5

Family, humanitarian and refugee migration

5.1 Australia's Migration Program has two main components, the skilled stream and the family stream. A third much smaller category is provided by the Humanitarian and Refugees program.

5.2 The Skilled Migration Program is by far the largest migration program taking 67 per cent of all entrants. Many families apply to come to Australia to fill jobs under both temporary and permanent visas, and after settling may wish to sponsor other family members offshore to reunite with them in Australia.[1]

5.3 The focus of the Family stream is the reunification of immediate family members of an Australian sponsor, with 75 per cent of visas granted to partners of Australian citizens and permanent residents. The remaining recipients comprise children, parents, remaining relatives, carers and aged dependent relatives of applicants.[2]

5.4 The Humanitarian and Refugee streams focus on protection for visa applicants at risk of persecution or violence in other nations. Those found to be refugees onshore are granted a Protection Visa (subclass 866) for which the health requirement is waived. Offshore applicants and family members must meet the Health Requirement. Of the total of 171 318 places under the migration program, 13 750 places were allocated to the Humanitarian Program for 2009-10.[3]

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1 The Department of Immigration and Citizenship, *Fact Sheet 24 – Over View of Skilled Migration*, accessed May 2010 at <http://www.immi.gov.au/media/fact-sheets/24overview_skilled.htm>

2 Department of Immigration and Citizenship, *Annual Report 2008-09*, 1.1.2 Output Family Migration, accessed May 2010 at <http://www.immi.gov.au/about/reports/annual/2008-09/html/outcome1/output1-1-2.htm#table7>

3 Department of Immigration and Citizenship, 'The Year at A Glance' Table, accessed May2010 at <http://www.immi.gov.au/about/

5.5 The family and humanitarian migration streams reflect Australia's international commitments to protect the family as the fundamental unit of society and to provide a safe haven for people in other nations who are escaping from the threat of persecution or violence.

5.6 This chapter evaluates evidence relating to the experience of families across the visa streams that have been negatively affected by Australia's migration Health Requirement. The impact on families in the skilled migration stream is also considered here. Further issues relating to the skilled migration are considered Chapter 6.

Programs and statistics

Family stream

5.7 Family stream migrants are selected on the basis of their family relationship with their sponsor in Australia. **Table 1** shows the four main categories with corresponding visas and Public Interest Criteria (PIC) governing assessment of the Health Requirement for each category.

5.8 The Department of Immigration and Citizenship (DIAC) advises that the family stream is a growing category of migration, with numbers increasing from 32 040 visas in 1998–99 to 56 366 visas in 2008–09.[4] Due to increased demand, DIAC adjusted the cap upwards for parent visas during 2009–10, and introduced a new provisional visa category for the Dependent Child (subclass 445). [5]

reports/annual/2008-09/html/overview/the-year-at-a-glance.htm>

4 In 2008–09 a total of 171 318 people were granted migration visas to Australia. The family stream comprised 34 399 spouse visas, 689 interdependent visas, 7 010 prospective marriage visas, 3 238 child visas (including adoption), 8 500 parent visas and 2 530 preferential and other family visas (including orphan relatives). Department of Immigration and Citizenship, *Annual Report 2008-2009*, 1.1.2 Family Migration, accessed May 2010 at <http://www.immi.gov.au/about/reports/annual/2008-09/html/outcome1/output1-1-2.htm#table7>

5 Department of Immigration and Citizenship, *Annual Report 2008-09*, 1.1.2 Family Migration, accessed May 2010 at <http://www.immi.gov.au/about/reports/annual/2008-09/html/outcome1/output1-1-2.htm#table7>

Table 1 Family stream visa categories with relevant Public Interest Criteria classification [6]

Category	Visa	PIC	Description
Partner	100 (P), 309 (Prov) 801 (Prov) 820 (Extended)	4007	Partner: the spouse or de facto partner (including same-sex partners) of the Australian sponsor
	300 (T)	4007	Prospective Marriage: a fiancé overseas who plans to marry their Australian sponsor after travelling to Australia
Child	101 (P) 445 (Prov) 802 (Residence)	4007	Dependent child: the child or stepchild of the Australian sponsor
	102 (P)	4007	Adopted child: a child adopted overseas
	117 (P)	4005	Orphan relative: a child who is unmarried, not in a de facto relationship and is under 18 years at the time of application who cannot be cared for by either parent.
Parent	103 (P) 804 (P)	4005 *	Parent category
	864 (P) 884(Prov)	*	Contributory parent category, which provides more spaces, has higher visa charges and larger Assurance of Support (AoS) bond (with a longer AoS period).
Other family	114 (P) 838 (P)	4005	Aged Dependent Relative: single
	116 (P) 835 (P)	4005	Remaining Relative: a person who has no near relatives outside Australia and is the brother, sister, child or step equivalent of an Australian citizen, Australian permanent resident or eligible New Zealand citizen
	116 (P) 837 (P)	4005	Carer: a person willing and able to give substantial care or continuing assistance to an Australian relative or member of their family who has a medical condition that impairs their ability to attend to the practical aspects of daily life. The need for assistance must be likely to continue for at least two years.
	461 (T)	4007	NZ Citizenship Family relationship

Source *(T) Temporary Residency visa. (P) Permanent residency visa (Prov) Provisional*
** If under subclass 676: 4007, other wise 4005*

5.9 In 2009–10 the planning level for the family stream was set at 60 300 visas, which represents 35.7 per cent of the total Migration Program (the overall planning level for 2009-10 was set at 168 700).[7]

6 Department of Immigration and Citizenship, *Fact Sheet 29–Overview of the Family Stream*, accessed May 2010 at <http://www.immi.gov.au/media/fact-sheets/29overview_family.htm> and see DIAC *Submission 66*, Attachment C.

Refugee and humanitarian program

5.10 Australia's refugee and humanitarian program has two components:

- the **Onshore (asylum or protection) component**, which offers protection to people in Australia who meet the refugee definition in the United Nations Convention relating to the status of Refugees, and
- the **Offshore (resettlement) component**, which offers resettlement for people outside Australia who are in need of humanitarian assistance.[8]

5.11 DIAC advised that the number of applications for resettlement received is far greater than the visas available each program year. For instance, in 2007–08 more than 47 000 persons applied and around 10 800 were granted visas. In the 2008–09 the majority of visas were for refugee and humanitarian applicants offshore: 11 010 visas were granted under the offshore component, and 2 497 program countable visas granted under the onshore component.[9]

5.12 As shown on **Table 2** visa applications in the refugee and humanitarian categories have a PIC 4007 classification, meaning that they are subject to the Health Requirement but a waiver consideration can be conducted at the Minister's discretion.

Waiver options and statistics

5.13 As indicated above, all visa applicants must be assessed under the Health Requirement excluding the Refugee and Humanitarian stream Onshore Protected visa which is exempted under human right commitments.

5.14 Applicants applying under visas classified by PIC 4005 will be passed or failed on that test by the Medical Officer of the Commonwealth (MOC). A limited number of visas in the Family and Humanitarian streams (under

7 Department of Immigration and Citizenship, *Annual Report 2008-09*, 1.1.2 Family Migration, accessed May 2010, <http://www.immi.gov.au/about/reports/annual/2008-09/html/outcome1/output1-1-2.htm#table7>

8 Department of Immigration and Citizenship, Visas, Immigration and Refugees, Refugee and Humanitarian Program, accessed May 2010 at <http://www.immi.gov.au/visas/humanitarian/>

9 Department of Immigration and Citizenship, Visas, Immigration and Refugees, Refugee and Humanitarian Program, Overview of the Offshore Humanitarian Program, accessed May 2010 at <http://www.immi.gov.au/visas/humanitarian/offshore/>and DAIC, 1.2.1 Offshore Humanitarian Program, accessed April 2010 at < http://www.immi.gov.au/about/reports/annual/2008-09/html/outcome1/output1-2-1.htm>

PIC 4007) have access to consideration of a waiver at the Minister's discretion. [10]

Table 2 Refugee and Humanitarian visa categories with Public Interest Criteria classification [11]

Category	Visa	PIC
Refugee	200 (P)	4007
In Country Special Humanitarian	201 (P)	4007
Global Special Humanitarian	202 (P)	4007
Emergency Rescue	203 (P)	4007
Woman at Risk	204 (P)	4007
Onshore Protected	866 (P)	None*

*Key: (P) Permanent residency visa * Health requirement is waived*

5.15 If PIC 4007 applies a Department decision-maker will assess any economic and other factors which may offset any health and community service costs associated with the granting of the visa. If these costs are not found to be 'undue' the visa will be granted.[12]

5.16 As discussed in the next Chapter, a waiver option also exists for limited skilled stream applicants under PIC 4006A where an employer provides an undertaking to cover health costs. More recently additional skilled stream visas have been provided with a waiver option under PIC 4007. [13]

5.17 DIAC's submission provides that over 2008–09:

- The most common health condition for which a waiver was acquired was HIV. A waiver was provided in 59 cases for which DIAC estimates a cost to Australia of $14 018 000.
- Other common conditions were intellectual impairment (26 cases, estimated cost $11 666 000) and cancer (10 cases at estimated cost $751 500).
- Waivers were granted to 42 applications for Subclass 457 (temporary skilled) visas.

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10 The Department of Immigration and Citizenship, *Submission 66*, p. 12.

11 Department of Immigration and Citizenship, *Fact Sheet 29 – Overview of the Family Stream*, accessed May 2010, http://www.immi.gov.au/media/fact-sheets/29overview_family.htm, DIAC *Submission 66*, Attachment C.

12 The Department of Immigration and Citizenship, *Submission 66*, p. 12.

13 Mr Neil Torkington, Department of Immigration and Citizenship, *Committee Hansard*, Canberra, 24 February 2010, p. 6.

- 138 onshore cases achieved waivers after a refusal on the basis of a family member's health.
- Almost all onshore waivers related to partner visa cases within the family stream and were granted.
- 150 cases with significant health problems achieved waivers offshore.[14]

The 'one fails, all fail' rule

5.18 The *Migration Act 1958* (Cth) contains the health criteria for assessment of the Health Requirement. Sub-section 5(1) states that the criteria:

> …relates to the applicant for the visa, **or the members of the family unit of that applicant** (within the meaning of the regulations)

5.19 Regulation 1.12 of the Migration Regulations 1994 defines the 'family unit' to include any dependent children under the age of 18, regardless of the custody or access arrangements in place.[15]

5.20 Under these provisions, all individuals included in the visa application, as well as any non-migrating dependants, must meet the Health Requirement on health costs and prejudice of access grounds.[16] As the Public Interest Advocacy Centre/NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) noted, the Health Requirement is thus a 'one fails, all fail' criterion:

> …if any members of the family unit should fail to meet the Health Requirement, and no health waiver is available, no family member will be granted a visa. This includes the applicant seeking to satisfy the primary criteria for the particular type of visa applied for. [17]

5.21 According to DIAC's statistics the 'one fails, all fail' rule supported a significant percentage of visa refusals on health grounds during the 2008-09 financial year: of 360 failed on the basis cost or prejudice to access, 282 were refused on the basis that:

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14 The Department of Immigration and Citizenship, *Submission 66*, Attachment G, p. 43.

15 Migration Regulations 1994 (Cth).

16 The Department of Immigration and Citizenship, *Submission 66*, Attachment G, p. 42.

17 Public Interest Advocacy Centre/NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, *Submission 87*, p. 7.

> …they were not granted a visa due to the "one fails all fails" rule for permanent visas - i.e. all applicants for the visa as well as any non-migrating dependants must meet the health requirement.[18]

5.22 The broad impact of this criterion was well recorded in the evidence: this requirement was regarded as highly discriminating towards people with a disability and their families, in stark contradiction to Australian's international obligations to protect family unity.[19]

5.23 Queensland Parents for People with a Disability (QPPD) stated:

> When families who have a member with a disability are treated in a less favourable manner than others it has the potential to impact most severely on the person with the disability. QPPD shares the view expressed by most experienced advocates for people with disabilities: that a strong family unit is the most effective support and safeguard for a person with a disability. Any policy that leads to depriving the person with a disability of the support of their family network has the potential to cause them a great deal of harm.[20]

5.24 The Federation of Ethnic Communities' Councils of Australia states:

> ...the 'one out all out' provision in the Migration stream can exclude a whole family unit from the grant of visas on the grounds that a single member has a disability, without necessarily giving adequate weight to the positive contributions that the person with a disability and the family unit as a whole may potentially make both socially and economically.[21]

5.25 Submissions to the inquiry took issue in particular to the application of the rule to all family members, irrespective of whether they are in the application for migration or not.

5.26 Ms Sharon Ford saw the requirement as both discriminatory and illogical:

> One family was denied entry to Australia because the principal applicant had a child with Down syndrome from a previous relationship. The visa application did not include this young man with Down syndrome, since he lived with, and would remain living with, his mother. Yet the father, with his partner and their

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18 The Department of Immigration and Citizenship, *Submission 66*, Attachment G: statistics, p. 42.

19 Professor Patricia Harris, *Submission 2*, p. 3.

20 Queensland Parents for People with a Disability, *Submission 17,* p. 1.

21 Federation of Ethnic Communities' Councils of Australia, *Submission 24*, p. 7.

> family were denied a visa on the basis that his son, for whom a visa was not sought, did not meet the health criteria.[22]

5.27 In a similar vein, the Immigration Advice and Rights Centre (IARC) held that the rule imposes an unnecessary administrative hurdle:

> The adoption of the "one fails, all fails" rule in the Australian migration system leads to extremely unfair outcomes for the families of persons with a disability. We fail to see any justifiable reason for the application of the health criteria to family members who are not applying to migrate to Australia. If such family members were to later seek entry to Australia then their visa application would be assessed in light of the health criteria, which would be applied to them at that time. This is the appropriate time for consideration of any health issues, not when another member of their family is migrating.[23]

5.28 A disturbing consequence of the 'one fails, all fail' requirement is that dependent family members with a disability are being abandoned to facilitate the separate migration of other family members.

5.29 The Australia Lawyers for Human Rights advised:

> The Health Requirement is designed so that if one fails, all fails and so we know that the operation of this policy has often resulted in children with a disability being left behind while other members of the family migrate, especially in refugee cases...[24]

5.30 Mr Brian Kelleher of the Migration Institute of Australia reported that families were put in the invidious position of waiting until a dependent child with a disability turns eighteen, so that the family could make an independent application:

> The whole family was refused because the health criterion is a 'one fails all fail' rule. In that example of the son who was blind, the family had to wait a few more years in which he was not part of the family unit before they tried again.[25]

5.31 Professor Mary Crock confirmed from her research that the policy is having a distorting affect on families, with children often the main victims:

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22 Ms Sharon Ford, *Submission 74,* p. 9.

23 Immigration Advice and Rights Centre, *Submission 30,* p. 10.

24 Australia Lawyers for Human Rights, *Submission 11*, p. 14.

25 Mr Brian Kelleher, Migration Institute of Australia, *Committee Hansard*, Sydney, 12 November 2020, p. 45.

> I have a particular research interest in children and immigration in this respect. One of the points where the health rules really bite hardest is in their impact on children. Unfortunately, there are families who will literally cast off a family member. The policy is unhealthy at so many different levels because it actually reinforces stereotypes; it forces migrants, sometimes, to act dishonestly because they are supposed to tell us about family members; and it has a horrendous impact on the child.[26]

5.32 The Refugee Council of Australia (RCOA) provided an explanation of this noting that waiver provisions attached to some family stream and refugee and humanitarian visas promote these distortions:

> The waiver process allows for consideration of the alternative care and welfare arrangements in place for a non-migrating dependant and Schedule 2 of the *Migration Regulations* allows for a waiver of the health requirement for a non migrating dependant 'if the Minister is satisfied that it would be unreasonable to require the person to undergo assessment in relation to that criterion'. It is our understanding that the combination of these discretionary provisions would allow for a family that otherwise met the criteria to make the extremely difficult decision to apply to leave behind an ordinarily dependent family member who might not meet the standard health requirement.[27]

5.33 Dr Susan Harris Rimmer, representing Australian Lawyers for Human Rights, observed:

> …if you are making someone choose between saving their life and staying with their child, often the family will make the decision that the mother will stay because the mother is not the target of the persecution but the father is, and the father will leave. Australia is one of the few countries that forces people to take that sword of Damocles sort of decision.[28]

5.34 As demonstrated by evidence, the 'one fails, all fail' rule can have a substantial impact on a family unit. Many applicants who have failed this requirement have been unable to understand the rationale behind it, especially in the situation where not all members of a family are seeking to migrate, or where the parents of children with a disability have the ability

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26 Professor Mary Crock, *Committee Hansard*, Sydney, 12 November 2020, p. 13.

27 Refugee Council of Australia, *Submission 105,* pp. 6–7.

28 Dr Susan Harris Rimmer, Australian Lawyers for Human Rights, *Committee Hansard*, Canberra, 18 November 2020, p. 6.

to make an economic impact to Australia and also contribute to the costs associated with their child's disability.

The Moeller and Kiane cases

5.35 Many submissions to the inquiry referred to the migration treatment of the Moeller and Kiane families to indicate the severity of problems imposed by the 'one fails, all fail' criterion on families with disabled children.[29]

5.36 The case studies on these matters (see **Case Studies 5.1 & 2**) raise a number of general considerations of relevance to the impact of the Health Requirement on families. In particular:

- **The impact of the cost assessment of children**
  - ⇒ There appears to be a predominance of cases where the acceptance of a whole family will hinge on the outcome of the medical assessment of a dependent child or dependent relative.
- **Many family stream visas and permanent residency visas do not have a waiver option, meaning no cost offsets will be considered**
  - ⇒ In the event of rejection under the 'one fails, all fail' rule, even where there is a waiver, the cost assessment on disability means most applicants have no recourse but to seek Ministerial discretion after a visa rejection and a lengthy process of appeal.
- **Offshore family members of Australian permanent residents are unduly affected by the rule**
  - ⇒ if immediate family members of an Australian permanent resident or protected visa holder are offshore they will be subject to the health requirement, and all will be rejected if one member has a disability.

5.37 The following analysis covers evidence on these issues.

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29 Professor Patricia Harris, *Submission 2*, p. 3; Queensland Nurses Union, *Submission 5*, p. [3]; Australian Federation of Disability Organisations, *Submission 6*, pp. 9–10; Australian Lawyers for Human Rights, *Submission 11*, pp. 13–20; Multicultural Development Association, *Submission 20*, p. 7; Advocacy, Disability, Ethnicity, Community (ADEC), *Submission 23*, pp. 7-8; Professors Ron McCallum AO and Mary Crock, *Submission 31,* Attachment 1, pp. 14-15; Cerebral Palsy League, *Submission 36,* p. 6; Refugee Council of Australia, *Submission 105*, pp. 8–9.

Case Study 5.1

Dr Bernhard Moeller—rural doctor and family and the 'one fails, all fail' rule

Dr Moeller was German GP practicing in rural Victoria on Temporary Long Stay 457 visa. The Moeller family was refused permanent residency because of 13 year old Lukas Moeller's Down Syndrome.

No waiver was available under the permanent skilled visa (PIC 4005) so the Migration Review Tribunal duly rejected the Moeller's application for review of their case. However, following representation by members of Federal and State Parliaments and media attention, the case was quickly resolved.

Exercising his discretionary powers the Minister intervened to waive the Health Requirement in recognition of the 'compelling and compassionate' circumstances, including Dr Moeller's considerable contribution as a rural based medical practitioner to offset any 'undue' costs.

Source *Australian Lawyers for Human Rights*, Submission 11, *pp. 17-19.*

Case Study 5.2

Mr Shahraz Kiane—protected refugee's family and the 'one fails, all fail' rule

Mr Kiane was an asylum seeker who received protection in Australia in 1997 and sought to sponsor his wife and children to join him.

Mr Kiane's Split Family Protection visa application was rejected on the basis that the Health Requirement was not met by one of his children, an eight year old girl with cerebral palsy and epilepsy. The visa has a waiver (PIC 4007) consideration, during which family members in Australia offered to guarantee financial and other support.

After four and half years in appeal, Mr Kiane subsequently set fire to himself in protest in front of Parliament House in Canberra in 2001. He later died of his injuries. In its report on the case, the Commonwealth Ombudsman expressed 'serious concerns about the fairness and professionalism of [the] decision-making process'.

Source *Refugee Council of Australia*, Submission 105, *pp. 8-9; Professors Ron Mc Callum AO and Mary Crock*, Submission 31, *Attachment 1, p. 15.*

The methodology for health cost assessments

5.38 In Chapter 3 of the report the Committee evaluated evidence relating to the calculation of significant cost and medical assessment conducted under the Health Requirement.

5.39 In this section the Committee focuses on the effectiveness and impact of the cost methodology when applied to children with a disability in conjunction with the Health Requirement's 'one fails, all fail' criterion.

Assessing health costs for children

5.40 Perhaps the strongest message of the inquiry was that the medically based cost assessment made under the Health Requirement is most flawed when applied to children with a disability.

5.41 Dr Susan Harris Rimmer and Dr Kristin Natalier objected to the underpinning assumption that children with a disability are a set deficit, with no potential for development or growth:

> Defining child applicants with reference to costs reflects and reinforces a conceptualisation of disability as a deficit and as largely unproductive. Able-bodied children are presumed to be in the process of developing (intellectually, physically, emotionally) into productive citizens … but this expectation is denied to children living with a disability, whose potential engagement in the labour market is denied.[30]

5.42 The Royal Australasian College of Physicians observed:

> Assessing a child's economic worth without considering the contributions of the family as a whole or the child's own potential, can lead to unjust decisions.[31]

5.43 The Australian Lawyers for Human Rights stated:

> Disabled Children are disproportionately impacted by the operation of this seemingly objective legal scheme because the heath requirements asks the MOC to calculate costs including education and pension costs over a person's lifetime and thus children are more likely to cross the $200 000 barrier than adults. Children are not usually the primary applicant so their particular

30 Dr Susan Harris Rimmer and Dr Kristin Natalier, *Submission 7*, p. 6.

31 The Royal Australasian College of Physicians, *Submission 80*, p. 8.

> situation or prospects are not considered at any stage in the process, unlike applicant adults.[32]

5.44 The Committee received a disturbing number of submissions and testimonies which cited a child with a disability as the reason behind a family's rejection under the Health Requirement. In response to these accounts, the Committee sought to establish the extent to which children with a disability are the reason for visa refusals under the 'one fails, all fail' rule.

5.45 DIAC was asked how many of the 282 cases refused under the 'one fails, all fail' rule involved a dependent child with a disability as the person refused. The Department could provide no more detail than the following:

> According to the Department's 2008-09 data, there were 44 people who were refused a visa because of some form of intellectual impairment. Of these, 26 were children, (the youngest 2 years, the oldest 15 years).[33]

5.46 DIAC's Chief Medical Officer Dr Paul Douglas clarified that it is not the condition itself which results in a visa rejection, but the calculation of health costs over time, and this calculation most impacts on children and the young:

> Legally everyone is assessed. There are no set diseases, circumstances or conditions which mean that people will not meet the health requirement, but practically we know that, if people are young enough and have a severe enough condition, it is almost automatic that they will not meet the health requirement.…[34]

5.47 Commenting on this, Mr Peter Papadopoulos of the Law Institute of Victoria (LIV) told the Committee that the bulk of the health costs estimated for children with Down Syndrome is attributable to their ability to access a Disability Support Pension (DSP). He noted:

> The problem is that the criteria which assess for DSP—under table 10, schedule 1B of the Social Security Act—mean that you are assessing children against criteria which apply to adults. So how on earth can you make a robust decision in relation to how much somebody is going to cost when you are talking about a four-year-old child? You are not sure really whether or not they are going to

32 The Australian Lawyers for Human Rights, *Submission 11*, p. 14.

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

34 Dr Paul Douglas, Department of Immigration and Citizenship, *Committee Hansard,* Canberra, 17 March 2008, p. 14.

> have moderate or mild Down syndrome. You are basing the entire visa decision on that one word.[35]

5.48 Ms Sharon Ford queried how can one 'reasonably assess quantitatively either the future economic or future social cost or contribution of any individual?' She suggested:

> If cost estimates are to continue to be applied then it should be to each and every applicant. And it must be a realistic assessment of costs based on the applicant's health and prognosis *at the time of application,* defined by standardised estimates and guidelines which are available for public scrutiny. The process of attempting to calculate the future cost of health and community services should be discontinued. It is impossible and the outcome meaningless in any real context.[36]

Costs 'regardless of use'

5.49 Another objection raised in relation to the cost methodology was the criterion set out in the PIC 4005, 4006A and 4007 which states that decision-makers should consider the likelihood of 'significant cost' to the Australian community:

> '…regardless of whether the health care or community services will actually be used in connection with the applicant'.[37]

5.50 Submissions suggested this was an illogical approach. Carers New South Wales stated:

> The most important issue for migrants with a disability and their families in the health requirement assessment is that the rigid criteria does not take into account whether the individual with a disability would actually utilise community services. The decision is made, in essence, on a hypothetical assumption of the use of the health and community services that a person in the same circumstances would use or may be eligible for, regardless of whether the health care or community services will actually be used by the applicant.[38]

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

36 Ms Sharon Ford, *Submission 74*, p. 4.

37 *Migration Regulations 1994*, *Schedule 4*, and see The Department of Immigration and Citizenship, *Submission 66,* Attachment B.

38 Carers New South Wales, *Submission 71,* p. 6.

5.51 The author of another submission had made an application for a permanent visa but was rejected on the basis of projected DSP costs associated with his child, who has mild spina bifida:

> In October 1997, I wrote a letter to the Immigration Minister and raised some serious concerns about the quality and integrity of the medical assessment done by an Australian government doctor. I asked for a detailed calculation of "significant cost" on the basis of which my visa application was denied. The minister indicated that my daughter was going to be eligible for A$ 1,950 per year disability allowance. There was nothing on the record to suggest that I was going to apply for the said disability benefit if my application for a migrant visa was approved. My family was not going to qualify for the said benefit due to our financial standing.[39]

5.52 The submitter reports that his daughter now attends one of the top United States' liberal art colleges and is thriving despite being judged deficient under the Australian system. [40]

5.53 Ms Lauren Swift referred to the body of case law testing the application of the 'regardless of use' criterion. She notes that in *Iguanti v Minister for Immigration and Multicultural Affairs*,[41] for example, the judgments went against the position that the PIC 4005 is invalid because it is illogical. This case has been seen to reinforce the view that it is reasonable to assess against potential cost to the community and that the MOC should not be required to take into account the potential to offset such costs. [42]

5.54 Ms Swift submitted that the finding is not consistent with Australia's commitments under Article 2 of the United Nations *Convention on the Rights of Persons with a Disability* (CRPD) and is discriminatory:

> …by not taking into account financial means, there is no way an applicant can overcome the hurdle of proving there will be no resulting burden on the state. This is an assumption not made for people without a disability.[43]

5.55 A number of other cases, such as *Robinson v Minister for Immigration and Multicultural and Indigenous Affairs*[44] which involved a child with Down Syndrome, were also cited in evidence to indicate the difficulty of

39 Name Withheld, *Submission 108*, p. 2.

40 Name Withheld, *Submission 108*, p. 6.

41 *Iguanti v Minister for Immigration and Multicultural Affairs [2001] FCA 1046.*

42 Lauren Swift, *Submission 60,* p. 21.

43 Lauren Swift, *Submission 60,* p. 21.

44 *Robinson v Minister for Immigration and Multicultural Affairs [2005] 148 FCR 182.*

achieving a successful outcome once rejected under the Health Requirement.[45]

Cost offsets

5.56 It was apparent to the Committee that there is a need to have a greater recognition in the legislation of factors that might offset the negative projected cost calculations for assessment of children of under current arrangements.

5.57 The Committees notes that Canada provides a set benchmark for the calculation of health costs and that all applicants may seek a second medical opinion and provide additional information which sets out how costs may be offset following a refusal based on health or service costs.[46]

5.58 Ms Kione Johnson, research student, has expertise on the Canadian migration systems:

> In Canada, when economic migrants are considered they are allowed to take into account the fact that the family may have significant private assets available to meet the cost of the disability. So the economic reasons behind the migration are taken into account rather than immediately dismissing the family on the grounds of disability. In terms of family migration and the policies behind family migration, you are not allowed to discriminate against an immigrant who is applying for a spouse or child visa simply on the grounds of excessive cost. The only reason you can exclude them is if they are a public health risk. In that case, you are giving better effect to the policies behind those areas of those forms of migration.[47]

5.59 Ms Stephanie Booker of immigration specialists Clothier, Anderson and Associates stated:

> Significant weight should be given to a family's capacity to pay for the care of disabled family members in Australia. As the regulation currently reads, even with the waiver criterion, 4007

45 See the Department of Immigration and Citizenship, *Submission 66,* Attachment I for a list of other relevant cases. For analysis of the Robinson case see Freehills Law Firm, *Submission 56* and Attachment. Also see Australian Lawyers for Human Rights, *Submission 11*, p. 11; Advocacy, Disability, Ethnicity, Community (ADEC), *Submission 23*, p. [8], Lauren Swift, *Submission 60,* p. 21.

46 NSW Disability Discrimination Legal Centre (DDLC) (Inc.), *Submission 55*, pp. 14–15.

47 Ms Stephanie Booker, Clothier, Anderson and Associates, *Committee Hansard*, Sydney, 12 November 2010, p. 13.

> leads to a scenario whereby decision makers are bound to take into consideration costs to the community—and these are theoretical costs, not actual costs—even if those costs would not be borne by the community. [48]

5.60 Ms Mary Ann Gourlay, Carers New South Wales and Dr Susan Harris Rimmer emphasised the importance of carers, often women, who care for a family members with a disability. Dr Harris Rimmer noted:

> Dr Moeller cannot be Dr Moeller without his wife. If we want Dr Moellers, generally we need to take their wives and children and understand that that is part of the package that makes him economically as well as socially valuable.[49]

5.61 The Public Interest Advocacy Centre/STARTTS advised:

> In many cases, the MOC cost assessment is based on the assumption that an applicant with a disease or condition would access all available health and community services. This assumption however ignores the fact that in many cases strong family and cultural ties mean that applicant's with a disease or condition would be more likely to be cared for by a family member and less likely to be put into care.[50]

5.62 Another submission emphasised the importance of extended family as carers in Asian communities. It described the circumstances of a young Asian man with severe autism, unable to speak and very lonely. Greater discretion to include extended family, not just immediate family, under the carer visa (PIC 4005) was recommended to:

> ... enable the Australian community to take advantage of family networks as they exist among migrants both first generation and second generation that can provide the support and care that would delay or permanently reduce the dependence on services that are much more expensive. I refer to the difference in cost in offering accommodation support in the family home as compared to the cost of providing for public accommodation with support services.[51]

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48 Ms Stephanie Booker, Clothier Anderson and Associates, *Committee Hansard*, Melbourne, 18 February 2010, p. 30.

49 Ms Mary Ann Gourlay, *Submission 25*, p. 37, Carers New South Wales , *Submission 71,* p. 1; Dr Susan Harris Rimmer, *Committee Hansard*, 12 November 2010, p. 11.

50 Public Interest Advocacy Centre/NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, *Submission 87,* p. 8.

51 Name Withheld, *Submission 12*, p. 2.

The experience of family visa applicants

5.63 While DIAC offers a range of visa categories to assist family reunification it is notable that among those without a waiver option (under PIC 4005) are the family stream visa categories of:

- Parent;
- Contributory Parent;
- Aged Dependent Relative;
- Sole Remaining Relative
- Orphaned relative,
- Carer, and
- Family visits.

5.64 As the IARC noted, these visa categories apply to individuals who could be considered to be the most needy in the migration stream.[52]

5.65 As part of its inquiry, the Committee solicited opinions from Senators and Members of Parliament about Australia's migration health requirement and its impact on their constituents. The Parliamentary Secretary for Disability and Children's Services, the Hon. Bill Shorten MP indicated in his submission that most correspondence to him on migration matters related to Australian family members who were trying to assist a relative in another country to migrate to Australia, often after their visa has been rejected.[53]

5.66 Among the many moving stories received in this category, were those relating to Sole Remaining Relative visas, often made on behalf of siblings with a disability or aged parents.

5.67 Mrs Cynthia Sierra Muir, an Australian citizen, advised the Committee of the situation of her sister and legal ward Carmen (Maria) Sierra Diaz. Ms Diaz was to be deported to Spain by the Australian Government because of a mild intellectual disability after failing the Health Requirement. In contrast to the home provided with the Muirs in Australia, Carmen would

52 Immigration Advice and Rights Centre, *Submission 30*, p. 2.

53 The Hon. Bill Shorten MP, Parliamentary Secretary for Disability and Children's Services, *Submission 112*, p. 1.

have had to leave for the country of her birth, where she has never lived, without carers or relatives, see **Case Study 5.3** following**.** [54]

5.68 It was apparent to the Committee that even where waiver options existed, many Australian citizens or ex-permanent residents are being put in an untenable position by the Health Requirement.

Case Study 5.3

Australian citizen seeking a sole remaining relative visa for her sister

Ms D has an intellectual impairment due to anoxia at birth. She was born in Spain but lived most of her life in France. After the death of her parents, her sister Mrs M, an Australian Citizen, became Ms D's sole and legal guardian.

Mr and Mrs M brought Ms D to Australia in June 2005 soon after her mother and carer died. They applied for Ms D's residency under a Sole Remaining Relative visa type 3344.

In November that year the visa application was rejected on the basis of costs associated with Ms D's disability. Her sister was told she could appeal following receipt of written advice. This did not arrive until three years later in 2008. The family was advised that within 28 days the M's either must pay a $1 400 Migration Tribunal appeal fee or fly Ms D back to Spain without care options at the other end.

Ms D underwent additional tests to confirm her IQ. The family did not obtain any additional health assessment on the basis that the MOC had found Ms D to be in good health. However, she did not pass the test because of her intellectual disability.

Ms D can take care of herself but cannot perform complex tasks, such as taxation returns, banking etc, which her sister, as her legal guardian, carries out. She has a loving home with her sister and husband and their two children, and has friends in the community.

After long years of waiting, the family have no certainty that Ms D will not be deported to Spain, where she has no relatives, friends or support of any kind. The M's are still waiting for the decision of the Migration Review Tribunal.

Source *Mrs Cynthia Muir*, Submission 3, *pp. 2-3.*

54 Mrs Cynthia Sierra Muir, *Submission 3*.

Case Study 5.4

Family unity overruled for an Australian returned resident

Mrs G is an Australian permanent resident (on a resident return visa since 2006) who sponsored her husband B of 28 years for a Subclass 309 Spouse visa in April 2008. Their 25 year old son J has a severe intellectual and physical disability and was named as a dependent in their application. The G's other son A is in Australia studying at university in Melbourne and is also a permanent resident.

The family had been living in Hong Kong where B was employed as a pilot. He is now an internationally-recognised aviation safety consultant. The visa application, lodged at the Australian Consulate-General in Hong Kong, was refused on 10 June 2009. The reason given was that son J could not to satisfy the Public Interest Criterion 4007 of the Migration Regulations 1994.

The Medical Officer of the Commonwealth (MOC) had determined that, over a lifetime, J's impairment and disability could cost the community approximately $2 100 000. The degree of prejudice to access to health and community services was considered to be only moderate. It was additionally noted that despite husband B's employability (aviation safety is an area of critical skills shortage in Australia and over the world) his age reduced any potential tax benefit of his employment in Australia.

The Gs maintained that the MOC did not give sufficient regard to moderating factors, such as the family's links to the Australian community (both the mother and son A), the benefit of B's skills and Mrs G's work as a qualified riding instructor for the disabled and as a nursery nurse. In addition was the family's independent capacity to care for J, their previous contributions to the community, and their significant family assets and property.

The case is currently before the Migration Review Tribunal. The pressure on the family is significant, particularly for Mrs G, who is depressed by her long struggle to return to Australia, and their son A, who must commute between countries to keep in contact with his family.

Source *Clothier, Anderson and Associates,* Submission 98*; and see Ms Stephanie Booker, Clothier, Anderson and Associates,* Committee Hansard, *Melbourne, 18 February 2010, pp. 30 36, and Mr A Greeves, p. 38.*

5.69 Clothier, Anderson and Associates advised of the case of Brian and Nicola Greeves whose dependent spouse visa application (a permanent visa assessed under PIC 4007) was rejected under the 'one fails, all fail 'rule despite their connections to Australia (Nicola's status is as a former Australian resident and her other son's residence in Australia) and the couple's considerable professional expertise, skills and assets. This underlined the need for some offsets against the 'significant cost threshold'. See **Case Study 5.4**, above.[55]

Case Study 5.5

Australian step-father's new family rejected under the Health Requirement

An Australian born citizen married a woman overseas who had a fourteen year old daughter from a previous marriage. The man wanted to live with his new wife and step-daughter in his country of birth, so he brought them back to Australia. He was unaware at this time that his step-daughter's disability would pose insurmountable difficulties to his dream.

The family's application for permanency was rejected because the child failed the Heath Requirement. The parents appealed to the Migration Review Tribunal. The processing of their application and the appeal process took over two and a half years.

During this time, their child was denied access to state primary school education and was not eligible for support from Disability Services Queensland. The Queensland Education Department would only allow the child to attend school if the parents paid full fees for her education and additional fees to access special education. These fees were to be paid up-front, at a total of approximately $20 000 annually, which the family could not afford.

The child consequently could not attend school for the entire two and half years and was deprived of the necessary developmental learning and social interaction with other children that attending school provides.

The stress became too great for the family, with a new son born during this time, they returned to the home country of the mother and child.

Source *AMPARO Advocacy Incorporated,* Submission 40, *p. 2.*

55 Clothier, Anderson and Associates, *Submission 98.*

5.70 Maureen Fordyce of AMPARO Advocacy Incorporated provided an update on the circumstances of an Australian stepfather and teenager with a mild intellectual disability, see **Case Study 5.5.** She stated:

> With that wait of 2½ years and what it did to that family I think the cost far outweighs any cost that the Australian community would have incurred had they been allowed to stay in Australia. What I did not mention in our submission, because we did not know it at the time, was that that family have since returned home, but they have also placed their child in an institution and are looking at coming back to Australia.[56]

5.71 Adopted children qualify for a visa with a PIC 4007 waiver option. Mr Robert McRae, a migration agent and president of Queensland Advocacy Inc, advised of an Australian couple working in Fiji who adopted two children, one with a disability. Despite achieving a first class medical assessment by paediatricians in NSW, the child with a disability was rejected under the Health Requirement:

> So we have a system that puts two Australians, who had actually had a medical assessment of one of their children because they were aware of this thing called a health requirement, in a position where they and their adopted child without a disability could come into Australia but the adopted child with the disability could not.[57]

5.72 The Skilled Migration stream is the largest migration program, and many families who are victims of the 'one fails, all fail' rule are on a provisional skilled visa seeking permanent residency after many years in Australia (this stream is considered in the following chapter).

5.73 While in Australia on Temporary 457 skilled visas, Dr Fiona Downes and her husband, also a doctor, were advised that their toddler Eamon had autism. Eight years later, and after two more children were born, the family applied for permanent residency (PIC 4005 visa) only to be rejected on the basis of Eamon's condition.[58] Dr Downes wrote to the Committee:

> Account should be taken of the devastating effect of a refusal of residency on the health of the individual concerned. Eamon came to Australia as a 7 months old baby, and if our application had

56 Ms Maureen Fordyce, AMPARO Advocacy Inc., *Committee Hansard,* Brisbane, 28 January 2010, p. 6.

57 Mr Robert McRae, Queensland Advocacy Inc., *Committee Hansard,* Brisbane, 28 January 2010, pp. 6–7.

58 Dr Fiona Downes, *Submission 103,* p. [1].

> been unsuccessful he would have had to leave his home aged 10 years. This would be a major set back for any child but for a child with Autism who wants and needs familiarity, it would likely cause regression and potentially irreversible loss of function.[59]

5.74 Another category of families affected by the operation of the Health Requirement's 'one fails, all fail' criterion were refugee and humanitarian visa applicants with disabled relatives.

Case Study 5.6

The Health Requirement and an Iraqi refugee family

A refugee family left Iraq and went to Syria where they stayed for a couple of years. They had a daughter with a mild intellectual disability who was about fourteen or fifteen years old. The family applied to come to Australia as refugees but were rejected as their daughter had not met the Health Requirement. It was decided to arrange a marriage for her so that she would no longer be included in the family unit. The family's second application was accepted and they came to Australia as refugees.

The daughter stayed in Syria with her husband. Unfortunately, less than a year after the rest of the family left, the marriage broke down. The daughter was still very young and now had a baby son without anyone to look after them. This situation put the refugee family in Australia under great financial and emotional strain.

Prior to the breakdown of the marriage the family were sending all of their Centrelink funds to support the couple. After the separation the father twice went to Syria to support his daughter and grandson, staying for a couple of months and then returning to try to save or borrow money. He was forced to borrow from small institutions at very high interest rates. This caused further financial hardship to the family and their rent was in arrears.

The family tried to bring the daughter to Australia under the family reunion or last remaining relative visa, but without success. The strain on the family was intense. The father started spending his money on drinking because of the stress and frustration. The family was split up. The parents lost focus on bringing up their children in Australia. The children got into trouble at school and were out on the streets. The parents had relationship issues between them.

Source: *Mrs Yamamah Khodr-Agha, Fairfield Migrant Resource Centre, Cabramatta Community Centre,* Committee Hansard, *Sydney, 12 November 2009, pp.68-69.*

59 Dr Fiona Downes, *Submission 103,* p. [2].

5.75 The Cabramatta Community Centre has dealt with many Iraqi families who have been trying to reunite with disabled relatives.[60] Mrs Yamamah Khodr-Agha reported the story of a teenager with a mild intellectual disability who was forced into an early marriage by the Health Requirement's 'one fails, all fail' rule (see **Case Study 5.6)** above. [61]

Case Study 5.7

The impact of HIV and the 'one fails, all fail' rule on a West African refugee extended family

A West African refugee in Australia sought to sponsor his extended family— his uncle, brother and sister and their immediate families—on a Global Special Humanitarian visa subclass 202. Two significant events occurred during this time: the sponsor's sister, a woman in her late twenties, died and her young son was then adopted by his uncle.

The family of thirteen members underwent medical tests for the Health Requirement. During these tests two family members discovered that they were HIV positive. One of these was the orphaned teenage boy. Discovering that their HIV positive status could affect their relatives' applications, he and the other positive applicant decided to withdraw from the process. At this point, they were informed of the 'one fails, all fail' policy.

The stress on discovery of the policy for all involved was very significant, and particularly for the two rejected under the test, who found out simultaneously about their HIV positive status and its potential to destroy the hopes of their extended family for a better life. Meanwhile in Australia the sponsor and his family, all of whom are torture victims, remain extremely fearful for their relatives in West Africa.

Prior to the health checks, positive indications had been given by the case officer in the humanitarian section of the Australian Embassy in Pretoria. The family sought advice from the HIV/Aids Legal Centre which made submissions of appeal on their behalf in early 2007.

Three years later those applications are still pending.

Source *HIV/Aids Legal Centre*, Submission 69, *p. 12.*

5.76 Australia is one of 59 countries out of 108 that applies migration restrictions on HIV positive people.[62] The HIV/Aids Legal Centre Inc.

60 Cabramatta Community Centre, *Submission 28,* p. 2.

61 Mrs Yamamah Khodr-Agha, Fairfield Migrant Resource Centre, Cabramatta Community Centre, *Committee Hansard,* Sydney, 12 November 2009, pp. 68-69.

62 Australian Capital Territory Human Rights Commission, *Submission 76*, p. 3.

(HALC) advised of the outcome for a teenage orphan whose HIV status was identified during the health test (in **Case Study 5.7)**.[63]

Visiting relatives

5.77 A discrete but important issue for family reunification was the capacity for people with a disability to visit relatives in Australia.

5.78 Dr Gabrielle Rose, Cerebral Palsy League, saw that the family visit program is discriminatory and not in keeping with family unification principles. The situation of a political refugee trying to arrange a visit from his parents reveals endemic problems:

> He arrived in Australia in 2000. So that the family could come and see whether he was okay, the department of foreign affairs expected him to put $30,000 on the table to assure that the mother and father would go back home. Then he had to pay this astronomical amount for all the health checks. His parents were in the vicinity of 70 years old. They had normal health problems—a little bit of high blood pressure; the mother had had a mastectomy—so they had been involved in the health system in their own country on a regular basis. It was not as though they were unhealthy for their age. They were coming over to Australia for only three months. But for that refugee to find about $40,000 to $50,000—after the flights, after the health checks, after the $30,000 deposit—I thought was an incredible ask of that family.[64]

5.79 Mr JP Tempest, a migration agent, also identified repeated health checks as an issue for clients with schizophrenia wishing to visit relatives in Australia on temporary tourist visas or sponsored family visit visas. On each visit, the applicant had to be assessed again by a different Medical Officer of the Commonwealth and risk a refusal. [65]

5.80 Mr Tempest concluded that while excluding the permanent migration people who are a health risk is justifiable, it is discriminatory to exclude people who have a disability or a condition for visits to relatives in Australia:

63 The HIV/Aids Legal Centre Inc., *Submission 69,* p. 11.

64 Dr Gabrielle Rose, Cerebral Palsy League, *Committee Hansard,* Brisbane, 28 January 2010, p. 14.

65 Mr JP Tempest, *Submission 18,* p. 6.

> To refuse a family member on the basis of cost is abhorrent and flies in the face of human dignity. It causes both considerable stress to both the applicant and the sponsor'.[66]

Committee Comment

5.81 From the evidence taken, it appears that the 'one fails, all fail' rule is discriminatory against families when a disabled member is involved. The consideration of non-migrating members has a prejudicial effect, with which could be ameliorated simply by assessing the individual of concern at the time of migration (if ever that occurs).

5.82 It is also appropriate that health care or continuing costs are assessed according to an individual's need, rather than the current 'regardless of use' approach. The Committee has earlier recommended a change to this approach.

5.83 As set out in Chapter 3, the Committee also considers that, if visa applications are to be assessed for the whole family unit, then it is only reasonable that there be opportunities to offset 'significant costs' against the 'sum benefit' to Australia of the family.

5.84 This should include consideration of the potential to defray cost through family carer and other arrangements under a broader range of visas.

5.85 Finally, the Committee considered that the current Health Requirement imposes undue hardship on families that include a member with a disability wanting to visit Australia. This should be reviewed.

66 Mr JP Tempest, *Submission 18,* p. 6.

Recommendation 11

The Committee recommends that the Australian Government review the operation of the 'one fails, all fails' criterion under the Migration Regulations 1994 to remove prejudicial impacts on people with a disability.

Recommendation 12

The Committee recommends that the Australian Government amend the criterion for assessing waivers to the Health Requirement to include recognition of the contribution made by carers within the family as an offset to health care or community services costs identified in the process.

Recommendation 13

The Committee recommends that the Australian Government review the requirements for health inspections for short term visas under the Family Visits program.

Onshore/offshore refugee and humanitarian programs

5.86 Australia's refugee and humanitarian program offers protections not afforded to visa entrants entering under the general migration program. The 1951 United Nations *Convention Relating to the Status of Refugees* defines a refugee as a person who:

> …owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.[67]

5.87 The Refugee Council of Australia advised:

67 Article 1(2), *Convention Relating to the Status of Refugees* 1951 accessed 10 May 2010 at UN Documents Gathering a Body of Global Agreements <http://www.un-documents.net/crsr.htm>.

> Australia's Humanitarian Program sits within a challenging global context. The United Nations High Commissioner for Refugees (UNHCR) reports that, at the end of 20081 there were some 42 million forcibly displaced people worldwide, comprising 15.2 million refugees (5.7 million of whom were in protracted situations2), 827,000 asylum-seekers and 26 million internally displaced persons, with a further 6.6 million identified stateless persons in need of humanitarian assistance. Developing countries are host to approximately 80 per cent of the world's refugees.[68]

5.88 The Committee notes that Australia has one of the largest resettlement programs among developed nations.[69] It manages its refugee and humanitarian migration intake under two streams of treatment —Onshore and Offshore, the:

- **Onshore Program** settles recognised refugees in accordance with our international obligations; and
- **Offshore Program** (Special Humanitarian Program (SHP**))** category is for people who, while not being refugees, are subject to substantial discrimination amounting to a gross violation of their human rights in their home country.[70]

5.89 DIAC's rationale for the different treatment is as follows:

> Some countries receive large numbers of asylum seekers and focus their efforts on assisting those who claim protection under the Refugee Convention. As Australia receives comparatively few asylum seekers we go beyond our international obligations and work closely with UNHCR to help protect refugees in other countries through resettlement.[71]

5.90 The United Nations High Commissioner for Refugees (UNHCR) has statutory obligations to supervise the application of the Refugees Convention. The UNHCR submitted that, while Australia has a strong record of onshore resettlement of refugees holding 'protection' visas, our

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68 The Refugee Council of Australia, *Submission 105*, p. 2.

69 United Nations Human Rights Commissioner for Refugees (UNHCR), *Submission 82*, p. 5.

70 Department of Immigration and Citizenship, 'Who is Eligible? Overview of the Offshore Humanitarian Program' accessed May 2010 at < http://www.immi.gov.au/visas/humanitarian/offshore/>.

71 The Department of Immigration and Citizenship, Refugee and Humanitarian Issues: Australia's Response, June 2009 p. 16, accessed May 2010 at <http://www.immi.gov.au/media/publications/refugee/ref-hum-issues/ref-hum-issues-june09.htm>.

offshore processes do not meet International obligations under Article 33 (1) Refugee Convention.[72]

5.91 In keeping with international obligations, Australia waives the Health Requirement for onshore protection visa applicants (Subclass 866). However, the Health Requirement stands for Offshore Refugee and Humanitarian visas. As shown earlier in **Table 2,** all Offshore Refugee, Humanitarian Emergency Rescue and Woman at Risk visas have PIC 4007 waivers attached.[73]

5.92 Submissions to the inquiry acknowledged Australia's commitment to refugee and humanitarian resettlement under the protected program but, like the UNHCR, many strongly opposed the imposition of the Health Requirement on the offshore stream.[74]

5.93 The Public Interest Advocacy Group/STARTTS advised:

> The refugee applying overseas and all members of their family including migrating and non-migrating dependants must satisfy the health testing requirements found in Schedule 4, PIC 4007 unless the Minister is satisfied that it would be unreasonable to require the person to undergo assessment in relation to the health criteria, for example, a situation where submitting to a health test may put the applicant's life at risk. If the refugee applying overseas or a family member fails to satisfy the health test, no medical treatment is provided. The application is simply refused, unless the Minister (or delegate) waives the Health Requirements.[75]

5.94 The Refugee Council of Australia (RCOA) also identified anomalies in the current approach noting:

> Incongruously, the onshore protection program is numerically linked to the SHP, such that every onshore protection visa grant translates into a deduction from the number of places available for offshore humanitarian resettlement. Australia is the only country

72 United Nations High Commissioner for Refugees (UNHCR), Regional Office for Australia, New Zealand Papua New Guinea and the Pacific, *Submission 82*, pp. 3–4.

73 Castan Centre for Law and Human Rights and Rethinking Mental Health Laws Federation Fellowship, Faculty of Law Monash University, *Submission 36*, p. 8.

74 Castan Centre for Law and Human Rights and Rethinking Mental Health Laws Federation Fellowship, Faculty of Law Monash University, *Submission 36;* p. 11.

75 Public Interest Advocacy Centre/NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, *Submission 87,* p. 18.

> to have established a numerical link between the fulfilment of its protection obligations and its resettlement quota.[76]

5.95 The RCOA opposed the policy on the basis that both streams serve distinctive but equivalent purposes, in protecting vulnerable people from risk of persecution or violence, which merits equal migration treatment.[77]

5.96 The HIV/Aids Legal Centre stated:

> Where an applicant meets all other criteria for a humanitarian type visa, the threat to their safety, the risk of persecution and the general humanitarian and compassionate circumstances must always merit grant of a visa, consistent with Australia's international treaty obligations, regardless of the estimated health costs of the applicant. A humanitarian applicant cannot be less worthy of assistance and a visa merely by dint of their having a disability or their health status. Surely by definition they are more in need, their circumstances more dire, and by extension they are all the more appropriate for grant of a humanitarian type visa because of their health condition or disability.[78]

5.97 The Multicultural Development Association (MDA) advised that meeting the Health Requirement adds to the trauma already experienced by refugees with a disability, as the most vulnerable and disadvantaged migrant group.[79] MDA advised:

> Most visa assessments are not undertaken at refugee camps but in the closest metropolitan city, and the journeys that are required are often long. For those that have been found with medical conditions like tuberculosis, clients are required to be treated for a lengthy period of time until their conditions improve and are able to be given a clean bill of health to travel.
>
> For many it means having to stay for an indeterminate period outside camps until their results have been delivered. What this means is that people are hiding in cities where they may be further discriminated against, or at risk of injury or death because of their ethnicity or disability. Further because they are refugees they are not counted in any riots or incursions that may break out because they have no status and are invisible. This is especially dangerous

76 Refugee Council of Australia, *Submission 105*, p. 5.

77 Refugee Council of Australia, *Submission 105*, p. 5.

78 HIV/Aids Legal Centre, *Submission 69,* p. 12.

79 Multicultural Development Association, *Submission 20*, p. 9 and see United Nations Human Rights Commissioner for Refugees (UNHCR), *Submission 82*, p. 5.

> for single women, children, the elderly or those with disability or heath conditions that are vulnerable targets and unable to avail themselves of places of safe refuge. [80]

5.98 Some submitters raised the option of using 'split family visas' as a viable template to facilitate the equitable processing of offshore family cases. DIAC advises that to qualify for a split family visa:

> People applying to be resettled in Australia as the immediate family member of a permanent Humanitarian (including Permanent Protection) or Resolution of Status visa holder must be proposed for entry to Australia by that family member. The applicant's relationship to the proposer must have been declared to the department before the grant of the proposer's visa.[81]

5.99 RCOA saw the benefits of treating all offshore applications under split family visas, in that:

> In the case of a Protection Visa (onshore applicant) proposer, the family member will be issued an SHP visa. "Split family" applications are also subject to a "compelling reasons" criterion. While this is a regulatory requirement, DIAC's current policy stipulates that this criterion is satisfied without further enquiry, in most cases, because the existence of close family ties in Australia is considered to be a sufficiently compelling reason.[82]

5.100 The Castan Centre for Law and Human Rights and Rethinking Mental Health Laws Federation Fellowship considered that this discretion on 'compelling' grounds should be clarified in the law:

> We also note that even if currently DIAC or the Minister for Immigration is using their discretion to waive the health cost criteria in relation to offshore refugee and humanitarian applicants (with the effect that the health criterion is not usually applied to this category of applicants), then this practice should be clarified and codified via abolition of the health cost requirement for these applicants.[83]

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80 Multicultural Development Association, *Submission 20*, p. 4.

81 For the purposes of the visa an immediate family member is either the proposer's partner, dependant child or, if the proposer is not 18 or more years of age, the proposer's parent,. Department of Immigration and Citizenship, Split Family Visa, Who is Eligible? accessed May 20010 at <http://www.immi.gov.au/visas/humanitarian/offshore/immediate-family.htm#b>.

82 Refugee Council of Australia, *Submission 105*, p. 6.

83 Castan Centre for Law and Human Rights and Rethinking Mental Health Laws Federation Fellowship, *Submission 36*, p. 12.

Committee comment

5.101 Currently all offshore refugee and humanitarian applicants are subject to the Health Requirement, although consideration of a waiver is available.

5.102 The Committee considers that the situation of refugees who may not meet the Health Requirement due to disability or health considerations warrants special attention and should be considered under compelling and compassionate grounds, particular for family reunion purposes.

Recommendation 14

The Committee recommends that the Australian Government amend the Migration Regulations 1994 to provide access to consideration of a waiver to offshore refugee visa applicants involving disability or health conditions on compelling and compassionate grounds.

Consideration should also be given to extended family members for the same treatment in the same circumstances.

Torture and trauma

1.1 It was apparent to the Committee that special consideration is needed to assists a class of refugees and their families who have sustained extremes of violence resulting in a disability in their home countries.

1.2 Multicultural Development Association (MDA) is Queensland's largest settlement agency, assisting approximately 1 100 newly arrived refugees annually. It currently has a working case load of 3 500 migrants and refugees in total.[84]

1.3 Over the last five years, MDA has settled approximately 32 families from Sierra Leone and 72 families from Liberia. The submission advises that Sierra Leonean and Liberian refugees are among a discrete but large group of refugees who have been permanently affected by civil war, in this instance, being victims of mass amputations by rebel militia. However, despite the scale of the problem none of MDA's refugee cases have been amputees. [85]

1.4 Ms Kerrin Benson from MDA's indicated that the Health Requirement is having its heaviest impact on the most vulnerable:

84 Multicultural Development Association, *Submission 20,* p. 3.

85 Multicultural Development Association, *Submission 20,* p. 5.

> In the last five years we have settled 5½ thousand newly arrived refugees and there would probably be no more than a handful of those people with physical disabilities, so an enormous proportion of people are not getting through in the refugee program. There are 10,000 amputees in Sierra Leone. Certainly, most of the people we work with would have some extended family member or close friend with some kind of physical impairment from the civil and social conflict at home. Broken legs, amputations or having been shot, slashed or macheted are very common problems. Severe physical problems from rapes in camps are also quite common.
>
> We are not seeing very many of those people but we are hearing a lot of stories from people who are unable to reunite with their family members.[86]

5.103 The extreme stress imposed on relatives unable to unite with family members in war zones was widely recorded in evidence. MDA provided the story of two young Rwandan women settled in Australia who were denied a visit from their amputee mother, see **Case Study 5.8**.

5.104 Ms Adama Kamara, from Sierra Leone, reported the situation of another young countrywoman who had come Australia hopeful of reuniting one day with her mother and sister:

> This happened quite recently: a sister had her lower left leg amputated. [The applicant] was trying to reunite with her mother, her sister and her sister's three children. She got the rejection letter saying that [her sister] did not meet the health test. As she explained it to me, she is a zombie. She has been in Australia for eight years. She has worked. Given the fact that she could live in the same country as her sister, her mother and her niece and nephews and be safe, to get the rejection letter has had so much effect. She said she started thinking about all the trauma that she experienced during the war. She said: 'What's going to happen to these people now that they can't actually live with me? What is going to happen?' So I think we really need to look at the health criteria and the impact it has when people are rejected on that basis. [87]

86 Ms Kerrin Benson, Multicultural Development Association, *Committee Hansard,* Brisbane, 28 January 2010, p. 29.

87 Ms Adama Kamara, Private Capacity, *Committee Hansard,* 12 November 2009, p. 64.

Case Study 5.8

Rwandan mother rejected for civil war injuries

Two young Rwandan women of mixed Hutu and Tutsi ethnicity fled war and genocide in their country, leaving family behind and arrived in Australia in 2003.

Both sisters were in their twenties and had endured significant trauma as a result of genocide, they had been displaced from their Homelands and separated from family. During this time they also suffered discrimination as a minority group because of their mixed ethnicity. As young women they had also been targeted by ever present groups of soldiers who utilised rape as a weapon of war.

In 2004 an application was lodged for their mother to join them in Brisbane. The application took approximately four months to be processed, but was ultimately rejected. Their mother had failed to meet the Health Requirement according to the legislation. The health problems identified were the result of civilian attack during the civil war. She had suffered serious gunshot wounds to both her legs, resulting in disfigurement and permanent disability.

Subsequently, the sisters applied for a family visit visa for their mother, but this too was rejected on the basis of her disability. After being educated and successfully settled in Australia for eight years, one of the young women has returned to Rwanda fearful for her mother's welfare.

Source *Multicultural Development Association*, Submission 20, *pp. 5-6; and see Ms Kerrin Benson, MDA*, Committee Hansard, *Brisbane, 28 January 2010, pp. 29 -30.*

5.105 MDA's Ms Benson advised that these extremely destabilising experiences result in higher health and community service demands: 'I think settlement would be less resource intensive if people were able to reunify with their families'.[88]

5.106 Ms Marg Le Seur of the Refugee and Immigration Legal Service observed that if arrangements were more generous it would be unlikely that the number of applicants would substantially increase. One factor is the obstacles to migration in countries of origin, including the civil war or political oppression that the people are fleeing. Ms Le Seur stated:

88 Ms Kerrin Benson, Multicultural Development Association, *Committee Hansard,* Brisbane, 28 January 2010, p. 30.

> Refugees are probably a very different kind of cohort to other people who are migrating. Generally, they are just trying to find safety. They are fleeing their country and they are trying to get some safety. They are hopeful of reuniting with their family once they get some safety themselves. That is the primary driver. So generally I would say that our refugee clients are fairly unsophisticated about the system and they are just hopeful that they will be able to be reunited.[89]

5.107 Other witnesses emphasised that people with a disability can contribute, and will provide benefit to the community over time. Ms Ricci Bartels, Cabramatta Community Centre, observed that services are available to assist amputees become productive members of the community:

> Initially it would cost us a bit of money to find a limb and to rehabilitate the amputee to be able to use that limb. That will cost us some money. If that person is from a different culture and background then one needs to work with how that person feels about being an amputee, just like we do with people from an English language background, and work with them in their rehab. But when that is done these people are ready to make a contribution, whether they are Australian-born or whether they come here. It comes back to it not being a ledger that just stands still at cost. It is a ledger that is not just short term; it is a ledger that is lifetime.
>
> It is a ledger that should take into account the contributions made by family and community who are very likely working, earning and paying their taxes and therefore making their contributions to all the things we have as rights or need to run a decent, civil society.[90]

5.108 Ms Adama Kamara concluded:

> To sum up, the need for protection overrides any issue of cost. I think we need to stop thinking of people as a cost. We all have contributions that we can make to the community, regardless of amputation. There are aids and equipment that Australia has that can assist someone to contribute to the community.[91]

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89 Ms Marg Le Seur, Refugee and Immigration Legal Service, *Committee Hansard,* Brisbane, 28 January 2010, p. 28.

90 Ms Ricci Bartels, Cabramatta Community Centre *Committee Hansard*, Sydney, 12 November 2009, pp. 69–70.

91 Ms Adama Kamara, *Committee Hansard,* 12 November 2009, p. 64.

Recommendation 15

The Committee recommends that the Department of Immigration and Citizenship create a priority visa category for refugees who have sustained a disability or condition as a result of being a victim of torture and trauma. The Committee recommends that similar visa consideration is provided to immediate family members within the offshore refugee program.