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Committee Secretary
Legal and Constitutional Affairs References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email to: legcon.sen@aph.gov.au

Dear Committee Secretary

Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the effectiveness of the current temporary skilled visa system in targeting genuine skills shortages

1. Estrin Saul Lawyers welcomes the opportunity to provide a submission to the Senate's Legal and Constitutional Affairs References Committee Inquiry into the effectiveness of the current temporary skilled visa system (**Inquiry**).

Introduction

2. This submission addresses the effectiveness of the current temporary skilled visa system in targeting genuine skills shortages, focusing on part (g) of the Committee's terms of reference, 'related matters'.¹
3. Specifically, this submission addresses issues facing skilled migrants with a disability (or with family members with a disability) who wish to temporarily stay and work in Australia under the current temporary skilled visa system. With specific reference to Public Interest Criterion (**PIC**) 4007 in schedule 4 of the *Migration Regulations 1994* (**Regulations**), as it relates to applicants for temporary skilled visa applicants, this submission addresses the health requirement and the application of the health waiver set out in PIC 4007 and the Procedures Advice Manual (**Policy**).
4. Our firm has seen several examples of how the current framework has thwarted the efforts of Australian businesses, academic institutions and health service providers to attract the best candidates for the proposed role.

¹ In discussing (g), 'related matters', it is worth referring to point (e), with its focus on 'wages and conditions and access to information about rights and protections'. The health provisions attached to the temporary skilled visa program mean that abuse of rights, and associated lack of access to information relating to rights and protections begins when applicants first apply for a visa, before the visa is granted.

5. Such examples include:
 - a) a regional neurological services provider being unable to secure TSS visas for the family of a highly skilled social worker;
 - b) a lithium company being unable to hire a brine specialist at short notice from overseas because her child has severe autism; and
 - c) a world-renowned economist currently holding a subclass 457 visa being unable to continue working in Australia because of an onshore diagnosis of multiple sclerosis.

6. The health waiver to item 4007 of the Regulations, set out at subitem 4007(2) in Schedule 4 of the Regulations, is as follows:

The Minister may waive the requirements of subitem (1)(c) if:

 - (a) the applicant satisfies all other criteria for the grant of the visa applied for; and
 - (b) the Minister is satisfied that the granting of the visa would be unlikely to result in:
 - (i) undue cost to the Australian community; or
 - (ii) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.

7. This submission argues that the process whereby the request for a waiver is currently dealt with under Policy is a misapplication of the requirements of the Regulations. It further demonstrates that this practice has adverse outcomes, namely:
 - a. it is unfair and detrimental to applicants for the subclass 482 visa, known as the Temporary Skills Shortage (**TSS**) visa;
 - b. it results in fully qualified and skilled applicants for the TSS visa, who satisfy all other criteria for the visa, being denied a visa, despite the fact that notional costs attributed to them cannot accrue; and
 - c. it unnecessarily limits the capacity of the current temporary skilled visa system to fill genuine skills shortage by unjustifiably limiting qualified visa applicants from obtaining visas.

PIC 4007 health requirement and the TSS visa

Migration legislation and the health requirement

8. The Joint Standing Committee on Migration's June 2010 report on the Inquiry into the Migration Treatment of Disability entitled *Enabling Australia: Inquiry into the Migration Treatment of Disability*, explained that:

Migrants to Australia have to meet Health Requirements in order to be eligible for certain visa classes of entry. These requirements aim to minimise the burden of planned migration on the health care system, to prevent the spread of contagious diseases, and to protect Australia's record of good health.²

9. Applicants for a TSS visa, both primary and secondary, are required to meet PIC 4007, set out at Schedule 4 to the Regulations, which relates to both public health and to potential costs to the Australian community.
10. Item 4007 to schedule 4 of the Regulations states in part:
 - (1) The applicant:
 - (a) is free from tuberculosis; and
 - (b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
 - (c) ... is free from a disease or condition in relation to which:
 - (i) a person who has it would be likely to:
 - (A) require health care or community services; or
 - (B) meet the medical criteria for the provision of a community service;
 - (ii) **the provision** of the health care or community services would be likely to:
 - (A) result in a significant cost to the Australian community in the areas of health care and community services; or
 - (B) prejudice the access of an Australian citizen or permanent resident to health care or community services;

[emphasis added]

11. As outlined above, subitem 4007(2) in Schedule 4 of the Regulation permits the Minister to waive or set aside the Health Requirement in certain circumstances.

Health care and community services

12. Public health aspects set out at subitems 4007(1)(a) and 4007(1)(b) in Schedule 4 of the Regulations are not the focus of this discussion. The focus here is on 'costs to the community' as set out at subitems 4007(1)(c)(i) and 4007(c)(ii).

²The Parliament of the Commonwealth of Australia, *Enabling Australia. Inquiry into the Migration Treatment of Disability*, Joint Standing Committee on Migration, Canberra, June 2010, 2.6 Migration legislation and the health requirement

13. Under reg 1.03 of the Regulations, 'community services' includes the provision of an Australian social security benefit, allowance or pension.
14. Education services are not included under 'community services' as defined under reg 1.03 of the Regulations and are only costed on the basis of Policy, but are generally included in assessing a visa applicant's likelihood of meeting the health requirement.
15. As set out in subitems 4007(1)(c)(i) and 4007(c)(ii), the costs of an applicant for a visa should be assessed by the Medical Officer of the Commonwealth (**MOC**) on the basis of whether the provision of community and health services for an applicant would be likely to result in a significant cost 'regardless of whether the health care or community services will actually be used in connection with the applicant'.
16. 'Significant cost' is set out in Policy as \$40,000 over the relevant period prescribed under the Regulations and Policy.
17. In practice, the MOC does not assess whether or not the provision of services would be likely to result in a cost to the community. The MOC assesses the costs of an applicant on the basis of the costs of a hypothetical person with a similar condition at the same level of severity who would use those services. This is the 'hypothetical person' test derived from the Federal Court judgment in *Robinson v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1626 (**Robinson**).
18. Under reg 2.25A(3) of the Regulations, when assessing whether or not an applicant meets the health requirement

The Minister is to take the opinion of the Medical Officer of the Commonwealth... to be correct for the purposes of deciding whether a person meets a requirement or satisfies a criterion.

The TSS visa

19. The TSS visa, as the name indicates, is a temporary visa. All streams within the subclass are subject to PIC 4007, which permits visa applicants who fail to meet the health requirement to apply for a waiver of that requirement.
20. Primary or secondary applicants with a disability or health issue will typically fail the health requirement on the basis of possible costs in the area of health, State and Commonwealth disability services or special education.
21. When delegates consider an application for a waiver, in line with policy direction on waivers as set out in Policy, attention focuses on whether costs may be considered 'undue', particularly in line with the notion of 'compassionate and compelling circumstances', which, under Policy, might tip the balance when considering whether or not costs are 'undue'.

22. In other words, delegates and decision makers focus on the second limb of item 4007(2)(b), namely:

- (2) The Minister may waive the requirements... if
 - (b) ...the granting of the visa would be unlikely to result in:
 - (i) **undue cost** ...

[emphasis added]:

23. This approach, however, is at the expense of the first limb of 4007(2)(b), namely:

- (2) The Minister may waive the requirements... if
 - (b) **the granting of the visa** would be unlikely to result in:
 - (i) undue cost ...

[emphasis added]

24. Delegates should properly look first at the question of whether or not the grant of a visa in itself can actually lead to a cost to the Australian community.

Entitlement to health and community services

25. Entitlement to Medicare is set out under section 3 of the *Health Insurance Act 1973* (Cth), and is extended to those who meet the definition of 'Australian resident' as defined under that Act, at s.3(d), namely:

- [a] person ... who is lawfully present in Australia and whose continued presence in Australia **is not subject to any limitation as to time imposed by law**

[emphasis added]

26. Such a person is considered to be an Australian resident for the purposes of the *Health Insurance Act 1973* (Cth) and hence is eligible for Medicare.

27. Importantly, under the *Health Insurance Act 1973* (Cth), the holder of a substantive temporary visa whose presence in Australia is 'subject to any limitations as to time imposed by law' does not meet the definition of Australian resident and is not eligible for Medicare.

28. Further, since access to subsidised drugs and medication under the Pharmaceutical Benefits Scheme (**PBS**) is restricted to holders of a Medicare card, the holder of a temporary visa cannot access this publicly funded scheme and needs to pay full price for any medications they obtain while in Australia.

29. The holder of the TSS visa is the holder of a substantive temporary visa subject to time limits. The holder of the TSS visa and their family members are not eligible for Medicare, nor for PBS.

30. Further as a condition of their visa, the holder of the TSS visa is required to provide evidence of 'adequate' health insurance. Consequently, medical and health care costs to the community cannot arise on the basis of the grant of a TSS visa.

State disability services

31. Eligibility for State disability services is subject to State government legislation and most, if not all States and Territories, apply the usual criteria for eligibility: namely that to be eligible a person must be an Australia citizen, permanent resident, or eligible New Zealand citizen.
32. Temporary residents such as holders of a TSS visa and their family members are therefore ineligible for State disability services. Consequently, community costs for State disability services cannot arise as the result of the grant of a TSS visa.

National Disability Insurance Scheme

33. State disability support services will soon be largely subsumed under the new Commonwealth National Disability Insurance Scheme (**NDIS**).
34. Eligibility for NDIS services is subject to age, disability and residence requirements. The residence requirement stipulates that eligibility is confined to Australian residents, defined as those who live in Australia and are either Australian citizens, permanent residents, or protected NZ citizens.³
35. Temporary residents such as holders of a TSS visa and their family members are ineligible for NDIS services. Consequently, community costs for State disability services cannot arise as the result of the grant of a TSS visa.

Education services

36. Cost of education is subject to the requirements of individual State governments, but it is notable that States do not distinguish between regular (or mainstream) and 'special' education in policies relating to charging temporary residents for educational services. Both mainstream and special education are treated indiscriminately by State governments since State governments, unlike the *Migration Act 1958*, are subject to disability discrimination legislation.⁴
37. The States differ on this, but most States will charge the holders of temporary visas, such as the TSS or the student visa, a direct fee for the schooling of family members. This fee is levied regardless of whether or not a child seeks mainstream or special education; although the amount to be paid may depend on whether or not mainstream or special education is required. Similarly, the amount charged will differ depending on whether a child attends a primary or secondary State school.

³ 'Access criteria' for eligibility for NDIS are legislated in the *National Disability Insurance Scheme Act 2013* (Cth) and supplementary *National Disability Insurance Scheme (Becoming a Participant) Rules 2016*.

⁴ Section 52 of the *Disability Discrimination Act 1992* (Cth) (**DDA**) exempts the *Migration Act 1958* (Cth) and any actions undertaken under the provisions of that Act from the DDA.

38. For example, in Western Australia, a holder of a subclass 457 visa (the TSS' predecessor) is required to pay a fee for their children's education, regardless of whether it is regular or special education; whereas in Queensland, holders of most temporary visas will pay fees to cover the costs of education with an additional fee charged for special education.
39. Consequently, the cost of special education is not automatically a charge against the community but is dependent on the location of the temporary visa holder. The cost of special education can accrue to the community as the result of the grant of a temporary resident visa only if that visa holder intends to live in a State which does not charge a temporary resident for education services.
40. The holder of a TSS visa is tied to an employer and to a location. Since the possible cost of special education is dependent solely on the education policy prevailing in the State in which the visa applicant intends to reside, any notional costs attributed to the applicant for a TSS visa should be automatically considered at waiver stage and assessed on the basis of the policy prevailing in the relevant State.
41. The blanket attribution of costs to TSS applicants in all States who fail the health requirement on the basis of special education costs is unfair and unjustified.

Commonwealth disability services

42. The above discussion of eligibility for health and community services indicates that most of the services generally assessed by the MOC when considering whether a visa applicant meets or fails the health requirement are simply not accessible to the holder of a temporary visa.
43. To a limited degree, this has been acknowledged legislatively, with regard to Commonwealth disability services at least, in *Migration Legislation Amendment Regulations 2011 (No.1)*, which sets out that certain Commonwealth disability services should not be costed by the MOC for certain temporary visas. This Amendment provides clear evidence of legislative intent relating to the unfairness of costing temporary visa applicants for community services which they cannot access as temporary residents, or which cannot become a cost to the community because of the particular conditions of some temporary visas.
44. This Amendment came about in response to concerns about *Robinson* and the hypothetical person test. The decision in *Robinson* sets out that the MOC must assess health and community costs, not on the basis of the individual's particular circumstances, but in terms of a hypothetical person with a condition of the same type and severity as the applicant.
45. These changes are documented in IMMI 11/073. The relevant Explanatory Statement sets out the logic of this position and the judicial intent behind it very clearly, directing the MOC not to cost certain services, and noting that '[t]he Instrument operates to list health care and community services that **a temporary visa applicant would be unlikely to be able to access** while in Australia'⁵ [emphasis added].

⁵ Explanatory Statement to IMMI 11/073 dated 3 Nov 2011

46. This is set out in greater detail in *Migration Legislation Amendment Regulations 2011 (No.1)*, Preamble:

...Despite having a significant medical condition, the costs of this condition would not be passed on to the Australian community, as the [applicant for a temporary visa] **would not be eligible for the services** and therefore **would be expected to pay** for any services required either personally or through a health insurance scheme, for example.

It certainly would not seem fair or reasonable... to refuse to grant a temporary visa to an applicant with a disability, or an elderly applicant, on the basis of services that they would not be eligible for when in Australia (due to the type of visa they are applying for and would hold if granted)...

[Emphasis added]

47. As a consequence of IMMI 11/073, Commonwealth disability services have largely been excluded from consideration by the MOC for certain temporary visa applicants. This establishes an important principle: that services that the holder of a temporary visa would be unable to access, should not be costed. But other costs, for example, health costs, are not specifically excluded under IMMI 11/073.
48. There is no logical or justifiable reason why health costs should not be excluded, on the basis of the *Health Insurance Act 1973* (Cth) discussed above. Nor is there any logical reason why the cost of the new NDIS should not also be excluded for applicants for the TSS visa.
49. Further, there is no logical reason why costs which must be covered by the visa holder as a condition of their visa status should not be excluded, as was also noted in the preamble to the *Migration Legislation Amendment Regulations 2011 (No.1)*.

Recommendations

50. This submission has argued that the process whereby the request for a waiver is currently dealt with under Policy is a misapplication of the requirements of the Regulations. Further, while the current approach to assessment of costs by the MOC is in line with existing legislation, it is at odds with the principle of logical and reasonable treatment of health costs established in *Migration Legislation Amendment Regulations, 2011 (No.1)*.
51. These two factors combined lead to an outcome for those with health or disability issues which:
- Is unfair and detrimental to applicants for the TSS visa;
 - results in fully qualified and skilled applicants for the TSS, who satisfy all other criteria for the visa, being denied a visa; and
 - limits the capacity of the current temporary skilled visa system to fill genuine skills shortage, by preventing qualified visa applicants from obtaining visas on the spurious grounds of health costs which cannot accrue.

52. The holder of the TSS visa:
- a. is not eligible for community-funded health care, nor PBS;
 - b. is required to maintain private health insurance;
 - c. is not eligible for Commonwealth nor State disability services;
 - d. is not eligible for NDIS; and
 - e. in many cases is required to cover their own costs for education, including special education.

Consequently, the grant of the TSS visa cannot lead to costs to the community in those areas.

53. We therefore make the following recommendations to the Committee:
1. In line with the principle relating to Commonwealth-funded services established in *Migration Legislation Amendment Regulations 2011 (No.1)*, the MOC should be directed to disregard all Commonwealth government costs such as health care, pharmaceuticals and NDIS, at the health assessment stage.
 2. On the basis of the first limb of subitem 4007(2)(b) of Schedule 4 of the Regulations, delegates should be instructed to automatically disregard any costs attributed to the visa applicant by the MOC in the areas of health, State and Commonwealth or NDIS services for the purpose of the exercise of waiver.
 3. Delegates should consider in which State a TSS visa applicant intends to reside before assessing whether or not notional costs for special education could become a charge on the community.
54. Should the Committee require any further information in relation to this submission, please contact Jan Gothard on _____ or by email _____

Yours faithfully,

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