



Refugee Council
of Australia

DEPARTMENT OF HOME AFFAIRS

REVIEW OF AUSTRALIA'S SIGNIFICANT COST THRESHOLD

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, people seeking asylum and the organisations and individuals who work with them, representing over 180 organisations. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, people seeking asylum and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds, and this submission is informed by their views.

Having made submissions to the Australian Government about discriminatory policies on the resettlement of refugees with disabilities and health conditions over the past 10 years, RCOA welcomes the opportunity to provide a submission in relation to the 2023 review of the Significant Cost Threshold (SCT). This submission focuses on the discriminatory barriers that the health requirement presents for refugee resettlement and complementary migration pathways.

Refugees have a higher likelihood of having a disability due to the harsh conditions they often endure. These include:

Impact of Conflict and Torture: Many refugees have experienced or witnessed severe trauma, including conflict and torture. These experiences can lead to both physical and psychological disabilities. For instance, physical torture can result in permanent physical impairments, while the psychological impact of witnessing violence can lead to mental health conditions like post-traumatic stress disorder (PTSD), anxiety, and depression.

Harsh Conditions During Displacement: The journey of fleeing from conflict or persecution often involves dangerous and harsh conditions. Lack of proper medical care, inadequate nutrition, and exposure to harsh environments during this journey can exacerbate existing health issues or lead to new disabilities. For instance, injuries sustained during escape or in refugee camps might not receive timely or adequate medical treatment, leading to long-term disabilities.

Vulnerability of Children and Elderly: Children and the elderly in refugee populations are especially susceptible to disabilities. Children might suffer from developmental disorders due to malnutrition or trauma, while the elderly might have pre-existing conditions that worsen due to the stress and physical demands of displacement.

Psychosocial Disabilities: The trauma of displacement and resettlement can also lead to psychosocial disabilities. Refugees often face a profound loss of their social networks, cultural dislocation, and the stress of adapting to a new environment, all of which can impact their mental health.

Cumulative Effect of Multiple Stressors: The cumulative effect of these stressors can lead to a higher prevalence of disabilities among refugees compared to other populations. It's not just the direct impact of conflict or persecution but also the compounded effect of displacement, loss, and adaptation to new and often challenging environments.

While refugees with a disability are provided with a health waiver if they apply through the Humanitarian Program, similar waivers do not apply for those applying through the Migration Program, including refugees utilising the recent Skilled Refugee Labour Agreement Pilot program, and those seeking to reunite through the Family Stream. We urge the Australian Government to consider health waivers for refugees applying through the Migration Program, as occurs in the Humanitarian Program.

RCOA refers to Welcoming Disability's submission to this review, which addresses the migration program in general. We agree with their submission that:

The health requirement and SCT currently discriminate against individuals with disability or health issues based on outmoded policy assumptions and settings around "cost to the community" which are at odds with the internationally recognised human rights and capacities of individuals with disabilities or health conditions. The calculation of SCT-thresholds, the inclusion of "special education" as a community cost, the application of the health requirement to children born in Australia, inequities in the right to apply for a health requirement waiver, the "one fails all fail" rule and the "hypothetical person" test are out of step with Australian values.

RCOA endorses Welcoming Disability's eight key recommendations to this review.

1 A human rights-based approach

People with a disability from a refugee background have rights under general human rights law and are also protected under the Refugee Convention and the Convention on the Rights of Persons with Disabilities (CRPD). Under Article 5 of the CRPD, Australia has obligations to:

- a. *Recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law;*
- b. *Prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds; and*
- c. *In order to promote equality and eliminate discrimination, take all appropriate steps to ensure that reasonable accommodation is provided.¹*

The health requirement effectively discriminates against people with disabilities and health conditions. This is enabled by the fact that discriminatory provisions of the *Migration Act 1958 (Cth)* are exempt from the operation of the *Disability Discrimination Act 1992 (Cth)*. In 2019, the United Nations Committee on the Rights of Persons with Disabilities noted this in their Concluding Observations on the second and third periodic reports of Australia:

The Committee is concerned about:

- a. *Migration and asylum legislation, such as the Migration Act 1958 (Cth) and the health requirement in the Migration Regulations 1994, which allows for discrimination against persons with disabilities in asylum and migration procedures;*
- b. *The Disability Discrimination Act 1992 (Cth) providing an exemption to certain provisions within the Migration Act 1958, which results in the exclusion of persons with disabilities.*

The Committee recommended that Australia:

¹ Article 5, Convention on the Rights of Persons with Disabilities.

- a. Review and amend its migration laws and policies to ensure that persons with disabilities do not face discrimination in any of the formalities and procedures relating to migration and asylum and,
- b. Especially, remove the exemption in the Disability Discrimination Act 1992 to certain provisions of the Migration Act 1958.²

In reviewing the SCT, the Australian Government should take a human rights-based approach which recognises people with disabilities and health conditions as valued members of society with rights, autonomy and dignity, rather than in terms of presenting a burden. People with disabilities have the right to equality before the law and should not be denied entry to Australia because their disability or health issue is assumed to be a cost to society.

Recommendation 1 Comply with international human rights obligations

- 1 RCOA recommends that the Australian Government remove the exemption in the Disability Discrimination Act 1992 (Cth) to discriminatory provisions in the Migration Act 1958 (Cth) in line with the recommendations of the UN Committee on the Rights of Persons with Disabilities and comply with its obligations under international conventions to which Australia is a party.

2 Refugees with disabilities

The June 2010 report from the Joint Standing Committee on Migration (JSCM), Migration treatment of disability: *Enabling Australia*,³ highlighted the discrimination against people with disabilities within Australia's Refugee and Humanitarian Program, as well as within the migration program more generally.

Under the existing legislative, regulatory and policy framework governing the operation of the health requirement, different procedures and thresholds apply across many of the visa categories encompassed by the humanitarian and broader migration programs. Within the humanitarian program, the distinction relates specifically to whether an application is made within the onshore or offshore component of the program. Applicants for onshore protection visas are not required to meet the health requirement as, if found to be refugees, they will be owed protection irrespective of their health status.⁴ They are required to undergo the same health examinations as other applicants for permanent visas and to undertake to be treated or monitored for a disease or condition that could pose a threat to public health.

Those applying under the offshore component of the Humanitarian Program are subject to Public Interest Criteria (PIC) 4007, under Schedule 4 of the Migration Regulations 1994, which imposes the health requirement and also provides for its waiver where the applicant satisfies all other criteria for grant of the visa applied for, and both costs and "prejudice of access to services" are not considered "undue".⁵ The Procedures Advice Manual (PAM3) provides detailed guidance as to considerations of compelling circumstances and mitigation of health costs, and clarifies that, in considering whether the threshold of "undue" has been reached, decision makers ought to weigh likely costs and

² Committee on the Rights of Persons with Disabilities, 2019, <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsnzSGolKOaUX8SsM2PfxU7sdcBNJQCwIRF9xTca9TaCwj5OlnhspoVv2oxnsujKTREtaVWFxhEZM%2F0OdVJz1UEyF5leK6Ycmqnrn8yzTHQCn>

³ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/mig/disability/report

⁴ RCOA (2010), Submission to the Joint Standing Committee on Migration Inquiry into the Migration Treatment of Disability, p.6 http://www.refugeecouncil.org.au/docs/resources/submissions/1003_JSCM_disability_submission.pdf

⁵ Item 4007(2), Schedule 4 to the Migration Regulations 1994.

prejudice of access against “the underlying purpose of the visa subclass sought and the ‘merits of the case’ (that is, the individual compassionate and compelling circumstances of the applicant)”.⁶

Following the 2010 *Enabling Australia* inquiry, the policy changed so that applicants for the Humanitarian Program are granted automatic health waivers on the grounds of “compassionate and compelling” circumstances, rather than having to apply for a discretionary waiver. However, other recommendations from the Enabling Australia inquiry have not been implemented, including abolishing the “one fails, all fail” rule and abolishing the requirement for non-migrating family members to meet the health requirement.

The health requirement carries a “one fails, all fail” rule for family applications, stipulating that all individuals included in the visa application, and also non-migrating dependants, must meet the health requirement for visas to be approved. 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”.⁷ The combination of these discretionary provisions have pressured families that otherwise met the criteria to make the extremely difficult decision to leave behind an ordinarily dependent family member who did not meet the standard health requirement.

Recommendation 2 Implement the recommendations of the 2010 Enabling Australia Inquiry Report

The Australian Government should implement the recommendations of the Enabling Australia Inquiry Report, especially those recommendations that were accepted within the Federal Government’s 2012 response, but which remain unimplemented, including: abolishing the “one fails, all fail” rule and abolishing the requirement for non-migrating family members to meet the health requirement.

3 Complementary pathways

In 2023-24 the Australian Government has assumed important global leadership roles relating to refugee resettlement and complementary migration pathways. Australia is chairing the consultations on resettlement and complementary pathways for 12 months. At the second Global Refugee Forum in December 2023, UN member states will be invited to make pledges for the coming four years. In April 2024, Australia will succeed Canada as chair of the Global Taskforce on Refugee Labour Mobility.

These global leadership roles demonstrate the Australian Government’s commitment to advancing international dialogue on durable solutions and practical outcomes for refugees globally. Australia is well-positioned to lead by example, using its leadership roles as opportunities to showcase what we do well, to encourage other governments to advance their programs and practices, and to expand and embed Australia’s commitments to resettlement and complementary pathways.

Unlike under the Humanitarian program, applicants for the migration program that have PIC 4005 do not have the opportunity to apply for a waiver of the health requirement. If the Australian Government is actively promoting complementary pathways through the migration program for refugees and other displaced people, then it must consider changing policy settings so refugees with disabilities can overcome barriers to accessing labour, family and educational migration pathways. This includes ensuring waivers are applied to the health requirement in the Skilled Refugee Labour

⁶ Procedures Advice Manual 3, available via <https://legend.online.immi.gov.au/>

⁷ Procedures Advice Manual 3, available via <https://legend.online.immi.gov.au/>

Agreement Pilot program and family reunion applications from refugee and humanitarian entrants. The Australian Government should provide automatic waivers to refugee applicants in the migration program, in line with the Humanitarian program.

Recommendation 3 Automatic waivers for complementary migration pathways

RCOA recommends that all visa applicants have the right to apply for a waiver of the health requirement by dispensing with PIC 4005. Complementary pathways including the Skilled Refugee Labour Agreement Pilot program, and all applications for family reunion made by refugee and humanitarian entrants should be granted automatic waivers of the health requirement in line with the Humanitarian program.