Review of Australia's Visa Significant Cost Threshold

Department of Home Affairs

27 November 2023

Telephone +61 2 6246 3788
Email mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612
Level 1, MODE3, 24 Lonsdale Street,
Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

Table of contents

About the Law Council of Australia 3
Acknowledgements 4
Executive summary 5
Context and Background 6
The legislative framework – PIC4005/4007 – the Health Requirement 6
SCT Policy Overview 7
2010 Enabling Australia Inquiry 7
Operation of the SCT Requirement 8
The need for greater flexibility 8
Timing and transparency of Medical Assessments 9
Amount of the SCT and Time Period 10
The HIV example 11
Application to Temporary Visas 12
Children born in Australia to parents on temporary visas 12
International Human Rights Obligations 13
International Obligations with respect to Disability 13
Inclusion of Special Education and the Convention on the Rights of the Child 15
2023 Disability Royal Commission Recommendation 15

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council of Australia (**Law Council**) is grateful to the Migration Law Committee of its Federal Dispute Resolution Section, its National Human Rights Committee, the Law Society of New South Wales and the ACT Law Society for the input that they provided to the submission.

Executive Summary

1. The Law Council is pleased to make a submission to the Department of Home Affairs (the **Department**'s) Review of Australia's visa Significant Cost Threshold (**SCT**), in response to the November 2023 **Discussion Paper**.[1]

2. The Law Council notes that containing public expenditure—the major focus of the present review—should be balanced against competing considerations, including human rights and ethics, and fairness and community expectations as cited in the Discussion Paper.[2]

3. There is insufficient flexibility in the current administration of the SCT to allow for those competing considerations to be balanced in many cases. This leads to an increased administrative review burden. It would be more efficient for the relevant competing considerations to be taken into account at first instance.

4. Significant concerns have been expressed by community organisations that the current SCT scheme may discriminate against those with special educational or treatment needs due to disability. This may engage Australia's obligations under the UN *Convention on the Rights of Persons with Disabilities* (**CRPD**).[3] The Law Council shares many of those concerns, and this submission's recommendations are in part directed to achieving better CRPD compliance.

5. Of the 'options to consider' set out on page 6 of in the Discussion Paper, the Law Council supports:

    - redefining (or reconsidering) the term 'significant' in the SCT;
    - raising the level of the threshold, and
    - reconsidering the inclusion of special education in the SCT.

6. The Law Council further recommends that the waiver process in Public Interest Criterion (PIC) 4007 should be extended to all provisional and permanent visa classes. PIC 4005 (which is not subject to a waiver) could be maintained for temporary visas classes, to uphold the containing of potential health expenditure and preserving public confidence in the integrity of the migration system. It is noted that protection (permanent or temporary) visas are not subject to PIC 4005 or PIC 4007.

[1] Discussion Paper accessed at: <https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers/review-of-australias-visa-significant-cost-threshold>.
[2] Ibid, 2 and 7.
[3] Opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

Context and Background

The legislative framework – PIC4005/4007 – the Health Requirement

7. Schedule 4 to the *Migration Regulations 1994* (Cth) prescribes two criteria that impose obligations relating to medical assessments and the expected public health costs of a visa applicant or holder: PIC 4005 and PIC 4007.

8. Relevantly, PIC 4005(1)(c)(ii)(A) and PIC 4007(1)(c)(ii)(A) each provide that:

   > *The 'applicant … is free from a disease or condition in relation to which … the provision of the health care or community services would be likely to …* ***result in a significant cost to the Australian community in the areas of health care and community services*** *… regardless of whether the health care or community services will actually be used in connection with the applicant.*

9. As the Discussion Paper notes, applicants for all but a small group of temporary visas must satisfy either PIC 4005 or PIC 4007.

10. The PICs are identical except that under PIC 4007(2), the Minister may waive the requirements in [10] if the applicant satisfies all of the other relevant visa criteria, and the Minister is satisfied that granting the visa would not result in:

    (i) undue cost to the Australian community; or

    (ii) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.

11. A waiver is not available to applicants to whom PIC4005 applies – which is currently the majority of visa subclasses.[4] According to the Department's Procedures Advice Manual, currently PIC 4007 is applied to visas including:[5]

    - all Class XB Refugee and Humanitarian visas;
    - certain skilled, business and other non-humanitarian migration visas;
    - the Subclass 500 (Student) visa (in the Foreign Affairs or Defence Sector stream only); and
    - the Subclass 482 (Temporary Skill Shortage) visa.

12. This means that there is a range of visas, including employer-sponsored and skilled visa categories, where it is not possible for the health requirement to be waived, including, importantly:

    - Subclass 186 - Employer Nomination Scheme visa (Direct Entry stream)
    - Subclass 189 - Skilled Independent (subclass 189) - Points-Tested
    - Subclass 190 - Skilled Nominated (subclass 190)
    - Subclass 491 - Skilled Work Regional (provisional) visa

13. If doubts are raised about an applicant meeting the requirements of PIC 4005 or 4007 after an initial medical assessment, the Minister must seek the opinion of a Medical

---

[4] Joint Standing Committee on Migration, *Enabling Australia: Inquiry into the Migration Treatment of Disability* (June 2010), [3.22-3.24].

[5] Department of Home Affairs, Procedures Advice Manual, 'Sch4/4005-4007 - The Health Requirement' – 'Waivers'.

Officer of the Commonwealth (**MOC**) on whether the person meets the requirements of, inter alia, PIC 4005(1)(c) or PIC 4007(1)(c).[6] The Minister must take the opinion of the MOC to be correct for the purposes of deciding whether a person satisfies the criterion.[7]

14. If the relevant PIC is not met, a visa must be refused under section 65 of the *Migration Act 1958* (Cth).

SCT Policy Overview

15. The SCT sets the threshold as to what is a 'significant cost' under PIC 4005(1)(c)(ii)(A) and PIC 4007(1)(c)(ii)(A). The Department's Discussion Paper notes that the SCT policy was established in 1995 after a joint review by the Department's predecessor (Department of Immigration and Ethnic Affairs) and the then-Department of Human Services and Health. It was determined at the time that 'significant cost' should be defined as 'higher than average annual health and community services costs for an Australian.' Since 2019, the relevant calculation has been based on data from the Australian Institute of Health and Welfare.[8]

16. If a MOC estimates that a visa applicant's condition or disease would be likely to result in health care and/or community service costs over the current threshold ($51,000 as of November 2023), the applicant is deemed not to meet the Migration Health Requirement (**MHR**).[9]

17. Even though the SCT is based on an annual average of health and community costs for an Australian – that is, one year of such costs – under the policy, the expected health costs of visa applicants are assessed over several years. Specifically, temporary visa applicants are assessed over the planned period of their stay, and the entire cost—even if the relevant period is several years—must be under the $51,000 threshold. For provisional or permanent visa applicants with chronic or ongoing conditions, the assessment period is ten years.[10] The Australian Institute of Health and Welfare's 2021-2022 *Health expenditure Australia* report notes that the average amount per capita spent on healthcare in Australia was $9,365 per person, or $93,650 over ten years.[11] It is unclear how this is translated into the $51,000 SCT.

2010 Enabling Australia Inquiry

18. In 2010, the Joint Standing Committee on Migration published its report *Enabling Australia: Inquiry into the Migration Treatment of Disability* (**Migration Committee Report**). In the 13 years since that report, there has been little progress in implementing a fairer and more transparent assessment process for persons with disabilities seeking to migrate to Australia.

19. Despite the Committee's relevant recommendations,[12] costs under the SCT are still not weighed against potential benefits to society from the applicant's potential contributions. There is still insufficient distinction between threats to public health and conditions linked to disability, assessments are still insufficiently personalised, and waiver options are still not available in all cases where they should be.

---

[6] *Migration Regulations 1994* (Cth) reg 2.25A(1).
[7] Ibid reg 2.25A(3).
[8] Discussion Paper, 3.
[9] Ibid, 4.
[10] Ibid.
[11] AIHW 2021-22: <https://www.aihw.gov.au/reports/health-welfare-expenditure/health-expenditure-australia-2021-22/contents/about>.
[12] Joint Standing Committee on Migration, *Enabling Australia: Inquiry into the Migration Treatment of Disability* (June 2010), xxii-xxv.

20. The Department's response to the *Enabling Australia* report in 2012 indicated that the Government was committed to investigating a 'net benefit' analysis so that the MHR could take into account factors (including social and economic contributions) which might offset the applicant's potential health costs.[13] As the response notes, it would be a 'more contemporary' approach.[14] However, there does not appear to have been significant progress in the Government's consideration of the 'net benefit' approach since 2012.

21. The Law Council has referred to the recommendations of that report where relevant in this submission.

Recommendation

- **The Government should consider the recommendations of the *Enabling Australia* inquiry, including those specifically identified in this submission as addressing ongoing issues faced by applicants and practitioners.**

Operation of the SCT Requirement

The need for greater flexibility

22. The key issue with the SCT in practice relates to the limited availability of the power to waive the health requirement. As noted above, only PIC 4007 provides for the power to waive the health requirement in circumstances where the visa applicant has been found not to meet the health requirement by the MOC.

23. This means that where a person has applied for a visa subclass with PIC 4005, and fails the health requirement, it is not possible for the health requirement to be waived and the visa granted. In other words, if a person fails the health requirement, and PIC4005 applies, that visa must be refused, regardless of circumstances of the particular case.

24. This means that currently a delegate cannot consider any of the following issues in making a decision to refuse a visa application where PIC 4005 applies, and the person fails the health requirement:

    - Compassionate and compelling circumstances (including the length of time a person has lived in Australia, their circumstances in their home country (including access to appropriate health care), the nature of the medical condition, etc);
    - The ability of the person to mitigate the costs to the Australian community of the medical treatment (through access significant funds or likelihood of a high income in Australia); and
    - The potential benefit to the Australian community of the person's presence in Australia, including economic, cultural, or social benefits, significant skill shortages, contribution of a person to a regional or remote area etc.

25. This means that if a person has applied for a subclass 189 Skilled Independent visa (a visa type to which PIC 4005 applies), and this person or a member of their family unit

[13] DHA, *Australian Government response to the Joint Standing Committee on Migration report – Enabling Australia* (2012): <https://www.homeaffairs.gov.au/reports-and-pubs/files/joint-standing-comm-enabling-australia.pdf>, 4-5.
[14] Ibid.

fails the health requirement, the Department **must** refuse the visa application. This would include a situation where the visa applicant is a Specialist Medical Practitioner, currently living in a regional area in Australia, earning significantly above the Fair Work High Income Threshold, and where the person fails the health requirement by a single dollar over $51000. None of these factors are able to be considered, and the delegate of the Minister is required to refuse the application.

26. This lack of flexibility can result in absurd outcomes. The benefit of a health waiver is that it remains open to the delegate to make a decision based on all the facts of the case whether the significant cost in the particular case is '*not undue*', and it is therefore appropriate to grant the visa. This, of course, leaves the discretion open to the delegate that the costs in a particular case would be undue, and not waive the health requirement.

27. In the current legislative framework, the only option for cases where there are strong compassionate or compelling grounds for grant of the visa (where PIC 4005 applies) is to seek Ministerial Intervention. This is a costly and cumbersome process, for both the applicant or holder and the Australian Government.

28. Before the person can apply for Ministerial intervention, they must first apply for review by the Administrative Appeals Tribunal (**AAT**) and the AAT must have affirmed the refusal decision. The Minister can then intervene to substitute the AAT decision with a more favourable decision.[15] The AAT is also required to accept the costings of the MOC – that is, a person must apply to the AAT, in the knowledge that they will be unsuccessful, just to have their circumstances considered by the Minister. The experience of practitioners is that the AAT refers most cases for Ministerial intervention.

29. Given this context, and the desirability that the Department have the ability to consider the individual merits of any application (including any compassionate and compelling circumstances), the Law Council recommends expanding access to health waivers, to all provisional and permanent visa types.

.**Recommendation**

- **PIC 4007 should apply to all provisional and permanent visa types, so that the health waiver is available to allow for consideration by the Department of individual circumstances.**

Timing and transparency of Medical Assessments

30. Where the SCT is applied without the possibility of a waiver (PIC 4005), consideration could be given to allowing applicants to apply for a medical assessment prior to lodging their visa application. The experience of practitioners is that MOC assessments are conducted too late in the application process, when considerable work has already been done on an application and delays have caused extra costs to be incurred.

31. Currently, the medical assessment is typically the last stage of the visa process, and visa fees are not refunded where applicant's costs are assessed as above the SCT or where a health waiver is not granted. Further, the costings methodology and framework applied in MOC assessments are often unclear. Not all conditions are covered and it is difficult for applicants and their representatives to calculate what the costs may be. The

[15] *Migration Act 1958* (Cth) ss 351 and 417.

dispositive issue is ultimately often the MOC's assessment of the nature and severity of the condition.

32. Applicants who may be uncertain as to whether they would fall within the SCT are therefore required to invest significant, non-refundable financial resources as part of the visa application. Consideration should be given to allowing MOC assessments to be conducted at the earliest possible stage, including prior to lodgement for pre-existing conditions, to allow potential visa applicants to consider whether to incur the significant costs of applying. However, this should only be considered if it can be done in an efficient and cost-effective way to avoid inadvertently increasing the cost of the health assessments generally.

33. Further, practitioners advise that MOC reports often omit vital cost details, meaning that the findings that applicants exceed the SCT are made on an unclear basis. It is recognised that if the MOC makes a 'does not meet' (**DNM**) outcome, the applicant will receive a DNM letter which states the estimated included services. Upon receipt of this letter, applicants and/or their representatives, may contact the Department requesting a breakdown of the costs of the services identified.[16] However, in the absence of public available costings tables or cost calculation methodology, and without an opportunity to make submissions on a proposed MOC decision, effectively this assessment is opaque.

Recommendation

- **MOC assessments should be made according to public guidelines and contain all of the information necessary. In particular, this information should include the costing methodology to determine how and why an applicant meets (or does not meet) the SCT.**

Amount of the SCT and Time Period

34. The Law Council suggests that consideration be given to raising the threshold so that applicants fail to meet the health requirement only where their assessed costs are in fact *significantly more* – and not simply 'more' than the average cost.

35. 'Excessive' is the term used in Canadian law,[17] and 'acceptable standard of health' is the term used in New Zealand.[18]

36. While the Law Council is not in a position to determine the appropriate level of the SCT, comparisons with other jurisdictions suggest that it may be set too low. Canada's significant cost threshold is currently set at CAD 24,000 per annum (approximately AUD 27,000) or CAD 128,445 over five years (approximately AUD 143,000), and New Zealand's threshold is NZD 81,000 (approximately AUD 74,500) over five years.[19]

---

[16] Ibid 'The MOC Assessment'.
[17] Government of Canada, *Medical Inadmissibility:* <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/inadmissibility/reasons/medical-inadmissibility.html#excessive-demand>.
[18] NZ Government, *Acceptable standard of health criteria for visa approvals*: <https://www.immigration.govt.nz/new-zealand-visas/preparing-a-visa-application/medical-info/acceptable-standard-of-health-criteria-for-visa-approvals>.
[19] Open Letter (with 101 signatories), *It's time to tackle Australia's discrimination against migrants with disabilities.* Welcoming Disability (March 2023): <https://alhr.org.au/wp/wp-content/uploads/2023/03/Welcoming-Disability-Open-Letter-March-2023-Final.docx.pdf>; updated 2023 CAD

37. Over the maximum ten-year period, Australia's threshold is therefore just 20 per cent of the Canadian one, and 34 per cent of the New Zealand limit. Even over the more usual five-year period, the schemes in those nations are considerably more generous.

38. The Canadian approach to medical inadmissibility has undergone reform in recent years, having previously reflected the Australian approach of setting the threshold at an amount equivalent to five-year average health/community services expenditure, and including special education services in assessing the costs posed by the applicant (the latter is discussed further below).

39. Under the Canadian scheme, the threshold is currently set at *three times* the five-yearly average expenditure. Based on current calculations of the five-yearly average expenditure, taking this approach in Australia would raise the threshold to $153,000.

The HIV example

40. The treatment of HIV cases demonstrate the case for reform. Practitioners' experience is that people living with HIV are currently 'costed' at around $107,000 for permanent visas. They will therefore always fail the MOC assessment. Anecdotally, however, 4007 'waiver' requests are almost always successful – which suggests both that the Department is doing extra work processing waiver requests for this cohort. It also means many who have been subject to PIC 4005, would potentially meet the health criteria if the SCT was higher, and for those with a PIC 4007 not have to go through the waiver process.

41. Since 2021, the Australian Government has expanded access to HIV treatment in Australia, including to people who are ineligible for Medicare.[20] As a result, people in Australia without permanent visas are already able to access treatment. It appears that treatment for HIV is rapidly evolving, and becoming increasingly more affordable.

42. On 1 April 2022, the long-acting injectable HIV treatment Cabenuva was listed on the Pharmaceutical Benefits Scheme.[21] This is an alternative treatment option to that which is currently on the market. However, this drug is not mentioned in the materials published by the Department of the treatments that are taken into account.

43. This is just one example supporting either a raise to the significant cost threshold, or treating certain conditions differently.

Recommendation

- **Consideration should be given both to increasing the dollar amount of the SCT, and reducing time period over which it applies to no more**

---

figure from Government of Canada, *Medical Inadmissibility:* <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/inadmissibility/reasons/medical-inadmissibility.html#excessive-demand>.

[20] The Hon Greg Hunt MP, Former Minister for Health and Aged Care, '$50 million investment in support for HIV and blood borne viruses', (1 December 2021, media release) <https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/50-million-investment-in-support-for-hiv-and-blood-borne-viruses#:~:text=Minister%20for%20Health%20and%20Aged%20Care%2C%20Greg%20Hunt%20said%2C%20the,access%20the%20treatment%20they%20need>; The Hon Mark Butler MP, Minister for Health and Aged Care, 'Eliminating HIV transmission and ensuring health equity for LGBTIQA+ Australians' (3 May 2023, media release) <https://www.health.gov.au/ministers/the-hon-mark-butler-mp/media/eliminating-hiv-transmission-and-ensuring-health-equity-for-lgbtiqa-australians>.

[21] The Hon Greg Hunt MP, Former Minister for Health and Aged Care, 'Making medicines more affordable for more Australians' (1 April 2022) <https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/making-medicines-more-affordable-for-more-australians>.

than five years, to bring Australian SCT policy closer to the Canadian and New Zealand equivalents.

Application to Temporary Visas

44. The main purpose of the SCT is to contain public expenditure on health care and community services.[22]

45. Where a person holds a temporary visa and is not otherwise entitled to access Medicare (for example, through a Reciprocal Agreement), they will not have access to publicly-funded health care in Australia. Therefore, refusing a temporary visa on the grounds that a person fails to meet the SCT does not achieve the principal purpose of the policy. If they do not have access to Medicare, they will be paying for the relevant services through insurance or directly.

46. There may be legitimate reasons to consider refusal of a temporary visa on the basis of 'prejudice to access' grounds (that is, "to safeguard the access of Australian citizens and permanent residents to health care and community services that are in short supply - currently this is dialysis and organ transplants"). Nevertheless, the current policy on how the SCT applies within the context of temporary visas should be consistent with all stated policy purposes.

Recommendation

- **The application of the SCT to temporary visa holders who are not entitled to access Medicare should be reviewed for compliance with the aims of the MHR.**

Children born in Australia to parents on temporary visas

47. It has been reported that the Minister has intervened in multiple cases where children with disability are born to parents living in Australia on temporary visas.[23] The Law Council understands that such cases, which have resulted in whole families having to leave Australia due to the 'one fails, all fail' visa rule,[24] is a major focus of the current consultation. There are also cases where the Minister intervenes where children who are accepted into Australia on a visa, but later fail the MHR (for example, they are diagnosed with autism or develop a serious disease) when applying for a subsequent visa.

48. The Law Council agrees with the LSNSW that it represents a loss to Australian society when families on temporary visas, who are in Australia and making valuable social and economic contributions, are denied a permanent visa if a child has a disability or health condition.

[22] Discussion Paper, 3.
[23] Angus Thompson, 'Hope for families facing deportation for having disabled children', *Sydney Morning Herald* (18 October 2023): <https://www.smh.com.au/politics/federal/hope-for-families-facing-deportation-for-having-disabled-children-20231017-p5eczl.html>.
[24] Visa criteria apply to all members of a family unit, which include any dependent children under the age of 18: *Migration Act 1958* (Cth) s 5(1) and *Migration Regulations 1994* (Cth) s 1.12.

49. The fact that the current policy relies on Ministerial discretion creates a situation of uncertainty, and high levels of stress for those temporary visa holders who find themselves in this situation.

50. In line with Recommendation 4 of the *Enabling Australia* Report,[25] the Australian Government should acknowledge that rejecting temporary visa holders as permanent visa holders solely because of the birth of a child with a disability is discriminatory and should develop protocols to address this. This should include visa holders whose children are diagnosed with a health condition after they arrive in Australia.

Recommendation

- **Appropriate changes should be made to law and policy to ensure that temporary visa holders do not have their permanent visa applications refused solely because they have a child in Australia with disability or a serious health condition.**

International Human Rights Obligations

International Obligations with respect to Disability

51. Under international human rights law, Australia can decide in which circumstances it will grant a visa to foreign nationals.[26] However, if Australia decides to make visas available to particular categories of non-citizens, then it must do so on a non-discriminatory basis, including non-discrimination on the basis of disability.[27]

52. The CRPD requires States Parties to move away from the 'deficit' or 'medical' model of disability reflected in the SCT policy approach, which effectively sees disability as a burden to society. Such an approach is at odds with a contemporary, CRPD-compliant model of disability which emphasises equality and the inherent value and dignity of people with disabilities. As UNSW academic and Vice Chair of the UN Committee on the Rights of Persons with Disabilities Rosemary Kayess has written:[28]

> *The development of the CRPD was achieved after decades of disability rights activism to bring about a fundamental shift away from the conception that people with disability embody deficits that require systems of care, treatment and protection. The exclusion of people with disability from the development and implementation of law, policy and practice, in favour of the views of medical experts, service providers and professionals, has been reflected in the development of international law that attempted to confer rights upon people with disability but failed to remove the social welfare and medical response to disability.*

[25] Joint Standing Committee on Migration, *Enabling Australia: Inquiry into the Migration Treatment of Disability* (June 2010), xxii.
[26] Subject to relevant international obligations, including those relating to refugee law and non-refoulement.
[27] CRDP, article 3(b) and 4(c-d) (also International Covenant on Civil and Political Rights articles 2 and 26; International Covenant on Economic, Social and Cultural Rights, article 2).
[28] See eg Kayess and Sands, *CRPD: Shining a Light on Social Transformation,* Research Report prepared for the Disability Royal Commission, September 2020: <https://disability.royalcommission.gov.au/system/files/2020-09/Research%20Report%20-%20Convention%20on%20the%20Rights%20of%20Persons%20with%20Disabilities%20Shining%20a%20light%20on%20Social%20Transformation.pdf>, 2-10.

53. Moreover, the exclusion of assessments under the *Migration Act 1958* (Cth) from the *Disability Discrimination Act 1992* (Cth)[29] and Australia's interpretive declaration to the CRPD relating to 'health requirements for non-nationals'[30] contribute to the impression of a human rights vacuum in this area of law.

54. Under Article 4(b) of the CRPD, States parties undertake to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'. As set out below, the inclusion of special educational needs in the costings for the SCT in particular may be discriminatory on the basis of disability, and should be reconsidered in the name of CRPD compliance.

55. In October 2019, the Committee on the Rights of Persons with Disabilities issued Concluding Observations on Australia's second and third periodic reports under the CRPD.[31] The Committee specifically referred to the MHR,[32] and 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.*[33]

56. In 2021, the UN Committee on the Rights of Persons with Disabilities found relevantly that the MHR had been applied to a visa applicant with multiple sclerosis in a manner inconsistent with the CRPD, explaining:[34]

> *The Committee recalls that, while not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Convention, "a failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority".*
>
> *Noting that the mere fact that the author had multiple sclerosis resulted in her failure to satisfy the health requirement, which prevented her from obtaining the work visa she required to go to Australia and take up the position for which she had previously been selected. In addition, it is contrary to the Convention because the State party is focusing on the person and not on attitudinal and environmental barriers that hinder the*

---

[29] *Disability Discrimination Act 1992* (Cth), s 52.
[30] See UN Treaty Collection, Chapter IV: Human Rights, 15. Convention on the Rights of Persons with Disabilities: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en>. This relevantly states that '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.'
[31] Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019).
[32] Ibid, [35(a)].
[33] Ibid, [36(a)].
[34] *Sherlock v Australia*, Comm No 20/2014, views adopted on 19 March 2021, UN Doc CRPD/C/24/D/20/2014 (30 April 2021), [8.7] (edited),

full and effective participation in society of persons with disabilities on an equal basis with others.

Recommendation

- **Australia's relevant obligations under the CRPD should be reflected in Departmental policy on the MHR. The relevant policies should be reviewed to ensure that visas applications are not refused on a discriminatory basis.**

Inclusion of Special Education and the Convention on the Rights of the Child

57. The Discussion Paper mentions that 'service costs' for child applicants with disabilities may result in a Does Not Meet finding with respect to the SCT.[35] Specifically, as noted, PIC 4005 and PIC 4007 require an assessment of whether there is a 'significant cost to the Australian community in the areas of health care and community services'. The term 'community services' is defined as including 'the provision of an Australian social security benefit, allowance or pension';[36] however, under relevant policy 'it is also taken to include services such as supported accommodation, special education, home and community care'.[37]

58. The inclusion of special education for disabilities such as autism in SCT costings is potentially inconsistent not only with the CRPD and the *Disability Discrimination Act 1992* (Cth),[38] but also the right to non-discriminatory enjoyment of the right to education guaranteed by article 2(1) in conjunction with articles 23(3) and 28 of the Convention on the Rights of the Child (**CRC**).[39]

59. Special educational needs should not be placed in the same category as treatment for diseases.

Recommendation

- **Consideration should be given to excluding special education costs from SCT costings on the basis of Australia's obligations under the CRPD and CRC.**

2023 Disability Royal Commission Recommendation

60. The Disability Royal Commission made the following recommendations in its *Final Report*:[40]

---

[35] Discussion Paper, 4-5.
[36] *Migration Regulations 1994* (Cth) reg 1.03.
[37] Department of Home Affairs, Procedures Advice Manual, 'Sch4/4005-4007 - The Health Requirement' – 'The MOC Assessment'.
[38] The case for inconsistency between these Acts (section 52 notwithstanding) is frequently made by immigration lawyers, see eg Snedden Hall & Gallop, *How does Australia's migration system deal with disability?* <https://shglawyers.com.au/how-does-australias-migration-system-deal-with-disability>. See further eg Kuzmin, 'Disability and the health requirement for migrants to Australia: exercising the power of discrimination? (2020) 98 *AIAL Forum* 100, 102-111.
[39] Opened for signature 20 November 1989, 1577 UNTS 3 (entry into force 2 September 1990).
[40] Disability Royal Commission *Final Report*, Recommendation 4.31: <https://disability.royalcommission.gov.au/system/files/2023-11/Final%20report%20-%20Executive%20Summary%2C%20Our%20vision%20for%20an%20inclusive%20Australia%20and%20Recommendations.pdf>.

- The Australian Government should initiate a review of the operation of section 52 of the *Disability Discrimination Act 1992* (Cth), insofar as it authorises discrimination against people with disability seeking to enter Australia temporarily or permanently. The review should consider changes to the legislation and migration practices to eliminate or minimise the discrimination.

- The review should be conducted with particular reference to the rights recognised by the Convention on the Rights of Persons with Disabilities and the Concluding Observations on the combined second and third periodic reports of Australia made by the United Nations Committee on the Rights of Persons with Disabilities.

61. The Law Council is still considering its position on the recommendations of the Disability Royal Commission more broadly, but suggests that these particular two recommendations be taken into account in the context of the current review.