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

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Submission to the Senate Legal and Constitutional Affairs References Committee inquiry into the efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions

Liberty Victoria

1. Liberty Victoria is a peak civil liberties organisation in Australia that has worked to defend and extend human rights and freedoms in Victoria since 1936. For more than eighty years we have advocated for civil liberties and human rights. These are spelled out in the United Nations international human rights treaties, agreed to by Australia. We speak out when such rights and freedoms are threatened by governments or other organisations.
2. We welcome the opportunity to provide a submission to the Senate Legal and Constitutional Affairs References Committee inquiry into the efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions (**the Inquiry**). The focus of our submissions and recommendations reflect our experience and expertise as outlined above.

Summary

3. On review of the Inquiry's terms of reference we have opted to limit our submissions to the below. Our submissions and recommendations in relation to each of them can be summarised as follows:

Limitations on eligibility to apply for relevant visas ***Eligibility for and access to family reunion for people who have sought protection in Australia***	
Summary submissions	The legal and policy frameworks governing family reunification unjustly discriminate based on the mode of arrival in Australia. These discriminatory laws and policies prevent people from reuniting with their loved ones. This has a significantly harsh impact on these people and their immediate families overseas, many of whom are highly vulnerable and survivors of torture, sexual violence and other abhorrent human rights abuses. No compelling case has been put forward by the Government to justify the continuation of these discriminatory and disproportionate laws and policies.
Recommendation 1.1	Temporary Protection visa and Safe Haven Enterprise visa holders be transitioned to permanent protection visas, or provision made for them to sponsor offshore immediate family members.
Recommendation 1.2	Ministerial Direction 80 be revoked, or alternatively, amended to ensure family visas lodged by immediate family of permanent protection visa holders who arrived by boat, are processed at the same priority as other family applications.
Recommendation 1.3	Repeal the bar on proposing immediate family for humanitarian visas by permanent protection visa holders who arrived by boat.
The suitability and consistency of government policy settings for relevant visas with Australia's international obligations	
Summary submissions	The statutory and policy frameworks governing family reunification are inconsistent with Australia's international obligations and those representations and commitments it previously made to the international community in this regard. These frameworks operate contrary to the fundamental principles of derivative refugee status and family unity, as derived from international instruments to which Australia is a signatory. The discriminatory nature of the laws and policies as they apply to family reunion is also contrary to Australia's international obligations and the

	commitments and representations it has previously made to the international community.
Recommendation 2	The discriminatory laws applicable to family reunion visas be abolished to ensure equal access for all protection visa holders and consistency with Australia's international obligations and those representations it has made to the international community.
Cost of applying for relevant visas	
Summary submissions	The existing visa application and other processing charges for family visas are excessive, both in objective terms and also relative to comparable countries. Family reunion should not be based on financial capacity. The excessive fees and charges applicable to family reunion visas operate to unnecessarily extend the separation of families. No compelling case has been put forward by the Government for why these excessive charges are both necessary and proportionate to the policy end.
Recommendation 3	The fees and charges applicable to family reunion visas be lowered significantly and a fee exemption be introduced for holders of protection visas and where the payment of those fees would cause serious financial hardship.
Other matters – survivors of family violence	
Summary submissions	Existing protections for family violence survivors are insufficient. The current framework undermines existing efforts to foster early intervention and to foreground survivors' voices, resulting in considerable danger to survivors.
Recommendation 4.1	Ministerial Direction 90 be urgently repealed and replaced with a Direction that is drafted after broad and inclusive consultation, which foregrounds the wishes of survivors and protects early intervention programs targeting family violence across Australia.
Recommendation 4.2	Visa criteria exception protections extend to all survivors onshore who are secondary applicants for temporary or permanent visas dependent on a perpetrator's primary application.
Recommendation 4.3	A broad enquiry be held into the efficacy of family violence mechanisms within the migration program to ensure survivors' safety and further the critical work of preventing family violence.
Other matters – transitory persons	
Summary submissions	The Australian government's policy of preventing medical transferees from Nauru and Papua New Guinea from reuniting with their wives and

	children residing in the Australian community is not only cruel and unjust but also disproportionate with the stated policy rationale. Furthermore, this policy is inconsistent with Australia's international obligations to provide for refugees to reunite with immediate family and not to discriminate under law according to their initial mode of arrival in Australia. No compelling case has been put forward by the Government to justify the continued protracted separation of these people from their immediate family members.
Recommendation 5	The Minister grant bridging visas to all medical transferees with immediate family residing in the Australian community.
Other matters – visa cancellations and refusals under s 501	
Summary submissions	Visa cancellations and refusals have devastating and often irreversible consequences not only for the individuals directly affected but for their families. Such processes can result in protracted and remote detention and forcible permanent removal from Australia, even where an affected person has minor children or has lived in Australia for the majority of their lives.
Recommendation 6.1	A new Ministerial Direction be made with increased protections against visa refusal or cancellation for people who have lived in Australia for over 10 years and people who have established families in Australia.
Recommendation 6.2	Consideration of visa cancellation and refusal should be subject to clear time limits to prevent undue delay and harm to families.
Recommendation 6.3	An effective and regular detention review mechanism ought to be legislated, entitling a person to appear before an independent body regarding the appropriateness of their ongoing detention.

4. Each of these matters is further developed below.

Limitations on eligibility to apply for relevant visas / Eligibility for and access to family reunion for people who have sought protection in Australia

5. People found by the Australian government to engage its international protection obligations are often prohibited from being reunited with their immediate family members in Australia. This prevents them from reuniting with their loved ones, including wives, husbands, same-sex partners, minor children and other immediate family.
6. In addition to the legal barriers discussed further below, many refugees and disadvantaged migrants in Australia are also prevented from reuniting with their loved ones overseas due to the excessive visa application charges payable to make apply for those visas.
7. No compelling case has been put forward by the Government to justify the continuation of these discriminatory and disproportionate laws and policies.

Legal framework

8. Permanent visa holders are generally eligible to sponsor immediate family members such as partners and dependent children for permanent visas. Some temporary visa holders, such as student and Temporary Skill Shortage visa holders, are also eligible in some circumstances to add family members to their visas to allow reunification in Australia.

9. The statutory framework governing family reunification unjustly discriminates based on the mode of arrival of the sponsoring family member in Australia. Migrants and refugees who arrive in Australia by plane with a visa in effect, and who are immigration cleared on arrival, are generally eligible to sponsor partners, children and other immediate family members.

10. However, protection visa holders who arrived in Australia by boat without a visa, or who arrived by plane but refused immigration clearance, are generally legally prohibited from sponsoring family members for visas for Australia. The current law provides for this in four ways:

11. First, all refugees who arrived in this manner are currently only eligible to apply for a Temporary Protection visa or Safe Haven Enterprise visa (**Temporary Protection Bar**). Both visas are temporary in nature and neither permit the addition of family members who are not in Australia or the sponsorship of family visas.

12. Second, for those refugees who arrived in Australia in these circumstances and granted a permanent protection visa prior to the legislation being amended preventing this in 2014[1], Ministerial Direction 80[2] applies such that, *in practice*, their family members are unable to be granted a visa for Australia (**Direction 80 Bar**).

13. Third, those refugees in the second category above are prohibited from proposing immediate family members for humanitarian visas (**Humanitarian Visa Proposer Bar**).

14. This discriminatory prohibition on family reunification prevents people who have been found by the Australian government as needing international protections, from seeing their loved ones. This has a significantly harsh impact on these people and their immediate families overseas, many of whom are highly vulnerable and survivors of torture, sexual violence and other abhorrent human rights abuses.

<u>Temporary Protection Bar</u>

15. On 16 December 2014, the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (**the Asylum Legacy Act**) amended the *Migration Act 1958* (Cth) (**the Act**) and *Migration Regulations 1994* (Cth) to, among other things, introduce a new temporary protection visa scheme.[3] This new scheme precluded persons who arrived in Australia by boat without a visa, or who arrived plane with a visa but who were refused immigration clearance on arrival (or previously arrived in these circumstances but had not yet been granted a protection visa), from being eligible for permanent protection visas. Instead, persons in these circumstances would only be eligible for a Temporary Protection visa (**TPV**) (3 year duration) or Safe Haven Enterprise visa (**SHEV**) (5 year duration).

[1] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).
[2] *Direction 80—order for considering and disposing of Family visa applications under s47 and 51 of the Migration Act 1958,* made by the Minister under s 499(1) of the *Migration Act 1958*.
[3] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), Schedule 2—Protection visas and other measures.

16. Since this time, refugees and other persons found to be owed protection who arrived in this manner have been barred from sponsoring family members for visas for Australia. This includes partner visas for wives/husbands and child visas for dependent minor children.

Ministerial Direction Bar

17. Persons who had been found to be owed protection by the Australian government and granted a permanent protection visa prior to 16 December 2014 were not affected by the Asylum Legacy Act and could continue to sponsor immediate family members for permanent visas to reunite with them in Australia. However, on 13 September 2016, the then-Minister made a direction under s 499(1) of the Act, *Direction 72 - Order for considering and disposing of Family visa applications* (**Direction 72**).

18. Among other things, Direction 72 obligated officers of the Minister's department to give the lowest possible processing priority to family visa applications sponsored by refugees who arrived in Australia by boat without a visa.

19. On 21 December 2018, the then-Minister made *Direction 80—order for considering and disposing of Family visa applications under s47 and 51 of the Migration Act 1958* (**Direction 80**). Direction 80 revoked Direction 72 but preserved the de-prioritisation of family visa applications sponsored by refugees who arrived by boat.

20. To the best of our knowledge, we are not aware of any family visa applications affected by this Direction to have been granted to family members of refugees in Australia unless the sponsoring refugee family member had subsequently acquired Australian citizenship (at which time the Direction ceases to apply to them). Following this, it can be said that the de-prioritisation effect of Direction 80 amounts to a complete suspension in processing in practice.

21. Further, it is our experience that many vulnerable refugees lodge partner visa and child visas to sponsor their partners and minor children unaware of these ministerial directions. In addition to the visa application charges that can total many thousands of dollars, the indefinite suspension in processing they experience can cause additional psychological harm to the sponsor in Australia and family members overseas.

Humanitarian Visa Proposer Bar

22. Refugees in Australia, including those resettled through the United Nations High Commissioner for Refugees (**UNHCR**) and those found to be a refugee in Australia and granted a permanent protection visa to remain, are generally eligible to propose immediate and other family members for permanent offshore refugee and humanitarian visas (and no visa application charge is payable). However, permanent protection visa holders who arrived in Australia by boat without a visa are barred from doing so.[4]

Long-term separation from loved ones

23. The cohort of people affected by these barriers are refugees and others found by the Australian government to be in need of international protection. By their nature, these individuals are often the most vulnerable members of our communities. These vulnerabilities

[4] *Migration Regulations 1994* (Cth), Part 2, r 2.07AM; Schedule 2, Part 202, cl 202.211(2)(e), cl 202.212; and Schedule 2, Part 200, cl 200.211(2)(e).

can derive from their lived experiences of torture and trauma, mental and physical health conditions, cultural and linguistic barriers, as well as isolation from family and community.

24. Separation from family can have significant long-term adverse effects on a person's mental health and general welfare. The effects of separation are made worse where a person has a history of torture or trauma; and where a person faces linguistic and cultural barriers in their country of residence. For refugees, the safety of family members is often the most pressing concern and the cause of constant distress. Refugees in Australia prevented from reuniting with family are denied this crucial aspect of rebuilding their lives.

25. It is important to note that the harm to family members in Australia involves not only significant mental/psychological harm and suffering but may also include financial and physical hardship. For example, a person in Australia may have otherwise received financial and physical support from a family member affected by the amendments, who may have otherwise qualified for a carer or spouse visa.

26. In response to the above concerns, it might be contended that refugees in these circumstances might offset the significant hardship they suffer due to this separation by travelling overseas to reunite temporarily with their loved ones. For the following reasons, we submit that this contention ignores the following realities.

    - First, any temporary reunification would be exactly that, 'temporary'.
    - Second, for many refugees in Australia the wife/husband and/or dependent child may be residing in their country of nationality, where they have been found to face a real risk of being killed or other serious human rights abuses.
    - Holders of temporary and permanent protection visas are generally prohibited from travelling to their home country and any such travel would be a clear breach of a condition attached their visa.[5] Following this, their visa may be cancelled while they are outside Australia (in which circumstances they would have no standing to apply for merits review), leaving them stranded with no way to return to safety.[6] Alternatively, if their visa were cancelled on return to Australia they would be liable to being placed in immigration detention for an indefinite period or forcibly expelled to the country where they are at risk of grave harm.[7]
    - Refugees generally require permission from the Australian government to travel outside Australia. Among other things, for permission to be granted a delegate of the Minister must be satisfied that there are compassionate or compelling circumstances justifying that travel.[8] The process for obtaining this approval is sometimes uncertain and complex. The application demands sufficient English language skills to complete the relevant Departmental forms and provide sufficient evidence in support of their case. For many refugees in Australia this may not be possible.
    - For protection visa holders, any overseas travel must be as the holder of a Convention Travel Document (**CTD**) issued by the Australian government. Many countries worldwide impose strict criteria for the grant of visas to holders of these travel

[5] *Migration Regulations 1994* (Cth), Schedule 2, Part 866, cl 866.611 and Schedule 8, condition 8559; Schedule 2, Part 785, cl 785.611 and Schedule 8, cl 8570; and Schedule 2, Part 790, cl 790.611 and Schedule 8, cl 8570.
[6] *Migration Act 1958* (Cth), section 116.
[7] *Migration Act 1958* (Cth), section 197C.
[8] *Migration Regulations 1994* (Cth), Schedule 8, cl 8570.

documents, much higher than those for holders of Australian passports, and some countries refuse to recognise the travel document entirely. Further,

- CTD holders are not eligible for Australian consular protection overseas and are not considered by the Australian government as evidence of any right to re-enter or remain in Australia.[9] In an emergency, the CTD holder would be required to seek consular assistance from their country of nationality. Not only might this be potentially dangerous, any such re-availing of state protection from that country by that person can lead to their refugee status ceasing and grounds for the cancellation of their protection visa arising.[10]
- For refugees on permanent protection visas, due to the operation of Ministerial Direction 80, the only hope of them ever bringing their loved ones to Australia is if they are granted Australian citizenship (as that direction does not apply to Australian citizens sponsoring family). Eligibility for Australian citizenship is contingent on them meeting the residence requirements which does not generally allow travel outside Australia for long periods.
- Overseas travel can be very expensive, particularly because of the COVID-19 pandemic. For many refugees, even if the person is not prevented by the Australian government from travelling to the country where the immediate family members are residing, it may not be safe to do so. Following this, it may be necessary for the immediate family members to travel to a third country if one can be safely and legally accessed. This can be a further considerable expense. Many refugees in Australia may have not have the financial capacity to undertake such travel. Additionally, even if they did their work and/or family responsibilities in Australia may not allow them to do so.
- Finally, presently due to the COVID-19 travel restrictions, refugees in Australia require the approval of the Australian government to travel overseas (in addition to that approval above). Further, even if this further permission is granted, the person risks being stranded outside Australia for months or potentially years.

27. The Australian government has an ethical responsibility to respond fairly to such persons it has committed to providing international protection, to minimise rather than inflict additional harm and further suffering. This ethical duty arises from the fact that Australia has held itself out as a State which provides protection to such people ever since it acceded to the Refugee Convention; and also from the proximity of the relationship, where vulnerable people have arrived to Australian shores seeking our protection, or for refugees referred by UNHCR for resettlement in Australia, where Australia has made a firm commitment to protect and ensure the wellbeing of these vulnerable people.
28. As stated above, no compelling case has been put forward by the Government to justify the continuation of these discriminatory and disproportionate laws and policies.
29. As follows, Liberty Victoria recommends the three bars on family reunification referred to above be repealed to ensure equal access to family reunion for all protection visa holders.

[9] Australian Department of Foreign Affairs and Trade, Australian Passports Office, Non-citizen travel documents, available at: https://www.passports.gov.au/getting-passport-how-it-works/special-travel-documents/non-citizen-travel-documents [accessed 24/04/2021].
[10] *1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol*, Article 1C; and *Migration Act 1958,* section 116.

<u>Recommendation 1.1</u> - Temporary Protection visa and Safe Haven Enterprise visa holders be transitioned to permanent protection visas, or provision made for them to sponsor offshore immediate family members.
<u>Recommendation 1.2</u> - Ministerial Direction 80 be revoked, or alternatively, amended to ensure family visas lodged by immediate family of permanent protection visa holders who arrived by boat, are processed at the same priority as other family applications.
<u>Recommendation 1.3</u> - Repeal the bar on proposing immediate family for permanent protection visa holders who arrived by boat.

<u>The suitability and consistency of government policy settings for relevant visas with Australia's international obligations</u>

30. The statutory and policy frameworks governing family reunification for persons found to be a refugee or otherwise owed protection by the Australian government are inconsistent with Australia's international obligations and those representations and commitments it previously made to the international community in this regard.

Derivative status and the principle of family unity

31. Within the international protection system immediate and dependent family members of persons recognised to be refugees are eligible to receive 'derivative refugee status' in accordance with their right to family unity.[11] This principle of family unity has long since existed as a central component in international human rights instruments and jurisprudence. Beginning with the Universal Declaration of Human Rights[12], which states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State", most international instruments dealing with human rights contain similar provisions for the protection of the unit of a family.[13]

32. The principle of family unity with respect to refugees is expressly provided for in the preamble to the *1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol* (**the Refugee Convention**) to which Australia is a signatory. It directs to:

> […] take the necessary measures for the protection of the refugee's family, especially with a view to:
>
> (1) **Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country**,
>
> (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption. [emphasis added]

[11] See: UNHCR, Procedural Standards for RSD under UNHCR's Mandate, Processing Claims Based on the Right to Family Unity – 5.1 Derivative Refugee Status, available at: http://www.unhcr.org/43170ff81e.pdf [accessed 30/04/2021].
[12] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)
[13] See the *International Covenant on Civil and Political Rights*, article 23(1), and the *Convention on the Rights of the Child*, preamble.

33. This intention is further evidenced by the Final Act of the Conference of Plenipotentiaries which adopted the Refugee Convention (and to which an Australian delegation was a party):

> The Conference,
>
> Considering that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and
>
> Noting with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems the rights granted to a refugee are extended to members of his family,
>
> **Recommends Governments to take the necessary measures for the protection of the refugee's family**, especially with a view to:
>
> (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,
>
> (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.[14] [emphasis added]

34. Member states of the UNHCR Executive Committee have repeatedly affirmed state obligations in relation to family unity and reunification.[15] Furthermore, previously through its membership of this committee, the Australian government supported the following recommendations with respect to the principles of derivative status and family unity in the refugee and humanitarian context:

> 1. In application of the Principle of the unity of the family and for obvious humanitarian reasons, **every effort should be made to ensure the reunification of separated refugee families**.
>
> 2. For this purpose it is desirable that countries of asylum and countries of origin support the efforts of the High Commissioner to **ensure that the reunification of separated refugee families takes place with the least possible delay**.
>
> […]
>
> 5. It is hoped that countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family.
>
> […]
>
> 7. The separation of refugee families has, in certain regions of the world, given rise to a number of particularly delicate problems relating to unaccompanied minors. Every effort should be made to trace the parents or other close relatives of unaccompanied minors before their resettlement. Efforts to clarify their family situation with sufficient certainty should also be continued after resettlement. Such efforts are of particular importance before an adoption – involving a severance of links with the natural family – is decided upon.
>
> 8. In order to promote the rapid integration of refugee families in the country of settlement, **joining close family members should in principle be granted the same legal status and facilities as the head of the family who has been formally recognized as a refugee**.

[14] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: http://www.refworld.org/docid/40a8a7394.html [accessed 25/04/2021].
[15] Excom Conclusions on International Protection Nos. 1, 9, 15, 24, 84, 85, 88, 103, 104, and 107.

> 9. In appropriate cases family reunification should be facilitated by special measures of assistance to the head of family so that economic and housing difficulties in the country of asylum do not unduly delay the granting of permission for the entry of the family members.[16] [emphasis added]

35. The principle of family unity, and obligation of states to act in accordance with it, also derives from other international instruments to which Australia is a signatory, including: *International Covenant on Civil and Political Rights* (**ICCPR**), Articles 17 and 23 (which prevent interference with the family and require protection of the family unit); *International Covenant on Economic, Social and Cultural Rights*, Article 10; and *Convention on the Rights of the Child* (**CRC**), Articles 9 and 10. Respecting these rights requires that States refrain from actions which would separate family members and that States take measures to reunite separated family members.

36. The circumstances in which refugees leave their countries of origin frequently involve the separation of families. Consequently, family reunification is often the only way to ensure respect for a refugee's right to family unity.[17]

37. Family unity also facilitates integration into the local community and economic self-sufficiency. This benefits not only the individual but the Australian community.[18]

38. Further, implementing the right to family unity through family reunification for refugees and other persons in need of international protection has special significance because of the fact that they are not able to return to their country of origin.[19]

39. Respect for family unity is an important part of Australia's international obligations to provide rights to refugees who cannot avail themselves of protection and rights in their home countries and to facilitate durable solutions.[20]

40. Refusal to allow family reunification may also amount to an interference with the family[21], particularly in the refugee context, where travel to the country of origin is not possible and family reunification may be the only feasible way to reunite.

41. The Government's Statement of Compatibility with Human Rights that accompanied the amending Bill that inserted the current temporary protection statutory framework[22] asserted that the current family reunion prohibition policy is lawful under international law and is not discriminatory. This was based on the Government's view that it is reasonable to differentiate based on whether arrival is legal or "illegal" and that it is a legitimate objective to maintain the integrity of Australia's system of migration. However, this is contrary to Australia's duty to

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[16] UN High Commissioner for Refugees (UNHCR), Family Reunification, 21 October 1981, No. 24 (XXXII) - 1981, Executive Committee 32nd session. Contained in United Nations General Assembly Document No. 12A (A/36/12/Add.1). Conclusion endorsed by the Executive Committee of the High Commissioner's Programme upon the recommendation of the Sub-Committee of the Whole on International Protection of Refugees - available at: http://www.refworld.org/docid/3ae68c43a4.html [accessed 25/04/2021].

[17] Summary Conclusions on Family Unity, Expert Roundtable organized by the UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, 8-9 November 2001, at [9].

[18] K. Jastram and K. Newland, "Family Unity and Refugee Protection", 555-603, in E. Feller, V. Turk, and F. Nicholson eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (CUP, 2003), at 558. See also Summary Conclusions on Family Unity, Expert Roundtable organized by the UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, 8-9 November 2001, at [6].

[19] Summary Conclusions on Family Unity, Expert Roundtable organized by the UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, 8-9 November 2001, at [10].

[20] Ibid, at 558.

[21] Summary Conclusions on Family Unity, Expert Roundtable organized by the UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, 8-9 November 2001, at [5].

[22] Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Explanatory Memorandum, Attachment A - Statement of Compatibility with Human Rights.

refrain from discrimination on the basis of any status under the ICCPR. It is wrong to describe arrival by boat as illegal under international law because such arrival is sanctioned under the Refugee Convention and differentiation on this ground is not permitted. Refugee protection is an international exception to orderly migration, and it is well recognised that family unity protects and promotes the emotional, physical and financial wellbeing of individuals.[23]

42. Further, Article 31(1) of the Refugee Convention relevantly obligates signatories as follows:

> The Contracting 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, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. [emphasis added]

43. And Article 26 of the ICCPR relevantly provides:

> **All persons are equal before the law and are entitled without any discrimination to the equal protection of the law**. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**. [emphasis added]

44. The legal and practical effects of the current statutory and policy frameworks deny many refugees the right to family unity. These legal and policy frameworks are inconsistent with Australia's international obligations and the international protection system, and are contrary to previous commitments made by the Australian government.

45. Liberty Victoria recommends these discriminatory laws and policies applicable to family reunion visas be abolished to ensure equal access to family reunion for all protection visa holders.

<u>Recommendation 2</u> - The discriminatory laws applicable to family reunion visas be abolished to ensure equal access for all protection visa holders and consistency with Australia's international obligations and those representations it has made to the international community.

<u>Cost of applying for relevant visas</u>

46. The existing visa application and other processing charges for family visas are excessive and operate in practice to unnecessarily extend the separation of families. As outlined previously, the separation of families, including parents with minor children, can have significant physical and psychological effects on those affected.

47. Currently, the Visa Application Charge (**VAC**) to lodge a partner visas costs $7,715 AUD plus an additional $3,860 AUD per dependent applicant aged 18 years and over, plus $1,935 AUD for dependent children under 18.[24] Following this, for a family with two minor children the initial visa application charge would be $11,585 AUD.

48. In addition to the VAC, there are further fees and charges payable prior to visas for family members being granted. These include charges for heath checks, police clearances and

[23] Summary Conclusions on Family Unity, Expert Roundtable organized by the UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, 8-9 November 2001, at [6] and K. Jastram and K. Newland, "Family Unity and Refugee Protection", 555-603, in E. Feller, V. Turk, and F. Nicholson eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (CUP, 2003), at 557.
[24] *Migration Regulations 1994* (Cth), Schedule 2, items 1129 and 1124B.

service fees charged by the Australian government contractors who receive documents and collect biometric information on the government's behalf outside Australia.[25] These additional fees add up to thousands of dollars for many applicants.

49. Relative to visa application fees in comparable countries, the cost of applying for a partner visa in Australia is exceptionally high. For example, the cost of lodging a partner visa application in other countries are as follows:

    - United Kingdom - $2,843 AUD[26], but this may be waived in some circumstances[27];
    - Canada - $550 CAD[28];
    - New Zealand – approximately $ 1,480 NZD[29]; and
    - United States - filing fee $535.00 USD plus $325.00 USD and other similar processing fees.[30].

50. These excessive fees charged by the Australian government operate in practice to prohibit many vulnerable and disadvantaged people from being reunited with their loved ones.

51. It is recommended that the fees and charges applicable to family reunion visas be lowered significantly and a fee exemption be introduced for holders of protection visas and where the payment of those fees would cause serious financial hardship.

Recommendation 3 - The fees and charges applicable to family reunion visas be lowered significantly and a fee exemption be introduced for holders of protection visas and where the payment of those fees would cause serious financial hardship.

Other matters – survivors of family violence

52. Current migration program settings do not adequately protect survivors of family violence, nor do they appropriately take into account the views of survivors of family violence. In many cases, they undermine existing family violence policies and programs developed in Australia that have been built upon consultation with people with lived experience.

53. This is evident from the following features of the program:

    - *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 90**), made by Alex Hawke, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, which came into effect on 15 April 2021 and which governs how all decision-

[25] Department of Home Affairs, Contact Us, Offices outside Australia, available at: https://immi.homeaffairs.gov.au/help-support/contact-us/offices-and-locations/offices-outside-australia [accessed 26/04/2021].
[26] United Kingdom Home Office, Visa application fees, available at: https://visa-fees.homeoffice.gov.uk/y/australia/aud/join-family/all [accessed 26/04/2021].
[27] United Kingdom Home Office, Family visas: apply, extend or switch, available at: https://www.gov.uk/uk-family-visa/partner-spouse [accessed 26/04/2021].
[28] Government of Canada Immigration Fee Schedule, available at: https://www.immigration.ca/government-of-canada-immigration-fee-schedule [accessed 26/04/2021].
[29] New Zealand Immigration, Fees, decision times and where to apply, available at: https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/tools-and-information/tools/office-and-fees-finder [accessed 26/04/2021].
[30] United States State Department, Travel.State.Gov > U.S. Visas > Fees for Visa Services, available at: https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/fees-visa-services.html [accessed 26/04/2021].

makers must approach visa refusal and cancellation on character grounds under the Act.

- The absence of visa criteria exceptions for victims of family violence in many classes of visas, including partner visas lodged offshore and protection visas.
- As is set out elsewhere in these submissions, visa refusal and cancellation can lead to long-term (and indefinite) detention, permanent separation of families, and forcible and permanent removal from Australia (including in breach of Australia's non-refoulement obligations). The Direction makes clear that all persons who are believed to have engaged in broadly-defined family violence should be refused visas or have their visas cancelled, even where there are 'strong countervailing circumstances'.

54. In our view, the Direction is unsafe, unclear and poorly considered. It has dangerous implications for survivors of family violence, including:
    - The permanent separation of children in Australia from their parents, potentially in breach of Australia's obligations under the CRC and ICCPR;
    - Survivors may be subjected to paternalist and disempowering intervention in their lives and against their wishes, including the permanent separation of a family unit they seek to preserve or removing access to future support from perpetrators, including financial;
    - Survivors may be deterred from seeking the assistance of police or other services, given the seriousness of consequences for people said to have perpetrated family violence, and this fear may be leveraged by perpetrators;
    - Misuse of the IVO system is recognised as a form of violence that can be used by perpetrators against survivors. Accordingly, survivors may have their visas refused or cancelled; and
    - The bluntness and lack of clarity of the Direction is likely to result in uncertainty and unjust outcomes.
55. Liberty Victoria also notes that the visa criteria exceptions for survivors of family violence are insufficient. Only a small cohort of survivors have appropriate protections, including people who have applied for a partner visa onshore and people who have been granted a temporary partner visa. This results in survivors excluded from these protections – including asylum seekers – staying in abusive and dangerous relationships.
56. There is also a remarkable lack of awareness of the existing protections in the Australian community. This again leads to survivors staying in abusive and dangerous relationships.

<u>Recommendation 4.1</u> - Ministerial Direction 90 be urgently repealed and replaced with a Direction that is drafted after broad and inclusive consultation, which foregrounds the wishes of survivors and protects early intervention programs targeting family violence across Australia.

<u>Recommendation 4.2</u> - Visa criteria exception protections extend to all survivors onshore who are secondary applicants for temporary or permanent visas dependent on a perpetrator's primary application.

<u>Recommendation 4.3</u> - A broad enquiry be held into the efficacy of family violence mechanisms within the migration program to ensure survivors' safety and further the critical work of preventing family violence.

<u>Other matters – transitory persons</u>

57. Currently, there are a number of people in Australia deemed to be 'transitory persons' for the purposes of the Act, who have been transferred here from Nauru and Papua New Guinea. These people previously arrived in Australia by boat without a visa and were transferred to those other countries where their refugee claims were assessed under the laws of those states. Under the Act, these people are prevented from applying for visas while in Australia unless the Minister personally finds that it is in the public interest to invite them to do so.[31]

58. Liberty Victoria understands that many of these medical transferees have been found to be refugees, some are waiting on their refugee determination process to be finalised, and others have been found not to be refugees by those regional processing countries' governments.

59. Many of these transferees reside in the Australian community on bridging visas, including with their immediate family. However, a number of these people continue to be held in immigration detention and denied the grant of a bridging visa. Some of these who remain in immigration detention are known to have wives and minor children living in the Australian community.

60. It is our submission that preventing the reunification of these families, many of whom have been found to be highly vulnerable and survivors of serious human rights abuses is cruel and unjust. We also contend that the stated policy purpose, a deterrent for other potential asylum seekers who may seek to travel to Australia by boat, is both unfounded and disproportionate to the harm caused to these people and their young children and wives. Furthermore, this policy is also inconsistent with Australia's international obligations and commitments referred to earlier.

<u>Recommendation 5</u> - The Minister grant bridging visas to all medical transferees with immediate family residing in the Australian community.

<u>Other matters – visa refusals and cancellations under s 501</u>

61. Visa refusals and cancellations have extraordinary consequences for individuals and families, including detention (including indefinite detention or detention in remote locations), family separation (sometimes permanent), forcible removal from a country, loss of refugee protection, potential refoulement to situations of persecution and serious harm, and serious psychological consequences. As was observed by Chief Justice Allsop, in some circumstances, cancellation is "*potentially life-destroying*".[32]

62. The law governing cancellation is complex, with numerous opportunities during a refusal or cancellation process for an individual to lose access to their rights, which is exacerbated by individual or socioeconomic disadvantage.

63. For the purposes of this Inquiry, Liberty Victoria focuses on the catastrophic effect of refusal or cancellation for families, including on children.

[31] *Migration Act 1958* (Cth), s 46B(1).
[32] *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 at [45].

64. The following features of Australia's cancellation regime make plain these devastating effects:

- Many thousands of people and families are affected. Between 1 January 2015 and 30 April 2020, 7,640 people were detained as a result of cancellation due to criminal offending *alone*. The countries of citizenship most highly represented were New Zealand, Vietnam and the United Kingdom. Over the same period and cohort, 30,137 people were removed from Australia.[33]
- There is no minimum standard of offending that can attract visa refusal or cancellation. People face this action on the result of charges alone. Some people with no criminal convictions have their visas cancelled. As at 30 June 2020, drug offences and assaults (which do not necessarily involve the application of force) are the most common types of offending attracting visa cancellation.[34]
- There are no protections for people who have lived in Australia for extended periods, since they were children, or for the majority of their lives.
- There are no protections or exclusions for people with parents, partners or children in Australia. Many individuals who have been resident in Australia since they were small children and who now may have grandchildren face these processes. Many individuals with small children to care for face these processes.
- Whilst the best interests of any minors are taken into account as a primary consideration in refusal or cancellation discretions, the strength of a person's ties to Australia are only an 'other' consideration, potentially at odds with Australia's obligations regarding family unity under the International Covenant on Civil and Political Rights.
- Family separation is generally permanent. People who have had a visa refused or cancelled under s 501 have minimal chance of remaining in or returning to Australia in their lifetime.
- Special Return Criterion 5001 applies to prevent people with s 501 refusals or cancellations from entering Australia.
- Section 501E of the Act prevents people whose visas have been refused or cancelled from making any further visa application, other than a protection visa.
- Protection visas can be refused on character and on other bases, even if the person is found to be a refugee.
- People whose visas have been refused or cancelled under s 501 are almost without exception detained, often in remote locations including at the Yongah Hill Immigration Detention Centre and the Christmas Island Immigration Detention Centre.
- Illustratively, as at June 2020, he average length of time for people who had applied for a protection visa was 978 days, and 106 people who had so applied had been in detention for greater than 5 years;[35]

[33] Department of Home Affairs, Freedom of information, FOI disclosure logs 2020, FA 20/04/01078.
[34] 'Visa statistics', Department of Home Affairs, available at https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation.
[35] Department of Home Affairs, Freedom of information, FOI disclosure logs 2020, FA 20/06/01001.

- As at 30 June 2020, there were 1,088 people in held detention who had been detained for over five months;[36]
- Between 1 January 2020 and 30 June 2020, there were 356 self-harm incidents in held detention facilities;[37]
- There have been at least 24 deaths in immigration detention since July 2013;[38]
- It is difficult to visit or access immigration detention, including to stay in contact via telephone or internet.
- Family members whose visas are cancelled or refused may face return to serious harm, including torture and death. Section 197C of the Act makes plan that there is an obligation to remove a person from Australia regardless of whether Australia owes international non-refoulement obligations in respect of that person. The harm to a family of having a family member returned and harmed cannot be estimated.

<u>Recommendation 6.1</u> - A new Ministerial Direction be made with increased protections against visa refusal or cancellation for people who have lived in Australia for over 10 years and people who have established families in Australia.
<u>Recommendation 6.2</u> - Consideration of visa cancellation and refusal should be subject to clear time limits to prevent undue delay and harm to families.
<u>Recommendation 6.3</u> - An effective and regular detention review mechanism ought to be legislated, entitling a person to appear before an independent body regarding the appropriateness of their ongoing detention.

<u>Conclusion</u>

65. Separation from family can have significant long-term adverse effects on a person's mental health and general welfare. The effects of separation are made worse where a person has a history of torture or trauma, and where a person faces linguistic and cultural barriers in their country of residence. For many refugees and disadvantaged migrants, the safety of family members is often the most pressing concern and the cause of constant distress. Those prevented from reuniting with family are denied this crucial aspect of rebuilding and furthering their lives with the comfort and security of loved ones.
66. The policy rationale for imposing legal and practical barriers to family reunion must be compelling and proportionate to the serious harm caused to those affected, and consistent with Australia's international obligations and those commitments it has made to the international community. No case has been provided by the Australian government that meets either of these criteria in respect of the matters to which we have referred.

<u>Recommendations</u>

67. In summary, our recommendations are as follows:

[36] Department of Home Affairs, Freedom of information, FOI disclosure logs 2020, FA 20/09/00642.
[37] Department of Home Affairs, Freedom of information, FOI disclosure logs 2020, FA 20/09/00642.
[38] Department of Home Affairs, Freedom of information, FOI disclosure logs 2021, As at March 2021: FA 21/02/00572.

Recommendation 1.1 - Temporary Protection visa and Safe Haven Enterprise visa holders be transitioned to permanent protection visas, or provision made for them to sponsor offshore immediate family members.
Recommendation 1.2 - Ministerial Direction 80 be revoked, or alternatively, amended to ensure family visas lodged by immediate family of permanent protection visa holders who arrived by boat, are processed at the same priority as other family applications.
Recommendation 1.3 - Repeal the bar on proposing immediate family for permanent protection visa holders who arrived by boat.
Recommendation 2 - The discriminatory laws applicable to family reunion visas be abolished to ensure equal access for all protection visa holders and consistency with Australia's international obligations and those representations it has made to the international community.
Recommendation 3 - The fees and charges applicable to family reunion visas be lowered significantly and a fee exemption be introduced for holders of protection visas and where the payment of those fees would cause serious financial hardship.
Recommendation 4.1 - Ministerial Direction 90 be urgently repealed and replaced with a Direction that is drafted after broad and inclusive consultation, which foregrounds the wishes of survivors and protects early intervention programs targeting family violence across Australia.
Recommendation 4.2 - Visa criteria exception protections extend to all survivors onshore who are secondary applicants for temporary or permanent visas dependent on a perpetrator's primary application.
Recommendation 4.3 - A broad enquiry be held into the efficacy of family violence mechanisms within the migration program to ensure survivors' safety and further the critical work of preventing family violence.
Recommendation 5 - The Minister grant bridging visas to all medical transferees with immediate family residing in the Australian community.
Recommendation 6.1 - A new Ministerial Direction be made with increased protections against visa refusal or cancellation for people who have lived in Australia for over 10 years and people who have established families in Australia.
Recommendation 6.2 - Consideration of visa cancellation and refusal should be subject to clear time limits to prevent undue delay and harm to families.
Recommendation 6.3 - An effective and regular detention review mechanism ought to be legislated, entitling a person to appear before an independent body regarding the appropriateness of their ongoing detention.

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