

## Skilled migration and disability

### Introduction

- 6.1 Australia's migration programs have traditionally been seen as being labour-driven programs. Over the years, some of the nation's largest infrastructure programs have relied on the skills of migrants who have subsequently called Australia home.
- 6.2 Australia's modern migration program has been a model for skilled migration used in other nations – the United Kingdom, for example, has just introduced the points system used by Australia for the new category of skilled visas.<sup>1</sup>
- 6.3 Australia's skilled migration stream accepts by far the largest number of migration entrants and is a major contributor to the Australian economy. In 2008-09 the skilled migration stream accounted for 67 per cent of the total national migration program.<sup>2</sup>
- 6.4 There are four main visa categories with a wide number of visas available, including independent skilled temporary or permanent visas, business visas and employer sponsored schemes. Some programs offer opportunities to apply for permanency after a temporary visa has been held. However, few of these visas have a waiver opportunity and

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1 Dr Susan Harris Rimmer, Australian Lawyers for Human Rights, *Committee Hansard*, 18 November 2010, p. 9.

2 The Department of Immigration and Citizenship, *Fact Sheet 24 – Over View of Skilled Migration*, accessed May 2010 at <[http://www.immi.gov.au/media/fact-sheets/24overview\\_skilled.htm](http://www.immi.gov.au/media/fact-sheets/24overview_skilled.htm)>.

applicants with a disability may be rejected under the Health Requirement, even if they meet the skills and attributes required for the visa class they are applying for.

- 6.5 This chapter examines some of the issues raised regarding skilled migrants with a disability, or with family members with a disability, who wish to enter Australia under the Skilled Migration Program.

## Programs and statistics

- 6.6 The Department of Immigration and Citizenship (DIAC) fact sheet on skilled migration notes that:

The Australian Government continues to emphasise skilled migration, while maintaining a commitment to family reunion migration. The migration to Australia of people with qualifications and relevant work experience helps to address specific skill shortages in Australia and enhances the size and skill level of the Australian labour force.<sup>3</sup>

- 6.7 DIAC further notes that the skilled migration stream aims to:

- strengthen the economic and budgetary benefits from granting permanent residence visas to skilled and business migrants;
- address key and emerging skill shortages, particularly in regional Australia; and
- expand business establishment and investment.<sup>4</sup>

- 6.8 There are four main categories of skilled migration:

- The **General Migration stream** (GMS) which encompasses a range of permanent points-tested visas.<sup>5</sup> The highest scores under the current test are for occupations in demand requiring specialised training, and then for general degree levels. Points are then awarded on a scale for age, English proficiency and other factors including Australian work or

3 The Department of Immigration and Citizenship, *Fact Sheet 24-Over View of Skilled Migration*, accessed May 2010 at <[http://www.immi.gov.au/media/fact-sheets/24overview\\_skilled.htm](http://www.immi.gov.au/media/fact-sheets/24overview_skilled.htm)>.

4 Department of Immigration and Citizenship, *Annual Report 2008-09*, 1.1.1 Output Economic Migration, accessed May 2010 at <<http://www.immi.gov.au/about/reports/annual/2008-09/html/outcome1/output1-1-1.htm>>.

5 Department of Immigration and Citizenship, *Annual Report 2008-09*, 1.1.1 Output Economic Migration, accessed May 2010 at <<http://www.immi.gov.au/about/reports/annual/2008-09/html/outcome1/output1-1-1.htm>>.

study experience, regional living and study, partner qualifications or state or territory government nomination.<sup>6</sup>

- **Employer Sponsored migration** which allows employers to nominate/sponsor personnel from overseas to work in Australia in skilled occupations through a number of visa options on a permanent basis. The following categories apply:
  - ⇒ **The Employer Nomination Scheme (ENS)** – allows Australian employers to nominate overseas workers for permanent residence in Australia to fill skilled vacancies in their business.
  - ⇒ **The Regional Sponsored Migration Scheme (RSMS)** – designed to encourage migration to regional and low population growth areas of Australia. Employers in these areas can nominate overseas workers for permanent residence to fill skilled vacancies in their business.
  - ⇒ **Labour Agreements** – are formal arrangements to recruit a number of overseas skilled workers. Both temporary and permanent visas can be granted under the agreement. Agreements are generally effective for two to three years.
  - ⇒ **State Sponsored schemes** – target the supply of labour in key occupations identified as in shortage by State and Territory governments.
- **Business skilled program** to encourage successful business people to settle in Australia and develop new business opportunities; and
- **Distinguished talented stream** which issues visa to people with special or unique talents of benefit to Australia, such as sportspeople, artists, and musicians.

## Skilled migration and the health requirement

### Skilled visas and waiver options

- 6.9 Australia requires visa applicants to undergo a health assessment for most permanent visas and for temporary entry visas (subject to length of

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6 As discussed later, these priorities are under review. See DIAC, General Skilled Migration (GSM) Points Test Review, accessed May 2010 at <<http://www.immi.gov.au/skilled/general-skilled-migration/pdf/faq-points-test.pdf>>.

- stay and the country of origin's risk level for tuberculosis (TB) and other factors).<sup>7</sup>
- 6.10 With the exception of some provisional visas, the majority of GMS visa applications, both independent and sponsored, are assessed under PIC 4005 which provides no waiver option. All applicants for permanent visas including the main applicant, spouse and any dependents must be assessed against the Health Requirement.<sup>8</sup>
- 6.11 As discussed earlier, there is currently no scope within Schedule 4 of the Migration Regulations 1994 for an assessment to include consideration of the economic and social contribution of people with a disability and their families unless the visa has a waiver option.
- 6.12 Until recently two visa classes under the skilled stream offered waivers. These were the Temporary Skilled (Business–Long Stay) 457 visa and the Educational sub-class 418 visa. Both of these had a PIC 4006A classification, meaning that a waiver would be considered at the Minister's discretion on the undertaking of an employer.<sup>9</sup> The Educational visa (Subclass 418) was repealed on 14 September 2009.<sup>10</sup>
- 6.13 In October 2006, the Government introduced visa subclasses 846, 855, 856 and 857 which have a PIC 4007 waiver arrangement. These visas were introduced to address the experiences of those who have been living and working under renewable skilled 457 business class visas, but had been rejected when applying for permanent residency visas (under PIC 4005).<sup>11</sup>
- 6.14 The new visa program allows for visa holders who have lived in Australia in a Specific Regional area for two years and worked for one

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7 Department of Immigration and Citizenship, *Fact Sheet 22– The Health Requirement*, accessed May 2010 at <<http://www.immi.gov.au/media/fact-sheets/22health.htm>>.

8 Department of Immigration and Citizenship, *Health Assessments Required for Visa Applicants*, accessed May 2010 at <<http://www.immi.gov.au/allforms/health-requirements/>>.

9 Department of Immigration and Citizenship, *Annual Report 2008-09*, 1.1.1 Output Economic Migration, accessed May 2010 at <<http://www.immi.gov.au/about/reports/annual/2008-09/html/outcome1/output1-1-1.htm>>.

9 Department of Immigration and Citizenship, *Health Requirement for Temporary Entry into Australia, Form 1163i*, accessed May 2010 at <<http://www.immi.gov.au/allforms/pdf/1163i.pdf>>; and see New South Wales Government, *Submission 96*, p. 6.

10 The Educational Visa (Subclass 418) accessed May 2010 at <<http://www.immi.gov.au/skilled/skilled-workers/ev/>>.

11 Department of Immigration and Citizenship, *Submission 66*, pp. 12–13.

year on a temporary visa to apply for permanent residency. These visas are subject to State and Territory agreement.<sup>12</sup>

- 6.15 Skilled visa applicants therefore have a range of visa options, but few provide for a waiver consideration. Additionally, under the Health Requirement, skilled visa categories face a double but distinct assessment.
- 6.16 The Council of Australian Graduate Associations (CAPA) informed the Committee:
- Applicants' qualifications, professional experience and skills are each assessed on a points-based system, while health and character requirements are assessed independently as part of the application process. Health assessment criteria require mandatory medical examinations, and these apply to both the main visa applicant and any family members relevant to the application.<sup>13</sup>
- 6.17 Under these arrangements skilled applicants who have all the requisite qualifications (and points) for a visa, and may even have a job offer in Australia, can be rejected on the Health Requirement if they or a member of their family have a disability.

## Permanent skilled visas

- 6.18 Applicants for Permanent skilled visas may apply for specific occupational visas identified on the SOL, skilled independent and sponsored independent, skilled designated area and skilled Australian sponsored, employer or state nominated visas, skilled regional sponsored, skilled overseas student and business schemes, both independent or sponsored. Except for the category of second stage skilled and business visas discussed later in this section, all of these visas are assessable under PIC 4005, which offers no waiver.<sup>14</sup>
- 6.19 The Committee was informed that the lack of a waiver option for the majority of permanent skilled visas means that applicants have limited opportunity to defray identified health costs, despite their capacity to do so.
- 6.20 The Royal College of Australasian Physicians stated:

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12 Department of Immigration and Citizenship, *Submission 66*, pp. 12–13.

13 Council of Australian Graduate Associations, *Submission 101*, p. 4.

14 See Department of Immigration and Citizenship, *Submission 66*, Attachment C.

The applicant's own means of support (including private health insurance coverage or support by family members or others) is not considered in the medical cost assessment made by the Medical Officer. Again, if the legitimate policy aim is the protection of scarce health resources, it is arguable that it cannot be a necessary and proportionate means of attaining that objective to screen out those who can fund their own treatment and therefore would not burden resources.<sup>15</sup>

- 6.21 HIV/ Aids Legal Centre Inc. (HALC) and others maintained that the skill points assessment under the GMS provides all the confirmation needed of the economic advantage in accepting a particular applicant:

For applicants with a disability in the skilled migration stream, they would already have a sound assessment of their economic contribution to Australia by virtue of their satisfaction of the other criteria for the skilled visa they apply for. Having met the points test for a skilled stream visa, the economic benefit to Australia test is already met and in many instances in order to meet that points test, the main applicant would need to show a history of working in an area relevant to the application. This would demonstrate the expected economic benefit to Australia in granting the visa to such a person and his or her family.<sup>16</sup>

- 6.22 Numerous accounts were provided to the Committee by people who had applied for permanent skilled visas but were rejected on the basis of their own disability, or who had relatives who were rejected on this basis, or were rejected under 'the one fails, all fail' rule due to a family member's impairment.
- 6.23 One example involved a Subclass 886 Skilled Sponsored (full fee) Visa application. Ms Simran Kaur was the primary applicant on behalf of herself and her husband in August 2009. Her application was refused on the basis of Ms Kaur's blindness. In an attachment to the submission, Vision Australia supported Ms Kaur citing her exemplary personal record, qualifications and professional experience in community sector work with people with a disability, see **Case Study 6.1**, following.

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15 The Royal College of Australasian Physicians, *Submission 80*, p. 11.

16 HIV/ Aids Legal Centre Inc., *Submission 69*, p. 13.

## Case Study 6.1

**Skilled community worker rejected because of vision impairment**

Ms K is a migrant from India living with extended family in Victoria. She was refused a Skilled Sponsored Subclass 886 visa in October 2009 because she has a vision impairment, which would make her eligible for the receipt of a Disability Support Pension (DSP). This is irrespective of whether Ms K chooses to apply for the DSP or not and regardless of the fact that current Social Security regulations prohibit her eligibility for 10 years.

Ms K speaks four languages and is a highly skilled community and welfare worker. Her first paid professional role in India was an associate social worker in the Inclusive Education Department, working with children with disabilities, their families, schools and the teaching staff with Action for Ability Development and Inclusion, a national disability non-government organisation. Subsequently, she worked as an HIV counsellor for the prevention of parent to child transmission of the disease with the Punjab States Aids Control Society.

In Melbourne she obtained a diploma in community welfare, having completed both undergraduate and post-graduate qualifications in social work in India. She has undertaken work experience placements as part of her recent qualification in Australia. She writes and types all her work using voice output software and is completely comfortable with standard phone technologies.

Ms K has been diagnosed with retinal macular dystrophy, which causes loss of central vision, yet she has been assessed as having a high level of competency in all aspects of daily living. She utilises a range of strategies at home to prepare, cook and serve food and to maintain herself and her home and externally while shopping and in the work place. Ms K's case is supported by Vision Australia.

Ms K and her husband's families and support structures are located in Australia, including Ms K's mother and only sibling. Her failure to gain permanent residency would force her to return to India, leaving her family here in Australia. Ms K's case was recently rejected by the Migration Review Tribunal and submissions will be made for consideration of Ministerial discretion under the *Migration Act 1958* (Cth), s 351.

*Source* Clothier, Anderson and Associates, Submissions 98 and 98:1 p. 14 and Attachment A, Vision Australia, and subsequent advice.

6.24 Commenting on the case Clothier, Anderson and Associates stated:

Ms Kaur has much to offer to the Australian community and is more than willing and able to work in such a community, for the benefit of Australians. However, she has not been given the chance, merely because the Medical Officer of the Commonwealth has concluded that she will be entitled to a pension that she has no intention of claiming, potentially at a cost to the community of over \$21,000.00 over the next 5 years.<sup>17</sup>

6.25 Ms Stephanie Booker of Clothier, Anderson and Associates informed the Committee that the case has now been referred to Migration Review Tribunal (MRT), which is likely to be a lengthy and costly process for the applicant.<sup>18</sup>

6.26 As mentioned earlier, the situation of Mrs Maria Gillman and her sister Una Thyse provided another example of the enormous emotional, financial and time investment made by skilled people with a disability attempting to negotiate the process of rejection and appeal.<sup>19</sup>

6.27 Mrs Gillman was sponsoring her sister under a Permanent Skilled Australian Sponsored visa 138 (PIC 4005), however the visa application was rejected on the basis of her sisters' disability, see **Case Study 6.2**.<sup>20</sup>

6.28 Ms Thyse, who was blinded in an accident at 21, currently volunteers in a mission in South Africa. She wrote to the Committee:

...I am a very active member of the staff where I am currently working, in a leadership position and making valuable contributions to the organization. I see no reason why I should be treated as a second-rate citizen of any country or deemed simply a mouth to feed while have intelligence, reason, hands to work with and a will to make a success of my life and see success in the lives of those I have contact with.<sup>21</sup>

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17 Clothier, Anderson and Associates, *Submission 98.1*, p. 2.

18 Ms Stephanie Booker, Clothier, Anderson and Associates, *Committee Hansard*, Melbourne, 18 February 2010, pp. 29-30.

19 Mrs Maria Gillman, *Committee Hansard*, Melbourne, 18 February 2010, p. 29.

20 Name Withheld, *Submission 29*, p. 1.

21 Ms Una Thyse, *Submission 93*, p. 1.



## Case Study 6.2

**Sisters seeking reunion under a skilled Australian sponsored visa**

Ms G sponsored her sister U, a resident of South Africa, under a Class BQ Subclass 138 Skilled Australian Sponsored visa in November 2006.

U has multiple qualifications and initially pursued a career in the performing arts, enrolling in a Bachelor of Arts degree with a major in drama. Two months before her 21st birthday she was, however, blinded in a street accident involving the side mirror of a passing vehicle. Less than two years after this, U returned to university full time and completed a Bachelor of Arts degree majoring in psychology. She worked as a rehabilitation counsellor, continued to develop her artistic talents and furthered her qualifications.

Following the deaths of her parents and a marriage break up she decided to migrate to Australia to be with her only sister. Living by herself in South Africa had become increasingly dangerous and so U moved into the mission where she volunteers, effectively institutionalising herself.

In July 2007 U failed to meet the Migration Health Requirement and her skilled visa application was rejected. Despite her skills and qualifications, it was assumed that U, as a totally blind person, would automatically receive the Disability Support Pension, resulting in significant cost to the Australian community.

As sponsor to the application, Ms G was able to take the matter to the Migration Review Tribunal (MRT). In October 2007 the original Medical Officer of the Commonwealth opinion was confirmed by the Review Medical Officer, and the MRT was bound to affirm the decision not to grant U a visa. This opened an opportunity for appeal to the Minister for Immigration and Citizenship to exercise his public interest powers.

Ms G made a comprehensive application to the Minister in December 2008 on behalf of U. The applicants were advised that on 19 February 2010 their matter would be referred to the Minister. At the time of writing, the Minister's decision is still pending

*Source Mrs Maria Gillman, Committee Hansard, Melbourne, 18 February 2010, pp. 3, 39; and Submissions Name Withheld 29 & Ms Una Thyse, 93.*

- 6.29 Ms Sharon Ford, the wife of an academic with a child with Down Syndrome, was rejected under the 'one fails, all fail' rule for a permanent employer sponsored visa, see **Case Study 6.3**.

#### Case Study 6.3

##### **Academic research project on hold due to the 'one fails, all fail' rule**

A United Kingdom academic was appointed as Principal Researcher for a University of Western Australia/CSIRO project and applied to migrate to Australia with his family in 1998 under an Employer Nominated Permanent residence visa.

The family's application was refused on the basis of costs attributable to the applicants' four year old daughter, C, who had Down Syndrome. The Medical Officer of the Commonwealth had judged at that time that C 'would be likely to require additional educational resources beyond mainstream education' and 'supported employment in the future at significant cost to the Australian community.'

In 2000 the decision was successfully overturned by the Migration Review Tribunal, at which time the family's statement of expectations for C and the additional 14 testimonies provided had an apparent impact on the review process. The 18 months intervening saw the family living in three different countries, at times separately, as the father took up temporary posts. Meanwhile, the research project at UWA, which was bound by funding deadlines, was kept on hold because the principal researcher was unable to secure a visa.

Today the family are Australian citizens and C, now sixteen, is the recipient of a Duke of Edinburgh Award. C engages in charity work, belongs to a guiding community, saves her earnings, and in April represented Victoria as a gymnast in the Special Olympics National Games in Adelaide.

*Source Ms Sharon Ford, Submission 74, and see Committee Hansard, Melbourne, 18 February 2010, p. 26-27.*

- 6.30 Ms Ford reported the upheaval caused in her family's life over the eighteen months it took to resolve the case through the MRT:

Whilst awaiting the outcome, my partner and I were obliged to put our lives on hold and to live in separate countries. His position in the UK had come to an end, while he had accepted a position at the University of Western Australia which he was unable to take up. We were "fortunate" that he was able to take up a temporary

position in Sweden, while I remained in the UK at my job and with our two preschool aged children. When this no longer proved viable we moved as a family to Brazil, where my partner also took up a temporary post. Meantime a research project bound by funding deadlines was standing idle at UWA because the principal researcher was unable to secure a visa. One can only wonder about the "significance" of the cost to Australia that this entailed.<sup>22</sup>

- 6.31 Ms Kione Johnson commented in relation to the 'one fails, all fail' rule, that:

The application of this policy in such circumstances, without allowing for consideration of the family unit's personal resources, may produce results which come to undermine the purpose of skilled migration.<sup>23</sup>

## Temporary and provisional visas

- 6.32 Temporary visas comprise a range of skilled visas, provisional business class visas, temporary education sector visas for students, academics, as well as regional and employer schemes, both sponsored and unsponsored.<sup>24</sup>
- 6.33 These visas may be offered over a range of time from one day to four-years and are renewable. Some, such as the Skilled-Regional Sponsored (Provisional) Visa (Subclass 475), have options for permanency after a qualifying period of living and working in a community.<sup>25</sup>
- 6.34 As noted above, the bulk of temporary visa options are currently designated under PIC 4005. Until recently, only two Temporary Skilled visa categories offered a waiver on the basis employer sponsorship (PIC 4006A). These were the Temporary Skilled (Business – Long Stay) Visa 457 and the Educational visa (Subclass 418), for educational workers, which have a PIC 4006 waiver.
- 6.35 The Committee notes that the Subclass 418 visa was repealed on 14 September 2009, and that a number of other temporary visas have also

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22 Ms Sharon Ford, *Submission 74*, p. 8.

23 Ms Kione Johnson, *Submission 62*, pp. [44–45].

24 Department of Immigration and Citizenship, *Submission 66*, Attachment C.

25 Department of Immigration and Citizenship, Skilled – Regional Sponsored (Provisional) Visa (Subclass 475), accessed at May 2010 at <<http://www.immi.gov.au/skilled/general-skilled-migration/475/>>

been temporarily suspended, including the Regional Sponsored (Provisional) Visa (Subclass 475) mentioned above.<sup>26</sup>

- 6.36 The situation of Dr Siyat Hillow Abdi, see **Case Study 6.4**, alerted the community to the impact of the Health Requirement on highly skilled people with disability. Dr Abdi, who has been blind since birth, was denied a permanent skilled visa after completing his Doctorate in Disability Studies at Flinders University in South Australia. Blind Citizens Australia advised:

Dr Abdi was the first teacher who is blind to be registered as a teacher by the South Australia Teachers Registration board yet under the application of the Health Requirement of the Act Dr Abdi does not qualify for Australian residency. Clearly people like Dr Abdi have the potential to add to the social, cultural, educational and economic value of the vibrant and diverse fabric that is Australia.<sup>27</sup>

#### Case Study 6.4

##### **Dr Siyat Hillow Abdi – blind educator refused permanent residency**

Dr Abdi is a Kenyan-born academic, blind since birth, who specialises in disability studies. Dr Abdi completed his Doctorate at the Flinders University of South Australia and was the first blind person to become a registered teacher in the state. Alongside his studies Dr Abdi was active in the community volunteering in a range of roles including as a mentor for young African refugees.

In 2009 Dr Abdi's application for permanent residency was refused due to his blindness under the Health Requirement. Dr Abdi's case was supported by Blind Citizens who wrote to Senator Chris Evans, Minister for Immigration and Citizenship, urging the Minister to intercede on Dr Abdi's behalf by invoking his public interest power under section 417 of the *Migration Act 1958* (Cth).

Dr Abdi has since been granted a temporary residency visa and has subsequently accepted a senior position with the South Australian agency Disability SA.

*Source* Blind Citizens Australia, *Submission 44*, pp.6, 7&9; Council of Australian Postgraduate Associations, *Submission 101*, p. 6.

26 The Educational visa (Subclass 418) accessed May 2010 at <<http://www.immi.gov.au/skilled/skilled-workers/ev/>>

27 Blind Citizens Australia, *Submission 44*, pp. 6-7.

## Permanency for temporary and provisional visa holders

- 6.37 After a qualifying period, and subject to certain conditions, temporary visa holders may apply for a permanent visa. For people with a disability, the only alternative can be to apply for an Employer Nominated Scheme (ENS) visa, which will allow a waiver on the undertaking of the sponsor to pay any health costs.
- 6.38 Dr Paul Douglas of DIAC described the operation of the employer sponsored waiver under the 457 visa, and options for renewal or permanency:
- For the 457, where they have nominated a period of time they are coming for, be it one year, two years, or up to four years, it is looked at in regard to whether the employer is happy to support that and what the other circumstances are around it. So that may be waived on that opinion. If they apply onshore for an additional visa or a new visa then under the employer nominated schemes and the employee sponsored schemes, if it is more than \$100,000, it has to go to the states and territories and they will provide some opinion as to whether they are happy to support it in that regard, as explained by Mr Kennedy at the last meeting. If it is less than \$100,000, it goes to the visa delegate, who will look at the compelling compassionate circumstances.<sup>28</sup>
- 6.39 Evidence before the Committee indicated that a majority of temporary visa holders, at the end of the contractual period, either seek to renew the visa or make an application for permanent residency. DIAC advised, for example, that a total of 39 170 permanent residency or provisional visas were granted to people who last held a Temporary Skilled (Business – Long Stay) Visa 457.<sup>29</sup> CAPA also noted that two thirds of all international students intend to stay in Australia; of these students around 95 per cent plan to gain permanent residency before or immediately after graduation.<sup>30</sup>
- 6.40 However, as DIAC's Mr Torkington confirmed problems can arise when a provisional visa expires and application for permanent visa is made:

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28 Dr Paul Douglas, *Committee Hansard*, Canberra, 17 March 2010, pp. 2–3.

29 Department of Immigration and Citizenship, *Annual Report 2008-09*, 1.1.1 Output Economic Migration, accessed May 2010 at <<http://www.immi.gov.au/about/reports/annual/2008-09/html/outcome1/output1-1-1.htm>>

30 The Council of Australian Graduate Associations, *Submission 101*, p. 6.

...sometimes the person meets the health requirement for a short stay but for a longer period they do not meet the health requirement. If there is no waiver available for that type of visa, there is nothing the department can do about that.<sup>31</sup>

## New initiatives to address skill shortages

- 6.41 The Minister for Immigration and Citizenship, Senator Chris Evans, has recently announced the release of the new Skilled Occupation List (SOL) following suspension of the Migration Occupations in Demand List (MODL) in 2008 and temporary application of the Critical Skills List (CSL).<sup>32</sup>
- 6.42 The new SOL *Fact Sheet* provides that the new skills list will reduce the number of occupations from 400 to 181, with a focus on higher skill employment:
- The new list is focused on targeting specialised occupations that require a long lead time of formal education and training. It includes managerial, professional, associate-professional and trade occupations. The list of occupations will be reviewed annually but it is expected that it will be relatively stable over time.<sup>33</sup>
- 6.43 Additionally, the new program will focus on employer sponsored jobs, moving away from the emphasis on skilled independent visa under the previous arrangement. It was further announced:
- The Minister will be recommending that the Governor-General in Council make amendments to the *Migration Regulations 1994* to give effect to the framework in which this new list would be applied. The new SOL is proposed to commence on 1 July 2010.<sup>34</sup>
- 6.44 The Committee heard that, at present, the system is turning away nurses and health professionals in critical areas need.

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31 Mr Nicholas Torkington, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 17 March 2010, p. 3.

32 Department of Immigration and Citizenship, The New Skilled Occupation List (SOL), accessed May 2010 at <<http://www.immi.gov.au/skilled/general-skilled-migration/pdf/factsheet-new-sol.pdf>>

33 Department of Immigration and Citizenship, The New Skilled Occupation List (SOL), accessed May 2010 at <<http://www.immi.gov.au/skilled/general-skilled-migration/pdf/factsheet-new-sol.pdf>>

34 Department of Immigration and Citizenship, The New Skilled Occupation List (SOL), accessed May 2010 at <<http://www.immi.gov.au/skilled/general-skilled-migration/pdf/factsheet-new-sol.pdf>>

- 6.45 The Queensland Nurses Union (QNU) advised that, in that State, there is a critical shortage of nurses across public and private hospitals and aged care facilities (conservative estimates put this at around 1 400 nurses).<sup>35</sup> Yet despite this, the application for a 457 visa from two nurses with skills in critical shortage were rejected due to a child's disability, see **Case Study 6.5**.

#### Case Study 6.5

##### **UK nurses with skills in critical shortage rejected under the Health Requirement**

A United Kingdom (UK) specialist haemodialysis (renal) nurse was in Australia on a Temporary Long Stay 457 visa after approaching an international recruitment agency. His wife, also a registered nurse, and four children underwent a medical assessment in the UK during which a mild intellectual disability was identified in one child.

In October 2008 the Department of Immigration and Citizenship (DIAC) rejected the family's application for permanent residency based on the findings of the Medical Officer of the Commonwealth that the nine year old son had a level of intellectual impairment which would require specialist education services costing \$40 000 over four years.

Queensland Health (QH) advised that it would not provide DIAC with the requisite undertaking to meet community service or health costs during the duration of the family's stay. QH also rejected an undertaking by the applicant to meet costs.

The family stayed in the UK where their child has since been assessed as ready for mainstream schooling with some additional support. The recruitment agency has reported a fall in applicants for Australia among this skilled cohort since the advent of the case.

Queensland Nurses Union has conducted an assessment of additional costs attributable to the child in a mainstream school setting, which were in the range of \$2 700 annually for a teacher's aide four days a week.

*Source Queensland Nurses Union, Submission 69, p. 14, and see Ms Beth Mohle, Committee Hansard, Brisbane, 28 January 2010, p. 41.*

- 6.46 Commenting further on the case at hearings, QNU's Ms Beth Mohle noted that, as a result of current requirements, Australia not only lost

35 Queensland Nurses Union, *Submission 5*, p. 2.

two skilled professionals in shortage (with the renal nurse being in the severe skill shortage category), but also damaged its competitiveness in the global skills market.<sup>36</sup> The QNU submission records:

Our members international recruitment agency informed us that a number of registered nurses have withdrawn their applications as a result of learning about the adverse impact that immigration laws have had on families of their peers and the possibility that an assessment of a secondary applicant may result in their family members not meeting the health requirement.<sup>37</sup>

- 6.47 QNU noted that the benefits to Queensland Health of filling these skilled nursing positions would have far outweighed the costs of mild intellectual impairment.<sup>38</sup> To remedy the issue, QNU recommended that a specific appeal process for people with a disability, standardised assessment and more transparency under Ministerial discretion should be adopted.<sup>39</sup>
- 6.48 Other witnesses commented on the negative impact of Australia's Health Requirement on our competitiveness for skilled people.
- 6.49 Wavelength International is a medical recruitment business which assists a large volume of medical doctors of all grades and allied health professionals into jobs in public and private medical institutions in Australia, New Zealand, Singapore and Canada. Wavelength described the obstacles placed before a senior nurse who wished to come to Australia. Despite having a willing sponsor for the 457 temporary visa, the disincentives were too great for the nurse and her husband, an academic, to risk the change.<sup>40</sup> (See **Case Study 6.6.**)
- 6.50 The circumstances of Dr Fiona Downes and her husband, both Specialist Emergency Physicians, demonstrates the potential risk taken on temporary migration, when a dependent child is later diagnosed with a disability. **Case study 6.7** describes how the family of six was almost driven offshore after eight years because of their son's autism.
- 6.51 Mr Andrew Bartlett, appearing on behalf of Ethnic Communities Council of Queensland, maintained that creating the right ethos or 'vibe' is

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36 Ms Beth Mohle, Queensland Nurses Union, *Committee Hansard*, Brisbane, 28 January 2010, p. 41.

37 Queensland Nurses Union, *Submission 5*, p. [4].

38 Queensland Nurses Union, *Submission 5*, pp. [2-3].

39 Queensland Nurses Union, *Submission 5*, pp. [2-3].

40 Wavelength International, *Submission 102*, p. 2.



important if Australia is to have success in attracting doctors and health professionals:

... it is a simple fact that with regard to the developed world longer term, in certain areas of skills there will be a lot of competition globally. I do not think that is going to change. Like a lot of areas, it serves us well – whether it is on a purely economic competitive basis or on some of those looser general terms of being seen to be more engaging, welcoming and encouraging of diversity – to have more recognition of the wider contributions people make. It gives us extra advantages over countries that do not do that.<sup>41</sup>

#### Case Study 6.6

##### **The emotional impact of the Health Requirement – obstacles to skilled emigration**

An experienced senior nurse living in the United Kingdom wanted to migrate to Australia. A GP clinic in Australia extended an employment offer to the nurse but one of her children suffered from Down Syndrome, and had a mild intellectual impairment.

Aware of the Health Requirement, the nurse did extensive research and found a private specialist college which could teach the child life skills so that he would have reasonable prospects of employment in the future. The GP clinic was keen to sponsor the nurse and was willing to sign the 4006A health waiver undertaking to secure a Temporary Long Stay visa 457.

The nurse applied for the visa but the child did not pass the health test. She had been aware of the probability that her child would not pass, but the Medical Officer of the Commonwealth's decision, which was based on a generic profile of a Down syndrome sufferer, was emotionally disturbing for her. She still retained hopes of applying for permanent residence in the future.

The nurse was then faced with a difficult choice. Should she and her husband, an academic, give up their well paid jobs in the United Kingdom to move to Australia on a 457 visa? Even if they did so, they would have to apply later for a permanent visa application, possibly take their case to the Migration Review Tribunal Appeal, and then on to a Ministerial request.

With several years of uncertainty ahead, the nurse decided that it would be too stressful for her and her family to take their chances in Australia.

*Source* Wavelength International, Submission102, p. 2.

41 Mr Andrew Bartlett, Ethnic Communities Council of Queensland, *Committee Hansard*, 28 January 2010, p. 5.

## Case Study 6.7

**Not in the 'public interest' – Emergency skilled doctors and family rejected after eight years in Australia**

In January 1998 Dr D and her husband, both junior doctors trained in the United Kingdom, came to Australia on 442 Temporary Residence visas. The couple were accompanied by their two children: a daughter aged three years and a son E, aged seven months.

Dr D and her husband both enrolled in the training program with the Australasian College of Emergency Medicine (ACEM) and worked towards gaining Fellowship (FACEM) as Emergency Medicine Specialists.

Over the next eight years the family continued to live in Australia having their Temporary Residence visas renewed on an annual basis. In July 1999, however, toddler E had been diagnosed with Autism, and so each application for his visa renewal was referred to the Medical Officer for the Commonwealth for approval. The application was always granted, subject to further medical reports.

During this time two other daughters were born to the family, in 2003 and 2004. Dr D and her husband were both successful in obtaining FACEM and gained positions as Staff Specialist Emergency Physicians with HNE (Hunter New England) Health. They submitted an application for permanent residency in 2006. The application was refused as E did not meet the Health Requirement.

The family realised that their only hope of remaining in their home in Australia was to seek Ministerial Intervention. They applied to the Migration Review Tribunal and then to the Minister.

On September 2007, they were granted permanent residency at the Minister's discretion, after living under a 'truly horrible cloud' for over a year. Dr D and family became Australian Citizens in February 2010.

*Source* Dr Fiona Downes, Submission 103, pp. 1-2.

- 6.52 Dr Susan Harris Rimmer of the Australian Human Rights Lawyers stated:

There are academics who will not come to Australia, and why would they when their child will be put through this process? They do not want them to have to go through the intrusive medical checks. Why would they when they can go to Canada or the US and not go through that process? The skilled migration category now globally is highly competitive. We cannot assume that we will attract these high-powered executives if we keep the current system that we have. That is only going to affect that tiny elite part, but, in terms of return to the national economy, that might be very significant.<sup>42</sup>

- 6.53 The Government has now introduced a suite of skilled visa categories to provide greater flexibility following problems identified in the Moeller case. Visa subclasses 846, 855, 856 and 857, under the Employer Nominated stream, offer permanent skilled visas with a health waiver provision under PIC 4007.<sup>43</sup>

- 6.54 DIAC described the evolution of the new visas:

In late 2008, a high profile case involving a doctor in a regional area, brought to light the need to pursue a skilled health waiver option with State and Territory participation. Following this case the Minister wrote to State and Territory leaders seeking their agreement to participate.

To date all States and Territories, except New South Wales have now been designated as participating jurisdictions under the new arrangements. Visa applicants from States and Territories that have not yet signed up have been offered the opportunity to have their visa decision delayed until such time as the State or Territory has made a decision regarding their participation.

Some participating states have now signed a Memorandum of Understanding (MOU) outlining the agreed implementation and operational arrangements with the Department. Under the MOU arrangements, in cases where the potential health care and community service costs are estimated to be \$100 000 or more, or prejudice to access is 'substantial' or 'extensive', the relevant jurisdiction will be consulted for their view on whether they

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42 Dr Susan Harris Rimmer, Australian Lawyers for Human Rights, *Committee Hansard*, Canberra, 18 November 2009, pp. 11-12.

43 Department of Immigration and Citizenship, *Submission 66*, p. 12.

support a waiver being exercised. The States and Territories will have an advisory role not a determinative role.<sup>44</sup>

6.55 However, as DIAC submission states:

...these provisions required State and Territory agreement in order to operate - and until 2009, such agreement had not been acquired, consequently no waivers were available.<sup>45</sup>

6.56 The Migration Institute of Australia was positive about the new visas:

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.<sup>46</sup>

6.57 However, issues were raised about the cost of the proposal and its administration. The Australian National University School of Law Migration Program noted:

...the question of cost will inevitably arise with this proposal. Any legislation which relates to health walks a tight-rope, balancing the needs of the Commonwealth and the States. While the Commonwealth is in charge of migration and can implement the policies it requires, any changes to the health requirement have implications for the State-run public healthcare systems and social services.<sup>47</sup>

6.58 DIAC's Mr Torkington further advised:

Obviously, I cannot speak for the state governments; but, if you expand it to more visa subclasses, it would have a greater impact on state health systems. You would have to go back to them and get their views again. Certainly, most of them were quite enthusiastic about signing up for skilled classes because they can see the benefits for the state.<sup>48</sup>

6.59 Mr Mark Dreyfus QC MP, Member for Isaacs, reported on a constituent with HIV who failed the Health Test for a PIC 4005 assessed permanent visa. Mr Dreyfus supported the new expanded employer sponsored visa classes but had concerns that state governments would not support the measure:

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44 Department of Immigration and Citizenship, *Submission 66*, pp. 12-13

45 Department of Immigration and Citizenship, *Submission 66*, p. 12.

46 The Migration Institute of Australia, *Submission 34*, p. [6].

47 Migration Law Program, Australian National University College of Law, *Submission 59*, p. 9.

48 Mr Nicholas Torkington, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 17 March 2010, p. 8.

Although there is now a provision for waiver of the health criterion for onshore applicants for subclass 856 (ENS) and 857 (RSMS) visas, this is dependant upon the state in which the applicant lives certifying that it will accept the costs associated with the health condition, and remains unavailable for applicants applying for these visas outside of Australia. Such a waiver, if made available for all permanent subclasses, could have been appropriately utilised in JPI's case, given JPI's ability to significantly contribute to the Australian community by being an employed, tax-paying resident who is working for a regional employer and passing JPI's skills to local workers.<sup>49</sup>

- 6.60 The Committee notes that the New South Wales (NSW) Government is the sole remaining government not to have committed to the rollout of the new 4007 visas.<sup>50</sup> In its submission, the NSW Government notes that it supports the measure but as the State with the largest influx of migrants, it would expect a heavier financial impact. The submission provided an itemised costing for expanded waivers in terms of education, migrant English, health and other costs.<sup>51</sup>

## Committee comment

- 6.61 The Committee is pleased to note the new visa categories which provide options to balance health costs with skilled work contributions. The Committee also considers that a more comprehensive program for expansion of the waiver option is required to include a broader range of skilled visa categories, especially for skill shortages and rural and regional development schemes.
- 6.62 The Committee is of the view that this would not only support the acceptance of more able and skilled people with a disability it would also advertise Australia as a progressive community likely to attract the most valued applicants needed to fill skill shortages.
- 6.63 The Committee recognises that the expansion of these schemes may put extra pressure on State health and community care budgets.

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49 Mr Mark Dreyfus QC MP, Member for Isaacs, *Submission 109*, p. 2.

50 Mr Nicholas Torkington, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 17 March 2010, p. 8.

51 NSW (New South Wales) Government, *Submission 96*, p. 8-11.

- 6.64 In this regard, the Committee urges the Federal Government to recognise these challenges and facilitate State and Territory support for these schemes as part of the Government's national health reform and National Disability Strategy agendas.

### Recommendation 16

**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.**

## Personal indemnification options

- 6.65 Many submitters saw that in addition to recognition of the social and economic contributions of migrants in assessment criteria for waivers, there should be some contractual opportunity to offsets cost, at least for those in the skilled stream who have the capacity to make such commitments.
- 6.66 The Committee is aware that the Australian system currently provides an Assurance of Support (AoS) scheme for contributory aged parents and employment sponsored visas. However, there is no option for other individuals applying under other visa categories to provide any undertaking to cover health costs under current system.
- 6.67 *Fact Sheet 34* on the AoS provides that:
- An AoS is a legal commitment by a person (not necessarily the sponsor) to repay to the Australian Government certain welfare payments paid to migrants during their respective AoS period.
- It is also a commitment to provide financial support to the person applying to migrate (the assuree), so that the assuree will not have to rely on social welfare payments.<sup>52</sup>
- 6.68 DIAC's Mr Matt Kennedy explained that the AoS system works by the lodging of a bond. Any access that is made by the application to social

<sup>52</sup> *Fact Sheet 34 – Assurance of Support*, accessed May 2010 at <<http://www.immi.gov.au/media/fact-sheets/34aos.htm>>

services or benefits is deducted from that bond. The AoS can also apply to partner visas but the system has limited jurisdiction and is at the discretion of the visa decision maker.<sup>53</sup>

- 6.69 DIAC raised concerns about any expansion of the personal assurances program noting that the measure only addresses the cost aspect not 'prejudice to access' concerns:

The other thing that is very clear about insurance is that people continually miss the prejudice to access issues, in that the health requirement also covers those things that are in short supply in Australia and that we do not have enough of to provide.<sup>54</sup>

- 6.70 DIAC also noted that the system could throw up anomalies in this regard:

Even if they demonstrate the ability to take out extensive health cover, what happens if that individual then falls on hard times and can no longer afford the \$2,000, \$3,000 or \$4,000 a year that they need for comprehensive health cover. Do you say, 'You promised that you would maintain that'?<sup>55</sup>

- 6.71 The HIV/AIDS Legal Centre (HALC) did not support a bond arrangement, regarding this as prejudicial to less affluent visa applicants. As an alternative it proposed a 'buy in' provision to offset the health assessment. HALC suggested:

For disabled applicants in the work stream a 2 or 5 year continued work capacity might be applied. A requirement for holding and using health insurance (this would require a limitation on Medicare access to those applicants). Alternatively an increased impost via taxation might be applied as a cost of entry provision. An incremented taxation impost spanning over 5-10 years would significantly defray the estimated lifetime costs the migrant is considered to bring, without unnecessarily burdening the migrant family. Such a scheme would have some popular appeal.<sup>56</sup>

- 6.72 Mr Iain Brady, Principal Solicitor with HALC added:

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53 Mr Matt Kennedy, Department of Immigration and Citizenship, *Committee Hansard*, Melbourne, 24 February 2010, p. 17.

54 Dr Paul Douglas, Department of Immigration and Citizenship, *Committee Hansard*, Melbourne, 24 February 2010, p. 17.

55 Mr Peter Vardos, Department of Immigration and Citizenship, *Committee Hansard*, Melbourne, 24 February 2010, p. 16.

56 HIV/AIDS Legal Centre Inc., *Submission 69*, p. 18.

...we were thinking in terms of an additional 1.5 per cent or some additional impost on Medicare as a buy-in.<sup>57</sup>

- 6.73 The Committee notes that Canada and United States provide options for personal indemnification against health costs:
- The US statute specifically states that age, health, family status, assets, resources and financial status, education and skills *must* be taken into account when deciding if an applicant may become a public charge. Families may also submit a binding affidavit for support.<sup>58</sup>
  - The Canadian immigration law provides that if an applicant is refused by the medical officer on an 'excessive demand' basis they have the opportunity to bring a 'credible plan' to the Immigration officer to demonstrate they can offset costs (by care of a family member, use of private sector services).<sup>59</sup>

## Committee Comment

- 6.74 The Committee considers there is merit in providing opportunities family members of applicants to indemnify costs across the visa streams. While there are concerns that such a proposal might be inequitable for some streams, it would appear also to be inequitable to exclude the option for offsets for those wanting to engage in such a scheme.
- 6.75 The Committee recommends that a bond, 'buy in' or credit management plan as applied in Canada be considered as an additional option for visa applicants. The Department may determine whether the mechanism should be offered as capped or a quota system for people with a disability. The Committee notes that quotas have been used effectively in New Zealand and some other countries to facilitate targeted migration of people in this cohort.<sup>60</sup>

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57 Mr Iain Brady, HIV/AIDS Legal Centre Inc., *Committee Hansard*, Sydney, 12 November 2010, p. 53.

58 Advocacy, Disability, Ethnicity, Community (ADEC), *Submission 23*, pp. 11–13.

59 High Commission of Canada, *Submission 86*, p. [2].

60 See Dr Susan Harris Rimmer, *Committee Hansard*, Canberra 18 November 2010, p. 12.



**Recommendation 17**

**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.**



