OPINION:
FAMILY SEPARATION IN AUSTRALIA AND INTERNATIONAL LAW[1]
February 2020

[1] This Opinion is based upon factual details and instructions provided to us by the Human Rights Law Centre, and it was prepared in February 2020. In preparing this Opinion we have not considered any potential impact of the Coronavirus pandemic.

1. INTRODUCTION AND OVERVIEW

1.1 We have been asked by the Human Rights Law Centre ("**HRLC**") to provide an opinion on whether the Australian Government's treatment of asylum seekers and refugees in relation to family separation and prohibitions on family reunification is unlawful under international law.

1.2 The Trump Administration's actions at the US border sharpened global focus on the separation of refugee families. The images of distraught children being torn from their parents in the US sparked global outcry and received swift international condemnation. However, Australia's separation of refugee families and the resultant suffering had largely escaped domestic and international scrutiny.

1.3 In Australia, the separation of refugee and asylum seeker families who arrive by boat has been widespread and systematic – and has been occurring for many years. Indeed, many consider that Australia provided the inspiration for the family separation policies implemented under the Trump Administration. The leaked phone transcript between President Donald Trump and Australian Prime Minister Malcolm Turnbull in early 2017 demonstrated President Trump's admiration for Australia's approach to refugees: "*You are worse than I am,*" Trump told Turnbull. In response to Prime Minister Turnbull's explanation of Australia's policy that no person who arrives by boat will ever be allowed in, President Trump replied: "*We should do that too*". In the months that followed, the Trump Administration introduced strict immigration and border protection policies, often referencing Australia.[2] This included their controversial family separation policy which has since sparked international controversy. In Australia, however, it has been happening for years.

[2] ''Very strong' borders: Turnbull offered refugee advice to Trump' *The Sydney Morning Herald* (online, 21 June 2018). <https://www.smh.com.au/world/north-america/very-strong-borders-turnbull-offered-refugee-advice-to-trump-20180621-p4zmrw.html>.

1.4 Families have been separated between Australia and third countries, including Australia's offshore detention sites in Nauru and Manus Island in Papua New Guinea.[3] The period of separation ranges from one month to five years or more and often with no foreseeable prospect for reunification of the family. HRLC assists a number of families that have been indefinitely separated by the Australian Government's policies, laws and actions. Our opinion is intended to inform this case work, as well as the HRLC's broader legal advocacy and policy work on the extent, impact and consequences of the indefinite separation of refugee and asylum seeker families in Australia.

1.5 Australia's mandatory detention policies have been widely condemned, including in Australia's Universal Periodic Review[4] and most recently by the new High Commissioner for Human Rights, Michele Bachelet, in her opening address to the Human Rights Council.[5] The UN Special Rapporteur on the Human Rights of Migrants concluded that those being held on Nauru or Papua New Guinea have been subject to indefinite detention and dehumanising conditions amounting to cruel, inhuman and degrading treatment.[6] Our opinion focuses on the specific question of family separation and prohibitions on family reunification, which has not yet been the subject of formal international adjudication.

1.6 Most recently, in February 2020, the Office of the Prosecutor ("**Prosecutor**") of the International Criminal Court expressed the view that Australia's offshore detention regime conditions *"constituted cruel, inhuman, or degrading treatment ("CIDT"), and the gravity of the alleged conduct thus appears to have been such that it was in violation of fundamental rules of international law."*[7] While, the Prosecutor's letter did not consider the issue of family separation and determined that there was no basis to proceed with a prosecution at this time, its characterisation of the detentions was scathing and, *"largely consistent with the assessments made by various UN bodies, human rights organisations, and, in part, certain domestic inquiries in Australia."*[8]

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[3] The official language used to refer to the detention centres is Regional Processing Centres ("RPCs"). Since 6 October 2015 the Nauru RPC has operated under an *"open centre"* arrangement (an arrangement put in place by the Australian Government following a High Court challenge to the detention practices). Similarly, the Manus Island RPC was *"opened"* in May 2016, which also coincided with a High Court challenge and then formally closed on 31 October 2017. The conditions on both islands amount to de facto detention and the actions of the Australian Government are widely criticised for putting asylum seekers at risk, including of physical and sexual violence. See, for e.g., Tom Allard, 'Nauru's move to open its detention centre makes it "more dangerous" for asylum seekers" *The Sydney Morning Herald* (online, 9 October 2015 <https://www.smh.com.au/politics/federal/naurus-move-to-open-its-detention-centre-makes-it-more-dangerous-for-asylum-seekers-20151008-gk4kbt.html> and Ben Doherty 'Manus detention centre cleared of all refugees and asylum seekers' *The Guardian* (online, 24 November 2017) <https://www.theguardian.com/australia-news/2017/nov/24/manus-detention-centre-cleared-of-all-refugees-and-asylum-seekers>.

[4] UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, 13 January 2016, A/HRC/31/14; UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, 24 March 2011, A/HRC/17/10.

[5] UN High Commissioner for Human Rights Michelle Bachelet, *Opening Statement by UN High Commissioner for Human Rights Michelle Bachelet*, 10 September 2018, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23518&LangID=E>.

[6] Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru* (24 April 2017) UN Doc A/HRC/35/25/Add.3, [80].

[7] Letter from the Office of the Prosecutor, International Criminal Court to Ms Kate Allingham, Office of Andrew Wilkie MP, 12 February 2020, 2 <https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers_(1).pdf>.

[8] Ibid.

1.7 Other relevant UN observations made within the last 18 months include, *inter alia*:

a) Michelle Bachelet, UN High Commissioner for Human Rights, at the Australian Human Rights Commission conference in Sydney, 8 October 2019, encouraging Australia to make greater use of human-rights compliant alternatives to detention and recalling the "*wealth of evidence to demonstrate the harmful effect [of mandatory detention] on [asylum seekers'] mental and physical well-being";*[9]

b) UN experts raising concern that the situation of *"indefinite and prolonged confinement, exacerbated by the lack of appropriate medical care amounts to cruel, inhuman and degrading treatment according to international standards*";[10] and,

c) UN High Commission for Refugees appealing for urgent medical intervention by Australia.[11]

1.8 In the wake of the US family separation controversy, the American Psychological Association issued a statement that the family separation policy "*is not only needless and cruel, it threatens the mental and physical health of both the children and their caregivers.*"[12] As is apparent from the Australian cases we have reviewed, interference with and separation of families results in severe suffering, which compounds the trauma already experienced by refugees. In the case of Australia, this is not just the trauma suffered by refugees prior to fleeing their countries of origin but includes the additional trauma inflicted upon refugees by the dehumanising conditions in Australia's offshore detention centres in Nauru and Papua New Guinea, which has itself been found to amount to cruel, inhuman and degrading treatment.[13] Many of the refugees who have been transferred to Australia suffer serious and ongoing physical and mental health conditions as a result of these traumas. In addition, in order to receive medical treatment, many have suffered the further trauma of being separated from their family. Those who continue to be held on Nauru or Papua New Guinea do not have access to adequate medical facilities for treatment and face additional imminent threats as a result of the prevalence of physical and sexual abuse in and around the offshore detention centres.

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[9] UN High Commissioner for Human Rights, Michelle Bachelet, *Free and Equal: An Australian Conversation on Human Rights* , 8 October 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25112&LangID=E>.
[10] UN OHCHR, 'Australia: UN experts urge immediate medical attention to migrants in its offshore facilities', 18 June 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24709&LangID=E>.
[11] UNHCR, 'UNHCR Appeals for Urgent Medical Intervention by Australia', 29 November 2018, <https://www.unhcr.org/en-au/news/press/2018/11/5bff8f237/unhcr-appeals-for-urgent-medical-intervention-by-australia.html>. See also UNHCR, 'UNHCR urges Australia to evacuate off-shore facilities as health situation deteriorates', 12 October 2018 <https://www.unhcr.org/en-au/news/briefing/2018/10/5bc059d24/unhcr-urges-australia-evacuate-off-shore-facilities-health-situation-deteriorates.html> and UNHCR 'UNHCR appeals to Australia to act and save lives at immediate risk', 23 October 2018 <https://www.unhcr.org/en-au/news/press/2018/10/5bcda38b7/unhcr-appeals-australia-act-save-lives-immediate-risk.html>.
[12] American Psychological Association, 'Statement of APA President Regarding the Traumatic Effects of Separating Immigrant Families' (29 May 2018) < https://www.apa.org/news/press/releases/2018/05/separating-immigrant-families >.
[13] Above n 5.

1.9 The impact of separation has been cruel, significant and unbearable for each affected family member, including children. This has and will result in psychiatric harm and long-term developmental harm. Many refugee children born in Australia were separated from a parent from the time they were born and, at the time of separation, had no foreseeable prospect of reunification (see further below). Many of those separated from their families, including children, have self-harmed or attempted suicide.[14] Given the severe mental pain and suffering that has been intentionally inflicted on refugees for the purposes of deterrence (i.e. coercion) and punishment, the acts leading to and including indefinite family separation arguably constitute a form of torture.

1.10 Indeed, in a recent case decided in the United States over the Trump administration's family separation policy, a federal judge ordered the immediate reunification of a father and his son, condemning their detention in separate facilities for five months as "*the most cruel of all cruelties*".[15] Lawyers have argued, in this case and others, that the practice of forcibly separating children from their asylum-seeking parents in order to deter immigration amounts to torture.[16] Australia's family separation policies have not yet been subjected to international adjudication.

1.11 Since commencing work on this opinion in 2018, there have been changes in Australian legislation and policy, namely the amendments to the Migration Act ("**Medevac Amendments**") and their subsequent repeal in December 2019. For a period between March and December 2019, the Medevac Amendments provided a limited pathway to family reunification in Australia for refugees separated from their families in offshore detention centres. As a result of the Medevac amendments and other individual legal action based on medical needs, our instructions are that most – if not all – families separated between Australia and overseas processing centres have now been reunited in Australia. While this is a positive development, the status of these families in Australia remains uncertain,[17] and it does not undo the harm already done to these families and children or provide them with any guarantee of permanent reunification in Australia, nor has there been accountability for these harms. The repeal of the Medevac Amendments means that refugees and asylum seekers held in indefinite offshore detention will face the risk of indefinite family separation in the future with no real prospect of reunification in Australia. The continued

[14] See for example, Ben Doherty, 'Nauru self-harm 'contagion' as 12-year-old refugee tries to set herself alight' *The Guardian* (online, 22 August 2018) <https://www.theguardian.com/australia-news/2018/aug/23/nauru-self-harm-contagion-as-12-year-old-refugee-tries-to-set-herself-alight>.

[15] See *D.J.C.V. v. U.S. Immigration and Customs Enforcement*, reported here Amanda Holpuch, 'Most cruel of cruelties': father and son separated under Trump policy to be reunited' *The Guardian* (online, 15 October 2018) https://www.theguardian.com/us-news/2018/oct/15/judge-orders-reunification-father-and-son-separated-under-trump-policy.

[16] Ibid. See also Center for Human Rights and Global Justice, 'Family Separation is Torture: Global Justice Clinic Submits International Law Brief to U.S. District Court' (22 February 2019) <https://chrgj.org/2019/02/22/family-separation-is-torture-global-justice-clinic-submits-international-law-brief-to-u-s-district-court/>.

[17] We are instructed that people who have been subject to offshore detention and have subsequently been brought to Australia for medical treatment have no legal right to remain in Australia permanently. The Migration Act provides that their transfer to Australia is for a temporary purpose only. The Federal Government maintains that people must then return to a regional processing country, their country of origin or a third country. While in Australia, they must remain in immigration detention unless they are granted a short-term visa at the Minister's discretion. They are barred from applying for a protection visa (or any other visa) in Australia.

uncertainty and changing political and legislative landscape affecting these families heightens the arbitrariness of their treatment by Australia and further reinforces the conclusions we reach.

1.12 In outline, our opinion sets out Australia's laws and policies on refugees insofar as they result in family separation and prohibitions on family reunification and their stated justification and rationale (Section 2), the relevant international law and Australia's binding obligations (Section 3), the application of the relevant international law to Australia's laws and policies, and concludes that Australia breached its international law obligations (Section 4). In preparing this opinion, we have relied upon the information in our brief from those instructing us. In reaching our conclusions, we have had to update our opinion in light of recent legislative changes in Australia, namely the introduction and subsequent repeal of the Medevac Amendments. However, the return to the historic position pre-Medevac Amendments means that our conclusions as to the unlawfulness of Australia's immigration policies under international law remain the same.

1.13 Our opinion demonstrates that the Australian Government's family separation policy violates Australia's international obligations. Specifically, Australia's policy of family separation:

a) violates the essential right to family unity, found in international human rights treaties to which Australia is a Party, including the UDHR, ICCPR, ICESCR, CRC and CAT, and customary international law;
b) violates Australia's international law obligations under Articles 17, 23 and 24, ICCPR;
c) violates Australia's international law obligations under Article 9, CRC; and
d) in certain circumstances, will violate the absolute prohibition on torture under CAT and the *jus cogens* norm of international law, or the prohibition of acts of cruel, inhuman or degrading treatment or punishment under CAT.

2. AUSTRALIAN LAW AND PRACTICE: SEPARATION OF REFUGEE FAMILIES

Introduction and Summary

2.1 Section 5AA of *Migration Act 1958* (Cth) ("**Migration Act**") classifies a person who enters Australia by sea with no valid visa as an Unauthorised Maritime Arrival ("**UMA**"). The legal framework within which separation of refugee and asylum seeker families who arrived by sea (i.e. UMAs) is determined by the date of arrival of the individual refugee/asylum seeker. This is because the significant policy changes by successive Australian Governments over recent years has meant different laws and policies apply to each cohort of asylum seekers and refugees. In summary (see also Table 1):

2.1.1 **Offshore Detention – Arrivals after 19 July 2013:** Pursuant to the Migration Act, any asylum seeker classified as a UMA who arrived in Australia after 19 July 2013 is subject to mandatory deportation and indefinite detention in a country designated by Australia as a "regional processing country", namely Papua New Guinea and Nauru. The Australian Government's policy is that none of these asylum seekers will ever be processed or resettled in Australia. This has resulted in two forms of family separation where there is no prospect of permanent family reunification (even under the US resettlement deal – see further below at [2.32]):

(A) Families have been denied family reunification if they arrived on different boats either side of this date, that is, before and after the introduction of mandatory offshore processing or if family members applied for US resettlement from Nauru, for which they at times had been required to sign a form relinquishing custody over children in Australia ("**Policy Separation**");[18] and

(B) Families have been separated when certain individuals have been evacuated from Nauru to Australia to receive urgent ongoing medical treatment. Prior to December 2016, the entire family would be transferred together to Australia. Between December 2016 and 30 April 2019, the family was separated and medical treatment in Australia was on the condition that they would receive treatment in Australia only if they left their close family behind. In such cases, the family member or members in Australia received ongoing treatment and support but were indefinitely separated from immediate family members who remained in Nauru ("**Medical Treatment Separation**"). As noted above, most families impacted by Medical Treatment Separation have since been reunited (some after several years of separation). However, following the repeal of the amendments to the Migration Act ("**Medevac Amendments**") in December 2019, there is no longer any assurance that people requiring medical transfer to Australia in future will not be separated from their family members in this way.

2.1.2 From March to December 2019, the Medevac Amendments allowed for:

(A) The reunification of families split by Australia's offshore detention policy in cases where there was a family that had a child under 18 years old in Australia[19] – this

[18] In relation to the latter situation, our instructions are that it appears that families are no longer required to sign a form relinquishing custody over children in Australia for the purposes of US resettlement.
[19] Migration Act, s 198C(5).

provided a pathway for reunification for certain categories of families in Offshore Detention affected by Policy Separation or Medical Treatment Separation;[20]

(B) The reunification of families split by medical treatment to be reunited in Australia;[21] and,

(C) The transfer of family members to accompany future persons requiring medical treatment to Australia.[22] The effect of these amendments was that those in Offshore Detention previously affected by Medical Treatment Separation were offered a pathway to family reunification.

2.1.3 On 4 July 2019, the Coalition introduced the *Migration Amendment (Repairing Medical Transfers) Bill* ("**Medevac Repeal Bill**") to the House of Representatives. The Medevac Repeal Bill was passed by both Houses on 4 December 2019 and repealed the Medevac Amendments in their entirety, effective from 5 December 2019. Remarkably, the Medevac Repeal Bill's Statement of Compatibility with Human Rights acknowledged the Australian Government's obligation to guarantee the right to respect for the family and contended that the Medevac Repeal Bill was compliant. As human rights groups have pointed out, this is a "*serious mischaracterisation*" of the practice prior to the Medevac Amendments,[23] with no basis in law and fact.[24] For the reasons we set out below, we do not consider that – prior to or since the repeal of the Medevac Amendments – Australia can be said to have complied with its obligations in respect of the right to family life. The effect of the repeal of the Medevac Amendments is to return to the historic position.

2.1.4 In relation to "Offshore Detention", this Opinion considers the situation of policy and medical treatment for offshore detainees, both prior to the Medevac Amendments and in the current framework. We emphasise that there remains substantial historic harm to families who were initially separated with no prospect of reunification, regardless of whether they have been reunified during the operation of the Medevac Amendments; and there is continuing uncertainty and distress for these families given the lack of clarity regarding their future as a family unit, a matter which HRLC are considering further.

[20] Migration Act, s 198C(5).
[21] Migration Act, s 198C(3).
[22] Migration Act, ss 198B(4)(b), 198C(3).
[23] Amnesty International, Submission No 35 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Migration Amendment (Repairing Medical Transfers Bill 2019* (16 August 2019), 7.
[24] Asylum Seeker Resource Centre, Submission No 56 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Migration Amendment (Repairing Medical Transfers Bill 2019* (14 August 2019), 10.

2.1.5 Since the passing of the Medevac Repeal Bill, the historic position has been re-adopted. The Medevac Amendments were a positive step[25] and went some way towards mitigating against the human rights violations we identify in this opinion. However, even for the period during which they were in force, the Medevac Amendments did not go far enough: instances of unlawful Policy Separation and Medical Treatment Separation can and do occur (see further below at [4.16]). Importantly, we are instructed that reunification does not preclude the same family members being separated again in the future and that there are untested questions regarding the power to remove people who were transferred under the Medevac Amendments back to offshore processing centres. Such uncertainty raises concerns in itself, and, against the backdrop of past harm, raises further concerns regarding retraumatisation. We understand that HRLC is considering these important issues further.

2.1.6 **Legacy Caseload – Arrivals between 13 August 2012 and 1 January 2014:** Asylum seekers designated as UMAs who arrived in Australia between 13 August 2012 and 1 January 2014 and who have not been transferred to a regional processing country for offshore processing are eligible to apply in Australia for Temporary Protection Visas (valid for 3 years) ("**TPV**") or Safe Haven Enterprise Visas (valid for 5 years) ("**SHEV**"). These asylum seekers are not eligible to apply for permanent protection and there is a complete bar on family reunification: they cannot sponsor their family to come to Australia and they are banned from returning to their home country or travelling to a third country without approval from the Australian Government (i.e. places where they could reunite with their families) ("**Policy Separation**"). For people granted SHEVs, there is a theoretical pathway to other visas after 5 years, leading potentially to citizenship after (on average) another 5 years, at which point family reunification would be available, but only after a decade of separation and at significant cost ("**Practical Separation**"). People who travel by air and seek protection upon arrival at Australian airports are similarly impacted by this policy.

2.1.7 **Pre-Legacy Caseload – Arrivals before 13 August 2012:** Asylum seekers who arrived by boat prior to 13 August 2012 were eligible to apply for and obtain Permanent Protection Visas ("**PPV**") in Australia. While holders of PPVs are technically able to sponsor family members to be granted visas to come to Australia, the Australian Government has introduced policies that act as a practical bar to reunification within a reasonable time period. We are instructed that the key policy impacting family reunion for people in this

[25] The Medevac Amendments were commended as providing a 'robust process guided by clear standards' by the UN High Commissioner for Refugees. See United Nations High Commissioner for Refugees, Submission No 7 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Migration Amendment (Repairing Medical Transfers Bill 2019* (August 2019), [11]. Refugee Council of Australia considered the Medevac Amendments safeguarded the right to family. See Refugee Council of Australia, Submission No 43 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Migration Amendment (Repairing Medical Transfers Bill 2019* (August 2019), 12.

category is Ministerial Direction 80 "Order for considering and disposing of Family visa applications under s47 and 51 of the Migration Act 1958" (formerly Direction 72 and 60). Subsection 8(g) of Direction 80 deprioritises visa applications for family members sponsored by refugees holding PPVs who arrived by boat, placing these applications as the "lowest priority" for processing and ensuring that applications sponsored by individuals who did not arrive by boat are automatically prioritised ahead of those awaiting decisions. In practice, this means that refugees who arrived by boat may never be able to reunite with their families as their visas may never be processed (despite paying the same significant application fee). The only way that families can avoid the operation of Direction 80 is to make out a narrow and rarely-granted exception based on "special circumstances of a compassionate nature", the requirements of which are not defined, or wait for the sponsor to be eligible for and granted Australian citizenship, at which point they will no longer be deprioritised under the Direction. However, delays in processing citizenship applications can mean people are forced to wait an additional five years or more before reunification is possible (this is, accordingly, another form of "**Practical Separation**").

2.2 In each of these categories and in all ongoing cases, it is our instructions that there is – for the most part – at least one family member in Australia who is a recognised refugee. In the case of the Legacy and Pre-Legacy Caseloads, at least one family member is a recognised refugee, as they will be holding a PPV, TPV or SHEV, or have progressed to non-refugee permanent visa via the SHEV stream. For people separated between offshore detention and Australia due to different dates of arrival, it is possible that certain individuals affected were not yet recognised refugees throughout the entire period of their separation because their refugee status may not yet have been determined or they may have been pursuing judicial review of a visa refusal decision. Current family separations under this category affect only those who were originally separated in this way and where one member of the family later accepted an offer to be resettled elsewhere (for example, to the US), leading to their separation between Australia and the country of re-settlement. In the case of Medical Treatment Separation, it is again possible that certain individuals affected were not yet recognised refugees. This is because, among other things, the refugee status determination ("**RSD**") procedure was exceedingly slow and, for an unknown period of time, individuals brought to Australia for a temporary purpose had their RSD put on hold due to the absence of onshore processing and requirement that interviews be conducted offshore.

2.3 Prior to 2 March 2019 (see further below from [4.5]), in all instances of Policy Separation and Medical Treatment Separation, the family had no prospect of reunification in Australia, with no right of legal challenge, and while having no alternative options for re-settlement and being

unable to return to their country of origin given their recognised refugee status. The Legacy Caseload straddles the Policy Separation and Practical Separation categories. While there is a prospect of reunification in the future for some people in the Legacy Caseload, it is dependent on obtaining another visa category and after obtaining citizenship, which may take in excess of a decade. The Pre-Legacy Caseload is an instance of Practical Separation because family reunification, while possible, is subject to a lengthy and expensive process taking up to, and in excess of, five years. In each of these cases of Practical Separation, the policy implemented creates a practical bar to family reunification in a reasonable period of time. For the period during which the Medevac Amendments were in force, there were limited and insufficient pathways to reunification.

2.4 This section sets out the legislative framework for each category of cases and the way in which family separation and prohibition on reunification takes place. The underlying policy justification of the Australian Government's refugee policies and the associated interference with the rights of the separated families in each category are, broadly speaking, immigration and border control measures designed to deter people arriving by boat. The policies have been described as necessary to combat people smuggling and prevent asylum seeker deaths at sea. While these are legitimate aims, the question is whether the measures adopted in separating families and prohibiting their reunification are proportionate and necessary in a democratic society to achieve this aim. In our opinion, family separation is a wholly disproportionate measure and is not necessary to achieve the stated aim. Evidence of the use of family separation as a method of encouraging refugees to return home or to discontinue domestic proceedings calls into question the veracity of the aim itself and suggests the Australian Government's "*single-minded focus on deterrence*" in fact relates to immigration, as opposed to the safety of refugees and asylum seekers.[26]

[26] Australian Parliament, "The Coalition's Operation Sovereign Borders Policy" (July 2013), <http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2616180/upload_binary/2616180.pdf;fileType=application%2Fpdf#search=%22library/partypol/2616180%22>, 5.

Table 1: Means of Family Separation / Prohibition on Reunification in Australia	
1. Offshore Detention (arrivals after 19 July 2013)	*Policy Separation:* Families separated between offshore Regional Processing Centres and Australia because of arrival on different dates (or arbitrary separation despite simultaneous arrival) or families separated by US resettlement, where family members that applied for US resettlement from Nauru were required to sign a form relinquishing custody over children remaining in Australia (Note: "Release of Custody Agreement"). From March to December 2019, the Medevac Amendments provided a limited pathway for reunification for those affected by Policy Separation where a child under 18 years old was in Australia.
	Medical Treatment Separation: From late 2016, Department practice to transfer individuals needing medical treatment from offshore sites to Australia *without* family unity (e.g. mother brought to Australia to give birth, husband left on Nauru, mother and child indefinitely in Australia; father prohibited from joining them and remains on Nauru). From March to December 2019, the Medevac Amendments compelled family reunification in instances of Medical Treatment Separation.
2. Legacy Caseload (arrivals between 13 August 2012 and 1 January 2014)	*Policy Separation & Practical Separation:* Individuals only have access to temporary protection (i.e. TPV or SHEV visas), which prohibit: family reunification; returning to home country; and traveling to a third country without Departmental permission. This policy applies equally to UMAs and people who travel by air and seek protection upon arrival at Australian airports. There is significant uncertainty about remaining in Australia, but there is a theoretical pathway to other visas after 5 years, leading potentially to citizenship after a further period commonly up to 5 years, at which point family reunification would be available, but only after a decade of separation.
3. Pre-Legacy Caseload (arrivals prior to 13 August 2012)	*Practical Separation:* For an unauthorised maritime arrival who holds a PPV, reunification is only available if the applicant can show "special circumstances of a compassionate nature" and "compelling reasons to depart from the order of priority". However, there is far greater demand for family visas than there are available places. Then, the only practical option for refugees is to wait to be granted citizenship and then seek to sponsor family. The Australian Government has unreasonably delayed the processing of citizenship applications; from PPV to citizenship is commonly in excess of five years, and that is before the time and cost of family reunification process.

Offshore Detention: Policy and Medical Treatment Separation

Legal framework

2.5 Since 19 July 2013, Australia has maintained a strict policy that persons arriving by boat will not be processed or resettled in Australia. Australia's policy applies without exception and regardless of family ties.[27] Pursuant to this policy, any persons who arrive in Australia by boat are transferred to Nauru or Papua New Guinea where they remain indefinitely. The choice available to those individuals is to remain in those locations, potentially indefinitely separated from family members; to voluntarily return to the country of origin from which they fled and have a well-founded fear of persecution if they are returned; or limited prospects of resettlement to a third country. However, third party resettlement options, such as the US resettlement deal discussed further at [2.32] below, also do not permit family reunification.

2.6 Historically, the Australian Government did not provide statistics regularly on offshore processing. As at August 2018, our instruction were that approximately 835 men, women and children were being held in Nauru and 780 men in Papua New Guinea on the basis of this policy. The Australian Government has limited transfers to Papua New Guinea to single men. Men, women and children have been removed to Nauru. In September 2019, the Refugee Council reported that there were approximately 609 asylum seekers and refugees in Nauru and Papua New Guinea.[28] However, in December 2019, the Australian Government finally published statistics indicating there were 194 refugees in Nauru and 177 refugees in Papua New Guinea.[29]

2.7 The legal framework which enacts the policy is as follows:

2.7.1 Under Australian law, section 198AB of the Migration Act enables the Australian Government, acting through the Minister for Home Affairs ("**Minister**"),[30] to designate a country as a "regional processing country".

2.7.2 On 29 August 2012, Australia and Nauru entered a Memorandum of Understanding regarding regional processing arrangements, and on 10 September 2012, Nauru was designated as a regional processing country under section 198AB.[31]

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[27] 'Australia's borders are closed to illegal immigration' *Australian Government Department of Home Affairs,* <http://osb.homeaffairs.gov.au/Outside-Australia>.
[28] 'Offshore processing statistics' *The Refugee Council*, 27 October 2019, available at <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/>.
[29] 'KEY STATISTICS as at 31 December 2019' *Australian Government Department of Home Affairs, https://www.homeaffairs.gov.au/about-us-subsite/files/population-and-number-of-people-resettled.*pdf>.
[30] Prior to 20 December 2017, the Minister's title was the Minister for Immigration and Border Protection.
[31] *Instrument of Designation of the Republic of Nauru as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958* (Cth).

2.7.3 On 8 September 2012, Australia and Papua New Guinea entered a Memorandum of Understanding regarding regional processing arrangements, and on 9 October 2012, Papua New Guinea was designated as a regional processing country under section 198AB.[32]

2.7.4 On 29 July 2013, the Minister gave a written direction that immigration officers take certain asylum seekers that had been deemed a UMA under the Migration Act to Papua New Guinea or Nauru.[33]

2.7.5 Under section 5AA of the Migration Act, a person is a UMA if:

(a) the person entered Australia by sea:

(i) at an excised offshore place at any time after the excision time for that place; or

(ii) at any other place at any time on or after the commencement of this section; and

(b) the person became an unlawful non-citizen because of that entry; and

(c) the person is not an excluded maritime arrival.

2.7.6 On 3 August 2013, a new Memorandum of Understanding was signed between Australia and Nauru which allowed for the temporary resettlement of refugees in Nauru ("**Nauru MOU**").[34]

2.7.7 On 6 August 2013, a new Memorandum of Understanding was signed between Australia and Papua New Guinea which allowed for the temporary resettlement of refugees in Papua New Guinea ("**Papua New Guinea MOU**").[35]

2.7.8 Under section 198AD, officers, as defined in the Migration Act to include officers of the Department, "*must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country*".

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[32] *Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958* (Cth).

[33] *Plaintiff S156-2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, [16].

[34] 'Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues' *Department of Foreign Affairs and Trade*, 29 August 2012, available at < https://dfat.gov.au/geo/nauru/Documents/nauru-mou-20130803.pdf>.

[35] 'Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues' *Department of Foreign Affairs and Trade*, 6 August 2013, available at <https://dfat.gov.au/geo/papua-new-guinea/Pages/memorandum-of-understanding-between-the-government-of-the-independent-state-of-papua-new-guinea-and-the-government-of-austr.aspx>.

2.8 The constitutional validity of these provisions of the Migration Act were upheld in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*.[36] It is important to note that Australia's Constitution does not have a bill of rights and therefore has limited means to challenge laws made by Parliament on human rights grounds.

Power to transfer persons to Australia – and transfers for medical treatment

2.9 The Australian Government has the power to transfer persons from regional processing countries to Australia, including under several provisions of the Migration Act. Section 198B(1) states that "*[a]n officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia*". Such transfers are not time limited by the Act and have the potential to extend indeterminately in circumstances where the "*temporary purpose*" is ongoing.[37]

2.10 Decisions to bring (or not to bring) a transitory person to Australia involve the use of the non-compellable discretion of the Minister and are not reviewable under the Migration Act. Section 474 renders the power a "*privative clause decision*" and therefore "*final and conclusive*". Further, section 494AB of the Migration Act places a bar on legal proceedings concerning the exercise of power in relation to transitory persons under section 198B(1).

2.11 Under section 198 AHA(2), the Minister has the power "*to take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of a country*". This is "*intended to ensure that the Commonwealth has capacity and authority to take action, without otherwise affecting the lawfulness of that action*".[38]

2.12 Under section 198AE, the Minister may exempt any person from the requirement under section 198AD to take a UMA from Australia to a regional processing country as long as it is "*in the public interest to do so*".

2.13 The Minister also has the power to exempt any person from regional processing and allow them to apply for a visa in Australia.[39]

2.14 As at 26 August 2019, the Australian Government had transferred an estimated 1459 persons from Papua New Guinea and Nauru to Australia for the purposes of providing medical

[36] (2014) 254 CLR 28.
[37] Department of the Parliamentary Library (Cth), *Bills Digest*, No 113 of 2001-02, 19 March 2002, 5-6.
[38] Section 198AHA(3) of the Migration Act.
[39] Migration Act, s 46A.

treatment.[40] In most of these cases, persons requiring medical treatment had been transferred at the discretion under section 198B of the Migration Act. While "temporary purpose" is not defined under section 198B of the Act, it was contemplated that such a purpose may include where a "*person has a medical condition which cannot be adequately treated in the place where the person has been taken.*"[41]

2.15 Each of the families affected by Medical Separation have at least one family member that requires medical treatment in Australia. Due to an imminent fear of removal by the Australian Government during treatment, many individuals filed legal proceedings in the High Court of Australia which sought to prevent removal to Nauru on the basis that the temporary purpose for which they were brought is ongoing, that removal is not "*reasonably practicable*" within the meaning of section 198AD(2) of the Migration Act, and that there is a real risk of serious harm upon return to Nauru which would amount to "*refoulement*" under the Refugee Convention.[42] These proceedings remain ongoing.

2.16 On 2 March 2019, the Medevac Amendments came into effect. These Amendments expressly provided that a temporary purpose may include "*accompanying a person who has or will be brought to Australia in accordance with subsection (1) or section 198C, if that person is a member of the same family unit or if recommended by a medical practitioner*".[43] In effect, this provided that persons could be brought to Australia for the purpose of accompanying family members who were temporarily receiving medical treatment in Australia, even if they themselves did not require medical treatment.

2.17 The Medevac Amendments also compelled the transfer of transitory persons to Australia in certain circumstances, providing an unprecedented pathway to reunification. These included the transfer of members of the same "*family unit*" as a person who was being brought to, or was in Australia, for a temporary purpose[44] and the transfer of a transitory person who was a member of the same "*family unit*" as a minor who was in Australia.[45] Families split by medical treatment or, in more limited circumstances, families affected by Policy Separation with a child under 18 years old in Australia had prospects of reunification during the period in which the Medevac Amendments were in effect.

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[40] Commonwealth, *Parliamentary Debates*, Senate, 26 August 2019, 68 (Michael Pezzullo, Secretary, Department of Home Affairs). It is implicit in each transfer that the required medical treatment cannot be provided in Papua New Guinea or Nauru.
[41] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1105 (Phillip Ruddock).
[42] Meaning the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967 (together, the **Refugee Convention**).
[43] Migration Act, s 198B(4)(b).
[44] Migration Act, s 198C(3).
[45] Migration Act, s 198C(5).

2.18 The Medevac Amendments also compelled the transfer of certain persons on the recommendation of a doctor.[46]

2.19 The Medevac transfers still required ministerial approval.[47] However, the power to refuse to transfer a family member from Papua New Guinea or Nauru could only be exercised in limited circumstances involving national security or criminality concerns. Further, in deciding whether to approve or refuse a transfer, the Minister was required to have regard to the best interests of the person and their family members and to take into account advice regarding whether any potential security threat could be mitigated.

2.20 The effect of the Medevac Amendments turned in large part on the meaning of "*family unit*". Under the *Migration Regulations 1994* (Cth), a person is part of a family unit if:

(a) They are a spouse or de facto partner; or

(b) They are a child or step-child of the family head or their spouse / de facto partner, and are:

(i) under 18; or

(ii) under 23 and remain dependent on their parent/s; or

(iii) is over 23, but is wholly or substantially reliant on their parent for financial support because they are incapacitated due to the total or partial loss of the first person's bodily or mental functions; or

(c) They are the child of a person's child (who fulfils one of the criteria above); or

(d) They are someone's parent or step-parent.

Justification for Policy Separation

2.21 The stated rationale of the policy is that Australia maintains "*a single-minded focus on deterrence*" with regard to its policy on asylum seekers arriving to Australia by boat.[48] Australia's policy of mandatory indefinite offshore detention, and the separation of families that results, is allegedly directed towards this overarching purpose. The Australian Government has long maintained that Policy, Medical and Practical Separation (together "Australia's family separation policy") are necessary consequences of a broader border protection measure to combat people smuggling and prevent asylum seeker deaths at sea. Others, including sources from within the Government, claim that "*it is 'unofficial policy' to use family separation as a coercive measure*

[46] Migration Act, s 198C(4).
[47] Migration Act, s 198G.
[48] Australian Parliament, "The Coalition's Operation Sovereign Borders Policy" (July 2013), <http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2616180/upload_binary/2616180.pdf;fileType=application%2Fpdf#search=%22library/partypol/2616180%22>, 5.

to encourage refugees in split families to agree to return to Nauru, or even to abandon their protection claims."[49]

2.22 The Australian Government's Operation Sovereign Borders website states the following in relation to this policy:

> *The Australian Government continues to implement tough border protection measures to prevent loss of life at sea and undermine people smuggling networks.*
>
> *Under Operation Sovereign Borders (OSB), anyone who attempts to travel illegally by boat to Australia will be turned back to their country of departure.*
>
> *Processing and settlement in Australia will never be an option for anyone who travels illegally by boat.*
>
> *Australia remains committed to protecting its borders and ending the criminal activity of people smuggling.*
> …
>
> *People smugglers will tell you that over time Australia will soften its policy. The Australian Government has not and will not change its strong position.*
> *Anyone who tries to come to Australia illegally by boat will not be settled in Australia.* ***The rules apply to everyone – families, children, unaccompanied children, educated and skilled. There are no exceptions.*** (emphasis added)

2.23 The Refugee Council of Australia states that offshore processing:

> *…is justified by the Australian Government as "breaking the people smuggler's business model" by removing the financial incentive to send boats to Australia and ensuring that those who arrive by boat do not gain an "unfair advantage" over others.*[50]

[49] Calla Wahlquist and Ben Doherty, 'Toddler born on Nauru to be brought to Australia for vital health tests', *The Guardian,* (online, 3 July 2018) : <https://www.theguardian.com/australia-news/2018/jul/03/toddler-born-on-nauru-to-be-brought-to-australia-for-vital-health-tests>.
[50] Refugee Council of Australia, 'Australia's offshore processing regime' (24 June 2016), <https://www.refugeecouncil.org.au/getfacts/seekingsafety/asylum/offshore-processing/briefing/>.

2.24 This is evident from the terms of the Nauru MOU and Papua New Guinea MOU, in addition to preceding agreements. For example, the Regional resettlement arrangement between Australia and Papua New Guinea states:

> *Australia and Papua New Guinea recognise the serious and urgent humanitarian and border security challenge presented to regional countries by people smuggling…*
> *…Australia warmly welcomes Papua New Guinea's offer to adopt additional measures which build on the Manus Regional Processing Centre. These measures will make a significant further contribution to encouraging potential unauthorised arrivals to avail themselves of lawful channels to seek asylum and to abandon the practice of perilous sea journeys which has led to the deaths of so many.*[51]

2.25 The deterrence rationale also applies more generally to interference with the family unit. This was confirmed by the then-Prime Minister of Australia, Malcolm Turnbull, in a 2016 interview when asked about family reunion:

> *Our position is very clearly that if you are on one of the regional processing centres, if you've come there, if you've come there by boat, you will not be able to settle in Australia full stop.*
>
> *That is our absolutely unequivocal position and that is vital, that's why this legislation we presented and passed through the House of Representatives, is so important, that's why Bill Shorten*[52] *should support it.*
>
> *We have to send the clearest, the most unequivocal message to the people smugglers - if you seek to come to Australia by boat, you will not succeed.*
>
> *We have to be very clear about that. It's only the clearest messages will work.*[53]

2.26 This rationale was more recently confirmed by the Department of Home Affairs in the context of submissions made to the Senate Inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019:

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[51] 'Regional resettlement arrangement between Australia and Papua New Guinea' (19 July 2013) <https://dfat.gov.au/geo/papua-new-guinea/Pages/regional-resettlement-arrangement-between-australia-and-papua-new-guinea.aspx> at [2].
[52] Bill Shorten was the then-leader of the opposition party in Australia.
[53] Australian Broadcasting Corporation, 'Turnbull on the asylum seeker deal with the US', (14 November 2016), <http://www.abc.net.au/7.30/turnbull-on-the-asylum-seeker-deal-with-the-us/8024956>.

> *Such an approach supports the broader policy intent of Operation Sovereign Borders by reinforcing the deterrence impact of regional processing and ensuring that persons arriving by boat without a visa will not be permanently settled in Australia.*[54]

2.27 It was further confirmed by the Secretary for the Department of Home Affairs in evidence given to the above noted Senate Inquiry:

> *The need to maintain the strong deterrence underpinnings and footings of OSB was such that, in order to send a very clear signal that no-one should think of getting on boats because the pathway's blocked…*[55]

Justification for Medical Treatment Separation

2.28 The broader deterrence rationale applies both in relation to Policy Separation and Medical Treatment Separation.

2.29 In a letter dated 1 June 2018, in response to a request from a family separated by medical treatment that HRLC act for, a representative of the Department stated:

> *The Australian Government is committed to regional processing and regional resettlement and will not facilitate the reunification of family members in Australia. It remains open to any regional processing country to permit the reunification of family members.*
>
> *People who have been temporarily transferred to Australia, leaving family members behind in Nauru, are being supported and encouraged to resolve the issues for which they were transferred. At the conclusion of treatment, people must return to their families...*

2.30 While persons requiring medical treatment in Australia are transferred for this purpose under the Migration Act, interference with the family unit in the Medical Treatment Separation context – with reunification only being possible upon return to Nauru – is apparently being used as a tactic designed to coerce medical transferees brought to Australia to return to Nauru instead of availing themselves of the legal remedies available to prevent their premature or unsafe removal from Australia.

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[54] Department of Home Affairs, Submission No 55, *Inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019*, [106].
[55] Commonwealth, *Parliamentary Debates*, Senate, 26 August 2019, 81 (Michael Pezzullo, Secretary, Department of Home Affairs).

Alternative re-settlement options?

2.31 There have been repeated calls from UN bodies for asylum seekers and refugees detained in Nauru and Papua New Guinea to be brought to Australia or another safe third country. A further issue for families separated by Australia's policies (whether Policy or Medical Treatment Separation) is that they are unable to access effective alternative resettlement options that would permit reunification of the family.

2.32 On 13 November 2016, the Australian Government announced that a number of refugees detained in Papua New Guinea and Nauru would be resettled in the US as part of a one-off deal (the "**US resettlement deal**"). The US resettlement deal was only open to persons currently in regional processing centres.[56] In order to be eligible for the US resettlement deal, applicants needed to have been recognised as refugees and pass "*extreme vetting*" by the US Homeland Security Agency.[57] In December 2019, the Australian Government published statistics indicating that 664 people had been resettled from Nauru and Papua New Guinea between 2017 and 2019.[58] However, separated families cannot access the US resettlement deal – with their entire family unit in tact – because:

2.32.1 Persons arriving in Australia prior to the 19 July 2013 cut-off are not eligible for resettlement under the US resettlement deal. While family members based in regional processing centres are technically eligible, resettlement does not come with any guarantee of being able to be reunited with family members based in Australia.

2.32.2 Refugees receiving medical treatment in Australia are technically eligible for consideration under the US resettlement deal.[59] However, up until September 2019, in order to be considered for the deal, it was required that they return to Nauru for processing.[60] This is despite the fact that each of the persons transferred to Australia for medical treatment face a risk of imminent harm if returned to Nauru.

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[56] Paul Karp and Paul Farrell, 'Refugees held in Australian offshore detention to be resettled in US' *The Guardian* (13 November 2016) <https://www.theguardian.com/australia-news/2016/nov/13/refugees-held-in-australian-offshore-detention-to-be-resettled-in-us>.

[57] Colin Packham, 'Exclusive: U.S. starts 'extreme vetting' at Australia's offshore detention centers' *Reuters* (23 May 2017) <https://www.reuters.com/article/us-usa-trump-australia-refugees-idUSKBN18J0GA>.

[58] 'KEY STATISTICS as at 31 December 2019' *Australian Government Department of Home Affairs, https://www.homeaffairs.gov.au/about-us-subsite/files/population-and-number-of-people-resettled.*pdf>.

[59] Paul Karp, 'Australia's deal to resettle refugees in the US: what we know so far' *The Guardian* (online, 13 November 2016, <https://www.theguardian.com/australia-news/2016/nov/13/australias-deal-to-resettle-refugees-in-the-us-what-we-know-so>.

[60] Legal and Constitutional Affairs Committee Transcript, (23 October 2017 <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22committees/estimate/3a32f9b8-b53d-4251-a739-7e12e1fc506e/0001%22>, 129 (Mr Pezzullo); Helen Davidson, 'Dutton urged to allow refugee families in Australia to apply for US resettlement' *The Guardian* (online, 10 April 2018) <https://www.theguardian.com/world/2018/apr/10/dutton-urged-to-allow-refugee-families-in-australia-to-apply-for-us-resettlement>.

2.32.3 Further, family members that apply for US resettlement from Nauru have been required to sign a form relinquishing custody over children remaining in Australia.[61] The HRLC is aware of more than one refugee who was provided a form entitled "Release of Custody Agreement" that states:

> *By affixing my/our signature(s) on this form, I/we hereby agree to relinquish custody of my/our minor child(ren) listed below...*
> *I/we fully understand that by signing this agreement, the non-custodial parent will not automatically be able to seek reunification with my/our child(ren) and that this may mean permanent separation.*

2.33 In the alternative, it is claimed they are permitted to return to their home countries where they can live together with their family. However, for those that have either been recognised as refugees or who have applied for asylum and are pending resolution of their claims, reunification in home countries is clearly not viable due to their well-founded fear of persecution if returned, which would also breach the fundamental refugee law requirement of *non-refoulement*.

Legacy Caseload: Policy and Practical Separation

2.34 In 2012, the Australian Government commissioned an expert panel to examine and provide recommendations regarding what it considered to be "*high risk maritime migration*" (i.e. arrival by boat and people smuggling) ("**Expert Panel**"). The Expert Panel produced the *Report of the Expert Panel on Asylum Seekers* in August 2012. Among the recommendations made to deter asylum seekers from travelling to Australia by boat, the Expert Panel recommended the application of the "*no advantage*" principle whereby those who arrived in Australia by sea and without visas should not be advantaged "*to ensure that no benefit is gained through circumventing regular migration arrangements*".[62] Following the Expert Panel's report, the Australian Government decided not to process the protection claims for persons who arrived in Australia by boat without a visa on or after 13 August 2012.

2.35 After the 2013 election, the Australian Government re-introduced temporary protection for those who arrived after 13 August 2012 but were not subject to offshore processing. This group is

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[61] Ben Doherty, 'Border Force tells Nauru refugees to separate from family if they want to settle in US' *The Guardian* (online, 5 December 2017) <https://www.theguardian.com/world/2017/dec/06/border-force-tells-nauru-refugees-to-separate-from-family-if-they-want-to-settle-in-us>.

[62] 'Report of the Expert Panel on Asylum Seekers' (August 2012) < https://www.kaldorcentre.unsw.edu.au/sites/default/files/expert-panel-report.pdf>, 14.

referred to as the Legacy Caseload. This policy of temporary protection applies equally to UMAs and people who travel by air and seek protection upon arrival at Australian airports.

2.36 In December 2014, the Australian Parliament passed the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth) ("**RALC**"), which introduced key changes into the Migration Act relevant to asylum seekers classified as UMAs. In particular, the RALC:

2.36.1 introduced TPVs (3 year validity) and SHEVs (5 year validity) and mandated that asylum seekers who arrived by boat after 13 August 2012 were eligible only to obtain either a TPV or a SHEV. This included asylum seekers who already had applied for a PPV – their applications were automatically converted to one for a TPV;

2.36.2 created a Fast Track Assessment process, which provides only a very limited review process under a newly created Immigration Assessment Authority ("**IAA**"). Under the new review process, some asylum seekers would be excluded from any form of merits review;

2.36.3 narrowed and made changes to the removal power and other existing refugee law, including restricting the definition of refugee; and,

2.36.4 mandated that children born in Australia to parents designated as UMAs would be classified and treated the same as their parents.

2.37 The uncertainty created for the Legacy Caseload by receiving only temporary protection is compounded by a complete bar on family reunification. Holders of a TPV or SHEV are barred from sponsoring family members for visas to come to Australia.

2.38 Schedule 2, paragraph 202.211 of the *Migration Regulations 1994* (Cth) ("**Migration Regulations**") sets out the criteria to be satisfied at the time of an application for a visa for family reunion under the Special Humanitarian Program. Schedule 2, paragraph 202.211(2)(e) makes clear that the proposer of an application for a family visa cannot be a "*person mentioned in subregulation 2.07AM(5)*". Subregulation 2.07AM(5) refers to a person who is a member of the Legacy Caseload, namely:

(a) a person who:

(i) between 13 August 2012 and before the commencement of this subparagraph, entered Australia at an excised offshore place after the excision time for that place; and

(ii) became an unlawful non-citizen because of that entry; or

(b) a person who, on or after 13 August 2012, was taken to a place outside Australia under paragraph 245F(9)(b) of the Act; or

(c) a person who, on or after the commencement of this paragraph, is an unauthorised maritime arrival.

2.39 As a result, members of the Legacy Caseload are prevented from sponsoring family members under the Special Humanitarian Program due to their mode and date of arrival. The criteria for sponsoring family members under the General Migration Program invariably include that the sponsor be an Australian citizen, permanent resident or eligible New Zealand citizen. As TPV or SHEV holders, members of the Legacy Caseload are entirely excluded from sponsoring family members for visas including Partner, Child and Parent visas.

2.40 In addition, when a TPV or SHEV is granted, conditions are placed on the visas that significantly restrict the ability to reunite with family members overseas, being:

2.40.1 the visa holders are barred from returning to their home country; and

2.40.2 the visa holders are unable to travel to any third country unless they have been granted permission by the Department of Home Affairs.

2.41 We are instructed there are some "theoretical pathways" for members of the Legacy Caseload to sponsor family members in the future. For holders of a SHEV, there is the ability to apply for a visa other than a TPV or SHEV after the five-year visa has expired if they meet the pathway requirements. These pathway requirements are that for at least three and a half years while on a SHEV, the person must have been employed and not received certain social security benefits or studied full time in a designated regional area.[63]

2.42 The individual is then only able to apply for limited visas – such as skilled visas, student visas or partner visas (if their partner is an Australian citizen or permanent resident). It is possible that an individual could be granted a SHEV, then be granted another form of visa by meeting the pathway requirements, then progress to citizenship and sponsor a family member. However, this pathway to family reunification is uncertain, only open to the few members of the Legacy Caseload who

[63] See further: Department of Home Affairs, *SHEV Pathway Requirements*, <https://www.homeaffairs.gov.au/visas/supporting/Pages/790/shev-pathway-requirements.aspx>.

could meet the criteria for the subsequent visa and would take well over a decade even if successful.

Pre-Legacy Caseload – Practical Separation

2.43 Asylum seekers who arrived by boat before 13 August 2012 are eligible for PPVs. While holders of PPVs are technically able to sponsor family members to be granted visas to come to Australia, the Australian Government has introduced policies that act as a practical bar to reunification within a reasonable time period.

2.44 In December 2013, the Minister issued Ministerial Direction 62, which directed delegates of the Minister to consider family visa applications in line with a set order of priority. The Direction relevantly provided that applications in which the applicant's sponsor is a UMA who holds a PPV are to be given the lowest priority and the exception to this order of priority that allowed delegates to take account of special circumstances did not apply to applications in which the applicant's sponsor is a UMA who holds a PPV.

2.45 The purpose of this direction was described as follows:

> *The order of priorities for considering and disposing of Family visa applications that is specified in this Direction gives effect to the Government's policy decisions as to the appropriate allocation of resources in considering and disposing of such applications, takes into account* ***the Government's policy intentions concerning the size and composition of the Migration Programme as a whole, and advances the national interest by facilitating the integrity of the programme and management of Australia's borders****.* (emphasis added)

2.46 We understand from those instructing us that organisations that assisted refugees who arrived by boat and held a PPV with these applications that, with demand for family visas significantly outweighing the number of places available, the effect of Ministerial Direction 62 was to deny these refugees any chance of reuniting with their families while on a PPV.

2.47 Ministerial Directive 62 was challenged in court in the case of *Plaintiff S61/2016 v Minister for Immigration and Border Protection*.[64] In response to the legal challenge and before judgment could be handed down, the Government issued Ministerial Directive 72, which revoked Ministerial Direction 62.

[64] [2014] HCA 22.

2.48 Ministerial Direction 72 was in substantially the same terms as Ministerial Direction 62 but allowed departure from the order of priority for applications in which the applicant's sponsor is a UMA who holds a PPV policy if the applicant can demonstrate "*special circumstances of a compassionate nature*" and "*compelling reasons to depart from the order of priority*". No further guidance was provided about these criteria. Ministerial Direction 72 also allowed departure from the order of priority where an application would not otherwise be processed within a reasonable time.

2.49 Direction 72 was then replaced by Direction 80 on 21 December 2018. Ministerial Direction 80 is once again in substantially the same terms as Ministerial Direction 72 but removes the requirement that an application be "*disposed of within a reasonable time*". Noting the significant backlog for family reunification applications, the practical effect of this is that an application deemed lowest priority may never be processed, thereby effectively denying the individuals involved any prospect of family reunification.

2.50 While Direction 80 still allows for compassionate and compelling circumstances, no further guidance has been provided about these criteria. The Refugee Council has reported that lawyers practicing in the area believe that the ordinary meaning of those words is not being applied by the Department and that the Department is instead requiring applicants to show extreme circumstances in order to be granted the exception.[65]

2.51 Accordingly, the only practical option for these refugees is to wait until they are granted citizenship by Australia and then seek to sponsor family members. However, recently, the Australian Government has been unreasonably delaying the processing of citizenship applications, such that the time from the grant of a PPV to grant of citizenship can be well in excess of five years. A further wait period and thousands of dollars in application fees is then required to sponsor family members. Refugees are left facing almost decade long waits, and significant costs, to reunite with family members.

[65] Refugee Council of Australia, 'Denying Family Reunion for Refugees: Impact of Direction 80' (15 April 2019) <https://www.refugeecouncil.org.au/direction-80/>

3. INTERNATIONAL LAW AND FAMILY SEPARATION

International law and the right to family unity and reunification

3.1 An overlapping matrix of international law protections apply to the refugee or asylum seeker family member. This section sets out the interacting strands of protection, from the general to the particular. International law has long recognised:

a) rights to dignity and freedom from torture and cruel, inhuman and degrading treatment – the Universal Declaration of Human Rights ("**UDHR**"),[66] the International Covenant on Civil and Political Rights ("**ICCPR**")[67] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment ("**CAT**")[68] expressly guarantee these rights;

b) rights to liberty and security of person – the UDHR[69] and the ICCPR[70] expressly guarantee these rights;

c) rights to privacy and "family life"– the UDHR,[71] the ICCPR,[72] the International Covenant on Economic and Social Rights ("**ICESR**")[73] and the Convention on the Rights of the Child ("**CRC**")[74] expressly guarantee these rights;

d) that refugees are entitled to special care and protection – the Refugee Convention both expressly and implicitly guarantees these entitlements, and explicitly prohibits penalising asylum seekers (for example, by denying the right to family reunification) on the basis of their mode of arrival/entry to Australia (see Article 31); and,

e) that children, and specifically the refugee child,[75] are rights-bearers entitled to special care and protection – the CRC is the primary instrument, however the UDHR,[76] ICCPR,[77] and ICESCR[78] each contain express provisions emphasising the obligations on States to provide special protection measures for children.

3.2 For the purposes of our opinion, the term "*refugee*" includes refugees under the 1951 Convention and other beneficiaries of international protection who cannot return to their country of origin due

[66] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), Article 5.
[67] International Covenant on Civil and Political Rights (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS 171, Article 7.
[68] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987).
[69] UDHR, Article 3.
[70] ICCPR, Article 9.
[71] UDHR, Article 12.
[72] ICCPR, Articles 17, 23 and 24.
[73] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1986), 993 UNTS 3, Article 10.
[74] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Preamble and Article 16.
[75] See Jason M. Pobjoy, *The Child in International Refugee Law* (Cambridge University Press, 2017), 13-43.
[76] UDHR, Article 25.
[77] ICCPR, Article 24.
[78] ICESCR, Article 10.

to conflict or other serious human rights risks. The term also encompasses asylum seekers, who, until their claims are processed, are presumptive refugees, and have a provisional right to remain under international law.

3.3 Cumulatively, the rights set out above, along with other international soft law, establish a right to family unity and family reunification. Since 1983, the United Nations High Commissioner for Refugees ("**UNHCR**") has adopted a policy of promoting family reunification, stating:

> *The circumstances in which refugees leave their country of origin frequently involve the separation of families. Such separation invariably leads to hardship and sometimes to tragic consequences. It may also create serious obstacles to a refugee's integration in a new homeland. Guided by both humanitarian and practical considerations … UNHCR has sought since its inception to ensure the reunification of separated refugee families.*[79]

3.4 This is stated to be based on a recognition that "*the family is the natural and fundamental group unit of society and is entitled to protection by society and the State*".[80] The Conference of Plenipotentiaries, which adopted the Refugee Convention, recognised in its Final Act that "*the unity of the family, the natural and fundamental group unit of society, is* ***an essential right*** *of the refugee*" (emphasis added).[81] UNHCR has repeatedly reiterated its commitment to and the importance of States ensuring the right to family reunification.[82]

3.5 It has also been argued that the right to family reunification can be construed from Article 25 of the Refugee Convention, which requires Contracting States to provide administrative assistance to refugees ("*arrange that such assistance be afforded to him by their own authorities or by an international authority*", "*[w]hen the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse*").[83] Legal commentary on Article 25 states that administrative assistance should be provided in relation to "*any right to which an individual refugee is lawfully entitled, whether under domestic or international law*". This could arguably extend to family reunification,[84] provided a right under international law is identified.

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[79] UNHCR Guidelines on Reunification of Refugees Families (July 1983), available at <https://www.unhcr.org/3bd0378f4.pdf>.
[80] Ibid. See also, UDHR Article 16(3) and ICCPR, Article 23.
[81] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 189 UNTS 37 (1951) Section IV. B on the Principle of the Unity of the Family.
[82] Insert references [JR to locate]
[83] Frances Nicholson, "The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification", UNHCR Division of International Protection, January 2018, <http://www.unhcr.org/5a8c413a7.pdf>, 6.
[84] Ibid, citing A. Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, p 1138.

3.6 In addition, Article 31 provides that states "*shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization".* Denying the right to family reunification for refugees found in the Refugee Convention and in other international human rights treaties (see below) on the basis of their mode of arrival (as with the imposition of mandatory detention) to Australia amounts to a penalty, contrary to Article 31.

3.7 More recently, in a resolution adopted by the UN General Assembly on 18 December 2019, the General Assembly called upon States to *"consider creating, expanding or facilitating access to … family reunification."*[85] In another resolution adopted that same day, the General Assembly urged States to prevent unnecessary separation of families[86] and to take appropriate measures to prevent and respond to the separation of families in humanitarian contexts.[87]

3.8 The right to family reunification for refugees is also explicitly provided in regional treaties and jurisprudence. For example, the African Charter on the Rights and Welfare of the Child builds on the rights set out in the CRC and specifies a number of State obligations, including "*to cooperate with existing international organizations…to protect and assist such a [separated] child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family*."[88] It also entitles any child "*permanently or temporarily deprived of his family environment for any reason … to special protection and assistance*" and requires States to "*take all necessary measures to trace and re-unite children with parents or relatives*."[89]

3.9 In Latin America, the 1984 Cartagena Declaration acknowledges that the "*reunification of families constitutes a fundamental principle in regard to refugees and one which should be the basis for the regime of humanitarian treatment in the country of asylum, as well as for facilities granted in cases of voluntary repatriation.*" The Inter-American Court of Human Rights has found, in two separate Advisory Opinions, that States must abstain from acts that involve separation of the members of the family, must take positive steps to keep the family united or to

[85] *Resolution adopted by the General Assembly on 18 December 2019*, 74th sess, Agenda item 61, UN Doc A/RES/74/130, (14 January 2020), [53].
[86] *Resolution adopted by the General Assembly on 18 December 2019*, 74th sess, Agenda item 66(a), UN Doc A/RES/74/133, (20 January 2020), [34].
[87] Ibid, [35].
[88] African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999), Organization of African Unity, CAB/LEG/24.9/49, <https://www.refworld.org/docid/3ae6b38c18.html>, Article 23(2).
[89] Ibid, Article 25.

reunite them where they have been separated,[90] and that separated children in a migration and refugee context should be reunited "*as soon as possible*".[91]

3.10 The European Court of Human Rights ("**ECtHR**") has found that while migration control is a legitimate social need which can justify the imposition of restrictions on or interference with the right to family life under Article 8 of the European Convention on Human Rights, recognised refugees have the right to family reunification. Undue delay (for example, three to five years), or difficulties imposed in the process of reunification for refugees in light of their vulnerability and the trauma they have already experienced, amounts to unlawful interference with family life.[92]

3.11 This regional practice is relevant because it suggests evidence of a customary law rule.

3.12 The protection of this "*essential right*" is not found in the Refugee Convention, but in a variety of rights found in other international human rights treaties to which Australia is a party, including the UDHR, ICCPR, ICESCR, CRC and CAT, and customary international law. The specific obligations under each treaty are set out below.

International Covenant on Civil and Political Rights

3.13 Australia ratified the ICCPR on 13 August 1980.[93] A number of the provisions of the ICCPR are relevant to the general treatment of refugees in Australia and in Australia's offshore detention centres, including with respect to the conditions of detention and the policies resulting in family separation.

Right to dignity and freedom from torture and cruel and inhuman treatment

3.14 The UN Human Rights Committee ("**Committee**") decisions clearly demonstrate that the indefinite detention of refugees, including their children, itself amounts to inhuman and degrading treatment. It is imperative to evaluate Australia's family separation policy in this framework.

[90] Advisory Opinion on Juridical Condition and Human Rights of the Child, OC-17/02, Inter-American Court of Human Rights (IACtHR), 28 August 2002, < http://www.refworld.org/cases,IACRTHR,4268c57c4.html>, 36.
[91] Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, 19 August 2014, <http://www.refworld.org/docid/54129c854.html>, [105].
[92] *Tanda-Muzinga v. France*, Requête no. 2260/10, ECtHR, 10 July 2014, [55 and 58]; *Mugenzi v. France*, Requête no. 52701/09, ECtHR, , 10 July 2014, [61].
[93] Australia had originally ratified the ICCPR subject to a reservation to Article 17, but the reservation was later withdrawn in 1984. See here: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en

3.15 In *FKAG v Australia*,[94] the Committee found that the grave adverse mental health effects of prolonged indefinite detention on refugees (in that case in relation to those held on security grounds) amounted to cruel, inhuman or degrading treatment contrary to Article 7, ICCPR. It also constituted arbitrary detention contrary to Article 9, ICCPR. The Committee concluded that, whatever the initial justification for detention (in that case for security reasons where those detained were considered a serious security risk), it was not proportionate to detain refugees and asylum seekers indefinitely:

> *Whatever justification there may have been for an initial detention, for instance for purposes of ascertaining identity and other issues, the State party has not, in the Committee's opinion, demonstrated on an individual basis that their continuous indefinite detention is justified. The State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's need to respond to the security risk that the adult authors are said to represent. Furthermore, the authors have been kept in detention in circumstances where they are not informed of the specific risk attributed to each of them and of the efforts undertaken by the Australian authorities to find solutions which would allow them to obtain their liberty. They are also deprived of legal safeguards allowing them to challenge their indefinite detention.*[95]

3.16 In that case, the Committee accepted that the harm to those detained could not be mitigated by Australia's provision of healthcare services in detention:

> *The Committee considers that the combination of the arbitrary character of the authors' detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant.*[96]

3.17 In repeated cases,[97] the Committee has found that Australia's judicial review of detention for refugees is insufficient because:

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[94] UNHRC Communication No. 2094/2011, views adopted (26 July 2013, ('*FKAG v Australia*'). See also *MMM v Australia*, UNHRC Communication No. 2136/2012, views adopted 25 July 2015 and *FJ v Australia*, UNHRC Communication No. 2233/2013, views adopted 22 March 2016.
[95] *FKAG v Australia*, [9.4].
[96] *FKAG v Australia*, [9.8].
[97] *Baban et al. v. Australia*, UNHRC Communication No. 1014/2001, views adopted on 6 August 2003, [7.2]; *Bakhtiyari v. Australia*, UNHRC Communication No. 1069/2002,views adopted on 29 October 2003, [9.4]; *Shams et al. v. Australia*, Communication Nos. 1255 et al, views adopted on 20 July 2007, [7.3].

> *…judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.*[98]

3.18 The Committee has made clear that the indefinite detention is not justified to protect against security interests, nor can it be justified in a broader sense to deter people smugglers bringing people to Australia by boat.

Right to Liberty and Security of Person

3.19 As the UNHCR Detention Guidelines make clear, confining an asylum seeker in civil immigration detention is permissible only when based on an individualised determination that confinement is necessary for a legitimate purpose, such as preventing flight or protecting public safety or national security, and when subject to prompt, independent judicial review.[99] Further, the Working Group on Arbitrary Detention affirmed in 2018, in its Revised Deliberation No. 5, that detention of asylum seekers must only be used as a "*last resort*", emphasising the absolute prohibition of arbitrary detention and the universal human right to seek asylum.[100] Deterring asylum applicants or discouraging future migration is not a lawful basis for depriving an individual migrant of liberty under international law.[101]

3.20 In relation to the detention of children, the Committee has previously found that adverse effects of arbitrary detention on children may involve a breach of the State party's obligation under Article 24(1), ICCPR to take adequate measures to protect children, specifically where measures taken are not guided by the children's best interests. In *Bakhtiyari v Australia*, the Committee stated:

> *Concerning the claim under article 24, the Committee considers that the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24, paragraph 1, of the Covenant. The Committee observes that in this case children have suffered demonstrable, documented and on-going adverse*

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[98] *FKAG v Australia*, [9.6].
[99] United Nations High Commissioner for Refugees, 'Detention Guidelines' (2012) <https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html> ('UNHCR Detention Guidelines'.
[100] Working Group on Arbitrary Detention, 'Revised Deliberation No. 5 on deprivation of liberty of migrants' 7 February 2018, <https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf>.
[101] See UNHCR Detention Guidelines, [32].

effects of detention suffered by the children, and in particular the two eldest sons, up until the point of release on 25 August 2003, in circumstances where that detention was arbitrary and in violation of article 9, paragraph 1, of the Covenant.[102]

3.21 In weighing the best interests of children in detention, and in assessing the proportionality of detention, an important consideration is the adverse mental health and developmental effects of detention on children. In *FKAG v Australia,* which considered the rights of children being kept in detention by virtue of the security assessments of their parent, the Committee found that a decision to detain must take into account "*the mental health condition of those detained*".[103] As such, detention that might initially be lawful may become unlawful as a result of the adverse health effects of detention over time and a state's failure to take adequate measures in response.

Right to Family Life

Interpretation

3.22 The key provision on the right to family life found in Article 17, states:

> *1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
> *2. Everyone has the right to the protection of the law against such interference or attacks.*

3.23 Other relevant provisions of the ICCPR include Article 23 (on the protection of the family as the fundamental unit of society), Article 18 (the right of parents to ensure the moral and religious education of their children) and Article 24(1) (that every child shall have, without any discrimination, "*the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State*").

3.24 While the wording of Article 17 does not contain the usual wording seen in other rights in respect of permissible limitations (see, for example, Articles 12(2), 18(3), 19(3), 21, 22(2)), the UN Special Rapporteur has confirmed that "*despite the differences in wording, article 17 should also be interpreted as containing the said elements of permissible limitations test.*"[104] When examining individual complaints concerning family reunification, the Committee has also

[102] *Bakhtiyari v Australia,* [9.6].
[103] *FKAG v Australia,* [9.3].
[104] UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development', (28 December 2009), A/HRC/13/37.

required that interferences with family life be provided for by law, in accordance with the provisions, aims and objectives of the ICCPR, and reasonable in the particular circumstances (see further below at [3.33]).[105]

3.25 The Committee explains how Articles 17, 23 and 24 of the ICCPR collectively protect the right to family in General Comment 19:

> *Article 23 of the International Covenant on Civil and Political Rights recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Protection of the family and its members is also guaranteed, directly or indirectly, by other provisions of the Covenant. Thus, article 17 establishes a prohibition on arbitrary or unlawful interference with the family. In addition, article 24 of the Covenant specifically addresses the protection of the rights of the child, as such or as a member of a family.*[106]

3.26 State Parties are "*under a duty themselves not to engage in interferences inconsistent with article 17 and to provide the legislative framework prohibiting such acts*".[107]

3.27 For the purposes of Article 17(1), the term "*unlawful*" has been interpreted to mean that "*no interference can take place except in cases envisaged by law*".[108] More relevant to this opinion is the interpretation of "*arbitrary interference.*" The Committee has found that the expression "*arbitrary interference*" can extend to interference provided for under the law:

> *The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.*[109]

3.28 In relation to family reunification, the Committee found:

> *The right to found a family implies, in principle, the possibility to procreate and live together. … Similarly, the possibility to live together implies the adoption of*

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[105] *Patricia Angela Gonzales v. Republic of Guyana*, Communication No. 1246/2004, CCPR/C/98/D/1246/2004 (2010) [14.3]. See also HRC, CCPR General Comment No. 16 adopted on 8 April 1988 (Article 17 ICCPR) [3-4].
[106] UN HRC, 'CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses', 27 July 1990, < http://www.refworld.org/docid/45139bd74.html>, [1] ("**GC 16**").
[107] GC 16 [9].
[108] GC 16, [3].
[109] GC 16, [4].

> *appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.*[110]

3.29 In *Ngambi and Nébol v. France*, the Committee affirmed that Article 23, ICCPR "*guarantees the protection of family life including the interest in family reunification*".[111]

3.30 It is also important to note that there is no right for aliens to enter or reside in any State party to the ICCPR. However, as the Committee has acknowledged in relation to the right to respect for family life:

> *The Covenant does not recognise the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However,* ***in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise***.[112] (emphasis added)

3.31 It is recalled that all refugees detained on Nauru or Papua New Guinea have been subject to indefinite detention and dehumanising conditions amounting to cruel, inhuman and degrading treatment.[113]

3.32 In General Comment 16, the Committee found that the term "family" for the purposes of Article 17 should be given a "*broad interpretation to include all those comprising the family as understood in the society of the State party concerned*".[114] In a recent HRC decision, the Committee affirmed that the meaning of 'family' must be interpreted broadly, and may differ from State to State. In that case, the Committee observed that the domestic authorities, in rejecting an application for family reunification, had failed to consider the relationship in the context of the couple's personal situation and cultural context of their country of origin.[115]

3.33 The Committee has examined individual complaints concerning family reunification, requiring that interferences with family life be provided for by law, in accordance with the provisions, aims

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[110] GC 16, [5]
[111] *Benjamin Ngambi and Marie-Louise Nébol v. France*, CCPR/C/81/D/1179/2003, 16 July 2004, [6.4].
[112] UN Human Rights Committee. 'CCPR General Comment No. 15: The Position of Aliens under the Covenant' UN Doc. HRI/GEN/1/Rev.7 (11 April 1986), [5] and [7].
[113] UN Human Rights Committee. *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, 24 April 2017, A/HRC/35/25/Add.3, [80].
[114] GC 16, [5].
[115] *Nimo Mohamed Aden et al v Denmark*, Communication No. 2531/2015, CCPR/C/126/D/2531/2015 (2019).

and objectives of the ICCPR, and reasonable in the particular circumstances.[116] The requirement of reasonableness has been found to require that any interference "*must be proportional to the end sought and be necessary in the circumstances of any given case*".[117] The best interests of the child (as provided for in Article 24, ICCPR) are given significant weight.[118] This corresponds with General Comment 16, which requires decisions resulting in interference to be made "*on a case by case basis.*" [119]

3.34 In family separation cases, when determining whether an interference is arbitrary for the purposes of Article 17, the Committee has generally had regard to whether the hardship caused by family separation is proportionate to the State party's legitimate reasons for the separation.

HRC jurisprudence

3.35 In relation to Australia, the Committee has made four important findings concerning a family's right to live together in Australia in the context of immigration proceedings involving the removal from Australia of a parent: *Winata v Australia*,[120] *Bakhtiyari v Australia*,[121] *Madafferi v Australia*[122] and *Leghaei v Australia.*[123] In all four cases, the Committee found that to remove one or more family members from Australia would constitute an arbitrary interference with the family, and that Articles 17 (the right to privacy), 23 (the right to found a family) and 24 (protection of children) of the ICCPR had been violated. The impact upon the children was important in each of these cases.

3.36 In *Winata v Australia*, the parents of a teenage child faced deportation from Australia to Indonesia following the refusal of their protection visa applications. The child had acquired Australian citizenship after residing in Australia for ten years with his family. The deportation of the parents would force them to choose between leaving their child alone in Australia or taking him with them to Indonesia for an extended period. The family had produced evidence of the psychiatric harms this may inflict upon the child.

3.37 The Committee found that Australia's separation of the family would have constituted arbitrary interference had it occurred. The Committee noted:

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[116] *Patricia Angela Gonzales v. Republic of Guyana*, No. 1246/2004, CCPR/C/98/D/1246/2004 (2010) [14.3]. See also GC 16 [3]-[4].
[117] See, e.g., *Nicholas Toonen v. Australia*, No. 488/1992, CCPR/C/50/D/488/1992 (1994) [8.3].
[118] *Hendrick Winata and So Lan Li v. Australia*, No. 930/2000, CCPR/C/72/D/930/2000 (2001); *Francesco Madafferi v. Australia*, No. 1011/2001, CCPR/C/81/D/1011/2001 (2004); and *Mohamed El-Hichou v. Denmark*, No. 1554/2007, CCPR/C//99/D/1554/2007 (2010). See also *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia*, No. 1069/2002, CCPR/C/79/D/1069/2002 (2003).
[119] *Hendrick Winata and So Lan Li v. Australia*, No. 930/2000, CCPR/C/72/D/930/2000 (2001); *Francesco Madafferi v. Australia*, No. 1011/2001, CCPR/C/81/D/1011/2001 (2004); and *Mohamed El-Hichou v. Denmark*, No. 1554/2007, CCPR/C//99/D/1554/2007 (2010). See also *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia*, No. 1069/2002, CCPR/C/79/D/1069/2002 (2003).
[120] *Hendrick Winata and So Lan Li v. Australia*, No. 930/2000, CCPR/C/72/D/930/2000 (2001).
[121] GC 16, [8].
[122] *Francesco Madafferi v. Australia*, No. 1011/2001, CCPR/C/81/D/1011/2001(2004).
[123] *Leghaei v Australia*, No. CCPR/C/113/D/1937/2010 (2015).

> *It is certainly unobjectionable under the Covenant that a State party may require, under its laws, the departure of persons who remain in its territory beyond limited duration permits… [T]here is significant scope for State parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances. In the present case, both authors have been in Australia for over fourteen years… In view of this duration of time, it is incumbent on the State party to demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of immigration law in order to avoid a characterisation of arbitrariness.*[124]

3.38 In *Madafferi v Australia*, the Australian Government sought to deport a father with four minor children to Italy after discovering his illegal presence in Australia, his dishonesty in dealings with the Government and his "bad character" stemming from criminal acts in Italy twenty years ago. In considering whether the deportation involved arbitrary interference with family life, the Committee found:

> *…in cases where one part of a family must leave the territory of the State party while the other party would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.*[125]

3.39 The Committee considered in detail the fact that Mr Maddaferi's outstanding sentences in Italy had been extinguished and there was no longer an outstanding warrant for his arrest, as well as "*the considerable hardship that would be imposed on the family*",[126] including "*substantial changes to long-settled family life*",[127] having to move the family (with an 11 and 13 year old) to Italy, a place they did not know and cannot speak the language, and care for their father who had mental health issues as a result of his treatment by the Australian Government. In these circumstances, the Committee found that his removal would constitute arbitrary interference with the family, contrary to Article 17(1), in conjunction with Article 23 in respect of all family

[124] *Winata v Australia*, [7.2].
[125] *Maddaferi,v Australia*, [9.8].
[126] Ibid.
[127] *Maddaferi v Australia*, Individual opinion of Committee member, Mrs Ruth Wedgwood.

members, as well as a violation of Article 24(1) in relation to the four minor children "*due to a failure to provide them with the necessary measures of protection as minors*."[128]

3.40 In *Bakhtiyari v Australia*, the Committee considered the circumstances where a Hazara family, the members of which had arrived in Australia separately claiming asylum and had been held in different immigration detention centres (under an earlier immigration policy where asylum seekers arriving by boat were detained in detention centres in Australia, rather than in Nauru or Papua New Guinea). Mr Bakhtiyari was separated from his wife and children on their way to Australia. He travelled ahead with people smugglers by boat, was detained and filed a protection visa application. Unbeknownst to Mr Bakhtiyari, Mrs Bakhtiyari arrived later, brought by the same people smugglers by boat, with their five children and her brother. They were also detained, but in a separate detention centre, and applied for protection visas. Mrs Bakhtiyari's claim was denied and the Government ordered that she and her children be deported. Mr Bakhtiyari's claim was also denied, but he continued to appeal. After lengthy Family Court proceedings, the family was later reunited in a separate immigration detention facility and two of the children were released from detention and placed into care. After a widely reported incident in which Mrs Bakhtiyari's brother self-harmed in order to raise awareness about her case, a complaint was filed with the Committee.

3.41 The Committee confirmed that "*to separate a spouse and children arriving in a State from a spouse validly resident in a State may give rise to issues under articles 17 and 23 of the Covenant*".[129] The Committee made no finding about whether the failure of the Australian Government to reunite the family earlier was arbitrary on the basis it was not clear when the authorities were notified of their relationship. However, the Committee found that deporting Mrs Bakhtiyari and her children would be arbitrary:

> *The Committee observes, however, that the State party intends at present to remove Mrs Bakhtiyari and her children as soon as "reasonably practicable", while it has no current plans to do so in respect of Mr Bakhtyari, who is currently pursuing domestic proceedings. Taking into account the specific circumstances of the case, namely the number and age of the children, including a newborn, the traumatic experiences of Mrs Bakhtiyari and the children in long-term immigration detention in breach of article 9 of the Covenant, the difficulties that Mrs Bakhtiyari and her children would face if returned to Pakistan without Mr Bakhtiyari and the absence of arguments by the State party to justify removal in these circumstances, the Committee takes the view that*

[128] *Maddaferi v Australia*, [9.8].
[129] *Bakhtiyari v. Australia*, [9.6].

> *removing Mrs Bakhtiyari and her children without awaiting the final determination of Mr Bakhtiyari's proceedings would constitute arbitrary interference in the family of the authors, in violation of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.*[130]

3.42 In *Leghaei v Australia*, Mr Leghaei was an Iranian national residing in Australia with short-term visas between 1994 and 1996. In 1996, he applied for a permanent visa, however, this application was denied by the Minister of Immigration on grounds of national security. The case concerned whether the refusal to grant a visa breached, *inter alia,* the right to family under Article 17 of the ICCPR. Australia argued, as it did in *Maddefferi v Australia,* that deporting a person with family ties does not constitute an interference with family life as other members of the family may choose to leave with the deportee. In this case, Australia stated that family members could follow Mr Leghaei to the Islamic Republic of Iran. The Committee reiterated its jurisprudence that a decision by the state party that compels the family to decide whether they should accompany the expelled person or stay in the state party is to be considered interference with the family, *"at least in circumstances where, as here, substantial changes to long-settled family life would follow".*[131] The Committee reiterated that the interference is arbitrary when it includes elements of inappropriateness, injustice, lack of predictability, and due process of law. In this case, Mr Leghaei's long-settled family life and the absence of any explanation from the state party as to the reasons for terminating his right to remain showed a lack of due process of law.[132] The Committee held that the rights of the author and his family under Article 17 of the ICCPR had been violated.[133]

3.43 In *Canepa v Canada*,[134] the Committee considered a complaint in circumstances where the author was to be deported from Canada to Italy owing to his extensive criminal history. As to "*arbitrary or unlawful interference*" in Article 17, the Committee noted:

> *[A]rbitrariness within the meaning of article 17 is not confined to procedural arbitrariness, but extends to the reasonableness of the interference with the person's rights under article 17 and its compatibility with the purposes, aims and objectives of the Covenant. The separation of a person from his family by means of his expulsion could be regarded as an arbitrary interference with the family and as a violation of*

[130] Ibid.
[131] *Leghaei v Australia,* [10.3].
[132] Ibid, [10.4]-[10.5].
[133] Ibid.
[134] No 558/1993, UN Doc CCPR/C/D/558/1993 (1997).

> *article 17 if in the circumstances of the case the separation of the author from his family and its effects on him were disproportionate to the objectives of removal.*[135]

3.44 In *AB v Canada,*[136] the Committee considered the deportation of a Somali national in similar circumstances. The Committee recalled that:

> *[T]he notion of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. The Committee also recalls that the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered in the light, on the one hand, of the significance of the State party's reasons for the removal of the person concerned and, on the other hand, of the degree of hardship the family and its members would encounter as a consequence of such removal.*[137]

3.45 In these cases involving deportation pursuant to Canadian domestic immigration laws (each involving someone who was not a refugee, but had committed criminal offences deemed sufficiently serious to justify expulsion), the Committee concluded that the author had not demonstrated that the impact of the interference with family life would be disproportionate to the States objects of the deportations (in these cases, upholding the public interest and promoting public safety).[138] However, the application of the same principles in other cases of deportation following criminal convictions has led to findings in the author's favour: see, for example, *Dauphin v Canada*[139] and *Nystrom v Australia.*[140]

3.46 The Committee has also made clear that, even in circumstances where a child has entered the country illegally and could return to the country of origin, the child's deportation would breach Articles 17 and 23 in circumstances where his primary caregiver was resident in the State party.[141]

3.47 In relation to recognised refugees, the Committee has made it clear that failure to allow family reunification breaches Article 17 and 23. In *El Dernawi v Libya*,[142] the author's family sought to join him in Switzerland, where he had gained asylum, only to be prevented from leaving Libya.

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[135] *Canepa v Canada*, [11.4] (*"Canepa"*).
[136] Communication No. 2378/2014 CCPR/C/117/D/2387/2014 (2017) ("*AB*").
[137] Ibid, [8.7].
[138] See *Canepa*, [11.5]; *AB*, [8.11].
[139] *John Michael Dauphin v Canada* [2009]; No. 1792/2008, CCPR/C/96/D/1792/2008 (2009).
[140] *Stefan Lars Nystrom v Australia* [2006]; No. 1557/2007 CCPR/C/102/D/1557/2007 (2011).
[141] *Mohamed El-Hichou v. Denmark*, CCPR/C/99/D/1554/2007 (2010).
[142] *El Dernawi v Libya*, CCPR/C/90/D/1143/2002 (2007).

The Committee determined that the State party had violated Articles 17 and 23 and reasoned as follows:

> *[T]he State party's action amounted to a definitive, and sole, barrier to the family being reunited in Switzerland. It further notes that the author, as a person granted refugee status under the 1951 Convention on the Status of Refugees, cannot reasonably be expected to return to his country of origin. In the absence of justification by the State party, therefore, the Committee concludes that the interference with family life was arbitrary in terms of article 17 with respect to the author, his wife and six children, and that the State party failed to discharge its obligation under article 23 to respect the family unit in respect of each member of the family.*[143]

3.48 The Committee has therefore made clear that, in the context of refugees, it is not reasonable to expect the family to return to the country of origin in order to be reunited. In *Gonzalez v. Guyana* the Committee held that the Guyanese authorities' refusal to grant a residence permit to the Cuban husband of a Guyanese national constituted a violation of Article 17(1), ICCPR.[144] The Committee emphasised that it was evident that the couple could not live together in Cuba and the State party had not indicated where else they might live as a couple.[145]

3.49 In addition, concern has been raised with delay in permitting family reunification for refugees in the Universal Periodic Review ("**UPR**") (the Human Rights Council ("**HRC**") review of State compliance with its treaty obligations, including under the ICCPR). For example, in its 2007 Concluding Observations on France, the HRC expressed concern about the length of family reunification procedures for recognised refugees.[146] In its 2016 Concluding Observations on Denmark, while the HRC acknowledged the challenge of dealing with large numbers of asylum seekers, it expressed concern about the compatibility of the newly introduced three-year waiting period for family reunification of temporary protection beneficiaries with the ICCPR.[147]

3.50 In Australia's most recent Universal Periodic Review ("**UPR**") in 2015 a number of states raised concern about Australia's treatment of refugees and asylum seekers. For example, Fiji (15) noted its concern that Australia's third-country processing regime for asylum seekers "breached human rights", Iceland (25) "expressed concern about reports of the treatment of asylum seekers in immigration detention", Sweden (78) noted that Australia was (then) the only country in the

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[143] Ibid, [6.3].
[144] *Patricia Angela Gonzales v. Republic of Guyana*, Communication No. 1246/2004, CCPR/C/98/D/1246/2004 (2010).
[145] Ibid, [14.3].
[146] HRC, *Concluding Observations: France*, CCPR/C/FRA/CO/4 (2018) [21].
[147] HRC, *Concluding Observations: Denmark*, CCPR/C/DNK/CO/6 (2016) [35].

world that used offshore processing and mandatory detention of asylum seekers, France (16) inquired about the policy of pushing back the boats and the precarious situation of refugees receiving only temporary visas, and the US (96) (then under the Obama administration) encouraged Australia to ensure humane treatment and respect for asylum seekers. However, no State raised specific concern with Australia's family separation policies. As stated in the introduction, Australia's policies on family separation have, for too long, largely escaped international attention and scrutiny.

International Covenant on Economic, Social and Cultural Rights

3.51 Australia is a Party to the ICESCR, having ratified on 10 December 1975. Article 10 provides that:

> *(1) The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.*
> *(2) Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.*
> *(3) Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.*

3.52 Article 10 is not limited to the protection of families which possess the nationality of the State in which they live, nor to non-citizen families who are lawfully resident in the State. Its protection applies to every "family", regardless of citizenship or lawful immigration status.[148]

3.53 The Committee on Economic, Social and Cultural Rights ("**the CESCR**") has expressed concern where States have adopted a restrictive approach to family reunification of refugees or the denial of reunification to those authorised to stay on the basis of subsidiary protection[149] or on humanitarian grounds.[150] The CESCR has also criticised "*the practice of restrictive family*

[148] Ben Saul, David Kinley and Jacqueline Mowbray, '*The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials'* (Oxford University Press, 2014), 721-860.
[149] CESCR, *Concluding Observations: Hungary*, E/C.12/HUN/CO/3 (2008), [21].
[150] CESCR, *Concluding Observations: Norway*, E/C.12/1.Add.109 (2005), [16].

reunification with regard to Palestinians, which has been adopted for reasons of national security."[151]

3.54 It is also arguable that the "*widest possible protection and assistance*" confers a positive obligation on State parties to facilitate family reunification, with economic and other support, although we do not in this Opinion address the arguments and counter-arguments concerning this issue.

Convention Against Torture

3.55 Australia is a Party to the CAT, having ratified on 8 August 1989. In response to child detention and family separation in the context of US immigration policy, a group of UN experts and academic commentators have suggested that such actions could amount to torture. For example, in a joint statement, UN experts stated that "*[d]etention of children is punitive, severely hampers their development, and in some cases may amount to torture…Children are being used as a deterrent to irregular migration, which is unacceptable*."[152] In relation to the specific issue of separating children, Professor Daniel Keating, a professor of psychology, said that "*[t]he avoidable infliction of long-lasting physical or mental harm by any state actor in order to obtain a policy goal, such as information or coercion, is a clear definition of torture under the United Nations Convention Against Torture*."[153]

3.56 As set out above, Australia's mandatory and indefinite detention policies – and the conditions in detention – have been found to amount to cruel, inhuman or degrading treatment. However, this has not been analysed with respect to the more specific issue of family separation.

3.57 Torture is defined as acts by which "*severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as… punishing him for an act he or a third person has committed or is suspected of having committed …[or] coercing him or a third person*" and "*is inflicted by or at the instigation of or with the consent or acquiescence of a public official*": Article 1, CAT. As defined by international law, torture thus comprises the following essential elements:

(a) The intentional commission of severe pain or suffering, whether physical or mental;

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[151] CESCR, *Concluding Observations: Israel,* E/C.12/1/Add.109 (2003), [18].
[152] OHCHR. 'UN experts to US: "Release migrant children from detention and stop using them to deter irregular migration".' (22 June 2018) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23245&LangID=E>.
[153] Daniel Keating. 'Why separating kids from parents is a form of torture.' CNN (online, 21 June 2018), <https://edition.cnn.com/2018/06/21/opinions/separating-children-at-border-is-torture-opinion-keating/index.html>.

(b) That is inflicted for a particular purpose (to obtain information, to punish the victim or another, to intimidate the victim or another, or for any reason based upon discrimination); and

(c) That is inflicted with the consent or acquiescence of a State actor.

3.58 Under Article 16, the CAT also requires States to prevent:

> *"other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."*

Application to US family separation policy

3.59 The argument that the separation of minor children from their asylum-seeking parents amounts to torture has been put persuasively in a number of cases in the US challenging Trump's family separation policy.

3.60 In a case in October 2018, a habeas corpus challenge was taken to the separation of a father and son in separate detention facilities in the US for a period of five months. In that case, D.J.C.V. and his father, Mr. C., arrived at the US-Mexico border on 30 April 2018, seeking asylum and other immigration protections under US and international law. They were forcibly separated pursuant to the Trump Administration's "zero tolerance" and family separation policy, which is designed – like Australia's program – to deter future asylum seekers by inflicting harsh measures upon families successfully entering the US. The action was filed to end their unlawful, indefinite detention and separation without any contact, and to reunify their family. Central to the case is a novel claim that the Trump Administration's "zero tolerance" and family separation policy constitutes torture and cruel, inhuman and degrading treatment.

3.61 The claim was made on the basis that the US Government is knowingly causing D.J.C.V. and Mr. C. to endure wrenching trauma as punishment for seeking asylum and to coerce and deter others from seeking similar relief, causing them severe mental pain or suffering that meets the statutory and international law definitions of torture. The claim asserted that the risk of psychological damage is particularly acute and lasting in the case of D.J.C.V because: he had recently turned two years old in detention, would remain in detention alone without any access to his father, in a foreign country, and with little or no ability to communicate in any language with anyone because he is too young. It was claimed that his situation is so precarious that if

judicial relief were not granted immediately, he may not remember his father or be able to re-establish a familial bond with his father – or any other family member – because he has already spent a substantial portion of his life in detention in the US. A US Federal Court judge ordered their immediate reunification and described the measure of family separation as "*the most cruel of cruelties*".

3.62 In another case involving the separation of an asylum seeker from her minor son, the New York University's Centre for Human Rights and Global Justice intervened in the case along with Juan Mendez, the former UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Their brief similarly argues that the forcible separation of parents from their minor children for the purposes of deterring immigration amounts to torture under international law.[154]

Convention on the Rights of the Child

3.63 Australia is a Party to the CRC, having ratified it on 17 December 1990. Article 3(1) of the CRC provides that "*[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*" ("**the best interests principle**"). The explicit language of "*all actions concerning children*" makes clear that the best interests principle is engaged not only where a decision directly affects a child, but also when any child or children are affected by State policy. Australia is obliged to ensure that the best interests of the child is a primary consideration in its decision-making concerning and impacting upon children.

3.64 The UN Committee on the Rights of the Child ("**the CRC Committee**") in its General Comment No. 14[155], describes the best interests principle as a "*threefold concept*":

a) First, it is a substantive right held by every child "*to have his or her best interests assessed and taken as a primary consideration when different interests are being considered*". It is also a "*guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general*": [6(a)].

b) Second, it is a "*fundamental, interpretative legal principle*" such that "*[i]f a legal provision is open to more than one reading, the interpretation which most effectively serves the child's best interests should be chosen*": [6(b)].

[154] See https://chrgj.org/wp-content/uploads/2019/02/Redacted-GJC-et-al-Brief-Amici-Curiae-Feb-2019.pdf.
[155] Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29th May 2013.

c) Third, it is a rule of procedure: "*Whenever a decision is to be made that will affect a specific child, a group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned*": [6(c)]. "*[T]he justification of a decision must show that the right has been explicitly taken into account*": ibid.

3.65 The CRC Committee has explained that Article 3 requires all public bodies to systematically consider "*how children's rights and interests are or will be affected by their decisions and actions*".[156] This includes in all migration and detention decisions affecting parents and their children:

> *States should conduct individual assessments and evaluations of the best interests of the child at all stages of and decisions on any migration process affecting children, and with the involvement of child protection professionals, the judiciary as well as children themselves. In particular, primary consideration should be given to the best interests of the child in any proceeding resulting in the child's or their parents' detention, return or deportation.*[157]

3.66 As has been made clear by the CRC Committee, Australia's obligations under the CRC "*apply to each child within their jurisdictions, including the jurisdiction arising from a State exercising effective control outside its borders.*"[158] Further,

> *Those obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from the territory of a State or by defining particular zones or areas as not or only partly under the jurisdiction of the State, including in international waters or other transit zones where States put in place migration control mechanisms. The obligations apply within the borders of the State, including with respect to those children who come under its jurisdiction while attempting to enter its territory*.[159]

3.67 Several provisions within the CRC specifically address the rights of children to be with their parents and family, including Article 7 (the right to know and be cared for by one's parent) and Article 8 (the right to family relations without interference). Article 9 of the CRC specifically bans the separation of parents from children except in limited circumstances and only when it is

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[156] Committee on the Rights of the Child, General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003 (**"GC5"**), [12].
[157] Committee on the Rights of the Child, 'The Rights of All Children in the Context of International Migration: Report of the 2012 Day of General Discussion' (2012), [72].
[158] Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child 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 (**"JGC3"**), [12].
[159] Ibid.

necessary to ensure the best interest of the child, for example, to safeguard them from parental neglect:

> *State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.*

3.68 Under Article 9, when States do separate children from their parents they must allow children to "*maintain personal relations and direct contact with both parents on a regular basis…*" and must also keep children informed of their parents' whereabouts. Article 9(3) provides that Australia is required to "*respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests*."

3.69 The CRC Committee has specifically addressed concern about the impact upon children subjected to enforced separation and, in particular, the particular vulnerability of children refugees:

> *Young children who are refugees are most likely to be disoriented, having lost much that is familiar in their everyday surroundings and relationships. They and their parents are entitled to equal access to health care, education and other services. Children who are unaccompanied or separated from their families are especially at risk. The Committee offers detailed guidance on the care and protection of these children in general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin.*[160]

3.70 In General Comment No. 6, the CRC Committee makes clear that to respect Article 9 State parties must "*ensure…all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child*".[161] The CRC Committee further emphasised that "*a child who has adult relatives arriving with him*

[160] Committee on the Rights of the Child, General Comment No. 7: Implementing Child Rights in Early Childhood, 2005, CRC/C/GC/7/Rev.1, [36].
[161] Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 2005, CRC/GC/2005/6, [81].

or her or already living in the country of asylum should be allowed to stay with them unless such action would be contrary to the best interests of the child."[162] In relation to refugee children, the CRC Committee makes clear that family reunification in the country of origin should not be pursued where "*there is a 'reasonable risk' that such a return would lead to the violation of fundamental human rights of the child"* and that "*the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein*". In such circumstances, Articles 9 and 10 CRC apply and govern Australia's obligations, requiring that family reunification applications from children or their parents to enter the country "*shall be dealt with by States parties in a positive, humane and expeditious manner*".[163] In addition, where "*a country of destination refuses family reunification to the child and/or to his/her family, it should provide detailed information to the child, in a child-friendly and age-appropriate manner, on the reasons for the refusal and on the child's right to appeal*".[164]

3.71 The CRC Committee has specifically considered the rights of children in migration contexts and notes in relation to the principle of non-separation and the States obligations not to interfere with the family unit:

> *The right to family unity for migrants may intersect with States' legitimate interests in making decisions on the entry or stay of non-nationals in their territory. However, children in the context of international migration and families should not be subjected to arbitrary or unlawful interference with their privacy and family life. Separating a family by deporting or removing a family member from a State party's territory, or otherwise refusing to allow a family member to enter or remain in the territory, may amount to arbitrary or unlawful interference with family life.*[165]

3.72 In relation to immigration-related decisions to separate a family, the CRC Committee concluded in its Joint General Comment No. 4 (with the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families):

> *The Committees are of the view that the rupture of the family unit by the expulsion of one or both parents based on a breach of immigration laws related to entry or stay is*

[162] Ibid, [40].
[163] CRC Committee, General Comment No. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CRC/GC/2005/6, [81-83].
[164] JGC4, [36].
[165] Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, [28].

disproportionate, as the sacrifice inherent in the restriction of family life and the impact on the life and development of the child is not outweighed by the advantages obtained by forcing the parent to leave the territory because of an immigration-related offence.[166]

3.73 More recently, the Status of the CRC Report by the UN General Assembly Secretary-General published in July 2019, observed that it is a State's international legal obligation to:

> *[P]revent the unnecessary separation of children from their families and promote swift family tracing and reintegration in cases in which separation has already occurred. States should also develop and effectively implement international standards for the protection of children at risk of family separation, guidelines for alternative care, cross-border child protection frameworks and universal and inclusive civil registration and identity systems to register all children from birth.*[167]

3.74 The importance of family unity has also been emphasised to ensure the right to a family environment under Article 18 of the CRC:

> *The Committees are also of the opinion that based on article 18 of the Convention on the Rights of the Child, a comprehensive approach to the child's right to a family environment in the context of migration should contemplate measures directed at enabling parents to fulfil their duties with regard to child development. Considering that irregular migration status of children and/or their parents may obstruct such goals, States should make available regular and non-discriminatory migration channels, as well as provide permanent and accessible mechanisms for children and their families to access long-term.*[168]

3.75 Joint General Comment No. 4 also addresses the issue of family reunification and Article 10 CRC, emphasising the need for this to be a possible option for children in an international migration context:

> *In the case of unaccompanied or separated children, including children separated from their parents due to the enforcement of immigration laws, such as the parents' detention, efforts to find sustainable, rights-based solutions for them should be initiated*

[166] JGC4, [29].
[167] Status of the Convention on the Rights of the Child Report of the Secretary-General (26 July 2019), [62].
[168] JGC4, [31].

> *and implemented without delay**, including the possibility of family reunification**. If the child has family in the country of destination, the country of origin or a third country, child protection and welfare authorities in countries of transit or destination should contact family members as soon as possible. **The decision as to whether a child should be reunited with his or her family in the country of origin, transit and/or destination should be based on a robust assessment in which the child's best interests are upheld as a primary consideration and family reunification is taken into consideration**, and which includes a sustainable reintegration plan where the child is guaranteed to participate in the process.*[169] (emphasis added)

3.76 In the context of refugees, the Committees make clear:

> *Family reunification in the country of origin should not be pursued where there is a "reasonable risk" that such a return would lead to the violation of the human rights of the child. When family reunification in the country of origin is not in the best interests of the child or not possible due to legal or other obstacles to return, the obligations under article 9 and 10 of the Convention of the Rights of the Child come into effect and should govern the State's decisions on family reunification therein. Measures for parents to reunify with their children and/or regularize their status on the basis of their children's best interests should be put in place. Countries should facilitate family reunification procedures in order to complete them in an expeditious manner, in line with the best interests of the child. It is recommended that States apply best interest determination procedures in finalizing family reunification.*

3.77 In *YB and NS v Belgium*,[170] decided in November 2018, the Committee found a violation of Article 3 (best interests of the child) and Article 10 (right to family reunification). In that case, the claimants resided in Belgium and provided accommodation to C.E. in the context of a *kafalah* ("**fostering arrangement**"). Belgium refused the claimants' visa application on the basis, *inter alia*, that the fostering arrangement did not give rise to a right of residence in Belgium because it did not create family ties between the claimant and C.E. The Committee observed that:

> *[T]he Belgian immigration authorities refused to grant a visa mainly because kafalah arrangements [a fostering arrangement] did not confer a right of residence and because the authors had failed to demonstrate that: (a) C.E. could not be taken care of by her biological family in Morocco, (b) the authors could not ensure her education by*

[169] JGC4, [34].
[170] Communication No. 12/2017, CRC/C/79/D/12/2017.

leaving her in Morocco, and (c) the authors had the financial means to support C.E. The Committee observes, however, that ***these reasons, which are general, reflect a failure to consider C.E.'s specific situation*** *— in particular her situation as a child born to an unknown father and abandoned at birth by her biological mother — so that the possibility that she could be taken care of by her biological family seems unlikely and is in any case not supported. ... That argument suggests that* ***the immigration authorities have not given any consideration to the emotional ties that have bound the authors and C.E. since 2011****. In addition to the legal relationship established by kafalah, the immigration authorities seem to have taken no account of N.S.'s life with C.E. since the latter's birth or the de facto family ties that have naturally been forged by their life together over the years.*[171]

…

In the Committee's view, article 10 of the Convention does not oblige a State party in general to recognize the right to family reunification for children in kafalah arrangements. The Committee is nonetheless of the opinion that, in assessing and determining the best interests of the child for the purpose of deciding whether to grant C.E. a residence permit, the State party is obliged to take into account the de facto ties between her and the authors (N.S. in particular) that have developed on the basis of kafalah. ***The Committee notes that, in assessing the preservation of the family environment and the maintenance of ties as factors that need taking into account when considering the child's best interests, "the term 'family' must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (art. 5).*** *In view of the fact that no consideration was given to the de facto family ties that existed in this case, and since it has been more than seven years since the authors submitted an application for a visa, the Committee concludes that the State party has failed to comply with its obligation to deal with the authors' request, which was equivalent to an application for family reunification, in a positive, humane and expeditious manner and that it has failed to ensure that the submission of the request entailed no adverse consequences for the applicants and for the members of their family, in violation of article 10 of the Convention.*[172]

[171] Ibid, [8.5] (emphasis added).
[172] Ibid, [8.11] - [8.12] (emphasis added).

Extra-territorial application of Australia's human rights obligations under the ICCPR, ICESCR, CAT and CRC

3.78 The international law obligations set out above apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens and in the territory of Australia (however defined). This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia over whom Australia is exercising 'effective control', or who are otherwise under Australia's jurisdiction.[173] The Australian Government has accepted that it has human rights obligations to persons outside its territory in circumstances where it exercises effective control over those persons.[174] Examining the Commonwealth's legal responsibilities with respect to the RPCs, the Senate Legal and Constitutional Affairs References Committee received and considered evidence regarding "effective control", and concluded that:

> *…the degree of involvement by the Australian Government in the establishment, use, operation, and provision of total funding for the [Manus Island] centre clearly satisfies the test of effective control in international law, and the government's ongoing refusal to concede this point displays a denial of Australia's international obligations.*[175]

4. APPLICATION OF INTERNATIONAL LAW

ICCPR Obligations

Right to Family Life

4.1 As outlined in the Attorney-General's Department's "Public Sector Guidance Sheet: Right to respect for the family", the Australian Government's position is that "*the legitimate application of migration laws will not result in a breach of articles 17 and 23, even if it causes the separation of families*".[176]

4.2 This assertion does not stand up to scrutiny as a rule of general application: each case requires individualised assessment of the personal circumstances of the family in question, with a

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[173] Senate Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru,* August 2015, [2.2]- [2.17].
[174] Replies to the List of Issues (CCPR/C/AUS/Q/5) To Be Taken Up in Connection with the Consideration of the Fifth Periodic Report of the Government of Australia (CCPR/C/AUS/5), paras 16-17, UN Doc CCPR/C/AUS/Q/5/Add.1 (5 February 2009).
[175] Senate Legal and Constitutional Affairs References Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, December 2014, p. 151.
[176] 'Right to respect for family life, *Australian Government Attorney-General's Department,* <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttorespectforthefamily.aspx>.

particular emphasis on the best interests of the children affected. It also does not stand up to scrutiny in the context of refugees.

4.3 The Australian Government claims that interference with the right to family life is justified by the need for migration and border protection policies which deter people smuggling and prevent deaths at sea. These are legitimate social aims. However, the Australian Government must also demonstrate that the measures adopted to achieve these aims are necessary in a democratic society, reasonable and proportionate to the end sought; that is, that they are not incompatible with the aims and objectives of the ICCPR and are the least intrusive measure available to achieve that aim. The Committee has already found that the indefinite detention of refugees and their children breaches Australia's international obligations.[177] Similarly, as the case law demonstrates, the Committee has repeatedly found that Australia's immigration decisions which separate families (in the context of deporting a parent from Australia) do not meet this test and therefore violate the ICCPR.

4.4 As the case law makes clear, a determination of what constitutes "arbitrary interference" under the ICCPR involves a balancing exercise of whether the purpose of the interference is reasonable and in accordance with the aims and objectives of the ICCPR, and, if so, whether the significance of the State party's reasons for enforcing the interference are outweighed by the hardship and injustice caused to the specific complainant(s). Where one spouse is in Australia, the deportation of the other spouse and children, in the context of asylum seekers who have suffered in difficult detention conditions, has been found to amount to arbitrary interference with family life. Similarly, the prevention of family reunification for refugees – where reunification in the country of origin is impossible – also violates Article 17. For the same reasons, the forced separation of families by Australia, indefinitely and without any possible option of reunification, amounts to an arbitrary interference with family life.

4.5 In all categories of Policy Separation and Medical Treatment Separation, the family has no prospect of reunification in Australia, with no right of legal challenge, while having no alternative options for re-settlement and being unable return to their country of origin given their recognised refugee status. For the Legacy Caseload, there is a theoretical prospect of reunification in the future, but it is dependent on obtaining another visa category and after obtaining citizenship, which likely takes in excess of a decade. For the Pre-Legacy Caseload, family reunification is possible but is subject to a lengthy and expensive process taking up to, and in excess of, five

[177] See, e.g., *FKAG v Australia*.

years. In each of these cases of Practical Separation, the policy implemented creates a practical bar to family reunification in a reasonable period of time, in breach of the requirements in ICCPR.

Offshore Detention, Legacy and Pre-Legacy Caseload – interference with the right to family life

4.6 For Australia's policy of family separation[178] to be incompatible with Articles 17, 23 and 24, ICCPR collectively:

a) There must be an interference with family life; and,
b) That interference must be arbitrary.

4.7 Detention itself arguably amounts to interference with family life. The Australian Human Rights Commission has criticised the "*difficulties of trying to maintain a 'normal family life'*" in relation to Australia's immigration policies and situations of protracted detention.[179] Where families or family members are detained, there is interference in the normal life of the family, including its ability to determine its own place of residence, living conditions, family activities outside the home, relationships in the community, etc. Many aspects of family life are curtailed by detention, which disrupts the freedoms and relationships that are normally guaranteed in a democratic society. Periodic visits to parents in detention and other visitation rights do not address this interference. Where children choose to be released into the community, this may still amount to arbitrary interference with family life if the best interests of the children are not considered.

4.8 However, it has not been definitively determined by the Committee as to whether and when detention itself may constitute "*interference*" in the family. In *FKAG v Australia,* the Committee was asked to consider whether the continued (and indefinite) detention of a father with three children living in the community amounted to arbitrary interference with family life. It is important to note that *FKAG v Australia* involved a case of onshore detention where legal action had resulted in the release of the wife and children to the community and where the children had regular visitation with their father. The Committee therefore found that the complaint was unsubstantiated and inadmissible because Australia facilitated contact between the father in detention and the wife and children in the community.[180]

4.9 This must be distinguished from Policy, Practical and Medical Treatment Separation of those in Offshore Detention. The indefinite offshore detention or resettlement to the US of the family

[178] Including Historic and Continuing Policy, Medical and Practical Separation.
[179] Australian Human Rights Commission, 'Immigration Detention at Villawood 2011',
< https://www.humanrights.gov.au/sites/default/files/content/human_rights/immigration/idc2011_villawood.pdf>, 17.
[180] *FKAG v Australia*, [8.7]. It is worth noting that this decision has been criticised as being inconsistent with its other jurisprudence. In any event, the interferences that are the subject of this opinion amount to indefinite family separation.

members itself amounts to a breach of Australia's international obligations.[181] Further, those in detention have no means by which to maintain contact with their family members (cf: *FKAG v Australia*). In these cases, the family is separated in different countries by virtue of the operation of Australia's policy and they have no prospect of family reunification, even with a family member being a recognised refugee in Australia. There are no means to judicially review the separation or the refusal to allow family reunification.

4.10 Equally, for the Legacy Caseload, Policy Separation amounts to a clear "*interference*" with family life – asylum seekers in this category are not eligible to apply for permanent protection and there is a complete bar on family reunification in all cases: they cannot sponsor their family to come to Australia and they are banned from returning to their home country or travelling to a third country without approval from the Australian Government (i.e. places where they could reunite with their families).

4.11 For the Legacy and Pre-Legacy Caseload, Practical Separation – the practical impossibility of reunification (or visitation) – amounts to interference with family life.

4.12 The refusal to allow family reunification for recognised refugees has been found by the Committee to breach Article 17 and 23, ICCPR in Australia and other country contexts.

Offshore Detention – arbitrary interference with the right to family life

Policy and Medical Treatment Separation amount to an arbitrary interference

4.13 This interference is "arbitrary" in the requisite sense. It is highly relevant that in earlier HRC jurisprudence on Australia, the deportation of family members where another family member was pursuing domestic proceedings[182] or settled in Australia[183] has been found to be arbitrary. The circumstances of Policy and Medical Treatment Separation set out above – no prospect of reunification, no prospects of family contact, no access to judicial review and indefinite detention – are clearly inconsistent with the obligations under the ICCPR, which protects these rights.

4.14 In the case of Australia, the effect of the separation and the blanket prohibition on family reunification with the family member who is in Australia also has the effect of leaving their family members, including children, in a situation where they are suffering inhuman and

[181] See UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, 24 April 2017, A/HRC/35/25/Add.3, [80].
[182] See discussion of *Bakhitiyari v Australia* above at [3.40].
[183] See discussion of *Winata v Australia* above at [3.36].

degrading treatment – which is in itself a clear violation of the aims of the ICCPR and the CAT (see further at [3.35]).

4.15 In addition, Policy and Medical Treatment Separation apply generally and with rigidity (and thus, arbitrarily), without any regard to the particular circumstances or to whether the hardship caused by family separation is proportionate to the State party's legitimate reasons. This argument is particularly strong in the case of Policy Separation, which permanently separates families merely because they arrived in Australia on different dates.

Continuing Policy and Medical Separation following the Medevac Amendments

4.16 The limited (albeit positive) scope for reunification provided by the Medevac Amendments must be understood (i.e. for the period in which they were in effect before being repealed). Those affected by Policy Separation without a child under the age of 18 in Australia remained separated, with no prospect of reunification. For these cases, the Policy Separation continued. Accordingly, the Medevac Amendments, for the period of time that they were effective, did not cure Australian immigration policy and arbitrary interference with the right to family life continued.

4.17 This is because the scope for reunification for Medical Treatment Separation was limited by the narrow and arbitrary definition of "*family unit*", which was incompatible with Article 17. As set out above, the term "family" for the purposes of Article 17 should be given a "*broad interpretation to include all those comprising the family as understood in the society of the State party concerned*".[184]

4.18 The Australian Institute of Family Studies ("***AIFS***") is the Australian Government statutory agency established to "*promote the protection of the family as the fundamental group unit in society*".[185] According to the AIFS, a family is:

> *Two or more persons, one of whom is at least 15 years of age, who are related by blood, marriage (registered or de facto), adoption, step or fostering; and who are usually resident in the same household. The basis of a family is formed by identifying the presence of a couple relationship, one parent-child relationship or other blood relationship. Some households will, therefore, contain more than one family*.[186]

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[184] Human Rights Committee, *General Comment No 16: Article 17 (Right to Privacy)—The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32nd sess, (8 April 1988) UN Doc HRI/GEN/1/Rev.9 (Vol. I), [5].
[185] *Family Law Act 1975* (Cth), s 114B.
[186] Australian Government, Australian Institute of Family Studies, 'Australian households and families (Australian Family Trends No 4)' (2013), <https://aifs.gov.au/publications/australian-households-and-families>, 2.

4.19 The AIFS states:

> *Under this "household family" definition, families may comprise: couples with or without co-resident children of any age; single parents with co-resident children of any age; grandparents caring for grandchildren; and other families of related adults, such as brothers or sisters living together, where no couple of parent-child relationships exist (although this excludes relatives beyond first cousins*).[187]

4.20 The definition of "*family unit*" under the Migration Act does not comply with the AIFS conception, and thus the ICCPR. Unlike the Migration Act definition, the AIFS definition:

a) includes children of any age;
b) includes scope for extended family, including siblings (*"two or more persons, one of whom is at least 15 years of age", "families of related adults", "although this excludes relatives beyond first cousins"*); and,
c) emphasises co-residence (as opposed to exclusively blood or martial relationships).

4.21 Narrow constructs of "family", such as the definition of "*family unit*" under the Migration Act, bear little resemblance to the de facto familial structures of emotional and economic interdependence of the refugees in offshore detention.[188] The potential for family reunification following the Medevac Amendments was thus limited to only certain types of family relationships, excluding adults siblings, uncles/aunts and nephews/nieces, grandparents etc. There was some scope for the transfer of other persons outside the "*family unit*". Under s 198C(4), a doctor could recommend the transfer of persons who did not necessarily meet the definition but who were close to the transitory person who was transferred for medical treatment.

4.22 It was also theoretically possible that delays defeated the possibility of reunification – for example, in circumstances where children reached the age of majority and were not eligible for admission, parents died, or marital relationships broke down under the strain of separation.[189]

Legacy Caseload – Policy Separation

4.23 For similar reasons as in *El Dernawi v Libya*, the blanket ban on family reunification for the Legacy Caseload amounts to a breach of Articles 17 and 23, ICCPR. As is the case for Offshore

[187] Ibid.
[188] James C Hathaway, *The Rights of Refugees under International Law*, (Cambridge University Press, 2005) 536.
[189] Above n 159, Hathaway, 538; K. Dixon-Fyle, 'Reunification: Putting the Family First' (1994) 95 *Refugees* 6, 10.

Detention, the interference to the Legacy Caseload asylum seekers applies generally and with rigidity (and thus, arbitrarily), without any regard to the particular circumstances or to whether the hardship caused by family separation is proportionate to the State party's legitimate reasons.

4.24 It has been described as particularly "*egregious*" to impose limits on the right to family reunification based strictly on forms of status. It cannot meet the standard of reasonableness for a State to rely strictly upon a punitive label assigned by them to an individual to grant or withhold rights to family life.[190]

4.25 This also breaches the ICESCR. The CESCR has criticised a restrictive approach to family reunification of refugees (such as Practical Separation – see further below) or the denial of reunification (Policy Separation) to those authorised to stay on the basis of subsidiary protection[191] or on humanitarian grounds.[192] This applies directly to Legacy Caseload cases on TPVs or SHEVs.

Legacy and Pre-Legacy Case Load – Practical Separation

4.26 In the case of both Legacy and Pre-Legacy Caseload, there is a theoretical pathway to citizenship, or to other visas which in time would permit citizenship, and then family reunification. But the time and expense involved is unreasonable and must be regarded an arbitrary interference with family life:

a) For the Legacy Caseload there is a theoretical pathway to other visas after 5 years, potentially leading to citizenship after another 5 years, at which point family reunification would be available, but only after a decade of separation and at significant cost; and

b) For the Pre-Legacy Caseload they are technically able to sponsor family members to be granted visas to come to Australia, but Ministerial Direction 80 and delays in processing citizenship applications means delays of five years or more before reunification is possible and at significant cost.

4.27 In *Winata v Australia*, it was sufficient that the separation would be for an extended period of time. For the Legacy Caseload, the separation is at least extended. In some cases, it is indefinite. Delays for family reunification for even three years have been condemned by the UN HRC UPR

[190] Above n 159, Hathaway, 558.
[191] CESCR, *Concluding Observations: Hungary*, E/C.12/HUN/CO/3 (16 January 2008), [21].
[192] CESCR, *Concluding Observations: Norway*, E/C.12/1.Add.109 (23 June 2005), [16].

process.[193] Another Australian case that attracted media attention concerned a Pakistani man recognised as a refugee in 1996, who had still not received permission – as of 2001 – to be reunited with his wife and three daughters, one of whom suffered from cerebral palsy. His level of desperation was such that he set himself alight outside Parliament in protest.[194]

CRC Obligations

4.28 The language of Article 9 makes clear that, unlike other human rights treaties which permit limitations and only prohibit interferences with family unity which are arbitrary or unlawful (a test which we submit is met by all Policy, Practical and Medical Treatment Separation – see above), no public interest – including immigration and border control measures – can justify the separation of a parent and child.

4.29 The policy of family separation clearly and directly violates Article 9, CRC. Australia is not separating children from their parents in their best interest – the only permitted reason to separate a parent and child – but as a deterrent and punishment for their parents' unauthorised entry to Australia (or, more officially, the mode by which they arrived to seek asylum: by boat).

4.30 Moreover, in cases of Policy, Practical and Medical Treatment Separation, Australia provides no opportunity for children to "*maintain personal relations and direct contact with both parents on a regular basis*"[195] or at all.

4.31 Finally, following Policy and Medical Treatment Separation, reunification applications have not been dealt with in a "*positive, humane and expeditious manner*".[196] Nor has there been the provision of "*detailed information to the child, in a child-friendly and age-appropriate manner, on the reasons for the refusal and on the child's right to appeal.*"[197] In fact, the relevant decisions being unreviewable, no such applications could be made or dealt with. In the case of Australia, for children who have experienced family separation as a result of Policy Separation and/or Medical Treatment Separation, the Australian Government has made clear that family reunification is not an option and there is no process to challenge these decisions.

4.32 It should be noted that in the case of Practical Separation there is potential to seek limited judicial review of some circumstances, but we understand there are a number of restrictions and practical

[193] HRC, *Concluding Observations: France*, CCPR/C/FRA/CO/4 (2018) [21]; HRC, *Concluding Observations: Denmark*, CCPR/C/DNK/CO/6 (2016) [35].
[194] E. MacDonald, "Daughter to reunite with father 'to give him strength,'" *Canberra Times*, (11 April 2001).
[195] CRC, Article 9. See further above at [3.47].
[196] CRC Committee, General Comment No. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CRC/GC/2005/6, [81-83]. See further above at [3.59].
[197] JGC4, [36]. See further above at [3.59].

barriers to such an action, including the need to identify some legal error in administrative decision-making., and as such there is no clearly established pathway to review for applications affected by Direction 80.

4.33 To the extent the Medevac Amendments provided a pathway to reunification, the narrow definition of "*family unit*" (see above) was equally problematic in the context of the CRC.

Convention Against Torture Obligations

4.34 The right to be free from torture, enshrined in CAT, is also a *jus cogens* norm of international law and the prohibition of torture is absolute. As set out above, torture comprises the following essential elements:

a) The intentional commission of severe pain or suffering, whether physical or mental;
b) That is inflicted for a particular purpose (to obtain information, to punish the victim or another, to intimidate the victim or another, or for any reason based upon discrimination); and
c) That is inflicted with the consent or acquiescence of a State actor.

Severe pain and suffering

4.35 Relevantly, the UN Special Rapporteur has found that the threshold at which treatment or punishment may constitute torture is lower when it comes to children, especially when they are deprived of their liberty. This is because children are still developing physically and emotionally.[198] There is strong evidence of immediate and long-term impacts of the family separation policy. It is clear that this can surpass the gravity threshold of severe physical or mental pain and suffering, particularly when it comes to children.[199]

4.36 The pain and suffering inflicted by each category of the family separation policy is compounded by Australia's policies which create situations in which children experience repeated, or prolonged, traumas such as that occasioned by indefinite immigration detention.[200] We recall that the immigration detention conditions in Australia amount to torture in and of themselves (see [1.5]-[1.8] above). Those instructing us, HRLC, have evidence that those subjected to these policies may suffer irreparable damage due to the serious adverse psychological, physical, and family life impacts. Generally, the UNHRC has observed that "*family members together have*

[169] UNGA, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment'(2015), [3].
[199] Insert references – see US materials too [**JR to locate]**
[200] See, e.g., Sarah Mares, 'The Mental Health of Children and Parents Detained on Christmas Island' (2016) *Health and Human Rights Journal* 18(2): 219–232.

more strength to face adversity than those apart."[201] This argument is particularly strong in the case of Medical Treatment Separation. In this circumstance, the transported family member is suffering from a serious health concern, and it follows that enhanced emotional and physical support is essential for all family members.

4.37 It is worth noting that family separation is recognised by the jurisprudence of other international tribunals as constituting torture of the parents as well as the children. For example, the ECtHR has recognised that the mental pain and suffering that comes from knowing that a child has been detained but not knowing the child's fate can constitute torture and/or ill-treatment of the parents.[202]

Prohibited purpose – specific intent

4.38 CAT contains an exhaustive list of purposes that must be shown as the "specific intent" element of the crime. These include punishing the victim for an act the victim or third person has committed or suspected of committing, intimidating or coercing the victim or a third person or for any reason based on discrimination of any kind.

4.39 The publicly stated purpose of the Australian Government's policy is to deter people smugglers and to "stop the boats" and deaths at sea (see above [2.21]), but there is evidence that the separation policy is in fact being used to deter asylum seekers from asserting their rights of protection once physically in Australia (see above [2.25]) and to deter other asylum seekers from seeking to come to Australia (i.e. "*coercing him or a third person*"). The separated children are therefore suffering for the immigration transgressions of their parents or to deter and/or coerce future potential border-crossers.

Consent or acquiescence of the state

4.40 The various immigration policies applying to asylum seekers and the statutory instruments which implement them do not expressly state a policy of family separation, but the practical impact of these policies on asylum seekers has the effect of separating families and is acknowledged as such. In relation to the US resettlement deal, it has in the past explicitly required that those accessing the ability to go to the US must sign away custody of their children. As such, this meets the requirement of consent and certainly of acquiescence.

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[201] UNHCR, 'Families in Exile: Reflections from the Experience of UNHCR' (1995), at 3.
[202] *Kurt v. Turkey*, Application No. 15/1997/799/1002, 25 May 1998.

Other acts of cruel, inhuman or degrading treatment or punishment

4.41 Alternatively, Australia's family separation policy amounts to *at least "acts of cruel, inhuman or degrading treatment or punishment"* (see [4.35]-[4.37] above) *"committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"* (see [4.40] above) in violation of Article 16 of the CAT.

5. CONCLUSION

5.1 It is clear that the Australian Government's family separation policy violates Australia's international obligations. Specifically, Australia's policy of family separation:

e) violates the essential right to family unity, found in international human rights treaties to which Australia is a Party, including the UDHR, ICCPR, ICESCR, CRC and CAT, and customary international law;

f) violates Australia's international law obligations under Articles 17, 23 and 24, ICCPR;

g) violates Australia's international law obligations under Article 9, CRC; and,

h) in certain circumstances, will violate the absolute prohibition on torture under CAT and the *jus cogens* norm of international law, or the prohibition of acts of cruel, inhuman or degrading treatment or punishment under CAT.

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