



Australian Government

Australian Government response to the Joint Standing Committee on Migration report:

Enabling Australia Inquiry into the Migration Treatment of Disability

November 2012

Preamble

The Australian Government welcomes the opportunity to respond to the report of the Joint Standing Committee on Migration's titled *Enabling Australia: Inquiry into the Migration Treatment of Disability*. The report was published in June 2010.

The Australian Government believes that the health requirement plays an important role in:

- protecting Australia from public health risks;
- containing public expenditure on health and community care services; and
- preserving the access of Australian residents to health and community care services in short supply.

The Government agrees that the health requirement should be updated and improved. As such, the Department of Immigration and Citizenship launched a review of the requirement in 2010. As a result of this review there are a number of activities that the Department will undertake, or has already completed, which address recommendations of the Committee.

The Government is grateful for the work the Committee has taken in respect to this important subject and for all those who contributed with their submissions and evidence to the Committee.

The Government's response to the recommendations made by the Committee follows. A number of the recommendations have already been implemented. The Government has committed to a rigorous investigation of the feasibility of other reforms.

Responses and Recommendations

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1. The Government will increase the Significant Cost Threshold to \$35 000 on 1 July 2012.

A review of the significant cost threshold has been completed and on 1 July 2012 the significant cost threshold will be raised to \$35 000 in line with current health expenditure.

Recommendation 1 - Accepted

The Committee recommends that the Australian Government raise the 'significant cost threshold' (which forms part of the Health Requirement developed under the Migration Regulations 1994) to a more appropriate level.

The Committee also recommends that the Department of Immigration and Citizenship quickly complete the review of the 'significant cost threshold'.

2. The Government has committed to further investigate a net benefit approach.

The Department of Immigration and Citizenship is currently assessing the feasibility of a net benefit approach. This approach, if feasible, will 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.

An inter-departmental committee process has begun to support the feasibility assessment of this approach. Stakeholder consultations are also occurring.

The Department of Immigration and Citizenship intends to report the outcome of the feasibility study and inter-departmental committee views to the Government in 2013.

Recommendation 2 – Supported in Principle

The Committee recommends that the Australian Government adopt a contemporary Health Requirement for prospective permanent and temporary migration entrants under the Migration Act 1958 (Cth). The Committee recommends changes to the Health Requirement include changes to the assessment criteria, processes and waiver options. These are outlined in subsequent recommendations.

The proposed net benefit approach would be a more contemporary health assessment process for temporary and permanent visa applicants. It would involve significant changes to the assessment criteria, processes and health waiver options.

Recommendation 3 – Supported in Principle

The Committee recommends that the Australian Government amend Schedule 4 of the Migration Regulations 1994 to allow 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.

The proposed net benefit approach would allow for the consideration of the likely social and economic contributions to Australia of a prospective entrant identified as having a health condition likely to result in a significant cost for health and community care services. The contributions of the entrant's family unit will be considered where relevant.

The economic contributions could be measured by a Net Fiscal Benefit Model which, based on some characteristics of the applicants, would calculate and model into the future the likely fiscal net contributions of the family unit to all levels of the Australian Government. The health costs would be included as an input in this model.

An expansion of the health waiver scheme would mean that the social contributions of an applicant and their family could be considered.

Recommendation 8 (b) – Supported in Principle

The Committee also recommends that the Australian Government revise the approach which assesses visa applicants' possible health care and service needs against 'the hypothetical person test'. This test should be revised so that it reflects a tailored assessment of individual circumstances in relation to likely healthcare and service use.

The proposed net benefit approach will involve, as part of the overall health requirement assessment, a consideration of an applicant's individual circumstances.

As part of the health requirement review, the application of the hypothetical person test will be reviewed.

Further, in July and November 2011 amendments were made to the Migration regulations to exclude the costs of services unlikely to be accessed by temporary visa applicants from their assessment. This signals a significant and justified departure from the hypothetical person test for this group.

Recommendation 10 – Supported in Principle

The Committee recommends that visa decision-makers in the Department of Immigration and Citizenship be provided with the discretion to consider mitigating factors for any visa stream once a 'does not meet' the Health Requirement decision is received from a Medical Officer of the Commonwealth. These factors may be used to mitigate the 'significant cost threshold'.

Under the proposed fiscal net benefit approach, mitigating factors will be considered. Likely fiscal benefits will be used to offset the likely cost to Governments (including identified costs for health and community care services). An expansion of the health waiver scheme will allow for the consideration of other social mitigating factors.

Recommendation 11 - Accepted

The Committee recommends that the Australian Government review the operation of the 'one fails, all fail' criterion under the Migration Regulations 1994 to remove prejudicial impacts on people with a disability.

The Government accepts this recommendation and will review the operation of the current 'one fails, all fail' criterion regardless of the outcome of the feasibility study into the net benefit approach.

The proposed net benefit approach would consider the likely benefit of a whole family unit. As such, the 'one, fails, all fail' criterion may no longer be applied.

Recommendation 12 – Supported in Principle

The Committee recommends that the Australian Government amend the criterion for assessing waivers to the Health Requirement to include recognition of the contribution made by carers within the family as an offset to health care or community services costs identified in the process.

The contributions of carers within a family unit are currently considered through the health waiver scheme. The Government does not propose to remove the consideration of the contributions of carers from the health waiver. The proposed net benefit approach may also calculate the fiscal benefit to Australia of that carer.

Recommendation 16 - Supported in Principle

The Committee recommends that the Australian Government work with State and Territory Governments to expand the waiver option to the Health Requirement for skilled migration visa classes to a broader range of skilled visa categories, targeting areas of skill shortages and rural and regional development schemes.

The Government supports this recommendation in principle. The proposed net benefit approach would see an expansion of health waivers across many more visa subclasses. Officers considering a health waiver can, and would continue, to consider whether an applicant's skills are in demand or necessary for regional development.

3. The Department of Immigration and Citizenship has made significant changes to improve transparency and information resources

The Department of Immigration and Citizenship has made many changes to systems and client information designed to improve transparency of the health assessment process since the release of the report.

Recommendation 5 - Accepted

The Committee recommends that the Department of Immigration and Citizenship make the current 'Notes for Guidance' publicly available. It further recommends that, when such papers are revised, their updated version be placed on the Department's website as soon as possible. 'Notes for Guidance' and associated background information should also be referred to in the Department's Fact Sheets for prospective visa applicants.

The Government accepts this recommendation. All endorsed Notes for Guidance have been uploaded to LEGENDcom. LEGENDcom is an electronic database of migration legislation and policy documents available to the public on a subscription basis. The Department of Immigration and Citizenship is committed to ensuring that new or revised papers are uploaded as soon as practicable.

Recommendation 6 - Accepted

The Committee recommends that the Department of Immigration and Citizenship publish on the Department's website the cost calculation methodology used by Medical Officers of the Commonwealth in assessing the costs associated with diseases or conditions under the Health Requirement.

In 2011 the Department of Immigration and Citizenship revised the information available to applicants on the internet. New health requirement web pages were published on 11 November 2011. Information concerning the costing process was included.

Recommendation 7 - Accepted

The Committee recommends that the Department of Immigration and Citizenship provide each applicant with a detailed breakdown of their assessed costs associated with diseases or conditions under the Health Requirement.

The Department of Immigration and Citizenship have made significant system changes to allow Medical Officers of the Commonwealth to record further information about a health case in a more structured way. This includes a requirement to record a detailed breakdown of services required and costs associated with these.

When clients are found not to meet the health requirement, they are provided with information including the medical opinion. Recently the Department of Immigration and Citizenship has revised this information to include further details about the identified condition and services required. A clearer explanation of the regulations is also provided.

4. The Government will streamline the health waiver for humanitarian visa applicants

On 1 July 2012 the health waiver for humanitarian visa applicants will be streamlined. Under the streamlined health waiver, a humanitarian visa processing officer will not consider any costs for health or community care services undue. This means that a health waiver can be granted more efficiently.

The Department of Immigration and Citizenship will review the effect of this policy and determine if it is desirable to make legislative changes so that offshore humanitarian visa applicants are not assessed against the cost element of the health requirement at all.

Recommendation 14 - Accepted

The Committee recommends that the Australian Government amend the Migration Regulations 1994 to provide access to consideration of a waiver to offshore refugee visa applicants involving disability or health conditions on compelling and compassionate grounds. Consideration should also be given to extended family members for the same treatment in the same circumstances.

All offshore humanitarian visa applicants can access a health waiver. A health waiver allows the consideration of all circumstances of the applicant and their family. The Government does not intend to remove the health waiver from this visa stream.

Recommendation 15 – Partially Addressed

The Committee recommends that the Department of Immigration and Citizenship create a priority visa category for refugees who have sustained a disability or condition as a result of being a victim of torture and trauma. The Committee recommends that similar visa consideration is provided to immediate family members within the offshore refugee program.

The Government does not support the creation of a priority visa category for humanitarian visa applicants with a health condition caused by torture or trauma. The Government will continue to resettle humanitarian visa applicants based on need. The Department of Immigration and Citizenship will continue to process cases as a priority if the United Nations High Commissioner for Refugees refers applicants for priority settlement. The Government also already has a priority visa category for women at risk and their families.

The streamlining of the health waiver for humanitarian visa applicants will result in a faster, more certain and simpler process. The streamlining of the health waiver will be particularly beneficial to applicants with a significant health condition due to torture or trauma as they generally do not meet the health requirement on cost grounds only.

5. The Government has committed to review other aspects of the health requirement

The Government commits to review further aspects of the health requirement in line with the Committee's recommendations.

Recommendation 13 - Accepted

The Committee recommends that the Australian Government review the requirements for health inspections for short term visas under the Family Visits program.

The Government will review the requirements for health examinations for short-term visas under the family sponsored visitor stream.

Recommendation 17 - Accepted

The Committee recommends that the Australian Government investigate the introduction of a voluntary bond or other scheme for visa applicants to indemnify against, or manage health care or community services costs assessed under the Health Requirement of the Migration Act 1958 (Cth).

The Committee recommends that any introduction of such a bond or other scheme should not prejudice those applicants that are unable to provide a surety.

The Government has advised the Australian State and Territory Health Ministers Conference that a review of the health insurance requirements for temporary visa holders is being undertaken by the Department of Immigration and Citizenship. The Government anticipates that the review process and outcome should be finalised by the end of 2012.

6. The Government does not support these recommendations

The Government does not intend to take action to implement the following recommendations.

Recommendation 4 – Not Supported

The Committee recommends that the Australian Government amend the Migration Regulations 1994 (in particular Public Interest Criteria 4005, 4006A and 4007) so that the assessment of diseases and medical conditions are addressed separately from the assessment of conditions as part of a disability.

The Government does not support this recommendation. The current method of assessing whether visa applicants meet the health requirement does not discriminate between applicants who have a disability, disease or a combination of both, with all applicants being treated in an equal and fair manner. It should also be noted that under most domestic legislation, such as the *Disability Discrimination Act 1992*, disability is defined broadly and encompasses a range of health conditions. The Government supports this broad definition.

The Government will continue to focus on the overarching aims of the health requirement rather than distinguishing between applicants with a disability and applicants with another health condition.

Recommendation 8 (a) – Not Supported

The Committee recommends that the Australian Government remove from the Migration Regulations 1994 the criterion under Public Interest Criteria 4005, 4006A and 4007 which states that costs will be assessed ‘regardless of whether the health care or community services will actually be used in connection with the applicant’.

The Government does not support the recommendation to remove the criterion that costs should be assessed ‘regardless of whether the health care or community services will actually be used in connection with the applicant’. The current construction allows a Medical Officer of the Commonwealth to consider the costs of all services that are likely to be required to appropriately treat the health condition and support the applicant. A Medical Officer of the Commonwealth will not consider costs associated with the condition that a hypothetical person would be unlikely to require. The Government believes that the current consideration is appropriate as it does not create an expectation that migrants could or should only access limited services and caters for significant changes in circumstances which can occur.

Recommendation 9 – Not Supported

The Committee recommends that the Australian Government amend Regulation 2.25A of the Migration Regulations 1994 in a manner which does not bind the Minister of Immigration and Citizenship to take as final the decision of a Medical Officer of the Commonwealth in relation to ‘significant cost’ and ‘prejudice to access’ issues, and provides scope for Ministerial intervention.

The Government does not support this recommendation. The current regulations state that a processing officer must take the opinion of a Medical Officer of the Commonwealth to be correct. This provision prevents case officers from substituting their own views as they do not have the required specialist skills or knowledge to make a decision as to whether an applicant with a serious health condition meets the requirement. The legislation does not curtail review rights.

Applicants can and do submit further information to the Department of Immigration and Citizenship after been found not to meet the health requirement. A Medical Officer of the Commonwealth considers the new information before issuing a fresh opinion (or confirming their original opinion).

Formal review of the visa decision is also available through the Migration Review Tribunal. The Tribunal can request a review of the original medical opinion (with or without providing new information) which is conducted by a Medical Officer of the Commonwealth working in a different organisation than the original assessing doctor.

The regulation does not limit an applicant’s right to apply for ministerial intervention. In a ministerial intervention case, the medical opinion does not constrain the Minister’s personal decision. Generally a range of medical information, which would include the opinion of a Medical Officer of the Commonwealth as well as other specialists, would be submitted and considered by the Minister.

Recommendation 18 – Not Supported

The Committee recommends that as part of its proposal to amalgamate Australian discrimination law, the Australian Government review the Disability Discrimination Act 1992 (Cth) with particular reference to the section 52 migration exemption, to determine its legal implications for migration administration and conduct expert consultations on its impact on people with a disability.

The Government does not support the recommendation on the basis that section 52 of the *Disability Discrimination Act 1992* has been sufficiently reviewed and amended to ensure that persons with a disability are treated in a fair manner.

The exempting section accords with the formal Declaration of Australia's understanding that the *Convention on the Rights of Persons with Disabilities* would not impact on the health requirement for non-nationals seeking to enter, or remain, in Australia where such requirement is based on legitimate, objective and reasonable criteria. Currently, all visa applicants are uniformly subject to the health requirement, regardless of disability and/or disease, and there is no explicit focus on disability as a basis for excluding persons.

Additional Recommendation A – Not Supported

We recommend that the Government remove the exemption of the Migration Act 1958 from the Disability Discrimination Act 1992.

The Government does not support the recommendation on the basis that section 52 of the *Disability Discrimination Act 1992* has been sufficiently reviewed and amended to ensure that persons with a disability are treated in a fair manner.

The exempting section accords with the formal Declaration of Australia's understanding that the *Convention on the Rights of Persons with Disabilities* would not impact on the health requirement for non-nationals seeking to enter, or remain, in Australia where such requirement is based on legitimate, objective and reasonable criteria. Currently, all visa applicants are uniformly subject to the health requirement, regardless of disability and/or other health condition. There is no explicit focus on disability as a basis for refusing visa applications.

Additional Recommendation B – Not Supported

In the event that Recommendation A is not accepted, we recommend that the Government acknowledge that rejecting temporary visa holders as permanent visa holders solely on the basis of the birth of a child with a disability is discriminatory and develop protocols to address this.

The Government does not support this recommendation. The Government has received advice that the current application of the health requirement is lawful and does not discriminate against applicants with a disability.

