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PROFESSIONAL STANDARDS SCHEME

24 November 2023

Department of Home Affairs

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

Dear Officers

Re: Response to Review of Australia's visa Significant Cost Threshold

Thank you for the opportunity to provide submissions in relation to the response to the review of Australia's visa significant cost threshold.

By way of background, I am a Principal Solicitor and Director of Nomos Legal, a boutique immigration law firm in Sydney. I am an Accredited Specialist in Immigration Law and have practiced in the field of immigration law since 2003. Early in my career, I worked at the HIV/AIDS Legal Centre and as such, have had significant exposure to the health requirements for Australian visas throughout the course of my career.

I am also the President of the Management Committee of the Immigration Advice and Rights Centre ('IARC') and have held this position for a number of years. As a result of this, I am very familiar with the vital work that IARC does with vulnerable clients, many of whom have issues meeting the health requirements for Australian visas.

I have had the benefit of reading IARC's submission on this topic and agree with the recommendations set out therein, specifically:

1. the *Migration Act 1958* (Cth) should not be exempt from the *Disability Discrimination Act 1992* (Cth),
2. the significant cost threshold requires review,
3. special education costs should be excluded from costing calculations,
4. Public Interest Criterion ('PIC') 4005 should be replaced by PIC 4007 for all visa subclasses,
5. the 'one fail, all fail' requirement should be abolished.

I have also endorsed the submission made by Welcoming Disability.

Rather than repeating the submissions made by IARC, I wish to note my observations on the significant cost threshold stemming from my own professional experience as an immigration lawyer who deals with clients with health issues on a regular basis, in case these are of benefit to the Department.

Significant cost threshold

I cannot reasonably estimate how many visa applicants with health issues I have advised over the course of my career to date, but as a rough guide, I have advised at least 50 individuals or family units with health issues since January 2020. Some of these clients have required assistance with ongoing visa applications, others have required representation before the Administrative Appeals Tribunal or in a request for Ministerial intervention[1]. These clients have had a range of medical conditions and/or disabilities, ranging from adults with HIV and cancer to children with autism spectrum disorders. Some of these clients were fortunate enough to have a pathway to permanent residence available to them (such as a Class UK/BS subclass 820/801 Partner visa application or a Class EN subclass 186 Employer Nomination Scheme visa application in the Temporary Residence Transition stream). The remainder have had no such pathway, and consequently, are left with no immediate or viable visa options. For some of these clients, this effectively closes the door to Australia.

Each of these clients has been reduced to a number, in terms of the likely cost they may be to the Australian community as a result of their condition.

Whilst I do not dispute that there *may* be a cost to the community that stems from the condition in question, or that it is the prerogative of the government to administer the migration program in the way they see fit, I question whether the health criteria as they stand currently are fit for purpose.

The main issue that I see in this regard is that the significant cost threshold does not properly reflect the current average amount per capita spent on health. Whilst the threshold has changed over the year, most recently to a figure of AUD51,000 over a 10 year period, to my mind, this requires further review. The significant cost threshold should accurately reflect the average annual health and community services cost for an Australian. If we are to learn from the Canadian experience, the concept of 'excessive demand' may be one to adopt[2]. If Australia was to adopt the Canadian approach of an indexed threshold per annum for five years (in Canada's case, CAD28,659 per year or CAD128,445 over five years, which equates to AUD 159,425 over five years), a significant number of visa applicants would meet the health requirement in the first instance, negating the need for a waiver (if available), and avoiding the possibility of visa refusal and/or the need for merits review. For some visa applicants, this could mean Australia was in fact a viable migration destination for them, and we would not lose them to New Zealand or Canada, amongst other countries. Given that the 'significant cost' threshold is set out in Departmental policy, rather than in the *Migration Act 1958* (Cth) or the *Migration Regulations 1994* (Cth), this change should not be difficult to make.

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[1] see for example *This single mother could be one of the last to have her Australian visa rejected over Hepatitis B*, 20 August 2019, SBS News, accessed via https://www.sbs.com.au/news/article/this-single-mother-could-be-one-of-the-last-to-have-her-australian-visa-rejected-over-hepatitis-b/uykiepe4r on 24 November 2023

[2] Government of Canada, 'Excessive demand on health services and on social services', accessed via https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/standard-requirements/medical-requirements/refusals-inadmissibility/excessive-demand-on-health-social-services.html on 24 November 2023

To illustrate, I have outlined three client examples below:

1. ***Client A – 38 year old doctor from the United Kingdom***

Client A is HIV positive and applied for a Class SI subclass 189 Skilled – Independent visa. Their application was refused because it was determined that they did not meet the health requirement set out in PIC4005, which is applicable to this subclass of visa.

The costs that would have been estimated for Client A based on my knowledge of these processes and the *Notes for Guidance for Medical Officers of the Commonwealth* would have been AUD117,850 over a 10-year period or thereabouts.

Client A was already in Australia as the holder of a Class GK subclass 482 Temporary Skill Shortage visa, and as such, was able to consider a pathway to permanent residence via the Class EN subclass 186 Employer Nomination Scheme visa application in the Temporary Residence Transition stream. That did not change the fact that they were, to say the least, horrified to find that a manageable condition that did not affect their ability to work as a General Practitioner had resulted in their visa application being refused.

2. ***Client B – 34 year old geologist from Brazil***

Client B is HIV positive and received advice from a migration agent who did not understand how the health requirements work. Based on this advice, Client B applied for a Class SN subclass 190 Skilled – Nominated visa. They received an 'invitation to comment' on their apparent failure to meet the health requirement set out in PIC4005, which is applicable to this subclass of visa.

The costs that would have been estimated for Client A based on my knowledge of these processes and the *Notes for Guidance for Medical Officers of the Commonwealth* would have been AUD117,850 or thereabouts.

Client B was already in Australia as the holder of a Class WA Bridging A visa and is in a *de facto* relationship with an Australian citizen, and as such, was able to consider a pathway to permanent residence via the Class UK/BS subclass 820/801 Partner visa. The fact that they were compelled to apply for their Class UK/BS subclass 820/801 Partner visa whilst holding a Bridging A visa has resulted in a more complicated visa application process, as well as additional costs for the couple to bear.

It should be noted that this client was nominated by an Australian state/territory for their visa, which was clear evidence of the demand for their skills. But for the client being in a *de facto* relationship with an Australian citizen, they would have left Australia as they did not want to disclose their medical condition to their employer, and they were concerned that this may become necessary if they relied on their employer for nomination for a permanent visa.

3. Client C – 44 year old program manager from New Zealand

Client C is a parent of a child with a progressive autoimmune disease that necessitated the use of a wheelchair. They sought my advice in respect of what, if any options, the family had to migrate to Australia.

The costs that would have been estimated for Client A based on my knowledge of these processes and the *Notes for Guidance for Medical Officers of the Commonwealth* would have been in excess of AUD1,000,000.

Client C was unable to meet the requirements for the then Class SI subclass 189 Skilled – Independent visa in the New Zealand stream. The TSS to ENS pathway was not a viable option for the family, for various reasons. As a result, we could not identify any immediate pathways for the family to migrate to Australia.

It should be noted that this client's spouse was an IT professional, with transferable skills in demand in Australia. Based on my experience, the family was well-placed to make an argument for a waiver of the health requirements if in fact this was available to them.

Each of these individuals found their options were affected by their ability to meet the health requirements for their respective visas. If for example Australia was to follow the Canadian example, Clients A and B would have had no issue meeting the relevant health requirements for the visas they initially applied for.

<u>Conclusion</u>

As outlined in IARC's submission, I agree that limiting a health waiver to a few subclasses of visas unnecessarily restricts access to permanent visas. In addition to being inequitable and out of step with community expectations, this also operates to the detriment of the Australian labour market. As an example, expanding the operation of PIC4007 to a wider range of skilled visas would ensure that prospective visa applicants with skills that are of benefit to Australia are not denied access to the general skilled migration program. If the expansion of PIC4007 to more visa subclasses is not something that the government is prepared to consider, then at the very least, the significant cost threshold should be revised such that it is realistic, reflects the standards set in other comparable countries and properly reflects the expectations of the Australian community.

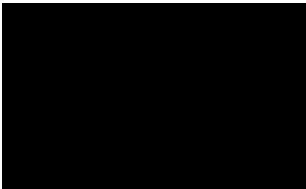
Many people who are living, working or otherwise contributing to Australia are forced to leave Australia if an appropriate pathway to permanent residence is not available to them due to their inability to meet the significant cost threshold. The assumption that individuals with health conditions and/or individuals who are differently abled are a cost to the community based on actuarial data and a 'hypothetical person' assessment does not fairly reflect the contributions that they and their family members do make to Australia.

In the time I have been in practice, I have seen significant changes in the way Australia administers the health requirements for Australian visas. There was a time in which the majority of my work with clients who had medical conditions was at the then Migration Review Tribunal. This has, for the most part, changed, but I believe there is more work to be done to ensure a program that works to fairly balance any financial considerations that may arise with the needs of the Australian labour market and the expectations of the wider Australian community.

Thank you for undertaking this timely review. I would appreciate the opportunity to provide further information, in person or in writing, if there are future consultations.

Yours faithfully,

NOMOS LEGAL



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