UNHCR
The UN Refugee Agency

Office of the United Nations High Commissioner for Refugees
Regional Office for Australia, New Zealand,
Papua New Guinea and the Pacific

SUBMISSIONS TO THE 2009 JOINT STANDING COMMITTEE ON MIGRATION INQUIRY INTO THE MIGRATION TREATMENT OF PEOPLE WITH A DISABILITY

SUMMARY OF RECOMMENDATIONS

Australia's resettlement programme is in many ways a model for other resettlement countries. UNHCR appreciates the ongoing partnership of the Government of Australia in protection of refugees through resettlement and is pleased to provide the instant comments in the interests of the further development of that program.

Within the Australian Offshore Humanitarian Program, UNHCR is of the view that it is essential that protection remain the paramount objective and that human rights principles, including non-discrimination, be observed.

More specifically, UNHCR recommends:

1. *That refugee and offshore humanitarian visa applications be made exempt from the operation of the health requirement.*

2. *In the alternative, that a* prima facie *presumption in favour of the granting of Ministerial waivers for refugee and offshore humanitarian cases be instituted.*

3. *That mandatory HIV testing be discontinued as an element of medical screening prior to resettlement.*

Introduction

1. The Office of the United Nations High Commissioner for Refugees ("UNHCR") welcomes the opportunity to comment on the Joint Standing Committee on Migration's inquiry into the migration treatment by the Government of Australia of people with a disability ("the inquiry"). The instant comments are submitted by the office of UNHCR's Regional Representation for Australia, New Zealand, PNG and the Pacific.

2. UNHCR's competence to provide comments relating to legislation and policy in the area of asylum derives from UNHCR's Statute in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees ("the Refugee Convention"), of which Australia is a State Party. [1] The Refugee Convention obliges States to cooperate with UNHCR in the exercise of its functions and, in particular, to facilitate UNHCR's duty of supervising the application of the provisions of the Refugee Convention. UNHCR is regularly requested to comment on national legislation and guidelines affecting asylum seekers and refugees.

3. UNHCR expresses its appreciation to the Government of Australia for its commitment and ongoing contribution to the search for solutions to refugee situations. UNHCR commends the Government of Australia and the Joint Standing Committee on the initiative taken to institute this inquiry, and to address any shortcomings which may be identified.

4. The Joint Standing Committee has posed a number of questions for comment, deriving from the inquiry's terms of reference. Among these are the following:

> *Are there additional factors that should be considered?*
> ...
> *What principles should apply to the assessment of visa applications against the health requirement? Should there be exceptions?*

5. The instant comments are intended principally to respond to these questions as they relate to refugees, with a particular focus on the operation of the refugee component of Australia's Offshore Humanitarian Program. Although UNHCR has no direct role in the conduct or administration of other elements of the Offshore Humanitarian Program, including the Special Humanitarian Program ("SHP"), a number of the persons granted resettlement through that channel are refugees, asylum seekers or others of concern to UNHCR. For that reason, a number of references in the instant comments are broadened beyond consideration of refugee visas alone, to also encompass the 'offshore humanitarian' visas.

Refugee protection and general migration distinguished

6. Refugees are some of the most vulnerable people in the world. They are people who have been forced by persecution to leave their homes and have been separated from traditional support structures – including families, wider social and government supports, and, in the initial phases, from essential social services such as healthcare and education.

7. Article 1A (2) of the Refugee Convention defines a refugee as someone who is outside the country of their nationality – owing to a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group, or political opinion – and who is unable or unwilling to return to their country of nationality.

[1] The full text of the Refugee Convention and its 1967 Protocol may be found at: http://www.unhcr.org/3b66c2aa10.html

8. There are a number of instances in which people are excluded from refugee status. These include active combatants, persons who have committed a crime against peace, a war crime or a crime against humanity, persons who have committed a serious non-political crime, and persons who have committed an act contrary to the purposes and principles of the United Nations. Persons who constitute a danger to the security or community of the country in which they have sought refuge are likewise excluded from the protections of the Refugee Convention.[2]

9. Refugees, by definition, are civilians who cannot, because of the threat of persecution, return home. As such, the movement of refugees constitutes a form of migration which is distinct and separate from 'general' migration. Although refugees may be either wealthy or poor, skilled or unskilled, or healthy or unwell, the key distinguishing feature which characterises their situation is the forced nature of their migration.

International obligations in relation to refugee protection

10. The modern institution of asylum has its roots in the 1948 Universal Declaration of Human Rights[3] and, in particular, in Article 14 (1): "Everyone has the right to seek and to enjoy in other countries asylum from persecution." A significant body of international law, deriving from custom and treaty, has since crystallized the legal obligations on States in relation to the protection of refugees and access to asylum.

11. The Refugee Convention remains the cornerstone of modern international refugee law and expresses, in Article 33 (1), the fundamental principal that:

> *No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

12. Accordingly, international law[4] obliges States Parties to admit persons who satisfy the criteria for refugee status, and to accord such persons the rights specified by the Refugee Convention. These rights include the right to enjoyment of the protections offered by the Refugee Convention without discrimination,[5] and the right to freedom from expulsion, save on grounds of national security or public order.[6]

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[2] See Articles 1F and 33 (2) of the Refugee Convention.
[3] See: http://www.un.org/en/documents/udhr/
[4] In addition to the Refugee Convention, a number of other international instruments relating to human rights also bear upon the treatment of persons who may be refugees. These include but are not limited to the 1966 International Covenant on Civil and Political Rights, the 1975 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1989 Convention on the Rights of the Child.
[5] Article 3 of the Refugee Convention requires Contracting States to "apply the provisions of [the] Convention to refugees without discrimination as to race, religion or country of origin." This list of factors is non-exhaustive and the principle of non-discrimination must be observed in relation to all factors save those for which exceptions are expressly made.
[6] Article 32 (1) of the Refugee Convention.

13. The right to access, and remain in, a country of asylum, as a question of international legal principle, is not relative to the health status of the applicant, save where that status may present a risk to national security or public order. This principle is observed in the treatment accorded by Australia's migration legislation and regulations to applicants onshore for 'protection' visas.[7] UNHCR is of the view that this principle should be extended to resettlement and offshore humanitarian cases.

It is of concern, however, that this principle is not presently observed by Australia in its consideration of resettlement, or 'offshore' humanitarian cases.

14. Of note in addition to the Refugee Convention is the 2006 Convention on the Rights of Persons with Disabilities[8] ("CRPD"), which Australia ratified on 17 July 2008. The Government of Australia made a declaration upon ratification which included the following:

> *Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.*[9]

Asylum and resettlement distinguished

15. Resettlement of refugees is a process which is separate and distinct from the granting of asylum. All of the 147 States Parties to the Refugee Convention are obliged to grant international protection to persons who present at their borders and demonstrate their need of it.

16. Resettlement, on the other hand, is an additional process undertaken by a relatively small number of predominantly developed countries, to share the burden of displacement which has largely fallen on the developing world. At the present time, it is estimated that there are in excess of 15.2 million refugees globally[10], approximately 80 per cent of whom are supported by developing countries.

17. Resettlement involves the transfer of refugees and stateless persons from a country of asylum to a third country which has agreed to extend to them international protection by granting permanent residence. This is entirely separate from, and additional to, States' core obligations under the Refugee Convention.

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[7] Sections 866.224, 866.224A and 866.224B of Schedule 2 to the *Migration Regulations 1994* require that applicants for a subclass 866 protection visa undergo medical examination and treatment for any identified "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." The Public Interest Criteria which constitute the Health Requirement (4005, 4006A and 4007), however, are not applied to applicants for protection visas.

[8] The full text of the CRPD may be accessed from: http://www.un.org/disabilities/default.asp?navid=12&pid=150

[9] See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en#EndDec

[10] UNHCR, "2008 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons", June 2009: http://www.unhcr.org/4a375c426.html

18. Australia administers a well-developed resettlement program which is among the largest of such programs worldwide. In this regard, the Government of Australia has been an extremely valuable partner of UNHCR over many years.

Australian law and practice

19. Australian migration law and practice encompasses a considerable array of factors which must be considered in reference to the grant of any given visa to enter into, and remain in, Australia. One such consideration is the "health requirement."

20. The health requirement is located in the *Migration Act 1958* ("the Migration Act") and the *Migration Regulations 1994* ("the Migration Regulations"). In accordance with Section 60 of the Migration Act, the Minister may require that an applicant undergo an examination of that person's "health, physical condition or mental condition" as a precondition to the grant of certain classes of visa.

21. The specific terms of the health requirement are situated in Schedule 4 to the Migration Regulations, and specifically criteria 4005, 4006A and 4007. Criterion 4007 requires that an applicant be:

- Free from tuberculosis; and
- Free from any disease or condition which is or may be a threat to public health or a danger to the Australian community; and
- Without a disease or condition which would be likely to:
  - Require health care or community services; or
  - Meet the medical criteria for the provision of a community service; and
- Without a disease or condition for which the required health care or community services would be likely to:
  - Result in significant cost to the Australian community; or
  - Prejudice the access of an Australian citizen or resident to health care or community services.

22. Where an applicant would otherwise satisfy the requirements for the grant of a given visa save for the question of the 'significant cost' or prejudice to access by the Australian community to the necessary health care or services, the Minister may give consideration to a waiver of the health requirement (4007 (2)). In UNHCR's experience, the Ministerial waiver is rarely used in resettlement cases.

23. The Migration Regulations specify which classes of visa are subject to the health requirement. Among these are the Class XB, offshore refugee and humanitarian visas. This visa class includes five subclasses:

- Subclass 200: refugee visa
- Subclass 201: in-country special humanitarian visa
- Subclass 202: global special humanitarian visa
- Subclass 203: emergency rescue visa
- Subclass 204: woman at risk visa

24. Refugees who are identified by UNHCR as requiring resettlement and submitted for the consideration of the Government of Australia are assessed against the requirements of the subclass 200, 203 or 204 visas. Each of these visa subclasses is subject to the health requirement.[11] As has been noted, in recognition of the international legal principle of non-discrimination, the health requirement is not applied to applicants onshore for protection visas.

25. Active tuberculosis is the only condition which is expressly proscribed by the health requirement. Refugees seeking resettlement in Australia who have any other 'disease or condition' are principally impacted by the consideration of 'significant cost.' Any physical or mental attribute of the applicant or a family member which may render that person eligible for health care or community services will trigger assessment of this aspect of the health requirement. This encompasses a vast array of conditions, including physical impairments and diseases such as HIV and AIDS. The assessment is made on the basis of an hypothetical person and does not take into account the specific circumstances of the applicant. Any refugee found to have HIV or AIDS will be effectively barred from resettlement to Australia, unless granted a Ministerial Waiver.

26. The health requirement is inherently discriminatory in its effect and is only legalized, to that extent, by section 52 of the *Disability Discrimination Act 1992*. Australia's declaration upon ratification of the CRPD, which makes specific reference to the health requirement, likewise reflects an awareness of the potential for a discriminatory effect to flow from the application of those provisions.

Impact of the health requirement

27. Refugees and asylum seekers, like any population group, are subject to certain levels of disability or sickness. These occurrence rates will normally reflect those of the broader population from which the refugees have come, influenced by genetic, environmental and regional factors. Some acquired conditions are necessarily more common in populations which have been subject to conflict, torture, malnourishment or sexual violence. Likewise, the continued prevalence of some treatable conditions which are ordinarily intercepted and corrected may be higher in populations which do not have access to the necessary medical skills and resources. In general, as has been observed, refugee health reflects the needs for care and intervention which are seen in the broader community.

28. In keeping with international principles of non-discrimination, UNHCR identifies candidates for resettlement based on their vulnerability and protection needs. Where a given condition or disability causes heightened vulnerability of a refugee, the fact of the condition itself may necessitate protection through resettlement,[12] however this is the exception rather than the rule. In most cases, resettlement submissions are assessed on the basis of protection needs deriving from legal and physical security concerns.

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[11] See for example sections 200.226 and 200.229 of Schedule 2 to the Migration Regulations in relation to the application for a subclass 200 refugee visa, and the family members of the applicant respectively.
[12] See UNHCR, *Resettlement Handbook*, November 2004 Edn (available at: http://www.unhcr.org/refworld/docid/3ae6b35e0.html). Chapter 4.4 addresses resettlement in cases of medical need.

29. Where refugees who are in acute need of international protection, but who also have a disability or condition which triggers the health requirement, are unable to access resettlement, the effects may be profound. This applies to some extent to the effects on UNHCR's resettlement program, which seeks protection for those most in need of resettlement without discrimination on the basis of health status; but more particularly to the effects on individuals and families who are effectively barred from resettlement.

30. The health requirement impacts on a very wide range of conditions. Refugees in need of resettlement have been impacted because of the presence of a case of deafness in the family, or because of a congenital or developmental disorder such as Down Syndrome. Disabilities caused by conflict or torture may also present difficulties. A number of conditions are assessed as a matter of course as presenting a 'significant cost' and are, therefore, effectively barred from resettlement in Australia.

31. Paediatric hydrocephalus is a condition which is estimated to affect one in 500 live births worldwide.[13] Accordingly, this is one of the most common developmental disabilities seen in children. There are a significant number of causes, however the condition can be effectively treated by the surgical implantation of a "shunt," or alternative drainage channel, allowing cerebral fluid to circulate normally and preventing harmful accumulation around the brain.[14] In the past 25 years, mortality rates associated with hydrocephalus have decreased dramatically, and the occurrence of intellectual disability resulting from the condition has also declined.

32. Notwithstanding this, access to the specialized treatment and surgical intervention required to manage hydrocephalus is extremely rare for refugees living in camp situations. Those living in urban situations may be physically close to the required medical capacity but be financially unable to access it. Lack of access to treatment of conditions such as hydrocephalus means that affected refugee children often only survive with pronounced developmental delay. This disability compounds the effects of the underlying condition and may place applicants for resettlement in the invidious position of choosing between abandonment of the disabled family member or refusing resettlement for the whole family.

33. Refugees in need of resettlement who are HIV-positive, or who have AIDS, are significantly affected by the health requirement. Australia requires HIV testing as a component of the pre-resettlement medical examination and the impact of the health requirement on persons suffering that condition will be touched upon as a case-study.

34. UNHCR, in common with all UN agencies, opposes mandatory HIV testing. This includes asylum seekers and refugees in the context of admission, asylum, resettlement and voluntary repatriation operations. There is no evidence of public health benefit from mandatory testing, and it is a practice which is at variance with a

[13] National Institute of Neurological Disorders and Stroke, "Hydrocephalus Fact Sheet": http://www.ninds.nih.gov/disorders/hydrocephalus/detail_hydrocephalus.htm#131713125

[14] Colombia University Medical Centre, Department of Neurological Surgery, "Hydrocephalus": http://www.cumc.columbia.edu/dept/nsg/ct/pediatric_hydrocephalus%20.html

number of relevant human rights standards, or may lead to their violation. These include rights to:

- Liberty and security of person
- Privacy
- Non-discrimination; and
- Non-*refoulement*

35. While UNHCR understands the necessity of countries to be informed of the potential cost of health care for resettling refugees, the Office is nevertheless opposed to testing conducted on a mandatory basis, including during resettlement processing. The World Health Organization and UNAIDS have stated that there is no public health justification for mandatory HIV screening, as this does not prevent the introduction or spread of the disease.[15]

36. UNHCR is strongly supportive of refugees being enabled to ascertain their HIV status. Public health interests are best served by promoting voluntary testing in an environment where confidentiality and privacy are maintained, and skilled counselling is available. Many applicants for resettlement undertake the test not because they wish to learn their HIV status at that time, but because it is a procedural requirement. For that reason, many are inadequately prepared for a positive test result and very serious consequences have sometimes followed.

37. The consequences of a resettlement application being rejected on the basis of HIV status can be far reaching; this includes family separation when, for example, resettlement applicants may feel that they have no alternative but to leave behind an HIV positive family member, or where HIV positive refugees are unable to rejoin close family members already living in the resettlement country.

Case study 1:

Mr X was a male in his forties who spent most of the 1990s in South-East Asia having fled his country of origin. In early 2002 he became ill and was found to be HIV positive. As he was now too ill to support his family, he approached UNHCR for protection and assistance. He was recognized by UNHCR as a refugee and a durable solution was sought for him. As it was not possible for him to be locally integrated into the country of asylum and repatriation was not available to him, resettlement was the only viable solution.

The applicant had numerous close relatives in Australia, including his parents, siblings and children from a previous marriage. All were Australian citizens and willing to provide financial and emotional support to care for him and his family including willingness to care for his younger children in the event of his death. The relatives applied to sponsor Mr X to go to Australia under the family sponsorship category.

[15] UNAIDS/WHO "Policy Statement on HIV Testing", June 2004.

Despite his circumstances and family sponsorship, his application was refused due to the health requirement. UNHCR was required to seek a solution for Mr X in other resettlement countries and succeeded in obtaining urgent medical care and resettlement for him elsewhere. The refugee was grateful for the assistance afforded him and his family by the resettlement country, however he was now living in a country where he and his family had no other family support and few communal ties. His process of settlement and the rebuilding of his life have been made correspondingly more difficult.

Case study 2:

A family of five refugees fled the Democratic Republic of Congo in the early 1990s after the father was badly tortured. They lived in a refugee camp for many years and were referred by UNHCR for resettlement in early 2006, with the father as the principal applicant.

The family were provisionally accepted but the father later reported to UNHCR that he had received a letter from the government of the resettlement country saying their application was rejected because the 19-year-old daughter was HIV positive. Neither the father nor daughter knew of her status prior to resettlement medical screening.

Within the family, the daughter now bears the brunt of the rejection decision. Initially, the father asked that the family be re-submitted without the daughter. He was advised that the entire family could be submitted to another country where they would all be accepted. UNHCR continued to counsel the whole family and was particularly concerned about the well-being of the daughter, for whom HIV related counselling was facilitated.

This family, focused on securing protection through resettlement, was clearly not prepared for the HIV results. This might go someway to explain the seemingly harsh reaction of the father who suggested leaving his daughter behind. Experience from non-refugee related HIV testing programs indicates such reactions are less likely when individuals and families are better prepared for the possibility of HIV-positive results.

Cost and benefit

38. UNHCR understands that the overall cost of the Australian resettlement program must be quantified by the Government of Australia in the context of planning for, and delivery of, the program. With regard to the assessment of any given individual resettlement case within the program, however, protection needs must be the prime consideration.

39. It should also be borne in mind that the long term contribution of refugees to receiving countries, although difficult to quantify, is in many cases very positive.

40. Further, effective treatments for many conditions are improving. Active life spans are likewise increasing, along with the potential for positive economic and social contribution.

41. Since the introduction of antiretroviral drugs in 1996, the quality of life and longevity of people with HIV and AIDS has improved markedly, while the cost of treatment has fallen. Improving treatments have decreased the mortality rate of those with HIV and AIDS. Improvements in and long-term effectiveness of combination antiretroviral therapy ("ART") for HIV-infected patients in high income countries have seen life expectancy increase by some thirteen years with an accompanying drop in mortality of nearly 40% in the same period.[16] Antiretroviral medications are now considered by the World Health Organization to be baseline standard 'essential medications'.[17]

42. It is important to note, from an economic point of view, that developments such as ART are effectively increasing active, contributing life expectancies. Increased labour participation and overall contribution to the host society flow from this. In the context of resettlement programs, where an estimate of costs is taken into account by decision makers, a balanced estimate of true costs against likely returns to the community, rather than a 'worst case scenario' estimate of possible maximum costs, is necessary.

Conclusions

43. UNHCR is of the view that Australia should exempt refugee and offshore humanitarian cases from the operation of the health requirement. The current application of the health requirement is broader than is necessary to ensure the protection of the Australian community and to achieve the relevant policy objectives. In the processing and health screening which are necessary to implement the health requirement, there is a danger of the infringement of some human rights norms.

44. The availability of a Ministerial waiver of elements of the health requirement goes some way to addressing these concerns, however it does not address the underlying issue of principle. Additionally, reliance on a discretionary and non-reviewable avenue of intervention as a response to the protection of human rights remains less than ideal. A more appropriate response is to address the underlying structures which give rise to discriminatory results.

45. Although the waiver is theoretically available, UNHCR's experience in practice suggests that it is very rarely granted and, effectively, automatic rejection of refugee cases which fail the health requirement is the norm. Subsequent application of the principle that 'one fails, all fail' means that the resulting effects are felt by all family members included in the given case. Presently there is very little information released by the Government regarding the number and types of Ministerial waivers granted or the number and range of cases which are refused. Hence, it is extremely difficult to assess the actual impact of the health provision.

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[16]The Antiretroviral Therapy Cohort Collaboration. "Life expectancy of individuals on combination antiretroviral therapy in high-income countries: a collaborative analysis of 14 cohort studies." Lancet. 2008 Jul 26;372(9635):293-9

[17] UNHCR, "Antiretroviral Medication Policy for Refugees, 2007.

46. Insofar as the health requirement operates to protect the Australian community from public health risks, there is no evidence that mandatory testing for HIV reduces the introduction or spread of HIV. In relation to other conditions, it is suggested that screening for tuberculosis and access to health care upon arrival are sufficient steps to protect the community.

47. Insofar as the health requirement operates to moderate expenditure and to ensure access by the Australian community to finite health care and community resources, it should be recalled that the numbers of refugee and humanitarian entrants remain a very small proportion of the overall migration program. Although the theoretical demand upon health services may be significant when calculated on the basis of hypothetical persons calling upon every service available to them, the actual demand exerted by a small group of entrants is unlikely to significantly prejudice the Australian community or present an untenable cost.

48. Perhaps most significantly, the present operation of the health requirement is discriminatory in effect and endangers a number of other human rights norms. To that extent, Australia presently falls short of its international obligations.

49. The effective exclusion of refugees who are disabled or who have significant health concerns from resettling to Australia has a very real impact on the lives of already vulnerable refugees. Resettlement is intended as a protection tool, but its linkage to health status significantly undermines the protection component and can lead to the separation of families and the creation of additional protection problems.

50. Ultimately, the underlying principle of non-discrimination should apply in all cases.

Recommendations

51. In returning to the Joint Standing Committee's highlighted questions:

Are there additional factors that should be considered?

52. UNHCR is of the view that, as long as the health requirement is retained, the distinct nature of refugee and humanitarian visas should be considered as an additional factor relevant to the assessment of those visa types. The protection of refugees and humanitarian entrants through resettlement arises from a philosophical basis fundamentally different from that underlying the broader migration program. Due weight should be accorded to these differences, and the international obligations which accompany resettlement, including the principle of non-discrimination.

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

53. Arising from Recommendation 1, and in light of the distinct nature of refugee and offshore humanitarian visa applications,

*1. **UNHCR strongly recommends*** that refugee and offshore humanitarian visa applications be made exempt from the operation of the health requirement.

54. This recommendation is made in accordance with international human rights principles, in light of the requirement for non-discrimination, and to bring Australia's resettlement program into conformity with its asylum procedures.

55. In the alternative, if the refugee and offshore humanitarian cases are not granted exemption from the health requirement,

*2. **UNHCR recommends*** the institution of a *prima facie* presumption in favour of the granting of Ministerial waivers for refugee and offshore humanitarian cases.

56. The effect of this recommendation would be to reverse the current onus. If the health requirement continues to apply to refugee and offshore humanitarian cases, the presumption should be that a waiver will be granted as a matter of course, unless there are exceptional and compelling reasons not to do so.

57. Finally,

*3. **UNHCR recommends*** that mandatory HIV testing be discontinued as an element of medical screening prior to resettlement.

58. Where testing is undertaken, basic rights of privacy, security and non-discrimination must be upheld, and the principles of the voluntary nature of testing based on informed consent and the maintenance of confidentiality must be applied, along with the provision of effective counselling and access to follow-up health care and support services.

UNHCR Regional Office
Canberra
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