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Department of Home Affairs
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Online lodgement

Dear Eminent Persons

Submission to the Department of Home Affairs in relation to the 2022 Review of Australia's Migration System, to inform the Strategy: A Migration System for Australia's Future

1. Estrin Saul Migration Specialists, in conjunction with Welcoming Disability,[1] welcome the opportunity to provide a Submission to the Department of Home Affairs (**Department**) in relation to the 2022 Review of Australia's Migration System, to inform the Strategy: A Migration System for Australia's Future (**Strategy**). This Submission relates to the Migration Health Requirement (**MHR**) and is made in response to the invitation to Welcoming Disability from Minister Andrew Giles to make a submission on this topic.[2]

2. While Public Interest Criteria (**PIC**) have been explicitly excluded from the terms of reference of the present Review, their impact in the form of the MHR cuts across many of the concerns of the Review.

3. With reference to the **MHR**, this Submission focuses on the Key Questions set out in the Discussion Paper, in particular those related to: challenges and opportunities in the international arena, and addressing the needs of regional Australia; and the principles which should underpin reform of our future migration system. It also addresses the issues noted in the introduction to the Discussion Paper: ensuring 'Australia's approach to migration reflects Australia's values as a diverse, welcoming and fair society', and that our system is 'simpler, more efficient, enhances our competitiveness, treats migrants fairly, and helps unlock the potential contribution of all migrants to the Australian community'.

4. This submission also draws the reviewers' attention to the *Enabling Australia. Inquiry into the Migration Treatment of Disability,* June 2010) (**Enabling Australia**),[3] to the government's 2012 Response to that inquiry (**Response**),[4] and subsequent follow up. The Response 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'.[5] Some Committee recommendations were rejected and others accepted; but even of those accepted, not all were implemented; and there has been no evidence of the promised 'rigorous investigation of the feasibility of other reforms'.

[1] Welcoming Disability is a small organisation advocating for reform of the Migration Health Requirement. See, welcomingdisability.com
[2] Email, Selina Briody to Jan Gothard, Welcoming Disability, 28 November 2022
[3] 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***]
[4] 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**]
[5] Response, November 2012

Background

5. 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.

6. This Submission leaves aside many of the general issues associated with the MHR, but highlights specific aspects of the visa system which are made more problematic because of the MHR.

7. Relevantly, the *Migration Act 1958* (Cth) (**Act**) is exempt from the scope of the *Disability Discrimination Act 1992* (Cth) (**DDA**). 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, further limits the rights of people with disability to enter Australia.[6]

Migration health requirement: legislative and regulatory background

8. All applicants for visas to enter Australia and their accompanying family members are required to meet the MHR. These are framed by PIC 4005 and 4007, set out in schedule 4 to the *Migration Regulations 1994* (Cth) (**Regulations**).

9. PIC 4007 offers applicants 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 should be set aside. PIC 4005 does not. The particular visa and visa stream applied for determines which PIC is relevant. According to a Department of Home Affairs spokesperson, **about half** of all visa applicants are eligible to apply for a waiver of the MHR.

10. To meet the MHR, a visa applicant must be free from tuberculosis (**TB**), or any other disease or condition which threatens public health; or which would require health or community services which could prejudice the access of an Australian citizen or permanent resident to services or products (in practice, organ transplant or dialysis); or which could result in a 'significant cost' to the community. These criteria are assessed as part of the MHR 'regardless of whether the health care or community services will actually be used in connection with the applicant'.[7]

11. PIC 4007 allows for the Minister to **waive** or set aside the requirements relating to cost to the community or prejudice to access, if all other criteria for the grant of the visa are satisfied, and if the granting of the visa would be unlikely to result in 'undue' **cost** to the Australian community; or 'undue' prejudice to the access to health care or **community services** of an Australian citizen or permanent resident.[8]

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

Assessment of the MHR

13. 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.

14. '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. 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.

15. In terms of international comparison, the significant cost threshold for New Zealand is now **NZD 81,000** (increased in

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[6] 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>

[7] Schedule 4, Migration Regulations 1994, PIC 4005, PIC 4007

[8] Schedule 4, Migration Regulations 1994, PIC 4005, PIC 4007(2)

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

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**.

16. Statistics provided by a DHA spokesperson suggest that, where applicants are eligible to argue for the exercise of the waiver (including applicants for humanitarian visas where the waiver is granted automatically) on the grounds that the benefits they bring outstrip notional costs, **96 per cent of applicants** are ultimately successful and are granted visas. However, this process takes a long time at great personal and financial cost. This also raises the question, beyond the scope of this submission, of why the other 50 per cent of visa applicants applying for visas governed by PIC 4005 are not similarly given the opportunity to argue for the benefits they too bring to Australia.

17. The Submission now addresses issues which, unresolved, prevent Australia's current migration system becoming 'simpler, more efficient, enhance[ing] our competitiveness, treat[ing] migrants fairly, and … unlock[ing] the potential contribution of all migrants to the Australian community'.

Special education

18. Regulation 1.03 of the *Migration Regulation* 1994 [Regulations] notes that 'Community services include the provision of an Australian social security benefit, allowance or pension', all of which are costed as part of the MHR. The Procedures Advice Manual **[Policy]** notes that 'community services' includes special education. However, neither 'regular' education, nor English as a Second Language (**ESL**), whether provided free through the government's Adult Migrant English Program (**AMEP**) or to students in government schools, is considered a 'community service' costed for the purposes of the MHR. Rather, they are considered to be 'investments'.

19. A family with a school-age child with a disability applying for a visa with a duration of two years or longer, either temporary (if required to undergo a medical) or permanent, is **almost guaranteed** to fail the health requirement based on the costs of 'special' education because of the costing ascribed to 'special' education under Policy. This is regardless of whether or not the family wishes to use 'special' education.

20. If the visa is governed by PIC 4005, the family has no opportunity to seek a waiver, and will be refused the visa because of the child's education costs.

21. Individuals or families with disabilities overwhelmingly bear the brunt of the health requirement provisions. This clear discrimination against families with a child member with a disability is at odds with any notion of Australia being a 'diverse, welcoming and fair society'. 'Special' education should no longer be considered a community 'cost'.

State-nominated skilled migration and DAMA/regional migration

22. State-nominated general skilled migration (subclass 190) visas have no health waiver. Fully qualified and eligible applicants invited by state governments to apply for these visas because of their relevant skills, who meet every other criteria but fail the health requirement (or whose family member fails the health requirement), are simply refused visas. They are not eligible to argue for the benefits they bring to Australia and the state, and the state government has no say in this matter, no matter how valuable the applicant or what skills they bring.

23. Further, provisional and permanent visas available under the Designated Area Migration Agreement (**DAMA**) - subclass 186 (employer nominated scheme) and subclass 494 and 491 (skilled employer sponsored regional - provisional) - have no waiver. An applicant who takes up a temporary skills shortage visa, subclass 482, anticipating proceeding to a permanent subclass 186 visa through their DAMA employer, has no access to a waiver of the health requirement for the permanent DAMA-sponsored visa. Similarly, an applicant for a (provisional) subclass 494 visa under the DAMA agreement has no access to a health waiver. This is particularly incongruous since waivers are available to applicants in other streams of the same visas: subclass 186 (employer nominated scheme) and subclass 494 (skilled employer

[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

sponsored regional (provisional)) visas. Waivers are simply not available for the DAMA 'labour agreement' stream for those visas, cutting off a path to PR for otherwise eligible applicants in state-designated areas of need.

24. This lack of a waiver impacts adversely on skilled workers already in Australia if they, or their family member, have a health condition or disability, even though they have met the health requirement for a temporary skilled visa, have already shown their capacity to work and contribute to Australia, and anticipate moving on to permanent residence. If there is no waiver, any subsequent visa will be refused.

25. The absence of a health waiver for these visas impacts adversely on the state's capacity to engage the skilled workers they want. This is particularly detrimental to the state's regional areas.

Children with disability or health issues born in Australia

26. 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 if they meet all the relevant eligibility criteria, they may be headed for permanent residence. The birth of a child with a medical condition or 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.

27. 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. However, those considering other visas such as general skilled migration (including state nomination visa subclass 190 or DAMA-related visas, discussed above), have no access to a waiver and the visa will be refused.

28. 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.

29. 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**, as a matter of fairness, regardless of whether or not the family is applying for a visa governed by PIC 4005 (no waiver) or PIC 4007 (waiver).

Required Medical Examinations:

30. 'Required Medical Examinations', referred to as the Health Matrix (**Matrix**)[11] 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.

31. 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.

32. 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

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

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. An applicant for a subclass 482 visa can apply for a waiver which is highly likely to be granted, since 96 per cent of waivers are now granted.[12] However an applicant for a student visa has no access to a waiver and will have a visa refused.

33. 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.

34. In terms of student visa applicants: our five highest source countries for students – China, India, Vietnam, Nepal and Columbia[13] – are all higher TB-risk countries. The burden of this additional screening therefore falls most heavily on students from our most important source countries.

35. 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.[14]

36. The Health Matrix discriminates unnecessarily and unfairly against visa applicants and family members with a disabilty, 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.

Conclusion

37. To facilitate the Strategy's goal of ensuring 'Australia's approach to migration reflects Australia's values as a diverse, welcoming and fair society', and that our system is 'simpler, more efficient, enhances our competitiveness, treats migrants fairly, and helps unlock the potential contribution of all migrants to the Australian community', as well as increasing Australia's reputation and competitiveness internationally, we recommend the following:

- Review the significant cost threshold, which is unrealistic and out of step with International comparisons;
- Remove 'special' education' from consideration as a community cost for the MHR;
- Grant children with disability born in Australia to temporary residents an automatic waiver of the MHR;
- Review the Health Matrix to retain its public health aspects while removing its discriminatory health elements;
- Make the possibility of a waiver of the MHR available for all visas;
- Review the exemption of the *Migration Act* from the *Disability Discrimination Act*;
- Review Australia's Interpretative Declaration to the UN CRPD.

38. Please feel free to contact me at jan@estrinsaul.com.au or on 0414 360 022 for any further information.

Sincere Regards

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[12] Email, spokesperson from Dept of Home Affairs, Sept 2022.
[13] https://www.austrade.gov.au/australian/education/education-data/current-data/summaries-and-news
[14] Bupa Medical Visa Services, *Australian Immigration Health Examinations Fees*, from 1 Dec 2022 <https://www.bupa.com.au/bupamvs/fees>