17 November 2023

Via email: health.requirement.review@homeaffairs.gov.au

Submission to the Public Consultation for the Visa Significant Cost Threshold (SCT) Review

To the Minister for Immigration,

We thank you for the opportunity to make a submission into the Review of the Visa Significant Cost Threshold.

We would like it to be noted that we endorse the Welcoming Disability Campaigns' submission and associated recommendations.

About Us

HIV/AIDS Legal Centre (HALC) is the only not-for profit, specialist community legal centre of its kind in Australia. HALC provides free and comprehensive assistance to people with HIV or hepatitis-related legal matters (within operational guidelines). Community Legal Education and Law Reform activities are also carried out in areas relating to HIV and Hepatitis. There are strict health criteria accompanying visas in Australia, leaving people living with HIV limited options when seeking to migrate and work in Australia on a temporary or permanent basis. Responding to this situation, one of HALC's main practice areas is immigration, having provided migration assistance to 503 clients in the 2022-2023 financial year.

The National Association of People with HIV Australia (NAPWHA) is the national peak, non-government organisation representing community-based groups of people living with HIV (PLHIV) across Australia. NAPWHA's membership of national networks and state-based organisations reflects the diverse make-up of the HIV-positive community and enables NAPWHA to confidently represent the positive voice in Australia. NAPWHA's vision is of a world where people with HIV live their lives to their full potential, in good health and free from discrimination.

Health Equity Matters is the peak national organisation for Australia's community HIV response. Health Equity Matters (formerly AFAO) is recognised both globally and nationally for the leadership, policy expertise, health promotion, coordination and support that they provide. Through advocacy, policy and health promotion, the organisation champions awareness, understanding and proactivity around HIV prevention, education, support and research. Health Equity Matters provides a voice for communities affected by HIV and leads the national conversation on HIV.

Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine (ASHM) is a peak organisation for health workers and medical professionals who work in HIV, blood borne viruses (BBVs), and sexual and reproductive health (SRH). ASHM draws on its experience and expertise to support the health workforce and to contribute to the sector, domestically and internationally. ASHM is a professional, not-for-profit, member-based organisation. It supports its members, sector partners and collaborators to generate knowledge and action in clinical management and research, education, policy and advocacy in Australasia.

Overview

Whilst we welcome the invitation to make submissions with respect to the significant cost threshold we also address in these submissions the broader problems that the current health criteria poses with specific reference to the challenges faced by people living with HIV (PLHIV) and the deleterious impact the current migration framework has on efforts to end HIV transmission by 2030.

The Australian Government currently imposes restrictions on PLHIV (and others with disabilities) from accessing certain types of visas. These visa restrictions are obsolete and based on the incorrect assumption that PLHIV will require prohibitively expensive life-long medical interventions, which may not be the case with rapid advances in medicine.

The restrictions also fail to take into account the fact that HIV is a manageable chronic health condition and PLHIV have a working life capacity that is not dissimilar to the general population. In reality, biomedical advances mean that most PLHIV maintain health outcomes equivalent to the broader population without onerous medical support costs. This means that current migration laws/policy also disincentivise healthy PLHIV (and often their Australian partners) from living in Australia and contributing to the community.

As well as being obsolete, these restrictions endanger the community by discouraging migrants who may seek or are currently seeking permanent residency from testing for HIV and/or seeking access to appropriate treatment for HIV.

Most visas are categorized under Public Interest Criterion 4005 (PIC 4005) or Public Interest Criterion 4007 (PIC 4007). For PIC 4005 visas, failure to meet health requirements leads to refusal. Most visas fall under PIC 4005, making it challenging for PLHIV to access visas. PIC 4007 visa applicants not meeting health criteria may seek a waiver by providing supporting information.

Obtaining a health waiver involves a costly and prolonged appeal process. HIV is deemed a condition incurring 'significant cost' to Australia in terms of healthcare and community services – in the case of all application for permanent residence (excluding protection visas). In practice, this hinders PLHIV from obtaining most visas. Consequently, the current health criteria therefore places PLHIV at greater risk of being taken advantage of or even being placed in dangerous personal and employment

relationships as options are limited and PLHIV may choose to remain in negative partner or employment relationships out of necessity and fear.

The following submissions address points 1, 2 and 5 of the terms of reference and make the following recommendations which are expanded upon in later in this submission:

Recommendation 1: Increase the significant cost threshold to at least $250,000.

Recommendation 2: Calculate health care and community service costs to a maximum period of 5 years irrespective of visa subclass or health condition.

Recommendation 3: Allow the MOC to, independently of the Minister, assess whether an applicant has a condition that in their view would be termed 'significant'.

Recommendation 4: Extend PIC 4007 to all visa subclasses.

Recommendation 5: Amend PIC 4005 and PIC 4007 to remove HIV from assessment for visa grant and instead implement a 'health undertaking' process for visa applicants who are HIV positive.

Recommendation 6: Remove the exemption from section 52 of the *Disability Discrimination Act 1992* (Cth) that exempts decisions made under *the Migration Act 1958 (Cth) from action under the DDA*.

Recommendation 7: Withdraw the Interpretative Declaration associated with Article 18 of the Convention on the Rights of Persons with Disabilities (CRPD).

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How the Australian visa Significant Cost Threshold is Calculated

The significant cost threshold is presently set at $51,000. The regulations provide that it is for the MOC to determine who is estimated to be a 'significant cost'; however, it is the Minister who dictates the threshold to the MOC. Separately, we note that this potentially amounts to jurisdictional error as it fetters the discretion of the MOC.

It is asserted that the significant cost threshold is based on average per capita expenditure over five years with an additional component of 20%,[i] we note that this has been reiterated in the discussion paper. To the best of our knowledge, the Minister has not purported to have deviated from this formula and we note that there have been minor periodic reviews to the figure over the years. However, we note that reports from the Australian Institute of Health and Welfare indicate that the average per capita expenditure approximates $16,000 (being in 21/22FY approximately $9,000 on health care and $9,000 on welfare).[ii] Accordingly, this would bring the significant cost threshold, as prescribed by the formula outlined by the Minister, to a figure closer to $100,000.

In the Procedures Advice Manuel, the policy indicates the period of assessment should be for either the course of the visa for a temporary visa or for permanent/provisional visas 10 years if they have a condition with a reasonably predictable trajectory of 65% likelihood. Policy determines that where the costs for the stipulated period of assessment exceeds $51,000 then they fail the Health Criteria. Whilst these costs are calculated over a 5-year period, the costs of HIV assessed against that threshold are calculated over a 10-year period, bringing about a patently unfair situation.

On average, a person living with HIV is estimated by the MOC to cost the Australian community around $12,000pa – this is less than what the average expenditure is which is around $16,000 pa yet PLHIV still fail the Health Criteria for permanent visas because they assess costs over a 10-year period, conversely to other health conditions which are only assessed over a 5-year period. It is difficult to see how costs associated with treating a PLHIV can be readily described as significant when the costs are less than the average per capita expenditure per annum.

When assessing costs for a provisional or permanent visa applicant where the applicant has a condition that is permanent and the course of disease is 'inevitable or reasonably predictable', the applicant is assessed for 10 years (according to policy). HIV is a condition that is permanent, and the cause could be considered predictable, however, the costs associated with HIV are not inevitable and nor are they reasonably predictable. The treatments in this area of medicine are rapidly evolving.

For example: Atripla is now off patent and significantly less expensive than it was 5 years ago (Current cost: $2449 per year, PBS, 17/11/23), and injectable treatments now exist and are covered through the Pharmaceutical Benefits Scheme. No scope for considering drugs coming off patent or advance in medicine is left by the current policy position or notes for guidance.

Therefore, it is likely that any attempt to calculate the costs associated with HIV beyond a 5-year period will inevitably be inaccurate, as advances in medicine and changes to recommended treatments are continuously evolving and costs of treatment change including as patents expire.

With the threshold still standing at $51 000 over 10 years, and no exception existing for those living with HIV, some applicants have been known to resort to accepting and receiving cheaper, suboptimal anti-retroviral treatments (ART). These applicants desire to remain on cheaper, suboptimal treatments in a misguided and desperate attempt to remain below the medical cost threshold, viewed as aiding their visa application, yet, at the same time, being less effective and posing a higher risk of side-effects than more modern treatments that are available.

We note that Canada and New Zealand both adopt similar migration laws and have a similar standard of health care and welfare available; however, in recent years their 'significant cost threshold' has been substantially increased in the last 12-18 months. The threshold in New Zealand and Canada is assessed up to a maximum of 5 years and has close to tripled from previous assessments.

RECOMMENDATION 1: Immediately increase the significant cost threshold to at least $250,000.

This would open the door for PLHIV to be able to meet the health criteria, ending the discriminatory situation where they may be unable to obtain a visa to Australia due to the health and welfare costs they might incur which, we would argue, are not 'significant' at all. And, as well, as situations where their social, cultural and economic contributions to the Australian community are not given an opportunity to flourish.

Setting the threshold at this level would also ensure reduced administrative burden on unnecessarily processing health waivers for applicants with health conditions other than HIV who may come close to the threshold and who are more likely than not to be able to demonstrate capacity to offset costs associated through positive community and employment contributions.

RECOMMENDATION 2: Calculate health care and community service costs to a maximum period of 5 years.

This would allow PLHIV to be assessed to a period commensurate to those with other illnesses and disabilities, ensuring that PLHIV are treated consistently with those other illnesses and disabilities. Not only that, it prevents the cost calculations spanning too far into the future where, due to medical and scientific advances, they will inevitably be inaccurate.

How 'Significant' is defined in the Australian visa Significant Cost Threshold

Section 60 of the Act provides that where the health of an applicant is relevant to the granting of a visa, the Minister may require the applicant to undergo a medical examination as a precondition to

the grant of certain subclasses of visa. For all permanent visas and many temporary visas, this assessment includes an HIV test. In practice, this means that anyone who has identified that they are a person with HIV or are on anti-retroviral treatments (ARVs) will more likely than not be required to undergo a visa medical examination, including an HIV test. The exception to this may be those applying for very short (less than 12 months) temporary visas.

The Medical Officer of the Commonwealth (MOC) will form an opinion as to whether the applicant meets the prescribed Health Criteria. The Health Criteria are set out in Sch 4 of the Regulations[iii] and apply to most visa subclasses.[iv] Part of the assessment involves consideration of where a person has a disease or condition which would be likely to result in a 'significant cost' to the Australian community in the areas of health care and community services; this is the part of Health Criteria that negatively impacts people living with HIV because all people with HIV fail this requirement for permanent and provisional visas (excluding most humanitarian visas), as all PLHIV are assessed as costing greater than the $51,000 significant cost threshold. We also note that all visa applicants for permanent and provisional visa are tested for HIV in contrast to other health conditions which are only tested for if there is indication to do so.

In making their assessment, the MOC must take into consideration all relevant information about the applicant's medical condition and reach an opinion based on a *hypothetical* person with the same condition and severity as the applicant.[v]

The MOC may not be a specialist in all areas of medicine. To reach an opinion, the MOC draws upon the "Notes for Guidance for Medical Officers of the Commonwealth of Australia: Financial implications and consideration of prejudice to access for services". For many conditions, the MOC will also request specialist reports.[vi]

The applicant is able to put forward any medical reports or other information demonstrating that they may meet the Health Criteria and the MOC must take that information into consideration. However, in practice there is nothing that PLHIV can say to not be classified as having a condition that will result in a 'significant' cost in terms of permanent and provisional visas and the MOC looks no further than the notes for guidance in reaching their assessment.

Based on anecdotal experience from the HIV/AIDS Legal Centre, along with the information outlined in the Notes for Guidance, in the last 12 months, a PLHIV has been calculated as costing approximately $117,000 for a permanent visa. This assessment is based on costs calculated over a 10-year period. As an approximate, these costs are:

Service	Cost

Medical services	$5,000
Pharmaceuticals	$112,000
Total	$117,000[vii]

Anecdotally, applicants note that the costs of treatment are calculated as if the applicant is receiving Biktarvy, irrespective of what treatment someone is actually prescribed. This is despite other pharmaceutical costs being listed in the Notes for Guidance and the fact that PLHIV are prescribed other, and less expensive ARVs for many and varied reasons.

Section 65 of the Act requires that a delegate rely upon the medical opinion provided by the MOC. If the MOC finds that the applicant fails to meet the Health Criteria, the delegate must refuse the visa. For individuals applying for permanent visas, all migrating applicants and non-migrating members of the family unit are subject to the Health Criteria. If the primary applicant or a member of their family unit (whether or not they are migrating) fail the Health Criteria, then the whole application will fail. This is known as the "one fails, all fail" rule.

If made validly, the MOC report is determinative and a s 65 delegate must take the MOC opinion to be correct.[viii] A MOC opinion, presented by way of a Form 884, is valid provided that:

- It is for the requisite length of time;
- It cites the correct visa subclass; and
- If considering a refusal, that the medical assessment on which it is based is not more than 12 months old.[ix]

The structure of the legislation protects the MOC opinion as an independent arbiter, which prevents legal dispute over medical costs estimates. However, we note that the definition of 'significant' is not set by the MOC but rather by the Minister – which in our view exceeds the jurisdiction of the Minister.

Depending upon the visa subclass, a waiver may be available for those who fail the Health Criteria on the basis of "prejudice to access" or "significant cost," if the Minister is satisfied that those costs or access to care would not be "undue".[x]

In determining whether or not the condition would be unlikely to result in "undue" cost or "undue" prejudice to access, the impact upon the Australian community is weighed against the compelling and compassionate factors that are applicable to the applicant.[xi] This includes the social and cultural contributions of the applicant, as well as any detriment that the applicant or any other person might

suffer as a result of a visa refusal. This assessment is not limited to an economic calculus of costs/benefits or capacity to mitigate the costs.

Relevantly, 'significant' remains undefined in both the Act, and the Regulations. Our view is that by putting an arbitrary number on what constitutes 'significant', rather than adopting the ordinary meaning of the term 'significant', the discretion of the MOC in reaching a determination that the condition will have a significant cost is being fettered. The administrative burden on the department is also much greater and processing times increased by the MOC being unable to make a more robust individualised determination of whether an applicant will be a 'significant cost'.

A person living with HIV is always found to fail to meet the Health Criteria for permanent and provisional visas as the estimated cost over 10 years exceeds the significant cost threshold. This means that if no health waiver is available the visa will be refused. Many PLHIV can meet the Health Criteria for temporary visas of up to 4 years.

In October 2012, then Minister for Immigration and Citizenship, Chris Bowen MP, announced that:

> "The government will now take into account all of the circumstances when assessing prospective visa applicants against the visa health requirement ... A 'net benefit' approach will allow decision makers to consider the social and economic benefits an applicant and their family bring to Australia compared to the cost of their health care."[xii]

That approach was never implemented.

In our submission the Health Criteria is currently applied in an incorrect/discriminatory way to the detriment of PLHIV.

RECOMMENDATION 3: Allow the MOC to, independently of the Minister, assess whether an applicant has a condition that in their view would be termed 'significant'.

The MOC should have capacity to consider whether indeed the applicant would be a 'significant cost' within the ordinary legal definition with reference to a broader range of factors including but not limited to:

1. likelihood of the costs arising in the reasonably foreseeable future; and
2. capacity to offset costs.

RECOMMENDATION 4: Extend PIC 4007 to all visa subclasses

In the event that the MOC following an appropriately independent assessment still concludes that the significant cost threshold is met, PIC4007 should be extended to all visa subclasses, allowing the health waiver to be available in such circumstances.

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'Any other matters in relation to the Migration Health Framework'

So long as HIV remains a barrier to entry, stay and residence Australia will not be able to end new HIV transmissions. Vulnerable migrant populations remain fearful of testing and treating for HIV as a direct consequence of the current Health Citeria and policies, until such time that we are able to inform PLHIV and those from at risk communities unequivocally that their HIV status will not be a barrier to obtaining permanent residency the goal of ending new HIV transmission in Australia by 2030 cannot be achieved.

Australia is one of just a handful of countries in the world with the potential to end HIV transmissions by 2030; as all Australian Governments have undertaken to do in the National HIV Strategy. However, there are an estimated 2600 PLHIV who remain undiagnosed in Australia. In order to end HIV transmissions, we must locate and diagnose this cohort. To do this we must, crucially, be able to encourage all people with HIV to come forward for HIV testing safe in the knowledge that, if they discover that they are HIV positive, they will not be penalised and, further, that they will be able to access the care and treatment they need.

For those on temporary visas who are in Australia this means they must not be subjected to immigration restrictions not faced by HIV negative people on the same visa type. Failure to do this will result in reluctance to come forward for HIV testing which, in turn, will mean that avoidable HIV transmissions continue, including avoidable transmissions to Australian Citizens.

The immigration system placed many people on temporary visas in a particularly vulnerable position. Not only are they less likely to speak English and less likely to have an up-to-date and evidence-based understanding of HIV but they are also less likely to be able to access subsidised treatment and care through the Medicare system. This means they do not have equivalent access to vital HIV prevention tools such as PrEP as the Australian born population. Their situation leaves them health excluded, vulnerable to abuse in relationships and also vulnerable to unscrupulous employers. We expect them endure this vulnerable situation and to contribute to the Australian economy via work and taxes yet if they require our help because they discover they have become HIV positive while in Australia, we instead respond with immigration restrictions that mean many have to leave. This is unfair and unjust and leaves both Australians and people on temporary visas more vulnerable to HIV transmission.

Migration health laws and policies currently result in negative health outcomes, people are concerned that they may have contracted HIV but are fearful of getting tested or have been tested but be fearful of commencing treatment as they wanted to show they are not a cost and maximise their visa prospects.

The continued implementation of the health criteria also goes against Australia's obligations to respect the principles of the *Convention on the Rights of Persons with Disabilities* (*CRPD*). The

benefits that a PLHIV - who most often will live a long and healthy life with modern treatment protocols - can bring to the community are neglected from the 'significant cost' consideration. HIV is vastly different to many health conditions in this respect, with PLHIV generally having capacity to offset the costs associated with their treatment with their level of economic productivity which is on par with the general population.

RECOMMENDATION 5: Amend PIC 4005 and PIC 4007 to remove HIV from assessment for visa grant and instead implement a 'health undertaking' process

We suggest that the solution is to amend PIC 4007 and PIC 4005 within the Migration Regulations 1994 ('Migration Regulations') to:

1. State that HIV be excluded from consideration when assessing the significant costing and prejudice to access tests; and
2. If a Commonwealth Medical Officer determines that the applicant is living with HIV, provide for arrangement to be made, on the advice of the Commonwealth Medical Officer, to place the applicant under the professional supervision of a health authority in a State or Territory to undergo any necessary treatment (Completion of form 815 Health Undertaking)

This amendment would work similarly to Visa Subclass 866 under Schedule 2 of the Migration Regulations whereby applicants found to have certain medical conditions are to be placed under the professional supervision of a health authority in a State or Territory to undergo any necessary treatment.[xiii] In practice, this results in applicants signing a health undertaking[xiv] to attend medical appointments for treatment.

Recommendation 6: Remove the exemption from section 52 of the *Disability Discrimination Act 1992* (Cth) that exempts decisions made under *the Migration Act 1958 (Cth) from action under the DDA*.

The *Migration Act* is specifically exempted from the *Disability Discrimination Act 1992* (Cth) (the DDA).[xv] This exemption means that decisions by the Minister and delegates under the Act or Migration Regulations are exempt from action under the DDA. The Department justifies its discriminatory health policies on the basis that they apply the same criteria to everyone and are not concerned with the disability itself but with the impact on the Australian community. However, this neglects the reality that the health criteria predominantly affect applicants with disabilities resulting in either visa refusal or different requirements from other applicants.

Recommendation 7: Withdraw the Interpretative Declaration associated with Article 18 of the Convention on the Rights of Persons with Disabilities (CRPD).

Article 18 of the CRPD requires States to recognise the rights of people with disabilities to liberty of movement, freedom to choose their residence and to a nationality, on an equal basis with others,

including the right to acquire and change a nationality. When Australia ratified the CRPD in 2009, Australia lodged an Interpretative Declaration with respect to Article 18, declaring that "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."

We thank you once again for inviting us to make submissions on this important subject. If you have any questions in relation to these submissions, please don't hesitate to contact us.

Your Sincerely,

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[i] Parliament of Australia – Parliamentary Enquiry – The Migration Health Requirement <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/mig/disability/chapter3>.

[ii] Australian Institute of Health and Welfare, 'Health Expenditure' https://www.aihw.gov.au/reports/health-welfare-expenditure/health-expenditure.

[iii] Sch 4 of the Regulations 4005 or 4007, depending on the visa subclass.
[iv] Excluding Onshore Protection visas and some subsets of Medical Treatment Visas (MTV). Onshore protection only requires that applicants undergo a medical assessment however there is no consequence of having a medical condition. MTV applicants in need of medical treatment excludes considerations under PIC4005(1)(c), therefore essentially only needing to demonstrate that they don't have TB or any other condition that could be considered a threat to public health.
[v] *Robinson v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 148 FCR 182.
[vi] Notes for guidance for Human Immunodeficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS), VM-4726; ADD2022/5179176.
[vii] See Scenario 1 of Notes for guidance for Human Immunodeficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS), VM-4726; ADD2022/5179176.
[viii] *Minister for Immigration and Multicultural Affairs v Seligman* (1999) 85 FCR 115.
[ix] *Applicant Y v Minister for Immigration and Citizenship* (2008) 100 ALD 544.
[x] PIC4007.
[xi] *Bui v Minister for Immigration and Multicultural Affairs* (1999) 85 FCR 134
[xii] A fairer approach to migration for people with disability, 31 October 2012 accessed at http://www.minister.immi.gov.au/media/cb/2012/cb191379.htm.
[xiii] Migration Regulations 1994 (Cth) Sch 2 cl 866.224B.
[xiv] Form 815.
[xv] *Disability Discrimination Act 1992* (Cth) s 52 Divs 1, 2 and 2A do not: (a) affect discriminatory provisions in: (i) the Migration Act 1958; or (ii) a legislative instrument made under that Act; or (b) render unlawful anything that is permitted or required to be done by that Act or instrument.