

Human
Rights
Law
Centre.

Families Belong Together

Submission to the Senate Legal and Constitutional
Affairs Committee inquiry into family reunion

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Human Rights Law Centre

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Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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1. Summary

- 1.1. The Human Rights Law Centre (**HRLC**) welcomes the opportunity to provide input into the Committee's 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**).
- 1.2. Everyone deserves to be together with their loved ones. But Australia's family migration system is broken and in urgent need of repair. Through punitive and discriminatory policies, exorbitant costs and unreasonable delays, the Australian Government is keeping thousands of people separated from their loved ones. Couples do not know when they will see each other again, children are deprived of the care of their parents, and older relatives are left isolated and alone.
- 1.3. Our migration policies are failing all families, but none more so than those who have sought safety in Australia. The deliberate and systematic separation of refugee families, designed to punish and deter people from seeking safety in Australia, is harmful, unlawful and in some cases amounts to torture.¹
- 1.4. The Human Rights Law Centre has worked for many years with families who have been separated or prevented from reuniting by Australian Government policy. We have worked to reunite families who were separated between Australia and places of offshore detention through a major UN complaint and legal action in Australia. We have witnessed the extreme emotional and physical toll that prolonged separation has on children and parents, loving partners, and brothers and sisters.
- 1.5. Our submission addresses just some of the grave flaws in current family migration policies:
 - **Our migration system is failing families**, through unreasonable delays caused by rigid caps on the number of visas granted each year, exorbitant costs that create a two-tier system favouring wealthy families, and a narrow understanding of 'family' that excludes some people from ever reuniting with loved ones.
 - The Australian Government is **deliberately keeping refugee families apart**, through endless deprioritisation under Direction 80, a complete bar on family reunion for temporary protection visa holders, and offshore detention policies.
 - Australia's family separation policies are in **breach of international human rights law**, including rights protected in the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child* and the *Convention Against Torture*.
 - **The disregard for family unity is widespread** and evident in other discriminatory policies that keep families apart, like unreasonable delays in processing citizenship applications, the 10-year exclusion period for identity refusals, and the proposed English language test for Partner visas.
- 1.6. In considering the many barriers families face while trying to navigate the hostile bureaucracy of our migration system, we urge the Committee to ask: what is gained from making some members of the Australian community miss a decade of their lives with their partners or children?
- 1.7. The Australian Government's willingness to leave families separated for years on end is at odds with the values shared by many people and communities across Australia. As we look to recommence migration following the unprecedented border restrictions associated with COVID-19, the Australian Government has an opportunity to reimagine the future of Australia's migration policy – to prioritise reuniting loved ones who are separated and to keep families at the heart of our country's growth.

¹ The intentional separation of refugee families is detailed in the Human Rights Law Centre's recent multi-disciplinary report *Together in Safety*, published in April 2021 and attached to this submission. It is also available at <https://www.hrlc.org.au/together-in-safety>.

Recommendations

1	Permanently increase family visa planning levels, to address the growing backlog of visa applications and extreme processing delays.
2	Reduce and standardise visa application costs, and introduce financial hardship waivers, to ensure that family reunion is accessible to everyone regardless of circumstances.
3	Adopt an inclusive understanding of ‘family’ and provide pathways for all family members to reunite.
4	Abolish Direction 80 and the processing priorities applicable to the Special Humanitarian Program, so that no families are separated indefinitely simply because of their mode of arrival.
5	Abolish temporary protection visas and grant permanent status to long-term temporary visa holders and people brought to Australia from offshore detention, so that all people owed protection in Australia can have the same access to family visas as other long-term residents and the certainty and stability to thrive.
6	End offshore processing, to ensure families are never again deliberately torn apart between Australia and Nauru or Papua New Guinea.
7	Abandon the discriminatory plan to introduce an English language test for Partner visa applicants and sponsors, which will harm women and keep families apart.
8	Repeal the identity exclusion period in PIC4020 which unfairly targets refugees and humanitarian migrants, and prevents people from reuniting for a decade.
9	End the unreasonable delay of citizenship applications, especially for people whose only pathway to family sponsorship is as an Australian citizen.
10	Establish a fair and fast humanitarian family reunion visa stream, available to all refugees regardless of visa status or mode of arrival.
11	Make family unity an express priority of Australia’s migration system, and a primary consideration in all visa, border and policy decisions.

2. The migration system is failing families

- 2.1. At its core, our migration system should value family unity and seek to create a thriving and diverse nation. Instead, our system is failing families. As the Australian Government prioritises increasingly selective migration, families are facing financial, technical and bureaucratic barriers which put the prospect of reuniting out of reach for many.

2.1 Visa backlog and unprecedented processing delays

- 2.1.1. People seeking to reunite with their loved ones in Australia are experiencing unjustifiable delays, as a growing backlog of applications is causing processing times to increase.
- 2.1.2. At the end of the last financial year, there were more than 200,000 people waiting for a family visa.² This backlog has been growing for several years. It is an increase of approximately 50,000 people since 2015-16.³
- 2.1.3. As a result, the expected waiting time for a permanent partner visa for someone who applies from outside Australia (and is not subject to Direction 80, discussed below) is now 17 to 24 months.⁴ For some types of parent visas and other relative visas, the expected waiting times are as long as 30 to 50 years.⁵
- 2.1.4. With these waiting times, parents may miss their child's first steps, or first day at school. Grandparents may never see their grandchildren in their lifetime.
- 2.1.5. It is crucial to understand that these waiting times are not a result of the actual time cost to the Department of Home Affairs. This problem is not caused simply because the Department is lacking resources or is overwhelmed by demand. The backlog and waiting times are a result of the Australian Government's decision over several years to *reduce* the number of family visas available each year.
- 2.1.6. In 2013-13, there were 60,185 family visas granted.⁶ In 2019-20, there were just 41,961 family visas granted.⁷ This trend is demonstrated in particular in the reduction of Partner visas, which have dropped from 47,825 in 2016-17 to 37,118 in 2019-20.
- 2.1.7. The Australian Government has refused to grant more family visas in line with demand, despite the fact that s 87 of the *Migration Act 1958* (Cth) (**Act**) makes it unlawful to impose a cap on the number of Partner or Child visas to be granted each year.
- 2.1.8. Tens of thousands of people have had their lives put on hold by these delays, and lost precious years with their families.
- 2.1.9. In 2020, in response to the significant reduction in immigration resulting from the COVID-19 pandemic, the Australian Government announced a one-off increase in Partner visa places – the first increase in over five years. This is a positive development, but the majority of those additional visas will be granted to people who are already in Australia, providing little comfort to families who have been separated for years.
- 2.1.10. To truly address the growing visa backlog and waiting times, and to bring families back together after years of separation, we need a permanent increase in family visa planning levels to reduce the backlog and decrease visa processing times.

² Department of Home Affairs, *2019 – 20 Migration Program Report* (Report, December 2020) available at <https://www.homeaffairs.gov.au/research-and-stats/files/report-migration-program-2019-20.pdf>.

³ Department of Home Affairs, *2015–16 Migration Programme Report* (Report, 2016) available at <https://www.homeaffairs.gov.au/research-and-stats/files/2015-16-migration-programme-report.pdf>.

⁴ Department of Home Affairs, 'Global visa processing times', (Webpage, last updated 19 April 2021) available at <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/global-visa-processing-times>.

⁵ Department of Home Affairs, 'Other Family visas – queue release dates and processing times' (Webpage, last updated 19 February 2021) available at <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/other-family-visas-queue-release-dates>; Department of Home Affairs, 'Parent visas - queue release dates and processing times' (Webpage, last updated 19 February 2021) available at <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/parent-visas-queue-release-dates>. The only way to avoid that extraordinary waiting period is to apply for a different type of parent visa, which costs close to \$50,000 and is out of reach for most families.

⁶ Department of Home Affairs, *2012–13 Migration Program Report* (Report, October 2014) available at <https://www.homeaffairs.gov.au/research-and-stats/files/report-on-migration-program-2012-13.pdf>.

⁷ Above n 2.

2.2 Exorbitant visa fees and hidden costs

- 2.2.1. The right to be together as a family should never depend on wealth. In Australia, the cost of applying for family visas is prohibitive for many families.
- 2.2.2. In July 2012, the Partner visa application fee was \$2,060. Since that time it has increased to \$7,715.⁸ An additional fee of \$1,935 per child under 18 years means that for many families, the right to be together in Australia comes at a cost of more than \$10,000 in visa fees.
- 2.2.3. As with other parts of our migration program, the Australian Government has implemented a two-tier system that favours those who can pay extra. A regular Parent visa, for example, costs \$6,415 but will not be processed for 30 years, making the application process effectively futile.⁹ A Contributory Parent visa, however, can be processed in 4-5 years, but costs \$47,755 (per person). Reuniting with parents is therefore an option available only to significantly wealthy families.
- 2.2.4. The costs of the family migration process do not end with the visa application fee. The complexity of our migration laws requires most people to pay for advice from a migration lawyer or agent, typically amounting to several thousands of dollars. Some will then need to pay for review processes in the Administrative Appeals Tribunal or the courts. Then there are the costs of document translations, police clearances, medical checks and flights. The result is a system in which family unity is increasingly attainable only by the wealthy, or at crippling expense.
- 2.2.5. People who want to share their lives with their closest family members should not be treated by the Australian Government as a revenue-raising opportunity. Application costs must be equitable and accessible to all families, regardless of their circumstances.

2.3 An exclusionary understanding of family

- 2.3.1. For some people, the narrow interpretation of ‘family’ reflected in our migration laws means that no expense, and no amount of waiting, will ever allow them to reunite with their loved ones.
- 2.3.2. Family visas are available for partners, children, parents, carers, orphan relatives, aged dependent relatives and ‘remaining’ relatives. It is not possible to sponsor siblings, aunts or uncles, cousins, adult children or other extended or informal family members regardless of the crucial role they may play in family life or in caring for children.
- 2.3.3. Narrow definitions of ‘family unit’ and ‘immediate family’ in the Migration Regulations also exclude some people from the split family provisions of the Special Humanitarian Program, and prevent some families from applying for protection visas as a family unit (including where children turn 18 while waiting for a protection application to be processed).¹⁰
- 2.3.4. For refugee families in particular, vital family relationships often extend beyond the ‘nuclear’ or ‘immediate’ family unit. The impact of persecution and displacement means that “refugee families are often reconstructed out of the remnants of various households, who depend on each other for mutual support and survival. These families may not fit neatly into preconceived notions of a nuclear family... In some cases the difference in the

⁸ Department of Home Affairs, ‘Partner visa (apply overseas) (Subclasses 309 and 100)’ (Webpage, last updated 18 March 2021) available at <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/partner-offshore>.

⁹ Above n 5.

¹⁰ See *Migration Regulations 1994* (Cth), reg 1.12 and 1.12AA.

composition and definition of the family is determined by cultural factors, in others it is a result of the refugee experience.”¹¹

- 2.3.5. Many people remain separated from their loved ones because of the inflexible and narrow concepts of family which determine visa eligibility. Our migration system must understand and account for the reality that, due to cultural factors or circumstances, families often extend beyond spouses and their children and include others who may or may not be related by blood, but are emotionally, socially and financially important members of a family.

Recommendations:

- Permanently increase family visa planning levels.
- Reduce and standardise visa application costs, and introduce financial hardship waivers.
- Adopt an inclusive understanding of ‘family’ and provide pathways for all family members to reunite.

3. Intentional separation of people seeking safety

- 3.1. The family migration system is failing all families, but none more so than those who have sought safety in Australia. People who are refugees face not only significant costs and growing delays – they are up against deliberate and coercive strategies which systematically prevent them from reuniting with their loved ones. For years, the Australian Government has used family separation as a tool to punish and deter people from seeking safety here.

3.1 Family separation is a deliberate policy

- 3.1.1. When fleeing persecution or threats to their lives, many refugees find themselves separated from family or forced to make the agonising decision to leave loved ones behind. Because of the danger they have fled, and the conditions imposed on their visas, refugees who make it to safety in Australia are unable to return to visit the family they have left.
- 3.1.2. Prolonged separation is difficult for all families, but is especially damaging for people whose family members remain in conflict areas or facing persecution and discrimination. Family members may be at risk of harm or death, or be forced to flee again to other countries of asylum. Profound uncertainty about the safety and wellbeing of loved ones in precarious situations causes immeasurable distress to the mothers, fathers, husbands and wives who have resettled in Australia.
- 3.1.3. Every effort should be made to urgently bring families back together where they have been separated in the course of seeking safety. But for almost a decade, the separation of families and the prevention of family reunion have been key elements of the Australian Government’s refugee policies.
- 3.1.4. Frequent, regressive changes to refugee policy have meant that people who seek safety in Australia are entitled to different visas, and have different rights, depending on factors like when they arrived in Australia or when their visa was granted. For those who travel by boat, some are sent to offshore detention in Nauru and Papua New Guinea, some are given only temporary protection, and others who arrived many years ago have been granted permanent residence. For people in each of these circumstances, the Australian Government has introduced laws and policies that are designed to keep families apart.

¹¹ UN High Commissioner for Refugees, *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context* (June 2001) available at www.refworld.org/docid/4ae9aca12.html.

- 3.1.5. There are three main ways that families are separated – through endless deprioritisation, complete bar on family sponsorship, or offshore detention. With each year that these policies continue, they do greater and greater harm to families.

3.2 Separation by endless deprioritisation

- 3.2.1. Like other permanent residents, people who hold permanent protection visas can apply to bring immediate family members to Australia through the family migration program. However, the Minister for Immigration, Citizenship and Multicultural Affairs has issued a policy known as Direction 80¹² which dictates that all visa applications for family members of people who arrived by boat are to be given ‘lowest processing priority’. The constant demand for family visas means those ‘lowest priority’ applications will likely never be considered.
- 3.2.2. The effect of the Direction is that thousands of people with refugee status who are living in Australian communities are prevented from ever successfully bringing family members to reunite with them in Australia. Despite paying the application fees and satisfying the criteria for the visa, their applications are never processed. We are aware of many families who have been waiting for their applications to be processed since the policy was introduced in 2013.
- 3.2.3. There is an exception to the order of priority in ‘compassionate’ circumstances, where there are ‘compelling reasons’ to depart from the rule. However, the Direction provides no guidance on when this exception applies, and migration lawyers who act for clients in this area report that the Australian Government requires applicants to show extreme circumstances in order for the exception to apply. We are aware of anecdotal reports that even where the exception is applied, applications are still unreasonably delayed.
- 3.2.4. In 2015 the Australian Human Rights Commission found that the previous version of the Direction constituted an arbitrary and unlawful interference with family, in violation of articles 17 and 23 of the *International Covenant on Civil and Political Rights*.¹³ When the legality of that Direction was also challenged in the High Court of Australia, the Minister withdrew the Direction and replaced it with one which allowed an exception to the order of priority where an application would otherwise be unreasonably delayed. But in 2018, that position was reversed, and today applications continue to be deprioritised despite commonly experienced delays of over five years.
- 3.2.5. People who hold permanent humanitarian or refugee visas are alternatively able to apply to bring immediate family members to Australia under the Special Humanitarian Program, which provides a limited number of visas each year, as set by the Minister. However, Government policy, long delays and the huge demand for these visas make family reunion through the Special Humanitarian Program a similarly unattainable option for most people, and effectively impossible for those who arrived by boat. As with Direction 80, Government policy dictates that applications under the Special Humanitarian Program are to be processed according to a set order of priority. People who travelled to Australia to seek asylum, either by boat or by plane, are the lowest processing priority.¹⁴

¹² David Coleman, Minister for Immigration, Citizenship and Multicultural Affairs, *Ministerial Direction 80 – Order for Considering and Disposing of Family Visa Applications*, issued 21 December 2018. Before Direction 80 was issued, similar policies were in place – see *Ministerial Direction 62 – Order for considering and disposing of Family Stream visa applications*, issued 19 December 2013, and *Ministerial Direction 72 - order for considering and disposing of Family visa applications*, issued 13 September 2016.

¹³ *CM v Commonwealth of Australia (Department of Immigration and Border Protection)* [2015] AusHRC 99, p.5.

¹⁴ Department of Home Affairs, *Procedural Instruction: Offshore Humanitarian Program Management and Class XB (Refugee and Humanitarian) visa processing* (reissued 10 December 2019), s 3.3.

3.3 Separation by complete bar on family reunion

- 3.3.1. Despite being recognised as refugees and becoming long-term residents in Australian communities, people who hold temporary protection visas (including Safe Haven Enterprise Visas) and people brought to Australia from offshore detention are completely barred from ever applying to bring their partner, children or other family members to come to live with them in Australia.¹⁵ Their status in Australia is permanently temporary.
- 3.3.2. People who hold Safe Haven Enterprise Visas, and who meet certain pathway requirements, may later be eligible to apply for other classes of permanent visas that would permit them to sponsor family members. However, the pathway to other visas is highly uncertain and only open to the select few people who are able to meet the criteria for a subsequent visa. Even then, people who arrived by boat will be subject to endless deprioritisation due to Direction 80.
- 3.3.3. This complete bar on family reunion is applied retrospectively to people who arrived in Australia before these laws were introduced. Tens of thousands of people across the Australian community are affected by this policy, and their partners and children remain overseas. In many cases, children have now endured almost a decade of their childhood arbitrarily deprived of the care of one of their parents.
- 3.3.4. Temporary protection visas are flawed and harmful – they deny people the stability and certainty necessary to rebuild their lives, and they re-traumatise people by forcing them to recount experiences of persecution on a recurring basis. They also keep people indefinitely separated from family. Temporary protection visas should be permanently abolished, and current holders should be granted permanency and the same rights to family reunion as other long-term residents.

3.4 Separation due to offshore detention

- 3.4.1. Any person seeking asylum who arrives in Australia by boat after 19 July 2013 is subject to forced transfer to detention in Papua New Guinea or Nauru.¹⁶ This policy remains in force.
- 3.4.2. The policy makes no exceptions for people with close family in Australia. As a result, family members who arrived on different dates and people who already had family members in Australia have been separated for years on end.
- 3.4.3. In many instances, family members who arrived by boat in Australia prior to 19 July 2013 were given protection and have settled in Australia, but their relatives who arrived after that arbitrary date were taken to Nauru or Papua New Guinea. In other cases, family members who settled in Australia years earlier are Australian citizens, and have been forced to watch as their brothers and sisters, mothers and children, husbands or wives who arrived after the introduction of the harsh new policies, have suffered in offshore detention.
- 3.4.4. Most families separated in this way have been reunited under the now-repealed Medevac laws or through other legal action. But for some the separation continues today, as the only option for permanent safety is to resettle in the United States and leave family in Australia behind. During eight years of life in Papua New Guinea, some people have also started families with Papua New Guinean citizens, but those partners and

¹⁵ Temporary visa holders who arrived in Australia by boat are expressly excluded from sponsoring family members under the Special Humanitarian Program: *Migration Regulations 1994* (Cth), sch 2 clause 202.211(2)(e). Temporary visa holders are otherwise prevented from sponsoring any general family visas, as the criteria for family visas include that the sponsor is an Australian citizen, permanent resident or eligible New Zealand citizen. See eg the criteria for a Partner (Subclass 100) visa, including the definition of ‘sponsoring partner’ in the *Migration Regulations 1994* (Cth), sch 2, clause 100.111. People brought to Australia from offshore detention are classified as “transitory persons” and are barred from applying for any visas in Australia (and are consequently barred from sponsoring family visas) – s 46B of the Migration Act.

¹⁶ Section 198AD of the Migration Act requires that ‘unauthorised maritime arrivals’ be taken to a ‘regional processing country’.

children are not recognised by the Australian Government. There is no prospect for people in this situation to resettle in the United States with their family, or to bring their family to Australia.

- 3.4.5. The Australian Government has also deliberately separated families in situations where one family member needed to be evacuated from offshore detention for urgent medical treatment in Australia, but other family members were forced to stay behind.
- 3.4.6. Government whistleblowers have confirmed that refusing to allow family members to travel was part of an ‘unofficial policy’ to use family separation as a coercive measure to encourage refugees in split families to agree to return to Nauru or Papua New Guinea despite their health and safety concerns, or even to abandon their protection claims.¹⁷
- 3.4.7. This ‘unofficial policy’ was frequently implemented against women who were experiencing pregnancy complications and were taken to Australia for treatment or to give birth. Their husbands or partners were not permitted to travel with them. These fathers were forced to miss the birth of their children, and these mothers were left to care for their newborns alone.
- 3.4.8. People who have since been transferred to Australia and reunited with family have no certainty that they will not be separated again while the offshore processing policy remains in force.

Recommendations:

- Abolish Direction 80 and the processing priorities applicable to the Special Humanitarian Program, so that no families are separated indefinitely simply because of their mode of arrival.
- Abolish temporary protection visas and grant permanent status to long-term temporary visa holders and refugees who are barred from applying for protection visas, to enable family sponsorship.
- End offshore processing, to ensure families are never again deliberately torn apart.

4. Human rights law implications

- 4.1. The importance of family is recognised by international law. The rights to have a family and be with your family are among the basic freedoms that governments must respect to allow everyone to live safely and without fear. In keeping families apart, the Australian Government is falling short of its promises to adequately protect and promote human rights.
- 4.2. Family unity is protected by an overlapping matrix of legal safeguards contained in the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment* and the *Convention on the Rights of the Child*.¹⁸ These are minimum standards that governments have agreed to uphold, recognising the importance of families a healthy and thriving society and the suffering that is caused by family separation.

¹⁷ Ben Doherty, ‘Border Force tells Nauru refugees to separate from family if they want to settle in US’, *The Guardian* (online, 6 December 2017) available at <https://www.theguardian.com/world/2017/dec/06/border-force-tells-nauru-refugees-to-separate-from-family-if-they-want-to-settle-in-us>.

¹⁸ These include the right of families to protection and assistance; the right to freedom from arbitrary interference with family; rights to non-discrimination and non-penalisation; and rights relating to settlement outcomes (including the rights to work, education and an adequate standard of living, and the rights of particular groups to protection, support and integration assistance; and the right to the highest attainable standard of health). They also include children’s rights: consideration of the best interests of the child and rights of the child to protection and care, to know and be cared for by their parents, and to have applications for family reunification treated in a positive, humane and expeditious manner. See eg Frances Nicholson, *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied* (Research paper, January 2018) available at <https://www.refworld.org/pdfid/5a9029f04.pdf>.

4.3. However, the Australian Government's policies breach these rights. They routinely fail to give adequate consideration to the best interests of children and the individual circumstances of the families they keep apart. Each of the measures described above in relation to refugees – the bar on family reunion, endless deprioritisation and separation due to offshore detention – constitute arbitrary interference with family.¹⁹ In some circumstances, intentionally separating families and preventing them from reuniting may also amount to torture, given that:

- policies of separating families or preventing them from reuniting are intentional and imposed for a punitive or coercive purpose;
- the harm caused to both adults and children is serious and long lasting, and can amount to 'severe pain and suffering'; and
- the harm is carried out with the clear consent and acquiescence of the Australian Government.²⁰

Where these three criteria are met, the Australian Government will be in breach of the absolute prohibition on torture contained in Article 1 of the *Convention Against Torture*.

4.4. Governments around the world have a wide range of options and choices when it comes to immigration laws and policies, but these are not without limits. Policies that violate human rights law are unacceptable. All of us are better off when we know there are legal protections against arbitrary interference with our families.

5. Discriminatory measures

5.1. Policies that separate people from relatives and loved ones should never be the accepted norm. But the Australian Government's disregard for family unity is deliberate and its willingness to keep family members apart for prolonged periods of time is far-reaching. This is demonstrated not only in the explicit rules regarding family visas, but also in other policy settings and Departmental practices across the migration system which have the indirect effect of keeping families apart. Three examples of these policies and practices that impose additional barriers to families from culturally and linguistically diverse backgrounds are:

- the proposed English language test for Partner visas;
- public interest criteria regarding identity; and
- delays in processing citizenship applications.

5.1 Proposed English language test will keep families apart

5.1.1. Love is not determined by the language a person speaks, and the Government has no place in telling Australians who they should choose to be with. Yet the Australian Government has indicated an intention to introduce an English language requirement for partner visa applicants and their sponsors.²¹

5.1.2. English language requirements for partner visas will force more families to remain apart for longer. Prolonged separation damages family relationships and children's development, and makes it harder for people to settle into new communities.

¹⁹ Caoilfhionn Gallagher QC and Jennifer Robinson, 'Family separation in Australia and international law', *Together in Safety* (Opinion, February 2020) available at <https://www.hrlc.org.au/family-separation-international-law>.

²⁰ Above n 19.

²¹ Department of Home Affairs, *Consultation Paper: Public consultation on the English language requirement and the new sponsorship framework for the Partner visa program* (Consultation paper, December 2020) available at <https://www.homeaffairs.gov.au/how-to-engage-us-subsite/files/consultation-paper.pdf>.

- 5.1.3. Inevitably, the impact of this policy will be disproportionately experienced along cultural and social-economic lines. Families from English-speaking countries, and families with the wealth and educational opportunities to study English, will be largely unaffected by these changes. On the other hand, families from non-English speaking countries or families with fewer educational opportunities will face additional barriers to being together.²²
- 5.1.4. It is appalling that the Government has sought to disguise this discriminatory requirement as a protection for women. Associating non-English speakers with greater rates of family violence is harmful and unfounded – family violence unfortunately occurs across all cultures and languages. Focusing on language ability as a way to address family violence is reductive, fails to address the underlying causes and places unfair blame on victim survivors.
- 5.1.5. Further, locking women out of permanent residency will not make them safer. Threats that rely on a victim’s temporary visa status are often exploited by perpetrators of violence to exert control, and women on temporary visas have less stability and less access to support services. These are measures would harm, rather than help, women.
- 5.1.6. Introducing an English language requirement for partner visa applicants and sponsors would be discriminatory, harmful to families and counter-productive to resettlement. This proposal must be abandoned.

5.2 Exclusion period targets refugee and humanitarian sponsors

- 5.2.1. For some families, the identity requirement in Public Interest Criterion (**PIC**) 4020 rules out any chance of being reunited in Australia for 10 years. This is a devastating and unjustifiable outcome.
- 5.2.2. PIC 4020 requires a person applying for a visa to satisfy the Minister and her delegates of their identity. If the decision maker is not satisfied, the person is barred from applying for any further visas for a period of 10 years. It is not possible to waive this exclusion period.²³
- 5.2.3. Proving identity requires significant formal documentation, generally issued by State authorities. This can be difficult or impossible for some refugees or family members of refugees to obtain. Documents may be lost or destroyed, a person may not be issued identity documentation due to discrimination, or record-keeping practices in other countries may be different to those of Australia.
- 5.2.4. The identity requirement and exclusion period in PIC4020 unfairly and disproportionately targets family members of people who are refugees or humanitarian migrants. The consequence for failing to provide sufficient identity documents is a further 10-year separation from loved ones, who may remain in dangerous situations in the meantime. This cruel exclusion period should be repealed.

5.3 Unreasonable delays in citizenship applications

- 5.3.1. For people who are prevented from reuniting with their families due to policies like Direction 80, temporary protection visas, or a future English language requirement, the only prospect of being together as a family is to obtain Australian citizenship so that these barriers no longer apply.
- 5.3.2. Yet for some, becoming an Australian citizen is also a near-impossible task, despite living here for over a decade.
- 5.3.3. Citizenship applications from people who previously arrived in Australia by boat face extreme delays and are likely to take longer to process than other applications. In a 2018-19 Report, the Australian National Audit

²² For further analysis, we refer to the submission of the Refugee Advice and Casework Service to the Department of Home Affairs’ consultation on reforms to the Partner visa program, dated 31 March 2021.

²³ *Migration Regulations 1994* (Cth), Schedule 4, PIC 4020(2A) and (2B).

Office found that the Department of Home Affairs had decreased its rate of decision making, failed to keep pace with increasing application lodgements, and been responsible for frequent, lengthy, and unexplained periods of inactivity (averaging 15 months).²⁴ People who previously arrived by boat are deprioritised in an already inefficient process as they face greater scrutiny over their identity and are routinely and uncritically characterised as ‘complex cases’.²⁵

- 5.3.4. As at 30 June 2018, applicants from the humanitarian stream were found to account for 77% of citizenship applications that had been waiting a determination for more than two years, despite comprising just 9% of all lodgements.²⁶ Some people in this situation will never be granted citizenship due to a lack of official documentation from their country of origin.
- 5.3.5. When citizenship represents the only possible pathway to reuniting with family, barriers to citizenship for people who sought safety in Australia have the additional consequence of keeping families apart for longer.

Recommendations:

- Abandon plans to introduce an English language test for Partner visa applicants and sponsors.
- Repeal the identity exclusion period in PIC4020.
- End the unreasonable delay of citizenship applications for people from refugee and humanitarian backgrounds.

6. Families must be at the heart of migration policies

- 6.1. The right to be together as a family should not be determined by wealth, language, cultural background or the way a family member first arrived in Australia. Our migration policies should not seek to keep families apart, or be selective as to the type of families who should be able to reunite – they should recognise that all families belong together.

As Australia looks to recommence migration following the unprecedented border restrictions associated with COVID-19, we have an opportunity to reshape our migration system and put families at the heart. By recognising the social, cultural and economic value that family unity brings to our communities, and eliminating the policies that directly and indirectly disadvantage families, a fairer migration system can play a crucial role in Australia’s recovery from the pandemic.

6.1 Family reunion benefits our whole community

- 6.1.1. Separation from family members is harmful to the health and wellbeing of both adults and children. Psychological harm suffered by children as a result of family separation can persist into adult life with ongoing implications for their mental health and social adjustment.²⁷

²⁴ Australian National Audit Office, *Efficiency of the processing of applications for citizenship by conferral* (Auditor-General Report No.25 2018– 19) pp 27, 39 available at https://www.anao.gov.au/sites/default/files/Auditor-General_Report_2018-2019_25.pdf.

²⁵ See *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530.

²⁶ Above n 24.

²⁷ Professor Louise Newman AM and Dr Sarah Mares, *Mental Health and Wellbeing Implications of Family Separation for Children and Adults Seeking Asylum* (April 2021) available at <https://www.hrlc.org.au/family-separation-health-impacts>.

- 6.1.2. In contrast, people who have the care and support of their families are better able pursue employment or education, develop new social and cultural connections, care for others, and recover from trauma or grief. Being with family helps people settle more easily into a new life in Australia.²⁸
- 6.1.3. Family reunion should be facilitated because it is the right thing to do – but economic modelling undertaken by Deloitte Access Economics for Oxfam Australia also shows that increasing Australia’s refugee and humanitarian intake, including a specific and additional quota for family reunion, could have notable positive impacts on the broader economy, by creating more jobs and increasing GDP.²⁹
- 6.1.4. Allowing families to be together contributes to diversity and multiculturalism in Australia, which improves our society. Entire communities benefit when people are able to build their lives together with loved ones.

Recommendations:

- Establish a new humanitarian family reunion visa stream, available to all refugees regardless of visa status or mode of arrival.
- Make family unity an express priority of the broader migration program and a primary consideration in visa, border and policy decisions.

²⁸ Oxfam Australia, *Stronger Together: The impact of family separation on refugees and humanitarian migrants in Australia* (Report, 2019) available at https://www.oxfam.org.au/wp-content/uploads/2019/08/2019-AC-012-Families-Together_report_FA2- WEB.pdf.

²⁹ Deloitte Access Economics and Oxfam Australia, *Economic and social impact of increasing Australia’s humanitarian intake* (Report, August 2019) available at <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-social-impact-increasing-australias-humanitarian-intake-280819.pdf>.