AUSTRALIA'S NATIONAL INTEREST AND THE IMMIGRATION HEALTH TEST[1]

Joanne Kinslor

Australia's immigration system is unashamedly focused upon Australia's self interest above that of non-citizens or of global or international concerns. The object of the Migration Act is "to regulate, **in the national interest**, the coming into, and presence in, Australia of non-citizens".[2] (my emphasis)

Apart from our refugee and humanitarian programme (where we have determined that it is in Australia's interest to give primacy to the protection of refugees and others suffering severe human rights abuses over direct benefits to Australia[3])

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[1] I would like to thank Carolyn Altan, Acting Manager, Permanent Skilled Entry (Melbourne), Department of Immigration and Citizenship for her explanations of the approach taken by the Department of Immigration in relation to skilled migration health waivers. I take full responsibility for any misunderstandings of the Department's approach.

[2] Section 4 Migration Act 1958

[3] The Department of Immigration and Citizenship (DIAC) commissioned a report by Access Economics in relation to economic contributions of migrants, which included a comparison between different visa classes. This report showed that migrants in most visa class made an economic contribution (with a strong surplus for employer sponsored migrants in particular), with a negative economic contribution in the parent stream as well as the humanitarian and refugee stream "due to low labour force

Australia has crafted its visa requirements to maximise benefits to Australia (including members of Australian society) and minimise costs to Australian society. This process involves direct and indirect discrimination on a number of bases, as Australia prioritises which non-citizens will be granted visas on the basis of criteria designed to maximise the benefit to be received by Australia. To the extent that human rights concerns can be given effect along with other national

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participation and considerable use of Government resources". Refer to Submission from the Department of Immigration & Citizenship to Joint Standing Committee on Migration Inquiry into immigration treatment of disability, November 2009, p20, available at www.aph.gov.au/house/committee/mig.

One aspect of the prioritisation of the needs of refugees relevant to health requirements is that onshore refugees are not denied a protection visa on account of having a medical condition, disease or disability.

A protection visa applicant must undergo medical examinations and x-ray for the purpose of Australia identifying medical conditions or threats to public health and will not be granted a visa unless arrangements have been made for any necessary treatment: Refer Subclass 866 Schedule 2 *Migration Regulations 1994*, particularly sub-regulations 866.223, 866.224, 866.224A and 866224B. However, the Regulations recognise that a refugee should not be denied protection on account of costs that will be incurred to the Australian taxpayer to provide them with medical care or community services.

Offshore humanitarian visas, where Australia's non-refoulement obligations under the Refugee Convention have not been directly engaged (because the person in need of protection is not within Australia) have public interest requirement 4007, which is a health test that may be waived. Refer, for example, to Sub-regulation 200.226. The fact of waiver is in recognition of the humanitarian focus of the visa. However, the case of Amun Kiyani demonstrates that such a requirement can be insurmountable for humanitarian visa applicants where the Department decides that health costs outweigh humanitarian concerns. Refer to discussion of this case in Australian Lawyers for Human Rights, Submission to the Joint Standing Committee on Migration Inquiry into the migration treatment of disability, October 2009 available at www.aph.gov.au/house/committee/mig, which references the Commonwealth Ombudsman's 2001 investigation into the matter.

priorities, particularly economic priorities, these concerns are accommodated in various forms throughout our immigration system. However, the primary object of Australian immigration legislation is not directed towards giving effect to international human rights law or advancing human rights norms.

Discussion of Australia's immigration health test needs to be set within this context. Until Australia adopts an open border approach or decides to increase its migrant intake beyond the number of non-citizens wishing to migrate it should be recognised that our immigration system is fundamentally discriminatory in its selection of temporary and permanent residents that it hopes will best serve Australia's national interest. The health test is but one way in which Australia distinguishes between desired and non-desired migrants.

Nevertheless, without going outside this broad framework of Australia's immigration system, there is much room for debate and much scope for varying concerns to be incorporated within Australia's 'national interest'. In introducing public hearings the Chair of the Joint Standing Committee on Migration Inquiry into Immigration Treatment[4] of Disability

[4] This inquiry is still on-going. It was commenced in 2009 after the Minister for Immigration and Citizenship, Senator Evans, and the Parliamentary Secretary for Disabilities and Children's Services, the Hon Bill Shorten, requested that the Joint Standing Committee on Migration consider the operation of the immigration health test in relation to people with disabilities following the Minister for Immigration's intervention in the case of Dr Bernhard Moeller who (along with his family) had been unable to satisfy the requirements for general skilled migration on account of his 13-year-old son having Down Syndrome. Refer to Senator Chris Evans media release, 'Terms of reference for migration and disability inquiry announced, 15 May 2009 at

('the Inquiry') focused upon a broad notion of Australia's national interest, saying:

> "This is a vexed area of migration policy and the Committee will be examining whether our current rules really are in Australia's interest as a forward-looking, inclusive and productive society", Mr Danby said.[5]

Michael Danby MP's acknowledgement that deciding immigration health requirements is a "vexed area" is an important step for Australia to develop a better immigration health test that addresses a broader scope of matters promoting Australia's national interest.

Perhaps one of the most troubling aspects of the operation of Australia's immigration health test over recent years is that the test has not even permitted a proper consideration of the personal and societal costs of the application of the test. For the majority of visas public interest requirement 4005 has operated so that a largely unquestionable and often unreasoned statement of health costs by the Medical Office of the Commonwealth bars visa applicants, without any scope for discourse as to the public interest or human cost relevant in a particular case. The 4007 health waiver provides decision makers with a discretion, but it operates in a largely non-transparent manner without legislative direction as to matters that should be taken into account and is required at a low threshold of "significant cost". With respect, the Department's comment below demonstrates a disturbing ignorance or denial of the effect of Australia's immigration

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http://www.minister.immi.gov.au/media/media-releases/2009/ce09039.htm.

[5]Joint Standing Committee on Migration, Media Release Issued 11 November 2009, www.aph.gov.au/house/committee/mig

health test. In its submission to the Joint Standing Committee the Department states:

> In considering changes discussed in this submission[6] and raised in other submissions to the Committee, it may be useful to reflect on the fact that the current arrangements have, prima facie, been effective, and with the exception of recent issues raised in relation to people with a disability, been largely non-controversial for at least the past 20 years.[7]

That there have been limited cases attracting headlines and generating substantial petitions of support from across the Australian community as in the case of Dr Moeller[8] does not establish that there is a unity of views amongst the Australian community as to the operation of the health test. Rather, in my view, it is a consequence of a test that has largely operated without a balancing of views, with a lack of transparency in relation to the decision-making process, which makes many arguments futile and creates hopelessness for visa applicants.

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[6] The Department's submission about the immigration health test submitted to the Joint Standing Committee on Migration November 2009

[7] Department of Immigration and Citizenship, Submission to the Joint Standing Committee on Migration Inquiry into immigration treatment of disability, November 2009 accessed www.aph.gov.au/house/committee/mig

[8] Dr Bernhard Moeller is a German doctor with a son who has Down Syndrome. He and his family were refused skilled visas because of the operation of the health test. The Minister for Immigration exercised his personal public interest discretion to grant Dr Moeller and his family permanent residence in Australia. Refer Telegraph.co.uk, 'Doctor barred from Australia because of Down syndrome son' 31 October 2008, http:www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/3329411 accessed 22 March 2010 and Senator Chris Evans, 'Statement by Senator Evans on Dr Bernard Moeller', Media Release, 26 November 2008, http://www.chrisevans.alp.org.au/news/1108/immimediarelease26-01.php accessed 22 March 2010

Of course, there are different components of the immigration health test and it is not all components that attract a plethora of divided views. I am not aware, for example, of any significant disagreement that the health test should seek to prevent "a threat to public health in Australia or a danger to the Australian community". However, the Joint Standing Committee has publicly recorded significant controversies and vexing issues with respect not only to the focus of the Inquiry, being how the immigration test operates in relation to persons with disabilities, but also the operation of the immigration health test generally. These concerns include the harsh nature of the immigration health test, the lack of transparency and accountability with the decision-making process and the considerations taken into account (or lack thereof) through the operation of the immigration health test. Reforms to the way in which health requirements operate in the area of onshore skilled sponsored migration may be viewed as a response to some of the criticisms articulated before the Inquiry, such as concerns that an assessment as to whether health care costs are undue should take into account a broad range of costs and benefits. This paper looks at these reforms in detail and seeks to evaluate the reforms, especially by reference to issues raised before the Joint Standing Committee Inquiry.

HEALTH WAIVERS AND ONSHORE SKILLED SPONSORED MIGRATION

Schedule 2 requirements for subclass 846 (State Territory Sponsored Regional Established Business in Australia), 855 (Labour Agreement), 856 (Employer Nomination Scheme) and

857 (Regional Sponsored Migration Scheme) were amended in October 2006[9] so that the applicable health test to be satisfied is 4007 in circumstances where "the applicant resides or proposes to reside in a participating State or Territory"[10], rather than the usual skilled visa health requirement of 4005 (which allows for no consideration other than whether the health test is met by all members of a visa applicants family). A "participating State or Territory" is defined in Schedule 2 (Interpretation) as a "State or Territory specified by the Minister in an instrument in writing for this clause." No agreement was reached with a state or territory until 2009[11] and, by consequence, no waiver was available for several years after the regulatory amendment. The current instrument is IMMI 09/131[12], which has operated since November 2009. It lists every state and territory in Australia apart from New South Wales, which I understand is still considering the scheme. In its submission to the Inquiry in December 2009 the NSW Government stated that "NSW agreed to participate in the scheme on 18 August 2009, subject to the finalisation of the MOU (Memorandum of Understanding with the Australian Government) and Guidelines."[13]

With respect to the scope of New South Wales residents to access a 4007 waiver now (I note that the Department has been offering to delay decision-making in New South Wales

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[9] DIAC submission p 12
[10] Refer, for example to Sub-Regulation 856.223(2)(ii)
[11] DIAC submission p12
[12] Federal Register of Legislative Instruments F2009L04254, 17 November 2009
[13] NSW Government Submission p6 accessed www.aph.gov.au/house/committee/mig

while the NSW Government decides whether to become a participating state[14]), the Regulations allow for waiver where an applicant does not reside in a participating State or Territory, but instead "proposes to reside" there. While such a proposal would need to be believable (presumably on account of the location of a job offer or relevant business being in a participating state or territory) New South Wales residents may conceivably be granted a 4007 waiver under the current scheme (as discussed below that for persons failing the health test for costs of less than AUD 100,000 no specific reference to the relevant state or territory government will be made under policy prior to such a decision being made). In this regard it is notable that the permanent resident visas within the scheme are not subject to any conditions (such as place of residence or employment) and that only the subclass 857 (Regional Sponsored Migration Scheme) visa is liable to be cancelled on account of a failure to commence or continue employment in the location specified in the visa application: refer section 137Q.[15] Therefore, a genuine proposal not realised may be sufficient under the scheme.

In addition, a visa applicant who is residing in a participating State or Territory at the time of visa processing does not at law need to establish that she or he will do so in the future. In such cases the Department has available a 4007 waiver which it may chose to exercise in the circumstances of the case.

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[14] DIAC submission p12

[15] If an applicant made a false statement in their visa application about their intentions s109 cancellation may come into play for any permanent resident visa, including those under the scheme.

Memorandums of Understanding

The Federal Government is in various stages of negotiation with participating state and Territory Government's regarding the terms of individual Memorandums of Understanding (MOUs). The MOUs are designed to formalise agreements between the Federal Government and participating States and Territories about how the scheme will operate, including matters such as mechanisms for transmission of information, service standards, reporting requirements, specific privacy law issues, the scope of comments to be provided by a participating State or Government and the text of the recommendation that the participating State or Government will provide. The MOUs have no legislative force and I understand that they will not form part of the Regulations or be included in PAM. However, it seems likely to me that a copy of the MOUs could be obtained through a *Freedom of Information* application.

The Operation of the Scheme

DIAC has developed a flowchart outlining the skilled health waiver decision-making process that it has adopted, which I have copied at Annexure A.

Onshore Skilled Sponsored Visas Only

Given the visas that this scheme covers, a 4007 waiver is only available for onshore applicants applying for onshore permanent resident visas. A Department delegate assessing these waiver applications explained to me that this fact (of the scheme only being available to onshore permanent resident applicants) underpinned a central question assessed by the Department in considering waiver applications in being, "What have they (the visa applicant) done in Australia?". The

Department anticipates that in most cases an applicant will be applying for residence after having spent time in Australia and being able to demonstrate what contribution they have made to Australia. The concern is not limited to a contribution across Australia at a national level. It may be expressed within a local context.

Unless there has been a change of circumstance for the main applicant or her or his family (such as the development of a health issue), that applicants are applying onshore will generally mean that the temporary visa held by the visa applicant has been granted on the basis of some sort of health waiver provision, or been recognized only since the last visa was granted (noting that medical examinations may not be required for a temporary visa). Usually the visa applicant/s will be in Australia on a sponsored 457 where the Minister has exercised a 4006A waiver after the Australian sponsoring employer has provided an undertaking to "meet all costs related to the disease or condition that causes" an applicant to fail the health test.[16]

Significantly, the terms of the 4006A waiver, where the critical assessment is made by the Australian employer, are completely different to the terms of a 4007 waiver where the

[16] Given that it is not a requirement for a primary 457 sponsored visa applicant to demonstrate that each member of his or her family passes the health test there will be cases where a primary 457 visa applicant may be in Australia without any form of health waiver having been exercised, even though they have a family member outside Australia who does not pass the health test. These non-citizens must obtain a health waiver to change to a permanent resident visa (even if the family unit member is not included in the permanent resident application) because the "one fail all fail test" applies for permanent resident applications.

Department assesses whether waiver is in the public interest. PAM directs that an assessment under 4007 requires a delegate to "weigh up the possible impact on the Australian community and the health care system of granting a visa against the underlying purpose of the visa subclass, the mitigating factors and the individual compassionate and compelling circumstances of the applicant." Unlike 4006A where a sponsoring employer, in effect, can be accepted as wiping out costs to the Australian community through an undertaking, 4007 requires all costs as assessed by the Medical Officer of the Commonwealth (which will include costs "regardless of whether the health care of community services will actually be used in connection with the applicant") to be weighed against "acceptable (being at an appropriate standard) and plausible actions to mitigate" care needs by sponsors or family members or others.

Broad Outline of Considerations Relevant to Waiver

While humanitarian, compelling or compassionate factors may be relevant in a particular case and would be a relevant factor for consideration of 4007 waiver, it is noteworthy that PAM directs a delegate to focus upon "the underlying purpose of the visa subclass". If the rationale of the immigration health test is to minimise costs to Australia and the Australian immigration system is directed towards maximising benefits to Australia it is logical that health waivers be assessed relative to other visa applicants of the same visa subclass. This is not only because the requirements of visa subclasses are designed to give effect to Government policies advancing the national interest, but also because the net benefit to Australia of a particular applicant with health costs will only be equivalent to the benefit of an applicant without health costs if

the benefit they provide (without taking into consideration health costs) is greater than that of an applicant without health costs- although quite apart from considerations of health costs there will be variations between applicants which are impractical to address or ignored by legislators and policy makers.

Given that the immigration health test is often primarily concerned with economic costs to the Australian community it is perhaps easier to undertake an analysis of net costs to the Australian community in the context of onshore skilled migration – which produces direct and quantifiable economic benefits.

Health Costs Assessed as Moderate

Waiver decisions under this skilled visa scheme are decided by a delegate without reference to the relevant State or Territory Government where:

- health care or community services costs are assessed by the Medical Officer of the Commonwealth as being less than AUD100,000; and
- the Medical Officer of the Commonwealth has not indicated that prejudice to access of services will be substantial or extensive.

I am not aware of any published Department policy specifically directed at such situations, but I understand the general approach of the Department to be that costs that are so limited are generally not considered undue in the circumstances of an onshore employer sponsored visa, given the significant economic contribution that such visa applicants make to Australia. In this regard I note that Access Economics

has assessed the net economic contribution of employer sponsored visa applicants to Australia as being significantly and consistently higher than any other visa category, being more than double (and up to three times) that of the business skills category over one to twenty years and being from more than double to approximately 30% more than independent skilled migrants varying over twenty years.[17]

The practical consequence of the Department's current approach for skilled non-citizens with work experience whose health costs (or those of a family member) have been assessed between $22,000[18] and $99,000 is that the difference between applying for permanent residence under the general skilled points test scheme and the employer nomination scheme is likely to be the difference between having no chance of obtaining permanent residence (apart from processing times!) to having extremely good prospects of permanent residence. Given the general approach of the Department there may be no imperative for such a non-citizen to inform their employer of a health condition relevant to them or their family because the waiver is likely to be exercised without intensive inquiry. However, this raises ethical considerations for lawyers acting for both a sponsor and applicant where we are in receipt of knowledge about a

[17] DIAC Submission p 20

[18] Costs are considered "significant" under the immigration health test "where a MOC assess that the potential cost of the applicant's disease or condition to the Australian community in terms of health care and community services are likely to be more than $21,000". "(T)his thresholds has been calculated on the average per capita health care and community service costs for Australian over a minimum of 5 years, plus a loading of 20% to take into account rapid increase in average expenditure on health and community services." Refer to DIAC Submission to Inquiry p9

visa applicant's or family member's health status and are requested not to disclose that information to the sponsor.

Substantial Health Costs or Prejudice

For visa applicants with an MOC opinion that costs will be equal to or greater than AUD100,000 and/or that the prejudice to access involved will be substantial or extensive the Department of Immigration will seek the opinion of the relevant state or territory government as to whether they will support a waiver of the health requirement.

Prior to this occurring the Department will send a letter to the visa applicant notifying them that they do not meet the health assessment and providing health waiver costing advice from the MOC. I attach at Annexure B a copy of a pro forma letter currently used in Victoria, which gives an indication of the content of letters that will be sent to visa applicants by the Department. The visa applicant is advised that the Department will consider waiver of the health requirement and request information from the visa applicant to assist in the assessment of waiver. The visa applicant is also informed that the information provided "may be disclosed to relevant State and Territory agencies in order for them to provide an opinion on whether a waiver of the need to meet the Health Requirement should be exercised in your case." The soliciting of an opinion from a separate government as to whether a legislative power should be exercised is a significant development in Department decision-making processes. While the Regulations contain numerous examples of where the Department must accept the opinion or assessment of a third party as to whether a legislative requirement is met (skills assessments and the health test being prominent

examples), this is a situation in which the Federal Government is, without specific legislative direction, constraining itself not to make a decision on a legislative requirement until after it has received (and taken into account) the view of a separate government.

The pro forma Victorian letter to applicants about potential waiver says, "If you wish to have a waiver of the need to meet the Health Requirement considered, please read, complete and return the attached Health Waiver Privacy Statement and Consent form." I understand that the consent form is primarily to protect the Federal Government in terms of providing visa applicant information to the Victorian Government, being the relevant participating state. I think there is a concern that the letter reads as though it is a condition that consent be given for the Department to assess a health waiver. In fact, for the Department to abide by its MOUs and to follow its processes it seems as though it is a requirement that this consent be given and the opinion sought. The potential difficulty is that there is no such legislative constraint upon the consideration of the health waiver power.

On the basis of informal discussions with a Department delegate I understand that participating states and territories have not set out what criteria or factors they will consider in forming their recommendation as to whether health costs are undue or not or that there will be any constraints upon the matters they consider. However, the Department generally aims to provide a broad range of information from a visa applicant to the relevant state or territory government for consideration. I note that PAM mentions a "Skilled waiver

submission template"[19] which presumably provides an outline of the information that is to be provided by the Department to participating State and Territory Governments. I think that this and other templates will be available through an application under the *Freedom of Information Act*.

Importantly, visa applicants do not receive an opportunity to make submission directly to a state or territory government. **All information from a visa applicant is provided to a state or territory government by the Department. The Department delegate exercises their discretion in relation to what information she or he decides should be provides.** There is no legislative direction as to whether this should be a short briefing note compared to that prepared by the Ministerial Intervention Unit for the Minister or the complete visa application. In practice it may be advantageous for visa applicants to provide to the Department a briefing note for the attention of the relevant state or territory government and request that the Department forward this in the form in which it is provided by the applicant. The critical point for acting lawyers to note is that the information that is received from an applicant by a state or territory government will be via the Department and that an applicant's potential to shape the information received by a state or territory government will be through submissions presented to the Department.

Nevertheless, applicants potentially have another means of influencing a state or territory government's view through political lobbying. An applicant may approach their local state or territory Member of Parliament and seek their support and the Member of Parliament may directly advocate for an

[19] Refer to Annexure C for specific reference

applicant with the state or territory government department assessing the waiver request.

Specific state examples

In Victoria the Department currently requests a wide range of information from applicants to be taken into account by the Department and which may be provided the Victorian Government. I understand that the Victorian Government has expressed interest in a broad range of factors.

The Department's current Victorian pro forma letter requests information about:

- the ability for the potential cost, care and level of prejudice of access to be mitigated including; evidence of assets and other income of all relevant adults (including home ownership, other property, investments, social security, investments, social security payments from overseas government, private superannuation etc);
- the skills that all relevant adults would be likely to contribute to Australia and/or the region the visa applicant resides, or proposes to reside in;
- English language skills of all applicants;
- occupational skills, qualifications and work history of all relevant adults;
- evidence of current employment or employment prospects for all relevant adults, supported by documents such as recent annual income advice or payslips;
- other potential skills or community contributions;

- care arrangements in place for the person with the identified medical condition or disease, or what are the proposed care arrangements;
- whether any other family member's ability to work is affected by the person's medical condition or disease (eg carer obligations);
- the willingness and ability of any relevant adult family members to provide care and support;
- the location and circumstances of all family members, including non migrating dependents, including, if applicable, information regarding what arrangements have been put in place for their care, and what is the likelihood of them ultimately applying to migrate to Australia;
- any established links to Australia, through family, extended periods of residence or community, professional or economic ties;
- factors prevent the visa applicant from returning to their own country, or another country;
- any other matter, including compassionate or compelling factors which the visa applicant considers relevant.

The New South Wales (NSW) Government envisages that decisions made in relation to NSW will result in a waiver where there is a "net benefit" to the Australian community, which can be understood as the "person's contribution to the Australian community offset by their cost to the taxpayers" and that an MOU and Guidelines being developed with the Australian Government "may assist in providing a model to assess **the economic and social contribution** of people with a disability **and their families** seeking to migrate to Australia"

(my emphasis).[20] Later on the Submission considers how a balance between costs and benefits may be achieved by reference to the terms of inquiry of the migration and disability inquiry.

The Submission mentions the following factors as relevant:

- an assessment of likely lifetime earnings based on the qualifications/profession of the individual and/or their family;
- the cost of producing an equivalent professional in Australia;
- the importance of the skills that the individual and/or their family would bring to the Australian economy, particular in key occupations where there are skill shortages;
- an intention to migration to an area where there are skills shortages for their particular occupation;
- any voluntary contribution of the individual and/or their family to the community, including membership of voluntary organizations; and
- any likely significant professional contribution in their field, including fields such as the arts, sport or science.

It would seem likely that the NSW Government will view these factors as relevant to a waiver assessment under the skilled visa scheme if it becomes a participating state.

In addition to the above costs and benefits the NSW Government considers the individual circumstances of the

[20] NSW Government Submission to Joint Standing Committee on Migration Inquiry Into the Migration Treatment of Disability p7 accessed at www.aph.gov.au/house/committee/mig

migrant and their family, including compassionate and compelling circumstances as relevant and, by way of example, cites the "draft Guidelines for the on-shore skilled visas waiver" as allowing for considerate of the following compassionate and compelling circumstances:

- established links to Australia (e.g. family, extended periods of residence or community, professional or economic ties);
- other links to or support in Australia;
- whether there are any Australian children who would be adversely impacted;
- factors preventing the applicant from returning to their own country or a third country. [21]

How DIAC considers State or Territory opinions

The Department receives an opinion from the relevant State or Territory Government as to whether they support a waiver. The text of the opinion is contained in the relevant MOU[22] and for Victoria I understand that it is an opinion in relation to whether costs are "undue", although I am yet to see the wording of the opinion. The opinion is accompanied by reasons. States and Territories have not made known what criteria or factors they will consider in forming an opinion, but to date I understand that Victoria has viewed skills shortages, the uniqueness of skills sets (such as incorporating professional skills with language skills and cultural understanding), whether an applicant's contribution will advance State development plans and the views of local community groups as relevant. It is not only personal

[21] NSW Submission p 12

[22] I note also that PAM mentions a template for a "Skilled waiver state opinion template". Refer to Annexure C

information about an applicant, but also reports and projections on economic and social issues affecting the relevant state or territory that will, therefore, be relevant to the State's assessment of whether health costs are undue. **Acting lawyers should consider what reports or assessments may be obtained or commissioned to substantiate claims as to the benefits a visa applicant will bring to a state or territory, with particular consideration being given to government plans and priorities.**

The Department delegate's legislative obligation is to form her or his own view as to whether or not a waiver should be exercised. Given the complexity of waiver decisions and the difficulty of defining the word "undue" there are potentially considerable difficulties for Department delegate's in interpreting and taking into account State or Territory opinions. By way of example, it would be difficult for a delegate to give meaning or weight to an unexplained opinion by a state or territory government that "costs are undue".

Particular issues arise if a delegate is considering not exercising the waiver power in the applicant's favour. Section 57 procedural fairness requirements[23] are of course relevant if the opinion of the State or Territory Government is against the applicant, but, with respect, PAM's explanation that, "To ensure natural justice is addressed, if the state or territory opinion does not support a health waiver, officers must notify the client of the state or territory's opinion and allow them the opportunity to comment on this opinion" is a wholly inadequate explanation of s57 requirements relevant to this scheme.

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[23] Separate natural justice provisions apply before the Migration Review Tribunal. Refer Division 5 Migration Act, ss357A- 367

"Relevant information" under s57 encompasses much more than the negative opinion of a state or territory. It would also include reasons provided by the state or territory which may influence the Department negatively (even if the overall opinion was positive) and it may include silence on the part of a state or territory about a particular matter, such as if the state or territory expresses support for some of the matters raised by an applicant, but is silent on other matters argued for by an applicant.

Furthermore, it is not only that "particulars of the relevant information" must be provided a visa applicant. The Department must also, "ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the consideration"[24]. For the Department to simply provide in full the opinion and reasons it has received from a state or territory without explanation as to why it is relevant to the consideration of the visa application would not be sufficient to meet the requirements of s57.

CONCLUSION

The onshore skilled health waiver scheme constitutes a new approach to the consideration of this public interest requirement, which allows for a broad range of factors to be taken into account in balancing the costs and benefits of sponsored skilled migration applicants. The significant role played by state and territory governments under the scheme is an obvious new feature in the assessment of public interest in this area. State and territory involvement can be justified on the basis that state and territory governments bear the

[24] S57(2)b)

majority of public hospital costs (at least until Prime Minister Rudd changes funding arrangements) and significant special education costs.[25] However, our immigration system is a constitutionally entrenched federal law system and visas constitute a permission to enter and remain in Australia generally with freedom of movement throughout Australia (with extremely limited qualifications). Arguably it is in the national interest that our immigration system be administered consistently throughout Australia.

The second salient feature of the skilled health waiver scheme is that it is for the most part operating outside of (whether unlawfully so will require a case by case consideration in the future) a legislative scheme. The legislation operates to provide the Minister with a broad 4007 waiver discretion once a visa applicant establishes a sufficient connection with a state or territory listed by gazette. The decision-making process that the Department has adopted is not required or supported by legislation.

As a final point, I observe that the consequences of the MOC's opinion not only in terms of whether or not the health test is met, but also the MOC's assessment of specific costs and/or prejudice has great significance under this scheme and given the importance of these assessments not only to whether the

[25] The Australian Government funded 39.2% public hospital costs in 2007-07 and state and territory governments 52.8%. Expenditure on welfare services by the Australian Government is approximately 40% and that of state and territory governments 2%. These estimates are from DIAC Submission p19. The New South Wales Government estimates that the cost of providing education services to a student with a disability in a NSW Government School is approximately $17,856 to $43, 797 per annum based upon 2008-2009 salary rates: refer NSW Government Submission p 10

AUD100,000 amount is met, but also because the nature and purpose of the relevant skilled visas encourages a direct cost/benefit analysis (particularly in comparison with humanitarian and family visas where less quantifiable compelling and compassionate humanitarian reasons feature strongly). That costs must be offset under a cost/benefit analysis emphasises the significance of short-comings in terms of the transparency, soundness and reasoning of MOC assessments- which have been strongly criticised by various organisations and individuals during the Inquiry into disability and migration.[26]

At the very least legislative amendment should be undertaken to require the MOC to provide reasons for an opinion. Currently there is no legislative requirement for the MOC to provide reasons[27] and the legislative scheme does not require the MOC to quantify costs, but only to form her or his own opinion about whether costs are significant.[28] However, it has

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[26] The lack of any meaningful review of an MOC assessment was a focus of strong criticism as well as lack of consistency in decision-making, absence of definitions and use of inconsistent definitions and an absence of detailed reasons and explanations from the MOC to support meaningful response from applicants. Refer, for example, Submission of the Immigration Advice and Rights Centre (IARC) pp 12-15, Submission National Ethnic Disability Alliance p19 and to the transcript of public hearings of Thursday 12 November 2009 recording oral submissions of Mr Brian Kelleher of the Migration Institute of Australia.
Support for the Canadian health assessment process, which requires two or more concurring medical opinions was voiced by submissions to the Inquiry "in recognition of the subjective nature" health assessments. Refer Submission of the Immigration Advice and Rights Centre (IARC) p 7 and Advice Dr Ben Saul, The University of Sydney, attached to Submission of National Ethnic Disability Alliance at paragraphs 40-41

[27] Refer *Ramlu v Minister for Immigration and Anor* [2005] FMCA 1735

[28] Refer *Blair v Minister for Immigration and Multicultural and Indigenous Affairs* [2001] FCA 1014 paragraph 46

been found that there is a requirement that the MOC opinion be sufficiently specific that the delegate or MRT is informed as to what the disease is to which the public interest criteria relate and the level of the disease.[29] For the Department's current policy to work there will need to be at least an informal arrangement between the Department and MOC for provision of a specific costs assessment in onshore skilled cases and this may be the subject of a second opinion by the visa applicant's expert, which may be used to challenge the validity of the MOC opinion[30], seek review of the opinion or constitute evidence relevant to consideration of a waiver[31]. Much more than an informal arrangement is required for a sound, transparent and accountable decision-making process.

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[29] Refer *Ramlu v Minister for Immigration and Anor* [2005] FMCA 1735

[30] An MOC opinion will not be invalid because it conflicts with medical evidence submitted on behalf of an applicant: *Blair v Minister for Immigration and Multicultural and Indigenous Affairs* at paragraph 33. However, an opinion must be reasonably formed, although establishing that an opinion is arbitrary or capricious is a difficult threshold to meet: *Blair v Minister for Immigration and Multicultural and Indigenous Affairs* In addition the MOC must assess the specific level of a condition suffered by an applicant: *Robinson v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1626

[31] While the Department is bound by the opinion of the MOC and must assess a waiver against the MOC assessment a waiver consideration will take into account mitigation of care requirements and medical evidence from applicants may assist in establishing that arrangements are acceptable and plausible in the circumstances of a particular case.