

Submission to Review of Australia's visa Significant Cost Threshold (SCT)

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Summary

Australia legislates the migration screening for health conditions and identify a list of non-communicable diseases or conditions that may pose a significant cost to the public system.¹ It has adopted a strict approach² to refuse visa applications if any of the visa applicants in a combined visa application would like to require health care or community services valued at or more than the 'significant cost threshold'³, regardless of whether they would actually use such services⁴. For many years the Medical Officer of the Commonwealth has been following department policy which requires the MOC to consider 'special education' costs as part of the community services.

We believe migration health requirements are important in preserving and protecting Australia's public health. However, we propose that 'special education' should be excluded from the costing of community services against the significant cost threshold.

SCALES and the Murdoch University Clinical Program

The Southern Communities Advocacy Legal and Education Service Inc. (SCALES) is a community legal centre working predominantly in the Rockingham/Kwinana region southwest of Perth. SCALES provides free legal advice, information and representation to people on low income and provides a state-wide service in the area of immigration.

For the last 25 years our service (SCALES) has represented clients on migration issues. Murdoch School of Law, in collaboration with SCALES, runs a clinical legal education program which provides students the opportunity to work alongside SCALES's legal practitioners to assist clients and contribute

¹ *Enabling Australia, Inquiry into the Migration Treatment of Disability*, Joint Standing Committee on Migration, June 2010, 39-42.

² *Lee (Migration)* [2021] AATA 2194 [12].

³ https://legend.online.immi.gov.au/migration/2021-2024/2022/20-08-2022/regs/Pages/document00000/level%20100010/level%20200372.aspx#JD_4005.

⁴ *Migration Regulations 1994* (Cth) sch 4, 4005 and 4007.

to law reform. This submission has been prepared with the assistance of our law students working at SCALES through the clinical program.

We welcome the opportunity to make a submission to inform the review of the Significant Costs Threshold.

Introduction

The Department must seek Medical Officers of Commonwealth (MOC)'s opinion as to the potential health care and community services costs over the period of stay (the lifespan of the visa, or 3, 5 or 10 years)⁵ on the basis of annual per capita rate⁶ for the services that would be accessible to the visa applicants if their visas were granted. If the estimate would result in a cost of \$51,000 or more,⁷ the visa applicant cannot meet the health criteria. The Department decision maker is bound by MOCs' opinion⁸ provided the opinion is formed by correctly applying the *Robinson hypothetical person test*.⁹

Issue

According to the *Migration Regulations 1994* 'community services' are defined to include 'the provision of an Australian social security benefit, allowance or pension.'¹⁰ However, according to the Department's policy community services are taken to include 'special education'. This has a significant impact on the calculation of the cost of community services. in the costing. As an example, the estimated special education cost for a 12-year-old visa applicant with Down Syndrome would be \$176,630, far above the current significant cost threshold of \$51,000.¹¹

The question is whether 'special education' should properly be included as being part of the definition of 'community services'.

The meaning of 'special education' in the Department's policy

⁵ https://legend.online.immi.gov.au/migration/2021-2024/2022/20-08-2022/regs/Pages/document00000/level%20100010/level%20200372.aspx#JD_4005.

⁶ <https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/health/protecting-health-care-and-community-services> accessed on 29 August 2022.

⁷ https://legend.online.immi.gov.au/migration/2021-2024/2022/20-08-2022/regs/Pages/document00000/level%20100010/level%20200372.aspx#JD_4005.

⁸ *Migration Regulations 1994* (Cth) reg. 2.25A.

⁹ *Robinson v MIMIA* [2005] FCA 1626; (2005) 148 FCR 182 ('*Robinson test*'), *Ramlu v MIMIA* [2005] FMCA 1735 and *Quirante (Migration)* [2022] AATA 769 [12].

¹⁰ *Migration Regulations 1994* (Cth) reg 1.03.

¹¹ *Kashyap (Migration)* [2022] AATA 1007.

Both the State and Territory governments and National Disability Insurance Scheme (NDIS) fund the special education. NDIS provides students with special needs that are not related to learning such as specialist transport support, self-care at school, specialised training for teachers and other staff in how to support the child, mobile equipment or assistive technology, and school leaver employment support.¹²

When the Department policy refers to ‘special education’ or ‘special education services’, it does not encompass all the support services provided to students with disabilities but refers to the costs related to the educational support only¹³. This is demonstrated in the cost breakdown in AAT cases where school-aged applicants with development delay or intellectual disabilities attract the costs of special education services and disability support services.¹⁴ NDIS costs are counted under the subcategory of ‘disability support services’. We accept these costs are social security benefits and within the definition of ‘community services’.

In contrast, the special education cost, according to the Department’s policy, is calculated on the basis of the loading under NCCD program since 2022¹⁵ or the funding rates under Program for Students with Disabilities (PSD) in Victoria.¹⁶ These funds are provided by State governments and targeted at educational support for students with disabilities by providing resources including teaching staff, specialist staff, education support staff, specialised equipment or materials, and consultancy or professional development.¹⁷ They are related to the education of students with disabilities.

Self-fettering by including special education in community services

Although the Department policy may consider community services other than the provision of an Australian social security benefit, allowance or pension, education is beyond the ‘ordinary, everyday, current meanings’ of ‘community services’.¹⁸

¹² <https://ourguidelines.ndis.gov.au/how-ndis-supports-work-menu/mainstream-and-community-supports/who-responsible-supports-you-need/school-education>, accessed on 29 August 2022.

¹³ The MOC advice pack March 2021 directs the cost of specialist education services excludes Education Entry Payments, which is a one off payment of \$208 a year for eligible persons receiving certain payments under the *Veterans’ Entitlements Act 1986* (VEA).

¹⁴ *Quirante (Migration)* [2022] AAT A 769, *Evangolio (Migration)* [2022] AAT A 1109, *Azim (Migration)* [2021] AAT A 1250.

¹⁵ *Kashyap (Migration)* [2022] AATA 1007. NCCD program stands for Nationally consistent collection of data on school students with disability.

¹⁶ Notes for Guidance for Disability, March 2021 ([can’t find it](#)) and *Dang (Migration)* [2021] AATA 3718 [21] and [42].

¹⁷ <https://www2.education.vic.gov.au/pal/student-resource-package-srp-equity-funding-student-based-funding/print-all> accessed on 16 September 2022.

¹⁸ *How to Read Legislation, a Beginner’s Guide*, accessible at [https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/howtoreadlegislation.pdf/\\$FILE/How%20to%20read%20legislation.pdf?OpenElement](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/howtoreadlegislation.pdf/$FILE/How%20to%20read%20legislation.pdf?OpenElement) on 02 September 2022.

Special education is no more than another form of education which accommodates to children with special needs. As a party to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), Australia recognizes ‘the right of everyone to education’¹⁹ and ‘with a view to achieving the full realization of this right, primary education shall be compulsory and available free to all’²⁰ and ‘secondary education in its different forms shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education’.²¹ Therefore, children with special needs should enjoy the right to education with appropriate educational support, just as applicants in need of ESL education are not financially discriminated in visa applications. Children with disabilities should not be viewed as a financial burden but be ‘treated as true equals’²² of children receiving mainstream schooling.

Simply put, special education cost should not be included in the costing because it is not a community service. Further, a costing decision that includes such a cost is *ultra vires* because the decision maker allows the Department’s policy rather than the enabling statute to guide their decision makings.²³

Proposal

Remove ‘special education’ from the Department’s health criteria policy and exclude its cost from the costing against the significant cost threshold.

Benefits of the proposed change

- The proposed change will **alleviate the backlog** of the visa applications delayed by the special education cost. Without such a cost, many cases of children with disabilities may pass the health test without going through the process of providing further comments and seek another MOC’s opinion or even a Review Medical Officer’s opinion. Regardless of the outcome, it is a long and stressing process for the Department and the families impacted.²⁴

¹⁹ *International Covenant on Economic, Social and Cultural Rights* (ICESCR) Article 13(1). <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>. Australia signed the ICESCR on 18 December 1972 and ratified it on 10 December 1975.

²⁰ *International Covenant on Economic, Social and Cultural Rights* (ICESCR) Article 13(2)(a). <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>

²¹ *International Covenant on Economic, Social and Cultural Rights* (ICESCR) Article 13(2)(b). <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>

²² <https://www.welcomingdisability.com/>.

²³ *Green v Daniels* (1977) 51 ALJR 463.

²⁴ In *Dang v AAT & Anor* [2019] FCCA 58, the visa applicants were refused a permanent visa in October 2015 due to their child with Down Syndrome. Despite the dismissal of the appeal in the Federal Circuit Court of Australia, their appeal was allowed in the Federal

- It may also **free up** the precious judicial **resources** and ministerial intervention for other more significant matters because visa applicants would probably resort to AAT, ministerial intervention and the Courts after they get refused.
- It is also **in the national interest** to remove the special education cost. The national interest in this concern is the financial interest, which is arguably to be calculated not only by the monetary value of the resources that might be consumed, but also the economic benefits that could be brought by the prospective migrants. In the current and foreseeable skills shortage, it is very likely that a highly skilled migrant with a disabled family member would be more a contribution than a burden to the Australian community. AAT has wisely remitted many refusal decisions to the Department with the direction that the child applicant meets the health criteria after considering all the circumstances, in particular, the parents' skills in a high demand by Australia.²⁵

The current special education annual funding rates of Victoria range from \$8,180 for students with the lowest support needs to \$62,436 for students with the most profound disabilities²⁶.

Despite the fact that these per capita funds may not be entirely dedicated to one child alone²⁷, it is almost certain that high-skilled migrants with a child suffering moderate development delay would be refused to migrate to Australia under 'one fails all fail' policy, regardless of how much economic benefits they would bring to the Australian community.

- For visa applicants subject to condition 4005 who have no access to health waiver, the *Robinson hypothetical person test*²⁸ means they cannot have their individual circumstances considered. This has 'caused frustration on decision makers who can see that there are broader compelling

Court of Australia. Their case was remitted to AAT and finally decided favourably on 13 July 2021. It would probably take considerable time for the Department to grant the visa they applied for in 2013.

²⁵ *Kashyap (Migration)* [2022] AATA 1007, *1826006 (Migration)* [2021] AATA 5464, *1718024 (Migration)* [2021] AATA 2553 and *Azim (Migration)* [2021] AATA 1250,

²⁶ <https://www2.education.vic.gov.au/pal/student-resource-package-srp-equity-funding-student-based-funding/guidance/4-program-students-0> accessed on 16 September 2022.

²⁷ *Kashyap (Migration)* [2022] AATA 1007 [58].

²⁸ This test requires the MOCs to take into account the cost of health care or community services for which a hypothetical person with the same form and level of the applicant's condition would be eligible.' To be specific, they must limit their consideration to the nature of the health condition, the age of the applicant, the type of visa applied for and the visa period. They are not allowed to consider any other mitigating factors such as applicants' undertaking not to use available services, voluntary payment for the services with their own savings, insurances or reciprocal health care agreements, their own medication and care resources or the unavailability of the services in particular locations in Australia.

circumstances that should be taken into account.’²⁹ The proposed change may not only relieve some frustration but also aligns with the United States which adopts a wider approach whereby migrants can sign an affidavit to indemnify against health costs and Canada which allows their medical officers to consider the offset of costs when deciding on whether applicants meet the health criteria.³⁰

- Finally, it is not cumbersome for the Department to implement the proposal because it does not involve any legislative change but only a change in the policy.

Conclusion

It is a small change in the policy to remove ‘special education’ from the community services costing, but a huge move to attract high-skilled migrants, reduce backlog, save public resources and send a message to the public that we are working ‘to ensure migrants are best positioned to reach their full potential in Australia and to further strengthen our social cohesion’.³¹

²⁹ Parliament of Australia, *Decision Making Processes* 4.111, accessed at

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/mig/disability/chapter4 on 29 August 2022.

³⁰ *Enabling Australia, Inquiry into the Migration Treatment of Disability*, Joint Standing Committee on Migration, June 2010, 39-42.

³¹ <https://immi.homeaffairs.gov.au/settling-in-australia/amep/about-the-program/background>.