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9 March 2023

Committee Secretary
Joint Standing Committee on Migration
PO Box 6021
Parliament House
Canberra ACT 2600

*Online lodgement*

Dear Committee Secretary

**Submission to the Joint Standing Committee on Migration in relation to the Inquiry: Migration, Pathway to Nation Building**

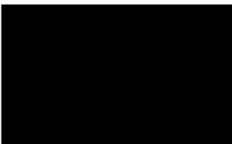
1. Estrin Saul Migration Specialists, in conjunction with Welcoming Disability,[1] welcome the opportunity to provide a Submission to the Joint Standing Committee on Migration (**the Committee**) in relation to the 2023 Inquiry into Migration, Pathway to Nation Building (**the Inquiry**).

2. The **attached** Submission relates specifically to the Migration Health Requirement (**MHR**).

3. The MHR underpins eligibility for every visa and is therefore fundamental to an inquiry into the efficacy of the migration system as a pathway to nation building. Meeting the MHR is an essential pre-requisite for the successful grant of a visa to enter or remain in Australia.

4. Please feel free to contact me at [redacted] or on [redacted] for any further information.

Sincere Regards



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[1] Welcoming Disability is a small organisation advocating for reform of the Migration Health Requirement. See, welcomingdisability.com

# Submission to the Joint Standing Committee on Migration in relation to the Inquiry: Migration, Pathway to Nation Building

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Submission to the Joint Standing Committee on Migration in relation to the Inquiry: Migration, Pathway to Nation Building

> Migrants to Australia have to meet Health Requirements in order to be eligible for certain visa classes of entry. These requirements aim to minimise the burden of planned migration on the health care system, to prevent the spread of contagious diseases, and to protect Australia's record of good health.
>
> (*Enabling Australia. Inquiry into the Migration Treatment of Disability*, June 2010)[1]

1. Estrin Saul Migration Specialists, in conjunction with Welcoming Disability,[2] welcome the opportunity to provide a Submission to the Joint Standing Committee on Migration (**the Committee**) in relation to the 2023 Inquiry into Migration, Pathway to Nation Building (**the Inquiry**).

2. This Submission relates specifically to the Migration Health Requirement (**MHR**).

3. The MHR underpins eligibility for every visa and is therefore fundamental to this Inquiry into the efficacy of the migration system as a pathway to nation building. Meeting the MHR is an essential pre-requisite to the successful grant of a visa for non-citizens to enter or remain in Australia.

4. In line with the priorities of the Inquiry, this Submission implicitly addresses the following matters:

   - The role of permanent migration in nation building, cultural diversity, and social cohesion;
   - Immigration as a strategic enabler of vibrant economies and socially sustainable communities in our cities and regional hubs;
   - Attraction and retention strategies for working migrants to Australia; and
   - Policy settings to strengthen skilled migrant pathways to permanent residency.

5. This Submission addresses the restrictions placed by the Australian Government on visa applicants and their family members who have a disability or a health condition which the Australian Government deems likely to be a 'significant cost' to the Australian community.[3]

6. This Submission argues that the current restrictions are unwarranted and have adverse implications: for visa applicants with a health or disability issue attempting to attain permanent residence; for state governments and employers seeking to recruit skilled workers; and for student visa applicants. Consequently, these restrictions impact adversely on the overall efficacy of the migration system as a pathway to nation building.

7. This Submission also makes concrete recommendations for change.

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[1] The Parliament of the Commonwealth of Australia, *Enabling Australia. Inquiry into the Migration Treatment of Disability, Joint Standing Committee on Migration*, Canberra, June 2010 [hereafter ***Enabling Australia***], 2.6 Migration legislation and the health requirement

[2] Welcoming Disability is a small organisation advocating for reform of the Migration Health Requirement. See, welcomingdisability.com

[3] Item 4005 (1)(c)(ii)(A) and item 4007 (1)(c)(ii)(A), schedule 4, *Migration Regulations 1994* (Cth)

## Background

8. As a consequence of the MHR, many otherwise fully-eligible and fully-qualified visa applicants and their families are refused a visa on the basis of a health or disability condition which causes an individual or a family member to fail the Migration Health Requirement (**MHR**).

9. Further, the knowledge that a disability is likely to lead to a visa refusal on heal))th grounds is a deterrent to highly–qualified visa applicants who would otherwise fit into the Government's template of 'desirable migrant'.

10. As well as leading to a loss of potential skills to Australia, and preventing the reunification of families, the policy of exclusion on the basis of costs associated with individuals with a disability has strongly negative implications in terms of societal perceptions of the value of the lives of people with disabilities.

11. Australia's MHRs are premised on protection of public health; protecting the right of Australian citizens and existing permanent residents to access scarce health resources; and limiting the impact of migration on health and disability support services. While recognising the importance of these criteria, we take the position that associated discrimination against people with disabilities is unacceptable. In particular, we note the exemption of the *Migration Act 1958* (Cth) (**Act**) from the scope of the *Disability Discrimination Act 1992* (Cth) (**DDA**); and the Australian Government's Interpretative Declaration to Article 18 of the United Nations Convention on the Rights of Persons with Disabilities (**CRPD**), relating to Liberty of Movement and Nationality.[4]

12. We also refer to the 2010 Joint Standing Committee on Migration Inquiry into the Migration Treatment of Disability, Enabling Australia (**Inquiry**),[5] and the Government's November 2012 Response to that Inquiry (**Response**).[6]

13. The Response promised to launch a review of the then Department of Immigration and Citizenship (now Home Affairs), advised that some actions had already been taken or would be taken to address the recommendations of the Committee, and 'committed to a rigorous investigation of the feasibility of other reforms'.[7]

14. Some of the Committee recommendations were rejected; others were accepted; but even of those accepted, not all were implemented.

## Migration health requirement: legislative and regulatory background

15. All applicants for visas to enter Australia, both main applicants and their family members, are required to meet the MHR. These are framed by Public Interest Criteria (**PICs**) 4005 and 4007, set out in schedule 4 to the *Migration Regulations 1994* (Cth) (**Regulations**).

16. In the case of applicants for permanent visas, even non-migrating members of the family unit of a visa applicant are required to meet the MHR before a visa can be granted to migrating family members. This is known as the **'one fails, all fail'** rule.

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[4] United Nations, Treaty Series, Convention of the Rights of Persons with Disabilities, Australia, Declarations and Reservations [hereafter CRPD], accessed 01 09 2022 at <https://treaties.un.org/pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-15&src=IND#EndDec>

[5] *Enabling Australia*, June 2010

[6] Australian Government, *Australian Government response to the Joint Standing Committee on Migration Report: Enabling Australia. Inquiry into the Migration Treatment of Disability*, November 2012 [**Response, November 2012**]

[7] Response, November 2012

17. All visa applicants must meet either PIC 4005, or PIC 4007, depending on the visa for which they have applied. PIC 4007 offers the applicant the opportunity to apply for a **waiver** of the health requirement, that is, to argue that the benefits they bring to Australia outweigh the costs and that the health requirement be set aside. PIC 4005 does not.

18. Items 4005 and 4007 to schedule 4 of the Regulations state in part that:

**(1)** The applicant:

**(a)** is free from tuberculosis; and
**(b)** is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
**(c)** is free from a disease or condition in relation to which:

(i) a person who has it would be likely to:
(A) require health care or community services; or
(B) meet the medical criteria for the provision of a community service;...

and

(ii) **the provision** of the health care or community services would be likely to:
(A) result in a **significant cost** to the Australian community in the areas of health care and community services; or
(B) prejudice the access of an Australian citizen or permanent resident to health care or community services;

regardless of whether the health care or community services will actually be used in connection with the applicant [emphasis added].

19. PIC 4007 (2) allows for the Minister to **waive** or set aside the requirements of subclause (1)(c) if

**(a)** The applicant satisfies all other criteria for the grant of the visa applied for; and

**(b)** the Minister is satisfied that the granting of the visa would be unlikely to result in:
(i) **undue cos**t to the Australian community; or
(ii) undue prejudice to the access to health care or **community services** of an Australian citizen or permanent resident [**emphasis added**].

20. Neither of the key terms 'significant cost' nor 'undue cost' is defined in the Regulations or the Act.

21. Public health aspects of the MHR set out at item 4005(1)(a) and 4005(1)(b) and items 4007(1)(a) and 4007 (1)(b) in schedule 4 of the Regulations are not the focus of this discussion. The focus here is on costs to the community as set out at items 4005(1)(c)(i) and 4005(1)(c)(ii), and 4007(1)(c)(i) and 4007 (1)(c)(ii) (**hereafter referred to collectively as items (1)(c)(i) and (1)(c)(ii)**).

**Community services**

22. Regulation 1.03 notes that 'Community services include the provision of an Australian social security benefit, allowance or pension'. Policy, as set out in the Procedures Advice Manual, notes that 'community services' includes special education. However, 'regular' education is not deemed a community cost in terms of the MHR, and nor is English as a Second Language (ESL), whether provided in the community or to school students in government schools.

### Waivers of the MHR

23. Waivers of the MHR are available for

- some family visas, namely child and partner visas, though not for parent visas;
- skilled migration visa applicants who have an employer sponsor and who are transitioning from a temporary to a permanent visa;
- applicants for the New Zealand resident stream of the general skilled migrant visa; and
- applicants for global talent visas.

24. Waivers are also granted automatically for applicants for humanitarian visas, as a result of the Recommendation of the Enabling Australia inquiry.

25. Waivers are not available for

- temporary visas such as student or visitor visas;
- general skilled migration applicants other than New Zealand citizens;
- **state-nominated general skilled migration (subclass 190) applicants**;
- investment visas.

26. In 2021-22, a total of 960,779 immigration medical examinations were undertaken, out of which 1,779 visa applicants did not meet the health requirement for a number of reasons.

27. Figures provided by the Department for July 2019 to June 2020, indicate that about half the visa applicants who failed to meet the MHR were eligible to apply for the waiver. In that year, 91 per cent had the waiver granted; in 2021-22, the number of waivers granted had risen to 96 per cent.[8]

28. This indicates that **the very large majority** of visa applicants refused visas on health grounds are able, **given the opportunity**, to demonstrate that the benefits they bring to the community outweigh their notional health costs. However, this process takes a long time at great personal and financial cost.

29. On the other hand, the other 50 per cent of the applicants who failed to meet the MHR had no opportunity to argue for the benefits they brought to Australia and their visas were refused.

### Impact on state-nominated general skilled migration

30. The lack of a waiver for those invited to apply for **state-nominated general skilled migration (subclass 190) visas impacts adversely on state skilled migration.**

31. Further, there is no consistency regarding the availability of waivers within a particular class or even subclass of visa. For example, although waivers are available to applicants in other streams of the subclass 186 (employer nominated scheme) and subclass 494 (skilled employer sponsored regional (provisional) visas, waivers are **not** available for applicants for visas under the Designated Area Migration Agreement (**DAMA**), since there is no waiver available for the 'labour agreement' stream for those visas, cutting off a path to PR for otherwise eligible applicants in state-designated areas of need. There is no justification for this anomaly in Policy or elsewhere.

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[8] Emails, DHA to Jan Gothard, 2021 and Sept 2022

Significant cost threshold

32. As set out in items (1)(c)(i) and (1)(c)(ii), the costs associated with a visa applicant are assessed by the Medical Officer of the Commonwealth (**MOC**), on the basis of whether **the provision of community and health services would be likely to result in a significant cost** 'regardless of whether the health care or community services will actually be used in connection with the applicant'.

33. 'Significant cost' is currently set out in Policy as $51,000 over the relevant period prescribed under the Regulations and Policy. This can range from the duration of the visa in the case of a temporary visa, to a maximum of ten years for a permanent visa, depending on the nature of the disability or health condition and its expected duration.

34. There is no publicly-available algorithm for determining the level of significant cost, as set by the Department from time to time.

35. According to the Australian government agency the Australian Institute of Health and Welfare (**AIHW**), the average amount per capita spent on health care in Australia in 2020-21 was $8,617, or $86,170 over ten years.[9] The MHR 'significant cost' is therefore just **59 per cent of the average cost** expended on Australians over a ten-year period.

International Comparisons

36. In terms of international comparison, the significant cost threshold for New Zealand is now **NZD 81,000** (increased in September 2022 from NZD 41,000) **over five years.**[10] Canada, which has recently reviewed and significantly amended its medical inadmissibility rules, has set its 2022 cost threshold at **CAD 24,057 per annum** or **CAD 120,285 over five years**.

Assessment of the MHR

37. In practice, the MOC does not assess whether or not the **actual** provision of services would be likely to result in a cost to the community. The MOC assesses the costs of an applicant on the basis of a 'hypothetical person' with a similar condition at the same level of severity who **would** be entitled to use those services, 'regardless of whether the health care or community services will actually be used in connection with the applicant'. This is the so- called 'hypothetical person' test derived from the 2005 Robinson Federal Court case (*Robinson v. Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1626) (**Robinson**).

38. Under reg 2.25A(3) of the Regulations, when assessing whether or not an applicant meets the health requirement the Minister is bound to accept the MOC's opinion as correct:

> The Minister is to take the opinion of the Medical Officer of the Commonwealth... to be correct for the purposes of deciding whether a person meets a requirement or satisfies a criterion.

39. Consequently, anyone assessed under PIC 4005, with no access to a waiver, will be automatically refused a visa; and in the event of an appeal to the Administrative Appeals Tribunal (**AAT**), the AAT will necessarily reach the same conclusion regarding costs, since under reg 2.25A(3) the AAT is required to

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[9] Health expenditure Australia 2020-21, AIHW https://www.aihw.gov.au/reports/health-welfare-expenditure/health-expenditure-australia-2020-21/contents/summary

[10] See, https://www.immigration.govt.nz/about-us/media-centre/news-notifications/significant-cost-health-threshold-increased; https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/updates/2022-cost-threshold.html

accept the opinion of the MOC as correct.

## 'Special' education

40. Individuals or families with disabilities overwhelmingly bear the brunt of the health requirement provisions. This is primarily because of the cost of 'special education' for children with disabilities.

41. While the DHA has not provided disaggregated statistics for the types of conditions with most frequently fail to meet the health requirement, professional experience of migration lawyers suggests that children with disabilities are the most frequently affected category.

42. As noted above, 'regular' education is not deemed a community cost in terms of the MHR.

### *Example*

43. Consider a situation where a family with three children applies to migrate to Australia. One seven-year old child has high functioning autism. That child currently attends a mainstream school with in-class support, and is assessed by the MOC as having a 'mild developmental delay'. The family meets all the criteria for skilled migration, but the child with the disability fails to meet the health requirement. That child will be assessed for special education support to the age of 18, at a cost ranging from about $26,000 to $50,000 per annum, but most likely at the lower end of the range.

44. Just two years of schooling will bring the child's notional costs for special education – whether they want 'special education' or not – above the significant cost threshold of $51,000.

45. If the child's parents have applied for subclass 482 visa, the only temporary skilled visa which leads to a permanent visa, they have access to a waiver through PIC 4007 and they may be successful in having the health requirement waived, though they will need to reapply for a health waiver when they subsequently apply for a permanent skilled visa.

46. If they are unsuccessful at the waiver stage and are either onshore (ie within Australia) or have a sponsor in Australia who is prepared to appeal on their behalf, they can apply for review of the visa refusal by the AAT.

47. If however they are offshore or have no sponsor prepared to act for them, their eligibility for review is significantly curtailed and may be non-existent.

48. If, on the other hand, they applied for any other skilled permanent visa, including a state government nominated visa, or for an investment visa, or for a provisional or permanent visa under DAMA, this visa would be subject to PIC 4005. Consequently they have no opportunity to apply for a waiver, and will be refused the visa because of the child's costs.

49. This refusal will not take into account the parents' capacity to support their child with a disability, their own income, their skills, professions, or the benefits they may bring to Australia in any form. Again, if they are off-shore, they may have no right to appeal. But even if they do have a right to appeal, the AAT is bound by reg 2.25A(3) to accept the opinion of the MOC regarding costs, so in almost every instance of failing to meet the MHR on the basis of PIC 4005, an appeal would be a waste of time and money.

50. A family with a school-age child with a disability applying for a visa with a duration of two years or longer, temporary or permanent, is almost guaranteed to fail the health requirement because of the costs of 'special education'.

51. Notably, neither ESL taught in schools nor the government's Adult Migrant English Program (**AMEP**) is considered a 'community service' in terms of the health requirement.

52. AMEP provides free English services to eligible migrants:

> as part of a broader plan to ensure migrants are best positioned **to reach their full potential in Australia**, and **to further strengthen our social cohesion**.[11] [emphasis added]

**It is both disappointing and illuminating that special education is not similarly considered an opportunity to enable school students with disability to reach their full potential, nor to strengthen social cohesion in terms of the disability community.**

### Children with disability or health issues born in Australia

53. A child born in Australia takes on the visa status of its parents. The parents may be on a temporary visa, such as a graduate or temporary work visa, and may be on track in due course for permanent residence, if they meet all the relevant eligibility criteria. The birth of a child with a disability throws them off that path, as the child will very likely fail the MHR: because of their health condition, or, in the case of a child with a disability, the cost of 'special' education.

54. If the parents are on track to apply, or have already applied for, a skilled visa with a health waiver, such as a subclass 186 (temporary residence transition stream only), they can apply for the waiver, though even if successful, it will significantly disrupt the time it takes for them to attain the visa.

55. However, those on track for other visas such as general skilled migration (including state nomination visa subclass 190) or DAMA-related visas, have no access to a waiver and they will be refused their visa.

56. One of the conditions taken into account when assessing whether or not the Department will exercise the health waiver is the 'compassionate and compelling' circumstances of the applicant. In the case of applicants for humanitarian visas, following the Enabling Australia inquiry, Policy changed to grant humanitarian visa applicants an automatic health waiver on the grounds of their 'compassionate and compelling' circumstances.

57. We consider that the situation of child with a disability born in Australia should be similarly assessed as 'compassionate and compelling; and should result in the automatic exercise of the health waiver, regardless of whether or not the family is applying for a visa governed by PIC 4005 (no waiver) or PIC 4007 (waiver)

### 'One fails, all fail' rule

58. The so-called 'one fails, all fail' rule relates to the requirement that all members of a family unit of a visa applicant, **even those members of the family unit not applying to migrate**, must meet the MHR. For example, one elderly parent permanently cared for in their home country in a residential nursing home, while the other parent applies for a parent visa to join children in Australia; or a child with a disability living in their home country with their siblings and parent, the former spouse of an applicant for a partner visa, must still meet the MHR.

59. If there is a waiver available, the applicant can apply for a waiver. If there is no waiver available, then

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[11] Australian Government, Department of Home Affairs, Immigration and Citizenship, Reform of the Adult Migrant English Program (AMEP), accessed 01 09 2022 at <https://immi.homeaffairs.gov.au/settling-in-australia/amep/about-the-program/background>

the visas of the applicant and any accompanying family members will be refused.

60. The Response to Enabling Australia agreed in 2012 that this 'one fails, all fail' criterion should go. It has not.

### Required Medical Examinations

61. 'Required Medical Examinations', referred to as the Health Matrix (**Matrix**)[12] are designed to protect public health through screening for tuberculosis (**TB**). Required medical examinations are based on countries of citizenship or recent residence organised into two categories: 'Lower TB-risk' and 'Higher TB-risk' countries as designated by WHO. Applicants from lower TB-risk countries for temporary stays of six months or more are not required to undertake a medical examination unless 'special significance' applies: for example, proposed employment in a particular profession or higher-risk occupation; or if an applicant has indicated on their application form that they have a health condition likely to require medical attention during their time in Australia. On the other hand, applicants from higher TB-risk countries for a visa of similar duration are all required to undertake a full medical examination including, for those aged over 11, a chest x-ray.

62. A chest x-ray will reveal TB, as is intended. However, the medical examination will also flag non-medical conditions or disabilities such as Down syndrome or autism, which will incur no medical costs and which consequently do not need to be mentioned on the 'Health Declaration' completed by the visa applicant. Once such a condition is flagged as a result of the medical examination, however, the applicant's community costs are assessed by the MOC under the MHR.

63. An applicant from a higher TB-risk country applying for a subclass 482 (temporary skill shortage) visa or subclass 500 (student) visa, with a child with a disability, applying for a visa of two years duration or longer, will consequently fail to meet the health requirements because of the notional cost of 'special' education. An applicant from a lower TB-risk country with a child with a similar disability will not be required to undergo the full medical examination and consequently will not fail the health requirement, though that child too is entitled to 'special' education.

64. An applicant for a subclass 482 visa who fails to meet the MHR can apply for a waiver which is highly likely to be granted, since 96 per cent of waivers are now granted.[13] However an applicant for a student visa has no access to a waiver and will have a visa refused.

65. While it is necessary from a public health point of view to screen applicants from higher TB-risk countries by requiring a chest-ray, the additional medical examinations – none of which are required for applicants from lower TB-risk countries – seem redundant. Since the acknowledged purpose of the Matrix and IMMI 15/144 is to screen for TB, a chest extra alone should suffice.

66. In terms of student visa applicants: our five highest source countries for students – China, India, Vietnam, Nepal and Columbia[14] – are all higher TB-risk countries. The burden of this additional screening therefore falls most heavily on students from our most important source countries.

67. It is also worth noting, at a time when Prime Minister Albanese is publicly advocating an increase in student numbers from India and facilitating ease of entry for Indian student visa applicants, that India is considered a higher TB-risk country. Perhaps as a matter of good faith and transparency, Indian students with a family member with a disability should be advised not to apply.

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[12] Regulations, Specification of Required Medical Assessment - IMMI 15/144

[13] Email, spokesperson from Dept of Home Affairs, Sept 2022.

[14] https://www.austrade.gov.au/australian/education/education-data/current-data/summaries-and-news

68. The cost of the medical assessment for applicants from higher TB-risk countries is also significant; and even more onerous where a temporary visa application includes family members. Whereas a chest x-ray alone costs $160.90, a full medical examination including chest x-ray costs $431.40.[15]

69. The Health Matrix discriminates unnecessarily and unfairly against visa applicants and family members with a disability, an issue compounded by the assessment of special education under the MHR. It also impacts adversely on students from our most important source countries for student visas.

### Disability Discrimination Act 1992

70. The DDA functions to prevent discrimination against people with disabilities in Australia. However, s 52 of the DDA states that relevant provisions of the DDA:

> do not affect discriminatory provisions in:
> (i) the *Migration Act 1958*; or
> (ii) a legislative instrument made under that Act; or
> render unlawful anything that is permitted or required to be done by that Act or instrument.

71. Section 52 thus renders impotent any argument relating to treatment of people with disabilities under the Act: treatment which, in other circumstances, would be deemed discriminatory, and therefore unlawful.

72. Successive ministers have argued that the health requirements are not discriminatory since everyone, regardless of health or disability, is subject to the same level of assessment. This response ignores the reference in s 52 of the DDA to 'discriminatory provisions in the *Migration Act 1958*'.

### UN Convention on the Rights of Persons with Disabilities (CRPD)

73. The Australian Government's legal power to discriminate on the grounds of disability in the migration realm is further reinforced at an international level through the CRPD. The Australian Government is a signatory to the CRPD (2007), and ratified the Convention in 2008 and the Protocol in 2009. However, the Australian Government also lodged a **caveat** to article 18, Liberty of Movement and Nationality, which pertains to migration. This caveat or 'Interpretive Declaration', reads in part:

> Australia recognises the rights of persons with disability ... to freedom to choose their residence and to nationality, on an equal basis with others. ...but declares ... that that does not create a right ... [to] impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on **legitimate, objective and reasonable criteria** [emphasis added].[16]

74. The notion of what constitutes 'legitimate, objective and reasonable criteria' requires further interrogation.

75. This Interpretative Declaration to Article 18 also leaves the Australian government position clearly out of step with Article 5 of the CRPD, which states:

[15] Bupa Medical Visa Services, *Australian Immigration Health Examinations Fees*, from 1 Dec 2022 <https://www.bupa.com.au/bupamvs/fees>

[16] CRPD, Declarations and Reservations

> States Parties recognise 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.
> States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.[17]

*Figure 1: Migration health regulations aren't discriminatory...*

A note on costs: the Canadian example

76. Other than protecting public health, the main argument used in support of the current health requirement concerns notional costs to the community. The Australian National Audit Office (**ANAO**) pointed out in a 2007 review of the administration of the Health requirements of the *Migration Act*, that the Department of Immigration (then, DIAC) did not have the technology in place, nor any sort of adequate information-gathering structures, to determine the actual cost of the migrants who had been granted or refused visas, and put in place recommendations that would enable the Department to collect such data.[18] There is no evidence that the Department has put in place those recommendations for data gathering.

[17] United Nations, Department of Economic and Social Affairs, Disability, Article 5 – Equality and non-discrimination, accessed 01 09 2022 at <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-5-equality-and-non-discrimination.html>
[18] The Auditor-General, 'Administration of the Health Requirement of the *Migration Act 1958*', Audit Report No. 37 2006-2007, Performance Audit, Australian National Audit Office

77. It is desirable that the government put in place structures which would help quantify the financial impact of relaxing the health requirement.

78. From 2016–2017, the Canadian government undertook a review of its existing Medical Inadmissibility (**MI**) requirements, as set out in the *Immigration and Refugee Protection Regulations* (**IRPR**), including an exercise in quantifying migration health costs across federal and provincial health jurisdictions. It subsequently determined that, contrary to widely held belief, the cost of admitting migrants with disability and health issues did not impact significantly on state budgets compared to the costs of other migrants and Canadian residents.

79. From 2018, it introduced significant temporary changes, relying on the Minister's authority to grant exemptions from obligations and criteria of the IRPR and associated Act, with the changes formalised through regulatory amendment in 2021.

80. The MI requirements were changed in line with contemporary international attitudes toward the rights of people with health and disability issues, and the Canadian government acknowledged that the limited increase in costs for health and social services associated with the change in regulations could be absorbed.[19]

81. As part of any meaningful review of the migration process and its health requirements, a similar audit should be conducted in Australia to ascertain the actual costs of permitting individuals with health and disability issues to enter Australia. While cost should not be the sole determinant of policy in this area, a realistic understanding of the actual costs of migrants with health and disability issues in comparison to any Australian resident should be an essential starting point for assessing the impact on Australia's health and community services and, as in Canada, would serve as a more realistic basis for setting the threshold for 'significant costs'.

### Recommendations for change: a staged approach

82. In order to protect all visa applicants with disabilities seeking entry or residence in Australia from discrimination, we recommend the following strategies to the Inquiry:

- review the recommendations of the Inquiry of 2010; and the reform measures promised in the Response to the Inquiry;
- undertake a costing review of the migration health requirements, along the lines of the Canadian government review of their Medical Inadmissibility requirement;
- review the notion of 'significant cost' to assess health costs based on a meaningful figure, calculated on the basis of average expenditures per capita on health and welfare costs;
- make waivers available for all applicants for all visas;
- remove special education from the Policy description of 'community costs';
- grant children born in Australia to temporary residents an automatic waiver of the MHR, on the same basis as applicants for all offshore humanitarian and refugee visas;
- review the application of the Health Matrix so as to retain its public health aspects while removing its discriminatory health elements;
- abandon the 'one fails, all fails' rule; and
- review the government's obligations under Australian and international law by bringing the Act, Regulations and Policy into line with the DDA and the CRPD. In doing so, we **recommend** the

[19] Canada Gazette, Part 1, Volume 155, Number 13: Regulations Amending the Immigration and Refugee Protection Regulations (Excessive Demand), March 27, 2021 accessed at https://canadagazette.gc.ca/rp-pr/p1/2021/2021-03-27/html/reg1-eng.html

Australian Government look to Canada as an international exemplar of a model of migration health requirements in a comparable setting which does not discriminate against the right to freedom of movement of people with disability.

Stage 1: **Policy interventions** which would immediately reduce the number of families applying for waivers.

- Automatic waiver of MHR for all children with health or disability issues born to holders of temporary residents visas.
- Remove 'special education' from Policy definition of community costs and consequently from MOC costings
- Re-assess the significant cost threshold and tie it systematically to the actual health costs associated with Australian citizens

Stage 2: Changes to Regulations

- Make waivers available to all visa applicants

This would have the effect of **raising** the number of applicants applying for waivers; however, if done in concert with Stage 1 above, the number of applicants for waivers would already have been significantly reduced.

- End to 'one fails, all fail' rule
- Review reg 2.25A(3) of the *Regulations*
- Review the application of the Health Matrix so that families from Higher-Risk TB countries applying for temporary visas who undergo chest x-rays to screen for TB are not also required to undergo full health examinations. This would reduce the bottle neck of people waiting to undertake health examinations and would help eliminate nationality-based discrimination again families with children with a disability

Stage 3: Immediate and ongoing

**Undertake a costing review of the migration health requirements**, along the lines of the Canadian review of their Medical Inadmissibility requirement, taking into account:

- actual costs of migrants ultimately refused visas on the grounds of the MHR;
- administrative costs of migration health requirements;
- personal and financial costs to visa applicants, employers, and state government authorities

**Review** s 52 of the Disability Discrimination Act

**Review** Australian government Interpretative Declaration to UN Convention on the Rights of Persons with Disability.

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