EXPLANATORY STATEMENT

Issued by the Minister for Immigration and Multicultural Affairs

Migration Act 1958

Migration Amendment (Public Interest Criteria 4005 and 4007) Regulations 2024

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

The *Migration Amendment (Public Interest Criteria 4005 and 4007) Regulations 2024* (the Amendment Regulations) amends paragraphs 4005(1)(c) and 4007(1)(c) of Schedule 4 to the *Migration Regulations 1994* (the Migration Regulations) so that a minor visa applicant born and ordinarily resident in Australia, is not required to satisfy the Minister that they are free from a disease or condition which would necessitate the provision of health care or community services, where that would result in a significant cost to the Australian community or prejudice the access of an Australian citizen or permanent resident to that health care or community service.

Subject to sections 84 and 86 of the Migration Act, section 65 of the Migration Act requires the Minister to grant a visa if the Minister is satisfied that:

- the health criteria for the valid visa application have been satisfied; and
- other criteria for the visa prescribed by the Migration Act or the regulations have been satisfied; and
- the grant of the visa is not prevented by sections 40 (circumstances when granted), 91W (evidence of identity and bogus documents), 91WA (bogus documents and destroying identity documents), 91WB (applications for protection visas by members of same family unit), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and
- any visa application charge payable in relation to the application has been paid.

Section 84 of the Migration Act provides the Minister the power to suspend processing of visa applications, and section 86 allows the Minister to determine limitations on the number of visas that can be granted in a financial year. Subsection 5(1) of the Migration Act defines ‘health criterion’ in relation to a visa to mean a prescribed criterion for the visa that:

- relates to the applicant or the members of the family unit of that applicant; and
- deals with a prescribed disease, physical or mental condition, kind of examination or treatment.

Public interest criteria in Part 1 of Schedule 4 to the Migration Regulations, in particular, clauses 4005 and 4007, provide details of migration health requirements that visa applicants must satisfy in order for the Minister to grant or refuse to grant their visa application. Prior to the Amendment Regulations,

paragraphs 4005(1)(c) and 4007(1)(c) of Schedule 4 of the Migration Regulations required the visa applicant to be free from a disease or condition in relation to which the person would be likely to require health care or meet the medical criteria for provision of a community services that would result in a significant cost to the Australian community or prejudice the access of an Australian citizen or permanent resident to health care or community services. This assessment must be conducted regardless of whether the health care or community services will in fact be used by the visa applicant.

The Amendment Regulations form part of the Australian Government's response to the final report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability (Disability Royal Commission Report). The Disability Royal Commission Report was published in September 2023, and recommended the Australian Government to review the existing migration practice and to eliminate or minimise disadvantages against people with disability seeking to settle in Australia. In April 2024, the Department of Home Affairs released the '*Report into its Review of the Migration Health Requirement and Australia's visa Significant Cost Threshold*', which proposed that child visa applicants born and living in Australia with a health condition or disability should be given special consideration within the migration health requirement due to their inherent connection to Australia since birth. Later in July 2024, the Australian Government released its final response to the Disability Royal Commission Report, proposing to amend the Migration Regulations to enable special consideration for child visa applicants born and living in Australia with a health condition or disability.

The Amendment Regulations implement the Australian Government's commitment made in the final response to the Royal Commission's report by ultimately allowing a minor visa applicant born and who ordinarily resides in Australia with a health condition and/or a disability to no longer be disadvantaged as part of their visa grant process solely due to that health condition or disability, and ensure fair and equal opportunity for settlement in Australia. The Amendment Regulations do not affect requirements all other minors with a disability or health condition must meet.

The Amendment Regulations also benefit visa applicants who are the parents or carers of a minor visa applicant born and ordinarily resident in Australia with a disability or a health condition, who would otherwise not satisfy the criteria for their visa only as a result of their child having that disability or health condition and not meeting paragraphs 4005(1)(c) or 4007(1)(c). Importantly, the Amendment Regulations do not provide an exemption to the whole of clauses 4005 and 4007 of Schedule 4 to the Migration Regulations or to other visa criteria.

The matters dealt with in the Amendment Regulations are appropriate for implementation in regulations rather than by parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed valid application requirements in the Migration Regulations rather than in the Migration Act itself, with the Migration Act also providing such authority in the provisions listed in Attachment A.

The current Migration Regulations have been in place since 1994, when they replaced regulations made in 1989 and 1993. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to effectively manage the operation of a citizen or a non-citizen's entry into Australia and respond quickly to emerging needs.

A Statement of Compatibility with Human Rights has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011.* The overall assessment is that the amending Regulations are compatible with human rights, with a copy of the Statement being available at Attachment B.

The Office of Impact Analysis (OIA) has been consulted in relation to the amendments, advising that no Impact Analysis is required. OIA consultation reference number is OIA24-06510.

Section 17 of the *Legislation Act 2003* (the Legislation Act) provides that the rule-maker must be satisfied that there has been consultation undertaken that is appropriate and reasonably practicable before making a legislative instrument. Information concerning consultation undertaken by the Department of Home Affairs in developing the Amendment Regulations is set out in Attachment C.

The Migration Regulations are exempt from sunsetting under table item 38A of section 12 of the *Legislation (Exemptions and Other Matters) Regulations 2015*. The Migration Regulations are exempt from sunsetting on the basis that the repeal and remaking of the Migration Regulations:

- is unnecessary as the Migration Regulations are regularly amended numerous times each year to update policy settings for immigration programs; and

- would demand complicated and costly training and operational changes that would impose significant strain on Government resources and the Australian public for insignificant gain, while not advancing the aims of the Legislation Act.

The Amendment Regulations are a legislative instrument for the purposes of the Legislation Act.

The Amendment Regulations commence on the day after registration on the Federal Register of Legislation. Further details of the Amendment Regulations are set out in Attachment D.

ATTACHMENT A

The following provisions of the *Migration Act 1958* (the Migration Act) provide the authority for making this Amendment Regulations:

- subsection 504(1) provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act;

- subsection 5(1), which defines 'health criterion' in relation to a visa to mean a prescribed criterion for the visa that relates to the applicant or the members of the family unit of that applicant, and deals with a prescribed disease, physical or mental condition, kind of examination or treatment; and

- subsection 31(3) allow regulations to prescribe criteria for a visa of a specified class.

ATTACHMENT B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration Amendment (Public Interest Criteria 4005 and 4007) Regulations 2024

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

Purpose of the migration health requirement

Most visa applicants are required to satisfy the migration health requirements in either Public Interest Criterion (PIC) 4005 or PIC 4007 in Schedule 4 to the *Migration Regulations 1994* (the Migration Regulations) in order to be granted a visa to enter and/or remain in Australia. The migration health requirements set out in these PICs, in particular paragraphs 4005(1)(c) and 4007(1)(c) of Schedule 4 to the Migration Regulations, require, among other things, that the visa applicant be free from a disease or condition in relation to which:

- a person who has it would be likely to require health care or meet the medical criteria for provision of a community service, and
- the provision of the health care or community services would result in a significant cost to the Australian community or prejudice the access of an Australian citizen or permanent resident to health care or community services.

These assessments are based on a hypothetical person rather than on whether the health care or community services will in fact be used by the visa applicant.

The aims of the migration health requirements are to:

- protect the Australian community from public health and safety risks;
- contain public expenditure on health care and community services; and
- safeguard the access of Australian citizens and permanent residents to health care and community services that are in short supply (currently this is dialysis and organ transplants).

Objective of the Disallowable Legislative Instrument

This Disallowable Legislative Instrument, the *Migration Amendment (Public Interest Criteria 4005 and 4007) Regulations 2024* (the Amendment Regulations), amends PIC 4005 and PIC 4007 to no longer require those visa applicants who are children born and ordinarily resident in Australia to satisfy the criteria that they be free from a disease or condition that would result in a significant cost to the Australian community or prejudice the access of an Australian citizen or permanent resident to health care or community services.

The objective of this amendment is to reform the migration health requirement to be fairer, more inclusive and minimise discrimination for Australian-born minor visa applicants with a health condition or disability. The Amendment Regulations form part of the Australian Government's

response to the final report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability (Disability Royal Commission Report).

Targeted and public consultations demonstrated that the community's expectation is that minor visa applicants born and ordinarily resident in Australia with a health condition or disability should receive special consideration in the application of the migration health requirement, due to their inherent connection to the Australian community since birth.

The amendment applies to both new visa applications and on-hand applications, including those currently under merits review. This is to ensure the amendment maximise the benefits of this measure for affected families.

Human rights implications

This Disallowable Legislative Instrument may engage the following rights:

- Rights of persons with disabilities under the *Convention on the Rights of the Persons with Disabilities* (CRPD), in particular in relation to freedom of movement in Article 18.

- Rights of children under the *Convention on the Rights of the Child* (CRC), in particular in relation to children with disabilities in Article 23.

- Non-discrimination under the CRPD, and under Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR).

Rights of persons with disabilities

Article 18 of the CRPD states, in part:

> *1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities: […]*
>
> > *(b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement; […]*

The amendment removes a potential barrier to obtaining a temporary or permanent visa for non-citizen minor born in and ordinarily resident in Australia, who have a health condition or disability. Prior to this amendment, these children, despite being born and ordinarily residing in Australia, would have been unable to meet PIC 4005 or PIC 4007 for the grant of a visa, if their health condition or disability would have resulted in significant cost to the Australian community or prejudice the access of Australian citizens and permanent residents to certain health services in short supply. These barriers were usually experienced by temporary visa holder families when applying for a permanent visa to remain in Australia.

The application of PIC 4005 or PIC 4007 acted not only as a barrier to permanent residency for these children and their families but also meant they were not able to benefit from the National Disability Insurance Scheme (NDIS) which is available to Australian citizens and permanent residents. By removing this barrier to permanent residency for these non-citizen minors, this measure means that, if granted a permanent visa, these children could have greater opportunities to access publicly funded

early intervention disability supports (such as those provided through the NDIS). These supports are important for the child's development and meaningful participation in all aspects of their future life.

The amendment positively engages human rights under the CRPD by ameliorating health-related immigration barriers for minor visa applicants born and ordinarily resident in Australia with a health condition or disability, as well as their parents who are applying for a visa with them. The amendment supports the ability of such children to remain in Australia on an equal basis with minor visa applicants born and ordinarily resident in Australia without a health condition or disability. Further, where such children and their families are ultimately granted permanent residence, this amendment supports access of the child and their family to a broader range of publicly-funded development, safety and well-being supports, thereby supporting a broad range of rights under the CRPD, for example those in Article 26 relating to rehabilitation.

Rights of children

Article 23 of the CRC states, in part:

> *1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.*
>
> *2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.*
>
> *3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development […]*

The amendments made by the Amendment Regulations have the effect that those visa applicants who are non-citizen minors born and ordinarily resident in Australia will no longer be prevented from meeting the migration health requirement if their health condition or disability would have resulted in significant cost or prejudice the access of Australian citizens and permanent residents to certain health services in short supply. As noted above, by removing an aspect of the migration health requirement that acted as a barrier to permanent residency for non-citizen minors born and ordinarily resident in Australia with a disability or health condition, this measure means that, after being granted a permanent visa, these children will have access to publicly funded disability supports (such as those provided through the NDIS). This supports their rights under Article 23 of the CRC as well as other rights such as those in Article 24 relating to health.

Non-discrimination

The CRPD requires countries to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disability without discrimination of any kind on the basis of their disability.

Article 26 of the ICCPR states:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The amendment is a beneficial measure for non-citizen minors with disabilities and/or health conditions who were born and are ordinarily resident in Australia.

Targeted and public consultation indicated concern that minor visa applicants born and ordinarily resident in Australia suffered discrimination by experiencing immigration barriers by virtue of their health condition or disability. The consultations demonstrated that the community's expectation is that minor visa applicants born and ordinarily resident in Australia with a health condition or disability should receive special consideration in the application of the migration health requirement, due to their inherent connection to the Australian community since birth.

The Amendment Regulations implement the Australian Government's commitment made in the final response to the Disability Royal Commission Report by allowing a non-citizen minor visa applicant born and who ordinarily resides in Australia with a health condition and/or a disability to no longer be ineligible to be granted a visa solely due to having a health condition or disability that would have resulted in significant cost to the Australian community or prejudice the access of Australian citizens and permanent residents to certain health services in short supply. This helps ensure a fair and equal opportunity for these children and their families to remain in Australia, including on a permanent basis, and promotes their rights relating to non-discrimination.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights.

The Hon Tony Burke MP

Minister for Immigration and Multicultural Affairs

ATTACHMENT C

The Department of Home Affairs (the Department) consulted with the following Commonwealth Government agencies on the Amendment Regulations:

- the Department of Social Services;
- the Department of Health and Aged Care; and
- the National Disability Insurance Agency.

The following State and Territory Government agencies were consulted on the Amendment Regulations:

- Health Departments of New South Wales, Victoria, Queensland, Tasmania, South Australia, Western Australia, the Australian Capital Territory and Northern Territory;
- Education Departments of New South Wales, Victoria and Queensland; and
- Treasury of New South Wales, Victoria, Tasmania, South Australia, the Australian Capital Territory and Northern Territory.

The following non-Government organisations were consulted in relation to the Amendment Regulations:

- People with Disability Australia;
- Down Syndrome Australia;
- Welcoming Disability; and
- Australian Lawyers for Human Rights.

Public consultation conducted by the Department also occurred in November 2023. The Department released its review after the consultation in April 2024.

Feedback on the changes was positive from all consultations, with minimal risks being identified.

ATTACHMENT D

Details of the *Migration Amendment (Public Interest Criteria 4005 and 4007) Regulations 2024*

Section 1 – Name

This section provides that the title of this instrument is the *Migration Amendment (Public Interest Criteria 4005 and 4007) Regulations 2024* (the Amendment Regulations).

Section 2 – Commencement

This section provides for the commencement of the provisions in the Amendment Regulations.

Subsection 2(1) states that each provision of the Regulations specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. The effect of this is that the Amendment Regulations will commence in their entirety on the day after registration on the Federal Register of Legislation.

A note at the foot of the table under subsection 2(1) explains that the table relates only to the provisions of the Amendment Regulations as originally made, and will not be amended to deal with any later amendments to the Amendment Regulations.

Subsection 2(2) provides that any information in column 3 of the table is not part of the Amendment Regulations.

Section 3 – Authority

This section provides that the Amendment Regulations are made under the *Migration Act 1958* (the Migration Act).

Section 4 – Schedules

This section provides for how the amendments in the Amendment Regulations operate.

Schedule 1 – Amendments

Migration Regulations 1994

Item [1] – Paragraph 4005(1)(c) of Schedule 4

Item 1 amends paragraph 4005(1)(c) of Schedule 4 to the *Migration Regulations 1994* (the Migration Regulations) so that a minor visa applicant born and ordinarily resident in Australia is not required to satisfy the Minister that they are free from a disease or condition in relation to which:

(i) a person would require, or meet the medical criteria that would require provision of, health care or community services; and
(ii) the provision of the health care or community service would result in a significant cost to the Australian community, or prejudice the access to health care or community service of an Australian citizen or permanent resident.

The amendments made by item 1 benefit minor visa applicants born in and is ordinarily resident in Australia with a disability or health condition as they can meet paragraph 4005(1)(c) despite their disability and be granted a visa by the Minister, if that was the only reason why the visa application would otherwise be refused. The child, as either a primary or secondary visa applicant, must still meet all other requirements to be granted the visa, including all other requirements under clauses 4005 and 4007. The item does not benefit all minors with a disability or health condition, but rather only those born in and ordinarily resident in Australia.

Item [2] – Paragraph 4007(1)(c) of Schedule 4

Item 2 amends paragraph 4007(1)(c) of Schedule 4 to the Migration Regulations and provides that subject to subclause 4007(2) of Schedule 4, paragraph 4007(1)(c) that a minor visa applicant born and ordinarily resident in Australia is not required to satisfy the Minister that they are free from a disease or condition in relation to which:

(i) a person would require, or meet the medical criteria that would require provision of, health care or community services; and
(ii) the provision of the health care or community service would result in a significant cost to the Australian community, or prejudice the access to health care or community service of an Australian citizen or permanent resident.

Subclause 4007(2) of Schedule 4 provides the Minister a discretionary power to waive the requirements of paragraph 4007(1)(c) if the visa applicant satisfies all other criteria for the grant of the visa applied for, and the Minister is satisfied that the granting of the visa would be unlikely to result in undue cost to the Australian community or undue prejudice to the access to health care or community services of an Australian. This discretionary power will remain unchanged for all visa applicants other than minor visa applicants born and ordinarily resident in Australia. Unlike subclause 4007(2), the amendment made by item 2 of Schedule 1 is only applicable for the affected class of persons (that is, minor visa applicants born and ordinarily resident in Australia).

The amendments made by item 2, like item 1, benefit minor visa applicants born in and is ordinarily resident in Australia with a disability or health condition allowing them to meet paragraph 4007(1)(c) despite their disability and be granted a visa by the Minister, if that was the only reason why the application would otherwise be refused. The child, as either a primary or secondary visa applicant, must still meet all other requirements to be granted the visa, including all other requirements under clauses 4005 and 4007. Similar to item 1, item 2 does not benefit all minors with a disability or health condition, but rather only those born in and ordinarily resident in Australia.

Item [3] – In the appropriate position in Schedule 13

Item 3 inserts a new Part 140 in Schedule 13 to the Migration Regulations. This Part provides for the application of the amendments made by the Amendment Regulations.

New clause 14001 of Part 140 of Schedule 13 to the Migration Regulations provides that the amendment made by Schedule 1 to the Amendment Regulations applies in relation to an application for a visa made, but not finally determined, before the commencement of that Schedule, or made on or after that commencement. This means that the Amendment Regulations apply to visa applications already made but not finally determined before the commencement of the Amendment Regulations, including those currently under merits review. The Amendment Regulations also apply to new applications for a visa made on or after the commencement of the Amendment Regulations.