



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



**Submission Provided to the Department of Home Affairs**

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Image Description: a child with down syndrome and a parent or carer play with small wooden elephants

**This submission was prepared by the Welcoming Disability Campaign.**

**The eight key recommendations within this submission are endorsed by the following organisations and experts:**

1. Australian Lawyers for Human Rights (ALHR)
2. Down Syndrome Australia
3. Australian Federation of Disability Organisations
4. National Ethnic Disability Alliance (NEDA)
5. People With Disability Australia
6. Children and Young People with Disabilities Australia (CYDA)
7. Women With Disabilities Australia
8. Inclusion Australia
9. LGBTIQ+ Health Australia
10. ACON
11. Amnesty International Australia
12. Equality Australia
13. Australian Women Lawyers Ltd.
14. Disability Advocacy Network Australia (DANA)
15. Advocacy for Inclusion
16. Physical Disability Australia
17. Rights and Inclusion Australia
18. Human Rights Law Centre
19. Centre for Human Rights Education, Curtin University
20. Australian Lawyers Alliance
21. Migration Institute of Australia
22. Public Interest Advocacy Centre
23. Neurodivergent Labor
24. Association for Services to Torture and Trauma Survivors (ASeTTS)
25. Centre for Law and Social Justice, Newcastle University
26. Deafness Forum Australia
27. Cystic Fibrosis Australia
28. Australasian Society for Intellectual Disability
29. New South Wales Council for Civil Liberties
30. Liberty Victoria

31. University of Sydney Disabilities Collective
32. Equality Building
33. Queensland Advocacy for Inclusion
34. SCALES (Southern Communities Advocacy Legal & Education Service)
35. AMPARO Advocacy
36. Imagine More
37. Disability Voices Tasmania
38. RIAC (Rights Information Advocacy Centre)
39. The Growing Space
40. Speak Out Advocacy
41. Rights In Action
42. Kurdish Program on 3ZZZ Community Ethnic Radio
43. SANE
44. Crossing Borders
45. Equality Lawyers
46. Down Syndrome Victoria
47. ACT Down Syndrome
48. Down Syndrome Queensland
49. Estrin Saul Lawyers
50. Dr Jan Gothard, Migration law and policy expert
51. The Hon Elizabeth Evatt AC
52. Graeme Innes AM, Former Australian Disability Discrimination Commissioner
53. Professor Adam Jaffe, UNSW Sydney
54. Professor Julian Trollor, Acting Director, National Centre of Excellence in Intellectual Disability Health; Head of Department of Developmental Disability Neuropsychiatry; NHMRC Leadership Fellow, UNSW Medicine and Health, UNSW Sydney
55. Kim Oates AO Emeritus Professor, Client Health, Sydney University
56. Professor Christine Bigby, Director of the Living with Disability Research Centre, La Trobe University
57. Professor Keith R. McVilly, University of Melbourne
58. Cornelia Koch, Adelaide Law School
59. Dr. Dinesh Palipana OAM
60. Professor Susan Harris Rimmer, Griffith University
61. Associate Professor Mary Anne Kenny, School of Law and Criminology, Murdoch University

62. Dr Robin Banks, Post-Doctoral Fellow, Faculty of Law, University of Tasmania
63. Michael Small, Director, Equality Building
64. Helen Said
65. Nathan Kennedy
66. Professor Charlie Fox, UWA History Department
67. Kathryn Viegas
68. Min Guo
69. Samantha Norman, RMA
70. Jane Kenway, Emeritus Professor, Monash University, Professorial Fellow, Melbourne University
71. Sarah Pettit, Associate Director Mapien



Image Description: a collage of all of the logos of the civil society organisations that have endorsed the eight key recommendations.

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***“Australians value fairness and compassion. Our immigration policies should reflect this rather than treating people with a disability or health condition as a lesser valued class.”***

Graeme Innes AM, Former Australian Disability Discrimination Commissioner

## Acknowledgement

Welcoming Disability acknowledges the traditional owners and custodians of the lands, rivers and seas on which we work, live and travel across Australia as the first people of this country. We recognise that the land belonging to these peoples was never ceded. It always was and always will be Aboriginal and Torres Strait Islander land. We pay our deep respect to Elders past and present.

## About the Welcoming Disability Campaign

Launched in 2020, [Welcoming Disability](#) is a joint civil society campaign led by Australian Lawyers for Human Rights (**ALHR**) and Down Syndrome Australia (**DSA**) and supported by over 100 organisations and experts. The Campaign seeks reform of Australia’s migration health laws and policies to remove their discriminatory impact on people with disabilities and health conditions. Key Campaign priorities include:

- Reform of Australia’s discriminatory migration health regulations practices;
- Removal of the exemption of the *Migration Act 1958* from the *Disability Discrimination Act 1992*;
- Ensuring Australia’s Migration Health framework is consistent with the core United Nations human rights treaties to which Australia is a party, including the *Convention on the Rights of Persons with Disabilities* and the *Convention on the Rights of the Child*.

## Executive Summary

Welcoming Disability is grateful for the opportunity to provide this Submission to the Department of Home Affairs (**Department**) in relation to the 2023 Review of Australia’s visa Significant Cost Threshold (**SCT**) (**Review**).

## Scope of Submission

This Submission addresses the Terms of Reference (**ToR**) set out for the Review:

1. How the Australian visa Significant Cost Threshold is calculated
2. How “significant” is defined in the Australian visa Significant Cost Threshold
3. The implications of special education as a costing policy definition of “community service”
4. The impact of the migration health requirement on non-citizen children with a disability born in Australia to people on temporary visas
5. Any other matters relating to the Migration Health Framework

It also draws the Review’s attention to:

- a. the June 2010 Report and recommendations of the *Enabling Australia Inquiry into the Migration Treatment of Disability* (June 2010) (**Enabling Australia Report**);<sup>1</sup>

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<sup>1</sup> The Parliament of the Commonwealth of Australia, *Enabling Australia. Inquiry into the Migration Treatment of Disability*, Joint Standing Committee on Migration, Canberra, June 2010 [hereafter **Enabling Australia**] at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Completed\\_inquiries/mig/disability/report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_inquiries/mig/disability/report)



- b. the then federal government's 2012 Response to *Enabling Australia (Response)*,<sup>2</sup> and subsequent follow up;
- c. the United Nations Committee on the Rights of Persons with Disabilities 2019 Concluding Observations to Australia.<sup>3</sup>
- d. recent, directly relevant recommendations of the 2023 Report<sup>4</sup> of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**).
- e. Australia's relevant international human rights law obligations toward adults and children with disabilities and health conditions

## The Need for Reform

Australia's migration laws discriminate against people with a disability or a health issue applying to enter Australia.

As set out on the Department's Discussion Paper,<sup>5</sup> Australia's Migration Health Requirement (**MHR**), including the SCT, is premised on the protection of public health; protecting the right of Australian citizens and existing permanent residents to access scarce health resources; and limiting the impact of migration on health and disability support services.

While accepting the need to protect public health, Welcoming Disability submits that the MHR and SCT currently discriminate against individuals with disability or health issues based on outmoded policy assumptions and settings around "cost to the community" which are at odds with the internationally recognised human rights and capacities of individuals with disabilities or health conditions.

The premise underlying Australia's MHR framework is an inherent, arbitrary assumption that people with disability or health conditions, and their families, are necessarily a net burden to Australian society, rather than a net asset to our communities, schools and workplaces. We urge the Review to reflect on whether this is an appropriate legal and policy premise for a modern, contemporary democracy.

Australia's MHR and SCT have failed to keep pace with community expectations. The calculation of the SCT is now obsolete when compared to per capita average healthcare spending within Australia and the SCT-type thresholds in place in comparable democracies. Further, the inclusion of "special education" as a community cost, the application of the MHR to children born in Australia, inequities in the right to apply for a MHR waiver, the "one fails all fail" rule and the "hypothetical person" test are all out of step with Australian values such as a fair go for all.

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<sup>2</sup> Australian Government, *Australian Government response to the Joint Standing Committee on Migration Report: Enabling Australia. Inquiry into the Migration Treatment of Disability*, November 2012 [**Response**] at: <https://www.homeaffairs.gov.au/reports-and-pubs/files/joint-standing-comm-enabling-australia.pdf>

<sup>3</sup> Committee on the Rights of Persons with Disabilities, Concluding Observations to Australia on the combined second and third periodic reports of Australia, CRPD/C/AUS/CO/2-3 at: <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsnzSGolKOaUX8SsM2PfxU7sdc bNJCQwIRF9xTca9TaCwjm5OlnhspoVv2oxnsuiKTREtaVWFXhEZM%2F0OdVJz1UEyF5JeK6Ycmqrn8yzTHQCn>

<sup>4</sup> 2023 Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability at <https://disability.royalcommission.gov.au/publications/final-report>

<sup>5</sup> Discussion Paper - Review of Australia's visa Significant Cost Threshold (SCT) (300KB PDF)

The Australian government is treating people who have a disability or a health issue differently from other prospective migrants and this is unfair. Regardless of their status or attributes, all people have a right to non-discrimination and equality before the law.

Neither adults nor children with disabilities or health conditions should be denied entry, forced to leave Australia or be unable to make a new life contributing to our communities in a myriad of diverse and valuable ways, purely because of arbitrary assumptions and thresholds that are applied specifically on the basis of their health or disability status.

This approach reinforces the stigma and discrimination that people with disabilities and health conditions already face. It is archaic, degrading and takes no account of the applicant's or their family's ability to contribute socially and economically to the Australian community.

Australia's Migration Health framework should be consistent with its obligations under the core United Nations human rights treaties to which it is a party, including the *Convention on the Rights of Persons with Disabilities* (CRPD)<sup>6</sup> and the *Convention on the Rights of the Child*<sup>7</sup> (CRC).

Yet, the *Migration Act 1958* (Cth) (**the Act**) is currently exempt from the scope of the *Disability Discrimination Act 1992* (Cth) (**DDA**) and the Australian Government's Interpretative Declaration to Article 18 of the CRPD, relating to Liberty of Movement and Nationality, further limits the rights of people with disability to enter Australia.<sup>8</sup> The MHR includes community costs, such as "special education" - a policy setting that is inconsistent with children's CRC rights.

Welcoming Disability believes that the Australian people are committed to valuing inclusion, diversity and equality. To live up to this commitment the Australian Government must reform Australia's MHR framework to remove its discriminatory impact on people with disabilities and health conditions.

## Participation Rights and the Review

Welcoming Disability is grateful to have had the opportunity to consult with the Minister and Department of Home Affairs in the lead up to this public Review.

However, we are concerned that the decision to set an extremely short (10 working day) time frame for the receipt of submissions from the community to the Review will prevent many people with disabilities and health conditions, their representative organisations, and civil society from meaningfully participating in the Review.

The Department's Position Paper specifically: "recognises the importance of engaging with the community" and invites the public to "provide their views on the policy settings for the Australian visa Significant Cost Threshold (SCT)."

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<sup>6</sup> United Nations, Treaty Series, Convention of the Rights of Persons with Disabilities, Australia, Declarations and Reservations [hereafter CRPD]

<[https://treaties.un.org/pages/ViewDetails.aspx?chapter=4&clang=\\_en&mtdsg\\_no=IV-15&src=IND#EndDec](https://treaties.un.org/pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-15&src=IND#EndDec)>

<sup>7</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html> [accessed 10 November 2023]

<sup>8</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at: <https://www.refworld.org/docid/45f973632.html> [accessed 10 November 2023]



We note that:

- a. Pursuant to Article 3(3) of the CRPD, the Australian Government, including the Minister for Immigration and the Department of Home Affairs, is obliged to “closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations” when developing and implementing legislation and policies and in other decision-making processes concerning issues relating to persons with disabilities;

Welcoming Disability respectfully submits that a 10 day timeframe is not in the spirit of the above participation rights and is insufficient for the public to digest the Department’s position paper and meaningfully provide their views on the policy settings for SCT and MHR.

Further, beyond the extremely short time frame for the receipt of submissions, Welcoming Disability is also concerned that the Review may not be accessible for the very people who are directly impacted by the SCT, MHR and Review outcomes, particularly in regard to the provision of information in formats that are accessible for people with disabilities<sup>9</sup> and people from CALD backgrounds.

As the Review process moves forward, Welcoming Disability hopes that participation rights and accessibility will be at the forefront of ongoing consultations and that any recommendations arising from the Review are co-designed in conjunction with people with disabilities and health conditions.

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<sup>9</sup> Noting that under Article 21(a) of the CRPD, the Australian Government, including the Minister for Immigration and the Department of Home Affairs, is obliged to provide "information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost."

## Recommendations

### Welcoming Disability recommends that the Federal Government:

1. Implement Recommendation 4.32 of the 2023 Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and Recommendation 36(a) of the United Nations Committee on the Rights of Persons with Disabilities 2019 Concluding Observations to Australia by reviewing and removing:
  - a. the exemption in the *Disability Discrimination Act 1992* (Cth) to certain provisions of the *Migration Act 1958* (Cth);
  - b. Australia's interpretative declaration to the *Convention on the Rights of Persons with Disabilities*;
  - c. all forms of discrimination against people with disabilities and health conditions in Australia's laws, formalities and procedures relating to migration and asylum in order to ensure compliance with Australia's obligations under:
    - i. the Convention on the Rights of Persons with Disabilities;
    - ii. the Convention on the Rights of the Child; and
    - iii. the remaining core United Nations human rights treaties to which Australia is a Party.
2. Immediately increase the unrealistic and internationally out of step Significant Cost Threshold (SCT) to a level that is at least commensurate with comparable democracies such as Canada and New Zealand.
3. Reduce the assessed SCT time frame applied to permanent visa applicants from ten years to five years in line with the practice adopted in comparable democracies such as Canada and New Zealand.
4. Formalise a definition of "significant cost" as a cost that exceeds the average costs of the Australian resident, as assessed by the Australian Institute of Health and Welfare (AIHW).
5. Tie the SCT to AIHW figures in order to enable regular and automatic incremental adjustments to the level of the SCT and establish a fixed and transparent relationship between the combined annual per capita expenditure on health and welfare as published by the AIHW and the SCT, to align with the notion that a significant cost is necessarily greater than the average cost.
6. Recognise that the right to education is a fundamental human right belonging to all children by immediately removing "special" education or supported education from Policy settings that include it as a community cost for the purposes of the MHR.
7. Grant all children with disability or health conditions born in Australia to temporary residents an automatic waiver of the MHR.
8. Implement the recommendations of the 2010 *Enabling Australia* Inquiry Report with particular regard to the Inquiry recommendations that were accepted within the Federal Government's 2012 Response, but which remain unimplemented, including:
  - a. granting all visa applicants the right to apply for a waiver of the MHR by dispensing with PIC 4005;
  - b. abolishing the "one fails, all fail" rule;
  - c. abolishing the requirement for non-migrating family members to meet the MHR; and
  - d. abolishing the "hypothetical person" test.

## Migration health requirement: legislative and regulatory backgrounds

All applicants for visas to enter Australia and their accompanying family members are required to meet the MHR. These are framed by the conditions pertaining to the grant of each visa, set out under Public Interest Criteria (PIC) 4005 and 4007, in schedule 4 to the *Migration Regulations 1994* (Cth)<sup>10</sup> (**Regulations**).

To meet the MHR, a visa applicant must be:

- free from tuberculosis (**TB**), or any other disease or condition which threatens public health;
- free from a condition which would require health or community services which could “prejudice the access of an Australian citizen or permanent resident to services or products” (in practice, organ transplant or dialysis); and
- free from a condition which could result in a “significant cost” to the community.

A “significant cost” is assessed over the duration or time frame of the temporary visa; or for a permanent visa, over five years for a short term condition, or over ten years for a permanent condition. Where that requirement for healthcare or community services would result in a “significant” cost (currently \$51 000) to the Australian community, the applicant fails the health requirement and the visa may be refused.

These criteria are assessed as part of the MHR “regardless of whether the health care or community services will actually be used in connection with the applicant”.<sup>11</sup> The practical impact of this is that:

- the costs for services are assessed even where an applicant does not actually require the use of those services; it is enough that their condition could meet the medical criteria for use of a service.

PIC 4007 offers applicants the opportunity to apply for a **waiver** of the health requirement, that is, to argue that the benefits they bring to the Australian community outweigh the potential monetary costs of the community services they might use and that the health requirement should be set aside.

PIC 4005 does not.

The particular visa and visa stream applied for determines which PIC is relevant. According to a Department spokesperson, **about half** of all visa applicants are eligible to apply for a waiver of the MHR.

PIC 4007 allows for the Minister to waive or set aside the requirements relating to cost to the community or prejudice to access, if all other criteria for the grant of the visa are satisfied, and if the granting of the visa would be unlikely to result in “undue” cost to the Australian community; or “undue” prejudice to the access to health care or community services of an Australian citizen or permanent resident.<sup>12</sup>

**Relevantly, neither of the key terms, “significant cost” nor “undue cost”, is defined in the Regulations or the Act.**

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<sup>10</sup> Schedule 4 to the Migration Regulations 1994 (Cth) <https://www.legislation.gov.au/Details/F2017C01164>

<sup>11</sup> Schedule 4, Migration Regulations 1994, PIC 4005, PIC 4007

<sup>12</sup> Schedule 4, Migration Regulations 1994, PIC 4005, PIC 4007(2)

The incredibly broad operation of this law means that there is very limited opportunity for a person with a disability or a health issue to meet the health requirement for a visa to enter or remain in Australia.

Legal protection under the *Disability Discrimination Act* is not available to migrants because any action permitted under the *Migration Act* is exempt from the operation of the *Disability Discrimination Act*.

## Australia's International Human Rights Law Obligations

Current migration health requirements and their application are not consistent with Australia's international human rights law obligations.

Australia is a party to the seven core United Nations human rights treaties and has agreed to respect, protect and fulfil people with disabilities or health conditions' human rights to equality and non-discrimination, as expressed in:

- articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR)<sup>13</sup>
- article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>14</sup>
- article 2 of the Convention on the Rights of the Child (CRC)<sup>15</sup>
- articles 3, 4, 5, 12 and 18 of the Convention on the Rights of Persons with Disabilities (CRPD)<sup>16</sup>

### *Convention on the Rights of Persons with Disabilities (CRPD)*

Australia ratified the CRPD in 2008. Australia became a State Party to the Optional Protocol to the Convention on the Rights of Persons with Disabilities<sup>17</sup> in 2009. As noted by the Auditor General in 2006 - 2007 when considering the administration of the Health Requirement of the *Migration Act 1958*, as a party to the **CRPD**, Australia has an obligation to take all appropriate measures to modify or abolish existing laws and regulations that constitute discrimination against persons with disabilities.<sup>18</sup>

The continued existence within the *Migration Act* and *Migration Regulations* of provisions which discriminate against persons with disabilities, violates this overarching obligation.

### **Equality and non-discrimination**

Australian migration laws specifically interfere with Australia's CRPD Article 5 obligations to:

- a. recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law;*

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<sup>13</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html>

<sup>14</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html>

<sup>15</sup> Op.cit

<sup>16</sup> Op.cit

<sup>17</sup> UN General Assembly, *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex II, available at: <https://www.refworld.org/docid/4680d0982.html>

<sup>18</sup> The Auditor-General, 'Administration of the Health Requirement of the *Migration Act 1958*', Audit Report No. 37 2006-2007, Performance Audit, Australian National Audit Office

- b. *prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds; and*
- c. *in order to promote equality and eliminate discrimination, take all appropriate steps to ensure that reasonable accommodation is provided.*

Pursuant to Article 5, specific measures which are necessary to accelerate or achieve the de facto equality of persons with disabilities are not considered discrimination under the CRPD.

### **Liberty of movement and nationality**

Australian migration laws specifically interfere with Australia's CRPD Article 18 obligations to:

*recognise the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:*

- a. *have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;*
- b. *are not deprived, on the basis of disability, of their ability to obtain, possess and utilise documentation of their nationality or other documentation of identification, or to utilise relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;*
- c. *are free to leave any country, including their own.*

In Welcoming Disability's view, article 18 does not, in and of itself, give rise to the right for a person with disability to migrate to Australia. **However, the current health requirement enshrined in the Act and Regulations does violate article 5 of the CRPD as a law which does not treat people with disabilities on an equal basis with others.**

### **Australia's Interpretative Declaration**

The Australian Government lodged a **caveat** to article 18 of the CRPD which pertains to migration. This caveat or "Interpretative Declaration", reads in part:

*Australia recognises 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** [emphasis added].<sup>19</sup>*

Welcoming Disability notes that the notion of what constitutes "legitimate, objective and reasonable criteria" requires further interrogation.

**Australia's Interpretative Declaration to Article 18 leaves the Australian government position clearly out of step with the scope and intent of Article 5 of the CRPD.**

The inconsistency of Australia's MHR with its CRPD obligations has not escaped international scrutiny. In its 2019 Concluding Observations on the combined second and third periodic reports of

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<sup>19</sup> CRPD Declarations and Reservations

Australia, the United Nations Committee on the Rights of Persons with Disabilities (**Committee**)<sup>20</sup> noted, in relation to Article 18:

*The Committee is concerned about:*

- a. Migration and asylum legislation, such as the Migration Act 1958 and the health requirement in the Migration Regulations 1994, which allows for discrimination against persons with disabilities in asylum and migration procedures;*
- b. The Disability Discrimination Act 1992 providing an exemption to certain provisions within the Migration Act 1958, which results in the exclusion of persons with disabilities;*
- c. The 10-year qualifying period for migrants with a non-permanent visa to access the Age Support Pension and the Disability Support Pension.*

The Committee recommended that Australia:

- a. 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*
- b. Remove the exemption in the Disability Discrimination Act 1992 to certain provisions of the Migration Act 1958.*

## Recommendations of the Disability Royal Commission

Less than two months ago, the Disability Royal Commission (**DRC**) recommended<sup>21</sup> that the Australian Government review the operation of section 52 of the *Disability Discrimination Act 1992* insofar as it exempts the *Migration Act* and thereby authorises discrimination against people with disability seeking to enter Australia temporarily or permanently. The DRC specified that such a review should:

- *consider changes to the legislation and migration practices to eliminate or minimise discrimination; and*
- *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.*

## Convention on the Rights of the Child (CRC)

Australia ratified the CRC in 2009, accepting a binding, universally agreed set of non-negotiable human rights standards and obligations applicable to all children. The CRC protects children's rights by setting standards in health care, education, and legal, civil and social services. The four core guiding principles of the CRC are:

- Non-discrimination (Article 2)
- devotion to the best interests of the child (Article 3)
- the right to life, survival and development (Article 4)
- and respect for the views of the child (Article 28)

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<sup>20</sup> CRPD/C/AUS/CO/2-3 Op.cit

<sup>21</sup> Recommendation 4.32 of the 2023 Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and Recommendation, Op.cit



## **Right to non-discrimination**

Article 2 of the CRC requires the Australian Government, including the Minister for Immigration and the Department of Home Affairs to:

- a. ensure that all of the rights set out within the CRC rights are protected and upheld within its jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status; and*
- b. take all appropriate measures to ensure that children are protected against all forms of discrimination or punishment on the basis of their status or the status of family members.*

## **Best Interests of the child**

Article 3 of the CRC requires the Australian Government, including the Minister for Immigration and the Department of Home Affairs, to ensure that:

*“in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration”.*

## **Rights to survival, development and education**

Relevantly, given the submissions made below regarding the inclusion of “special” education or supported education as a “community cost” within the MHR:

1. Article 4 of the CRC requires the Australian Government, including the Minister for Immigration and the Department of Home Affairs to “ensure to the maximum extent possible the survival and development of the child.”
2. Article 28 of the CRC recognises education as a legal right to every child “on the basis of equal opportunity”. Further, Article 29 of the CRC reflects Australia’s agreement that the education of children must be “directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential.”

## **Right to participation**

Welcoming Disability notes that the principle of respect for the views of the child is often neglected in Australia’s consideration of its CRC obligations. Pursuant to Article 12 of the CRC, the Australian Government, including the Minister for Immigration and the Department of Home Affairs must assure to all children capable of forming their own views the right to express those views freely in all matters affecting the child, with the view of the child being given due weight in accordance with the age and maturity of the child.

As noted below in the sections of this submission that address the ToRs, Welcoming Disability submits that aspects of Australia's current application of the MHR are significantly inconsistent with its CRC obligations to:

- protect children from discrimination on the basis of their disability or health status;
- protect children's rights to development and education;
- ensure that the best interests of the child are a primary consideration in the design and application of Australia's MHR; and
- ensure that the views of impacted children are heard and given due weight in accordance with the maturity of the child

**Welcoming Disability calls for review of the existing MHR laws, regulations and policies to identify a way that a migration health requirement can be enforced without discriminating against adults and children with disabilities or health conditions migrating to Australia.**

#### **Recommendation 1:**

**That the Federal Government implement Recommendation 4.32 of the 2023 Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and Recommendation 36(a) of the United Nations Committee on the Rights of Persons with Disabilities 2019 Concluding Observations to Australia by reviewing and removing:**

- a. the exemption in the *Disability Discrimination Act 1992 (Cth)* to certain provisions of the *Migration Act 1958 (Cth)*;**
- b. Australia's interpretative declaration to the *Convention on the Rights of Persons with Disabilities*;**
- c. all forms of discrimination against people with disabilities and health conditions in Australia's migration and asylum laws, including all formalities and procedures relating to migration and asylum, in order to ensure compliance with Australia's obligations under:**
  - i. the Convention on the Rights of Persons with Disabilities**
  - ii. the Convention on the Rights of the Child**
  - iii. the remaining core United Nations human rights treaties to which Australia is a State Party**

**The Submission now addresses the ToR set out for the Review.**

### **Significant cost threshold (SCT)**

- **How the Australian visa SCT is calculated**
- **How "Significant" is defined in the Australian visa SCT**

**The SCT is arbitrary, outdated and out of step with community expectations and comparable democracies.**

Every visa applicant should have the right to argue their case but Australia's migration regulations explicitly assume disability and health conditions are a cost burden to the wider community.

Each potential immigrant with a disability or health condition is currently assessed against a theoretical, arbitrary and non-transparent "significant cost threshold", applied irrespective of whether services are actually used.

The costs associated with a visa applicant are assessed by the Medical Officer of the Commonwealth (MOC), on the basis of whether **the provision** of community and health services

would be likely to result in a “significant cost.”

“Significant cost” is currently set out in Policy as \$51,000 over the relevant period prescribed under the Regulations and Policy. This can range from the duration of the visa in the case of a temporary visa, to a maximum of ten years for a permanent visa, depending on the nature of the disability or health condition and its expected duration.

**When compared with comparable developed democracies and average per capita expenditure on health within Australia, this figure is unreasonably low.**

## International comparisons

### New Zealand

The significant cost threshold for New Zealand, a comparable migrant-receiving democracy, is now set at **\$NZD 81,000** (increased in September 2022 from \$NZD 41,000) and is assessed over a maximum of **five years**.<sup>22</sup>

### Canada

Canada, which has recently reviewed and significantly amended its medical inadmissibility rules, has set its 2023 cost threshold at **\$CAD 25,689 per annum** or **\$CAD 128,445 over a maximum term of five years**.<sup>23</sup>

This figure:

- is tied explicitly to average annual costs per Canadian citizen for health and social benefits and is set at **three times** that figure;<sup>24</sup> and
- is updated automatically each year in line with changes in that level of expenditure.

Welcoming Disability also notes that the Canadian MIT does not apply to certain applicants for visas, including in particular:

- refugees and their dependants
- protected persons
- certain people being sponsored by their family, such as dependent children, spouses and common-law partners.<sup>25</sup>

The Canadian government introduced this framework after a three year trial that examined the costs of admitting visa applicants with a health or disability issue, and weighed those costs against the

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<sup>22</sup> See,

<https://www.immigration.govt.nz/about-us/media-centre/news-notifications/significant-cost-health-threshold-increased>;  
<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/updates/2022-cost-threshold.html>

<sup>23</sup>

<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>

<sup>24</sup>

<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>

<sup>25</sup>

<https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/inadmissibility/reasons/medical-inadmissibility.html>

benefits of inclusion for the Canadian community, human rights obligations and community expectations.

**Welcoming Disability draws the Review's attention to the following points.**

1. Australia's ten year maximum period of assessment for permanent visas is out of step with Canada and New Zealand, which both allow for a maximum period of assessment of five years.
2. To bring Australia's SCT into line with New Zealand's, if our SCT continues to be assessed over a maximum 10 year period at the current exchange rate, it would need to be raised to approximately \$160,000 over ten years; or \$80,000 over five years.
3. To bring Australia's SCT into line with the Canadian medical inadmissibility threshold (MIT), at the current exchange rate, it would need to be raised to approximately \$29,000 per annum, or \$145,000 over five years, or \$290,000 over ten years.

## Calculation of SCT

As noted above, the key term "significant cost" is not defined in the Regulations or the Act; nor is "significant cost threshold".

The Discussion Paper<sup>26</sup> notes that the SCT was established in 1995 and was to be interpreted as a cost that was "higher than average annual health and community costs for an Australian", and from 2019, was to be "reviewed biennially to align with the release of Australian Institute for Health and Welfare (AIHW) data".

The Discussion Paper notes that it relies on AIHW health expenditure and welfare expenditure publications in calculating the SCT, using a five-year per capita approach and weighted projections for increases in costs.

The Discussion Paper further notes:

*the approach sets the SCT value at a level that represents **the average five yearly per person expenditure on health and welfare services in Australia**... Using this methodology in 2021, the average cost of health and community services per year for an Australian was determined to be \$51,000, and **therefore this figure is also the cut-off for the SCT** which is currently in place. (Emphasis added)*

Welcoming Disability submits that:

1. at the very least, this approach is at odds with the stated intention that the SCT be interpreted as a cost that was "**higher** than average annual health and community costs" (Emphasis added);
2. Further, given current AIHW health and welfare expenditure data, it is difficult to reconcile the **AIHW** figures with the current SCT.

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<sup>26</sup> Op.cit

## Health expenditure

According to the most current AIHW data on health expenditure, the average amount per capita spent on healthcare in Australia in 2020-21 was \$9,356, or \$93,650 over ten years.<sup>27</sup> The MHR “significant cost” is therefore just **59 per cent of the average cost** expended by the government on Australians **on health care alone** over a ten-year period.

This figure of \$9,536 per annum includes items such

- Public and private hospitals;
- Primary health care such as medical services, pharmaceuticals, community and public health; and
- Referred medical services.<sup>28</sup>

## Welfare expenditure

Welfare and educational payments are all additional features above and beyond the AIHW figure provided in the biennial AIHW reports into health; but some can be accessed in the AIHW welfare data.

The AIHW Welfare Report 2021-22 statistics on welfare spending indicate that annual government spending on welfare and social service payments was about \$8,243 per person. This data included Social Services and National Disability Insurance Agency (NDIA) data, and state government welfare expenditure.<sup>29</sup>

On that basis, the amount expended annually for every Australian resident taking into account both health and community or welfare costs, is about \$9,536 + \$8,243, or \$17,599 per annum. This amounts to **\$175,990 over ten years**, not taking into account weighted projections of costs.

The SCT is just **29 percent** of this figure.

Welcoming Disability submits that there is **no obvious alignment** between AIHW health and welfare data and the calculation of the SCT.

Based on the latest AIHW data on health and welfare, that would require a SCT:

- greater than \$17,599 per annum;
- greater than \$87,995 over five years; or
- greater than \$175,990 over ten years.

Setting the SCT at this level, and providing for a maximum assessment period of five years, would bring Australia closer to international standards of comparable nations such as New Zealand and Canada.

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<sup>27</sup> AIHW, Health Expenditure Australia 2021-22 See, <https://www.aihw.gov.au/reports/health-welfare-expenditure/health-expenditure-australia-2021-22/contents/about>

<sup>28</sup> AIHW, Health expenditure Australia 2021-22 See, <https://www.aihw.gov.au/reports/health-welfare-expenditure/health-expenditure>

<sup>29</sup> AIHW, Welfare Expenditure, 2021-22, See <https://www.aihw.gov.au/reports/australias-welfare/welfare-expenditure#Government>

The following table of comparisons, at the current exchange rate,<sup>30</sup> shows how Australia's SCT ranks against Canada's and New Zealand's; and against the Australian government's own data for combined annual average health and welfare expenditure per capita, as provided by the AIHW.

SCT	\$AUD Amount per annum	\$AUD Amount over five years	\$AUD Amount over ten years	Notes
Australia	5,100	25,500	51,000	
Canada	29,000	145,000	290,000	Canada does not assess its SCT equivalent beyond five years.
New Zealand	16,000	80,000	160,000	New Zealand does not assess its SCT equivalent beyond five years
(AIHW)	17,599	87,995	175,990	Combining annual costs per annum from Health (\$9,536) and Welfare (\$8243) data from AIHW Reports 2021-22

#### **Recommendation 2:**

That the Federal Government immediately increase the unrealistic and internationally out of step SCT to a level that is at least commensurate with comparable democracies such as Canada and New Zealand.

#### **Recommendation 3:**

That the Federal Government reduce the assessed SCT time frame applied to permanent visa applicants from ten years to five years in line with the practice adopted in comparable democracies such as Canada and New Zealand.

#### **Recommendation 4:**

That the Federal Government formalise a definition of "significant cost" as a cost that exceeds the average costs of the Australian resident, as assessed by the Australian Institute of Health and Welfare (AIHW).

#### **Recommendation 5:**

That the Federal Government tie the SCT to AIHW figures in order to enable regular and automatic incremental adjustments to the level of the SCT and establish a fixed and transparent relationship between the combined annual per capita expenditure on health and welfare as published by the AIFW, and the SCT, to align with the notion that a significant cost is necessarily greater than the average cost.

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<sup>30</sup> At 07 Nov 2023



## The implications of special education as a costing policy definition of “community service”

As discussed, the SCT is assessed on the basis of “health and community costs”. Regulation 1.03 of the **Regulations**<sup>31</sup> notes that “Community services include the provision of an Australian social security benefit, allowance or pension”, all of which are costed as part of the MHR. These services and their costs are all captured under the AIHW Health and Welfare statistics (see above).

In addition, the Procedures Advice Manual (**Policy**) notes that “community services” includes “special education”.

Welcoming Disability draws the Review’s attention to the fact that:

1. the cost of “special” education is not captured in the statistics released by the AIHW as part of their Health or Welfare Expenditure data;
2. neither “regular” education, nor English as a Second Language (**ESL**), whether provided free through the government’s Adult Migrant English Program (**AMEP**) or to students in government schools, is considered a “community service” costed for the purposes of the MHR. Rather, these forms of education are considered to be community “investments”.

AMEP provides free English services to eligible migrants “as part of a broader plan to ensure migrants are best positioned **to reach their full potential in Australia**, and **to further strengthen our social cohesion**.”<sup>32</sup> (Emphasis added)

**Welcoming Disability submits that it is discriminatory, anomalous, and deeply concerning that “special” education is not similarly considered an opportunity to enable school students with disability to reach their full potential, nor to strengthen social cohesion in terms of the disability community.**

A family with a school-age child with a disability applying for a visa with a duration of two years or longer, either temporary (if required to undergo a medical) or permanent, is **almost guaranteed** to fail the health requirement based on the costs of “special” education, because of the costing ascribed to “special” education under the current Policy. This is regardless of whether or not the family wishes to use “special” education.

If the visa is governed by PIC 4005, the family has no opportunity to seek a waiver (discussed below), and will be refused the visa because of the child’s education costs.

Individuals or families with disabilities, therefore, overwhelmingly bear the brunt of the health requirement provisions.

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<sup>31</sup> Ibid.

<sup>32</sup> Australian Government, Department of Home Affairs, Immigration and Citizenship, Reform of the Adult Migrant English Program (AMEP), accessed 01 09 2022 at <<https://immi.homeaffairs.gov.au/settling-in-australia/amep/about-the-program/background>>

Welcoming Disability submits that the inclusion of special education as a “health and community cost” as a matter of Government Policy is:

1. Inconsistent with Australia’s above described international legal obligations under the CRPD and CRC to protect children’s rights to non-discrimination, education and development and to act in the best interests of the child; and
2. Out of step with community expectations.

Special education should no longer be considered a community “cost”. Rather in line with “regular” education and ESL, it should be regarded, in purely fiscal terms, as a community investment.

Furthermore, every child has an internationally recognised human right to education and development commensurate with their individual needs.

The implicit assumption underlying the discriminatory singling out of “special education” as a community cost, is that that education for a child with a disability is a burden on the Australian community, compared to the education of **all** other children. Given that ESL is not so included, it is clear that this is direct discrimination on the basis of a child’s disability status. This Policy is degrading, archaic, and at odds with community expectations, Australian values and international human rights law.

#### **Recommendation 6:**

**That the Federal Government immediately remove “special education” or supported education from Policy settings as a consideration as a community cost for the purposes of the MHR.**

### **The impact of the migration health requirements on non-citizen children with a disability [or health condition] born in Australia to people on temporary visas**

Welcoming Disability notes that the above ToR has neglected to include non-citizen children **with a health condition** born in Australia to people on temporary visas. We note that both children with a disability and children with a health condition are disproportionately impacted by Australia’s Migration Health Framework.

We submit that Australia’s treatment of non-citizen children with a disability or health condition born in Australia to people on temporary visas is inconsistent with the UNCRPD and CRC.

A child born in Australia takes on the visa status of its parents. The parents may be on a temporary visa, such as a graduate or temporary work visa, and if they meet all the relevant eligibility criteria, they may be headed for permanent residence. The birth of a child with a medical condition or disability throws them off that path. The child will very likely fail the MHR because of their health condition or, in the case of a child with a disability, the cost of supported education, should the MOC consider that might be required.

## Case Study

### *Darragh: three-year-old born in Australia to people on temporary visas<sup>33</sup>*

*An Irish family who had been living in Australia for a decade had their application for permanent residency denied because their three-year-old Australian-born son, Darragh, was diagnosed with cystic fibrosis and failed the MHR. The child's parents had moved to regional Victoria on working holiday visas in 2009 and received an offer to apply for permanent residency in 2015, just weeks before their son was born. An appeal to overturn the decision failed. The family was granted a permanent visa when the Minister decided to intervene.*

#### **Visa pathways with a health waiver**

If the parents of a child born in Australia with a disability or health condition are on track to apply, or have already applied for, a skilled visa with a health waiver, such as a subclass 186 (temporary residence transition stream only), they can apply for the waiver. However, even if successful, it will significantly extend the time it takes for them to attain the visa. **The time spent waiting for a health waiver to be granted takes a tremendous toll on applicants.**

### *Case Study: Pathway with a health waiver*

#### *Father of child born in Australia, describes impact of waiting for a health waiver to be granted<sup>34</sup>*

*Adrian (not his real name) wrote of the impact on his family of waiting for a health waiver, which took over three years from the time of application for a permanent visa, to the eventual grant:*

*We applied for a 186 visa which is a permanent residence visa and has a pathway with a health waiver. I am an engineering surveyor and my wife has a middle management role in the disability sector and works as a Practice Leader. Our daughter, born here in Australia, was diagnosed with Down syndrome at birth. The whole process is emotionally draining and is constantly at the back of our minds and this has affected us in the following ways:*

- *Our ability to plan for the future, making decisions such as buying a house or making long term investments is not possible.*
- *Our ability to plan a family is impacted. We intended to have more children, however we decided to hold off on that pending the outcome of the visa. Again we are not getting any younger and this is something we may not be able to do if we are still in limbo for longer.*
- *We are constantly trying to save our finances to ensure we have something to fall back on in the event of an adverse decision.*
- *Our daughter has never met her grandmother and other family who still live overseas and our ability to facilitate visits either way is compromised.*
- *My current temporary visa allows me to only work in the profession that I applied my visa with. This means I am unable to pursue a different career path.*

*These are just a few of the issues we are facing. We are currently living a decent life but this can change very quickly (negatively or positively) once a decision is made and we can't bear to imagine the impact a negative decision would have on our lives especially for our daughter.*

*We feel we are discriminated against because we should all be treated equally and having our child being seen as a burden in the very community that we are actively contributing to is very unfortunate. It's been very difficult and tedious, all we can do is try to patiently see the process out and hope and pray for a positive outcome.*

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<sup>33</sup> See <https://www.abc.net.au/news/2019-07-08/irish-family-with-cystic-fibrosis-son-fend-off-deportation/11288232>

<sup>34</sup> See Welcoming Disability at <<https://www.welcomingdisability.com/stories/#story1>>

## Visa pathways with no health waiver

Parents of a child born in Australia with a disability or health condition considering other visas such as general skilled migration (including state nomination visa subclass 190 or DAMA-related visas), have no right to apply for a health waiver and the visa will be refused.

### *Case Study: pathway with no health waiver*

#### *Father of child born in Australia describes impact of no right to apply for health waiver*

*Qasim Butt<sup>35</sup> was on track for a permanent skilled visa (subclass 189), until his son was born here in Australia with a life-threatening health condition. Shaffan has a rare genetic condition, affecting bone development. He relies on a ventilator and is paralysed from the neck down. The family's visa was refused in 2017. The family's appeal against refusal was also rejected at the AAT. Shaffan was unable to depart Australia on medical grounds, because of his condition and the family requested ministerial intervention to allow them to stay. This was granted more than five years after the first visa refusal.*

*Qasim is now a manager at a solar installation company. He said the Minister's intervention last year removed the "sword hanging" over his son's head, and that while he and his family had been trying their best to contribute to Australian life, the law was not on their side. For years he was unable to find an ongoing, secure job because of the restrictions of his temporary bridging visas. "I'm so grateful, but as a human being, as a person, I pray to God no one will be in this situation if they have a kid with a disability... Please, we need to look after the children".*

### *Case Study*

#### *Adyan: six-year-old born in Australia<sup>36</sup>*

*Adyan, a six-year-old boy born in Australia with mild cerebral palsy and a mild intellectual disability, was, according to his Australian paediatrician, doing well at his mainstream primary school, able to read, write and draw, with good language skills and would only require modest support going forward. His parents, Dr Bhuiyan and Rebaka Sultana filed for permanent residency in March 2016. Dr Bhuiyan, who is a structural engineer, had been nominated to apply for a permanent skilled migration visa after finishing his PhD at Deakin University. Ms Sultana was a Bangladesh qualified medical doctor.*

*Dr Bhuiyan said he had expected their visa application to be a straightforward process and was left in shock when it was rejected because of the "one fails, all fail" policy. An appeal to the AAT also failed, leaving the family on a bridging visa, which needs to be extended every two-and-a-half months, until the Minister finally intervened to grant his family permanent visas. Dr Bhuiyan said waiting for so long and not knowing what would happen to his family had taken an enormous toll. "We feel that we are unable to breathe. I understand my son needs some help but he is not a burden."*

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<sup>35</sup> See Sydney Morning Herald, 18 October 2023 at <https://www.smh.com.au/politics/federal/hope-for-families-facing-deportation-for-having-disabled-children-20231017-p5eczl.html>; SBS, 5 November 2019, at <https://www.sbs.com.au/language/urdu/en/article/obscene-family-faces-deportation-from-australia-to-pakistan-due-to-childs-medical-condition/9ergweaii>; Jan Gothard, The Conversation, 24 October 2023 at <<https://theconversation.com/a-migration-review-could-close-some-disability-discrimination-loopholes-but-not-for-people-already-waiting-or-refused-visas-215894>>

<sup>36</sup>

<https://www.9news.com.au/national/australia-immigration-familys-permanent-visa-denied-over-sons-mild-disability/6c3d3de2-b64e-4a6e-9738-d81f77bbe798>

One of the conditions taken into account when assessing whether or not the Department will exercise the health waiver is the “compassionate and compelling” circumstances of the applicant. In the case of applicants for humanitarian visas, following the *Enabling Australia* inquiry, Policy changed to grant humanitarian visa applicants an automatic health waiver on the grounds of their “compassionate and compelling” circumstances. The compassionate and compelling circumstances of a child born in Australia with a disability or health condition must also be considered.

A non-citizen child born in Australia who resides here on an ongoing basis on a temporary visa while their parents run the gauntlet of completing their studies, extending temporary visas, living on bridging visas pending the outcome of an application of a waiver, joining the horrendously long queue for a merits review at the Administrative Appeals Tribunal (AAT), or finally, awaiting the possibility of ministerial intervention, can claim Australian citizenship at the age of ten years.

Given the speed with which the Department, the AAT and the Minister are able to intervene and resolve these matters, this is by no means impossible. However, as a temporary resident, the child has no access to NDIS or to the critical early intervention programs which are designed to enhance their potential for future independence and their capacity to contribute to society.

Once a child attains citizenship at the age of ten, doors open to enable access to life-enhancing PBS pharmaceuticals, medical procedures and disability supports and intervention. After a ten year delay, however, the opportunities may come too late. The loss to the child who has been deprived of their right to flourish is profound; though the Australian community too will face a greater fiscal burden supporting a child, now a citizen, who has lost the opportunity for full development.

Further, if these children and their families are eventually returned to their families’ countries of origin, they will be equally disadvantaged, their future potential diminished by having missed out on early intervention while their families were living here in Australia contributing their skills to the Australian economy and society.

**Welcoming Disability submits that the impact of the MHR on non-citizen children with a disability or health condition born in Australia to people on temporary visas is:**

- 1. Inconsistent with Australia’s above described international legal obligations under the CRPD and CRC to protect children’s rights to non-discrimination, education and development and to act in the best interests of the child; and**
- 2. Out of step with community expectations**

Granting automatic waivers of the health requirement to children born in Australia with disabilities or health conditions will not give them permanent residence; nor will it give them access to PBS pharmaceuticals or disability support. However, it will mean that, should their parents be eligible for a permanent visa, the child’s condition in itself will not be a barrier (in many cases insurmountable if there is no waiver) to achieving that goal within the usual time frame.

The situation of child with a disability or health condition born in Australia should be assessed as “compassionate and compelling” and should result in the **automatic exercise of the health waiver**, as a matter of fairness and human rights, regardless of whether or not the family is applying for a visa governed by PIC 4005 (no waiver) or PIC 4007 (waiver).

**Recommendation 7:**

**that the Federal Government grant all children with disability or health condition born in Australia to temporary residents an automatic waiver of the MHR**

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

### Enabling Australia Recommendations

In June 2010, the Recommendations of the *Enabling Australia* inquiry<sup>37</sup> (Recommendations) were released. The government responded in November 2012, advising that some actions had already been taken or would be taken to address the Recommendations, and “committed to a rigorous investigation of the feasibility of other reforms”.<sup>38</sup>

### Waivers for all

One feature recommended was the adoption of waiver options (Recommendation 2), comprising a “net benefit” approach, which would take into consideration the social and economic contributions of a migrant family in terms of:

- overall assessment of a visa (Recommendation 3);
- assessment of an individual’s particular circumstances instead of adopting the hypothetical person approach (Recommendation 8(b));
- consideration of mitigating factors when assessing significant cost (Recommendation 10); and
- recognition of the contribution made by carers as an offset to health care or community services (Recommendation 12).

In response, the Government advised that it would assess the feasibility of a net benefit approach which would “dramatically change the way in which the health requirement is applied to visa applicants. It will result in a more individualised and flexible legislative, policy and procedural framework”. Under the proposed approach:

*any applicant who is found to have a health condition which is likely to result in a significant cost, will have their, and their family’s, likely contributions to the Australian community considered. This would involve an economic assessment of the applicants’ likely net fiscal contributions (by a Net Fiscal Benefit Model) coupled with an expansion of the health waiver scheme so that social contributions and compassionate and compelling circumstances could also be considered. [Emphasis added]*

The Response stated that the extension of the health waiver scheme would allow for consideration of social and other mitigating factors, including the contribution of carers. Further, the Response declared:

*The proposed net benefit approach would see an expansion of health waivers across many more visa subclasses; for skilled migration visa classes, to encompass a broader range of skilled visa categories.*

**Despite these recommendations and Response commitments, more than a decade later health waivers are only available in an extremely limited number of visas.**

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<sup>37</sup> *Enabling Australia* Op.cit

<sup>38</sup> Response, November 2012



## Waivers of the MHR are available for

- some family visas, namely child and partner visas, though not for parent visas;
- skilled migration visa applicants who have an employer sponsor and who are transitioning from a temporary to a permanent visa;
- applicants for the New Zealand resident stream of the general skilled migrant visa; and
- applicants for global talent visas.
- Waivers are also granted automatically for applicants for humanitarian visas, as a result of the Recommendation of the Enabling Australia inquiry.

Statistics provided by a spokesperson from the Department of Home Affairs suggest that, where applicants are eligible for the exercise of the health waiver under PIC 4007, including applicants for humanitarian visas where the waiver is granted automatically, **96 per cent** of applicants who apply for a waiver of the health requirement are ultimately successful and are granted visas. This indicates that the very large majority of visa applicants refused visas on health grounds are able, given the opportunity, to demonstrate that the benefits they bring to the community outweigh their notional health costs, though this process also takes a long time at great personal and financial cost. This raises the question of why the other 50 percent of visa applicants applying for visas governed by PIC 4005 are not similarly able to argue for the benefits they too bring to Australia.

While the availability of a waiver, with its 96 percent success rate, is to be applauded, the process is arduous and expensive and takes a huge toll on applicants. It is also a significant drain on bureaucratic resources at a time of excessive visa grant times.

### Case Study

*Even where waivers are available, and with a 96 per cent success rate, the time frame for visa grant is a tremendous strain, emotional and financial, on affected families.*

*Grace<sup>39</sup> (not her real name), a young British woman, whose husband and young daughter are both Australian citizens, was already working in Australia in a high-profile professional role on a temporary employment visa when she applied for a partner visa. However, her medical condition led to her failing to meet the health requirement.*

*“The effort involved in gathering all of the necessary information and documents needed to prove that you should receive a health waiver is substantial. Some of this documentation had to be paid for e.g. letters from my specialist. And migration lawyers. I was able to afford this but it was a very costly exercise, and not everyone will have the resources to be able to pay for this. This process was also incredibly invasive, for me, my immediate family and my broader family. I was also forced to reveal information about my condition and likely prognosis to a much wider group of colleagues than I would otherwise have chosen to do.*

*Finally, the very fact that my family and I had to go through this process, was in many ways quite demeaning. It placed a lot of stress on my family - I didn't appreciate quite how much until my PR was granted, and the weight was lifted from all of us. Why should my condition, which attacked me at random, through no fault of my own, mean that I have to go through this? I've already proved that I have a credible, tangible reason for wanting to live here (in my case, my relationship with my Australian husband and our daughter) that qualified me for permanent residence in the first place, and it was difficult to come to terms with the idea that this wasn't enough - that because of my disability I had to do more than others to be allowed the right to stay indefinitely.”*

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<sup>39</sup> See Welcoming Disability at <<https://www.welcomingdisability.com/stories/#story6>>

### Waivers are not available for:

- temporary visas such as student or visitor visas;
- general skilled migration applicants other than New Zealand citizens;
- state-nominated general skilled migration (subclass 190) applicants;
- investment visas.

Consequently, only **about half** of visa applicants who fail to meet the MHR are eligible to request the exercise of the health waiver. Their visas are refused.

Some applicants refused on the basis of PIC 4005 have a right to appeal to the AAT, for example, if they are on shore. However, the AAT is bound to accept the opinion of the MOC, on the basis of reg. 2.25A(3) which states:

*The Minister is to take the opinion of the Medical Officer of the Commonwealth... to be correct for the purposes of deciding whether a person meets a requirement or satisfies a criterion.*

As a result, in almost every instance of failing to meet the MHR on the basis of PIC 4005, an appeal is a waste of time and money. The time frame for an AAT hearing, as noted above, is significant, and the cost, now \$3,374, is prohibitive.

Nonetheless, this is the only route available to families in this situation who believe their circumstances might warrant Ministerial Intervention. The Minister cannot intervene until after an AAT decision has been provided. This is the situation faced by many families with a child born in Australia.

### Case Study

#### **No waiver available: Krishna Aneesh and Aneesh Kolikkara**

*Indian citizens Krishna Aneesh and Aneesh Kolikkara both work in Australia in areas of designated skills shortage: Krishna as a cybersecurity expert analyst at a large mining company; Aneesh in the critical telecommunications field.<sup>40</sup>*

*Their ten-year old son, Aaryan, has Down syndrome. Krishna came to Australia to study for her Masters degree in Cybersecurity, then she and her husband Aneesh were granted temporary skilled visas.<sup>41</sup> After meeting the skills requirements for permanent residence, Krishna was invited by the state government to apply for a subclass 190 visa. Applying for the visa alone cost the family about \$9000, and they were subsequently required to pay several thousand dollars more to appeal to the AAT.*

*However, because there is no health waiver for the subclass 190, the AAT could not change the refusal decision. The family was finally granted a permanent visa after the Minister intervened, just days before their bridging visa expired. The process lasted years, cost the family thousands of dollars and took a huge emotional toll.*

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<sup>40</sup> See ABC News, 3 March 2023 at <https://www.abc.net.au/news/2023-03-02/perth-family-faces-deportation-over-son-s-down-syndrome-diagnos/10204683>; ABC News, 10 July 2023 at

<<https://www.abc.net.au/news/2023-07-10/wa-disability-discrimination-police-down-syndrome/102572544>>

<sup>41</sup> See Mamamia, 9 March 2023 at <<https://www.mamamia.com.au/perth-family-deportation/>>

## The “hypothetical person” test

*Enabling Australia* also recommended that the so-called “hypothetical person” test be dropped (Recommendation 8(b)) and that an individual’s particular circumstances should be considered.

When assessing whether or not an applicant meets the MHR, the MOC does not assess whether or not the **actual** provision of services, in the case of a given applicant, would be likely to result in a cost to the community. Rather, the MOC assesses the costs of an applicant on the basis of a hypothetical person with a similar condition at the same level of severity who would be entitled to use those services, “regardless of whether the health care or community services will actually be used in connection with the applicant”. This is the so-called “hypothetical person” test, derived from the 2005 Robinson Federal Court case (*Robinson v. Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1626) (**Robinson**).

In the event that a waiver is available, an applicant has the opportunity to put to the Minister their individual circumstances. These factors include income, professional and other skills, social capital, compassionate and compelling circumstances, capacity to mitigate costs, availability of carers, family networks, and support options: all the features which are taken into account when the exercise of the waiver is considered. When these arguments are put to the Minister, the combination of these factors has been found persuasive in 96 percent of cases. This means that 96 percent of applicants assessed against the MOC’s hypothetical person have been able to argue successfully that they are not simply hypothetical people, to be measured purely in terms of community costs. They bring assets to Australia which have been found to benefit the country.

Automatically refusing a visa on the assumption that a hypothetical person with a similar condition at the same level of severity, will not be a benefit to Australia, and giving that person no right of reply beyond arguing that their medical condition has not been properly understood by the MOC, is demeaning, dehumanising and an affront to natural justice. It is intended to discriminate against people with a disability or a health condition.

Every visa applicant should have the opportunity to make their case for the benefits they bring to Australia.

**Welcoming Disability submits that the “hypothetical person” test should be abandoned and, as the *Enabling Australia* inquiry recommended, every visa applicant should be assessed as a person, not measured solely as a cost, a health condition or a disability.**

## State-based skilled migration

The absence of a health waiver for certain visas impacts also adversely on state governments’ capacity to engage the skilled workers they want.

State-nominated general skilled migration (subclass 190) visas have no health waiver. Fully qualified and eligible applicants invited by state governments to apply for these visas because of their relevant skills, who meet every other criteria but fail the health requirement (or whose family member fails the health requirement), are simply refused visas. They are not eligible to argue for the benefits they bring to Australia and the state, and the state government has no say in this matter, no matter how valuable the applicant or what essential skills they bring.

Similarly, applicants for specialised state government recruitment programs such as those currently in place to recruit experienced police officers to WA and Queensland, have no health waiver. This is deterring eligible and much-needed applicants from applying for these programs.

### Case Study

Jonathan Wales,<sup>42</sup> an experienced UK Police Officer, responded to the WA government's call for UK police officers to join the WA Police Force.<sup>43</sup> The Queensland government has also introduced a similar scheme to recruit police officers from overseas.<sup>44</sup>

Jonathan was provisionally accepted for the WA Police force but subsequently withdrew his application on learning that his family's permanent residence visa subclass 186 (direct entry) would be refused because his son has autism. He had contacted the WA Police explaining his position and seeking a different visa pathway which included a health waiver, but was told there was no alternative route.

Jonathan said:

*"It's been very difficult. It's very unfair to write off a four-year-old. As a family, we would absolutely contribute far more than we would take out. Obviously, I do a difficult job and there's a need for more police officers, and there's clearly an issue with retaining and attracting staff...."*

*People are really in the dark about where they stand in the process and the likelihood of them obtaining a visa for the family, based on children with various degrees of disability or health conditions. There's certainly plenty of people in our situation and not for one second do I think this is something that only affects us.*

*I think it'd be far better for people to know that there's a strong chance that they will not be able to obtain a visa from the outset. It was a big emotional commitment and financial commitment for the recruitment process. It's very difficult when you go through all of that to find out that there's no chance for us".*

### Case Study

Lisa (not her real name) also responded to the WA government's call for UK police officers to join the WA Police Force.<sup>45</sup> Lisa had years of experience as a UK police officer and a keen desire to move to Australia with her young family to fill one of the state's 31,000 vacant jobs. Lisa was accepted for the WA Police Force but says she had to withdraw her application after finding out that her family's permanent residence visa subclass 186 (direct entry) would very likely be refused because her daughter has Down syndrome. Lisa said:

*"My daughter is nearly nine years old, and I have never in all that time felt so discriminated against. My daughter is physically fit and well. She has always attended mainstream school. She attends normal clubs. She has friends just like any other child. Lisa's daughter would have failed to meet the MHR because of the notional costs of her "special" or supported education, regardless of whether or not her daughter actually needed or intended to access education support."*

*Lisa withdrew after an immigration lawyer advised her that she could not meet the health requirement and that her visa would be refused, with no right to apply for a waiver attached to visa subclass 186.*

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<sup>42</sup> ABC News 26 Sept 2023 at <https://www.abc.net.au/news/2023-09-26/visa-issues-hampering-wa-police-overseas-recruitment-process/102898152>; ABC News, 16 Sept 2023 at <<https://www.abc.net.au/news/2023-09-16/uk-cop-blocked-from-wa-police-by-migration-act/102858980>>

<sup>43</sup> Personal correspondence, 'Lisa' and Jan Gothard, Estrin Saul Lawyers; and Ashleigh Davis, ABC News, 10 July 2023 at <<https://www.abc.net.au/news/2023-07-10/wa-disability-discrimination-police-down-syndrome/102572544>>

<sup>44</sup> See, <https://www.policerecruit.qld.gov.au/international-police-recruitment>

<sup>45</sup> Personal correspondence, 'Lisa' and Jan Gothard, Estrin Saul Lawyers; and Ashleigh Davis, ABC News, 10 July 2023 at <<https://www.abc.net.au/news/2023-07-10/wa-disability-discrimination-police-down-syndrome/102572544>>

Further, provisional and permanent visas available under the Designated Area Migration Agreement (**DAMA**) - subclass 186 (employer nominated scheme) and subclass 494 (labour agreement) and 491 (skilled work regional - provisional) - have no waiver. An applicant who takes up a temporary skills shortage visa, subclass 482, anticipating proceeding to a permanent subclass 186 visa through their DAMA employer, has no access to a waiver of the health requirement for the permanent DAMA-sponsored visa.

This is particularly incongruous since waivers are available to applicants in other streams of the same visas: subclass 186 (temporary residence transition stream) and subclass 494 (skilled employer sponsored regional (provisional) stream) visas.

Waivers are simply not available for the DAMA “labour agreement” stream for those visas, cutting off a path to PR for otherwise eligible applicants in state-designated areas of need.

This lack of a waiver impacts adversely on skilled workers already in Australia if they, or their family member, have a health condition or disability, even though they have met the health requirement for a temporary skilled visa, have already shown their capacity to work and contribute to Australia, and anticipate moving on to permanent residence. If there is no waiver, any subsequent visa will be refused.

### **Case Study**

#### **Waivers for all: Roberto's Story**

*I arrived in Australia on a student visa. A few years into my PhD, I was diagnosed with HIV. My world fell apart. No support and no medicare. Medication was not provided by the Australian government at the time, everything was based on your visa status. So I was getting my medication supplied by the Brazilian Government via post every three months.*

*I'm still unable to apply for PR, even though I have a PhD in engineering from an Australian university, many years of experience, a job, high income, and I'm young and healthy. I am 34 years old and could easily apply for the 189 or 190 skilled visa.*

*My medical health condition is 100 percent manageable. [My viral load is] undetectable which means I cannot pass HIV to anyone and can live a normal life.*

*Stigma is the most horrendous thing anyone can ever experience, and has impacted my life in so many ways. This fear prevents a number of international students and people on a visa from getting tested every year, because they know they won't be able to stay in Australia if they are HIV positive. All reports from the Health Equity Matters and HIV researchers back this statement. It's a fact.*

*I've definitely given more to Australia than taken out. I've done everything I can to be accepted here, so this is my last resort. I supplicate the Australian Government to change the rules, by increasing the significant cost threshold, or give us the opportunity for a health waiver. Visa subclasses 189 and 190 are not eligible. Help me to call Australia home.*

*Ableism and stigma should not be welcomed in Australia anymore. This needs to change.<sup>46</sup>*

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<sup>46</sup> Submission provided by “Roberto” to Welcoming Disability, 1 Nov 2023

## “One fails, all fail” rule and non-migrating family members

The so-called “one fails, all fail” rule relates to the requirement that all members of a family unit of an applicant for a permanent visa must meet the MHR.

If there is a waiver available, the applicant can apply for a waiver of the MHR for the family member. If there is no waiver available, then the visas of the applicant and any accompanying family members will be refused.

As noted above, the AAT must endorse this refusal in the case of a visa governed by PIC 4005 where no waiver is available.

The government Response also accepted the Recommendation to end the “one fails, all fail” rule, to remove its prejudicial impact on people with a disability (Recommendation 11). This was tied to the availability of waivers for all, with the Response noting that:

*the proposed net benefit scheme would consider the likely benefit of a whole family unit. As such, the “one fails, all fail” criterion may no longer be applied.*

However, as the proposed net benefit scheme did not eventuate, the “one fails, all fail” system remains in place, despite the indication in the Response that it should go.

In the case studies above, Qasim Butt, Krishna Aneesh, Adrian and Adyan, along with all the members of their families, were denied permanent visas because one child failed to meet the health requirement; and similarly, both Jonathan Wales and Lisa would have had visas for each of their family members refused because one family member failed to meet the health requirement. One fails - all fail.

The “one fails all fail” rule has a particularly invidious effect as it relates to the “non-migrating family member” (**NMFM**). Though Policy no longer requires all NMFM to undertake a health examination, those who are required to do so are invariably individuals who have a health- or disability- or age-related issue, and who will consequently fail.

With the “one fails, all fail” rule still in place, this means all other applicants in the family will be refused a visa, **even though the family member who has failed to meet the MHR is not themselves applying to migrate.**

Consider, for example, the case of one elderly parent permanently cared for in their home country in a residential nursing home, while the other parent is sponsored for a parent visa to join children in Australia; or a child with a disability living in their home country with their siblings and custodial parent, the former spouse of an applicant for a partner visa who now has a new Australian citizen spouse, and perhaps a new Australian family.

In neither case is there any possibility that the NMFM could be a cost to the community, or have any impact on Australia’s community services. In neither case is the NMFM likely to apply for migration to Australia; but if they did so, they too would be required to meet the MHR at that time.

In the case of the partner visa there is a health waiver available. In the case of the parent visa, there is no waiver available and the visa of the parent who wishes to join their children in Australia will be refused.

The government has in no sense met the promise made in its Response to introduce a scheme which provides “a more individualised and flexible legislative, policy and procedural framework”.



Welcoming Disability submits that the current framework for waivers is unfair, inequitably applied and continues to treat many people with disabilities and health conditions as a net burden to our community. Such an approach is archaic and out of step with community expectations.

**Recommendation 8:**

**that the Federal Government implement the recommendations of the 2010 *Enabling Australia* Inquiry Report with particular regard to the Inquiry recommendations that were accepted within the federal government's 2012 Response, but which remain unimplemented, including:**

- e. granting all visa applicants the right to apply for a waiver of the MHR by dispensing with PIC 4005;**
- f. abolishing the "one fails all fail" rule;**
- g. abolishing the requirement for non-migrating family members to meet the MHR;**  
**and**
- h. abolishing the "hypothetical person" test.**

## Conclusion

Australia's migration regulations explicitly assume disability and health conditions are a net cost burden to the wider community, ignoring their individual and familial potential for significant contributions to our communities. This is discriminatory, archaic and degrading.

The right to live free from discrimination on the basis of disability or health status is a fundamental human right belonging to every adult and child.

The *Migration Act 1958* should not be exempt from the *Disability Discrimination Act 1992*.

Australia's migration health requirements are inconsistent with this Country's obligations under both the CRPD and CRC.

The human rights of children born in Australia are disproportionately impacted by the SCT and MHR. Otherwise eligible families already in Australia on temporary visas, looking to make their contribution to Australia permanent, are being told they may have to leave because they have a child born here with a disability or health condition.

Australia's inclusion of education support for children with a disability or health condition within the "significant costs" threshold is inconsistent with Australia's CRC obligations to act in the best interests of children and protect their human rights to education, development and non-discrimination. Special education or supported education costs should not be treated differently to any other education cost. Education is a right and a community investment - not a cost.

Welcoming Disability asks this Review to consider the issues raised within this submission. It is time to bring Australia's Migration Health Framework into line with current understandings of people with disability and health conditions as full and valuable members of society.

Welcoming Disability thanks the Review for the opportunity to make this Submission. We stand ready to continue to work with the Department of Home Affairs and the Minister, with whom we have already been consulting in the lead up to these developments.

Should you have further questions relating to our Submission, we are available for further consultation.

Yours sincerely,

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