4

Decision making processes

4.1 There are two key agents in the decision making processes for the Health Requirement and visa assessments. This Chapter considers the role and operation of Medical Officers of the Commonwealth (MOCs) and role of operation of Department decision-makers. Both operate under Migration regulations and guidelines which detail methodologies for various assessments.

4.2 The Chapter considers limitations on the scope to make decisions based on individual circumstances, the consistency and transparency of decisions made, and review mechanisms.

Medical Officers of the Commonwealth

4.3 The decisions made by Medical Officers of the Commonwealth (MOCs) are crucial to the operation of the Health Requirement as outlined in Chapter 3. The opinion expressed by an MOC in relation to whether a visa applicant either 'meets' or 'does not meet' will affect an individual's ability (or even whole family's ability) to apply for a visa to remain in or permanently migrate to Australia.

4.4 This MOC opinion is gained in situations where either the applicant or Departmental decision-maker identifies that the applicant has a 'significant medical condition'. In such a circumstance, the Department decision maker is obliged to ask the applicant to undergo an assessment under the Health Requirement as outlined in Chapter 3. This assessment is performed either by a Panel Doctor based overseas (in the case of offshore applicants) or by a MOC for applicants in Australia.

4.5 The authority for the health assessment stems from s 60(1) of the *Migration Act 1958* (Cth) which states:

> (1) If the health or physical or mental condition of an applicant for a visa is relevant to the grant of a visa, the Minister may require the applicant to visit, and be examined by, a specified person, being a person qualified to determine the applicant's health, physical condition or mental condition, at a specified reasonable time and specified reasonable place.[1]

4.6 Medical Officers of the Commonwealth (MOCs) are qualified medical practitioners employed by the Department of Immigration and Citizenship (DIAC) and are charged with undertaking assessments as required by the Health Requirement under the Migration Regulations 1994.

4.7 The decision made by a MOC is final and must be applied by a Departmental decision-maker. In cases where the Health Requirement is assessed by a Panel Doctor, the decision is able to be reviewed by an MOC. The final nature of an MOCs decision is brought about through Regulation 2.25A(1) and (3) of the Migration Regulations 1994:

> (1) In determining whether an applicant satisfies the criteria for the grant of a visa, the Minister must seek the opinion of a Medical Officer of the Commonwealth on whether a person (whether the applicant or another person) meets the requirements of paragraph 4005 (a), 4005 (b), 4005 (c), 4006A (1) (a), 4006A (1) (b), 4006A (1) (c), 4007 (1) (a), 4007 (1) (b) or 4007 (1) (c) of Schedule 4....
>
> (3) The Minister is to take the opinion of the Medical Officer of the Commonwealth on a matter referred to in subregulation (1) or (2) to be correct for the purposes of deciding whether a person meets a requirement or satisfies a criterion.[2]

Offshore assessment by Panel Doctors

4.8 A Panel Doctor is a medical practitioner (or radiologist) appointed by the Australian Government to perform medical examinations (as per the Health Requirement) on visa applicants who have applied from outside Australia. Medical examinations conducted overseas in relation to the

1 *Migration Act 1958* (Cth) s 60(1).

2 Migration Regulations 1994 (Cth) r 2.25A(1) and (3).

Health Requirement are generally only acceptable if conducted by accredited Panel Doctors.

4.9 In terms of the ability of Panel Doctors to make adequate assessments under Australian law, DIAC informed the Committee:

> ... They work on what we call a panel network. In other words they are doctors who we have screened—looked at their credentials—and provided with some training in how to undertake a medical assessment for immigration purposes. [3]

4.10 There has been some criticism of the attitude and understanding of requirements by Panel Doctors. For example, Ms Gillian Palmer commented in relation to the assessments made by Panel Doctors:

> Whether or not an applicant meets the health requirement is a totally arbitrary decision, made by the MOC alone, based on nothing but documents supplied via a Panel Doctor. These documents may not be sufficient because a lot of the Panel Doctors in the UK cannot be bothered to do their own part of the job properly. They simply collect high fees for conducting the most brief and cursory of examinations. If a known medical condition is either apparent or is disclosed to the Panel Doctor, they do not seem to know what (if any) additional information the MOC will require. They prefer simply to get the bundle of papers on its way to Australia and then they leave it to the MOC to provide a "shopping list" of any other information that the MOC might want... Frequently the MOC simply makes a decision on the basis of the half-information provided, without asking for anything more.[4]

4.11 Another submission to the inquiry noted of a Panel Doctor in the United Kingdom, that:

> This doctor collected a very high fee for conducting the most brief and cursory of examinations and we were very displeased by his service...he did not understand the reasoning behind our medical if I had not disclosed to him that our son had a disability and did not know that the MOC would require any additional information![5]

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3 Dr Paul Douglas, Department of Immigration and Citizenship, *Committee Hansard*, 24 February 2010, p. 11.

4 Ms Gillian Palmer, *Submission 19*, p. 4.

5 Name Withheld, *Submission 27*, p. 2.

Committee comment

4.12 The Committee understands the valuable role that is played by Panel Doctors in respect of migration health screening for Australia's Health Requirement. Panel Doctors assists DIAC and its Australian-based MOCs in processing applications in a more timely fashion.

4.13 It may be however that the assessments made by some in the panel network is not as stringent as would be expected of an Australian MOC.

4.14 The Committee sees value in DIAC continuing to maintain the training of doctors on the panel network in relation to the Health Requirement. This training should encompass information in relation not only to the medical requirements of MOCs in making assessments but also information about the policy which underpins the Health Requirement.

4.15 The Committee note this will be particularly important following any revision to the Health Requirement assessment process and criteria.

Current assessment procedures

4.16 There are a range of factors that an MOC must consider in relation to the Health Requirement. Foremost of these, following the referral of an applicant for an assessment, is to establish whether a health waiver exists for the particular visa category that the applicant is applying for.

4.17 By way of information for potential migrants, DIAC's *Fact Sheet 22* provides a brief outline of the Health Requirement:

> Applicants for a permanent visa will be asked to undergo a medical examination, an x-ray if 11 years of age or older and an HIV/AIDS test if 15 years of age or older, as well as any additional tests requested by the Medical Officer of the Commonwealth (MOC).[6]

4.18 In relation to temporary migrants, DIAC reserves the right to outline the health tests required and potential visa applicants:

> ...may be required to undergo a medical examination, chest x-ray and/or other tests depending on how long they propose to stay in Australia, their intended activities in Australia, their country's risk level for tuberculosis (TB) and other factors.[7]

6 Department of Immigration and Citizenship, website <http://www.immi.gov.au/media/fact-sheets/22health.htm>, accessed May 2010.

7 Department of Immigration and Citizenship, website <http://www.immi.gov.au/media/fact-sheets/22health.htm>, accessed 18 May 2010.

4.19 DIAC have told the Committee that in terms of the testing of visa applicants:

> All people who elect to come here permanently undergo similar testing. That testing is undertaken by a panel doctor who is appointed to our panel. They will undertake a physical examination and a chest x-ray if they are 11 years or older, and an HIV blood test if they are 15 years or older. That information is recorded on forms that we provide to the doctors or through an electronic system and then they are forwarded to the immigration department for assessment. There are a large number of countries where we have said we are happy with the x-ray reporting, and those countries have what we call 'local clearance'. In other words the admin staff can look at what the doctor has provided and automatically clear that information. From some other countries, or where a doctor has provided what we call a B recommendation on that initial assessment, the application is forwarded to a Medical Officer of the Commonwealth in Sydney for review. They base their assessment on the information that has been provided.[8]

4.20 Following assessment by an MOC, the applicant is provided with feedback from the MOC in relation to whether they have met the Health Requirement or not. All applicants have the opportunity to provide additional supporting material to the MOC at this stage and the initial decision may be altered.

Notes for Guidance

4.21 As part of making an assessment under the Health Requirement, MOCs are provided with a series of papers called 'Notes for Guidance'. There are 18 such papers which each consider a separate disease or condition which an MOC may encounter in relation to a visa applicant. DIAC informed the Committee that the series of papers include:

- a general "Principles Paper" which is currently being updated to:
  - ⇒ outline the legislative and policy framework within which MOCs must operate;
  - ⇒ provide MOCs with broad guidance when assessing visa applicants within this framework;

8 Dr Paul Douglas, Department of Immigration and Citizenship, *Committee Hansard*, 24 February 2010, p. 11.

- ⇒ provide guidance regarding what constitutes a lawful MOC opinion;
- ⇒ explain DIAC's approach in determining what constitutes a "significant cost"; and
- ⇒ explain in brief the approach to unit costings adopted in the Notes for Guidance papers.

- 18 separate papers which provide disease/condition specific costing information to help ensure the consistency of MOC opinions and costings are due to be completed by mid 2010. The HIV paper has already been completed, together with the ophthalmology and hepatitis papers.[9]

4.22 Mr Peter Papadopoulos from the Law Institute of Victoria told the Committee:

> The Notes for Guidance are a suite of papers. There are 20 conditions papers and—they are in the department's submission as well—you get an idea of the kinds of diseases and conditions they deal with... it says circa 1991 was the last update. The figures relating to disability support pension are quite different to what the disability support pension criteria relate to today. The research in terms of workforce participation which supports the assumptions underneath these papers for people with disabilities is very out of date....[10]

4.23 The HIV/AIDS Legal Centre Inc told the Committee that, for example:

> One of the things about notes for guidance ... or guidelines for Medical Officers of the Commonwealth in relation to a range of other conditions are not known by the community and are not known by the applicant. They are available for those who subscribe or are required to subscribe to the policy guidelines... There is no transparency.[11]

4.24 It is clear that the 'Notes for Guidance' series are an essential tool of assessment for MOCs. They are relevant for both assistance with the policy parameters which underpin the Health Requirement and also to provide MOCs with information on the costings used when calculating the 'significant cost threshold' as outlined in Chapter 3.

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9 Department of Immigration and Citizenship, *Submission 66*, p. 11.

10 Mr Peter Papadopoulos, Law Institute of Victoria, *Committee Hansard*, Melbourne, 18 February 2010.

11 Mr Lachlan Riches, HIV/AIDS Legal Centre Inc, *Committee Hansard*, Sydney, 19 November 2009, p. 55.

4.25 These papers are currently only available to legal practitioners and migration agents on a fee-paying basis through the Legendcom system, described later in this chapter. This information would also be of use to many prospective visa applicants considering migrating to Australia. There appears no valid reasons for the current lack of transparency.

Revised Notes for Guidance (2010)

4.26 Comments made to the Committee alluded to the out of date nature of the costing guidance in the 'Notes for Guidance' series. The Committee understands that a new set of 'Notes for Guidance' papers will be released by DIAC in 2010.

4.27 DIAC told the Committee, that in relation to the revised 'Notes for Guidance':

> There are 19 papers for the *Notes for Guidance*. We have three papers that have already been published on the legend system and we have another one which has been endorsed by the College of Psychiatrists which has not yet been published on legend. We have five other papers which have been final drafts and are currently with the College of Physicians awaiting their endorsement of the clinical content of those papers. Our anticipation is that we still have another eight to 10 papers to complete. We have been told by the contractor that they should be complete by the end of this financial year.[12]

4.28 DIAC also told the Committee that:

> The minister recently agreed that the notes for guidance ... will be published on LEGEND and therefore publicly available as they are updated.[13]

Assessment benchmarks

4.29 Assessments against the Health Requirement require applicants to demonstrate an assessed level of health and functionality. Assessments are very circumstantial and it is not the Committee's prerogative to examine the testing procedures used. The Committee has however taken

12 Dr Paul Douglas, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 17 March 2010, p. 6.

13 Mr Matt Kennedy, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 24 February 2010, p. 5.

some evidence on the key benchmark used in assessment - the hypothetical person test.

The hypothetical person

4.30 One of the more controversial elements of assessments made under the Health Requirement is the benchmark of the 'hypothetical person.' This test essentially assesses the level of a visa applicant's disability and measures that against the health and community services which a person currently resident in Australia with the same condition would be eligible to access.

4.31 The measure is controversial in that many visa applicants believe that they are unlikely to access the full spectrum of payments and services available to them. Many submissions to the inquiry argue that not even persons permanently living in Australia with a similar condition would currently access the entire set of benefits available to them. Applicants are also concerned by this test as it does not take into consideration the resources that the applicant (or their family) has to offset the costs of the payments and services which they may be eligible for.

4.32 DIAC provided the Committee a history of the hypothetical person test:

> The hypothetical test was something that was instituted following a legal decision that was made with regard to a child with an intellectual disability associated with Downs. The courts at that stage believed that the MOCs were not adhering to the legislation in that they were individualising their opinion based on that individual client. Their reading of the legislation was that that was not the intent of the legislation. They had to look at this hypothetical person who had the same form—in other words the same condition—to the same severity and look at what they might be able to use if they were able to access those services here in Australia. We have no idea what the individual may or may not end up using.[14]

4.33 DIAC provided the Committee with a number of examples of the way the hypothetical person test operated. The first one being that:

> Let us say that an applicant has Down syndrome. Down syndrome is not a condition that we would talk about. It would be the other associated factors with Down syndrome—so the child might have

14 Dr Paul Douglas, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 24 February 2010, p. 15.

> an intellectual impairment which is associated with Down syndrome, so the condition is the intellectual impairment. So we will look at the intellectual impairment. We will look at the level of that intellectual impairment—it might be mild, moderate, moderately severe or severe. If it is a child with a mild intellectual impairment, we will then look at what the hypothetical person in Australia of the same age, with the same level of impairment, might be eligible to use here in Australia.[15]

4.34 The second example provided by DIAC stated:

> ...For instance, look at a person who might have paraplegia. According to the form and level of condition for the hypothetical person here in Australia they would be eligible for a disability support pension. Under the previous arrangements MOCs would have asked the individual, 'Are you employed?' Once the hypothetical test came in, that became a little bit of a grey area for the doctors. So now in those situations we would go back to the client and ask, 'Can you provide me with an employment history?' Then they would do a hypothetical test as a person who has paraplegia which is life long but who has been fully employed. They would do that as the hypothetical person here in Australia.[16]

4.35 In defending the use of the hypothetical person test, DIAC suggested that:

> ...the hypothetical test actually makes it a little bit easier to be much more consistent with the decision-making and apply the rules fairly, looking at this from a population perspective. If we go down the waiver path later on, I think it is good to separate that decision so that we can see the clear, medical, functional impairment facts, compared to what someone might look for as the broader contribution this person might make to society.[17]

4.36 There were a number of submissions to the inquiry and witnesses who recounted experiences of those subject to the test. Ms Chantelle Perpic draws the Committee's attention to Full Federal's Court's decision in *Imad v Minister for Immigration and Multicultural Affairs*, where Heerey J

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15 Dr Paul Douglas, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 17 March 2010, p. 14.

16 Dr Paul Douglas, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 24 February 2010, p. 15-16.

17 Dr Paul Douglas, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 24 February 2010, p. 16.

upheld the validity of the Migration Regulations 1994, in relation to the 'hypothetical person' test (as applied in PIC 4005) and stated that:

> ...It is not a prediction of whether the particular applicant will, in fact, require health care or community services at significant cost to the Australian community. This meaning is rendered, in my view, clear beyond argument by the concluding words beginning with "regardless".
>
> The intention behind this regulation is understandable, particularly in the light of reg 2.25A. One would expect that a medical officer would be able to assess the nature of a disease or condition and its seriousness in terms of its likely future requirement for health care. On the other hand, one would not expect a medical officer to inquire into the financial circumstances of a particular applicant or any family members or friends or other sources of financial assistance.[18]

4.37 Mr Papadopoulos of the Law Institute of Victoria told the Committee:

> One of the main reasons decision makers, including the medical officer of the Commonwealth, cannot take into account the visa applicant's circumstances is the indefinite article in 'a person' as it appears in the health criteria. It does not say 'the person' or 'the visa applicant' and their disease and condition; it says 'a person with the visa applicant's condition'. Essentially that divorces any consideration of the individual circumstances of the visa applicant and their family or what they might bring to Australia, and it reduces it to just a generic idea of what HIV is, what Down syndrome is and so forth. So it does not really assess the particular nature of their disease or condition, or other aspects of their personality in the visa decision.[19]

Criticisms of the MOC processes

4.38 Many submissions have been critical of the processes adopted by MOCs, especially in relation to the transparency of the decision-making process, the stance in relation to internal reviews and the difficulty in interpretation of decisions, especially those in relation to 'significant cost'.

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18 Ms Chantelle Perpic, *Submission 63*, p. 2.

19 Mr Peter Papadopoulos, Law Institute of Victoria, *Committee Hansard*, Melbourne, 18 February 2010, p. 19.

Transparency and consistency of decisions

4.39 One of the key criticisms has been the issue of the lack of transparency and consistency in MOC decisions. Several submissions to the Inquiry commented on the fact that many visa applicants are surprised at the estimated costs of treatment established by MOCs. Many visa applicants do not understand how their costs under the 'significant cost' threshold have been established and feel that estimations have been applied arbitrarily.

4.40 As outlined in Chapter 3, the Committee understands that many of these costs are standardised and are applied against the 'hypothetical person' test.

4.41 In this regard, DIAC told the Committee:

> One of the issues with individual comments about whether we are consistent or not is that individuals commenting on other cases do not know the full range of circumstances. So it can be a matter of what the eye perceives rather than the reality. One of the things we do do is that any waivers involving health care and community costs of $200,000 or more go to our central decision maker, who is a director of the health integrity projects—effectively, somebody involved long term in health policy and in the application of health policy. We have a single decision maker, and we introduced that so that we would get consistency of approach.[20]

4.42 The Immigration Advice and Rights Centre Inc stated:

> There is a distinct lack of transparency in relation to the health criteria under Australian immigration law. This means that it is very difficult in advance for people to know what conditions or disabilities will cause them to fail the health test. In order to enable applicants to make an informed decision about applying for a visa there should be published information on average cost calculations for specified disabilities or conditions and information on how this is calculated.[21]

4.43 The Immigration Advice and Rights Centre Inc adds:

> This lack of transparency continues in relation to the opinion provided by the MOC which generally provides very little guidance in relation to exactly how their opinion was formed. The

20 Mr Matt Kennedy, Department of Immigration and Citizenship, *Committee Hansard*, 24 February 2010, pp. 7-8.

21 Immigration Advice and Rights Centre Inc, *Submission 30*, p. 13.

> provision of more detailed reasons and explanations would enable a more meaningful response from applicants and would enable them to address those issues more pointedly in any application for review by a RMOC.[22]

4.44 The Australian Federation of Disability Organisations referred to MOCs:

> Any interpretation that the Convention can continue to allow discriminatory assessments by Migration medical personnel as to the extra cost of disability is a breach of human rights. These medical personnel have no specialist expertise in the provision of disability services and its costs other than the outdated stereotype that all persons with disability are a burden on society and must be locked away in institutions. These medical personnel do not make their assessments available to the people they are assessing or to Advocacy Organisations supporting these person. In fact there is doubt that a comprehensive assessment detailing the extra cost of disability compared to the cost to the community of a non-disabled person is ever undertaken.[23]

4.45 Mr Papadopoulos of the Law Institute of Victoria told the Committee:

> Medical officers of the Commonwealth are obviously experts in making decisions relating to whether somebody has a disease or condition, but the point I would like to add and conclude on—and it is in our submission—is that perhaps the quality of the decision-making process could be improved by separating the decision in relation to cost and assigning it to another specialist, perhaps a health economist, who is able to make a more accurate assessment of the cost arising from a particular disease or condition.[24]

4.46 Mr Papadopoulos added that the opinions provided by MOCs need:

> ... to specify things that it is based upon up-to-date medical information and that it considers medical and other information put forward by these applicants and their families. Where that information is contrary to their opinion, they need to deal with that and specify why it has not been given any weight rather than dismiss it altogether. Currently the opinions—if you have seen them—come out as a computer generated document. I have seen probably 400 or 500 and it takes me about 12 seconds to review

22 The Immigration Advice and Rights Centre Inc, *Submission 30*, p. 15.

23 Australian Federation of Disability Organisations, *Submission 6*, p. 5-6.

24 Mr Peter Papadopoulos, Law Institute of Victoria, *Committee Hansard*, Melbourne, 18 February 2010, p. 15.

> them because they are all the same except for on the second page where you will find the disease or condition specified and one word might vary.[25]

4.47 The Immigration Advice and Rights Centre Inc stated:

> The assessments by the MOC are binding and there is no independent review process. This is particularly concerning given that the MOC may not have the relevant expertise to be making the assessments that they are making - for example, it requires very specialized knowledge and expertise to be able to make assessments and forecast the prognosis, treatment or effects of a particular disability or condition. Only a specialist should be able to do this.[26]

4.48 It is clear that many submissions to the inquiry are critical of the situation that it is an MOC which makes a decision in a domain not related to health – specifically those in relation to 'significant cost' and 'prejudice to access'. It is argued that an MOC does not have the expertise, however guided, to arrive at an estimate of the health and community service costs of a particular applicant. Such factors, although standardised in the 'Notes for Guidance' series of papers, do not account for the many individual differences between applicants including employment prospects and the availability of health and community services.

Action following negative assessment

4.49 This section considers the action that can be taken following an assessment by an MOC that an applicant 'does not meet' the health requirement. The key issue here is that of second opinions, given that currently, in most cases, the decision of the MOC is final. The following section provides an overview of the formal appeal mechanisms available to visa applicants following an MOC decision that the applicant 'does not meet' the Health Requirement.

4.50 DIAC has told the Committee that:

> Where a MOC finds that an applicant does not meet the health requirement, the applicant is given the opportunity to comment, where natural justice provisions apply, and put forward any

25 Mr Peter Papadopoulos, Law Institute of Victoria, *Committee Hansard*, Melbourne, 18 February 2010, p. 18.

26 The Immigration Advice and Rights Centre Inc, *Submission 30*, p. 13.

> additional information which the MOC must consider. A new MOC opinion will be provided if this information is materially different.
>
> If the applicant does not provide any new information or the MOC considers that the new medical information is not materially different, then the visa will be refused on health grounds. The applicant may, as discussed above, be entitled to appeal to the Migration Review Tribunal (MRT). [27]

4.51 The Migration Institute of Australia advised that the client is automatically disadvantaged in waiver considerations, because the MOCs decision remains final:

> The difficulty comes then when they actually seek independent medical advice on this person's disease or condition and put it in the health waiver submission. The department will come back and state that it does not match up with what the Medical Officer of the Commonwealth has stated, and it is the medical officer of the Commonwealth's decision that prevails. That is where the difficulty lies for an agent. They may have a very good case for a health waiver but when it comes to getting that medical advice, if it does not meet the Medical Officer of the Commonwealth's decision, then the health waiver may fail.[28]

4.52 Further, Mr Peter Papadopoulos of LIV stated:

> The problem is that the policy guidance is under that regulation, but you cannot use that policy unless it is lawful, and the way the law is currently drafted you cannot take that into account. So it is a very arbitrary sort of approach. Essentially, you have a regulation which says the minister is bound by the medical officer of the Commonwealth's opinion. It has gone all way to courts—and they have tried to carve that open—but the courts have come back and said, 'The wording of the legislation is this. Therefore, even though it is a refusal, it is lawfully made and that's all we can do. We cannot take into account other circumstances.'[29]

4.53 Second opinions on medical assessments are available in limited circumstances following a 'does not meet' decision by a MOC. As stated above, following a 'does not meet' decision, an applicant is able to

27 Department of Immigration and Citizenship, *Submission 66*, p. 13.

28 Migration Institute of Australia, *Submission 34,* p. 42.

29 Mr Peter Papadopoulos, Law Institute of Victoria, *Committee Hansard,* Melbourne 18 February 2010, p. 18.

provide additional information which may be taken into consideration by the MOC.

4.54 The Committee asked whether visa applicants could receive a second medical opinion in relation to a decision. DIAC told the Committee:

> It depends on the visa classes they are applying under...In all cases of a negative decision, all applicants have the chance to provide additional information or additional reports, and the MOCs will then reconsider the original decision. When they get the additional information, probably 50 per cent of applicants find that the MOCs change their minds.[30]

4.55 DIAC made a number of comments in relation to the internal review procedures used by the Department in the circumstances where an applicant 'does not meet' the Health Requirement. These centred around peer review, where decisions are examined with other MOCs. DIAC has told the Committee:

> There is a formal peer review process but, at the end of the day, it is an individual MOC who would make that decision. That is usually based on advice and assistance that he may have had in discussions with other MOCs. That is internal—within DIAC itself....
>
> ...There are some cases which are very straightforward, and obviously those cases are not discussed with other MOCs, but it is in those cases where there might be some question about what the costing might be or whether this person actually meets or does not meet the health requirement where that process works.[31]

4.56 DIAC further told the Committee:

> We also have a process where every 'does not meet' decision is discussed with other medical officers of the Commonwealth so that they are certain that they are making the right decision and doing it in a way that is fair to the client. I think the 'fair and reasonable' aspect is always there. Additionally, we have a fail-safe mechanism that all 'does not meet' decisions by MOCs are reviewed by one of my senior doctors and, if he thinks there has been an error in judgment, he will go back to the original MOC

30 Dr Paul Douglas, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 24 February 2010, p. 15.

31 Mr Paul Douglas, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 17 March 2010, p. 12.

> and ask them to review their original decision to see whether they think they have not considered all the facts.[32]

4.57 The Immigration Advice and Rights Centre Inc was critical of this process and stated:

> ...While a person who fails the health test is provided with an opportunity to comment in relation to the opinion of the MOC, in most cases this is meaningless where there is no health waiver provision. In a few cases additional information may be provided in response to this, which is then given to the MOC for them to reconsider their opinion. In lmmigration Advice and Rights Centre's experience this reconsideration will in most cases not result in a change of the opinion formed by the MOC.[33]

4.58 The Committee understands that many who have failed the Health Requirement are critical of the process following the receipt of a 'does not meet' decision. As it is understood by the Committee, where a decision is given a 'does not meet' classification, visa applicants have the opportunity to provide additional information for consideration by the MOC. If the decision remains as one that 'does not meet' the Health Requirement, that case is reviewed internally by a senior medical practitioner employed by DIAC who may recommend that the MOC reconsider their decision.

4.59 The current situation is, however, that the decision made by the initial MOC is unable to be amended, unless it is by an RMOC at the direction of the Migration Review Tribunal. This issue is discussed later in the Chapter as part of a decision-maker's capacity to provide a more holistic assessment based on the circumstances of the individual.

Interpretation of decisions

4.60 Many visa applicants use the services of migration agents to correctly lodge their visa applications. The migration agent role is important in assisting potential applicants to produce the evidence required not only by DIAC, but also any additional supporting information which is required by an MOC to alter a 'does not meet' decision in relation to the Health Requirement.

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32 Dr Paul Douglas, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 24 February 2010, p. 12.

33 The Immigration Advice and Rights Centre Inc, *Submission 30*, p. 12.

4.61 This additional information may include specialist reports, obtained independently of the visa assessment process, and at considerable expense to the visa applicant. There is no guarantee that any additional information which is presented by a visa applicant to an MOC following a 'does not meet' decision will be taken into consideration or will hold sufficient weight to change an initial decision.

4.62 The Committee has taken some evidence on the difficulties faced by migration agents in assisting their clients in gaining a favourable outcome. The key issues in this regard are that migration agents have difficulty interpreting the decisions made by MOCs especially in relation to the calculation of 'significant cost'.

4.63 The Migration Law Program at the ANU College of Law stated that:

> Migration agents report difficulties in getting a meaningful breakdown of the overall costs as assessed by Medical Officer of the Commonwealth and the extra costs that can be involved in attempting to access such details.[34]

4.64 The Migration Institute of Australia commented:

> Migration agents will often be very cautious in their advice when looking at the health criteria simply because a migration agent does not know the full extent of diseases or conditions that a person might have. They are using their knowledge through other sources and the Department of Immigration is using their guidance notes on particular diseases and conditions. The two may not necessarily meet up and giving advice to a client is often very difficult.[35]

4.65 The Migration Institute of Australia also commented that:

> The difficulty comes when an agent is faced with a person's disease or condition and they might not have any knowledge about it, nor should they because they are not medically qualified. The difficulty comes then when they actually seek independent medical advice on this person's disease or condition and put it in the health waiver submission. The department will come back and state that it does not match up with what the Medical Officer of

34 Migration Law Program, ANU College of Law, *Submission* 59, p. 5.

35 Mr Brian Kelleher, Migration Institute of Australia, *Committee Hansard*, Sydney, 12 November 2009, p. 41.

> the Commonwealth has stated, and it is the medical officer of the Commonwealth's decision that prevails.[36]

4.66 Ms Knight from the Law Institute of Victoria told the Committee:

> It is a very complicated and frustrating thing when there is this system with a binding opinion but you cannot reach into that binding opinion to look at the reasonableness or the very factors that that decision maker has considered. It goes against principles of administrative law and it is very frustrating.[37]

4.67 Mr Robert McRae, a solicitor and President of Queensland Advocacy Inc told the Committee:

> If you are sitting in China and you want to know what this health requirement is, there is nothing there that helps you decide what it is apart from perhaps if you have tuberculosis or a number of other conditions that are specified there. There is no reference to disability, for example Down syndrome, so you could read that and all other forms similar to that through and there is no reference to anything other than obesity in one case, tuberculosis and HIV. That is about it. I have a form here issued by the Australian embassy in China. Again there is nothing much that helps people. I think it is a fraud.[38]

Committee Comment

4.68 A number of criticisms have been raised regarding the MOC decision making and review process. Firstly, the Committee is concerned at the lack of transparency regarding the 'Notes for Guidance' series of papers which provide a basis for MOC decision making and the Committee recommends that the 'Notes for Guidance' series be made available to potential visa applicants.

4.69 There are many individuals and families who seek to migrate to Australia each year and it is clear from the evidence to this Committee that many of these persons make applications without information regarding the

36 Mr Brian Kelleher, Migration Institute of Australia, *Committee Hansard*, Sydney, 12 November 2009, p. 42.

37 Ms Jo Knight, Law Institute of Victoria, *Committee Hansard*, Melbourne, 18 February 2010, p. 19.

38 Mr Robert McRae, Queensland Advocacy Incorporated, *Committee Hansard*, Brisbane, 28 January 2010, p. 7.

Health Requirement and its implications, such as cost. The Committee believes that the provision of such information including the ease of access to this information will assist prospective migrants and their migration agents to make well-informed and timely decisions about whether to migrate to Australia.

4.70 The Committee is pleased to note that the Minister for Immigration and Citizenship has determined that the revised suite of Notes for Guidance will be made available online. However, the Committee recommends that meantime the current papers in the series should be made available as a matter of priority.

Recommendation 5

The Committee recommends that the Department of Immigration and Citizenship make the current 'Notes for Guidance' publicly available. It further recommends that, when such papers are revised, their updated version be placed on the Department's website as soon as possible. 'Notes for Guidance' and associated background information should also be referred to in the Department's Fact Sheets for prospective visa applicants.

4.71 Ensuring that the 'Notes for Guidance' are publicly and freely available will greatly improve transparency. However, as an explanatory background to the 'Notes for Guidance', the Committee considers that information should be available on how costs for each condition are calculated.

Recommendation 6

The Committee recommends that the Department of Immigration and Citizenship publish on the Department's website the cost calculation methodology used by Medical Officers of the Commonwealth in assessing the costs associated with diseases or conditions under the Health Requirement.

4.72 The current practice is for an applicant to receive an estimated cost of the condition which has been assessed by the MOC. No explanation is provided as to the breakdown of the assessed costs and how these are calculated. The Committee does not consider this appropriate and recommends that all applicants are provided with a detailed account of their assessed costs.

Recommendation 7

The Committee recommends that the Department of Immigration and Citizenship provide each applicant with a detailed breakdown of their assessed costs associated with diseases or conditions under the Health Requirement.

4.73 The Committee understands the need for MOCs to have a benchmark in making assessments in relation to the Health Requirement. The 'hypothetical person test' provides such a vehicle. However it is limited in its application to being able to total the costs of services and support available to be accessed by a particular individual. There is no account of the fact that not all individuals (regardless of whether they currently have the right to permanently reside in Australia or not) will access each and every service or payment to which they are eligible.

4.74 The Committee does not support this current approach and considers it unjustly discriminates against those with a disability who are productive and contributing community members. The Committee is adamant that this hypothetical person test must be revised to enable an approach more tailored to patterns of individual use. This would allow for an assessment based on likely service utilisation, rather than service availability.

Recommendation 8

The Committee recommends that the Australian Government remove from the Migration Regulations 1994 the criterion under Public Interest Criteria 4005, 4006A and 4007 which states that costs will be assessed 'regardless of whether the health care or community services will actually be used in connection with the applicant.'

The Committee also recommends that the Australian Government revise the approach which assesses visa applicants' possible health care and service needs against 'the hypothetical person test'. This test should be revised so that it reflects a tailored assessment of individual circumstances in relation to likely healthcare and service use.

4.75 The Committee is also concerned that under the present system, the opinion presented by an MOC is taken as final. The 'significant cost' threshold which is calculated takes into account only the costs involved to the Commonwealth and the States and Territories of an applicant using health and community services. This decision, by virtue of regulation 2.25A of the Migration Regulations 1994, must be taken as final by the Minister.

4.76 In limited circumstances, a waiver is available which allows for consideration to be given to the ability of the applicant to defray some of this cost. The waiver also allows for consideration to be given to the potential contribution that a visa applicant will make to Australia. However, in many classes of visa, this waiver is unavailable and consequently the MOC opinion is final.

Recommendation 9

The Committee recommends that the Australian Government amend Regulation 2.25A of the Migration Regulations 1994 in a manner which does not bind the Minister of Immigration and Citizenship to take as final the decision of a Medical Officer of the Commonwealth in relation to 'significant cost' and 'prejudice to access' issues, and provides scope for Ministerial intervention.

Department decision-makers

4.77 DIAC manages Australia's immigration intake. Each year, it assists many thousands of individuals and families to successfully migrate to Australia under a variety of migration programs. Part of this responsibility includes the administration of the Health Requirement under the *Migration Act 1958* (Cth).

4.78 Department decision-makers, employed by DIAC, play a crucial role in the assessment of visa applications and in the determination of whether a 'significant health condition' exists. Department decision-makers are required to be well informed and trained to identify such health conditions for referral to either a Medical Officer of the Commonwealth (MOC) or a panel doctor overseas. The Committee asked DIAC about the background of Departmental decision-makers. DIAC replied:

> We come from many disciplines, as all public servants do, but we have very dedicated decision-making training for our officers because it has to be lawful decision making within the framework of the Migration Act et cetera ... but we have a very comprehensive process of training our decision makers, for example, before they go overseas, whether they are in state or territory offices or whether they are protection visa decision makers or general migration decision makers or whatever.[39]

4.79 DIAC informed the Committee about the level of experience held by Department decision-makers:

> The delegation level is that it has to be made by at least an executive level 1 officer. Overseas, an executive level 1 is a principal migration officer—so the manager of the post. Most people who get to that level have a long history of employment in the department. They have gone through the induction and training to be a decision maker in the department. But before you go on an overseas posting everyone goes on a six-week overseas training course, and that covers issues like the health requirement, interviewing and decision-making techniques...
>
> Onshore, the training would vary more from state to territory, because it is at state and territory offices... Entry level is normally at the APS3 level, and to move from an APS3 to an executive level 1 you would normally already have extensive experience deciding

39 Mr Peter Vardos, Department of Immigration and Citizenship, *Committee Hansard*, 24 February 2010, pp. 7-8.

> visa applications as well as having the basic training in legal decision making, writing decision records and interview techniques.[40]

4.80 DIAC contends that Departmental decision-makers undergo much training and assessment in relation to the decisions that they make. However, their decision making is limited by the lack of flexibility in the Migration Regulations 1994. The Committee has received a number of comments in relation to the role that it is believed that Departmental decision-makers should be able to play.

4.81 Dr Harris Rimmer from Australian Lawyers for Human Rights told the Committee:

> We want immigration officials to use their common sense because they are the ones with the family sitting in front of them. Departmental officials need to receive better levels of training around some of these issues. They need to feel that they have the freedom to make common-sense judgements and also that those common-sense judgements can be reviewed where possible. The medical officer of the Commonwealth's decisions cannot be reviewed, and I think that is the problem in this case.[41]

Assessment procedures

4.82 This section discusses the assessment processes which are followed by a Department decision-maker.

4.83 Following the lodgement of an application, the Department decision-maker may identify an applicant as having a 'significant medical condition' as outlined under the Health Requirement. The application is then referred to an MOC. If the applicant is based overseas, a medical assessment is generally conducted with a panel doctor, the results of which, if returned with a decision which 'does not meet' the Health Requirement, may be cleared by the Department decision-maker at a number of overseas posts in circumstances where a visa waiver is available (known as local clearance).[42]

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40 Mr Nicholas Torkington, Department of Immigration and Citizenship, *Committee Hansard*, 17 March 2010, p. 7.

41 Dr Susan Harris Rimmer, Australian Lawyers for Human Rights, *Committee Hansard*, Canberra, 18 November 2009, p. 13.

42 Mr Nicholas Torkington, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 17 March 2010, p. 4.

4.84 In the circumstance where a significant medical condition is identified (and a waiver is not available) or the application was lodged at a post where local clearance is not possible, the medical reports are forwarded to the Department's Health Operations Centre in Australia. It is here where an MOC makes an assessment of the medical report issued by the overseas panel doctor in relation to whether the applicant meets the Health Requirement or has access to waiver provisions. [43]

4.85 DIAC commented on the differences between:

> ... the role of the medical officers of the Commonwealth versus the decision makers. The way the regulations are structured—and the regulation is regulation 2.25A—with some exceptions the visa decision maker is required to seek an opinion from a medical officer of the Commonwealth as to whether or not someone meets the health requirement. Unless one of the exceptions applies, the visa decision maker cannot assess the health requirement without getting the MOC opinion. The second part of that regulation is that, once you have got the MOC opinion, you are required to treat that opinion as correct.[44]

4.86 The Department told the Committee:

> ...If the opinion is that they do not meet the health requirement and there is a waiver available, the medical officer also provides a costing advice, which indicates what the cost attached would be and the waiver to access.... [45]

4.87 The Department decision-maker is then provided with this decision for discussion with the applicant. It is at this point where the Department decision-maker has the ability to exercise a waiver, if one is available under that visa class. Where the MOC returns a 'does not meet' assessment and the visa applied for is of the type where a waiver is available, the Department decision-maker is able to seek further information from the applicant. Following this, DIAC told the Committee:

> ...the visa decision maker will then look at all of the information that is presented and will consider whether or not to exercise the waiver. They will look at the medical opinion, the costing, any

43 Mr Nicholas Torkington, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 17 March 2010, p. 4.

44 Mr Nicholas Torkington, Department of Immigration and Citizenship, *Committee Hansard*, Melbourne, 17 March 2010, p. 1.

45 Mr Nicholas Torkington, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 17 March 2010, p. 4.

> further information that is provided by the applicant and any compassionate or compelling circumstances. The costings are done on a hypothetical person, but when you are looking at the waiver you do look more at the applicant's actual circumstances— that is, their ability to defray some of the costs of a hypothetical person.[46]

4.88 The Department decision-maker is thus in a position where their decisions require a high level of expertise in asserting waiver elements.

Consistency of decisions

4.89 One of the key issues raised by many submissions is that decisions made by Department decision-makers are not consistent.

4.90 DIAC told the Committee:

> ... if the cost was over a certain level, $200,000, all the cases go to a director in Canberra who gives a recommendation on the waiver or advice to the processing office... They do not make the actual decision but they provide advice and a recommendation, which is usually accepted in almost all cases. My understanding is that it is accepted by the decision maker. ... But there are some things that are basically pretty much accepted as compelling or compassionate in all circumstances—for example, if it is a refugee case, a split family case or a woman at risk case. Those ones are pretty much always waived. There is guidance for decision makers to look at things. For example, if it is a partner case and the partner is not able to join the applicant in their own country, that is given substantial weight. If the sponsor has extremely close ties with the Australian community, that is also given substantial weight ...you are looking at all the individual circumstances ...[47]

4.91 DIAC also told the Committee:

> ...we do have a referral process if it is over a certain costing amount. I think the process is consistent. Obviously, because you are looking at individual circumstances with the waiver the result will vary. Of two people with the same condition, one may be waived and the other not depending on their individual

46 Mr Nicholas Torkington, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 17 March 2010, p. 4.

47 Mr Nicholas Torkington, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 17 March 2010, p. 5.

> circumstances. I would not necessarily see that as an inconsistent result. It is that one person might have stronger factors in favour of the waiver than the other one.[48]

4.92 In relation to this, DIAC added:

> We have developed within the department a decision-making template for all people to step them through the waiver opinions process. That was developed by the health policy section about 18 months ago. I would say with confidence that, since that has been put in place, there has been much greater consistency between the different decision makers.[49]

4.93 Down Syndrome Western Australia provided an example of the inconsistency of the application of the Health Requirement. In this case, Dr Edi Albert, an academic based in Tasmania (who had a son suffering Down Syndrome) failed the Health Requirement in the process of applying for permanent residency (the visa class applied for stipulated that no Health Requirement waiver was available). Dr Albert was provided with the opportunity to respond to the report of the MOC and did so. Down Syndrome Western Australia commented that:

> ...within weeks, the family was advised that all their visas had been granted. They were not required to go through the Migration Review Tribunal and with no further examination their assessment was rewritten to show that infant son was no longer deemed to pose a possible future cost to the community.[50]

4.94 Down Syndrome Western Australia contrasted Dr Albert's case with the well known case of Dr Bernard Moeller in Victoria. In that case, following the Department's rejection of a permanent residency visa, the Minister for Immigration and Citizenship stated:

> Where a Medical Officer of the Commonwealth has assessed a visa applicant as having a health condition that is likely to result in a significant cost to the Australian community or prejudice the access of Australians to health care or community services, the law requires that this decision must be accepted by the department.[51] [emphasis in submission].

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48 Mr Nicholas Torkington, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 17 March 2010, p. 7.

49 Dr Paul Douglas, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 17 March 2010, p. 7.

50 Down Syndrome Western Australia, *Submission 57*, p. 13.

51 Cited in Down Syndrome Western Australia, *Submission 57*, p. 14.

4.95 Ultimately, the decision in relation to the Moeller's was overturned through Ministerial discretion, however the case highlights the apparent inconsistencies in assessments and outcomes.

4.96 It is imperative that Departmental decision-makers make consistent decisions in relation to each case. As outlined earlier in this report, it is also important that decisions made by MOCs are also consistent in the application of all aspects of the Health Requirement.

4.97 The following sections outline two tools used by Department decision-makers to achieve consistent decisions.

Procedures Advice Manual 3 (PAM 3)

4.98 The key resource for Department decision-makers is the Procedures Advice Manual 3 (PAM 3). The PAM 3 provides Department decision-makers with advice regarding the procedure for the processing of visa applications including some interpretive advice regarding decisions made by MOCs. DIAC has submitted to the Committee:

> *PAM3:Sch4/4005-4007 The Health Requirement* (the Health PAM), provides advice and guidance to visa decision-makers about:
>
> - which health assessments are required for particular applicants;
> - how they should be undertaken; and
> - the process for making a decision as to whether the applicant meets the health requirement.[52]

4.99 The Law Institute of Victoria has told the Committee:

> Other matters relevant to the health requirement are set out in the Procedures Advice Manual 3 (PAM3), Schedule 4, 4005-4007, including:
>
> - Health examination requirements for temporary visa cases, including by Country and period of stay;
> - Health examination requirements for permanent/provisional visa cases;
> - Delegations, record-keeping, and clearance processes for assessment of applicants against the health requirements; and
> - Guidance for assessing cases against the PIC, including health waiver and health undertaking provisions.[53]

4.100 Australian Lawyers for Human Rights states:

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52 Department of Immigration and Citizenship, *Submission 66*, p. 11.

53 Law Institute of Victoria, *Submission 88*, p. 7.

> The Procedures Advice Manual 3 also provides guidance as to how the health waiver is to be exercised. In particular, officers are to consider the following in making this assessment:
>
> - the opinion of the MOC
> - any compassionate or compelling circumstances
> - whether the applicant has met all other visa criteria
> - the ability or potential for the applicant and their supporters to mitigate costs
> - the degree of care required, and the private care and support that is available
> - other relevant factors such as education, skills, job prospects, assets and income, whether minor children will be affected, location of family members and sponsors, the merits of the case, and the applicant's immigration history.[54]

Legendcom

4.101 Another resource available to Department decision-makers and also to migration agents, lawyers and the general public (on a fee-paying basis) is the Legendcom database. DIAC's website states that:

> LEGENDcom is an online database of migration and citizenship legislation and policy documents. It is an essential resource library of these materials...
>
> LEGENDcom contains current and historical versions of the following:
>
> - Migration Act 1958 and associated Migration Regulations (since 1 September 1994)
> - Citizenship Act 1948 and associated Citizenship Regulations (since 10 April 1997)
> - Other Migration and Citizenship related legislation
> - Procedures Advice Manual 3
> - Migration Series Instructions
> - Australian Citizenship Instructions
> - Legislative Instruments (including Section 499 Directions and Gazette Notices).[55]

4.102 DIAC told the Committee that Legendcom:

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54 Australian Lawyers for Human Rights, *Submission 11*, p. 12.

55 Department of Immigration and Citizenship, website: <http://www.immi.gov.au/business-services/legend/about.htm> accessed May 2010.

> ...is the legislation and the regulations; it is not policy. The policy, in fact, is explained in the submission we gave to the committee, and it is not a hidden thing. Policy advice is available.[56]

4.103 Ms Jo Knight from the Law Institute of Victoria told the Committee that Legendcom:

> ...is a subscription based service and it is usually lawyers migration agents who fork out for the privilege of accessing that database; it is not something that the general public can access.[57]

4.104 DIAC clarified this in a submission:

> Current departmental policy instructions are publicly available via the department's on-line subscription service LEGENDcom, which is available:
>
> - at the public libraries and institutions that participate in the LDS, the Commonwealth Library Deposit and Free Issue Schemes or
> - by paid subscription.[58]

4.105 DIAC also told the Committee that:

> I do not think there is any process to try and stop people getting the information. In fact, we daily get emails from individuals, law societies and migration agents asking for information and interpretation of how we do these things. We answer those emails and regularly provide documentation for people. Some people want that done personally, and I have gone out and provided education sessions for the Migration Institute, medical groups and other groups. We are quite happy to provide those ongoing discussions. It is fairly easy to tell people how it works under the policy, so at any stage we are more than happy to do that.[59]

4.106 Both the PAM 3 and Legendcom are available to Department decision-makers in the processing of visa applications. DIAC believes that these systems allow decision-makers to apply the law in a consistent and transparent fashion. It is still the case however that Department decision-makers retain some element of discretion in the decision making process where a waiver is available. This is discussed in the following section.

56 Mr Matt Kennedy, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 24 February 2010, p. 12.

57 Ms Jo Knight, Law Institute of Victoria, *Committee Hansard*, Melbourne, 18 February 2010, p. 25.

58 Department of Immigration and Citizenship, *Submission 66.1*, p. 2.

59 Dr Paul Douglas, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 24 February 2010, p. 14.

Discretion of decision makers

4.107 Another issue highlighted to the Committee is the discretion of decision-makers. At present, when an MOC presents an opinion, particularly a 'does not meet' decision, it has to be accepted as final by Department decision-makers unless the visa applicant has applied in a visa category where a waiver is available.

4.108 The Committee asked DIAC whether it would prefer its officers to have more discretion in the decision-making process. DIAC responded:

> ...the short answer to your question is, yes, I think for a whole range of reasons, including practical and efficient administration of the migration program, allowing people in when there are compelling circumstances to grant them a visa...there is a need for an expansion of the waiver.[60]

4.109 In cases where a waiver is available, DIAC noted:

> In terms of the waiver factors ... the visa decision maker makes that decision, not the MOC. They have in front of them the MOCs assessment and the MOCs assessment of the likely long-term cost of health and community services... They look at the impact on Australian citizens' children, because sometimes children are involved—a child who might be an Australian citizen of a parent who is not an Australian citizen...They also look at the individual's ability to mitigate the costs; the ability to mitigate prejudice to access, which is a particularly contentious area—that is access to services by Australians and permanent residents, which is something that does attract some attention if people think that somebody coming from offshore is going to take a service that is not freely available—and perhaps where a spouse cannot join.[61]

4.110 The Committee asked to what extent there was capacity for a visa decision-maker to decide on compassionate grounds. Mr Peter Vardos replied:

> ...once a finding is made by a Medical Officer of the Commonwealth, decision-makers in DIAC are bound by it. So if there is no waiver attached to the particular visa class then that is the end of the story for us. We have no further flexibility and the

60 Mr Peter Vardos, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 24 February 2010, p. 5.

61 Mr Matt Kennedy, Department of Immigration and Citizenship, *Committee Hansard*, 24 February 2010, p. 7.

> only pathway open would be to review and, ultimately, to seek ministerial intervention. I think one of the reasons we are quite happy for this issue to be addressed is because there are cases—whether they fall in the family stream or the skilled stream—where the principal applicant is very worthy of a grant of a visa. But where a member of the family fails a health requirement then our hands are tied. So I sympathise with the issues that are being put to you.[62]

4.111 The Committee has heard that the decisions of MOCs are final and that they must be abided by Departmental decision makers. Mr Peter Vardos of the DIAC stated that this:

> ...does cause frustration on the part of decision makers who can see that there are broader compelling circumstances that should be taken into account, but there is no waiver.[63]

4.112 DIAC has also submitted to the Committee:

> ...it is DIAC's view that there would be benefit in widening the circumstances in which economic gains which might be offered by the applicant, could be a consideration in the visa decision.
>
> There are a number of ways in which additional decision-making flexibility could be introduced, including:
>
> - allowing an applicant's individual circumstances (i.e. their personal circumstances as well as the severity and nature of their condition) to be taken into account as part of the assessment as to whether they meet the health requirement, for any visa application.
> - allowing individual circumstances to be considered as part of the assessment as to whether the applicant meets the health requirement, for a specified range of visa classes.[64]

4.113 DIAC has qualified this by stating:

> Careful consideration would need to be given to the range of factors a visa-decision maker could have regard to when considering a waiver for a wider range of visa classes. Waivers are currently decided by visa decision makers. Where the cost to the health budget is estimated to be more than $200,000, the visa

62 Mr Peter Vardos, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 24 February 2010, pp. 4-5.

63 Mr Peter Vardos, Department of Immigration and Citizenship, *Committee Hansard*, 24 February 2010, p. 5.

64 Department of Immigration and Citizenship, *Submission 66*, p. 25.

> decision maker takes advice from a central policy adviser. DIAC would propose to retain this approach for a wider range of waivers, to ensure consistent application of policy settings and given the significant economic implications of a decision to grant a waiver in these circumstances. DIAC may also look at whether if a condition may extensively or substantially prejudice access to services for the Australian community that waiver may not apply in the same manner as public health risks cannot currently be waived.[65]

4.114 The Law Institute of Victoria states it also has concerns in relation to the MOCs role in preparing a health waiver costing advice.[66]

4.115 Professors Ron McCallum AO and Mary Crock have submitted to the Committee that:

> The best option for returning the regime to one that is not overtly discriminatory towards persons with disabilities is to amend the regulations to allow immigration officials, including merits review bodies, to weigh the costs that might be associated with the admission of an individual with disabilities against the benefits that might flow from admitting the individual and his or her family. Medical doctors could retain the function of determining the disease or condition affecting the applicant. Immigration officials would then be empowered to consider a range of other factors in making the decision whether or not to grant a visa.[67]

4.116 The Royal Australasian College of Physicians stated:

> In Australia, it is the opinion of a single medical officer about the disability condition of a visa applicant that is held sufficient to support adverse differentiation against the person on the basis of disability. Requiring two or more concurring medical opinions may be an important safeguard against arbitrary or unjustifiable differentiation against the disabled, in circumstances where medical opinions can reasonably differ on questions such as the severity of the disability and the care and treatment (and thus the expense) required. While there is ordinarily an avenue of merits review in Australia through the Migration Review Tribunal, which can re-evaluate the factual basis of the decision, the Tribunal is not itself a medically-qualified body and is therefore not in a position

65 Department of Immigration and Citizenship, *Submission 66*, p. 25.

66 Law Institute of Victoria, *Submission 88*, p. 12.

67 Professor Ron McCallum and Professor Mary Crock, *Submission 31*, p. 3.

> to provide expert reconsideration of medical opinions (as opposed to the weighting and legal evaluation of that expert medical opinion).[68]

4.117 Department decision-makers are highly skilled and have a range of resources at their disposal. A limiting factor in the decision-making process, however, is the reliance on a waiver being applicable for that visa class before factors outside of health may be considered.

4.118 Given the evidence presented, it is apparent that there is little flexibility in the system, especially in circumstances where a waiver option is not available. In such cases, the last, and often unsuccessful resort, is to the Minister's discretion.

Delays in processing

4.119 Many submissions and witnesses commented on the fact that there was a delay in the processing of visa applications. The Committee understands that the processing of applications is an involved process and may be delayed by such things as the need to seek additional information from applicants or seeking clarification from MOCs regarding decisions.

4.120 Some evidence however pointed to unacceptable delays. For example, Mr James Muir told the Committee that in regards to a rejected application on behalf of his sister-in-law:

> ...we were told verbally, shortly after our application in 2005, that she had not been accepted and that the process now was that we could apply for a tribunal hearing, which we agreed to, and that we would receive a letter stating all of this and explaining all of this. It was three years later that we actually received that letter.[69]

4.121 Ms Knight of the Law Institute of Victoria commented on the delays encountered in processing applications:

> ...in terms of people not really knowing when their paperwork might have been sent to the medical officer of the Commonwealth, and then the delays that can happen there. I think it comes back to the transparency about what is being considered and the process...
>
> It is most acute in offshore offices and health issues...it depends on the quality of the advocate that someone can afford or find, and you are particularly disadvantaged when you are applying

68 Royal Australasian College of Physicians, *Submission 80*, pp. 9 – 10.

69 Mr James Muir, *Committee Hansard*, 28 January 2010, pp. 38 – 39.

> offshore. ... A lot of it is to do with processing and it just sort of disappearing into the system, and with not having much access to the people who are making those decisions—let alone understanding what this 'medical officer of the Commonwealth' is.
>
> ... And often you will be waiting a year to be looked at by the Migration Review Tribunal ...[70]

4.122 Susan Laguna of the Multicultural Disability Advocacy Association told the Committee that:

> We have been involved in cases where we had to wait for eight to 10 years, by which time sponsors had already died. There was one case of a family who lives in Albury. The husband had cancer and the wife applied for a carer visa for a relative to come, but he died before the relative could come. There was also one case of a man, about 40. The immigration office dragged its feet and took a long time in processing the child visa application—he had Down syndrome—and the father died, despite the fact that the immigration agent had informed that the father was very sick and wanted to finalise things. It took about eight years.[71]

4.123 DIAC commented on the suggestion that there were delays in the system in respect to appeals:

> As to appeals, the Migration Review Tribunal is an independent body from the department. They do have guidelines, and the principal member issues guidelines to members as to the timeliness of appeals. But it is not something that the department can directly control. My understanding is that the tribunal has made significant improvements in productivity in a number of areas, but, as I say, the time taken to do an appeal is largely outside the department's control.[72]

4.124 As stated, there are obviously a number of reasons, primarily administrative, as to why delays might occur in the processing of applications. Some of the evidence presented, however, point to unacceptably long delays in communicating decisions to visa applicants.

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70 Ms Jo Knight, Law Institute of Victoria, *Committee Hansard*, Melbourne, 18 February 2010, pp. 24-25.

71 Ms Susan Laguna, Multicultural Disability Advocacy Association, *Committee Hansard*, Sydney, 12 November 2009, p. 62.

72 Mr Nicholas Torkington, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 17 March 2010, p. 11.

Committee Comment

4.125 The Committee considers that the expedient processing of visas is a core function of the Department and undue delays are a serious matter. The Department is urged to consider the reasons behind these delays and identify where the blockages are in the current system.

4.126 In regards to the process of decision-making and the capacity DIAC decision-makers to exercise discretion and make individual assessments, the Committee make a number of comments.

4.127 As outlined earlier, a health waiver may only be exercised after a 'does not meet' decision in relation to the Health Requirement is given for a visa applicant who applies for a visa in a limited range of categories. There is an argument to say that the Health Requirement should form part of a more holistic decision-making process rather than being, in many cases, the factor which will cause a visa to be denied. This is not to say that the Health Requirement should be ignored, rather that mitigating circumstances should be taken into account, especially in relation to the 'significant cost threshold' element of the Requirement. The ability to account for mitigating circumstances should be available in all visa streams – family, humanitarian and skilled – not simply for a specified few eligible for waiver consideration, as is currently the case.

4.128 In the Committee's view, decision-makers should have greater discretion to consider mitigating factors following a 'does not meet' MOC decision. The Committee considers that, following the receipt of a visa application, if a 'significant medical condition' is identified, the applicant should be referred to an MOC or panel doctor for assessment under the Health Requirement, as is currently the case.

4.129 If a 'does not meet' decision is returned, the Department decision-maker should be in a position to consider the circumstances of mitigation which are available to the visa applicant as discussed in this chapter. This should include the economic contribution of the entire family or any significant social contributions – especially in situations where the applicant has strong family connections to Australia. The financial resources that the applicant has at their disposal should be considered, especially where family members have offered to indemnify the Commonwealth in relation to health costs.

4.130 In summary, further to the earlier discussion regarding consideration of social and economic contribution, it is the view of the Committee that the

capacity to consider mitigating factors should be available across all visa streams and not limited to those with a waiver.

Recommendation 10

The Committee recommends that visa decision-makers in the Department of Immigration and Citizenship be provided with the discretion to consider mitigating factors for any visa stream once a 'does not meet' the Health Requirement decision is received from a Medical Officer of the Commonwealth. These factors may be used to mitigate the 'significant cost threshold'.

Review mechanisms

4.131 There are a limited number of review mechanisms available to visa applicants. This section considers the Migration Review Tribunal and the Refugee Review Tribunal, and review of a decision through Ministerial discretion.

4.132 As discussed in Chapter 3, the Migration Regulations 1994 provide that a visa application is to be rejected by an MOC if costs and services for a particular level of condition are judged to be beyond the 'significant cost threshold' for a given period, irrespective of whether these costs and services are used. [73]

4.133 A waiver consideration gives an opportunity to the applicant to provide information to offset these costs, but is only available for certain limited visa categories attached to PIC 4007 or 4006A. The former provides for a waiver consideration at the discretion of the Minister which is assessed against set criteria, the second accepts an undertaking of an employer, again at the Minister's discretion.

4.134 Under PIC 4007, the Department decision-maker can take into account the following factors to offset 'significant' costs identified by the MOC, including:

- the merits of the case (i.e. compassionate and/or compelling circumstances)
- qualifications and employment prospects of the applicant in Australia;

73 Migration Regulations 1994, *Schedule 4*. PIC 4005.

- established links in Australia including community and economic ties;
- assets and income; and
- availability of care and support from family members or other bodies.[74]

4.135 If the waiver is not granted the only option is to pursue avenues of appeal through the Migration Review Tribunal (MRT). This process of appeal can be expensive and time consuming, particularly for the least advantaged applicants under the system. Further obstacles are in the legal constrictions and lack of medical expertise of the MRT, which tend to result in a repeat rejection of a visa, making Ministerial discretion the last resort.[75]

Migration Review Tribunal and Refugee Review Tribunal

4.136 The website of the Migration Review Tribunal and Refugee Review Tribunal states:

> The Migration Review Tribunal (the MRT) and the Refugee Review Tribunal (the RRT) provide an independent and final merits review of decisions made in relation to visas to travel to, enter or stay in Australia. The MRT reviews decisions made in respect of general visas (e.g. visitor, student, partner, family, business, skilled visas) and the RRT deals with decisions made in respect of protection (refugee) visas.
>
> The Tribunals are established under the *Migration Act 1958* and the Tribunals' jurisdiction and powers are set out in the Migration Act and in the Migration Regulations 1994. All Members and staff are cross-appointed to both Tribunals and the Tribunals operate as a single agency for the purposes of the *Financial Management and Accountability Act 1997*.[76]

4.137 DIAC advised:

> The primary objective of merits review is to ensure that the correct or preferable decision is reached on the facts before the review body. The Tribunals, in addition to the Tribunal's specific powers, operate within the same legislative framework as the visa decision

74 Procedures Advice Manual 3, Schedule 4.4005-4007.97.3, quoted in ANU Migration Program School of Law, *Submission 59*, p. 8.

75 Mr Mark Dreyfus QC MP, *Submission 109,* p. 2.

76 Migration Review Tribunal and Refugee Review Tribunal, website: <http://www.mrt-rrt.gov.au/> accessed May 2010.

> makers. Therefore, the Tribunal, like the visas decision maker, is bound by the findings of the MOC (reg. 2.25A(3)). The Tribunal however, can consider new information.[77]

4.138 As an example, Down Syndrome Western Australia cites the case of Dr Bernard Moeller:

> In the Moeller case too, it is also worth noting that the MRT process was not able to reach the decision that Evans reached, that the family's net contribution was positive. The MRT was also bound to accept the view of the CMO of the 'costs' of the person with disability and is not empowered to take into consideration the factors which led Evans to reverse the MRT's decision, namely the benefit to the community of the family as a whole.[78]

4.139 DIAC has informed the Committee that as part of the MRT's process in relation to a review of a decision relating to the Health Requirement, an applicant has the ability to obtain a new health assessment from a Review Medical Officer of the Commonwealth (RMOC). However, if the RMOC is also of the opinion that the applicant does not meet the Health Requirement then both the Tribunals and DIAC are bound by this decision. [79]

4.140 DIAC noted in this regard that:

> If they have a review right to the MRT, they can actually get a formal second opinion—a review medical officer for the Commonwealth appearing as part of that review. So that is a formal right to get a second opinion.[80]

4.141 Following rejection by the Tribunals, an applicant is able to make an appeal to the Federal Magistrates Court, which has the capacity to remit the Tribunal's decision for review. Ministerial intervention is also available where the decision by the Department is affirmed by the Tribunal. [81]

4.142 When asked as to whether the MRT takes into account the fact that an assessment is being made on a child, for example, whose potential is yet to be reached, Mr Papadopoulos told the Committee:

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77 Department of Immigration and Citizenship, *Submission 66*, p. 13.

78 Down Syndrome Western Australia, *Submission 57*, p. 15.

79 Department of Immigration and Citizenship, *Submission 66*, p. 13.

80 Mr Nicholas Torkington, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 17 March 2010, p. 6.

81 Department of Immigration and Citizenship, *Submission 66*, p. 13.

> ...The MRT's powers are inquisitorial—it has an inquisitorial function; it can take into account various information. It largely relies on the applicants and their representatives to put forward information to it and to put the arguments forward... The MRT itself stands in the shoes of the departmental decision maker and the process is simply repeated; they just rely on the opinion of the review medical officer of the Commonwealth and, like the minister and the delegate, are bound to apply it.[82]

4.143 The impact of the current attenuated review process was regarded as particularly detrimental to the family reunification of refugees and humanitarian entrants. The Committee heard many stories of families in extreme stress:

> One Afghan client that I now have has a baby with a disability, and the process has taken so long that his wife is saying: 'I don't believe you anymore. I don't believe that you really want to bring me.' He now has to quit his job and go to Pakistan to convince his wife. The visa is about to be granted, but his wife has almost pulled the pin and is saying, 'I don't believe you anymore.' So he now has to give up his job, go to Pakistan, look after her and make sure that she believes that he really wants her. So those are additional costs, and that happens quite often. People often do not understand the process, and a lot of time, effort and money have to be put into convincing them that they have not been abandoned by their relative in Australia.[83].

Ministerial discretion

4.144 The final review process in a number of cases is an appeal to the Minister's discretion. Essentially this occurs when an applicant has exhausted all other avenues to successfully be granted a visa to either migrate to or remain permanently in Australia.

4.145 The exception to Ministerial discretion, according to the Law Institute of Victoria are:

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82 Mr Peter Papadopoulos, Law Institute of Victoria, *Committee Hansard*, Melbourne, 18 February 2010, p. 24.

83 Ms Marg Le Suer, Refugee and Immigration Legal Service, *Committee Hansard,* Brisbane, 28 January 2010, pp. 24-25.

> Health requirements relating to (a) tuberculosis or (b) other threats to public health in Australia or dangers to the Australian community cannot be waived by the Minister in any case.[84]

4.146 Evidence to the Committee suggests that the process of Ministerial discretion is relatively discretionary and many applicants that reach this stage do so following extensive media coverage of their cases.

4.147 DIAC states:

> Where the Tribunal is required to affirm the Department's refusal decision, it is; however, open to the applicant to request that the Minister intervene in his or her case. The Minister is then able to take into account the applicant's individual circumstances, including any compelling or compassionate reasons why a visa should be granted.[85]

4.148 Mr Don Randall MP, Member for Canning, reported a constituent's experience to indicate an overreliance on Ministerial discretion to resolve permanent residency issues:

4.149 Earlier this year I assisted a family awaiting ministerial intervention on their application for permanent residency as one of them had failed the health requirement as they had been diagnosed with HIV. In this case the family were more than happy and capable of providing the medical care when and if required for their family member's illness. They run several successful businesses in the local area and employ a number of Australians. Their daughter has just started at a local school and only knows Australia as her home. They love the lifestyle, people and culture of Australia and want nothing more than to permanently settle here. This family put in an application for permanent residency knowing that it would be refused and then refused again on appeal to the Migration Review Tribunal, leaving ministerial intervention as the only option for a grant of permanent residency. After personally meeting with them I could see first hand the emotional toll the uncertainty of their application was having on them. There obviously needs to be reform to a system that makes ministerial discretion the only avenue for this family to gain permanent residency.[86]

4.150 Mrs Maria Gillman was also demoralised by a system in which she saw herself as 'ultimately forced to go begging to the Minister on hands and

84 Law Institute of Victoria, *Submission 88*, p. 6.

85 Department of Immigration and Citizenship, *Submission 66*, p. 13.

86 Mr Don Randall MP, Member for Canning, *Submission 110*, p. [2].

knees 'as sponsor for her multi-skilled but sight impaired sister. She provided a report of the trajectory from rejection under PIC 4005 to review:

> As Una's sponsor, I was able to apply to the Migration Review Tribunal for a review of the decision to refuse Una a skilled migration visa. I first had to apply for an opinion from a review medical officer of the Commonwealth, as the Migration Review Tribunal could only overturn the decision if the review medical officer of the Commonwealth overturned the opinion of the medical officer of the Commonwealth, which was based on the report of the panel doctor. The RMOC upheld the opinion of the MOC and in October 2007 the Migration Review Tribunal was bound to affirm the decision not to grant Una a visa, which meant that my application to the MRT had failed. I was then able to appeal to the Minister for Immigration and Citizenship to request that he exercise his public interest powers, which enabled him to grant me a more favourable decision than the MRT and ultimately enabled him to grant Una a visa. Even if the minister decides to grant her a visa, it is my understanding that he is not compelled to grant Una the visa that she has applied for. Instead, he can decide to grant her a visa in a different class. [87]

4.151 Uniting Justice in Australia states:

> While the Health Requirement is waived for some refugees and migrants by ministerial discretion, this exemption process is arbitrary and inconsistent. The exercise of the minister's powers is non-reviewable and non-transferable, making it an inadequate substitute for transparent legal and regulatory protection of the human rights of those with disabilities.[88]

4.152 The Immigration Advice and Rights Centre states:

> ...While Ministerial intervention can be effective in isolated cases, it often only arises as a result of media coverage and/or community support. For those who are unable to clearly articulate their compassionate claims (eg due to language barriers, social isolation or as a direct consequence of their disability) the result is not always so positive.[89]

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87 Mrs Maria Gillman, *Committee Hansard,* 18 February 2010, pp. 31-32.

88 Uniting Justice in Australia, *Submission 48*, p. 4.

89 Immigration Advice and Rights Centre, *Submission 30*, p. 13.

4.153 Additionally, it was reported that a significant number reported of cases were progressed by representations from Members of Parliament.

4.154 Mr Mark Dreyfus QC MP, Member for Isaacs, advised the Committee of his representations to the Minister on behalf of constituent with HIV whose visa was rejected under PIC 4005 criteria, with no waiver option.

4.155 Reporting on the case, Mr Dreyfus remarked that the system overall lacked transparency and consistency. He also noted the lack of a waiver opportunity under PIC 4005, the limited review capabilities of the MRT, the lack of obligation to investigate to RMOC opinions and the legislative definition of significant cost as major problems in the system.[90]

4.156 Mr Andrew Bartlett of the Ethnic Communities Council of Queensland told the Committee:

> ...any system that basically requires people to hope that they will get the right at answer at the ministerial discretion stage, which is the case wherever there is no health waiver in place, is, apart from anything else, going to involve a lot more administrative costs to the taxpayer. You have to go through the initial application, the appeal and then you get to the minister. It is not good public policy to have that as a matter of your best hope of getting reasonableness.[91]

4.157 The Migration Law Program at the Australian National University suggests:

> Because there is no health waiver available under Public Interest Criterion 4005, a migration agent is frequently put in a position where they have to advise a client to submit a visa application which they know is likely to fail, with a view to eventually putting their case to the Minister to exercise his or her personal discretion to grant a visa. The 'safety-valve' of the Minister's discretionary powers is there to redress the compassionate and humanitarian circumstances of individual cases that fall between the cracks of the rigid codified system of visa criteria, including the unwaivable health criterion 4005. Resort to personal appeals to the Minister has obvious disadvantages including the lack of certainty of the outcome, the delay in waiting for an uncertain outcome, and perhaps most damaging to the welfare of the family and the

90 Mr Mark Dreyfus MP QC, *Submission 109,* p. 2.

91 Mr Andrew Bartlett, Ethnic Communities Council of Queensland, *Committee Hansard*, Brisbane, 28 January 2010, pp. 10-11.

> community. Since a decision of a Tribunal is a prerequisite to the Minister's personal discretionary powers being activated, there is also the added costs burden of additional appeals to the Migration Review Tribunal.[92]

4.158 Ms Kione Johnson submitted to the Committee that:

> The Minister is only likely to exercise this power if the applicant can demonstrate 'unique or exceptional circumstances', including threats to their personal safety, considerations of the role of the family unit, the rights of the child, whether refusal would cause considerable hardship to an Australian citizen, or whether the applicant could provide 'exceptional economic, scientific, cultural or other benefit' to Australia.[93]

Committee Comment

4.159 Evidence to the Committee suggests that in most cases which are related to the Health Requirement, applications are rejected in the first instance. This leads to much frustration on the part of visa applicants especially because many have gone to considerable time and expense in the application process. Many also have trouble understanding the complex process in relation to appeals of decisions.

4.160 An appeal for Ministerial discretion is the absolute last resort and is also unsuccessful in many cases. All other avenues of appeal must have been exhausted to be in a position to appeal to the Minister's discretion. Ultimately, very few visa applicants reach this stage: many having given up as a result of the lengthy and costly process. Some of those who have had the advantage of such decisions have been subject to high levels of media attention.

4.161 The Committee contends that this option is not one that is available to everyone nor is it transparent or practical. It is preferable for flexibility and greater review options through waivers or consideration of additional factors to be form part of the assessment process.

4.162 The Committee notes that currently very few visa categories have attached to them provision for a waiver which would enable a Department decision-maker to consider mitigating factors for significant cost test, as

92 Migration Law Program, *Submission 59*, pp. 5-6.

93 Ms Kione Johnson, *Submission 62,* p. 4.

outlined in the Health Requirement. Mitigating factors may include the ability to offset health costs through employment or the resources of other family members. Other mitigating factors could include the applicant's social and family ties to Australia. The Committee has recommended an increase in the capacity of decision-makers to apply discretion in considering individual cases.

4.163 A further concern raised during the inquiry was the reliance placed on both the Migration or Refugee Review Tribunals and the process of Ministerial Intervention. The Committee has heard that there are many cases that are appealed through both mechanisms, rather than being dealt with at Department level. The Committee believes that the option for Ministerial intervention is one that should be reserved for circumstances that are extraordinary and profound in nature. The majority of cases should be able to be determined in a fair and consistent manner, appropriate to individual cases through MOC and DIAC decision-making processes.

4.164 The Committee contends that the recommendations in this report regarding increasing transparency, providing greater discretion for decision-makers and individual assessments of costs contribution will vastly improve the fairness and robustness of the system. In particular, the Committee considers that greater discretion at the DIAC decision-maker level to consider mitigating factors would reduce the need for many applicants to proceed through the Migration Review Tribunal and seeking Ministerial intervention.