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Joint Standing Committee on Migration  
Department of House of Representatives  
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AUSTRALIA



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The Migration Institute of Australia (MIA) welcomes the opportunity to contribute to the Joint Standing Committee on Migration's Inquiry into the migration treatment of disability.

### **About the Migration Institute of Australia**

The MIA is the peak representative body for the Australian migration advice profession, advancing the interests of Registered Migration Agent (RMA) members and their clients.

Registered Migration Agents provide professional services to applicants and sponsors for temporary visas and permanent migration. RMAs facilitate the process of migration by advising people on the most appropriate visa, properly preparing the application with all necessary evidence and representing the case effectively during processing.

There are more than 4,000 migration agents registered with the Australian regulatory office, of which approximately half are members of the Institute.

The MIA also provides extensive Continuing Professional Development (CPD) throughout Australia, including CPD programs for lawyers in the field of migration practice.

### **Preamble**

The MIA notes all terms of reference for the purposes of the Inquiry. In the interests of providing instructive comment however, we have limited ourselves to the following terms of reference:

- Report on whether the balance between the economic and social benefits of the entry and stay of an individual with a disability, and the costs and use of services by that individual, should be a factor in a visa decision.
- Report on how the balance between costs and benefits might be determined and the appropriate criteria for making a decision based on that assessment.

Australia's ratification of the United Nations *Convention on the Rights of Persons with Disabilities* ('the UN Convention') on 17 July 2008 has led to a subsequent review of how provisions of how the *Migration Act 1958 (Cth)* ('*Migration Act*'), *Migration Regulations 1994 (Cth)* ('*Migration Regulations*') and the associated Policy and Advice Manuals (PAMs) addresses the migration treatment of people with disability.

In addition to Australia's ratification of the UN Convention, the MIA notes the following excerpt from the additional declaration that was included at the time of signing:

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<sup>1</sup>

The MIA understands and agrees with the principle that requirements for non-nationals to enter and remain in Australia must be subject to 'legitimate, objective and reasonable criteria' of which health requirements would be a part.

The MIA however, does have some reservations as to the health criteria in place under the *Migration Act* and its related provisions currently. There appears to be a need for greater clarification on these criteria and how they relate to non-nationals in order to create greater transparency and confidence in the legitimacy, objectivity and reasonableness of these criteria both domestically and internationally.

### **Defining disability**

The definition of disability for the purposes of the UN Convention does not provide a restrictive definition to the term. Rather, it defines disability as:

An evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others<sup>2</sup>

Within Australia, section 4(1) of the *Disability Discrimination Act 1992 (Cth)* (*'Disability Discrimination Act'*) provides that the definition of disability in relation to a person means:

- (a) total or partial loss of the person's bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes a disability that:

- (h) presently exists; or

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<sup>1</sup> Declarations and reservations, United Nations *Convention on the Rights of Persons with Disabilities*

<sup>2</sup> Preamble, United Nations *Convention on the Rights of Persons with Disabilities*, para (e)

- (i) previously existed but no longer exists; or
- (j) may exist in the future (including because of a genetic predisposition to that disability); or
- (k) is imputed to a person.

In contrast, the *Disability Services Act 1986* (Cth) (*'Disability Services Act'*) provides that the definition of disability for the purposes of this Act applies to people to whom whereby:

- (i) is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of such impairments; and
- (ii) results in a substantially reduced capacity of the person:
  - (A) to obtain or retain unsupported paid employment; or
  - (B) to live independently.

For the purposes of this submission, the MIA will be relying on the more objective definitions as contained within both the *Disability Discrimination Act* and the *Disability Services Act*.

The MIA supports the UN Convention notion of disability as an evolving concept informed by reference to interactional participation in society. Within the context of eligibility to enter and remain in Australia under the *Migration Act* however, the more definitive framework as provided under Australian legislation is more instructive for the purpose of this submission.

### **Disability within the context of the *Migration Act***

Within the context of the *Migration Act*, those with a disability (using the more objective definitions as provided in Australian legislation) are routinely refused visas based on their failure to meet the Schedule 4 health requirements.

4005, 4006A and 4007 provides the framework for assessing whether visa applicants meet the relevant health criteria.

Each of these criteria differ, however essentially are made of the same initial four components of assessment. Namely, that the applicant:

- a) Is free from tuberculosis; and
  - b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community
  - c) Is not a person who has a disease or condition to which the following subparagraphs apply:
    - (i) the disease or condition is such that a person who has it would be likely to:
      - (A) require health care or community services; or
      - (B) meet the medical criteria for the provision of a community service;
- during the period of the applicant's proposed stay in Australia;

(ii) provision of the health care or community services relating to the disease or condition would be likely to:

(A) result in a significant cost to the Australian community in the areas of health care and community services; or

(B) prejudice the access of an Australian citizen or permanent resident to health care or community services;

regardless of whether the health care or community services will actually be used in connection with the applicant; and

(d) If the applicant is a person from whom a Medical Officer of the Commonwealth has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended residence in Australia for a follow-up medical assessment, the applicant has provided such an undertaking.

Regulation 2.25A(3) of the *Migration Regulations* also requires the Minister to take as correct the opinion of the medical Officer of the Commonwealth (MOC). As such, MOC assessments play a critical part in the treatment of people with disability in the migration context.

Applicants that fail to meet the health requirements on the basis of disability generally fail on the basis of having a ‘disease or condition’ that will require them (or make them eligible for) health care or community services or provision of this care would result in a ‘significant cost’ or prejudice access.

In short, the health criteria of 4005, 4006A and 4007 comprises of three very separate health issues; tuberculosis, health conditions that pose a threat to the Australian community (generally taken to be by way of contagion) and subsequently those with a ‘disease or condition’. In the interests of completeness, all three health criteria will be addressed within our submission, however of particular concern is the use of 4005 and 4007 (by way of both the *Migration Regulations* and associated PAMs) as criteria to be met for the grant of a visa.

Currently the standard health criteria upon which most visa subclasses are decided against is 4005. This criteria does not have any health waiver component and as such, all people that are taken to be members of the family unit (whether they be included in the application or not) that fail to meet this criteria must have their visa refused.

The health criteria 4006A applies to applicants for a subclass 457 temporary business (long stay) visa only. It enables a health waiver to be granted in circumstances where the sponsor provides an undertaking to meet the costs as assessed by the MOC.

4007 then does have a component enabling the Minister to waive the health requirement in circumstances where:

(a) the applicant satisfies all other criteria for the grant of the visa applied for; and

(b) the Minister is satisfied that the granting of the visa would be unlikely to result in:

(i) undue cost to the Australian community; or

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

This limited health waiver has quite restrictive associated Policy for waiving the health requirement. It also relies on undefined concept of undue. The associated PAMs for meeting the health waiver requirement focuses on compassionate and compelling circumstances and does not bring into consideration any positive economic or social benefits that an individual could bring to the Australian community.

### **Recommendations towards addressing:**

- **Balancing the economic and social benefits of the entry and stay of an individual with a disability, and the costs and use of services by that individual factoring in a visa decision**
- **Balancing between costs and benefits might be determined and the appropriate criteria for making a decision based on that assessment**

The MIA proposes five main recommendations to create a more flexible and equitable treatment of disability within the context of migration:

- Schedule Four criteria that specifically addresses ‘disease or condition’ separately from the other health criteria
- Provision of MOC assessments to applicants that clearly details the basis of the calculated cost of the condition
- Ability for the MOC assessment to take subsequently take into consideration of other accredited medical opinions and calculations
- Greater availability of the 4007 health waiver to more visa subclasses and thus ability to exercise discretion at the departmental level
- Clarification of the 4007 health waiver requirements to take into consideration the economic and social benefits that an individual may bring to the Australian community

Implementation of these changes would create greater transparency of the system and promote further confidence in the process.

*Schedule Four criteria to specifically address the issue of ‘disease or condition’ separately from other criteria*

Under current Schedule Four criteria, and as previously outlined, addressing an applicant’s ‘disease or condition’ forms only part of the either the 4005, 4006A and 4007 health criteria.

The issue then of ‘disease or condition’ (which includes, but is not limited to disability) then will be placed within a framework where this assessment, based on an updated and clarified

model, could be considered as a separate and distinct issue from the other health components of the Schedule Four criteria.

*Provision of MOC assessments to applicants clearly detailing the basis for assessment of costs*

Instituting this measure would enable applicants and/ or their migration agents to have a better understanding of how the established framework of health assessment relates to them. Provision of detailed advice as to costing will also provide greater transparency and confidence as to how this costing is calculated.

There is an ongoing concern that the MOC Guidance Notes upon which the costing is based is not publicly available and further, may be relying on outdated and potentially inaccurate data.

*Formalised ability for MOC assessments to take into consideration other accredited medical opinions and calculations*

In view of the above point, the MIA believes that based on more detailed advice of costing from the MOC, that there should be an instituted framework whereby other accredited medical opinions and calculations may be able to be provided to MOC for further consideration.

Whilst this practice is observed to a limited extent currently, there should be scope for this to be more formalised and for greater weight to be given to assessments by accredited specialists in relation to a condition.

*Clarification of the 4007 health waiver requirement to take into consideration the economic and social benefits that an individual may bring to the Australian community*

The current health criteria in place currently assesses applicants only in terms of whether they could incur an undue cost or prejudice access to Australian health and community costs.

There is currently no means by which the positive aspects that people with disability can bring to the Australian society, including but not limited to economic and social aspects, can be balanced against the potential for costs that they may incur in accommodating a disability.

There should be a structured criteria which accommodates that people with disability (amongst others who will be subject to be assessed against this criteria) should be assessed as not only being a potential burden, but also with reference to the positive aspects that they may bring.

*Greater availability of the 4007 health waiver to more visa subclasses and greater power to exercise discretion at the departmental level*

The recent 4007 health waiver for certain skilled visa applicants that live in or intend to live in a participating state or territory has certainly been a positive advent and welcomed by many.

The MIA submits that this health waiver, exercised within a more structured ability as detailed above, should be extended to more visa subclasses.

It may be that this would be based on a universal model whereby all visas would be subject to 4007 health criteria waiver and not the 4005.

At a minimum though, consideration to extending this to other visa subclasses in both the skilled and family stream should be subject to a structured ability to obtain a waiver under 4007 or similar provisions.

The MIA has taken a practical approach as to how the existing framework may be modified to reflect an approach that may provide more legitimate, objective and reasonable criteria.

A handwritten signature in black ink that reads "Maureen Horder". The signature is written in a cursive, flowing style.

Maureen Horder

Chief Executive Officer  
Migration Institute of Australia