



Australian
Human Rights
Commission

Review of the Migration Health Requirement Significant Cost Threshold

Australian Human Rights Commission

Submission to the Department of Home Affairs

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1 Introduction

The Australian Human Rights Commission (Commission) welcomes the opportunity to provide a written submission to the Department of Home Affairs (Home Affairs) regarding the review of Australia's visa Significant Cost Threshold as per the Migration Health Requirements.¹ The Commission has engaged on numerous occasions with Home Affairs on matters pertaining to the Review of the Migration Health Requirement and its impact on migrants with disability and is pleased that the Significant Cost Threshold is now subject to public consultation.

The Commission is Australia's National Human Rights Institution, established on a permanent footing by the *Australian Human Rights Commission Act 1986* (Cth) (Australian Human Rights Commission Act),² with recognised independent status and roles in United Nations human rights fora. The Commission's operations are determined independently of the government through the President and Commissioners.

The Commission's purpose is to provide independent and impartial services to promote and protect human rights and fundamental freedoms in Australia. The Commission undertakes a range of policy development and research tasks that aim to promote compliance with Australia's human rights obligations, while also investigating and conciliating complaints of unlawful discrimination and breaches of human rights. The Commission also has a role in promoting an understanding and acceptance of human rights in Australia.³

The Commission appreciates the need to consider the impact of migration on public expenditure on health care and community services, however these considerations should not have a discriminatory or disproportionate effect on people with disabilities and their families who wish to migrate to Australia under any circumstances.

The Commission is aware that people with disability are often denied a visa as they do not meet the strict requirements under the Migration Act, by way of having a disability or ongoing health condition.

The 2010 Parliamentary Joint Standing Committee on Migration's 'Inquiry into the Migration Treatment of Disability' (Enabling Australia Inquiry) heard many instances of people with disability and their families being excluded from Australia due to costs presumed to be associated with their disability. The Committee raised significant issues with the approach, detailing the negative impact the existing process has on migrants with disability. The Committee found Australia's approach to its migration health requirements to be

‘outmoded’ and discriminatory towards people with disability, which assumes disability, or conditions associated with disability, to be a cost burden to society.⁴ The Committee was clear that the model should be replaced by a ‘modern form of a health requirement which has scope to positively recognise individual or overall family contributions to Australia’.⁵ The Commission is concerned that many of the recommendations made by the Committee remain unaddressed. These recommendations should be considered in a contemporary migration context, relying on current data about who is impacted by the policies to inform evidence-based solutions.

Recommendation 1: The Department of Home Affairs should consider the findings and recommendations raised in the Joint Standing Committee on Migration’s 2010 report *Enabling Australia: Inquiry into the Migration Treatment of Disability*.⁶ The Australian Government should seek to implement relevant recommendations which have not yet been addressed. Recommendations 3, 4, 6, 7, 8 and 18 are particularly relevant.

While the scope of the present review is limited to the application of operational policy rather than legislative reform, this submission sets out the Commission’s recommendations in relation to both the legal framework giving rise to the Significant Cost Threshold and Migration Health Requirement more broadly, and how it operates in practice. The Commission makes a number of recommendations to improve the operation of the Significant Cost Threshold to better reflect a human rights model of disability.

1.1 Consultation timeframe

While the Commission appreciates the opportunity to publicly respond to the Review of the Significant Cost Threshold, it is concerned by the short consultation timeframe.

The timing for consultation has coincided with the release of the Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) on 29 September 2023. The Commission, like many disability organisations, is investing significant resources into reviewing and responding to the Disability Royal Commission’s Final Report, resulting in the perspectives of people with disabilities not being adequately captured in this consultation period.

It is critical that the Review addresses, and seeks to remedy, the key concerns of the disability community and their representatives to avoid repetitive consultation processes and stakeholder fatigue. People with disability, Disability Representative Organisations and Disabled Peoples’ Organisations continue to

be required to make themselves available for significant amounts of consultations and for submissions to numerous enquiries. Combined with the effect of the global pandemic and other concurrent significant inquiries relating to disability policy, this has meant that already resource-constrained individuals and organisations face a significant, at times unmanageable, workload.

Notwithstanding the above concerns, the Review provides an opportunity to consider how Australian values about disability are reflected in the legislation and policy and what message this sends to the broader community about disability inclusion and social cohesion.

The Commission stresses that the findings of the Review and any policy proposals should be made publicly available, including in easy language formats, and be subject to further public consideration.

1.2 General Comments on the Significant Cost Threshold

The Significant Cost Threshold is one of the policies related to the operation of the Migration Health Requirement under Public Interest Criteria 4005 and 4007 of the *Migration Regulations 1994* (Cth) (Migration Regulations), which attach to particular types of visas.⁷ These public interest criteria provide that the visa applicant must be ‘free from a disease or condition’ (which includes any disability) that is likely to result in a need for health care or community services, and where the provision of those services would be likely to result in a significant cost to the Australian community or prejudice the access of Australian citizens or permanent residents to such services.⁸ Significant cost assessments are applied ‘regardless of whether health care or community services will actually be used in connection with the applicant’.⁹

There are very limited number of visa sub-classes that are not subject to the Migration Health Requirement or Public Interest Criteria 4005 or 4007.¹⁰

Home Affairs state that the purpose of the Significant Cost Threshold policy is to ‘contain public expenditure on health care and community services’.¹¹ Decisions in relation to defining, calculating and applying the Significant Cost Threshold are operational policy – rather than legislated – decisions.

This submission makes the case for aspects of the Threshold, such as significant cost assumptions, to be based on legal and objective criteria, reflective of the individual needs and circumstances of the individual/s. It is also important that information about applicants’ rights to a review and procedural fairness processes be made publicly available and accessible on the Home Affairs website. This must be provided in accessible and plain language formats.

2 Recommendations

The commission recommends:

Recommendation 1: The Department of Home Affairs should consider the findings and recommendations raised in the Joint Standing Committee on Migration's 2010 report *Enabling Australia: Inquiry into the Migration Treatment of Disability*.¹² The Australian Government should seek to implement relevant recommendations which have not yet been addressed. Recommendations 3, 4, 6, 7, 8 and 18 are particularly relevant.

Recommendation 2: The Australian Government should withdraw its interpretative declaration on Article 18 of the United Nations Convention on the Rights of Persons with Disabilities.

Recommendation 3: The Australian Government should review and amend Australia's migration laws and policies to ensure people with disability do not face discrimination in any of the formalities and procedures relating to migration and asylum. The review should refer to Australia's international human rights obligations and be guided by the human rights model of disability, giving particular regard to the application of the Migration Health Requirement under Public Interest Criteria 4005 and 4007 of the *Migration Regulations 1994* (Cth).

Recommendation 4: The review of the Significant Cost Threshold should be guided by, and embed, human rights principles giving specific consideration to Article 3 of the United Nations Convention on the Rights of Persons with Disabilities.¹³

Recommendation 5: The Australian Government should review the operation of section 52 of the Disability Discrimination Act to ensure that people with disability seeking entry into Australia are protected from discrimination on the ground of disability. The review should consider Australia's international human rights obligations, giving regard to the rights and obligations outlined in the *Convention on the Rights of Persons with Disabilities*.

Recommendation 6: The policy definition of 'significant cost' should be amended to:

- allow for an increased threshold that is based on evidence and objectively.

- **give explicit consideration to an applicant's and/or their families' ability to offset any costs considered 'significant'.**

Recommendation 7: The Department of Home Affairs should publish a plain language breakdown of what is included in calculating the 'average cost' and how this is determined.

Recommendation 8: Significant cost threshold should be applied to all applicants on an annual basis and regardless of disability status.

Recommendation 9: The Significant Cost Threshold should be increased alongside a revised definition of 'significant' and adjusted regularly to accurately reflect of the cost of health care and community services. An increase to the threshold should be driven by a review of data and based on objective, reasonable and legitimate decision-making principles.

Recommendation 10: Home Affairs should publish the cost calculations methodology used by Medical Officers of the Commonwealth in assessing the costs associated with disabilities or health conditions under the Migration Health Requirement (see recommendation 6 of the *Enabling Australia* final report¹⁴).

Recommendation 11: Costings should be restricted to costs incurred by governments and not include costs that are predominantly privately funded.

Recommendation 12: The Department of Home Affairs should develop and publish a policy definition and list of services of the 'health care or community services' considered in scope for Significant Cost assessments.

Recommendation 13: The Department of Home Affairs should seek to incorporate a revised definition of 'community services' and include a definition of 'health care services' in the Migration Regulations to provide clarity and legal guidance as to what costs can and should be considered in the cost assessments. These definitions should be aligned to the rights-based approach outlined in this submission.

Recommendation 14: social security benefits should not be included in the scope of 'health care and community services' when calculating costs to the Australian community as part of the Migration Health Requirement Significant Cost Threshold. The existing definition of 'community service' under the *Migration Regulations 1994 (Cth)* should be amended accordingly.

Recommendation 15: services and supports that facilitate inclusion and enable social and economic participation should be excluded from

significant cost assessments. This includes personal care supports and capacity building disability supports.

Recommendation 16: The definition of 'community services' should be redefined to only include supports and services closely related to health care services.

Recommendation 17: Remove 'special' education costs (and supported education costs where applicable) from the Significant Cost Threshold assessments.

Recommendation 18: the Department of Home Affairs should implement recommendation 8 of the *Enabling Australia* final report to remove from the *Migration Regulations 1994* (Cth) the criterion under Public Interest Criteria 4005 and 4007 which states that costs will be assessed 'regardless of whether the health care or community services will actually be used in connection with the applicant'.

This includes revising the approach to assessing an applicant's health care and community service needs against the 'hypothetical person' test. A revised test should reflect a tailored assessment of individual circumstances and needs in relation to likely health care and community service usage.

Recommendation 19: Australian Government should amend Schedule 4 of the *Migration Regulations 1994* (Cth) to allow for the consideration of the social and economic contributions to Australia of a prospective migrant or a prospective migrant's family in the overall assessment of a visa.

Recommendation 20: The availability of the Migration Health Waiver should be expanded to all visa applicants.

Recommendation 21: Health Waiver decision-making should be guided by human rights principles and include explicit consideration of social and economic benefits and contributions of the applicant. To support this Migration staff should have appropriate training on human rights. Policy guidance and decision-matrixes should be made publicly available.

Recommendation 22: Applicants should be provided with a detailed breakdown of all assessed costs associated with the disability or health condition, as applied under the Migration Health Requirement.

Recommendation 23: The Australian Government should amend the *Migration Regulations 1994* (Cth) to make dependants with disabilities, including children, exempt from being subject to the migration health

requirement significant cost threshold. This includes non-citizen children born in Australia to temporary visa holders, and children and dependents born offshore.

In the absence of legislative amendment, this recommendation includes making an automatic health waiver available for all non-citizen children born with disability in Australia, to avoid drawn-out processes.

Recommendation 24: The Australian government should review the operation of the 'one fails, all fail' criterion under the *Migration Regulations 1994 (Cth)* to remove prejudicial impacts on people with disability and their families.

3 Human Rights Framework

3.1 International Human Rights

Australia ratified a range of international human rights instruments that set out clear rights and obligations relating to people with disability, most obviously the *Convention on the Rights of Persons with Disabilities* (CRPD). As people with disability represent the full breadth of intersectional identities, all of Australia's human rights obligations are relevant to the human rights of people with disability in Australia, including migrants and prospective migrants with disability. In addition to the CRPD, this includes:

- *The International Covenant on Civil and Political Rights* (ICCPR)
- *The International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- *The International Convention on the Elimination of all forms of Racial Discrimination* (CERD)
- *The Convention on the Elimination of all forms of Discrimination against Women* (CEDAW)
- *The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*
- *The Convention on the Rights of the Child* (CRC)
- *The Convention Relating to the Status of Refugees*

Australia has also signed and/or ratified a number of optional protocols to these treaties¹⁵ including the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*.¹⁶

Obligations contained in international treaties are binding as a matter of international law, but not as a matter of domestic law until their provisions are adopted into domestic legislation.¹⁷

The 1948 Universal Declaration of Human Rights (the Declaration), of which Australia is a signatory, consists of 30 articles that outline fundamental human rights and freedoms to which all people are entitled.¹⁸ These include:

- All human beings are born free and equal in dignity and rights.
- Non-Discrimination: Everyone is entitled to all the rights and freedoms without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status
- Right to Life, Liberty, and Security: Everyone has the right to life, liberty, and security of person.
- Right to education
- Right to work
- Right to standard of living
- Right to social security
- Right to nationality, and to change nationality.

(a) Human Rights and Migration

Under international human rights law, States are entitled to exercise jurisdiction at their international borders and in migration laws but must do so in accordance with human rights obligations and without discrimination.

Article 12(2) of the ICCPR outlines that all people have the freedom to leave any country, including their own.¹⁹ Article 12(3) is clear that this right may be subject to restrictions 'provided by law...necessary to protect national security, public order, public health or morals or the rights and freedoms of others' consistent with other rights in the ICCPR.²⁰

While international law recognises the right to leave any country, it does not establish the right of entry to another country.²¹ In effect, this means that States retain sovereignty to determine the legal and governance frameworks controlling entry and expulsion of migrants, including the criteria for admission.²² This sovereignty must be exercised in line with human rights obligations.

Australia has the right to control the entry of non-nationals into its territory and may reasonably seek to impose restrictions, including quarantine requirements, when a person with a particular medical condition such as a communicable

disease may pose a risk of harm to others. However, the Commission considers that a more general reservation to the right of persons with disability to freedom of movement adopts an outdated view of disability as a deficit, which stands in conflict with the CRPD's human rights model of disability, explained below.

3.2 The Convention on the Rights of Persons with Disabilities (CRPD)

The CRPD is the first binding international human rights instrument that explicitly addresses disability. Australia ratified the CRPD in 2008, signalling its commitment to protecting and promoting the rights of people with disability in domestic laws and policies. The purpose of the CRPD is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.²³ This includes rights to non-discrimination and equality before the law.²⁴

Australia is obliged by international human rights law, and as a signatory to the CRPD, to ensure that the fundamental human rights and freedoms of all people with disability are upheld and protected²⁵ by taking 'all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'.²⁶

(a) Article 18

With regards to migration, Article 18 of the CRPD outlines the right of people with disability to liberty of movement and to choose their residence and nationality on an equal basis to others.²⁷ This right is universal and not limited to citizens or permanent residents. Article 18 aligns with international law standards for a state to determine who may enter its territory, so long as such determination is neither arbitrary nor based on one's disability.

Upon ratification of the CRPD Australia issued an interpretive declaration in relation to Article 18, as follows:

Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor 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.²⁸

The principles of 'legitimate', 'objective' and 'reasonable' as they apply to differential treatment in the context of discrimination, and limitations on rights, are well established under international human rights law.²⁹ It is worth noting that the concept of 'reasonableness' is intrinsically linked to the values and perceptions of the society in which it is being applied, in conjunction with human rights obligations.

While these concepts remain broadly applicable, the Commission is critical of the interpretative declaration and its role in allowing for the continual discrimination of people with disability in Australian migration law and policy, as well as the legitimate, objective and reasonable nature of the Significant Cost Threshold policy.

Research commissioned by the Disability Royal Commission raises concerns with the way in which Australia relies on the interpretive declaration in its migration law.³⁰ The interpretive declaration fails to recognise the inherent value of people with disability and does not consider the social and economic contributions that migrants with disability, and their families, make to Australian society.

The Commission considers that the Migration Health Requirement, and by extension the Significant Cost Threshold, in its current form applies in a way that discriminates against people with disability and does not accord with Australia's obligations under article 18(1)(b) of the CRPD.³¹ This is a position shared by the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee) in its reviews of Australia's implementation of the CRPD in 2013 and 2019 and in its views in individual communications involving Australia. The High Court has said that the interpretation of treaty rights by bodies such as the CRPD Committee, which are established to supervise the application of a treaty, should be given 'considerable weight' when determining the content of a treaty obligation.³²

The CRPD Committee recommended, in both its 2013 and 2019 Concluding Observations, that the Australian Government 'review' and 'withdraw' the interpretative declaration on article 18 of the CRPD.³³

In *Sherlock v Australia* (20/2014), the author was refused a skilled, temporary work visa to enter Australia and take up a senior executive position at the multinational firm Oracle, based on the Migration Health Requirement (then in Public Interest Criteria 4006A) because she had a diagnosis of multiple sclerosis. The CRPD Committee adopted the view that 'the State party has failed to fulfil its obligations under articles 4, 5 and 18 of the Convention'³⁴ and made several recommendations to the Australian Government, including:

In general, the State party is under an obligation to take measures to prevent similar violations in the future. In this regard, the Committee requires the State party to ensure that barriers to the enjoyment by persons with disabilities of the right to utilize the immigration proceedings on an equal basis with others are removed under national legislation.³⁵

In its 2019 review of Australia, the CRPD Committee recommended that Australia:

Review and amend its migration laws and policies to ensure that persons with disabilities do not face discrimination in any of the formalities and procedures relating to migration and asylum and, especially, remove the exemption in the Disability Discrimination Act 1992 to certain provisions of the Migration Act 1958.³⁶

The Commission continues to make recommendations to this effect,³⁷ but recognises this is outside the scope of the present Review. At a minimum, the Review should aim to clearly articulate how the application of the Significant Cost Threshold is 'legitimate, objective, and reasonable' as described in the interpretative declaration on article 18 of the CRPD.

Recommendation 2: The Australian Government should withdraw its interpretative declaration on Article 18 of the United Nations Convention on the Rights of Persons with Disabilities.

Recommendation 3: The Australian Government should review and amend Australia's migration laws and policies to ensure people with disability do not face discrimination in any of the formalities and procedures relating to migration and asylum. The review should refer to Australia's international human rights obligations and be guided by the human rights model of disability, giving particular regard to the application of the Migration Health Requirement under Public Interest Criteria 4005 and 4007 of the *Migration Regulations 1994* (Cth).

(b) Article 3

Article 3 of the CRPD sets out the general principles of the convention, including (but not limited to):

- Non-discrimination
- Full and effective participation and inclusion in society
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity

- Equality of opportunity

The human rights model of disability espoused in the CRPD and the principles in CRPD Article 3 are particularly important in the context of this Review of the Significant Cost Threshold.

The CRPD represents a fundamental shift in how disability should be viewed and understood, applying universal human rights principles to State obligations to respect, protect and fulfil the specific rights of people with disability. The CRPD builds on the social model of disability³⁸ by establishing a human rights model recognising people with disability as rights-holders who can and should determine the course of their lives to the same extent of as any member of society rather than “objects” of charity, medical treatment and social protection’.³⁹ The human rights model embraces disability as a natural part of human diversity, defining limitations imposed by social and physical environment as infringements on people's rights.⁴⁰

The social and human rights model of disability are complementary in nature and inform a rights-based and person-centred approach to policy development and implementation for people with disability. Legal frameworks and policies affecting the lives of people with disability should reflect the human rights model to work towards the progressive realisation of Australia’s obligations as signatory to the CRPD.

Inherent in the human rights models of disability is the recognition of the value people with disability bring to society, particularly when their rights are protected, promoted and upheld to enable full and effective participation and inclusion in the community. In its assumption that people with disability and/or health conditions are a cost burden to society without accounting for the social, cultural, and economic contributions they bring to the Australian community, the existing approach to the Significant Cost Threshold is at odds with this model.

In line with the human rights model of disability, any cost assessment should recognise that the provision of health and community services is an investment that enables participation and inclusion, and builds capacity, rather than something that merely amounts to a cost to be borne by governments and society. The Australian Government, in implementing the CRPD, should value and recognise the social and economic benefit that people with disability and their families bring to the rich diversity of Australia rather than be overshadowed by outdated, medicalised views of disability.

There is nothing to be gained from the exclusion of people with disability via any legal or policy framework. The exclusion of people with disability not only has an individual and systemic impact on their rights it also has profound costs to

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society. Research has found that nations forego up to 7% of their Gross Domestic Product due to the exclusion of people with disability. There are also significant political and social costs associated with exclusion.⁴¹

In contrast, in the *Enabling Australia Inquiry*, the Parliamentary Joint Standing Committee on Migration heard significant evidence regarding the positive impact that many migrants with disability have or would make to Australia, both socially and economically.⁴² Enhancing and promoting the inclusion of people with disability in law, policy, service and program design is a core goal of disability policy, and a human rights approach, which should be guided by human rights principles at all stages.

Recommendation 4: The review of the Significant Cost Threshold should be guided by, and embed, human rights principles giving specific consideration to Article 3 of the United Nations Convention on the Rights of Persons with Disabilities.⁴³

3.3 Disability Discrimination Act 1992 (Cth)

The *Disability Discrimination Act 1992 (Cth)* (Disability Discrimination Act) provides protection for everyone in Australia against discrimination on the basis of disability. It is unlawful to discriminate against a person in defined areas of public life, including employment, education, accessing public places and access to goods and services.

The Disability Discrimination Act defines discrimination on the grounds of disability as being either:

- ‘direct discrimination’ in which a person with disability is treated less favourably than a person without disability in circumstances which are ‘not materially different’⁴⁴
- ‘indirect discrimination’ in which a condition or requirement that is the same for everyone disadvantages and a person with disability, and is not reasonable in the circumstances.⁴⁵

The Disability Discrimination Act includes exemptions from the Act across a range of areas. Australia has relied on the Interpretive Declaration to CRPD Article 18 in enacting section 52 of the Disability Discrimination Act, which provides that the Migration Act and any legislative instruments made under it (for example, the Migration Regulations) are exempt from the core anti-discrimination provisions of the Disability Discrimination Act.⁴⁶

This exemption has been subject to much criticism in both the disability and human rights advocacy spaces. In addition to the CRPD Committee, the Special Rapporteur on the human rights of migrants has recommended that Australia repeal section 52 of the Disability Discrimination Act, expressing particular concern about children and family members with disabilities.⁴⁷

In its Final Report, the Disability Royal Commission recommended that the Australian Government review the operation of section 52 of the Disability Discrimination Act 'insofar as it authorises discrimination against people with disability seeking to enter Australia temporarily or permanently'.⁴⁸ The Disability Royal Commission were clear that such a review should also consider changes to migration law and policy to eliminate or minimise discrimination. Reviewing the migration exemption under the Disability Discrimination Act is also in line with the Commission's recommendation in its *Free and Equal Position Paper – A reform agenda for federal discrimination laws* – that all permanent exemptions under federal discrimination law be reviewed to ensure they remain appropriate.⁴⁹

Recommendation 5: The Australian Government should review the operation of section 52 of the Disability Discrimination Act to ensure that people with disability seeking entry into Australia are protected from discrimination on the ground of disability. The review should consider Australia's international human rights obligations, giving regard to the rights and obligations outlined in the *Convention on the Rights of Persons with Disabilities*.

4 A Human Rights Act for Australia

Currently, Australia does not adequately protect human rights and is without a comprehensive Human Rights Framework or federal Human Rights Act. A consequence of this is the lack of accountability on governments to ensure that inherent and fundamental human rights of all people are explicitly considered and embedded in law and policy. This creates gaps in the way Australia respects, protects, and fulfils its human rights obligations.

The Commission proposes a model for a Human Rights Act and Framework in Australia, as part of its *Free and Equal Agenda: An Australian conversation on Human Rights*,⁵⁰ informed by extensive consultation and research.

In its position paper, *A Human Rights Act for Australia*,⁵¹ the Commission outlines the necessity of embedding human rights into federal law to increase the responsibility of governments to consider how laws, policies and actions affect people's human rights, and to respect, protect and fulfil these. A federal Human

Rights Act would comprehensively incorporate Australia's international obligations domestically and codify the fundamental common law rights reflected in international instruments.

The Commission's model seeks to ensure appropriate consideration of human rights upstream in a preventative manner, as well as ensuring adequate protections and remedies for when human rights are not appropriately treated. This would enforce a positive duty on the Australian Government and Public Servants to consider the impact of legislation and policy on human rights and seek to ensure the compatibility of such with these rights. This includes rights specific to people with disability.

A national Human Rights Act and Framework would introduce, among other measures, a more robust assessment of the compatibility of legislation and policies such as the Migration Health Requirement to be scrutinised in the context of domestic and international human rights protections and would ensure that there are consequences for not adequately considering human rights.

5 Assessment of the Significant Cost Threshold against a human rights model of disability

5.1 Defining 'significant'

When establishing the Significant Cost Threshold, 'significant costs' are currently interpreted as any cost that is 'higher than the average annual health and community service costs for an Australian'.⁵² In practice, this means that any cost that amounts to a single dollar amount more than the average costs are considered significant. Noting that this is not a legislated definition and is a matter of policy interpretation.

The Commission has concerns about the legitimate, objective, and reasonable nature of this interpretation. There is scope to significantly raise the current threshold to better reflect Australian values towards the inclusion of people with disability, and what constitutes a 'significant' burden on public healthcare and community services expenditure in Australia.

The definition of 'significant' could be revised in the following ways:

1. Significant costs should be interpreted as costs that are 'significantly higher' (i.e more than \$1 higher) than the average annual health and community service cost for an Australian.

2. A cost threshold deemed 'significantly higher' should be determined based on data and evidence from cases where the Significant Cost Threshold has been applied and consider international examples, such as the recent amendments to the 'excessive demand' threshold Canada. This could be achieved by applying an objectively decided, evidence-based multiplier to the average annualised health and community service costs of an Australian (explored in section 5.4 below).
3. The interpretation of 'significant costs' and the comparison to an 'average Australian' should be applied equitably for all prospective migrants and be specified as being assessed on an annual basis, regardless of the duration of the visa being applied for (as explained in section 5.3).
4. The definition should acknowledge an applicant and their families ability to offset costs through social and economic participation, including caring, which is not presently the case.

Recommendation 6: The policy definition of 'significant cost' should be amended to:

- **allow for an increased threshold that is based on evidence and objectively.**
- **give explicit consideration to an applicant's and/or their families' ability to offset any costs considered 'significant'.**

5.2 Calculating the 'average cost'

The Commission does not have the expertise to inform changes to the 'average cost' calculations, but nonetheless welcomes any revision of what currently exists to ensure enhanced inclusion of people with disability in Australia's migration policies, subject to further consultation.

It seems arbitrary that the calculation of the 'average cost' (used to determine the Significant Cost Threshold) could exclude services that are in scope for the assessments (such as 'special' education), giving rise to inequitable and perhaps false comparisons.

Section 5.4 of this submission explores the Commission's views on what services should be considered in scope in the assessment of a prospective migrant's significant costs. The Commission considers that services included the 'average cost' calculation should be aligned to those considered in the assessment of significant cost, to ensure equitable and fair comparisons.

The Commission recommends that a breakdown of what is included in calculating the 'average cost' and how this is determined, be made publicly available in a plain language format.

Recommendation 7: The Department of Home Affairs should publish a plain language breakdown of what is included in calculating the 'average cost' and how this is determined.

5.3 Examining the level of the threshold

As previously explained, the threshold is determined based on the average *annual* health care and community services cost for an Australian. The Discussion Paper states the average Australian is expected to cost \$51,000 in public health care and community service expenditure, setting the existing significant cost threshold at \$51,001.⁵³

The annual average of \$51,000 should, over 10 years, equate to an average of \$510,000 per person in Australia. However, the way the Threshold is applied is such that a visa applicant is required to stay at or under the \$51,001 threshold *for the entire duration period of the visa they are applying to*, or between five and 10 years for provisional and permanent visa applicants, rather than on an annual basis. When applying this logic, an individual with an expected cost of \$20,000 per year in health and community service provision would not meet the Migration Health Requirement for any applicable visa over three years in duration due to the significant cost assessment, despite their annual cost being lower than that of an average Australian. For a provisional or permanent visa applicant with a disability to meet the significant cost threshold their expected health and community service costs must be at or below \$5,100 per year, which is 10 per cent of the annual cost of an average Australian.

The Commission is concerned that the Threshold of \$51,001 is not being applied on an annual basis or in the same way to everyone. Instead, the application of the Significant Cost Threshold is based on two factors as per below:

- the length of the proposed stay in Australia for temporary visa applicants; and
- the permanent nature of the health condition or disability
 - Up to five years for people whose health condition or disability is not considered long-term or chronic (provisional or permanent visa applicants)

- Up to 10 years for people whose health condition or disability is considered chronic and predictable (permanent and provisional visa applicants).
- For up to 3 years for people aged 75 or older (permanent visa applicants).

Practically, this means that different applicants are subject to different thresholds. The annual average used for the Significant Cost Threshold shrinks over the length of the visa thereby disadvantaging people applying for longer visas and those with chronic health conditions or permanent disability.

It is unclear how this policy decision is reasonable and objective, or fair. Notwithstanding the Migration Act and Migration Regulations being exempt under the Disability Discrimination Act, from a principled perspective, the Disability Discrimination Act does not allow for differential treatment based on disability type or status. The methodology also appears to be contradictory to the pre-existing definition that states that significant costs should be interpreted 'as a cost that is higher than the *average annual* health and community services costs for an Australian'.⁵⁴

As highlighted in section 5.1, the Commission has recommended changes to this definition to avoid vagueness and align with more reasonable and objective definition. The Review should consider the appropriateness of putting inequitable timeframes on significant cost assessments.

Recommendation 8: Significant cost threshold should be applied to all applicants on an annual basis and regardless of disability status.

At minimum the current approach to determining the threshold should be amended by reviewing the data and evidence establishing the actual fiscal impact of people assessed as not meeting the Migration Health Requirements due to costs on an annual basis, as a percentage of public expenditure, versus the social and economic benefit of inclusion.

A more reasonable calculation of what should be considered 'significantly higher' than the average Australian health care and community services cost should be applied. Home Affairs should give consideration to the Canadian policy example below.

International policy example: Canada

In 2018, Canada reviewed its medical inadmissibility migration policy resulting in an increase in the cost threshold to three times the previous level. The

revised threshold was informed by data from 1,000 yearly medical inadmissibility cases (0.2% of applicants undergoing medical screening). It was found that these cases resulted in a 0.1% saving of all publicly funded health spending. As a result, the Canadian Government identified that many refused cases were due to insufficient cost thresholds, and that an applicant's health or disability was one readily accommodated by Canadian Government. The threshold was increased to dispense the majority of such cases, thereby aligning Canada's migration policies to contemporary views and values on the inclusion of persons with disability, whilst maintaining a level of fiscal responsibility for publicly funded health and social services.

The current 'excessive demand cost threshold' is **\$128,445 CAD over five years** (or \$25,689 per year), with exclusions for refugees and their dependants, protected persons, and certain people being sponsored by their family (such as children, spouses and common-law partners).⁵⁵ The threshold is set at three times the average Canadian per capita health and social services costs over five years.⁵⁶

It is worth noting that Canada relies almost entirely on a public health system, compared to Australia's reliance on both public and private health care which influences access to certain services and costs.

Notably, the Canadian Government has been clear on their intent to work towards the full elimination of the policy.⁵⁷

Recommendation 9: The Significant Cost Threshold should be increased alongside a revised definition of 'significant' and adjusted regularly to accurately reflect of the cost of health care and community services. An increase to the threshold should be driven by a review of data and based on objective, reasonable and legitimate decision-making principles.

5.4 Examining costings and assessments

Central to this Review is determining the appropriateness of existing costings and how these impact applicants with disabilities' experience of the Migration Health Requirements, via the Significant Cost Threshold. As mentioned earlier in this submission, a rights-based approach recognises that the provision of 'health and community services' is not merely a public cost but an investment that enables participation and inclusion and builds capacity. This should be a guiding principle in determining costings to be considered in the significant cost assessments.

It is also worthwhile noting that Australia's health and community service systems are universal, and needs based, built on the premise of equity and fairness – aligned to Australian values. Access to health care, social security, disability supports, and education are human rights that all people are entitled to.⁵⁸

Despite recommendations made in the *Enabling Australia* final report,⁵⁹ there continues to be a lack of transparent information available about the cost calculations associated with disabilities or health conditions when assessing the Migration Health Requirement.

Recommendation 10: Home Affairs should publish the cost calculations methodology used by Medical Officers of the Commonwealth in assessing the costs associated with disabilities or health conditions under the Migration Health Requirement (see recommendation 6 of the *Enabling Australia* final report⁶⁰).

Recommendation 11: Costings should be restricted to costs incurred by governments and not include costs that are predominantly privately funded.

(a) Defining health care and community services

There is no clear definition or scope available to determine the meaning of 'health care and community services' in the assessment of costs leaving a broad and subjective approach to operational decision-making lacking in transparency.

The Migration Regulations define 'community services' to include the provision of social security benefits, allowances or pension,⁶¹ however it is unclear whether this definition includes other services that would ordinarily be considered a 'community service'. Additionally, the Commission would consider that community service has a more specific meaning than 'welfare services'.

The data set used to calculate the 'average Australian' community service costs are derived from the Australian Institute of Health and Welfare (AIHW) 'welfare expenditure' data set,⁶² goes beyond social security payments to also include direct government services and government funded community services (e.g. National Disability Insurance Scheme (NDIS), family support services, youth programs, child services, and services for older people and people with disability).⁶³ The Commission assumes that these services are also considered in cost assessments as part of the Significant Cost Threshold policy, despite the limited definition in the legislation. However, without transparent information on the policy definition or list of services that are considered in costing assessments it is difficult to provide a comprehensive analysis of current costings.

Additionally, health care services are not defined under the legislation and there is limited policy guidance available to the public as to what is considered in health care cost assumptions. Costings that are considered under each category should be made publicly available.

Recommendation 12: The Department of Home Affairs should develop and publish a policy definition and list of services of the ‘health care or community services’ considered in scope for Significant Cost assessments.

Recommendation 13: The Department of Home Affairs should seek to incorporate a revised definition of ‘community services’ and include a definition of ‘health care services’ in the Migration Regulations to provide clarity and legal guidance as to what costs can and should be considered in the cost assessments. These definitions should be aligned to the rights-based approach outlined in this submission.

(b) Social security benefits and welfare services

Social security is a universal human right⁶⁴ and is vital to the realisation of other fundamental human rights for those who are unable to work or require support to facilitate their economic participation. Despite the legislation defining community services to include social security benefits, the Commission is of the view that this is inappropriate in the assessment of significant costs for the purpose of the Migration Health Requirement.

First, applying assumptions about an individual’s work capacity based on their disability status is inappropriate and disregards the importance of the provision of health care and community services to support independence and economic participation. Conversely, some people with disability may not have the capacity to work full time or in a traditional workplace setting, however this does not diminish the value they bring to their community.

Secondly, most migrants with disability are unable to access the disability support pension within the first 10 years of their residency,⁶⁵ rendering the inclusion of social security costs to the Significant Cost Threshold arbitrary and irrelevant.

In its Review of the migration medical inadmissibility ‘excessive demand on health and social services’ policy, the Canadian Government amended its legislated regulatory definition of ‘social services’⁶⁶ and published a list of services that are included and excluded in cost assessments.⁶⁷ Of note, the included social services are those considered to be ‘closely related’ to health services and related to the provision of ‘constant supervision and care’, such as residential and

institutional care.⁶⁸ Social security, by definition, is not included in cost considerations by the Canadian Government.

In amending this definition, the Canadian Government acknowledged that the existing medical assessment included costs considered 'critical to promoting inclusion' such as personal support services, 'special' education, and social and vocational rehabilitation services.⁶⁹ These supports and services have been removed from the regulatory definition and reframed as 'investments' enabling participation and inclusion. The Commission supports this approach to the assessment of costs as one that is aligned to human rights principles and recognises the value of inclusion. Noting that the Commission's preferred approach is to not assess the value of a person against an economic dollar amount.

Recommendation 14: social security benefits should not be included in the scope of 'health care and community services' when calculating costs to the Australian community as part of the Migration Health Requirement Significant Cost Threshold. The existing definition of 'community service' under the *Migration Regulations 1994 (Cth)* should be amended accordingly.

Recommendation 15: services and supports that facilitate inclusion and enable social and economic participation should be excluded from significant cost assessments. This includes personal care supports and capacity building disability supports.

Recommendation 16: The definition of 'community services' should be redefined to only include supports and services closely related to health care services.

(c) 'Special' Education

Education is a fundamental and universal human right⁷⁰ and the need to access appropriate education and supports should not be used to unfairly disadvantage children with disabilities and their families via the immigration process. It also cannot be assumed that all children with a particular disability would choose to, or need to, attend a specialised school setting.

In a recent article in *The Conversation*, Adjunct Associate Professor Jan Gothard addressed the issue of children with disability being assessed as too costly, and thus their entire family being excluded from Australia.⁷¹ In particular, the inconsistencies around what is and is not considered in the calculations, and comparisons to children without disability:

Education support is where many applicants with a child with disability hit a brick wall. Whereas the cost of both “regular” education and English as a second language is deemed a community investment, “special” education support is considered a cost. Any child assessed as requiring such support for more than two years will fail the migration health requirement.⁷²

All types of education should be treated as an essential public investment rather than a cost. ‘Special’ education should not be considered differently to mainstream or other education costs.

The inclusion of ‘special’ education in significant cost assessments is inconsistent with Australia’s human rights obligations under the Convention on the Rights of the Child (CRC) to protect children’s right to education, development and non-discrimination.⁷³ Both the CRPD and the CRC outline that State parties have an obligation to act in the best interests of the child,⁷⁴ and enshrine the right of children with disabilities to education.⁷⁵ The CRPD is clear that all necessary measures should be taken ‘to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children’.⁷⁶

The Commission strongly recommends that Home Affairs remove ‘special’ education costs from significant cost assessments, and that no educational support costs should be factored into the Significant cost threshold policy.

Recommendation 17: Remove ‘special’ education costs (and supported education costs where applicable) from the Significant Cost Threshold assessments.

(d) The need for individualised cost assessments

The current approach to assessing costs is based on a ‘hypothetical person’ test factoring in an applicants’ eligibility for available services which could be used by a hypothetical person with the same disability or health condition. This approach is guided by the criterion under Public Interest Criteria 4005 and 4007 of the Migration Regulations which states that costs will be assessed based on the individual being ‘likely to meet the medical criteria for the provision of a community service’⁷⁷ and ‘regardless of whether the health care or community services will actually be used in connection with the applicant’.⁷⁸

The Parliamentary Joint Standing Committee on Migration was critical of this approach in its final report to the 2010 *Enabling Australia* inquiry, stating that it does not account for ‘the fact that not all individuals...will access each and every service or payment to which they are eligible’.⁷⁹ The hypothetical person test does not allow for an assessment based on an applicant’s likely service utilisation

tailored to their individual circumstances and needs. The Commission supports the views and findings of the Committee in that the existing provisions in the legislation and the ‘hypothetical person’ test could amount to unfair discrimination against people with disability, based on their disability status. The Commission is also concerned that such an approach would unfairly disadvantage applicants with certain disabilities or health conditions over others based on generalised costings. Simply increasing the threshold would not be sufficient to mitigate this, rather a revision of the existing ‘hypothetical person’ test should be prioritised with a view towards individualised assessments.

Health and community service cost assessment should be tailored to individual circumstances and patterns of service usage in relation to healthcare and community service needs as evidenced by the applicant, their family, or treating physicians, rather than being based on a ‘hypothetical person’ test that may assert costs for services that an applicant may not require or be entitled to.

Recommendation 18: the Department of Home Affairs should implement recommendation 8 of the *Enabling Australia* final report to remove from the *Migration Regulations 1994* (Cth) the criterion under Public Interest Criteria 4005 and 4007 which states that costs will be assessed ‘regardless of whether the health care or community services will actually be used in connection with the applicant’.

This includes revising the approach to assessing an applicant’s health care and community service needs against the ‘hypothetical person’ test. A revised test should reflect a tailored assessment of individual circumstances and needs in relation to likely health care and community service usage.

(e) Accounting for social and economic benefit and contributions

As previously mentioned, the Commission is concerned that the Migration Health Requirement and the application of the Significant Cost Threshold does not allow for, or consider, the social and economic benefits migrants with disabilities and their families bring to Australian society. Viewing disability as a cost burden ignores the vast social and economic benefit related to the investment of support and services towards enhanced social and economic inclusion.

The *Enabling Australia* inquiry heard many examples of the positive social, cultural and economic benefits migrants with disability and their families contribute to Australian Society.⁸⁰ Home Affairs and the Australian Government should refer to the evidence provided in the inquiry (and indeed in many inquiries since then) in relation to expanding and legislating relevant factors to

be considered in a fair and reasonable decision-making process regarding the migration of people with disability.

The Commission supports the recommendation made by the Committee and agrees with its position that 'any assessment of health costs must balance this with an assessment of likely social and economic contribution'.⁸¹

Any consideration of social and economic benefits should recognise:

- The social and economic contributions the applicant and/or their family are likely to make to Australia, offset against any 'significant costs'. This includes (but is not limited to):⁸²
 - Educational and trade qualifications, including any existing training/education being undertaken or likely to be undertaken in the future
 - Previous and expected employment, including whether there is an unmet need for the nature of the work.
 - Capacity to earn and income and pay taxes
 - Past voluntary work and voluntary work likely to be done in the future.
 - Cultural benefits the applicant may bring to Australia
 - Value and benefit of maintaining family units.
- the social and economic benefit related to the investment of support and services towards enhanced social and economic inclusion.
- the role of families in the provision of support and care acknowledging the role of informal support in reducing health care and community service costs.

Decision-making in relation to whether someone meets the requirements under Public Interest Criteria 4005 and 4007 should include consideration of Australia's obligations under relevant international human rights instruments, including the CPRD.

The Castan Centre for Human Rights Law and Rethinking Mental Health Laws Federation Fellowship submission to the *Enabling Australia* inquiry provides considerations for enhanced decision-making under the Migration Health Requirement in line with a human rights approach (noting the need to consider

this in a contemporary context).⁸³ This should also be informed by any existing decision-making factors that exist in Health Waiver policy guidance.

Recommendation 19: Australian Government should amend Schedule 4 of the *Migration Regulations 1994* (Cth) to allow for the consideration of the social and economic contributions to Australia of a prospective migrant or a prospective migrant's family in the overall assessment of a visa.

Such an amendment should also consider the inclusion of other relevant factors to guide decision-making and allow for flexibility including compelling circumstances (such as humanitarian or compassionate factors), pre-existing familial or social/economic ties, any other relevant factors, as well as international human rights obligations including the CRPD. These changes should be accompanied by publicly available policy guidance.

The role of Health Waivers

The Commission is aware that a health waiver is available for some visa subclasses, as provided for under Public Interest Criteria 4007(2).⁸⁴ In determining whether a health waiver can be granted, the applicant has the opportunity to provide information as to why the health waiver should be exercised in their individual circumstances, which may include evidence as to the social and economic benefits the applicant and/or their family can bring to Australia. A decision-maker must then be satisfied that the applicant meets all other criteria for the visa being applied for and granting the visa is unlikely to result in 'undue cost to the Australian community'⁸⁵ or 'undue prejudice to the access to health care or community services of an Australian Citizen or permanent resident'.⁸⁶

The Commission believes this not only places an unnecessary burden on individuals to prove their inherent worth and value but also relies heavily on an applicant's personal ability and financial resources to advocate for themselves. There is also no publicly available policy guidance as to what is considered in the health waiver decision-making process or as to what applicants should include in their formal submission.

While a health waiver provides an opportunity for a decision-maker to consider additional factors beyond the cost assessment, it remains discretionary, and therefore subjective. Consideration of social and economic contributions of applicants should be incorporated into the legislation to be considered in the overall assessment of a visa application, in the first instance.

In the absence of legislative reform, the Commission encourages Home Affairs to consider the following approaches to enhancing the Health Waiver:

- Expanding the availability of the Health Waiver to all visa applications
 - This would ensure that more applicants with disability have the opportunity to demonstrate their ability to offset significant costs via social, cultural and economic participation and is also likely to protect more families applying to migrate to Australia who have family members with disability from the 'one fails, all fail' criterion.
- Decision-making under a Health Waiver should be guided by human rights principles.
 - This includes recognising the inclusive nature of supports which build capacity and enable social and economic participation, giving respect to the importance of family unification, and ensuring that an applicant's disability is considered in this context.
 - Decision-making should include consideration of the social and economic benefits and contributions of applicants and their families, as outlined above.
 - Policy guidance should be made publicly available in a variety of accessible and plain language formats.
- Applicants should be informed about their right to appeal a decision made under a health waiver.
 - This includes enhanced availability of information regarding applicant's rights to a review of decisions made under the Migration Health Requirement more generally. This information should be made publicly available and accessible.

Recommendation 20: The availability of the Migration Health Waiver should be expanded to all visa applicants.

Recommendation 21: Health Waiver decision-making should be guided by human rights principles and include explicit consideration of social and economic benefits and contributions of the applicant. To support this Migration staff should have appropriate training on human rights. Policy guidance and decision-matrixes should be made publicly available.

(f) Transparent information on cost assessments

As far as the Commission is aware, applicants subject to the Significant Cost Threshold are only given the total estimated cost rather a detailed breakdown of the costs attributed to their disability or health condition. This was a

recommended area for improvement in the *Enabling Australia* inquiry and the Commission agrees with the assertion that this is inappropriate.⁸⁷

The provision of a detailed account of costs ensures that applicants have all necessary information to challenge a decision if required and to understand what was considered in the assessment of their disability or health condition. This supports the principles of transparent, legitimate, reasonable, and objective decision-making.

Recommendation 22: Applicants should be provided with a detailed breakdown of all assessed costs associated with the disability or health condition, as applied under the Migration Health Requirement.

5.5 Impact on non-citizen children born with a disability in Australia to people on temporary visas

The Commission is aware of many instances of children with disability unable to obtain a visa to remain in Australia resulting in themselves and their families facing the risk of deportation from Australia due to the assumed cost burden of the child's disability.⁸⁸ This is a direct result of the Significant Cost Threshold and the 'one fails, all fail' rule requiring that all members of a family unit must meet the Migration Health Requirement, or else no family member will be granted a visa (unless there is a health waiver available). There are no exceptions for children born with a disability in Australia, and there is no flexibility in the application of the health requirement for these children and their families. This conflicts with Australia's obligations to protect and fulfil the rights of children with disability.⁸⁹

For many families this process has required Ministerial intervention to allow them to remain in Australia. While the Commission is pleased that Ministerial intervention has resulted in positive outcomes in specific cases, it is an unnecessarily difficult and drawn-out process for families and not all families are eligible to apply for this intervention.⁹⁰

The adverse impact is not only felt on a family's wellbeing, but also contributes to non-citizen children with disability born in Australia not having access to essential early intervention publicly funded disability supports (such as those through provided through the NDIS), thereby preventing long-term / life-long benefits to their social and economic participation and reductions in health care and community service costs down the track.

The application of the Significant Cost Threshold acts as a barrier to permanent residency for these children and their families, which is an eligibility requirement of the NDIS.⁹¹ This can have a further socio-economic impact on families and the

Australian community due to parents or family members needing to take time away from the workforce to provide increased disability support.

The Commission is of the view that dependants with disability, regardless of whether they were born onshore or offshore, should not be subject to any Migration Health Requirement. Canada, for example, includes exceptions to their excessive demand health cost requirement for a child, spouse or common law partner of a Canadian sponsor, refugee or protected person.⁹²

For further evidence as to the experience of family visa applicants, the ‘one fails, all fail’ criterion, and the impact of the Migration Health Requirement on cost assessments for children, the Commission encourages Home Affairs to review the *Enabling Australia* Final Report.⁹³ Despite being conducted over 13 years ago, the evidence and recommendations remain relevant to this issue.

Recommendation 23: The Australian Government should amend the *Migration Regulations 1994* (Cth) to make dependants with disabilities, including children, exempt from being subject to the migration health requirement significant cost threshold. This includes non-citizen children born in Australia to temporary visa holders, and children and dependents born offshore.

In the absence of legislative amendment, this recommendation includes making an automatic health waiver available for all non-citizen children born with disability in Australia, to avoid drawn-out processes.

Recommendation 24: The Australian government should review the operation of the ‘one fails, all fail’ criterion under the *Migration Regulations 1994* (Cth) to remove prejudicial impacts on people with disability and their families.

5.6 Transparent and publicly available data

It is useful to understand who is most likely impacted by any existing or proposed policy. The Commission appreciates the high-level data provided in the Discussion Paper, however, does not view this as sufficient to understand which conditions or disabilities are more likely to not meet the Health Requirement, regardless of their ‘stability or predictability’, or the costs generally attributed to these.

Transparent health requirement cost data by primary disability, disease, or condition (indicating whether a co-morbidity exists), would be useful for the purposes of consultation to understand the potential impact of any policy changes and whether the significant cost threshold has, and would continue to

have, a disproportionate effect on certain disability types. This data should be based on an annual cost assessment. Home Affairs and the Australian Government should consider an approach to providing meaningful publicly available data on the migration of people with disability in Australia. This should be considered in the context of the National Disability Data Asset and a Human Rights Indicators framework (such as the one recommended by the Commission in its Free & Equal Project).⁹⁴

6 Other Considerations in relation to the Migration Health Requirement

6.1 The need for broader legislative reform

The Commission understands that this Review is limited to the policy operation of the Migration Act and the Migration Regulations, related to the Significant Cost Threshold. However, the Significant Cost Threshold is only one element of the broader legislative context of the Migration Health Requirement requiring review. The Commission reiterates its recommendation for Home Affairs and the Australian Government to review and amend migration laws and policies, in line with international human rights obligations, to ensure people with disability do not face discrimination in any of the formalities and procedures relating to migration and asylum. Disability and human rights advocates have called for immediate reform to these processes in a recent open letter.⁹⁵

A particular concern raised throughout this submission is the inflexibility of the existing criteria under the Migration Health Requirement which does not allow for the consideration of the social and economic contributions of people with disabilities and health conditions. There is an opportunity to reform the existing legislation to better reflect contemporary attitudes towards disability and a rights-based approach to migration. This includes giving due consideration as to whether applying cost assessments to some, or all, applicants with disabilities is in fact aligned with international human rights obligations and necessary at all once additional factors are considered.

The Commission welcomes the opportunity to engage with Home Affairs and the Australian Government on matters beyond this submission requiring further attention and consideration in the context of a broader review.

7 Conclusion

Disability intersects across all groups and identities in society. Australia is a country that prides itself on the concept of a 'fair go' and its multicultural diversity. However, prospective migrants with disability continue to face barriers and discrimination in Australia's migration processes, based solely on the fact that they have a disability.

The current approach to migration in Australia continues to adopt an outdated deficit and medical model of disability, which perpetuates negative attitudes associated with disability, impeding true inclusion. This is at odds with a rights-based approach and the human rights model of disability. Values reflected within major legislative and policy practices have a significant impact on how broader society perceives and accepts disability.

To achieve the bigger picture of the inclusive and diverse society that we value in Australia, the Australian Government must give policy consideration to the messaging around how people with disability are viewed and valued in our society. This messaging impacts Australians as well as potential immigrants – both with and without disability.

The Commission emphasises the need for broader reform to the Migration Regulations which set out the policy context for the Migration Health Requirement and Significant Cost Threshold. In the absence of this, the Commission reiterates that it remains essential for this Review to take a rights-based approach consistent with, and giving effect to obligations in, core international human rights treaties including the CRPD and the CRC, as outlined in this submission.

Australia's migration policies should recognise the inherent dignity and value of people with disability and give regard to the social, cultural, and economic contributions they bring to our society. Importantly, Australia's policies should aim to give effect to the obligations and rights enshrined in the CRPD and operate in accordance with international law.

The Commission is available for further consultation regarding this submission and is committed to working with the Department of Home Affairs and the Minister, as it has done prior to this Review, to improve Australia's migration framework for people with disability.

The Commission will remain engaged in this process and welcomes further consultation on the findings and policy recommendations arising from this review.

- ¹ The Migration Health Requirement are set out in Public Interest Criteria 4005 and 4007 of the *Migration Regulations 1994* (Cth), subordinate legislation to the *Migration Act 1958* (Cth).
- ² *Australian Human Rights Commission Act 1986* (Cth) s 7.
- ³ *Ibid* s 11(1)(g).
- ⁴ Joint Standing Committee on Migration, Parliament of Australia, *Migration treatment of disability: Enabling Australia* (Final Report, 2010) x-xi [1.4], [1.6] <[Report - Enabling Australia – Parliament of Australia \(aph.gov.au\)](#)> (*Enabling Australia*).
- ⁵ *Ibid* [1.6].
- ⁶ See *Enabling Australia* (n 4).
- ⁷ See *Migration Regulations 1994* (Cth) sch 4 regs 4005, 4007; *Migration Act 1958* (Cth).
- ⁸ *Migration Regulations 1994* (Cth) sch 4 regs 4005(1)(b)-(c), 4007(1)(b)-(c).
- ⁹ *Ibid* sch 4 regs 4005(1)(c)(ii), 4007(1)(c)(ii).
- ¹⁰ The following visa sub-classes are not subject to the health requirement:
- Sub-class 988 (Maritime Crew) visa
 - Subclass 155 (Five Year Resident Return)
 - Subclass 157 (Three Month Resident Return) visa
 - Subclass 403 (Temporary Work International Relations) visa (Privileges and Immunities stream applicants only)
 - Sub-class 995 (Diplomatic Temporary) visa
 - Sub-class 444 (Special Category) visa
 - Special purposes visas – see *Migration Act 1958* (Cth) s 33.
- ¹¹ Department of Home Affairs (Cth), *Australia's Significant Cost Threshold (SCT) Review* (Discussion Paper, November 2023) 2 (*SCT Discussion Paper*).
- ¹² See *Enabling Australia* (n 4).
- ¹³ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 3 (*CRPD*): **Article 3 – General Principles:**
- The principles of the present Convention shall be:
- a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
 - b. Non-discrimination;
 - c. Full and effective participation and inclusion in society;
 - d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
 - e. Equality of opportunity;
 - f. Accessibility;
 - g. Equality between men and women;
 - h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.
- ¹⁴ See *Enabling Australia* (n 4) 77.
- ¹⁵ *Operational Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, GA Res 54/4, UN Doc A/RES/54/4 (22 December 2000, adopted 6 October 1999); *Operational Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 57/199, UN Doc A/RES/57/199 (22 June 2006, adopted 18 December 2002).
- ¹⁶ *Operational Protocol to the Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN Doc A/RES/61/106 (3 May 2008, adopted 13 December 2006): As a signatory to the

operational protocol on the Convention of the Rights of Persons with Disabilities (CRPD), Australia has agreed to recognise

the competence of the Committee on the Rights of Persons with Disabilities (“the Committee”) to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the conventions (article 1).

Communications can only be received in relation to States who are party to the Protocol. There has been one individual communication on migration made in relation to the CRPD and Operational Protocol which is referred to in this submission.

¹⁷ *Bradley v Commonwealth* (1973) 128 CLR 557 at 582 (Barwick CJ and Gibbs J); *Dietrich v The Queen* (1992) 177 CLR 292 at 305 (Mason CJ and McHugh J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286–287 (Mason CJ and Deane J) and 315 (McHugh J).

¹⁸ *United Nations Universal Declaration of Human Rights*, GA Res 217/A(III) (adopted 10 December 1948).

¹⁹ *United Nations International Covenant on Civil and Political Rights*, GA 2200A (XXI) (23 March 1976, adopted 16 December 1966) art 12(2).

²⁰ *Ibid* 12(3).

²¹ Inter-Parliamentary Union, International Labour Organisation, United Nations Office of the High Commissioner for Human Rights, *Migration, human rights and governance* (Handbook for Parliamentarians No 24, 2015) 19
<https://www.ohchr.org/sites/default/files/Documents/Publications/MigrationHR_and_Governance_HR_PUB_15_3_EN.pdf>.

²² *Ibid*.

²³ CRPD (n 13) art 1.

²⁴ *Ibid* art 5.

²⁵ See *ibid* art 4.

²⁶ *Ibid* art 4(1)(b).

²⁷ *Ibid* art 18.

²⁸ *Convention on the Rights of Persons with Disabilities Declaration 2009* (Cth) sch 2.

²⁹ See United Nations Committee on Human Rights Committee, *General Comment No. 18: Non-discrimination*, 37th session, UN Doc HRI/GEN/1/Rev.7 (10 November 1989) [13].

³⁰ Ron McCallum AO, ‘The United Nations Convention on the Rights of Persons with Disabilities - An Assessment of Australia’s Level of Compliance’ (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020)
<<https://disability.royalcommission.gov.au/publications/united-nations-convention-rights-persons-disabilities-assessment-australias-level-compliance>>.

³¹ CRPD (n 13) art 18: **Article 18 – Liberty of Movement and Nationality**

1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:
 - a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;
 - b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;
 - c) Are free to leave any country, including their own;

d) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

³² [CRI026 v Republic of Nauru](#) (2018) 92 ALJR 529 at [22].

³³ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) [9]; Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) [6b].

³⁴ Committee on the Rights of Persons with Disability, *Views: Communication No 20/2014*, UN Doc CRPD/C/24/D/20/2014 (30 April 2021) 14 [9] (*Sherlock v Australia*).

³⁵ *Ibid* 14 [9b]

³⁶ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) 10 [36a].

³⁷ See Australian Human Rights Commission, Submission to the United Nations Committee on the Rights of Persons with Disabilities, *Information Concerning Australia's compliance with the Convention on the Rights of Persons with Disabilities* (25 July 2019) 24 [78]-[80] <<https://humanrights.gov.au/our-work/legal/submission/information-concerning-australias-compliance-convention-rights-persons>>; Australian Human Rights Commission, Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of Persons with Disabilities, *Implementation of the United Nations Convention on the Rights of Persons with Disabilities* (December 2022) 12 <<https://humanrights.gov.au/our-work/disability-rights/projects/royal-commission-violence-abuse-neglect-and-exploitation-people>>; The Commission has also made these representations to the Department of Home Affairs and the Minister for Immigration, Citizenship and Multicultural Affairs via consultation feedback and formal correspondence.

³⁸ The social model of disability recognises that 'disability' is a result of the physical, attitudinal, communication and social barriers that have been built into society. The social model of disability acknowledges disability as form of socially created oppression and focuses on removing these barriers to ensure people with disability can participate as equal members of society, without minimising or denying the reality of impairment or its impacts.

³⁹ 'Convention on the Rights of Persons with Disabilities', *United Nations Department of Economic and Social Affairs: Social Inclusion* (Web page, 2023) <<https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd>>.

⁴⁰ Anna Lawson and Angharad E. Beckett, 'The social and human rights models of disability: towards a complementarity thesis' (2021) 25(2) *International Journal of Human Rights* 351 quoting Rehabilitation International, 'UN Convention on the Human Rights of People with Disabilities: Ad Hoc Committee Seventh Session – Daily Summaries' (on file with the authors) (24 January 2006).

⁴¹ See Lena Morgon Banks and Sarah Polak, 'The Economic Costs of Exclusion and Gains of Inclusion of People with Disabilities: Evidence from low and middle income countries' (Research Report, 2015) <https://www.iapb.org/wp-content/uploads/CBM_Costs-of-Exclusion-and-Gains-of-Inclusion-Report_2015.pdf>; High cost of exclusion and what we need to do about it', *Portulans Institute* (Web Page, 2023) <[The high cost of exclusion and what we need to do about it - Portulans Institute](#)>.

- ⁴² See *Enabling Australia* (n 4) 46-55.
- ⁴³ See *CRPD* (n 13) art 3.
- ⁴⁴ *Disability Discrimination Act 1992* (Cth) s 5.
- ⁴⁵ *Ibid* s 6.
- ⁴⁶ *Ibid* s 52.
- ⁴⁷ UN Special Rapporteur on the human rights of migrants, 'UN Special Rapporteur on the Human Rights of Migrants Concludes His Official Visit to Australia' (1 November 2016) [49], [92] <<https://un.org.au/files/2016/11/16.11-SRM-Australia-End-of-mission-Statement.pdf>>.
- ⁴⁸ This refers to recommendation 4.31 of the Disability Royal Commission: *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, 335.
- ⁴⁹ See Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws* (Position Paper, December 2021) 134-142, 335 < [Free and Equal: A reform agenda for federal discrimination laws \(2021\) | Australian Human Rights Commission](#) > ('*Free and Equal: Reform agenda for federal discrimination law*').
- ⁵⁰ See 'Free and Equal: An Australian conversation on Human Rights', *Australian Human Rights Commission* (Webpage, 31 May 2019) < <https://humanrights.gov.au/free-and-equal>>.
- ⁵¹ See Australian Human Rights Commission, *A Human Rights Act for Australia* (Position Paper, 7 March 2023) <<https://humanrights.gov.au/human-rights-act-for-australia>>.
- ⁵² See *SCT Discussion Paper* (n 11) 3-4.
- ⁵³ *Ibid* 4.
- ⁵⁴ *Ibid* 3.
- ⁵⁵ 'Medical inadmissibility', *Government of Canada* (Web Page, 01 May 2023) <[Medical inadmissibility - Canada.ca](#)>.
- ⁵⁶ *Immigration and Refugee Protection Regulations*, SOR/2002-227, pt 1 div 1 s 1(1) (definitions – excessive demand).
- ⁵⁷ See 'Government of Canada brings medical inadmissibility policy in line with inclusivity of persons with disabilities', *Government of Canada* (News Release, April 16 2018) <[Government of Canada brings medical inadmissibility policy in line with inclusivity for persons with disabilities - Canada.ca](#)>.
- ⁵⁸ See *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, GA RES 2200A (XXI) (entered into force 3 January 1976) arts 12, 9, 13; *CRPD* (n 13) arts 4, 5, 9, 19, 20, 24, 25, 26, 28.
- ⁵⁹ See *Enabling Australia* (n 4) 77: Recommendation 6.
- ⁶⁰ *Ibid*.
- ⁶¹ *Migration Regulations 1994* (Cth) reg 1.03 (definitions – 'community services').
- ⁶² *SCT Discussion Paper* (n 11) 4; Australian Institute of Health and Welfare, 'Welfare expenditure' (Web article, 7 September 2023) < [Welfare expenditure - Australian Institute of Health and Welfare \(aihw.gov.au\)](#)>.
- ⁶³ See Australian Institute of Health and Welfare, 'Welfare expenditure' (Web article, 7 September 2023) < [Welfare expenditure - Australian Institute of Health and Welfare \(aihw.gov.au\)](#)>.
- ⁶⁴ See *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, GA RES 2200A (XXI) (entered into force 3 January 1976) art 9.
- ⁶⁵ *Social Security Act 1991* (Cth) section 94(1) (e) (ii). There can be exemptions to this. Refugees and holders of humanitarian visas generally have exemptions. It is also acknowledged that migrants who acquire their disability when residing in Australia have different eligibility provisions: *Social Security Act 1991* (Cth) section 94(1) (e) (i)

- ⁶⁶ ‘Changes to the medical inadmissibility policy of the Immigration and Refugee Protection Act take effect, *Government of Canada* (Web page, March 16 2022) <[Changes to the medical inadmissibility policy of the Immigration and Refugee Protection Act take effect - Canada.ca](#)>; *Immigration and Refugee Protection Regulations*, SOR/2002-227, pt 1 div 1 s 1(1) (definitions – social services): Under the revised definition, **social services** means ‘residential or institutional care, including the provision of devices related to the care, that is recommended by a health professional and for which more than half of the funds are contributed by governments, either directly or through publicly funded agencies’.
- ⁶⁷ See ‘Archived – Temporary Public Policy Regarding Excessive Demand on Health and Social Services’, *Government of Canada* (Web Page, 26 October 2022) <[ARCHIVED – Temporary Public Policy Regarding Excessive Demand on Health and Social Services - Canada.ca](#)>.
- ⁶⁸ ‘Medical inadmissibility’, *Government of Canada* (Web Page, 01 May 2023) <[Medical inadmissibility - Canada.ca](#)>.
- ⁶⁹ Changes to the medical inadmissibility policy of the Immigration and Refugee Protection Act take effect, *Government of Canada* (Web page, March 16 2022) <[Changes to the medical inadmissibility policy of the Immigration and Refugee Protection Act take effect - Canada.ca](#)>; See ‘Archived – Temporary Public Policy Regarding Excessive Demand on Health and Social Services’, *Government of Canada* (Web Page, 26 October 2022) <[ARCHIVED – Temporary Public Policy Regarding Excessive Demand on Health and Social Services - Canada.ca](#)>.
- ⁷⁰ See *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, GA RES 2200A (XXI) (entered into force 3 January 1976) art 13.
- ⁷¹ Jan Gothard, ‘A migration review could close some disability discrimination loopholes – but not for people already waiting or refused visas’, *The Conversation* (online, 24 October 2023) <<https://theconversation.com/a-migration-review-could-close-some-disability-discrimination-loopholes-but-not-for-people-already-waiting-or-refused-visas-215894#:~:text=It%20is%20the%20backbone%20of%20community%E2%80%9D%20to%20treat%20or%20support>>
- ⁷² *Ibid.*
- ⁷³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 2, 6, 28 (‘CRC’).
- ⁷⁴ *Ibid* art 3(1); *CRPD* (n 13) art 7(2).
- ⁷⁵ *CRC* (n 73) art 23(3); *CRPD* (n 13) art 24.
- ⁷⁶ *CRPD* (n 13) art 7(1).
- ⁷⁷ *Migration Regulations 1994* (Cth) sch 4 regs 4005(c)(i)(B), 4007(c)(i)(B).
- ⁷⁸ *Migration Regulations 1994* (Cth) sch 4 regs 4005(c)(ii)(B), 4007(c)(ii)(B).
- ⁷⁹ *Enabling Australia* (n 4) 78 [4.74].
- ⁸⁰ *Ibid* 46-55.
- ⁸¹ *Enabling Australia* (n 4) 55: Recommendation 3.
- ⁸² This criterion is based on a draft schedule for the *Migration Regulations 1994* (Cth) Public Interest Criteria 4005 submitted to the *Enabling Australia Inquiry* by the Castan Centre for Law and Human Rights and Rethinking Mental Health Laws Federation Fellowship: The Castan Centre for Law and Human Rights and Rethinking Mental Health Laws Federation Fellowship, Submission No 36 to the Parliamentary Joint Standing Committee on Migration, *Inquiry into immigration treatment of disability* (28 October 2009) 17-19.
- ⁸³ See The Castan Centre for Law and Human Rights and Rethinking Mental Health Laws Federation Fellowship, Submission No 36 to the Parliamentary Joint Standing Committee on Migration, *Inquiry into immigration treatment of disability* (28 October 2009) 15-19.
- ⁸⁴ *Migration Regulations 1994* (Cth) sch 4 reg 4007(2).

⁸⁵ *Migration Regulations 1994* (Cth) sch 4 reg 4007(2)(b)(i)

⁸⁶ *Migration Regulations 1994* (Cth) sch 4 reg 4007(2)(b)(ii).

⁸⁷ *Enabling Australia* (n 4) 78 [4.72]

⁸⁸ See for example "Australian visa rejection overturned for boy with Down syndrome and his family" *SBS News* (online, 15 July 2020) <<https://www.sbs.com.au/news/article/australian-visa-rejection-overturned-for-boy-with-down-syndrome-and-his-family/lbmlumdu1>>; <https://www.abc.net.au/news/2023-04-16/familys-visa-uncertainty-because-of-childs-health-care-cost/102212474>; <https://www.abc.net.au/news/2023-03-04/aneesh-family-deportation-son-down-syndrome/102050564>; <https://www.abc.net.au/news/2023-03-08/aneesh-family-get-visa-stay-after-andrew-giles-intervenues/102070108>>.

⁸⁹ See *CRC* (n 73); *CRPD* (n 13).

⁹⁰ *Migration Act 1958* (Cth) s 417.

⁹¹ See *National Disability Insurance Scheme Act 2013* (Cth) s 23: Noting that a child may gain citizenship after being born and residing in Australia for 10 years at which time they would meet the residence requirements of the National Disability Insurance Scheme Act. However, the impact of the delay in access for children whose disability would meet the disability requirements under section 24 of the National Disability Insurance Scheme Act is significant and adverse and could be avoided if the immigration process was designed in a way that did not disadvantage non-citizen children born with disability.

⁹² *Immigration and Refugee Protection Act*, S.C 2001, c. 27, s 38(2): This exception also extends to refugees and protected persons themselves.

⁹³ See *Enabling Australia* (n 4) 103-129.

⁹⁴ See Australian Human Rights Commission, Submission No 1 to the Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (May 2023).

⁹⁵ Open letter from Welcoming Disability to the Australian Federal Parliament, 'It's time to tackle Australia's discrimination against migrants with disabilities' (2023) <<https://alhr.org.au/wp/wp-content/uploads/2023/03/Welcoming-Disability-Open-Letter-March-2023-Final4.docx.pdf>>: This letter was signed by over 100 disability and human rights advocates.