies and allocating scarce resources.

The subsequent South African Constitutional Court case of *Khosa Others v Minister of Social Development and Others* involved a challenge by permanent residents to the denial of social security benefits to non-citizens.⁷³ While the basis of differentiation was non-citizenship (rather than length of residence combined with non-citizenship, as under the Australian waiting periods), the application of the reasonableness test in that case is instructive in the Australian context.

A majority of the Constitutional Court found that differentiation on the basis of citizenship was unreasonable, on the basis that the constitutional guarantee of social security applied to 'everyone' and the Court deliberately departed from the American social contract model of reserving rights for citizens.⁷⁴ The Court accepted that the State had a legitimate concern in preventing non-citizens from becoming a financial burden and that, furthermore, there were compelling reasons for not extending social benefits to all (such as guest workers, visitors and illegal residents, 'who have only a tenuous link with this country') regardless of their immigration status.⁷⁵

Yet, the Court found that the exclusions from social security were cast too broadly because they did not differentiate between 'those who have become part of our society and have made their homes in South Africa, and those who have not', or between those who could turn to sponsors for support in times of need and those who could not.⁷⁶ Most pertinently, the government was unable to provide adequate evidence of the additional burden which would be placed on public finances if permanent residents were entitled to social security.⁷⁷ The 'speculative' calculations available did 'not support the contention that there will be a huge cost in making provision for permanent residents'; rather social security expenditure would at most increase by a modest 2%.⁷⁸

⁷³ *Khosa and Others v Minister of Social Development and Others*, CCT 12/03, 4 March 2004.

⁷⁴ *ibid* [53]-[57]. (Mokgoro J, with Chaskalson CJ, Langa DCJ, Goldstone J, Moseneke J, O'Regan J and Yacoob J concurring),

⁷⁵ *ibid* [58].

⁷⁶ *ibid* [59].

⁷⁷ *ibid* [59]-[62].

⁷⁸ *ibid* [62].

The Court also noted that there were other means by which the cost burden could be alleviated, such as more careful selection of migrants and obtaining adequate security from them or guarantees from their sponsors.⁷⁹ The Court distinguished its approach from that of the American courts⁸⁰ on the basis that the American standard of a ‘rational connection’ between the measure and a legitimate aim was lower than the South African requirement of reasonableness.⁸¹ In other words, restricting the availability of social security to non-citizens is rationally related to reducing welfare expenditure, but it is not necessarily reasonable. Although the Court in *Grootboom* asserted that ‘reasonableness will not enquire whether other more desirable or favourable measures could have been adopted’,⁸² the Court’s analysis of alternative measures in *Khosa* highlights the reality that reasonableness is often a comparative standard: whether one measure can be considered reasonable may depend on the range of other choices available to attain the same end.

In weighing the interests at stake, the Court concluded that the human impact of the social security restrictions ‘far outweighed’ the financial and immigration considerations on which the State relied.⁸³ The exclusions from social security were ‘likely to have a severe impact on the dignity of the persons concerned, who, unable to sustain themselves, have to turn to others to enable them to meet the necessities of life and are thus cast in the role of supplicants’.⁸⁴ Such people would be ‘relegated to the margins of society and deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution’ and were accordingly affected in a ‘most fundamental’ way.⁸⁵ In contrast, a minority of dissenting judges accepted that the restrictions were justified in the light of the scarcity of public resources, the need to discourage welfare migration, the availability of a discretionary ministerial power to grant benefits, the legitimacy of

⁷⁹ *ibid* [64].

⁸⁰ *City of Chicago v Shalala*, 189 F.3d 598 (7th Cir 1999).

⁸¹ *Khosa* (n 73) [66]; see also *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) [27]; *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) [46].

⁸² See *Grootboom* (n 65) [41]; see also *Khosa* (n 73) [48].

⁸³ *Khosa* (n 73) [82].

⁸⁴ *ibid* [80].

⁸⁵ *ibid* [81].

distinctions between citizens and non-citizens, and the need to defer to the expertise of policy-makers.⁸⁶

The South African judgments provide a nuanced and sophisticated approach to the assessment of socio-economic rights.⁸⁷ Whereas the UN Committee's 'minimum core' approach 'focuses on declaring an absolute minimum level of achievement, the... reasonableness standard embraces a contextual analysis of what measures the government is taking to realise a given socio-economic right'.⁸⁸ That contextual analysis is 'more flexible and adaptive'⁸⁹ than a rigid 'minimum core' approach and, as resources increase over time, is capable of making rights available to 'an increased number and breadth of people'.⁹⁰ A 'reasonableness' standard also requires governments to provide evidence of the long-term planning, design and implementation of policies to progressively extend socio-economic rights, rather than only requiring a minimum content to be provided at a given moment. The South African approach acknowledges the proper role of State discretion in the formulation and prioritization of socio-economic policy, but demarcates the outer limits of that discretion by ensuring that vulnerable groups are safeguarded, restrictive measures are not cast too broadly, and other means of achieving the objective are more intensively considered. The higher standard of reasonableness imposes more rigorous boundaries on the zone of State discretion, placing an appropriate value on human dignity in the evaluative process.

IX. APPLICATION OF THE SOUTH AFRICAN APPROACH TO THE AUSTRALIAN CONTEXT

The above jurisprudence provides a useful basis on which to assess Australia's migrant waiting periods. As noted previously, reducing welfare expenditure is a legitimate objective and imposing waiting periods for new migrants is rationally related to that objective. The Australian qualifying periods are also less blunt than the South African

⁸⁶ *ibid* (Ngcobo J and Madala J dissenting) [119]-[130].

⁸⁷ More generally, see M Olivier, 'Constitutional Perspectives on the Enforcement of Socio-Economic Rights: Recent South African Experiences' (2002) 33 *Victoria University of Wellington Law Review* 117.

⁸⁸ R Young, 'Justiciable Socio-Economic Rights? South African Insights into Australia's Debate' (2008) 15 *Australian International Law Journal* 181, 200.

⁸⁹ *ibid* 201.

⁹⁰ *ibid* 200-201.

restrictions in that they do not exclude all non-citizens from social security. Any non-citizen resident in Australia for more than two years is entitled to welfare. Residency periods are thus a more targeted basis of restricting access to social security than a blanket exclusion of non-citizens. Further, a ‘Special Benefit’ is exceptionally payable in Australia where a person’s circumstances change substantially for reasons beyond their control after arriving in Australia, suggesting that there is some flexibility in the application of the Australian measures.

The finding in *Khosa* turned on the view that ‘those who have become part of our society and have made their homes in South Africa’ were entitled to social security, in contrast to those with less well established links to the country (such as guest workers, visitors and illegal residents). The fact of being ‘settled’ in a country – as a permanent resident – was thus at the heart of the Court’s reasoning, a kind of half-way status between being wholly foreign or fully citizen. Some commentators have suggested that this decision hints ‘at a future basis for accommodating the domestic politics of migration’ by reconciling universal human rights and equality principles with State sovereignty, ‘territorialism’ and citizenship.⁹¹

On that basis, given that Australia’s waiting period of two years corresponds with the period necessary to obtain permanent residency, the waiting period might be viewed as lawfully targeting only those non-citizens who are not ‘settled’ permanent residents – that is, people in the transitional two-year period after arrival. That same cannot be said, however, for the ten year waiting period for disability support, which may apply for up to eight years after a person has qualified for permanent residency. On a strict application of *Khosa*, at the very least the ten year waiting period is not compatible with the right to social security.

The decision in *Khosa* did not, however, turn exclusively on the necessity of permanent residence. The applicants in that case were permanent residents, so it was not strictly necessary to decide the fate of others. While the Court nonetheless distinguished those with less tenuous connections to South Africa as less deserving of social security, and thus privileged permanent residency, other parts of the judgment are

⁹¹ T Carney, ‘Securing Social Security for Migrant Workers: Orthodox Approaches or An Alternative (Regional/Political) Path for Southern Africa’ (2010) 18 *African Journal of International Law Comparative Law* 24, 35.

more equivocal and lend themselves to a more expansive construction of the right to social security.

First, the Court repeatedly emphasised that the literal scope of the constitutional right to social security applied to ‘everyone’ in order to extend the right beyond citizens (as limited by the government) to include permanent residents. Yet, a simple argument concerning the meaning of the term ‘everyone’ could equally be extended to entitle non-permanent residents to social security and does not provide a sufficient reason for differentiating between categories. It is unclear why, for instance, parents, spouses or family members who move to a country to be reunited with permanent residents or citizens of that country should not be viewed as part of that ‘new’ community, when their links are both deep and personal.

Second, while the core of the Court’s reasoning concerned the negative impacts on human dignity of the denial of social security to vulnerable groups, much of that reasoning can be instantly transposed to the situation of *all* foreigners, not just permanent residents. Consider, for example, the following passage:

“There can be no doubt that the applicants are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing, here, with intentional, statutorily sanctioned unequal treatment of part of the South African community. This has a strong stigmatising effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance. Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits represent the extent

to which poor people are treated as equal members of society.⁹²

Non-permanent residents also pay taxes; they too suffer from a lack of congruence between benefits and burdens created by an exclusionary law; and their stigmatization and marginalization affects their dignity just as deeply. Just as the Court said of permanent residents, non-permanent residents too may be forced into 'relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons'.⁹³ There is thus an inherent tension or ambivalence in the Court's reasoning, which vacillates between seeking to preserve the human dignity of all while simultaneously carving out 'deserving' and 'non-deserving' groups.

A more honest and fruitful path would be to recognise that the denial of social security is capable of severely affecting the human dignity of *any* person within a State's jurisdiction, and that the preservation of human dignity should not be contingent upon citizenship, permanent residence, or immigration status. The focus of analysis would then shift to the range and appropriateness of measures available to both alleviate such harm while also mitigating the burden upon welfare expenditure.

Where the person is a visitor, the question will seldom arise, given the brevity of a person's presence and the conditions upon their entry. Where the person is a temporary worker or guest worker, permission to remain in the country can be made conditional upon the person obtaining employment, upon their employer undertaking to sponsor any supporting costs that may arise, and/or upon bilateral social security arrangements with the country of origin. In the case of parent, spouse or family migration, sponsors could be required to provide enforceable undertakings of support for those they wish to bring to Australia, before any of them could draw upon social security. In the case of independent skilled migrants, a bond or guarantee could be demanded as a condition of entry, from which social security costs could be recovered. In the case of illegal entrants, the State has ample legal authority to deport such persons or otherwise to deal with them in accordance with refugee law. All of the above possibilities are consistent

⁹² *Khosa* (n 73) [74].

⁹³ *ibid.*

with the notion of reciprocity underlying immigration which was articulated in *Kbosa*:

‘At the time the immigrant applies for admission to take up permanent residence the state has a choice. If it chooses to allow immigrants to make their homes here it is because it sees some advantage to the state in doing so. Through careful immigration policies it can ensure that those admitted for the purpose of becoming permanent residents are persons who will profit, and not be a burden to, the state. If a mistake is made in this regard, and the permanent resident becomes a burden, that may be a cost we have to pay for the constitutional commitment to developing a caring society, and granting access to socio-economic rights to all who make their homes here. Immigration can be controlled in ways other than allowing immigrants to make their permanent homes here, and then abandoning them to destitution if they fall upon hard times.’⁹⁴

That statement is, indeed, more consistent with an expansive view of the right to social security than with the ultimate conclusion of the Court that social security is restricted to citizens and permanent residents. Immigration law, rather than social security law, provides the proper framework for controlling undue burdens on welfare resources, and is sufficiently flexible to achieve that goal.⁹⁵ There is no global cosmopolitan order of ‘open borders’. International law endorses the premise that States are generally free to determine their immigration intakes in accordance with political and economic policy priorities, to conserve resources as far as possible for the benefit of nationals and other residents.

⁹⁴ *ibid* [65].

⁹⁵ Productivity Commission, ‘Review of the Disability Discrimination Act 1992’ (2004), 348. Immigration programs generally are already highly selective and differentiate between non-citizens on a variety of bases, including skills, financial assets, and language. Requirements concerning health, labour market, social welfare, financial and government policy considerations are ‘by nature and design, discriminatory’ (though not necessarily on prohibited grounds as such).

Yet, Australia has not availed itself of the above possibilities before simply cutting off access to social security for new migrants. While an 'Assurance of Support', guaranteed by a returnable bond, is required of those sponsoring parents to Australia, such measures are seldom applied to the larger migration categories of spouses or partners.⁹⁶ Obligations upon employer sponsors and independent migrants to guarantee their own support costs could also be readily tightened. Social security would then only be drawn upon in those exceptional cases where other support systems fail. In this connection, waiting periods are unnecessary as a disincentive to 'welfare migration' in circumstances where a well constructed immigration program imposes conditions of entry which control any call upon welfare (for example, by requiring certain skills, assets, an offer or contract of employment, employer or family sponsorship/support, or enforceable, secured assurances of support).

In any event, the reasonableness of the Australian waiting periods must also be assessed according to the economic justifications for it. While restricting access to welfare is rationally connected to reducing welfare expenditure, Australia's waiting periods are both crudely constructed and disproportionate. While the two year waiting period was justified in 1996 as necessary to curb rising welfare expenditure among new migrants against a backdrop of massive national debt and high unemployment, as the Court observed in *Khosa*, '[c]onditions do not remain static' and measures 'require continuous review'.⁹⁷

There is little evidence of continuous government review of relevant conditions such as the state of the labour market, federal budget, national debt, general economic conditions, composition of the annual migration intake, affordability of social security relative to federal revenue and so forth. Nor is there any evidence that the likely welfare costs incurred have been offset against actuarial estimates of the net contribution of migrants to the national economy (such as through tax contributions, enlarging GDP, or indirect contributions to social capital as through carer duties).⁹⁸ Less still is there evidence of any discount or offset for the lack of any need for Australia to provide for 'sunk-costs',

⁹⁶ See Birrell and Evans (n 10). Less than 7% of spouse sponsors were required to provide an Assurance of Support in 1994-95.

⁹⁷ *Khosa* (n 73) [43].

⁹⁸ See Carney (n 6) [32].

such as education.⁹⁹ Australia has few qualms about importing trained doctors or nurses from other countries which have borne the considerable costs of their training and where those skills may be in short supply.

In this context, while it is obvious that excluding some people from social security will logically reduce welfare expenditure, it will not necessarily do so in a reasonable manner, particularly fourteen years after the original, and very limited, economic justifications were presented. According to one estimate, if Australia's 'Special Benefit' alone was exempted from the two year waiting period, new residents would comprise only 0.011 to 0.014% of all social security expenditure¹⁰⁰ – significantly less than the additional 2% burden on social security thought to be incurred by entitling South African permanent residents to welfare in *Kbosa*. There is little evidence that successive Australian Governments are committed to long-term social and economic policy planning to progressively widen the availability of social security for newly arrived migrants. Rather, the assumption of disentanglement to welfare appears to be squarely political: the commitment is to excluding new migrants from welfare, regardless of the human rights costs or changing circumstances.

Moreover, as noted earlier, reducing 'middle class welfare' in Australia – estimated to be worth up to \$50 billion per year¹⁰¹ – would bring substantial savings without sacrificing the human dignity of marginal groups. Even allowing a wide discretion to the legislature in socio-economic policy and the distribution of benefits and burdens amongst different groups, it exceeds any reasonable limits of discretion to provide a baby bonus to a well-off stockbroker or banker living in wealthy suburbs while denying subsistence payments, essential to human dignity, to a new migrant living destitute on the streets. That, indeed, would be a perverse political system of socio-legal ordering, if human rights law could not correct a deliberate policy choice to inflict

⁹⁹ K Betts, 'Immigration Policy under the Howard Government' (2003) 38 *Australian Journal of Social Issues* 169.

¹⁰⁰ Australian Social and Economic Rights Project, Submission to the UN Committee on Economic, Social and Cultural Rights: Australia's Compliance with the UN Covenant on Economic, Social and Cultural Rights, Victorian Council of Social Service and Stegley Foundation (April 2000) 32.

¹⁰¹ 'Government urged to axe "middle-class welfare"' *ABC News* (1 April 2009) <www.abc.net.au/news/stories/2009/04/01/2532160.htm> accessed 24 October 2010.

destitution on some to preserve inessential benefits for others. A policy interest in controlling welfare expenditure should not be secured by expecting some members of society (new migrants) to bear the costs while others in the community bear little or none.

Responding to political or public concerns about the access of new migrants to public welfare – for example, notions that they have not ‘earned’ public welfare through membership of the community over time, or they are not yet sufficiently ‘Australian’ to deserve it – is not a sufficiently strong ground for a government to deprive a person of an adequate standard of living, to bring about their impoverishment, and to undermine their basic human dignity. Ironically, if a period of residency is regarded as a test of integration into the community, then waiting periods may in fact be counterproductive:¹⁰² they may *diminish* the capacity of a person to integrate into the community and to establish her or himself in Australia, resulting in long-term social and economic costs to Australia while harming the individual at the same time.

In circumstances where new migrants are left destitute and/or homeless by the denial of social security, there may also be a separate violation of the right not to be subjected to cruel, inhuman or degrading treatment or punishment.¹⁰³ Freedom from degrading treatment is not subject to any limitations whatsoever under human rights law. By analogy, the House of Lords found that British legislation depriving asylum seekers of welfare support, in circumstances where private charities could not support them, thus rendering them homeless and destitute, amounted to inhuman or degrading treatment contrary to article 3 of the European Convention on Human Rights.¹⁰⁴

X. FURTHER ISSUES CONCERNING DISABILITY SUPPORT

Much of the above analysis similarly applies to the ten year waiting period for disability support in Australia. That waiting period, is however, more indiscriminate in that it continues to apply for up to eight years after a migrant has obtained permanent residency. This measure accordingly draws an arbitrary distinction between persons with

¹⁰² National Welfare Rights Network, ‘Submission to the Joint Standing Committee on Migration’, *Inquiry into the health requirements in the Migration Act 1958 (Cth)* (2009-2010) 4.

¹⁰³ In article 15 of the Disabilities Convention, and the equivalent general provisions in the 1984 Convention against Torture and the ICCPR.

¹⁰⁴ *Adam v Secretary of State for the Home Department* [2005] UKHL 66.

disabilities and residents without disabilities. Just as distinctions on the basis of citizenship unfairly and unreasonably stigmatized certain members of the South African community in *Khosa*, here the combination of distinctions based on residency and disability amplify the level of prejudice in Australia. Persons with disabilities are often already socially marginalized such that their exclusion from assistance serves both to reinforce negative stereotypes about disability and limit the capacity of some people to develop their potential. Despite the availability of other forms of income support after two years have elapsed, in many cases such support may be inadequate to meet the special needs and expenses of some persons with disabilities. Thus the standard required by the rights to an adequate standard of living and social protection must be viewed in the context of the special needs of persons with disabilities.

The denial of income and disability support to migrants with disabilities may also result in an unjustifiable interference in the right to health of persons with disabilities. Article 25 of the CRPD requires States Parties to, inter alia:

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

Article 25(a) established a right of persons with disabilities to equal treatment in the provision of health care, relative to people without disabilities. If DSP eligibility is a condition of access to health services by new migrants with disabilities, then article 25 may be relevant. One difficulty is that the ten-year waiting period may result in a denial of health services to some people with disabilities but not others, thus it is arguable that there is parity in the health provisions as between Australians with disabilities and other Australians, yet differential treatment only between migrants (or new residents) with disabilities and other persons with disabilities.

However, article 25(a) should be interpreted as applying to all persons with disabilities within a country’s jurisdiction, regardless of immigration status, so that there is still relevant differential treatment in access to health care between at least some persons with disabilities (new

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

In accordance with the analysis above in this article, and given the high importance of health services for persons with disabilities and the correlatively high threshold demanded to justify its displacement, there is no reasonable and objective justification for the denial of disability pensions to new migrants for ten years after their arrival. While the waiting period can be waived for Australian residents who acquire a disability within Australia, that narrowly available waiver is discretionary and is not routinely applied. As the Federation of Ethnic Communities Councils of Australia observes: '[t]here is a higher incidence of work related disability among adult migrants because a lot of them engage in lower paid jobs or manual labour. There are fewer workplace safety measures for them, so a lot of them acquire a disability [in Australia]'.¹⁰⁵ It is at this intersection of labour, migrant and disability rights that some people are most vulnerable. Despite contributing to the economy and suffering injury as a result, such migrant workers may find themselves unassisted by disability welfare programs for prolonged periods of time.

XI. NON-DISCRIMINATION AND THE WAITING PERIODS

As a party to the ICESCR, Australia is required, in guaranteeing Convention rights,¹⁰⁶ to refrain from discrimination on the basis of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.¹⁰⁷ Whereas protection against 'disability' discrimination is expressly articulated in the CRPD,

¹⁰⁵ Federation of Ethnic Communities Councils of Australia, 'Submission to the Joint Standing Committee on Migration', *Inquiry into the health requirements in the Migration Act 1958 (Cth)* (2009-2010) 6.

¹⁰⁶ Including rights to social security and an adequate standard of living.

¹⁰⁷ International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution 2200 (XXI) (16 December 1966), article 2(2).

disability is *implicitly* covered under the ICESCR by the requirement not to discriminate on the basis of any ‘other status’.¹⁰⁸

In assessing whether the social security waiting periods amount to impermissible discrimination under international law, it is first likely that neither waiting period involves discrimination on the basis of disability *per se*. The two-year waiting period for income support for *all* newly arrived residents does not directly discriminate on the basis of disability, since it does not expressly differentiate between particular members (persons with disabilities and those without disabilities) of the similarly-situated class of all newly arrived migrants.

It may still, however, have an indirect discriminatory effect on persons with disabilities since that group might be disproportionately affected by its impact. Under international law, indirect discrimination may arise from ‘the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate’, where ‘the detrimental effects of a rule or decision exclusively or disproportionately affect’ members of a protected group and there are no ‘objective and reasonable grounds’ for such impact.¹⁰⁹

Whether the two-year waiting period is indirectly discriminatory would depend upon closer empirical investigation of the proportion of migrants with disabilities in need of social security assistance relative to the proportion of other migrants in need of social security. That is difficult to ascertain, since in the absence of any entitlement to social security enjoyed by new migrants, statistics are unavailable on the proportion of migrants with disabilities and other migrants who might otherwise draw upon benefits. It is also unwise to assume that disability results in a higher dependency upon welfare, given that many people with varying disabilities participate in the workforce and do not draw upon social security resources. There are also other newly arrived migrants who face substantial hardship due to the two-year waiting

¹⁰⁸ UN Human Rights Committee, Concluding Observations on Ireland (2000) UN Doc. A/55/40, [422]-[451].

¹⁰⁹ UN Human Rights Committee, *Althammer v Austria*, Communication No 998/2001, para 10.2. Likewise under the European Convention on Human Rights, it is recognised that ‘where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group’, and where there is no ‘reasonable and objective justification’ for it: *Hoogendijk v The Netherlands* (2005) 40 EHRR SE22.

period, such that it may not impose special prejudice on migrants with disabilities.

The ten-year waiting period for the DSP is also likely not to be (directly or indirectly) discriminatory on the basis of disability since it does not apply to other categories of persons with disabilities, such as Australian citizens with disabilities or long-term permanent residents with disabilities. Rather, the relevant differentiation is between *different classes of persons with disabilities* within Australia – ‘newly arrived migrants with disabilities’ and other persons with disabilities. ‘Migrant disability’ is not *per se* a prohibited ground of discrimination under the CRPD.

Additionally, it is not likely that the waiting periods would involve discrimination on the basis of ‘nationality’. Australian dual nationals and long-term permanent residents with other nationalities are still entitled to social security. Rather, the basis of eligibility is the length of residence in Australia. However, the Hong Kong Government, which imposes a seven-year residency requirement for eligibility for social security, has noted that while ‘the length of residence in a region is not the same as birth or national origin it may be regarded as being closely connected with a person’s place of birth or national origin’.¹¹⁰ If waiting periods can be characterised as targeting nationality, the question then becomes whether such measures are necessary and proportionate restrictions on non-discrimination.

A third, and more probable, ground of *prima facie* discrimination is the use of the term ‘other status’. In *Kbosa*, the Court observed that citizenship is not specified as a ground of discrimination under the South African Constitution, yet the courts have accepted analogous grounds of differentiation where a measure has ‘an adverse effect on the dignity of the individual, or some other comparable effect’.¹¹¹ In that case, foreign citizens were characterized as ‘a minority in all countries’ who enjoy ‘little political muscle’.¹¹² Citizenship was further regarded as a ‘personal attribute which is difficult to change’ or which is otherwise ‘a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs’.¹¹³

¹¹⁰ Hong Kong Health (n 64) [9].

¹¹¹ *Kbosa* (n 73) [70].

¹¹² *ibid* [71].

¹¹³ *ibid*.

The determination of an ‘other status’ under the ICESCR might be beneficially guided by the principle enunciated in *Kbosa* that what matters is whether a measure adversely affects human dignity. In Australia, the two-year waiting period targets an identifiable social group of ‘newly arrived migrants’, that is, a class constructed by reference to both non-citizenship and length of residence in Australia. Furthermore, the ten-year waiting period targets an identifiable group of ‘newly arrived migrants with disabilities’, a class constructed by reference to non-citizenship, length of residence, and disability-related needs. Again, the question then becomes whether the denial of social security to such a group, and any consequential denial of an adequate standard of living, is justifiable in pursuing a legitimate aim or, alternatively, whether it impermissibly discriminates.

The question whether the waiting periods justifiably discriminate on the basis of ‘other status’ involves similar considerations to those considered earlier, in respect of the justifiability of restrictions on the right to social security generally. Under international human rights law: ‘[n]ot all differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate’.¹¹⁴ Australia’s ‘Declaration’ to the CRPD correctly identifies and endorses this test when it declares that the migration health test must be ‘based on legitimate, objective and reasonable criteria’.¹¹⁵

In light of the special attention which the UN Committee on Economic, Social and Cultural Rights has paid to the situation of

¹¹⁴ UN Human Rights Committee, General Comment 18 [13]; see also UN Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para 2), E/C.12/GC/20 (10 June 2009) [13]; UN Human Rights Committee, *Broeks v The Netherlands*, 172/84 [13]; CERD Committee, General Recommendation No. 30 [4] (applying the same test to differentiation on the basis of citizenship or immigration status).

¹¹⁵ This Declaration does not declare that the current health test is *actually* legitimate, objective and reasonable, contrary to the view of JSCOT, *Report 95* (n 2) [2.35] (‘the Australian Government has made a Declaration asserting that Australia’s migration processes are in full compliance with the Convention’). As the Australian Human Rights Commission rightly puts it, the declaration is simply indicating that the health test is lawful ‘*if and to the extent that* these requirements are based on legitimate, objective and reasonable criteria’: Australian Human Rights Commission, ‘Submission to the Joint Standing Committee on Migration’, *Inquiry into the health requirements in the Migration Act 1958 (Cth)* (2009-2010) 3 (emphasis added).

vulnerable groups, including non-nationals, refugees and asylum seekers,¹¹⁶ it is arguable that differentiation in the provision of most ICESCR or CRPD rights on the basis of nationality or migration status will seldom be justifiable. In many cases, it will be difficult for a State to justify targeting non-citizens (including refugees or asylum seekers) as a necessary and proportionate means of safeguarding scarce national resources. Other, less discriminatory means of safeguarding such resources will often be available, such as the spreading of the cost burden across different groups; for example, by reducing social security payments across the board, rather than eliminating them entirely for non-citizens.

While human rights law allows a balance between non-discrimination and other social interests such as public health, in the migration area the balancing of interests is frequently tilted presumptively in favour of the local community and against the foreigner. Preserving scarce public welfare or health resources is not an ultimate value which must take pre-eminence in all situations. There is a countervailing public policy interest in ensuring that migrants and persons with disabilities are *not* treated adversely on account of personal characteristics – residency status, or permanent and debilitating impairments – which are beyond their immediate control.

The immutable nature of permanent disabilities, and the debilitating nature of other disabilities, can be what sets disability apart from other grounds of selection in immigration programs (such as skills, finances, or language abilities) and over which individuals can ordinarily exercise a greater degree of human agency. According to the contemporary ‘social model’ of disability, there is a further countervailing public interest in recognising and valuing the social diversity which comes with disability, including its manifestation in migrant communities.

Australia’s migration program already ‘cherry picks’ skilled labour and business people from other countries, yet refuses to admit the natural diversity of foreign populations, including persons with disabilities. Consequently, Australia drains the capacity of developing

¹¹⁶ UN Committee on Economic, Social and Cultural Rights, General Comment No. 5: ‘Persons with disabilities’ (9 December 1994) [9].

countries to meet their own economic needs and to prosper,¹¹⁷ while at the same time refusing to mitigate the costs it imposes on other countries by admitting a more representative intake of migrants or by paying for their welfare needs. Men and women with disabilities already face enough obstacles in the immigration system, where, for instance, they cannot meet skills, assets or language tests on account of their disabilities; these problems are compounded further by these additional restrictions on disability assistance.

XII. CONCLUSION: WAITING FOR DIGNITY

Australia has assumed an international legal obligation to ensure that its domestic laws and policies comply with the requirements of both the ICESCR and CRPD, including its treatment of migrants. There is a pragmatic reason to reform Australian immigration law. On 21 August 2009, Australia acceded to the Optional Protocol to the CRPD, following a JSCOT recommendation.¹¹⁸ The Optional Protocol came into force for Australia on 20 September 2009. Article 1 enables individuals to complain of violations to the new UN Committee on the Rights of Persons with Disabilities; as of 2008, an individual complaints mechanism is similarly available under the ICESCR. In addition, article 6 of the Optional Protocol to the CRPD empowers the Committee with a wider function to investigate 'grave or systematic violations' of Convention rights by a State party.

If Australia is to avoid complaints being made pursuant to these procedures, and the inevitable adverse publicity and embarrassment which it may entail, it is essential to reform existing discriminatory immigration practices to comply with social security and disability rights standards. Decisions about the allocation of resources are obviously ones which governments are well positioned to make in the exercise of their discretionary political and economic judgment on policy matters, and those views should be accorded significant weight. Yet, the very point of international human rights law is to impose outermost constraints on national policy-making when national authorities resolve to sacrifice the rights of vulnerable people in pursuit of some wider public interest, whatever the human cost to those affected. Australia has an opportunity

¹¹⁷ Acknowledging, however, that migrants' remittances to their home countries provide important contributions to the economies of developing countries.

¹¹⁸ JSCOT, *Report 99* (12 March 2009) ch. 2.

to reconfigure its immigration and social security laws to treat new migrants and migrants with disabilities in a more rational and humane manner. It also has an opportunity to signal to the world a new era of human rights in Australia – one in which domestic political considerations, such as national sovereignty and economic self-interest, no longer trump human rights considerations.¹¹⁹

¹¹⁹ Carney and Boucher (n 6) 32.