



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC:CBsb171123

17 November 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: Matthew.Wood@lawcouncil.asn.au

Dear Dr Popple,

Review of Australia's visa Significant Cost Threshold

The Law Society appreciates the opportunity to contribute to the Law Council's submission to the Department of Home Affairs in response to its review of the Significant Cost Threshold. The Law Society's Human Rights Committee has contributed to this submission.

At the outset, the Law Society notes that, since the Joint Standing Committee on Migration published its report in June 2010, *Enabling Australia: Inquiry into the Migration Treatment of Disability (Joint Standing Committee Report)*, little progress has been made to ensure a fairer and more transparent assessment process for persons with disabilities seeking to migrate to Australia.

Important recommendations on the migration health requirement, and associated decision-making processes, included:

- Allowing for the consideration of the social and economic contributions to Australia of a prospective migrant, or a prospective migrant's family, in the overall assessment of a visa;
- Amending the *Migration Regulations 1994* (in particular, Items 4005, 4006A and 4007) so that separate assessments may be made for diseases or conditions perceived to be a threat to public health, as opposed to those conditions linked to disability; and
- Revising the approach to assess visa applicants' possible health care and service needs to reflect a tailored assessment of individual circumstances in relation to likely healthcare and service use.¹

In our view, the recommendations in the Joint Standing Committee report remain valid and we encourage their adoption. It is concerning that in contemporary Australia, disability in the context of migration policy continues to be cast in deficit terms, such that any person with a disability or health condition is assumed to represent a burden to the Australian community. Such an approach is at odds with the social model of disability which emphasises equality and the inherent value of people with disabilities.

¹ Joint Standing Committee on Migration, *Enabling Australia: Inquiry into the Migration Treatment of Disability* (June 2010).

We note that s 52 of the *Disability Discrimination Act 1992* (Cth) (**DDA**) provides that significant provisions in the Act do not apply to the *Migration Act 1958*, or those who administer it. Further, Australia issued an interpretive declaration to the *Convention on the Rights of Persons with Disabilities* (**CRPD**), which states that its understanding of the Convention ‘does not impact on Australia’s health requirements for non-nationals seeking to enter or remain in Australia’.²

While the interpretation of human rights treaties such as the CRPD allows for measures that are reasonably and objectively justifiable, state parties should nevertheless ‘take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities’.³ In light of this, the Law Society encourages an approach to visa assessment which allows for the individual circumstances of different applicants to be considered in a flexible and nuanced way.

In relation to the issues in the discussion paper, we make the following brief comments:

Examining the level of the threshold

The current threshold is AUD 51,000. The Discussion Paper notes that about half of all visa applicants in 2022-23 who failed the Significant Cost Threshold were assessed with health and community costs, over a period of ten years, of between AUD 51,000 and AUD123,000.

While the Law Society is not in a position to determine the appropriate level of the threshold, comparisons with other jurisdictions suggest that it may be set too low. We refer the Law Council to the Open Letter of March 2023 on this issue, which noted that Canada’s significant cost threshold is currently set at CAD 24,000 per annum (approximately AUD 27,000) or CAD 120,000 over five years (approximately AUD 135,000), and New Zealand’s threshold is NZD 81,000 (approximately AUD 75,000) over five years.⁴

Special Education

In our view, special education should not form part of the calculation of community services costs. As recognised in the Discussion Paper, the inclusion of special education costs means that most children with a disability, born in Australia to people who hold a temporary visa, will not meet the health requirement when applying for a provisional or permanent visa.

Non-citizen children, born in Australia with a disability, to people on temporary visas

It represents a loss to Australian society when families on temporary visas, who are in Australia and making valuable social and economic contributions, are refused a permanent visa if a child is born with a disability or health condition.

Recent media reporting has suggested the Minister has exercised his discretion in all cases of this kind that have come before him.⁵ However, the fact that the current policy relies on ministerial discretion creates a situation of uncertainty, and high levels of stress for those temporary visa holders who find themselves in this situation. In line with the recommendations in the Joint Standing Committee Report, and in the absence of the repeal of s 52 of the DDA, the Government should acknowledge that rejecting temporary visa holders as permanent visa

² United Nations Treaty Collection, [Australia’s Interpretive Declaration on the Convention on the Rights of Persons with Disabilities](#), Convention on the Rights of Persons with Disabilities (**CRPD**) 189 UNTS 137 (signed 30 March 2007, entered into force 3 May 2008).

³ CRPD, Article 4.

⁴ Open Letter (various authors), [Welcoming Disability](#) (March 2023).

⁵ Angus Thompson, ‘Hope for families facing deportation for having disabled children’, SMH (18 October 2023).

holders solely because of the birth of a child with a disability is discriminatory, and develop protocols to address this.

Thank you for the opportunity to contribute to the Law Council's submission. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at (02) 9926 0285 or sophie.bathurst@lawsociety.com.au.

Yours sincerely,

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

Cassandra Banks
President