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04 MAR 2010

Submission No 105

BY: Migration

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Refugee Council  
of Australia

## **Submission to the Joint Standing Committee on Migration Inquiry into the Migration Treatment of Disability**

The Refugee Council of Australia (RCOA) welcomes the opportunity to contribute to the Joint Standing Committee on Migration inquiry into Australia's migration treatment of disability, and commends the Australian Government on its instigation. We thank the Committee for allowing an extended timeframe for our brief submission. RCOA is also a co-signatory to joint submission number 47, led by the Australian Federation of Disability Organisations and the National Ethnic Disability Alliance.

RCOA is the national umbrella body for non-government organisations involved in supporting and representing refugees and asylum seekers, and has a membership of more than 130 organisations. RCOA aims to promote the adoption of flexible, humane and constructive policies towards refugees, asylum seekers and other displaced persons by governments and communities in Australia and elsewhere. RCOA consults regularly with its members and refugee community leaders and this submission is informed by their views. RCOA has recently completed its latest annual submission to Government on the size and composition of Australia's Humanitarian Program. This may be viewed at <http://www.refugeecouncil.org.au/resources/consultations.html>.

Consistent with our mandate, our comments and recommendations are confined to Australia's treatment of disability as it relates to refugee and humanitarian entrants, prospective entrants, and their family members. We commence by providing a background overview of the global context and relevant features of the Humanitarian Program. We then turn briefly to some of the framing questions posed by the Committee, derived from the terms of reference for the inquiry:

- *What principles should apply to the assessment of visa applications against the health requirement? Should there be exceptions?*
- *Is the current process for assessing a visa applicant against the health requirement fair and transparent?*
- *What types of contributions and costs should be considered? How do we measure these?*
- *Are there additional factors that should be considered?*

We note that the Committee has received an array of detailed and expert submissions, many of which include a comparative analysis of Australia's migration health requirement with those of other migrant-receiving countries, and/or have provided legal opinion that Australia's current migration treatment of disability does or may violate core principles underpinning international human rights law and Australia's international obligations. While we make reference to certain international principles below, we have not undertaken our own analyses in these areas and defer to our expert colleagues in this regard.

Our principal submission is that continuation of Australia's long-standing commitment to effectively resettling those in greatest need of protection and the honouring of our international obligations and human rights principles (including those of non-discrimination and family unity) must be paramount considerations in all decisions relating to our Humanitarian Program. Flowing from this premise:

1. *RCOA recommends that applications under the offshore component of the Humanitarian Program be made exempt from the operation of the health requirement.*

2. *Should the above not be adopted, RCOA recommends, as a lesser alternative, that there be an automatic presumption in favour of the grant of a health requirement waiver for all applications under the offshore component of the Humanitarian Program.*
3. *RCOA recommends that all applications for family reunion made by refugees and humanitarian entrants under the general Migration Program be eligible for a health requirement waiver, with an automatic presumption in favour of a waiver grant.*

## **Overview of Australia's Humanitarian Program within the global context**

### **The need for enhanced resettlement within the international protection system**

Australia's Humanitarian Program sits within a challenging global context. The United Nations High Commissioner for Refugees (UNHCR) reports that, at the end of 2008<sup>1</sup> there were some 42 million forcibly displaced people worldwide, comprising 15.2 million refugees (5.7 million of whom were in protracted situations<sup>2</sup>), 827,000 asylum-seekers and 26 million internally displaced persons, with a further 6.6 million identified stateless persons in need of humanitarian assistance. Developing countries are host to approximately 80 per cent of the world's refugees.

UNHCR promotes three durable solutions for refugees: voluntary repatriation in conditions of dignity and safety; local integration in a country of asylum; and resettlement in a third country, where other durable solutions are not available. UNHCR estimates that about 600,000 refugees will voluntarily repatriate in 2010. It estimates that resettlement is the only foreseeable durable solution for 747,000 refugees, including 203,000 refugees who will require urgent resettlement during 2010.<sup>3</sup>

In identifying refugees for resettlement referrals, UNHCR prioritises those with acute physical and legal protection needs (including an imminent threat of *refoulement*, arbitrary arrest, or other human rights violation such that asylum has become untenable) and others with heightened vulnerabilities. The latter category may include survivors of torture and other forms of violence, and also people with acute medical needs or disabilities if their conditions are such that they are life threatening without proper treatment or there is a risk of irreversible loss of functions or debilitating aggravation of the condition in the country of asylum, and resettlement would likely improve the prognosis. Among such cases, further priority is given to those where the health condition is directly related to the person's persecution, flight or exile. UNHCR policy stipulates that those referred for resettlement on the basis of a health condition must be resettled with their family or dependants. It further sets out that those who are well-adjusted to their disability and are functioning at a level deemed to be satisfactory will not be referred for resettlement on the basis of their disability.<sup>4</sup>

As noted in several other submissions to this Inquiry, disabilities and other health conditions may be acquired or aggravated as a direct consequence of the refugee experience, which, among other extreme hardships, may involve torture, other forms of targeted or generalised violence, protracted malnourishment and prolonged lack of access to effective medical treatment. We note, however, the observation made by UNHCR in its submission (number 82), that a referral for resettlement on the basis of a disability or other health condition, while feasible, is "the exception rather than the rule", with the vast majority of referrals for resettlement made on the basis of threats to protection

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<sup>1</sup> UNHCR (2009), 2008 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons, June 2009 at <http://www.unhcr.org/4a375c426.html>

<sup>2</sup> Defined as situations in which 25,000 or more refugees of the same nationality have been exiled for five or more years in a given asylum country. *ibid.*

<sup>3</sup> UNHCR, UNHCR Global Appeal 2010-2011 – Finding Durable Solutions, UNHCR Fundraising Reports, December 2009 at <http://www.unhcr.org/4b03ca759.html>

<sup>4</sup> UNHCR (2004), UNHCR Resettlement Handbook: Chapter 4 – UNHCR Criteria for Determining Resettlement as the Appropriate Solution, Resettlement, 1 November 2004, pp. 3,5,10-11, available at <http://www.unhcr.org/3d464db54.html>

deriving from legal and physical security concerns.<sup>5</sup> In some instances, such as where disclosure of a person's HIV/AIDS status results in threats to the person's physical safety, a health condition may generate a referral for resettlement on the basis of protection needs.<sup>6</sup>

The destruction of the family unit is another notable characteristic of the refugee experience, with the reconfiguration of refugee families also a common result of violence and flight (for instance, where the child of neighbours who have been killed has been absorbed, or where strong dependency relationships have developed between people who have survived and journeyed together).<sup>7</sup> Where separated family members have been traced, or new dependencies formed, the inability to reunite or to attain lasting safety together is utterly devastating to all concerned. In addition to the above priorities for referrals, the UNHCR *Resettlement Handbook* notes that "the importance of resettlement as a tool of international protection extends to cases where it preserves or restores the basic dignity of a refugee's life, for example, through family reunification".<sup>8</sup> It further states that, without effective mechanisms for the realisation of family unity, "resettlement runs the risk of not being a meaningful, durable and sustainable solution".<sup>9</sup>

Over recent years, UNHCR has significantly increased its capacity to identify and refer refugees for resettlement. However there has been no commensurate increase in the number of places made available by resettlement states. In addition, the actual number of resettlement departures falls short of the number of places available. In 2008, 21 states set aside 76,740 places for resettlement in cooperation with UNHCR,<sup>10</sup> with actual departures falling short of this figure by 11,000 places. Australia, the USA and Canada also have adjunct resettlement programs that operate without the direct support of UNHCR. When these additional places are factored, the global refugee and humanitarian resettlement outcome for 2008 totalled 88,800 people (of which Australia contributed 11,006 places),<sup>11</sup> representing well under one per cent of the total refugee population.

UNHCR has called for an enhanced global commitment to and capability for resettlement, in order that it may become a viable durable solution for an increased proportion of the world's refugees, leading to a more equitable sharing of responsibilities within the international protection system.<sup>12</sup> UNHCR has further encouraged states to ensure that their resettlement allocation is aligned with global needs and priorities, and that they remove all restrictive criteria that may undermine the foundations of resettlement – namely, a shared commitment to the protection of those most in need underpinned by the principle of non-discrimination. In addition to a more strategic use of resettlement, there is also a clear need for contributing countries to simplify and expedite their resettlement procedures<sup>13</sup>.

### **Australia's contribution to international protection and corresponding benefits**

State parties to the Refugee Convention (Australia is currently one of 147 parties) are obliged to protect those who, having entered their territories or presented at their borders, are found to be

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<sup>5</sup> UNHCR, October 2009, Submission to the Joint Standing Committee on Migration Inquiry into the Migration Treatment of People with a Disability, Submission No. 82, p.6 available at <http://www.aph.gov.au/house/committee/mig/disability/subs/sub082.pdf>

<sup>6</sup> UNHCR (2004), UNHCR Resettlement Handbook: Chapter 4, op. cit., p.11

<sup>7</sup> McDonald-Wilmsen, B. & Gifford, S. (2009). Refugee resettlement, family separation and Australia's humanitarian programme, UNHCR Policy Development and Evaluation Service, <http://www.unhcr.org/4b167ae59.html>, p. 2.

<sup>8</sup> UNHCR (2004), UNHCR Resettlement Handbook: Chapter 4, op. cit., p.22

<sup>9</sup> *ibid.*, p.23

<sup>10</sup> UNHCR (2009). Frequently Asked Questions About Resettlement. UNHCR Geneva. Retrieved 8/1/10, <http://www.unhcr.org/4ac0873d6.html>, p. 2

<sup>11</sup> UNHCR (2009), 2008 Global Trends, op. cit., cited in RCOA (2010), Australia's Refugee and Humanitarian Program 2010-11: Community views on current challenges and future directions, February 2010, p.20 available at <http://www.refugeecouncil.org.au/docs/resources/Intake%20Sub%202010-11.pdf>

<sup>12</sup> UNHCR (2009), "UNHCR Projected Global Resettlement Needs 2010". Resettling Refugees – Sharing the Responsibility to Protect. 15<sup>th</sup> Annual Tripartite Consultations on Resettlement. Geneva: 30 June - 2 July, pp. 5-6.

<sup>13</sup> RCOA (2009), Australia's Refugee and Humanitarian Program: Community views on current challenges and future directions, January 2009, p.6 available at [http://www.refugeecouncil.org.au/docs/resources/submissions/2009-10\\_intakesub.pdf](http://www.refugeecouncil.org.au/docs/resources/submissions/2009-10_intakesub.pdf)

refugees (which includes their not being subject to the Convention's exclusion clauses).<sup>14</sup> This obligation is distinct from any contribution to the urgent global need for resettlement places. State parties to the Refugee Convention are also obliged to cooperate with UNHCR in the exercise of its mandate with respect to the system of international refugee protection.

Australia is a long-standing supporter of UNHCR and, along with USA and Canada, is a leader among resettlement states, maintaining a relatively sizeable annual resettlement program and having resettled around 740,000 refugees and humanitarian entrants since Federation.<sup>15</sup> In addition to its resettlement program, Australia's contribution to the international protection system includes humanitarian relief and other forms of development and capacity-building assistance targeted towards addressing the root causes of flight and improving prospects for protection and livelihoods within countries of asylum.

Australia's Humanitarian Program has an onshore and an offshore component, with distinct functions and procedures. The onshore program affords protection to refugees in accordance with our international obligations. The offshore program reflects Australia's long-term commitment to furthering our contribution to the international protection regime by resettling refugees with heightened protection needs as well as others in urgent need of humanitarian assistance. The Department of Immigration and Citizenship (DIAC) explains Australia's approach as follows: "Some countries receive large numbers of asylum seekers and focus their efforts on assisting those who claim protection under the Refugee Convention. As Australia receives comparatively few asylum seekers we go beyond our international obligations and work closely with UNHCR to help protect refugees in other countries through resettlement."<sup>16</sup>

During 2008-09 Australia issued 13,507 visas under the Humanitarian Program, just 6.6 per cent of the total 224,619 permanent additions to Australia through overall migration. The growth in the overall migration program over the past seven years has been far greater than the modest growth in the Humanitarian Program. As a result, the Humanitarian Program as a proportion of total migration is now close to its lowest level in 35 years.<sup>17</sup> While commending Government on its sustained contribution to international protection, RCOA has long maintained that we are ably equipped, in both experience and resources, to do more in this area, and has recently called upon Government to increase the Humanitarian Program to 20,000 places over the coming five years.<sup>18</sup>

While refugee and humanitarian resettlement is certainly an exercise in international goodwill, significant benefits also accrue to the receiving country. As found in RCOA's recently released literature review on the economic, social and cultural contributions of refugees,<sup>19</sup> with appropriate early settlement supports, refugees and humanitarian entrants make substantial contributions to their new countries, across all fields of endeavour. Indeed, aside from many notable contributions to the arts, sciences, sports, media, research, business and civic and community life, five of Australia's eight billionaires listed in the 2000 Business Review Weekly's "Rich 200" list were people whose families had arrived to the country as refugees.<sup>20</sup> Other of the positive, far-reaching effects of refugee resettlement on the economy are more complex to measure, such as improved economies of scale for service provision in regional areas, the growth of business and cultural

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<sup>14</sup> See Article 1A(2) for the definition of a refugee and Articles 1F and 33(2) for the exclusion clauses. The 1951 Refugee Convention and its 1967 Protocol are available at <http://www.unhcr.org/3b66c2aa10.html>. It is worthy of note that Australia's obligation to protect extends beyond the scope of the Refugee Convention to encompass certain other human rights instruments to which we are a party. These obligations are addressed within the Migration Amendment (Complementary Protection) Bill 2009 currently before Parliament.

<sup>15</sup> RCOA (2010), Australia's Refugee and Humanitarian Program 2010-11, op. cit., p.9

<sup>16</sup> DIAC (2009), Refugee and Humanitarian Issues: Australia's Response, June 2009 p.16 available at <http://www.immi.gov.au/media/publications/refugee/ref-hum-issues/pdf/refugee-humanitarian-issues-june09.pdf>

<sup>17</sup> This figure includes temporary visa holders granted permanent residency while in Australia. See RCOA, "Australia Urged To Take Greater Leadership In Refugee Resettlement", 24 February 2010, at [http://www.refugeecouncil.org.au/docs/releases/2010/100224\\_Intake\\_submission.pdf](http://www.refugeecouncil.org.au/docs/releases/2010/100224_Intake_submission.pdf)

<sup>18</sup> *ibid.*

<sup>19</sup> RCOA (2010), Economic, Civic and Social Contributions of Refugee and Humanitarian Entrants: A Literature Review, released February 2010, available at [http://www.refugeecouncil.org.au/docs/resources/Contributions\\_of\\_refugees.pdf](http://www.refugeecouncil.org.au/docs/resources/Contributions_of_refugees.pdf)

<sup>20</sup> *ibid.*, p.7

linkages between Australia and other countries, and the fact that the humanitarian intake is largely youthful,<sup>21</sup> resulting in a positive contribution to a labour market in which new retirees have been exceeding new labour force entrants.<sup>22</sup>

Professor Graeme Hugo of the University of Adelaide is currently leading substantial research into the demographics and the economic, social and civic contribution of refugees and humanitarian entrants in Australia over time. His preliminary findings strongly bear out those of RCOA, including the observation that, while existing studies commonly use a very limited set of fiscal measures such as initial resettlement costs and short-term economic return to calculate the net impact of the Humanitarian Program, data in fact suggests that humanitarian entrants will generate a positive net economic contribution in the longer term.<sup>23</sup> Indeed, Professor Hugo's findings reveal high entrepreneurial activity among both newly arrived and former refugees and clearly indicate that, while multiple barriers including discrimination and trauma can thwart early workforce participation, within 10 to 15 years the economic performance of former refugees starts to equal or surpass that of the Australian-born population. Where life-time and inter-generational perspectives are considered, the contributions across many dimensions are immense.<sup>24</sup>

### **The Humanitarian Program and operation of the health requirement**

A total of 13,750 places have been allocated to the Humanitarian Program for 2009-10. As indicated above, the program has an onshore protection and an offshore resettlement component. Those found to be refugees onshore are granted a Protection Visa (subclass 866). The offshore resettlement component of the program is made up of two main streams:

- The Refugee Program is for people subject to persecution in their home country, who are typically outside of their home country, and who are in need of resettlement. It includes the Refugee (200), In-country Special Humanitarian (201), Emergency Rescue (203) and Woman at Risk (204) visa subclasses. The majority of applicants under this category are identified and referred to Australia for resettlement by the UNHCR. A total of 6,000 places has been allocated for the Refugee Program during 2009-10.
- The Special Humanitarian Program (SHP, visa subclass 202) is for people who are outside their home country, are subject to substantial persecution and/or discrimination in their home country amounting to a gross violation of their human rights, and are supported by an Australian-based proposer, who will assist with the organisation and financing of travel to Australia and settlement post-arrival. The remaining 7,750 places have been allocated to the SHP for 2009-10.

Incongruously, the onshore protection program is numerically linked to the SHP, such that every onshore protection visa grant translates into a deduction from the number of places available for offshore humanitarian resettlement. Australia is the only country to have established a numerical link between the fulfilment of its protection obligations and its resettlement quota. RCOA has opposed this policy since its introduction in 1996, arguing that the onshore and offshore programs are designed to meet quite different international responsibilities. The onshore protection program aims to meet Australia's obligations as a signatory to the Refugee Convention, enabling people at risk of persecution to seek refuge in Australia. The offshore resettlement program is a voluntary contribution to the sharing of international responsibility for refugees for whom no other durable solution is available.

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<sup>21</sup> RCOA (2009), *Amplifying the Voices of Young Refugees*, p.4 at [http://www.refugeecouncil.org.au/docs/current/Young\\_Refugees\\_report.pdf](http://www.refugeecouncil.org.au/docs/current/Young_Refugees_report.pdf)

<sup>22</sup> RCOA (2009), *Australia's Refugee and Humanitarian Program*, op. cit., p.15

<sup>23</sup> Access Economics 2008. *Migrants Fiscal Impact Model: 2008 Update: Report by Access Economics Pty Ltd for DIAC.* <http://www.immi.gov.au/media/publications/research/pdf/migrants-fiscal-impact-april-2008.pdf> and others cited in *ibid*.

<sup>24</sup> Graeme Hugo, "Refugee and Humanitarian Settlement in Australia: Recent Trends", Presentation to Symposium on Child Refugee Health and Wellbeing, Adelaide, 29 October 2009, available at <http://www.adelaide.edu.au/hda/news/Hugo.pdf> and audio file <http://www.adelaide.edu.au/hda/news/ref%20talks/Graeme%20Hugo.mov>

There are two avenues for family reunification under the Humanitarian Program. The “split family” provisions allow those who have been granted visas (either onshore or offshore) to propose their immediate family members (with some accommodation for the concept of dependency) within five years of their own visa grant, provided that they declared the relationship prior to the issuing of their own visa. If the application is successful, the proposed family member will generally be issued the same visa subclass as the proposer but will not have to demonstrate that they are subject to persecution or discrimination. In the case of a Protection Visa (onshore applicant) proposer, the family member will be issued an SHP visa. “Split family” applications are also subject to a “compelling reasons” criterion. While this is a regulatory requirement, DIAC’s current policy stipulates that this criterion is satisfied without further enquiry, in most cases, because the existence of close family ties in Australia is considered to be a sufficiently compelling reason.<sup>25</sup> The other avenue for family reunion under the Humanitarian Program is via the SHP. Applicants must meet all the standard criteria for SHP (including sponsorship for travel to Australia) and demonstrate a particular (not necessarily immediate) familial or dependent relationship with their sponsor, with immediate family relations accorded highest priority.

Given that demand greatly exceeds places (87 per cent of SHP visa applications were rejected in 2008-09),<sup>26</sup> many refugee and humanitarian entrants feel compelled to apply for family reunion under the family stream of the general migration program. This attracts significantly higher support costs, including a two-year bar on sponsored family members accessing welfare services.

Under the existing legislative, regulatory and policy framework governing the operation of the health requirement, different procedures and thresholds apply across many of the visa categories encompassed within the humanitarian and broader migration programs. Within the former, the distinction relates specifically to whether an application is made within the onshore or offshore component of the program.

Applicants for onshore protection visas are not required to meet the health requirement as, if found to be refugees, they will be owed protection irrespective of their health status.<sup>27</sup> They are required to undergo the same health examinations as other applicants for permanent visas and to undertake to be treated or monitored for a disease or condition that could pose a threat to public health.

Those applying under the offshore component of the Humanitarian Program are subject to Public Interest Criteria 4007, under Schedule 4 of the *Migration Regulations* 1994, which imposes the health requirement and also provides for its discretionary waiver where the applicant satisfies all other criteria for grant of the visa applied for, and both costs and “prejudice of access to services” are not considered “undue”.<sup>28</sup> The DIAC Procedures Advice Manual (PAM3) provides detailed guidance as to considerations of compelling circumstances and mitigation of health costs, and clarifies that, in considering whether the threshold of “undue” has been reached, decision makers ought to weigh likely costs and prejudice of access against “the underlying purpose of the visa subclass sought and the ‘merits of the case’ (that is, the individual compassionate and compelling circumstances of the applicant)”.<sup>29</sup>

The health requirement itself carries a “one fails all fail” rule for family applications, stipulating that all individuals included in the visa application, and also non-migrating dependants, must meet the health requirement in order for visas to be approved. The waiver process allows for consideration

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<sup>25</sup> The “compelling reasons” criterion is defined as follows: The Minister is satisfied that there are compelling reasons for giving special consideration to granting to the applicant a permanent visa, having regard to: the degree of discrimination to which the applicant is subject in the applicant's home country; and the extent of the applicant's connection with Australia; and whether or not there is any suitable country available, other than Australia, that can provide for the applicant settlement and protection from discrimination; and the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia. RCOA (2010), Australia's Refugee and Humanitarian Program 2010-11, op. cit., p.17

<sup>26</sup> *ibid.*, p.18

<sup>27</sup> see DIAC submission number 66, p.5, fn.1; and UNHCR, Submission No. 82, p.4

<sup>28</sup> See Item 4007(2), Schedule 4 to the Migration Regulations 1994.

<sup>29</sup> DIAC, PAM3, available via [www.LEGEND.com](http://www.LEGEND.com)

of the alternative care and welfare arrangements in place for a non-migrating dependant<sup>30</sup> and Schedule 2 of the *Migration Regulations* allows for a waiver of the health requirement for a non-migrating dependant "if the Minister is satisfied that it would be unreasonable to require the person to undergo assessment in relation to that criterion".<sup>31</sup> It is our understanding that the combination of these discretionary provisions would allow for a family that otherwise met the criteria to make the extremely difficult decision to apply to leave behind an ordinarily dependent family member who might not meet the standard health requirement.

Some family visa subclasses under the general Migration Program are also eligible for a health waiver, while others are not. As such, some of the family reunion visa subclasses that are accessed by refugees and humanitarian entrants do not have waiver eligibility.

In its submission to this Inquiry, DIAC provides statistics relating to visa refusals on health grounds and waiver grants during 2008-09. We note that, of the 1,568 visa subclass refusals, 116 fell within the Humanitarian Program. By contrast, we have been advised by separate correspondence that a total of 69 applications within the Humanitarian Program were granted a health waiver during the same period.<sup>32</sup> We note that 282 of the overall number of visas refused did not meet the requirement due to the "one fails all fail" rule.

### **Key themes arising from RCOA's consultations with its members**

Our submission is informed by the views of our member organisations and refugee and humanitarian entrants, including input received during our annual nationwide consultations, which form the basis for RCOA's detailed submissions to the Australian Government regarding the size, composition and operations of the Humanitarian Program. Our consultations are broad-ranging in scope, and input regarding the operation of Australia's migration treatment of disability has not been specifically sought in these fora. However, a number of prominent themes to have emerged consistently in our consultations are relevant to this inquiry. They include the following:

- The critical importance of family reunion to the well-being and settlement prospects of refugee and humanitarian entrants is perpetually raised as a priority matter, with community members and service providers underscoring the devastating psychosocial and economic consequences of protracted family separation. Many refugees and humanitarian entrants send significant remittances overseas to support family with whom they have been unable to reunite, often for considerable periods of time and at significant personal cost. Many report a level of anguish and guilt in relation to family separation that severely hampers their capacity to fully engage with activities associated with settlement.<sup>33</sup>
- The conviction that Australia's resettlement program should retain its focus upon those most in need of protection is another strong theme to emerge consistently through consultations, with participants appreciating that this means that a balance needs to be struck with respect to the also compelling demands for humanitarian family reunion.
- The need to improve transparency and accountability in the processing of offshore visa applications is routinely emphasised. Particular frustrations and distress often relate to: experiences of repeated unexplained refusals of SHP applications, incorrect details being recorded on applications (which in turn inhibits future split family applications), deficiencies in pre-departure health check processes, including the requirement to travel to or through areas which raise physical safety concerns for the purpose of undertaking tests or treatment, and

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<sup>30</sup> *ibid.*

<sup>31</sup> See sections 200.229 (2b), 202.229 (2b), 203.229 (2b) and 204.229 (2b), Schedule 2 to the Migration Regulations 1994

<sup>32</sup> It was noted that the overall number of people granted a waiver would likely exceed the number of applications given that many people may be included on a single application. Email dated 4 February 2010 from Health Integrity Projects, DIAC. See also DIAC, Submission 66, pp.42-3

<sup>33</sup> For more detailed discussion, see, in addition to RCOA intake submissions, McDonald-Wilmsen, B. & Gifford, S. (2009), *op. cit.* (in particular pp.15-24 for case studies and analysis regarding the often devastating psychosocial and settlement impacts of family separation), and RCOA (2009), "Family reunion and Australia's Refugee and Humanitarian Program: A discussion paper", at <http://www.refugeecouncil.org.au/docs/resources/reports/family.pdf>.



devastating decisions to split up families when one or more members are denied visas, or in circumstances where a family member's departure is delayed (often by many months) due to the results of a pre-departure medical check.

## **Responses to questions posed by the Committee**

### **What principles should apply to the assessment of visa applications against the health requirement? Should there be exceptions?**

RCOA submits that all decisions relating to our Humanitarian Program must reinforce the continuation of Australia's long-standing commitment to resettling those in greatest need of protection and ought, without exception, to ensure the honouring of our international obligations and to fully align with established international human rights principles, specifically including those of non-discrimination, family unity, respect for human dignity, best interests of the child, inclusiveness, equality of opportunity and fairness.

We join others in commending the Government on its recent ratification of the Convention on the Rights of Persons with Disabilities and its Optional Protocol, and urging it to ensure that its overall migration treatment of disability aligns in all respects with the social model of disability espoused within this instrument, as well as our international obligations and human rights principles more broadly.

### **Is the current process for assessing a visa applicant against the health requirement fair and transparent?**

RCOA submits that, in light of the protection and humanitarian impetus of the program overall, it is entirely inappropriate and unfair to apply different standards and procedures in respect of the health requirement to the onshore and offshore components of the Humanitarian Program, noting that the former are designed to uphold our international obligations. RCOA sees no justifiable grounds for the current differential treatment and urges that the standards and procedures currently applicable to the offshore program be aligned with those applicable to the onshore program.

We note the tragic, much cited case of Mr Shahrzad Kiane, a refugee who received protection in Australia and sought to sponsor his wife and children to join him. The application was rejected on the basis that the health requirement was not met by one of his children, who had cerebral palsy and epilepsy, notwithstanding submissions regarding the existence of some extended family support that may have mitigated service support requirements associated with her conditions. Mr Kiane subsequently fatally self-immolated in front of Parliament House in Canberra. The matter was investigated by the Commonwealth Ombudsman, who raised "serious concerns about the fairness and professionalism of [the] decision-making process"<sup>34</sup>, called for regulatory changes to be made to the processing of applications for family reunion under the Humanitarian Program, and made the following observation, in his report:

*I consider that the grant of a refugee based visa should carry with it an expectation that the refugee's immediate family members would normally be permitted to settle in Australia unless there were exceptional circumstances to the contrary. Introduction of cost factors to outweigh the compassionate considerations involved would seem to be at odds with the basic objectives of the Humanitarian Program. The current arrangements, as they stand, appear to leave open the possibility for unfair and oppressive outcomes.<sup>35</sup>*

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<sup>34</sup> Commonwealth Ombudsman, 'Ombudsman reports on events leading to refugee's death', at <http://www.ombudsman.gov.au/media-releases/show/19>

<sup>35</sup> Commonwealth Ombudsman (2001), Report on the Investigation into a Complaint about the Processing and Refusal of a Subclass 202 (Split Family) Humanitarian Visa Application, August 2001



The following two cases, raised with us by the individuals concerned during consultations, are also illustrative of family separation and hardship associated with a decision not to grant a waiver of the health requirement in relation to Humanitarian Program claims.

**Case study 1:** Following a reunification in a refugee camp with his parents, two adult siblings and their three children, a man and his two young sons joined the family's application for resettlement to Australia. His mother, the lead applicant, advised on the application that her adult daughter had a mild intellectual disability but was capable of caring for herself and her own young daughter and was otherwise fit and healthy and required no medication for her condition. Following a medical examination, the doctor confirmed verbally to the mother that her daughter's condition was mild. The family's application was rejected without explanation. Some time later, following significant deterioration in camp conditions, the man decided to reapply for resettlement in Australia with his sons. They were accepted and granted refugee visas, and he made the immensely difficult decision to accept resettlement in the hope of subsequently being able to sponsor the remainder of their family to join them. Once in Australia, the man sought information through a Freedom of Information request regarding the basis of the earlier refusal, and discovered that the family was rejected on the basis of projected costs associated with his sister's disability. Neither the costs nor the nature of the anticipated treatment or services were set out within the decision that he obtained. His parents and sister and her daughter have all subsequently been accepted for resettlement elsewhere.

**Case study 2:** A young man accepted for resettlement in Australia as a refugee had developed a very close bond with another young man with whom he had shared many difficult experiences during flight and while living in a refugee camp. Neither of the young men was accompanied by relatives. The medical examinations conducted in association with their visa applications revealed that his friend was HIV positive. His friend was rejected for resettlement in Australia and other people within the camp came to know of his diagnosis. He experienced harassment and became depressed. He was subsequently accepted for resettlement elsewhere.

1. *RCOA recommends that applications under the offshore component of the Humanitarian Program be made exempt from the operation of the health requirement.*

While recognising that the considerations for waiver of the health requirement under PIC 4007 allow for a fairly expansive and individualised consideration of compelling and compassionate circumstances relating to a person's application, we do not consider a discretionary procedure is a fair or effective mechanism for safeguarding the protection of human rights. Notwithstanding this caveat, we consider that, if the above recommendation is not adopted, a presumption in favour of a waiver grant would be significantly preferable to the current circumstances. We suggest that the policy approach adopted by DIAC with respect to "split family" applications (as set out on page 6), might offer a viable model, with the fact of a person meeting all other criteria for the grant of a refugee or humanitarian visa being in itself deemed a sufficiently compelling reason for a waiver of the health requirement to be applied.

2. *Should the above not be adopted, RCOA recommends, as a lesser alternative, that there be an automatic presumption in favour of the grant of a health requirement waiver for all applications under the offshore component of the Humanitarian Program.*

Given that many refugees and humanitarian entrants are compelled to seek to reunite with their family members via the general migration program, we consider that equivalent provisions to the above ought to apply to family sponsorship processes which fall outside the Humanitarian Program.

3. *RCOA recommends that all applications for family reunion made by refugees and humanitarian entrants under the general Migration Program be eligible for a health requirement waiver, with an automatic presumption in favour of a waiver grant.*

**What types of contributions and costs should be considered? How do we measure these?**

We submit that cost considerations should not be entertained for applications under or relating to the Humanitarian Program. We note that the number of people resettled in Australia under the Humanitarian Program is numerically small relative to the overall migration program. We further note that it is an immensely complex exercise to value and project individual human contributions to a country, and that short-term quantification of projected economic outputs represents an unsophisticated and dehumanising approach. We note that, in relation to refugees, research currently underway is set to reveal that, notwithstanding the considerably hardships and disadvantages invariably faced by this population, refugees make extraordinary and diverse contributions to Australia over time.

**Are there additional factors that should be considered?**

As observed earlier, Australia is a long-standing supporter of the UNHCR and makes a highly commendable contribution to the international protection regime. RCOA believes that reforms as recommended above would contribute to the strengthening of resettlement as a viable durable solution, by reinforcing its non-discriminatory underpinnings and upholding the principle of family unity. Australia has an opportunity with this Inquiry to exercise greater leadership in an area in which it has and continues to make a laudable contribution.

4 March 2010