Committee Secretary
Senate Legal and Constitutional Affairs
Parliament House Canberra ACT 2600

Submitted via email legcon.sen@aph.gov.au

30 April 2021

Dear Committee Secretary

We welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Reference Committee on the *Inquiry into the efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions* (the **Inquiry**).

We work with people seeking asylum and refugees, many of whom desperately wish to be reunited with their family members who live in dangerous and volatile situations. In our experience, the current migration system renders the possibility of family reunion illusory for the vast majority who have come to Australia seeking our protection.

Our submission highlights the targeted and systemic barriers to family reunion for refugees and people seeking asylum, particularly those who arrived in Australia by boat. We remain deeply concerned about the legislative and policy architecture that deliberately and permanently separates families, even after they have been granted visas to remain in Australia. We include in our submission a range of recommendations that would dramatically improve access to family reunion for all Australians, irrespective of the mode of their arrival.

We would welcome the opportunity to appear before the Committee.

Kon Karapanagiotidis OAM
CEO Asylum Seeker Resource Centre

1. Introduction

1.1 The Asylum Seeker Resource Centre

1.1.1 Founded in 2001, the Asylum Seeker Resource Centre (ASRC) is a Australia's largest independent aid and advocacy organisation for people seeking asylum and refugees, supporting and empowering people at the most critical junctures of their journey.

1.1.2 The ASRC's Human Rights Law Program (HRLP) and the Detention Rights Advocacy Program (DRAP) have provided legal assistance and advocacy to refugees and people seeking asylum over the past fifteen years. We work directly with individuals and their families fleeing persecution. The HRLP exists to provide access to justice through legal representation at all stages of the application process. The DRAP provides casework services to more than 400 clients in immigration detention across Australia and in regional processing centres in Nauru and Papua New Guinea. Together, we welcome the opportunity to provide this submission to the Committee based on our experiences in service delivery and the experiences of our clients.

1.2 Overview of submission

1.2.1 Our submission is based on our longstanding and comprehensive work with refugees and people seeking asylum in Australia. Given our expertise, we have primarily focused our submission on the following Terms of Reference:

- Terms of Reference (g) – Eligibility for and access to family reunion for people who have sought protection in Australia; and
- Terms of Reference (h) – Suitability and consistency of government policy settings for relevant visas with Australia's international obligations**.**

1.2.2 Under Terms of Reference (j) in relation to any other matters that the Committee deems relevant, we also highlight systemic barriers to family reunion that disproportionately affect our clients including the impact of mandatory immigration detention and delays in the processing of Australian citizenship applications.

1.2.3 We provide our submission in the context of the devastating impacts of family separation on people seeking asylum. Refugees are often forced to make agonising decisions to leave family members behind and to live in protracted uncertainty without knowing, or fearing for, the situation of family members elsewhere. Our clients regularly tell us that despite all the deprivations and challenges they face in their refugee journeys, the cruellest and most difficult they face is the impact of prolonged separation from their families.

1.2.4 There is substantial literature on the adverse cultural, societal and economic consequences of this family separation. In consultations conducted with hundreds of people from refugee backgrounds, service providers and community members by the Refugee Council of Australia, a consistent theme was the impact of family separation in undermining successful settlement outcomes.[1] Those experiencing family separation face a higher probability of mental illness and post-traumatic stress disorder, and are more likely to disengage from study or job training.[2] Research also demonstrates the wide-ranging psychological and social consequences of family

[1] Refugee Council of Australia, *Addressing the pain of separation for refugee families* (November 2016).

[2] Oxfam, *Stronger Together: The impact of family separation on refugees and humanitarian migrants in Australia* (2019), p 10.

separation including hampering the process of resettlement, maintaining a sense of helplessness and powerlessness, depression, anxiety, loneliness, exacerbation of trauma reactions, sleeplessness, nightmares and poor concentration.[3]

1.2.5 Despite these well-documented consequences of family separation, this submission highlights the targeted and discriminatory operation of the Australian immigration system in further devastating many categories of refugees and asylum seekers through barriers to family reunion within a reasonable period, or at all. To illustrate the impact of this system on individuals, we use case studies throughout based on the experiences of our clients.[4]

1.3 Summary of recommendations

1.3.1 We recommend that the Australian Government:

Recommendation 1: Permit all holders of protection visas – irrespective of their mode of arrival – to sponsor their family members to come to Australia.

Recommendation 2: Require family reunion to be a specific consideration in the exercise of the Minister's powers to lift statutory bars in the *Migration Act 1958* (Cth) that prevent people seeking asylum from making valid visa applications.

Recommendation 3: Facilitate greater transparency and accountability in the operation of the statutory bars in the *Migration Act 1958* (Cth), including a review mechanism.

Recommendation 4: Create a mechanism for refugee families to be processed on the same visa pathway, with the most beneficial pathway offered to all members of the family.

Recommendation 5: Amend *Direction 80—order for considering and disposing of Family visa applications under s47 and 51 of the Migration Act 1958* (Cth) to remove the de-prioritisation of family visa applications where the sponsor is an unauthorised maritime arrival.

Recommendation 6: Amend the processing priorities in the Special Humanitarian Program so that applications are not de-prioritised on the basis of the sponsor's visa.

Recommendation 7: Amend the definition of "immediate family" for the purposes of the Special Humanitarian Program to include children, parents and siblings regardless of age.

Recommendation 8: Enable family members who lodged on the same protection visa application to be processed together by removing the requirement for children to still be considered a "dependent child" at the time a decision is made.

Recommendation 9: Prioritise the processing of protection visa applications to facilitate family reunion for refugee families and streamline family reunification processes such that the primary visa holder and their onshore family members can have their visa applications processed simultaneously.

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[3] United Nations High Commissioner for Refugees, Brooke McDonald-Wilmsen and Sandra M Glifford, *Refugee resettlement, family separation and Australia's humanitarian program* (November 2009), p 15.

[4] To protect the identities of our clients, each case study is de-identified and some identifying details have been changed.

Recommendation 10: Amend the *Migration Act 1958* (Cth) to require principles of family unity and the best interests of the child to be given proper weight in all decisions made under the Act, including in relation to the visa determination process, detention and removal.

Recommendation 11: Amend the processing priorities for the Family Migration Program to prioritise applications where the sponsor has a refugee or humanitarian background.

Recommendation 12: Provide a dedicated stream for humanitarian family reunion either in the Family Migration Program or the Special Humanitarian Program.

Recommendation 13: Require the maintenance of the family unit and the best interests of any affected child to be paramount considerations in determining whether, where and for how long to detain a person.

Recommendation 14: Prioritise and expedite the processing of citizenship applications for people from refugee and humanitarian backgrounds.

Terms of Reference (g):

2. Eligibility for and access to family reunion for people who have sought protection in Australia

2.1 Denial of family reunion for those who arrived by sea

2.1.1 There are severely limited pathways for family reunion for people who arrived in Australia by sea and sought protection. This group is characterised as "unauthorised maritime arrivals" under s 5AA of the *Migration Act 1958* (Cth) (the **Migration Act**), and are subject to a harsher legislative framework to those who arrived in Australia by air. [5] Their options for family reunion are contingent upon the date of their arrival in Australia. Broadly:

- Those who were granted permanent Protection visas (class XA) (**PPVs**) prior to 16 December 2014 are able to sponsor their family members to come to Australia, but are subject to delays in processing (see further Section 2.4: De-prioritisation of permanent refugee visa holders).
- Those who applied for PPVs and whose applications were undetermined on 16 December 2014 had their applications converted to applications for Temporary Protection visas (class XD) (**TPVs**).[6]
- Those who had no pending applications on 16 December 2014 are only able to apply for a TPV or a Safe Haven Enterprise visa (subclass 790) (**SHEV**) and only if the Minister lifts the statutory bar that prevents unauthorised maritime arrivals from making a valid visa application (see further Section 2.2: Barred from reunion – impact of statutory bars).
- Those who arrived by sea on or after 13 August 2012 are subject to offshore processing in a regional processing country (Nauru or Papua New Guinea) and can never resettle permanently in Australia, nor sponsor their family members.

2.1.2 Refugees who hold TPVs or SHEVs are not eligible to sponsor their family members to come to Australia due to the temporary nature of their visas.[7] While SHEV holders may be eligible to apply for some permanent visas after completing the pathway requirements, for most this option remains unattainable.[8]

2.1.3 In introducing this suite of legislative amendments and a range of other measures including offshore processing of unauthorised maritime arrivals, the Australian Government stated that:

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[5] The ASRC maintains that the different legal provisions applicable to each based only on their mode of arrival is impermissible legal discrimination, as it is not reasonable, proportionate nor for a legitimate purposes and therefore is in breach of Article 31(1) of Australia's obligations under the *Convention relating to the Status of Refugees 1951.*

[6] Section 45AA of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), read with reg 2.08F of the *Migration Regulations 1994* (Cth) (the **Migration Regulations**).

[7] See eg cl 100.111 of Sch 2 to the Migration Regulations (Partner visa), cl 101.211 of Sch 2 to the Migration Regulations (Child visa) and cl 103.211 of Sch 2 to the Migration Regulations (Parent visa).

[8] A SHEV provides a pathway to permanent residency in Australia if the visa holder satisfies the SHEV pathway requirements. Those requirements are that the person must, for a total of 42 months while on a SHEV, either be: (a) employed in a SHEV regional area and not receiving certain social security benefits; or (b) enrolled and studying full-time in a SHEV regional area; or (c) a combination of the above. A person who satisfies the pathway requirements may be eligible to apply for certain permanent visas, but will still need to satisfy all the requirements for that visa, which is unattainable to almost all SHEV holders.

> In terms of… preventing UMAs from applying for Permanent Protection visas… it is important to maintain consistency within the family unit and ensure families are not separated by the operation of the Migration Act.[9]

2.1.4 However, the inevitable consequence of a system that only permits unauthorised maritime arrivals to apply for temporary protection is that families are "separated by the operation of the Migration Act" – a fact that is readily acknowledged and intended by the Australian Government:

> These two policies work in conjunction to provide a disincentive for people who wish to remain united with their families by indicating that travelling to Australia via unauthorised means will not result in the reunification of their family should they choose to travel separately.[10]

2.1.5 The result is an immigration system that only permits family reunification for some, while others are deliberately left separated from their loved ones indefinitely. This is despite the well-documented barriers to people seeking asylum being able to travel to Australia via "authorised means", including limited visa options for refugee families to seek protection in Australia and severely constrained opportunities for resettlement from countries of origin or third countries.

Case Study 1 – Mehdi

Mehdi is a Hazara male from Afghanistan. Mehdi arrived in Australia by boat in 2012. He lodged his application for a SHEV in 2017 after the statutory bar was lifted, and is waiting for his interview with the Department of Home Affairs.

Mehdi has a wife and three children in Pakistan who he has been separated from since 2012. Mehdi has not seen his wife and children in 9 years. As he is on a Bridging Visa E, he cannot leave Australia as he will lose the opportunity to be granted the SHEV. Mehdi's mental health has declined due to the protracted processing times which have meant lengthy separation from his family. Mehdi has been diagnosed with major depressive disorder by his psychologist.

Even if Mehdi is granted a SHEV, he must seek permission from the Australian Government to leave Australia and visit his wife and children in Pakistan. He will not be able to sponsor his wife and children to come to Australia so that they are reunited as a family. The requirements for the SHEV pathway are very difficult and it is unlikely Mehdi will be able to transition to a permanent visa under the current SHEV pathway arrangements. While Mehdi can be given permission to travel and to visit his family overseas, it is unlikely Mehdi will ever be able to permanently live in safety with his family.

2.1.6 We therefore consider that a key barrier to family reunification for people who have sought protection in Australia is the operation of the current visa system, which discriminates against refugees on the basis of their mode of arrival. We recommend that the Australian Government immediately restore rights to family sponsorship for all people recognised as refugees.

Recommendation 1: Permit all holders of protection visas – irrespective of their mode of arrival – to sponsor their family members to come to Australia.

2.2 Barred from reunion – impact of statutory bars

[9] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), p 12. This statement was made in relation to new subsection 198AD(2A) which has the effect that children of unauthorised maritime arrivals who arrived in Australia prior to 13 August 2012 are not, consistent with their parents, subject to offshore processing.

[10] The two policies referenced are the prohibition on TPV holders sponsoring their family members and the introduction of offshore processing: Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), p 230.

2.2.1 The legislative framework operates to prevent people seeking asylum from reuniting with their families through statutory bars that prohibit the making of a valid visa application. Without the ability to make a visa application, and unable to return to their countries of origin, people in this group are either granted very short-term bridging visas or have no lawful status in Australia. Given that visa status is inextricably linked with the ability to pursue family reunion, the imposition of these statutory bars presents a further barrier to the reunion of refugee families.

2.2.2 The key statutory bars which affect our clients include:

- The bar that prevents unauthorised maritime arrivals from making valid visa applications while they are unlawful (that is, while they have no visa) or while they hold a bridging visa or temporary protection visa.[11]
- The bar that prevents transitory persons[12] from making a valid visa application while they are unlawful (that is, while they have no visa) or while they hold a bridging visa or temporary protection visa.[13]
- The bar that prevents a person who has two or more nationalities from making a valid application for a protection visa.[14] In our experience, this often occurs in relation to children who acquire different citizenship from each of their parents even though they may never have resided in the countries of citizenship.
- The bar that prevents a person from making a subsequent protection visa application, where their first protection visa application has been refused or their protection visa has been cancelled.[15] This situation arises where there has been a deterioration in the person's country of origin, or a change in their circumstances since their last visa application was determined.
- The bar that prevents holders of temporary safe haven visas who have not left Australia since the grant of that visa from making a valid visa application.[16] These visas were previously granted to certain unauthorised maritime arrivals, generally for short periods, until the person was granted a different type of visa.

2.2.3 The Minister for Home Affairs may "lift" these bars and permit the applicant to lodge a valid visa application, however the exercise of these powers is personal, non-compellable and entirely discretionary.[17] While the initial rationale for ministerial intervention powers was to enable flexibility to determine complex and compelling cases within the otherwise rigid legislative framework,[18] over time the existence of these powers has created a system that lacks transparency, consistency and fairness.

2.2.4 We are also aware of many instances in which a request for a bar lift is not referred by the Department of Home Affairs (the **Department**) to the Minister, purportedly on the basis of Ministerial Guidelines that set out the circumstances in which the Minister will consider lifting

[11] Section 46A of the Migration Act.

[12] A "transitory person" is defined in s 5(1) of the Migration Act, and includes unauthorised maritime arrivals who were transferred to a regional processing centre and then transferred back to Australia for the temporary purpose of receiving medical treatment.

[13] Section 46A of the Migration Act.

[14] See ss 91M – 91Q of the Migration Act and in particular s 91N(1).

[15] Section 48A of the Migration Act.

[16] Section 91K of the Migration Act. This provision does not apply to unauthorised maritime arrivals or transitory persons.

[17] See ss 46A(2), 46B(2), 48B, 91L and 91Q of the Migration Act.

[18] See eg Senate Select Committee on Ministerial Discretion in Migration Matters, *Inquiry into Ministerial Discretion in Migration Matters* (March 2004), Chapter 2.

the bar.[19] Notably, these Guidelines do not adequately prioritise family reunion as a basis for the Minister to lift the bar.[20]

2.2.5 In this context, many applicants are not even afforded the opportunity to have their requests considered by the Minister, facing a double bar – first in the legislation and second, in its administration by the Department. There is presently very limited recourse for applicants in this position with no clear review rights in the courts or other forums.

Case Study 2 – Ling

Ling arrived in Australia on a tourist visa, escaping family violence and forced marriage in China. Upon her arrival, she lodged a permanent protection visa application.

In Australia, Ling met Hamid and they started a relationship. Hamid is from Iran and arrived in Australia by boat in 2011. He is considered an unauthorised maritime arrival under Australian law. As Ling arrived by plane and Hamid arrived by boat, they are not able to have their visa applications considered together.

Hamid and Ling have since had two children together. When she was born, Ling tried to add her first daughter to her protection visa application, but her daughter was not allowed to be added as she is considered an unauthorised maritime arrival due to her father's status and therefore barred from making a valid visa application.

Ling has requested that the Minister allow her two children to lodge protection visa applications. Even if the Minister grants this request, Ling's two children will only be able to lodge applications for a TPV or SHEV, while their mother is eligible for a permanent protection visa. The family members are therefore on different visa pathways that significantly limits their ability to remain together in Australia.

2.2.6 The current system of statutory bars is also vulnerable to politicisation and lacks appropriate checks and balances in relation to matters that – for people seeking asylum – often involve life or death. In the absence of a review mechanism, the legislative framework vests unparalleled power in the hands of a politician. The result is that many families remain separated due to the operation of Australia's immigration system.

Recommendation 2: Require family reunion to be a specific consideration in the exercise of the Minister's powers to lift statutory bars in the *Migration Act 1958* (Cth) that prevent people seeking asylum from making valid visa applications.

Recommendation 3: Facilitate greater transparency and accountability in the operation of the statutory bars in the *Migration Act 1958* (Cth), including a review mechanism.

2.3 Splintering of families within Australia

[19] See eg *PAM3: Refugee and Humanitarian – Minister's s46A(2) Guidelines* (1 October 2017); *PAM3: Refugee and Humanitarian – s48A cases and requests for s48B ministerial intervention* (1 July 2019).

[20] The Ministerial Guidelines in relation to the bar in s 46A provide that a matter may be referred to the Minister for consideration where "a UMA is a member of the same family unit (MSFU) of another person who has been or will be referred for consideration of the exercise of my public interest power": *PAM3: Refugee and Humanitarian – Minister's s46A(2) Guidelines* (1 October 2017), Section 5.2.1 However, there is no specific requirement for the Department to consider family reunion in other circumstances. Similarly, the Ministerial Guidelines in relation to s 48B do not include any express requirement for family reunion considerations.

2.3.1 The impact of differential treatment for those who arrived by boat (Section 2.1 – Denial of family reunion for those who arrived by boat) and the operation of statutory bars (Section 2.2 – Barred from reunion) has resulted in refugee family members facing different and complex legislative frameworks to remain in Australia.

2.3.2 While the Australian Government has stated that "it is desirable for members of the same family unit to have a consistent status,"[21] successive policy and legislative changes that discriminate on the basis of a person's mode and date of arrival has resulted in fragmented immigration pathways for members of the same family. The manifestation of these changes for each refugee family is complex. However, by way of example:

- Family members who arrived in Australia separately may be subject to different visa options and periods of stay. For example, some family members may be limited to 3-year TPVs while others may be able to apply for permanent PPVs.
- Children who have one parent who is an unauthorised maritime arrival are also treated as unauthorised maritime arrivals, even where the other parent does not have that status.[22] This impacts on the visa options available for the child, as most unauthorised maritime arrivals are only able to apply for temporary protection.
- Children who are born in Australia and ordinarily resident for the period of 10 years from their birth are entitled to Australian citizenship, however there is no straightforward pathway for their parents to also attain citizenship or a permanent right to reside here.[23]
- Lengthy processing times of up to 10 years has created additional barriers for children who are dependents at the time of making their visa applications, but no longer have that status at the time that a decision is made on the application, requiring separate applications to be made (see Section 2.5 – Lengthy delays in processing).[24]
- Visa review processes prevent the addition of other family members to an existing application under review. This may arise due to children being born after an initial visa application was already refused, or because the family member/s arrived in Australia and applied later for a visa than other family members. With no way of being added to the existing visa application or review process of other family members, they are at risk of receiving a different outcome from other family members and thus permanent separation from their spouses and dependent children.

[21] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), [1423].
[22] Section 5AA(1A) of the Migration Act.
[23] Section 12(1)(b) of the *Australian Citizenship Act 2007* (Cth). The parent may be subject to a statutory bar or may lack the finances required to lodge a Parent visa application (with their Australian citizen child as the sponsor).
[24] See the definition of "member of the family unit" in s 5(1) of the Migration Act, read with reg 1.12(3)-(4) of the Migration Regulations.

2.3.3 This means that, even once safely in Australia, refugee families remain subject to precarious and uncertain futures. Many of the clients whom we assist have been fighting to remain with their families for years, often entirely reliant on the exercise of a non-compellable Ministerial discretion to progress their immigration pathways.

Case Study 3: Maya

Maya is a woman from India who arrived in Australia by plane in 2010. Maya has experienced family violence from her Australian ex-partner, with whom she had two children who are now aged 8 and 10 years. Maya applied for a protection visa in 2014 which was refused in September 2016. Maya lodged an application at the AAT but her application was dismissed as she missed her hearing. In 2016, Maya lodged an application for a ministerial intervention.

Maya's eldest child is now an Australian citizen as she was born in Australia. Her youngest child has a visa application that is being reviewed by the Administrative Appeals Tribunal. As Maya has already had a protection visa refused, her only chance to remain in Australia with her children is if the Minister agrees to "lift the bar" to allow her to lodge a subsequent application or agrees to grant her a visa. Each family member is on a separate visa pathway.

Recommendation 4: Create a mechanism for refugee families to be processed on the same visa pathway, with the most beneficial pathway offered to all members of the family.

2.4 De-prioritisation of family reunion for refugees who arrived by sea

2.4.1 There are also significant barriers for refugees who hold permanent visas who are able to propose or sponsor their family members to migrate to Australia. The key migration pathways are through the Family Migration Program or the Special Humanitarian Program (**SHP**). As discussed above in Section 2.1 – Denial of family reunion for those who arrived by sea, this option is not available for refugees who have been subject to the temporary protection regime. However, even where a refugee has a permanent visa, Australian Government policy has effectively removed any meaningful opportunity for these families to reunite.

Family Migration Program

2.4.2 The Family Migration Program provides for partner, child, orphan relative, remaining relative, parent, carer and aged dependent relative visas. In the context of this Program, barriers to family reunion are largely due to the operation of *Direction 80—order for considering and disposing of Family visa applications under s47 and 51 of the Migration Act 1958* (**Direction 80**), which provides the order of priority for Department officers to consider and process family visas.[25] Pursuant to Direction 80, family visa applications in which the sponsor is an unauthorised maritime arrival who holds a permanent visa are given the lowest priority.[26] Delegates may depart from the order of priority where there are "special circumstances of a compassionate nature" and "compelling reasons" to do so.[27] However, the length of waiting

[25] In broad terms, "family visas" refers to visas where the primary applicant and the sponsor are spouses, de facto partners, prospective spouses, dependent children, parents, aged parents, aged dependent relatives, carers, orphan relatives, and remaining relatives: cl 6(2) of *Direction 80—order for considering and disposing of Family visa applications under s47 and 51 of the Migration Act 1958* (***Direction 80***). The predecessors to Direction 80 were Direction 62 and Direction 72. Direction 62 was replaced by Direction 72 following the legal challenge to Ministerial Direction 62 in *Plaintiff S61/2016 v Minister for Immigration and Border Protection*, in which the final hearing was vacated.

[26] Clause 8(1)(g) of Direction 80.

[27] Clause 9 of Direction 80.

cannot be the basis for such departure and, in our experience, there has been no such departure in the vast majority of applications.

2.4.3 The result is that applications for family reunion made by those who arrived by boat are pushed to the end of the processing queue, with priority given to all other applications where the sponsor is not an unauthorised maritime arrival. Given the large number of applications lodged each year – in the 2019-20 financial year, there were 66,358 new applications lodged in the Family stream (excluding Child visas)[28] – the practical result is that family visa applications lodged by unauthorised maritime arrivals will never be processed.

2.4.4 The disproportionate and punitive nature of this de-prioritisation is best illustrated by a simple example: Samah lodged a Partner visa for her husband in 2018. John lodged for a Partner visa application for his wife in 2021. By ordinary principles of fairness, Samah's application for her husband should be processed before the application lodged by John given that it was lodged first in time. However, because Samah came to Australia by sea, Direction 80 requires John's application for his wife to be processed *before* the application for Samah's husband.

2.4.5 While sponsors who are Australian citizens are not subject to the same de-prioritisation, delays in processing citizenship applications for unauthorised maritime arrivals has resulted in continued barriers to family reunion (see Section 5.2: Delays in citizenship application process).

Case Study 7: Basim

Basim arrived in Australia as an unauthorised maritime arrival in 2012. He was 15 years old at the time. His mother had made arrangements for him to leave Afghanistan following the abduction and killing of his male family members. Following an application for protection, Hussain was advised that he could propose his widowed mother and siblings for under the SHP.

Basim worked hard to adjust to life in a new country. He learnt English in school and studied at TAFE. He had also the responsibility to support his widowed mother and younger siblings in Afghanistan. Communication with his mother was very difficult throughout this time due to the poor telephone connection and constant need for his family to remove themselves to safety. There were many nights that Hussain would cry himself to sleep.

During this challenging time, Basim lived with the hope that he would soon be reunited with his family in Australia. In March 2014, Basim's application for family reunion – along with all other unauthorised maritime arrivals who had made applications to be reunited with immediate family – was subjected to a new policy whereby split family applications for immediate family members were deprioritised and on an assessment his application for family reunion was refused.

Basim was later introduced by his sister to Nadia who was living as a refugee living in Iran. Basim and Nadia, with the blessing of their families, were married in 2018. However, Basim now faces a long wait to sponsor Nadia to Australia as his citizenship application lodged in 2018 is still to be finalised. Without citizenship, his application receives the lowest priority in processing due to the operation of Direction 80. The COVID-19 pandemic has further meant that Basim cannot visit his wife in Iran and faces continuous separation with no likelihood of being able to reunite.

2.4.6 There is no justifiable policy rationale for preventing Australian permanent residents from reuniting with their family members merely due to the mode of their arrival in Australia many

[28] Australian Government, Department of Home Affairs, *2019 – 20 Migration Program Report: Program year to 30 June 2020,* pp 50-52.

years earlier. Indeed, such policies are antithetical to the Australian Government's purported desire to "[deter] people making the dangerous journey by boat to Australia".[29]

2.4.7 In 2015, the Australian Human Rights Commission found an earlier version of Direction 80 constituted an arbitrary and unlawful interference with family in violation of Articles 17 and 23 of the *International Covenant on Civil and Political Rights*. However, the core policy that de-prioritises some applications on the basis of the sponsor's mode of arrival remains in place.

Recommendation 5: Amend *Direction 80—order for considering and disposing of Family visa applications under s47 and 51 of the Migration Act 1958* to remove the de-prioritisation of family visa applications where the sponsor is an unauthorised maritime arrival.

Special Humanitarian Program

2.4.8 The alternative option for permanent visa holders who have sought protection in Australia to reunite with their family members is the SHP. Under the SHP, family members who face substantial discrimination in their home countries can be proposed by their Australian citizen or permanent resident relatives for resettlement in Australia. Due to prohibitive costs associated with sponsorship through the Family Migration Program, most refugees rely on the SHP to reunite with their families.

2.4.9 The advantages of persons from refugee backgrounds seeking family reunion under the SHP is that it provides for a greater flexibility in the processing of visa applications. Applicants from refugee backgrounds and conflict affected areas typically have difficulty providing documentation to establish identity, nationality and relationships. They may also struggle to pay for visa application and medical charges under the Family Migration Program. The SHP adopts a greater flexibility in dealing with these issues. Importantly, there is no visa application charge or fees for medical examinations under the SHP.[30]

2.4.10 However, as the Department states on its website, "many more applications are received under the Special Humanitarian Program (SHP) each year than the number of places available".[31] In 2019-20, only 5099 visas were granted under the SHP.[32] This is despite 40,232 applications

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[29] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), p 12. See also, Joint Media Release between David Coleman (former Minister for Immigration) and Scott Morrison (PM), 3 February 2019 ("We have secured our borders, we stopped the boats and the tragic drownings at sea. And we have been supporting children compassionately without putting our strong border security at risk"); Former Prime Minister Kevin Rudd, transcript of joint press conference, 19 July 2013 ("I want to be absolutely clear with the Australian people as to why we're doing this … with each vessel that comes, there is a continued risk of drownings, and we've seen too much of this already").

[30] However, there is a visa charge, assurance of support and other fees associated with the Community Support Program, which excludes many applicants from utilising the Program for family reunion. This Program was introduced as a pilot and now has 1000 places within the SHP. Those who meet the criteria for a SHP visa can apply for this visa. Additional criteria include that that the applicant be under 50 years of age, have a job offer in hand or pathway to employment and be from one of the designated countries prioritised for this visa. Applicants must also be sponsored by an Approved Proposing Organisation: see further Australian Government, Department of Home Affairs, *Community Support Program (CSP)* (last updated 11 December 2018), available online: <https://immi.homeaffairs.gov.au/what-we-do/refugee-and-humanitarian-program/community-support-program>.

[31] Australian Government, Department of Home Affairs, *Global Special Humanitarian visa* (last updated 18 March 2021), available online:
<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/global-special-humanitarian-202#Overview>.

[32] Australian Government, Department of Home Affairs, *Australia's Offshore Humanitarian Program: 2019–20* (21 September 2020), available online:
<https://www.homeaffairs.gov.au/research-and-stats/files/australia-offshore-humanitarian-program-2019-20.pdf > p 1.

being lodged for the SHP in 2019-20 alone.[33] The prospect of family reunion under the SHP is therefore illusory for most refugees.

2.4.11 There are also further barriers due to the priorities for processing set by the Australian Government. Priority is given to applicants whose proposers are:[34]

- an immediate family member (which is defined very narrowly)[35] who was granted a Class XB visa; or
- a relative[36] who resides in a regional location[37] and does not hold a PPV or Resolution of Status (CD-851) visa.

2.4.12 Proposers who currently hold a PPV or Resolution of Status (CD-851)[38] visa are given the lowest priority, and may only receive a higher priority once they become Australian citizens. However, delays in the processing of citizenship applications that disproportionately affects refugees means that there are no meaningful options to expedite family reunion (see Section 5.2: Delays in citizenship application process).

Recommendation 6: Amend the processing priorities in the Special Humanitarian Program so that applications are not de-prioritised on the basis of the sponsor's visa.

Recommendation 7: Amend the definition of "immediate family" for the purposes of the Special Humanitarian Program to include children, parents and siblings regardless of age.

2.5 Lengthy delays in visa processing

2.5.1 The refugee determination process in Australia involves significant delays in the processing of applications. According to data released by the Department the average processing time for a PPV has been steadily increasing:[39]

Period	Average processing time for a PPV
2017-2018	231 days
2018-2019	329 days

[33] Ibid, p 4.

[34] See Australian Government, Department of Home Affairs, *Global Special Humanitarian visa* (last updated 18 March 2021), available online: <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/global-special-humanitarian-202#Overview>.

[35] "Immediate family member" is limited to a partner, dependent child or the proposer's parent if the proposer is not 18 or more years of age: Ibid.

[36] "Relative" means a partner, child, parent, sibling, grandparent, grandchild, aunt, uncle, niece, nephew or cousin: Ibid.

[37] Regional Australia means anywhere outside of Sydney, Melbourne and Brisbane: Ibid.

[38] In broad terms, a person may be granted a Resolution of Status (Class CD) visa where they hold either a Return Pending visa (subclass 695), or used to hold a Temporary Protection Visa (TPV) granted before 2008 and they have not yet left Australia, or the Australian Government makes an offer of a permanent stay in Australia on humanitarian grounds: see reg 2.07AQ of the Migration Regulations.

[39] See Department of Home Affairs FOI Request FA19/06/00889: *Regarding visa subclass 866: Total number of visas granted and the average processing time for the visa application for the financial years ending 30 June 2018 and 30 June* 2019, available online: <https://www.homeaffairs.gov.au/foi/files/2019/fa-190600889-r1-document-released.PDF>; Department of Home Affairs FOI Request FA20/090/0618: *Humanitarian Program visas granted and average processing time for visa subclass 200, 201, 202, 203, 204 and 866 for financial year 2019-2020*, available online: <https://www.homeaffairs.gov.au/foi/files/2020/fa-200900618-r1-document-released.pdf>.

2019-2020	1018 days

2.5.2 If a person seeking asylum has their application refused by the Department, this can cause a further delay of 2-5 years to allow for an application for merits review at the Administrative Appeals Tribunal, and then if necessary proceedings in the courts.

2.5.3 Where a person seeking asylum wishes to apply for family reunion in Australia, they must first wait for their own visa application to be processed and finally determined. In light of the information above, this results in a very long waiting period, possibly a decade or more, before a person can even contemplate making an application for family reunification. Further, the key pathways for family reunion require the proposer or sponsor to be a permanent resident or an Australian citizen, a process which similarly can take years to be resolved (see Section 2.1: Denial of family reunion for those who arrived by boat and Section 2.4: De-prioritisation of family reunion for refugees who arrived by boat).

Requirement for overseas police clearances

2.5.4 The visa processing times may be prolonged by the Department's requirement for police clearances from the applicant's country of origin, as well as any country where the applicant has spent more than 12 months or more in the last 10 years. Applicants may have spent significant amounts of time in countries of asylum where they were not registered which can make obtaining the required documentation virtually impossible, thereby causing further delays in processing and lengthening the overall timeframes before a visa application is finalised.

Separation from family overseas

2.5.5 These lengthy delays in visa processing inevitably result in long periods of separation from family members overseas. As discussed at paras [1.2.3]-[1.2.4] above, research demonstrates that family separation is one of the main reasons for the negative mental health of many refugees and people seeking asylum. The drawn-out visa processing times exacerbate the negative effects on the mental health of both the applicants already in Australia and their family members offshore.

2.5.6 We note that as a result of the manifestly long application process a distinct clinical syndrome was identified by a group of Australian psychiatrists in 2012 called "protracted asylum seeker

Case Study 4: Fara

Fara is a single woman from Papua New Guinea (PNG). She left PNG in July 2019 following significant family violence perpetrated by her family members. Fara was forced to leave her three children in PNG when she fled the violence. Her children remain in the care of her abusive relatives. All of the children continue to experience family violence at the hands of these family members.

Fara applied for a PPV in December 2019. Given the long delays associated with processing of visa applications, it is possible that Fara may not be invited for an interview for 1-2 years, and the Department will not make a decision on her application for 2-3 years. During this period she cannot sponsor her children to come to Australia. Fara is constantly worried and anxious about her children and she does not have any idea when they might be reunited. She has tried to reach out to services in PNG that help children and women in violent situations however resources are very scarce, and she was unable to find any help. Fara's mental health is rapidly declining as she continues to hear reports from her children about the harm they are suffering.

If Fara is granted a PPV, she can then receive advice about sponsoring her children to come to Australia, however this application process is expensive and will take many years. Fara has no other option than to wait for visa processing in Australia to help her children out of their violent situation.

syndrome".[40] Symptoms include fluctuating mood, poor concentration and attention, irritability, recurrent and intrusive thoughts about the refugee determination process and overwhelming feelings of hopelessness and powerlessness.[41] Such devastating mental health consequences can only be intensified by the forced separation from family.

Dependant applicants over 18

2.5.7 Delays of many years in visa processing may also substantively impact on the ability for children to be included in their parent's visa application as a "member of the same family unit".[42] For PPVs, TPVs and SHEVs, this requires the child to be considered a "dependent child". However, the definition of "dependent child" only includes children under the age of 18 years or children over 18 years who are dependent on their parent or incapacitated for work due to loss of bodily or mental functions. It also excludes children who are engaged to be married or who have a spouse or de facto partner.[43]

2.5.8 For the purposes of visa processing, the child must be considered a "dependent child" at the time a decision is made on their visa application, which can be years after the application was lodged.[44] Children who have become adults since lodgement therefore may no longer be considered dependent at the time a decision is eventually made.

2.5.9 This results in the now adult child being removed from their parent's application, and therefore required to establish their own claims for protection. If unsuccessful, this can have the inconceivable outcome that a parent is granted protection and may remain in Australia and the (adult) child is forced to return to their country of origin, sometimes one they have been away from for many years and have no continuing connections to.

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[40] Linda Hunt, *'Psychiatrists identify 'asylum seeker syndrome'',* ABC News online*,* 22 May 2012, <https://www.abc.net.au/news/2012-05-22/rsearch-reveals-mental-health-toll-on-asylum-seekers/4025480>.

[41] *Long waits for refugee status lead to new mental health syndrome*, The Conversation, 23 May 2012, <https://theconversation.com/long-waits-for-refugee-status-lead-to-new-mental-health-syndrome-7165#:~:text=Protracted%20asylum%20seeker%20syndrome,-The%20characteristics%20of&text=poor%20concentration%20and%20attention%2C,feelings%20of%20hopelessness%20and%20powerlessness> .

[42] See the definition of "member of the same family unit" in s 5(1) of the Migration Act: one person is a ***member of the same family unit*** as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. A "member of the family unit" is defined in reg 1.12 of the Migration Regulations.

[43] See the definition of "dependent child" in reg 1.03 of the Migration Regulations, read with reg 1.12(4).

[44] See eg cl 866.221(3) in Sch 2 to the Migration Regulations in relation to a PPV.

2.5.10 This issue is particularly problematic for those people on temporary visas, such as the TPV or SHEV, who are required to re-apply every 3 or 5 years to remain in Australia. For applicants who arrived as children and have since turned 18, at the time of re-applying they will be required to lodge their own claims for protection separate to their parent's claims.

Case Study 5: Niroshanth

Niroshanth is a citizen of Sri Lanka. As a young child he experienced family violence from both of his parents and so he went to live with his aunt. In 2012, when Niroshanth was 12 years old, his aunt fled Sri Lanka and brought him to Australia. However, they had to wait until 2017 for the Department to allow them to apply for a Safe Haven Enterprise Visa. At that time, Niroshanth was still a child and was therefore included as a dependant on his aunt's application.

Niroshanth and his aunt were called for an interview with a Department delegate in 2019. As Niroshanth was 19 at the time of his interview, his application was separated from his aunt's application as he was no longer considered a 'dependent' under Australian law. Niroshanth and his aunt were interviewed separately.

Niroshanth's aunt was granted a SHEV, however Niroshanth's application for protection was refused. Niroshanth has lived with his aunt from a young age and considers her to be his parent, however if he is ultimately unsuccessful in having the Department's decision reversed, they face permanent separation.

Recommendation 8: Enable family members who lodged on the same protection visa application to be processed together by removing the requirement for children to still be considered a "dependent child" at the time a decision is made.

Recommendation 9: Prioritise the processing of protection visa applications to facilitate family reunion for refugee families and streamline family reunification processes such that the primary visa holder and their onshore family members can have their visa applications processed simultaneously.

Terms of Reference (h):

3. Suitability and consistency of government policy settings for relevant visas with Australia's international obligations

3.1 International obligations concerning family reunion

3.1.1 Australia played an important and proud leadership role in establishing international human rights standards and laws, including those that protect rights to family life and family unity. Australia was a founding member of the United Nations (**UN**) and played a prominent role in the negotiation of the UN Charter in 1945. Australia was also one of eight nations involved in drafting the Universal Declaration of Human Rights (**UDHR**). Australia then continued to support development of the international human rights order by ratifying all seven core international human rights treaties.

3.1.2 It is important to recall Australia's historical global leadership role when reflecting on Australia's lamentable contemporary approach to implementing its human rights obligations, especially those regarding the rights of refugees and people seeking asylum. Rather than continuing to play a positive global leadership role, Australia has chosen to become deeply invested in systematic breach of fundamental human rights obligations owed to refugees and people seeking asylum, including their rights to family life and family unity. Australia now sets global records for cruelty in family separation and arbitrary detention, rather than in protection and rights. This is despite Australia being bound under international law to provide durable protection and swift pathways for family reunion to refugees and protection from protracted, semi-permanent situations of limbo, or detention, which also act to prevent them being united with close family members as they never acquire a migration status which enables them to initiate family reunion applications.

3.1.3 As discussed above, government policies over successive years have arbitrarily separated family members on the basis of their mode and date of arrival in Australia (see Section 2.1: Denial of family reunion for those who arrived by boat). The decision to deny these refugees durable protection in Australia, in the name of deterring future arrivals, represents a major dereliction of responsibility and retreat from Australia's international protection obligations. To then also apply policies which deliberately and permanently separate families, not only during the refugee determination process, but even after that, by giving no means for families to align themselves on a common resettlement pathway, even when they are all physically in Australia, adds particular cruelty to the situation. This remains one of the most blatant examples of Government policies designed to permanently separate refugee families.

3.1.4 However, the cruel and punitive approach taken to refugees who arrived by sea, is not an isolated example. The comprehensive and finely calibrated range of measures, which deny refugees family unity, span across onshore, offshore, and global refugee programs (see Section 2: Eligibility for and access to family reunion). This points to an overarching purposeful policy to deny refugees their rights to family life and family unity; one of many punitively applied measures aimed at deterring refugees from coming to Australia, especially those who dare to exercise their basic right to seek asylum onshore.

Basis of the Rights to Family Life and Family Unity

3.1.5 The rights to family life and family unity emanate from recognition of the family as the fundamental group unit of society and as entitled to protection and assistance**,** as contained in Article 16(3) of the UDHR; in Article 23(1) of the 1966 *International Covenant on Civil and*

Political Rights (**ICCPR**); and in Article 10(1) of the 1966 *International Covenant on Economic, Social and Cultural Rights* (**ICESCR***). The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (**CMW**) contains similar language, as do the preambles to the 1989 *Convention on the Rights of the Child* (**CRC**) and the 2006 *Convention on the Rights of Persons with Disabilities* (**CRPD**). There is a high level of consensus across all of these human rights treaties and the international community that the right to family unity is a core human right which occupies a privileged position in international human rights law.

3.1.6 Protection of family life is also anchored in the right not to be subject to arbitrary or unlawful interference with privacy, family, home or correspondence as per Article 17(1) of the ICCPR, and the right to "the protection of the law against such interference or attacks" as per Article 17(2) of the ICCPR.

3.1.7 As one might expect, the CRC sets out some of the strongest protections of the child's right to family unity, as well as States Parties' corresponding obligations. Article 7 accords children the right to know and be cared for by their parents. Articles 8 and 9 oblige States to recognise the right of children to family relations "recognised by law and without unlawful interference", and assurance that children are not separated from their parents against their will, except when competent authorities, subject to judicial review, determine this is in their best interests.[45] Notably, all decisions concerning children, including those relating to the child's right to family life are subject to the overarching requirement that "the best interests of the child" be a primary consideration.[46]

Applicability of rights to family life and unity to refugees and people seeking asylum

3.1.8 Importantly, these rights to family life and family unity apply irrespective of a person's migration status. This is because, as noted above, the right to family life and family unity, applies universally to all people, which of course includes refugees, as well as others in need of complementary or other international protection. Notably, these rights also apply throughout all stages of the refugee journey, from displacement, to arrival and admission, detention, throughout the refugee determination process, and to removal or deportation, as well as where protection, whether temporary or permanent, is granted.

3.1.9 Refugees' rights to reunite with close family members are explicitly recognised by governments globally.[47] The Final Act of the Conference at which the *1951 Convention relating to the Status of Refugees* (the Refugee Convention) was adopted, agreed a specific and strongly worded Recommendation:

> Considering that the unity of the family ... is an essential right of the refugee and that such unity is constantly threatened, [it] [r]ecommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to ensuring that the unity of the family is maintained … [and for] the protection of refugees who are minors, in particular unaccompanied children and girls, with particular reference to guardianship and adoption".[48]

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[45] Article 18 also recognizes that "[p]arents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child", that "[t]he best interests of the child will be their basic concern', and that "States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for thecare of children".

[46] Article 3(1) of the CRC.

[47] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951, UN doc A/CONF.2/108/Rev.1 (26 November 1952), Recommendation B; Executive Committee of the High Commissioner's Programme, *Conclusion No 88(L) on Protection of the Refugee's Family* (8 October 1999).

[48] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: http://www.refworld.org/docid/40a8a7394.html.

3.1.10 As noted by UNHCR, this Recommendation has been "observed by the majority of States, whether or not parties to the 1951 Convention or to the 1967 Protocol", indicated by the strong body evidence of State practice regarding observance of rights to family life and unity. These rights are further reinforced by numerous Conclusions of UNHCR's Executive Committee, which represent the agreement and expertise of nearly 100 countries on refugee matters. Three Conclusions are particularly relevant including those on family reunion,[49] family reunification[50] and the protection of the refugee's family.[51] Highlighting the recognised status of refugees' rights to family unity, the UNHCR expert roundtable on family unity in 2001 agreed in its Summary Conclusions:

> A right to family unity is inherent in the universal recognition of the family as the fundamental group unit of society, which is entitled to protection and assistance. This right is entrenched in universal and regional human rights instruments andinternational humanitarian law, and it **applies to all human beings, regardless of their status. It therefore also applies in the refugee context…….The obligation to respect the right of refugees to family unity is a basic human right which applies irrespective of whether or not a country is a party to the 1951 Convention**.[52] [Emphasis added]

3.1.11 The expert round table on family unity outlined not only the basis of refugees' rights to family unity, but also the state obligations to prevent family separation and to take proactive steps realise rights to family unity:

> Respect for the right to family unity requires not only that **States refrain from action which would result in family separations, but also that they take measures to maintainthe unity of the family and reunite family members who have been separated. Refusal toallow family reunification may be considered as an interference with the right to family life or to family unity,** especially where the family has no realistic possibilities for enjoying that right elsewhere. Equally, deportation or expulsion could constitute an interference with the right to family unity unless justified in accordance with international standards.[53] [Emphasis added]

3.1.12 Similarly, the Joint General Comment by the *Committee on the Rights of All Migrant Workers and Members of their Families* (**CMW Committee**) and the CRC Committee stated in 2017:

> Protection of the right to a family environment frequently requires that States not only refrain from actions which could result in family separation or other arbitrary interference in the right to family life, but also take positive measures to maintain thefamily unit, including the reunion of separated family members.[54]

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[49]UNHCR ExCom, *Family Reunion*, Conclusion No. 9 (XXVIII), 12 October 1977, available at: http://www.refworld.org/docid/3ae68c4324.html.

[50] UNHCR ExCom, *Family Reunification*, Conclusion No. 24 (XXXII), 21 October 1981, available at: http://www.refworld.org/docid/3ae68c43a4.html.

[51] UNHCR ExCom, *Protection of the Refugee's Family*, Conclusion No. 88

[52] UNHCR, "Summary Conclusions: Family Unity, para 1. Expert roundtable organized by UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, 8–9 November 2001", in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (Feller et al. eds), CUP, 2003, pp. 604-608.

[53] Ibid, para 5.

[54] CMW and CRC Committees, *Joint General Comment on the general principles regarding the human rights of children in the context of international migration*, para 29, *Joint General Comment No. 3 (2017) of the CMW Committee and No. 22 (2017) of the CRC Committee on the general principles regarding the human rights of children in the context of international migration*, CMW/C/GC/3-CRC/C/GC/22,16 November 2017, available at: http://www.refworld.org/docid/5a2f9fc34.html.

Rights of Family Unity for Children who are Refugees, Asylum Seekers or Unaccompanied

3.1.13 The rights of refugee, asylum seeking or unaccompanied children to family unity have an even stronger basis in international law due to provisions of the CRC. Article 10 of the CRC requires that applications by a child or his or her parents for the purpose of family reunification shall be dealt with "in a positive, humane and expeditious manner". Article 22 explicitly concerns asylum-seeking and refugee children and requires States Parties to ensure children receive "appropriate protection and humanitarian assistance", and if separated from their parents or other family, creates a positive obligation upon states to cooperate with efforts to trace the parents or other family members for the purpose of family reunification. In a Joint General Comment on the general principles regarding the human rights of children in the context of international migration, the CMW and CRC Committees require States parties to:

> …ensure that the best interests of the child are taken fully into consideration inimmigration law, planning, implementation and assessment of migration policies anddecision-making on individual cases, including in granting or refusing applications onentry to or residence in a country, decisions regarding migration enforcement and restrictions on access to social rights by children and/or their parents or legal guardians, and decisions regarding family unity and child custody, where the best interests of the child shall be a primary consideration and thus have high priority.[55]

3.1.14 In addition, the UNHCR's Executive Committee have stressed that "all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity".[56]

Requirement of Non-Discrimination

3.1.15 An overarching principle of international human rights law is the principle of non- discrimination. Discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status is prohibited in virtually every human rights treaty, including the ICCPR, ICESCR, CRW and CRC, which are the basis of the rights to family life and family unity. In essence, the principle of non-discrimination requires that similarly situated individuals should enjoy the same rights and receive similar treatment. This includes measures impacting upon individuals' right to family life and family unity, regardless of their immigration or other status, except where such distinctions can be objectively justified.[57]

3.1.16 There is clear evidence across the international human rights treaty system that migration or refugee status is not a permissible ground for discriminating between groups unless it can be demonstrated to be proportionate and for a legitimate purpose. For example, in its General Recommendation on discrimination against non-citizens, the *Committee on the Elimination of Racial Discrimination* noted:

> Under the [ICERD] Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation,judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.[58]

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[55] Ibid, para 27.

[56] UNHCR Executive Committee (ExCom), *Refugee Children,* Conclusion No. 47 (XXXVIII), 12 October 1987, available at: http://www.refworld.org/docid/3ae68c432c.html, para. (d).

[57] Frances Nicholson, UNHCR, The Right to Family Life and Family Unity ofRefugees and Others in Need of International Protection and the Family Definition Applied, Legal and Protection Policy Series, January 2018, PPLA/201/01.

[58] UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXX on discrimination against non-citizens*, 1 October 2002, available at: http://www.refworld.org/docid/45139e084.html,

3.1.17 Similarly, and specifically regarding children, the CRC Committee stated:

> The principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant.[59]

3.1.18 We submit that the Australian Government's laws and policies aimed at preventing family unity and denying family reunion, especially for refugees, is clearly not proportionate to any identified risk and is not for any legitimate purpose. Violating the fundamental rights of a group of people in order to deter others from seeking to exercise their human right to seek asylum, which is the main driver of Government policy, is clearly not a legitimate purpose. Thus, the prohibition on discrimination applies also to refugee and people seeking asylum, and Australia's policies that interfere with their rights to family life and family unity constitute breaches of Australia's international human rights obligations.

3.1.19 There is clearly a large body of international human rights law and practice establishing rights to family life and family reunion for refugees and people seeking asylum, especially for children, at all stages of their journeys, including during their admission, detention, refugee determination processing, during removal, and throughout temporary or permanent protection and re-settlement.

Requirement that Australia Interpret its Treaty Obligations in Good Faith

3.1.20 As a State Party to all of the relevant human rights treaties referred to above, (ICCPR, ICESCR, CRC,CMW, CERD, CRPD and the Refugee Convention), Australia is required to respect, protect and fulfil the rights it has committed itself to. By ratifying these treaties, Australia has explicitly agreed, before the international community, to ensure that these rights and responsibilities are integrated into the practices of all pillars of the Australian State, being within the legislature, executive and the courts. Accordingly, new and existing laws must be consistent with, and applied in a manner that give proper expression to, treaty obligations. This is especially crucial in a dualist state, such as Australia, where enactment of national laws is a further necessary step in order for treaty commitments to become directly applicable and enforceable in Australian law.

3.1.21 Article 26 of the Vienna Convention on the *Law of Treaties*[60] requires Australia to "interpret its treaty obligations in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

3.1.22 Australia's laws and policies which, read together, demonstrate a clear aim to prevent and interfere with family unity for refugees and asylum seekers, not only directly breach its obligations under the various human rights treaties it has ratified, but also provides clear evidence that Australia is in breach of the *Law of Treaties* itself. Australia's persistent, repeated and wilful refusal to align our laws so they do not continue to breach fundamental rights of people seeking asylum, can only be understood as an act of bad faith vis-à-vis Australia's treaty obligations.

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para 4. Note, Australia has also ratified the Convention for the Elimination of Racial Discrimination (CERD) and is also bound by the non-discrimination provisions of the Treaty.

[59] UN Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: http://www.refworld.org/docid/42dd174b4.html, para. 18.

[60] Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969, ratified by Australia on 13 June 1974, see https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf.

3.1.23 As highlighted throughout this submission, there is currently a cavernous gap between what Australia is bound to do under international law, what it claims to do before the international community, and what it actually does in practice. This hypocrisy has been highlighted in Australia's recent participation in the third cycle of the Universal Periodic Review process in January 2021, where 47 nations criticised Australia's policies towards refugees and people seeking asylum, including Australia's persistent use of prolonged detention and offshore processing,[61] being also two of the key causes of family separation.

3.1.24 Between 2012 and 2018 the United Nations made no less than 61 statements criticising Australia's offshore processing arrangements.[62] The UN Human Rights Committee which investigates individual complaints of breaches of rights under the ICCPR has repeatedly found Australia's detention regime to breach article 9 of the Convention, prohibiting arbitrary detention.[63] The UN Working Group on Arbitrary Detention (**WGAD**) has highlighted the alarming regularity with which egregious cases in relation to Australia are brought to its attention, the illegitimacy of Australia's argument that the validity of a domestic law is sufficient to shield Australia from its international obligations, and the persistent refusal of Australia to engage in good faith with international mechanisms despite being consistently and repeatedly reminded of their obligations under international law.

> **The Working Group finds it inconceivable that the unison voice of numerous independent, international human rights mechanisms can be disregarded**, and therefore calls upon the Government to review withoutdelay the Act in the light of the State's obligations under international law.[64] [Emphasis added]

3.2 Specific instances of interference with the rights to family unity

3.2.1 We outline below a collection of some of the key areas where Australia's laws, policies and procedures likely breach Australia's human rights obligations to afford rights of family unity and family reunion to refugees and people seeking asylum. We note that this is not intended to be an exhaustive list:

- **Absence of any overarching provisions in the Migration Act which require principles of family unity to be applied or given proper weight** in:
  - any visa determination process and decision
  - any decision to detain or transfer a detained person to a location which will prevent them from receiving in person visits from family members
  - any decision to remove, deport or "take" a person to another country.
- **Absence of any overarching provisions in the Migration Act which require the best interests of the child to be given primary consideration** in any of the three above scenarios. There are very few instances where decision makers are required to turn their mind at all to the impact of a decision upon a child applicant or another affected child, let alone a requirement that an assessment of the child's best interest must be undertaken and given primacy in taking the decision. The absence of any mechanisms for this to be an inherent aspect of all decisions taken under the Migration Act represents a major breach of Australia's obligations under s 3(1) of the CRC, along with a failure to consider any of the

[61] Refugee Council of Australia, 21 January 20201, see https://www.refugeecouncil.org.au/un-member-states-challenge-australias-refugee-and-asylum-policies/.
[62] United Nations observations on Australia's transfer arrangements with Nauru and Papua New Guinea (2012-2018).
[63] See Australian Human Rights Commission which identified at least 9 instances of this between 1997-2010. https://humanrights.gov.au/our-work/rights-and-freedoms/right-security-person-and-freedom-arbitrary-detention.
[64] A/HRC/WGAD/2019/2, Opinion No. 2/2019 concerning Huyen Thu Thi Tran and Isabella Lee Pin Loong (Australia), 6 June 2019, p14-15, available here. WGAD_2019_Opinion.

other often relevant CRC provisions relating to children's rights to be cared for by their families or provided with family reunion, to name just two.

- **Statutory bars preventing some family members from lodging visa applications, unless they are granted individual Ministerial permission to do so** (see Section 2.2: Barred from reunion).
- **Splitting of applications from the same family units due to restrictions on adding applicants to existing applications** (see Section 2.3: Splintering of families within Australia).
- **Inadequacy of Ministerial personal, non-compellable public interest discretions (under ss 417, 351 and 501J of the Migration Act)** which are often the only option available to address situations where families face permanent separation due to being on different visa pathways.[65] However, only a relatively narrow group of applicants are even eligible to make such a request as applicants must have a decision from a merits review tribunal (those who are unlawful are excluded).[66] Of the eligible requests, the Department only refers to the Minister for consideration a tiny proportion of the requests put forward by applicants whose circumstances meet this guideline. In short, these ministerial discretions, which are narrow in scope, purely discretionary and non-compellable, are an insufficient safeguard for ensuring that the operation of other provisions or procedures known to create situations of family separation, are prevented from doing so.
- **Inadequacy of complementary protection as a means of securing protection from family separation**. Since 2012 Australia has included determination of complementary protection obligations within refugee decision making in order to give effect to some of Australia's obligations under the ICCPR, the CAT and the CRC. However s 36(2A) of the Migration Act limits these to situations where people face a real risk of significant harm including arbitrary deprivation of life, the death penalty, torture, cruel, degrading, or inhuman treatment or punishment. Deprivation of family life, family separation or lack of family reunion are not covered within the existing complementary protection regime.[67]
- **Operation of statutory bars that prevent unauthorised maritime arrivals from making a valid application for a visa, and which confer that status to their children born in Australia** (see Section 2.2: Barred from reunion).
- **Denial of any pathway to family reunion for unauthorised maritime arrivals** who are only able to apply for temporary protection visas (see Section 2.1: Denial of family reunion for those who arrived by boat).

[65] The Ministerial Guidelines include cases for referral to the Minister for consideration where there are "strong compassionate circumstances that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to an Australian citizen or an Australian family unit, where at least one member of the family is an Australian citizen or Australian permanent resident."

[66] This excludes all unauthorised maritime arrivals as their cases are referred to the Immigration Assessment Authority, which is not a Tribunal and others who may have missed their AAT application deadline; a statutory deadline without any discretion to accept an application out of time, no matter the circumstances.

[67] These limitations were highlighted in a decision of the Full Federal Court in *GLD18 v Minister for Home Affairs* [2020] FCAFC 2, which found that a person cannot satisfy the criterion in s 36(2)(aa) if the harm she or he identifies arises because of separation from her or his family members, who will not return with that person to her or his country of nationality. The significant harm feared cannot be caused by the fact that the person cannot remain in Australia, and will consequently be separated from their family (and vice versa). The rights to family unity contained in the CRC and the ICCPR were unfortunately not considered by the Court.

- **De-prioritisation of applications for family reunion by certain refugees**, including the operation of Direction 80 (see Section 2.4: De-prioritisation of family reunion for those who arrived by boat).
- **Protracted processing times for Australian citizenship applications by refugees**, noting that citizenship is a key factor in enabling family reunion (see Section 5.2: Delays in citizenship applications).
- **Decisions to detain or transfer people to detention centres away from proximity to family members,** including in other States (see Section 5.1: Impacts of immigration detention).
- **Legal and practical consequences of mandatory and discretionary cancellation of protection visas**, resulting in family separation either through the impact of protracted or indefinite detention in Australia, or through the person being removed/deported from Australia, resulting in them facing lengthy or permanent re-entry bans (see Section 5.1: Impacts of immigration detention).

3.2.2 In this context, we consider that a fundamental first step in better protecting the rights of refugees and asylum seekers to family reunion and family unity is the incorporation of international law principles into the migration framework. This will require all decisions made under the Migration Act to give paramount consideration to the rights of the child and Australia's international obligations concerning family reunion.

Recommendation 10: Amend the *Migration Act 1958* (Cth) to require principles of family unity and the best interests of the child to be given proper weight in all decisions made under the Act, including in relation to the visa determination process, detention and removal.

Terms of Reference (a) – (e):

4. Eligibility for relevant visas and waiting times

4.1 Visa capping, fees and sponsorship barriers in the family stream

4.1.1 As discussed above, there are substantial delays in processing family reunion applications under the Family Migration Program due to the operation of Direction 80 (see Section 2.4: De-prioritisation of family reunion for refugees who arrived by boat). There are also additional challenges for refugee families seeking to reunite through the Family Migration Program. These include prohibitive visa application and other costs, more stringent processes around establishing identity, requirements of base identity and other documentation to engage with visa processing partners such as VFS Global and caps on visas leading to lengthy processing timeframes.

4.1.2 The current visa application for a partner visa is $7715, with $3585 for each additional applicant over 18 and $1795 for each additional applicant under 18 years of age. In addition, applicants have to pay for medicals, police reports and airfares. The Department reports that 95% of offshore partner visa (subclass 309) applications are finalised within 24 months.[68] Due to the delays in processing of applications, often applicants have to repeat medicals and police checks 2 or 3 times over the course of the processing of their visa applications as these documents are valid for only 12 months. This poses additional challenges for applicants and sponsors given the volatile security climate overseas in which most applicants reside.

4.1.3 In relation to parent visas, there are two pathways for permanent residency: "non-contributory" and "contributory". The non-contributory visa currently takes a prohibitive 30 years to be processed, but attracts a lower visa application charge while the contributory parent visa can be processed quicker, but has significantly higher costs (around $47,000 and an assurance of support). All parent visas also require children to meet the balance of family test (**BOF**) in that an equal or greater number of children live in Australia than overseas. This test can be difficult to satisfy for humanitarian entrants, who may have large families overseas who are unable to care for the applicant due to living in war-affected areas. It can also be difficult to provide sufficient documentation to establish that an applicant satisfies the BOF in places where documentation with regards to the births, deaths and missing persons cannot be easily obtained.

4.1.4 Within the "Other Family" visas category, the orphan relative visa, carer visa and aged dependent relative visa continue to play an important role in assisting protection visa holders to deal with emerging family reunification and carer needs. For instance, the orphan relative visa and the aged dependent relative visa provide a pathway for vulnerable family members to be reunited and cared for by their Australian family members. However, caps on the number of grants for each visa category and strict processing priorities has resulted in lengthy processing times for these family visas.[69] The estimated processing time for remaining relative and aged dependent relative visa applications that meet the criteria to be queued is quite

[68] Australian Government, Department of Home Affairs, *Visa processing times* (last updated 19 April 2021), available online: <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/global-visa-processing-times>. For analysis of the impact of processing delays on refugees, see Refugee Council of Australia, *Family Reunion Issues for Refugees*, 2019, <https://www.refugeecouncil.org.au/family-reunion-issues/>.

[69] Australian Government, Department of Home Affairs, *Family visa processing priorities* (last updated 16 October 2020), available online: <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities>.

literally a lifetime at approximately 50 years.[70] For carer visa applications, the Department estimates on current planning that applications that meet the criteria to be queued are likely to take approximately 4.5 years to be released for final processing.

4.1.5 These protracted delays are unacceptable, particularly when those family members may remain in a conflict zone experiencing ongoing persecution and violence.

Recommendation 11: Amend the processing priorities for the Family Migration Program to prioritise applications where the sponsor has a refugee or humanitarian background.

Recommendation 12: Provide a dedicated stream for humanitarian family reunion either in the Family Migration Program or the Special Humanitarian Program.

[70] Australian Government, Department of Home Affairs, *Visa processing times* (last updated 19 February 2021), available online: <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/other-family-visas-queue-release-dates>.

Terms of Reference (j):

5. Any other matters

5.1 Impacts of immigration detention

5.1.1 We wish to draw to the Committee's attention the adverse effects of immigration detention on family reunion. Australian law requires the detention of all unlawful non-citizens.[71] Immigration officers have a legal obligation to detain a person who arrives without a visa, or who arrives with a visa and subsequently becomes unlawful because their visa has expired or has been cancelled. This also includes transitory persons who have been transferred to Australia for medical treatment from regional processing centres.

5.1.2 In relation to visa cancellation, it is worth noting that visas may be cancelled for a number of reasons, not necessarily related to character or security concerns. In circumstances where a visa is mandatorily cancelled, no consideration is given to the impact that visa cancellation will have on the family unity rights of the refugee/visa holder, as well as upon their spouse or children.[72] Even where visa cancellation is discretionary, Ministerial Directions (now 90) prescribe that the weight given to consideration of the impact of separation of the person from their family members, is less than the weight given to other considerations. Nor does the decision making process give proper weight to the impact of permanent family separation on the spouse or even the children of the person.[73]

5.1.3 The mandatory detention of a non-citizen invariably separates them from their family. They are severely restricted in the contact they can have with their family members, may be sent to an immigration detention centre in another State (up to 5000km away), and for long periods of time. We are also aware of circumstances in which family members are detained in different locations. This practice has been repeatedly found to be in breach of the prohibition under international law on arbitrary detention (see Section 3.1: International obligations concerning family reunion). This unjustifiable detention often also results in protracted, even permanent, separation of families.

5.1.4 There is no scope to take into consideration the impact this detention may have on both the detainee's right and also his/her spouse or children's rights. There have been glaring examples where a single parent, who is the sole carer of dependent children, has been taken into detention without regard for their children's rights to be cared for by their parent, resulting in the children being placed in State care, contrary to their best interests.

[71] Section 189 of the Migration Act.

[72] Under the Migration Act, a refugee/other person's visa must be automatically cancelled if they have a 'substantial criminal record', meaning they have been sentenced to 12 months or more of imprisonment or found guilty of a sexual crime involving a child.

[73] A further consequence of visa cancellation for refugees, special humanitarian entrants or others in need of complementary protection, may be *refoulement*, often to countries where remaining spouses and children will not be able to safely visit, meaning that these families may not only be permanently separated but may never see their loved ones again, in addition to possibly finding their own lives to be at risk.

Case Study 6: Mohammad

Mohammad arrived in Australia by boat in 2013 with his wife. They were detained on Christmas Island and transferred to Nauru where they were held in offshore detention. While in Nauru, Mohammed and his wife had a child who required urgent medical care that the child could not receive in Nauru.

While the Australian Government agreed to transfer Mohammad's wife and child to Australia, Mohammad was not permitted to travel with them and remained in Nauru. Mohammad's mental health declined significantly due to the separation from his family, and he was eventually transferred to Australia for medical treatment in 2019.

In Australia, Mohammad was detained in an alternative place of detention. Mohammed was not released into the community and was unable to see his wife and child, who were living in the same city as him. Mohammed's mental health worsened due to ongoing family separation and he attempted to take his own life on two occasions.

It was only after his second attempt that Mohammed was released from detention and able to be reunited with his wife and child, whom he had not seen for 3.5 years. Although all three family members were living in Australia, they had not been allowed to see each other during this time due to the Australian Government's policy of mandatory detention.

5.1.5 Detention can also have devastating mental health consequences for both the detainee and their family. Numerous studies have found that separating children from their parents is harmful for children's development and health. Effects can include an increased risk of post-traumatic stress disorder, sleep disturbance, aggression and withdrawal.[74] The increased risk of depression and stress reactivity can persist 60 years after the separation, resulting in long term health consequences such as increased risk of hyperglycemia and cardiac problems later in life.[75] This is particularly relevant in the context of refugees and people seeking asylum as the children themselves are fleeing often violent circumstances, and where they are able to maintain a secure attachment to their family they are protected from some of the psychological consequences of trauma.[76]

5.1.6 If a family member is detained, this results in interference in the normal life of family, which cannot be negated by periodic visits to the person in detention.[77] This can cause severe stress and anxiety for the family in circumstances where the detention may be indefinite leading to chronic uncertainty about the prospects of family reunification.[78]

[74] J. Cleveland, C. Rousseau and R. Kronick, *The Harmful Effects of Detention and Family Separation on Asylum Seekers Mental Health in the Context of Bill C-31*, Brief submitted to the House of Commons Standing Committee on Citizenship and Immigration (Canada); <https://refugeeresearch.net/wp-content/uploads/2016/11/Cleveland-et-al-2012-Detention-and-asylum-seekers_mental-health.pdf>.

[75] Ibid.

[76] Ibid.

[77] B. Saul, *Indefinite Security Detention and Refugee Children and Families in Australia: International Human Rights Law Dimensions*, Australian International Law Journal, 1 January 2013; *http://www.austlii.edu.au/au/journals/AUIntLawJl/2013/5.pdf*

[78] Ibid.

5.1.7 In this context, immigration detention must be limited to a reasonable time in which to conduct necessary identity and security checks, and the importance of the maintenance of the family unit must be paramount.

Recommendation 13: Require the maintenance of the family unit and the best interests of the child to be paramount considerations in determining whether, where and for how long to detain a person.

5.2 Delays in citizenship application process

5.2.1 We also draw to the Committee's attention the impact of delays in the processing of citizenship applications on the ability of families to reunite in Australia. As discussed above, processing priorities across the Family Migration Program and the SHP have relegated PPV holders who arrived by boat to the bottom of the processing queue for family reunion applications (Section 2.4: De-prioritisation of family reunion for refugees who arrived by boat). Accordingly, becoming an Australian citizen is of particular significance for this cohort as it provides a pathway to expedite their applications to be reunited with their overseas family members.

5.2.2 However, applications for citizenship by conferral by protection visa holders are subject to prolonged delays in processing far beyond the Department's stipulated timeframes of between 14 to 16 months.[79] An Australian National Audit Office Report found that applications for citizenship by conferral, especially "more "complex" applications from refugee/humanitarian applicants, had not been efficiently processed by the Department.[80]

5.2.3 Similarly, in a 2017 investigation into delays in processing of citizenship applications by conferral, the Ombudsman noted huge delays in processing of applications that were subject to enhanced identity and integrity checks – the longest being over 4 years.[81] Notably, those that were subject to these enhanced screening checks were applicants from Afghanistan, people who had come by sea seeking asylum and people who had been sponsored for a family visa or humanitarian visa by an asylum seeker who had arrived in Australia by sea.

5.2.4 Two applicants who sought judicial review with the support of the Refugee Council of Australia had been waiting 18 to 23 months for a decision on their citizenship applications. The court found that in both cases there had been unreasonable delay in deciding their citizenship applications finding that a reasonable time for processing of the applications was between 6 and 7 months from the time the citizenship test was taken.[82] Despite these recommendations, the unreasonable delays in processing of applications for citizenship for asylum seekers who arrived by boat has continued.

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[79] Australian Government, Department of Home Affairs, *Citizenship processing times* (last updated 31 March 2021) <https://immi.homeaffairs.gov.au/citizenship/citizenship-processing-times>.

[80] See "Efficiency of the Processing of Applications for Citizenship by Conferral, February 2019, Australian National Audit Office, < https://www.anao.gov.au/work/performance-audit/efficiency-the-processing-applications-citizenship-conferral>.

[81] Commonwealth Ombudsman, *Delays in processing of applications for Australian Citizenship by conferral* (December 2017).

[82] See Refugee Council of Australia, *Ombudsman reports on citizenship delays* (25 January 2019), <https://www.refugeecouncil.org.au/ombudsman-citizenship-delays/>. See also *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530.

5.2.5 These delays in processing and granting citizenship for people who arrived by boat has huge implications on their lives, in particular their ability to visit and reunite with family.

Case Study 7: Leena

Leena arrived in Australia with her daughter in 2011. She and daughter were found to have a well-founded fear of persecution in Sri Lanka and granted PPVs in 2014. In 2018, Leena and her daughter became eligible to apply for Australian citizenship. It has now been 3 years and she is still waiting to hear from the Department about the outcome of her application.

The delay in processing their application for citizenship has meant that her daughter who is now at VCE may not qualify for a FEE-HELP. Leena also wishes to travel to Sri Lanka to see her aging mother. She would like her daughter, who has grown up in Australia, to get to know her grandparents, aunts, uncles and cousins. Getting to her know her extended family is very important to Leena as her daughter is her only child and they have limited family in Australia. Travel to Sri Lanka is also the only means of her seeing her mother as Leena has been advised that an application for a visitor visa by her mother will most likely be refused due to Leena's own background of having arrived in Australia by boat. She has also been advised that her mother's application for a visitor visa is likely to have a better chance of success if Leena obtains citizenship.

While awaiting the processing of her citizenship application, Leena and her daughter must remain isolated from family. It is unclear how long they must wait.

5.2.6 Citizenship is also a requirement to qualify for an Australian passport. For many permanent protection visa holders who have arrived from war-torn areas without personal identification documentation, holding a passport is also the means for travel to visit family overseas. While temporary travel documents are issued to refugee visa holders, they do not hold the same status as a passport and many countries have bars on entry for persons holding travel documents.[83] Further it is only with the Australian passport that permanent refugee visa holders can travel to their country of origin, they otherwise risk having their visas cancelled. Travel to country of origin once the threat of persecution has ceased either permanently or temporarily due to a regime change or an end to a conflict continues to be important for applicants who have often fled leaving close family and other persons with whom they have close ties behind.

Recommendation 14: Prioritise and expedite the processing of citizenship applications for people from refugee and humanitarian backgrounds.

[83] For example, the United Arab Emirates.

6. Conclusion

This submission has highlighted the systemic barriers to family reunion for refugees and people seeking asylum. The current system imposes insurmountable barriers through limited or no pathways to permanent residency for those who arrived by sea, the operation of statutory bars that prohibit the making of a valid visa application, de-prioritisation on the basis of the sponsor's mode of arrival in Australia and lengthy delays in the processing of visa and citizenship applications.

This architecture – which disproportionately and intentionally targets people who have sought protection – likely breaches Australia's international human rights obligations to afford rights of family unity and family reunion pursuant to the ICCPR, ICESCR, CMW, CRC and CRPD.

In our view, these issues could be addressed through the incorporation of international law principles into the domestic migration framework, requiring decisions under the Migration Act to give consideration to family unity and the best interests of the child.

In our experience, there is an urgent need for legislative and policy changes to open meaningful pathways to family reunion for the clients whom we assist.

We urge the Committee to adopt our recommendations to ensure that the possibility of family reunion is afforded to all Australians, including those who have come to Australia in need of our protection.