

Human
Rights
Law
Centre.



Together in safety

A report on the Australian Government's
separation of families seeking safety.

Contact

David Burke and Josephine Langbien
Human Rights Law Centre
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4450
E: david.burke@hrlc.org.au
josephine.langbien@hrlc.org.au
W: www.hrlc.org.au

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 are an independent and not-for-profit organisation and donations are tax-deductible.

Follow us: @rightsagenda

Join us: www.facebook.com/HumanRightsLawCentreHRLC

About this Report

This report was produced with the support of the Global Centre for Pluralism, and in collaboration with the Refugee Advice and Casework Service.

Authors and researchers of this report include Freya Dinshaw, Arif Hussein, Katie Robertson, Daniel Webb, Hollie Kerwin, David Burke, Josephine Langbien and Scott Cosgriff, with assistance from Michelle Bennett and Roselina Press.

Published April 2021.

Human
Rights
Law
Centre

Acknowledgements

The Human Rights Law Centre acknowledges and pays our deep respects to the people of the Kulin and Eora Nations, the traditional owners of the lands on which our offices sit, and we acknowledge that those lands were never ceded. We recognise the ongoing, unrelenting work of Aboriginal and Torres Strait Islander peoples, communities and organisations to demand equality, justice and self-determination and we commit to standing with them in this work. The policies of intentional family separation outlined in this report should be understood in the context of the historical and ongoing removal of Aboriginal and Torres Strait Islander children from their families.

We thank the Global Centre for Pluralism for generously supporting this project.

Thank you to each of the individuals and families who agreed to share their personal stories with us for this report.

Thank you also to the people and organisations who provided invaluable advice and input to the report, including the American Civil Liberties Union (ACLU), Behrouz Boochani, Dr Beth O'Connor and Médecins Sans Frontières, Caoilfhionn Gallagher QC, the International Refugee Assistance Project (IRAP), Jennifer Robinson, Le Groupe d'Information et de Soutien des Immigrés (Le GISTI), Professor Louise Newman AM, Maureen Silcoff, Sarah Dale and the Refugee Advice and Casework Service, Dr Sarah Mares, and Wotton + Kearney.

Cover photo: Dima and Mohammad.
Credit: Ben Searcy – Sydney Morning Herald.

Contents

02 Foreword

04 Executive summary

06 Chapter 1: Family separation is used as a deliberate tactic

16 Chapter 2: Family separation is harmful

26 Chapter 3: Family separation is unlawful

34 Chapter 4: Family separation is unparalleled

38 Recommendations

42 Endnotes

Foreword

“This report shines a light on the Australian Government’s deliberate choice to use family separation to cause suffering, and calls for urgent action to end this cruelty so that families can be reunited. Although the impact of separation may be long lasting, there is still time to give a future to the families who have waited so many years to be together in safety.”

In my documentary film *Chauka, Please Tell Us the Time*, which narrates the lives of Manus Island refugees, the main character, Kaveh, goes back and forth between the telephone booth and the camp. During one of the many calls, he tells his young wife that even he does not know where he has been stuck. When his wife does not seem to grasp the depth of his suffering and adversity, Kaveh raises his voice in utter desperation: “You don’t know, you do not know; none of you will ever know what I’m going through, you just won’t.” He, like many other refugees, hides the realities of daily life from his family. Even when he attempts to describe the intractable state of limbo at Manus, words fail him.

In a later scene of the film, Amin, an Ahvazi refugee from Iran, says into the camera, “I hate myself because my son doesn’t recognise me anymore...I have nothing else to lose. I hate myself for still being alive.” In another incident, Faysal Ishak Ahmed, a Sudanese refugee, dies from head injuries he suffered during a seizure, despite asking for medical help for his chest pains and frequent seizures more than 20 times in the previous six months. He leaves behind a letter addressed to a friend who is in the same prison camp. In that letter, Faysal asks his friend to do everything in his power to help rescue Faysal’s children from the refugee camps at Sudan’s border if his heart condition gets the better of him.

Another story from Manus is about a Syrian refugee who surrendered to the pressure of Australia’s immigration system during the peak of Syria’s civil war. He voluntarily asked Australian authorities to deport him back to his country because he saw no chance of rescuing his family from the war. The Australian Government did send him back to Syria, but I later learned that he had suffered injuries in a mortar explosion and his father had died in a separate bomb blast.

These are just a handful of the hundreds of tragic stories that have unfolded in the Manus and Nauru camps, in detention centres across Australia and in the Australian community. These stories – stories about love, family and endless separation – are reproduced daily. In fact, they have become part of the identity of Australia’s detention and refugee deterrence system, a system that has been engineered to utilise any possible means for forcing refugees back to their countries. At times, it deprives ill refugees of access to basic medical care in order to pressure them into returning to where they fled from, and it exerts immense pressure on families for the same reason.

It is in this context that single inmates sometimes forget their own suffering and sympathise with fellow prisoners who have been left separated from their families. For the Australian Government, however, this is an opportunity to force the prisoners to give up. Many of these families have gone through separation while inside camps. In numerous cases, young couples were separated because the wife was held in Nauru and the husband in Manus, or one parent was in Australia with a child while the other parent was detained in Nauru. Most of the refugees who appear to move around “freely”



in Australian communities hold temporary visas and even after eight or nine years, they cannot see a bright prospect for reuniting with their families. Detention periods are so long that few families survive without breaking apart. Throughout the years, tens if not hundreds of married lives have been destroyed due to the detention of one or both spouses. Family members have experienced the falling apart of the family unit over the phone without being able to do anything about it.

Every refugee detained by this system has a story and each story is a tragedy in its own right. However, for those who have been separated from their families, the tragedy is so deep that it lives within the family and the relationships amongst family members even after freedom. That is if the family unit stays intact in such turbulent circumstances. Not only have these men and women been taken hostage by the Australian detention system, but their families have also experienced the violence of this systematic torture. As a matter of fact, these sufferings have countless twins on the other side of the world in the hometowns of the refugees who were forced to leave family behind, and the trauma is constantly reproduced in varying forms and degrees.

This report shines a light on the Australian Government's deliberate choice to use family separation to cause suffering, and calls for urgent action to end this cruelty so that families can be reunited. Although the impact of separation may be long lasting, there is still time to give a future to the families who have waited so many years to be together in safety.

Behrouz Boochani, Ursula Bethell
Writer in Residence at Canterbury
University of New Zealand

Translated by Mohsen Kafi, Victoria
University of Wellington

▲
Credit: Helen Davidson –
The Guardian

Executive Summary

The Australian Government uses the ties that bind families together – the love a mother has for her child, a person has for their partner, a brother has for his sister – to try to prevent people from exercising their right to seek safety.

In 2020, families around the world felt the pain of sudden separation as cities locked down, borders closed and international travel ground to a halt in response to the COVID-19 pandemic. Important family events were missed and moments that should have been shared were experienced alone. This separation was endured by countless families for the benefit of our wider community's health and safety. But for some families, the pandemic was yet another setback in an already long and agonising struggle to be reunited in safety. For these families, their ongoing separation serves no defensible purpose, and their suffering is largely unrecognised.

For too long the Australian Government has escaped scrutiny for pursuing calculated policies of family separation targeting people who have sought safety in Australia.

This report exposes how the Australian Government deliberately and systematically separates family members and prevents them from reuniting where one family member has sought asylum at Australia's borders. Refugees are forced to make an unthinkable choice between their safety, their health and being with the ones they love.

The Australian Government uses the ties that bind families together – the love a mother has for her child, a person has for their partner, a brother has for his sister – to try to prevent people from exercising their right to seek safety.

Because of this, fathers have missed their baby daughters' first steps and first words. Mothers have been prevented from visiting their children for years on end. Partners in loving relationships have spent years not knowing if they will ever see each other again. The Australian Government has made deliberate policy choices to cause this suffering.

The Australian Government separates families in different ways based on when a person arrived in Australia and their visa status. The main methods of separation are:

- Endlessly deprioritising family reunion applications for people who arrived by boat to seek safety and are now permanent residents.
- Completely banning family reunion for people who are only eligible for temporary protection visas, or who are ineligible to apply for protection altogether.
- Splitting families between Australia and offshore detention, either where family members arrived in Australia on different dates and are subjected to different laws, or one family member is transferred to Australia for medical treatment but others are not brought with them.

Thousands of people in Australia are separated from their family members by these policies.

This report is a multi-disciplinary collaboration to highlight the Australian Government's intentional use of family separation against people who seek asylum. Calling on leading medical experts and international law specialists, this report shows that the Australian Government's tactic of separating families is not merely morally wrong:

- **It is deeply harmful to the health of the people ripped from their families.** Doctors report serious and lasting health impacts of family separation on both adults and children, including an increased risk of self-harm, suicidal ideation and mental health disorders, and adverse consequences for a child's brain development and social adjustment where separated from a parent.
- **It is illegal, as a violation of Australia's binding international legal obligations.** Leading international human rights lawyers advise that Australia's policies of family separation breach the right to family, and that the harm caused by family separation is so severe that in certain circumstances it amounts to torture under international law.
- **It is unparalleled among comparable countries.** A comparison with refugee family reunion policies in four other jurisdictions shows that Australia stands alone in its cruel and punitive approach to family separation.

This report calls for the Australian Government to immediately implement the following changes, to stop this unnecessary and cruel approach:

- 1 End discrimination against refugees based on how they arrived in Australia,** by offering a consistent pathway to family reunion and ending the use of family separation as a tool for punishment.
- 2 Shut down offshore processing,** to ensure families are never again deliberately torn apart by Australian Government policy, and that family members in Australia do not risk being returned to offshore detention in Papua New Guinea or Nauru.
- 3 Grant permanent status to long-term temporary visa holders and others living in limbo,** 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.
- 4 Stop the endless deprioritisation of family reunion applications from refugees who arrived by boat and drastically improve processing times,** by replacing the current visa processing rules with a policy that does not perpetuate indefinite separation for some Australian residents, and by processing applications within acceptable timeframes in line with comparable international standards.
- 5 Create a new humanitarian family reunion visa stream,** available to all refugees regardless of visa status or mode of arrival, which is fair, fast and accessible and which reflects an inclusive understanding of family.

We call on the Australian Government to take these five steps and to stop using family separation against people seeking safety.

We need the Australian Government to respect what everyone in our community knows – **families belong together in safety.**



Family separation is used as a deliberate tactic

Key Summary

- ▶ Depending on factors like their date or mode of arrival, or when their visa was granted, people who seek safety in Australia are treated differently – some are sent to offshore detention and barred from seeking protection in Australia, some are given only temporary visas and others become permanent residents.
- ▶ For all people who have arrived in Australia seeking safety, the Australian Government has introduced laws and policies that are designed to separate families and prevent them from reuniting.
- ▶ Thousands of people are separated from family members because of the Australian Government's actions.
- ▶ No matter the policy justification, it is never acceptable to use the desire to be together as a family as a way to punish and deter people.



For more than a decade, the Australian Government's policies regarding refugees and people seeking asylum have undermined standards of fairness and established international norms. The Australian Government has often claimed to have a 'single-minded focus on deterrence' in attempting to legitimise cruel and punitive treatment of refugees, and of those who arrived by boat in particular.¹ These policies – largely supported by both major political parties – have had painful consequences for people who have come to Australia to seek safety. A key element of this punitive framework is the separation of families and the prevention of family reunion.

The Australian Government's 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.

There are three broad methods of family separation:

- 1 separation by **endless deprioritisation**;
- 2 separation by **ban on family reunion**; and
- 3 separation by **offshore detention**.

This chapter explains these methods of separation and highlights the human cost of the Australian Government's policies.

1 Separation by endless deprioritisation

The most widespread method of family separation is the practical block on reunion imposed by the Australian Government's policy of endlessly deprioritising applications for family visas.

Most people who travelled to Australia by boat before 13 August 2012 and were recognised as refugees were eligible for permanent residence, and were granted permanent protection visas. Like other permanent residents, people in these circumstances can apply to bring immediate family members to Australia through the family stream of the migration program.

However, the Australian Government has introduced policies that effectively deny permanent residents who arrived in Australia by boat the prospect of ever being approved for family reunion.

The Minister responsible for immigration² has directed government officials who decide family visa applications to process applications in a set order of priority. Ministerial Direction 80 dictates that all visa applications for family members of people who arrived by boat are given 'lowest processing priority'.³ Because new applications for family visas are constantly being lodged, decision makers spend all their time processing those higher priority applications, and the 'lowest priority' applications are never considered.

Direction 80 contains an exception to this ranking in 'compassionate' special circumstances, where there

are 'compelling reasons' to depart from the rule. However, the Direction provides no guidance on when this exception applies. Migration agents who act for large numbers of clients in this area report that the Australian Government requires applicants to show extreme circumstances in order to be granted the exception.⁴

Consequently, the effect of Direction 80 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, because their applications are never processed.

Different status based on date of arrival or visa decision

Entitlement to family reunion is largely dependent on legal status. Legal status often depends on the time and method of arrival in Australia:

Permanent protection

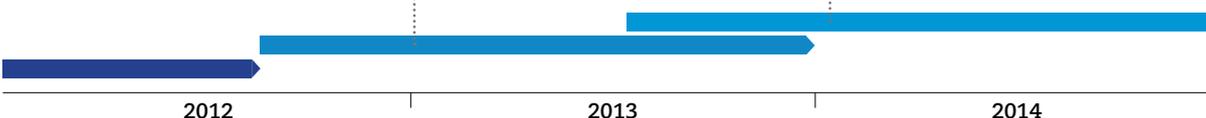
Most refugees who arrived by boat in the years prior to 13 August 2012 have become permanent residents of Australia.

Temporary protection

People who arrived by boat between 13 August 2012 and 1 January 2014 and who were not taken to offshore detention (but were recognised as refugees in Australia) are typically only entitled to temporary protection visas that must be renewed every three to five years. This also applies to people who seek asylum at Australian airports and are recognised as refugees.

Offshore detention

People who arrived by boat after 19 July 2013 were forcibly taken by the Australian Government to offshore detention centres in Nauru or Papua New Guinea, with few exceptions.





“My wife fell ill about three years ago. The separation became unbearable.”

Hassan

▲
Credit: Paula
Solloway – Alamy
Stock Photo

People holding permanent refugee or humanitarian visas are alternatively able to apply to bring immediate family members⁵ 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.⁶

The only pathway left for people in this situation is to wait until they can apply for citizenship and then seek to bring family members to Australia if citizenship is granted, as Direction 80 does not deprioritise citizens in the same way. However, the time from the grant of a permanent protection visa to citizenship can be well in excess of five years, on top of the many years it often takes to obtain a permanent protection visa in the first place.⁷ 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.⁸ Some people in this situation will never be granted citizenship due to a lack of official documentation from their country of origin. As such, people are left facing decade-long waits – not to mention significant costs – to reunite with family members.

Hassan's story:

Hassan* has been in Australia since 2012. His wife passed away while they were waiting to reunite. His children remain in Pakistan.

My wife and I had to flee our home in Afghanistan and go to Pakistan when we were a young couple. It was too dangerous to stay due to the violent persecution of the Hazara people. Our three children were born in Pakistan. However, the dangers of being Hazara followed us to Pakistan, where Hazaras were targeted and our lives were in danger. Finally in 2010, I decided to take the dangerous journey to try to find a safe place for my family to live.

I arrived in Australia by boat. I was granted permanent protection, and then in 2013 I applied for my family to be reunited with me. However, because of the Ministerial Direction, my application was always at the bottom of the pile and was never processed years after I had arrived.

My wife fell ill about four years ago. The separation became unbearable. Before my wife fell ill, I visited my family every year. After she became sick, I visited more regularly but every time I had to leave, it was so hard because I didn't know if I would see her again.

She died three years ago. I think if she had been with me in Australia, and there is no reason why she shouldn't have been with me, she would have been okay. If my wife was here, she would have received better treatment and may have been saved.

My kids cannot go back to Afghanistan because it is unsafe. They are living alone as illegal refugees with no hope for the future in Pakistan. And I can't bring them here. This is very painful to understand and explain to them, but this is my current situation.

* Throughout this report, * indicates a pseudonym, which has been used to protect the person's privacy or safety.

2 Separation by ban on family reunion

For other people who have sought safety in Australia and are now beginning to rebuild their lives in Australian communities, the Government has imposed a complete ban on family reunion.

The Australian Government prevents some people seeking asylum from obtaining permanent protection visas based on when and how they arrived in Australia. People are limited to applying for temporary protection if they:

- sought asylum in Australia by boat between 13 August 2012 and 1 January 2014, and were not transferred to Nauru or Papua New Guinea; or
- arrive by plane at any time, and seek asylum at Australian airports.⁹

People in these circumstances who are found to be refugees are granted either a temporary protection visa (valid for three years) or safe haven enterprise visa (valid for five years). At the end of each three or five year period, they must reapply for protection. None of these people are eligible for permanent protection visas.

Others are denied even the opportunity to apply for temporary protection. Hundreds of people who were previously subjected to offshore detention have since been brought to Australia for purposes usually

relating to medical treatment. Despite living in Australian communities for several years, people in this situation remain in legal limbo and are barred from applying for protection visas or any other visas in Australia. Most are granted rolling, short-term bridging visas or live in ‘community detention’ with no visa. Some are still detained.

Despite being recognised as refugees and becoming long-term residents in Australian communities, holders of temporary protection visas and people brought to Australia from

Mary's story:

Mary* and her young daughter Sarah* are in Australia. Her husband and other children are in a refugee camp in Africa.

I live in regional Australia on a temporary protection visa with my six year old daughter. My husband and my three other daughters live in a large refugee camp in Africa.

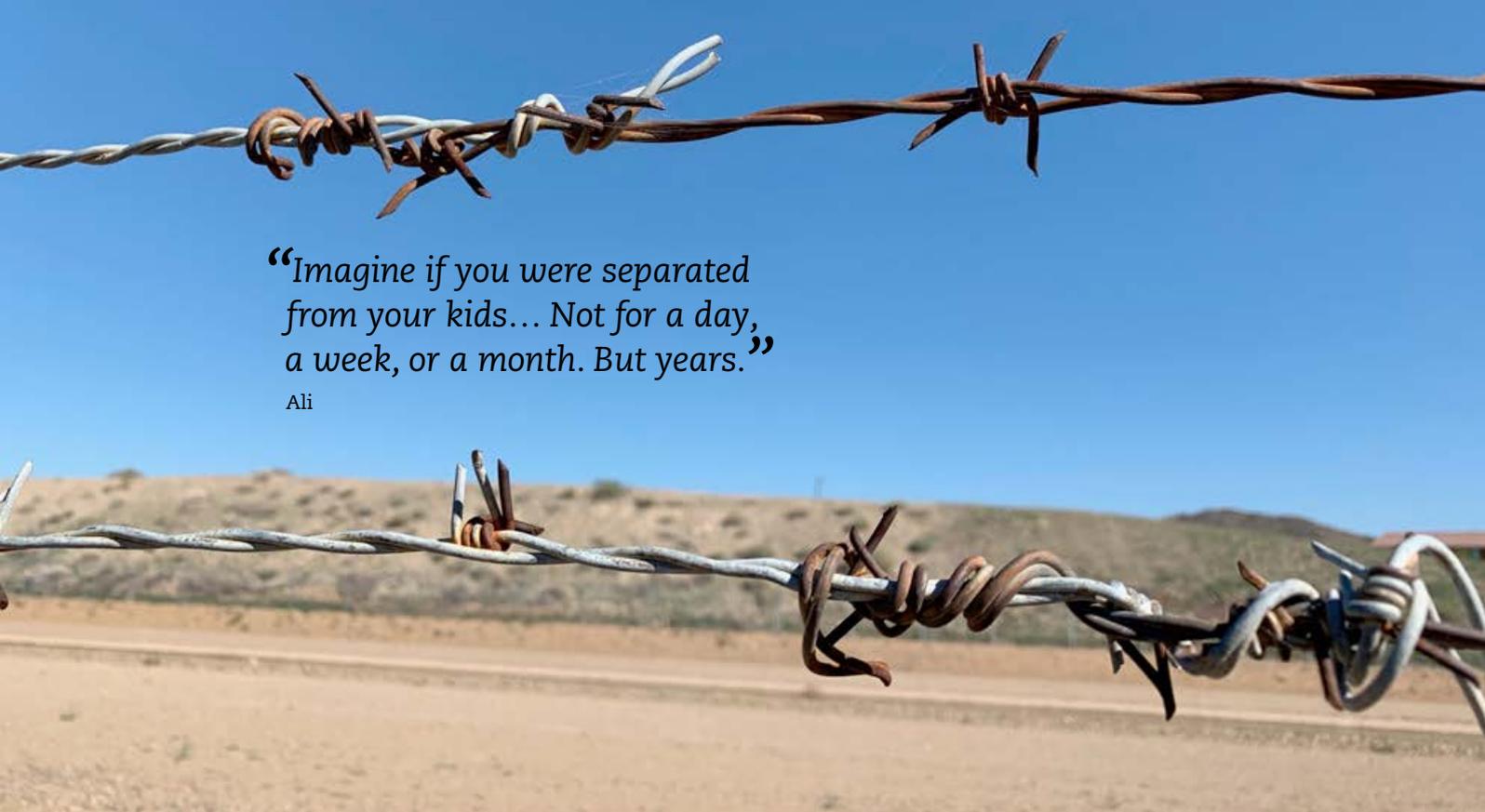
I asked for my family to join me so that they could be safe and we could be together.

When Immigration told me that I would never be able to bring my children to Australia I fell apart. I went to bed for two weeks and couldn't eat or sleep.

Every night, when I tuck my daughter Sarah into bed, she asks me "Mummy, why can't my dad and sisters come and be with us?" I don't know what I can say. I tell her, "They can't come, because the Australian Government won't allow it."

The pain was unbearable. It still is – everyday. How can I live like this?

Every day I worry, I cry, thinking of my children. It has been my hope that I can bring them to safety here, that we can be together as a family and live with freedom.



“Imagine if you were separated from your kids... Not for a day, a week, or a month. But years.”

Ali

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.¹⁰ Their status in Australia is permanently temporary.¹¹

In addition, the conditions placed on people who hold temporary protection visas significantly restrict their ability to visit family members overseas. They are barred from returning to their home country regardless of the circumstances, and are unable to travel overseas without permission from the Department of Home Affairs,

which is only granted in limited circumstances. For people who have survived offshore detention but remain in legal limbo – if they depart Australia to visit family members, they will not be permitted to return.

Ali's story:

Ali* is in Australia. His wife and his two children are in a refugee camp in Bangladesh.

I fled Myanmar soon after my second child was born. As a Rohingya man, the situation in my home country had become unbearable and I had no choice but to flee for my life. I left my young daughter and son, my wife and my extended family behind, to find a safe place for us all.

I am now living safely in Australia and working at a pharmacy. I am here, my body is here, but my mind and heart are not here. They are always with my family.

I have two kids. I always think of their life, their future, and how I can protect and provide for them while I am away from them.

Because I am not allowed to bring my family to Australia, they are suffering in an unsafe refugee camp, with their future escaping them day by day.

It is hard to explain, but it is simple to understand. Imagine if you were separated from your kids, and you were safe while they were in a dangerous refugee camp. Not for a day, a week, or a month. But years.

3 Family separation by offshore detention

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.¹² This policy remains in force. The Government's position is that none of these people will ever be permanently resettled in Australia, even though the majority have been recognised as refugees.¹³

The Australian Government's offshore detention policies have created two forms of family separation.

a. Separation based on different arrival times

The mandatory policy of offshore detention is applied regardless of whether a person has any family connection in Australia.¹⁴ Consequently, families seeking asylum who arrived on different dates or people who already had family members in Australia were separated for years on end.

In many instances, family members who arrived by boat in Australia prior to 19 July 2013 were granted asylum and have settled in Australia, but their relatives who arrived after that arbitrary date were taken to offshore detention.

In other cases, some family members settled in Australia years earlier and are now citizens, but 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, suffer in indefinite detention in Nauru or Papua New Guinea.

Spotlight:

Complaint to the United Nations Human Rights Committee

In October 2018, the Human Rights Law Centre lodged a major group communication against Australia to the UN Human Rights Committee on behalf of 63 refugees from 14 families who were separated by offshore detention. The complaint alleged that the indefinite separation of these families was unlawful under several articles of the International Covenant on Civil and Political Rights, and was causing irreparable damage to the mental and physical health of the complainants.

Due to the severity of the harm already caused to the complainants, in December 2018 the UN Special Rapporteurs on New Communications and Interim Measures issued a request for interim measures against Australia requiring immediate action to prevent further harm from occurring.

After separate threatened legal action based on the need for medical treatment, each of the families has finally been reunited. However, the situation for these families remains precarious. As there is no guarantee that they will not face separation again, the UN case is ongoing.



“All I want in this life is to be together with my kids and family.”

Naysar

▲ Fleeing persecution, Naysar was separated from his family en route to Australia. While they rebuilt their lives in Australia, he was detained on Manus Island. Credit: Matthew Abbott

Naysar's story:

Naysar was sent to Manus Island, Papua New Guinea. His family, who arrived just months before him, were allowed to remain in Australia.

My family was separated when we were in Indonesia on the way to catching the boat to Australia. We were supposed to all get in one car and go to the boat but there were not enough seats in the car. I told my family to go ahead and I would be right behind them. But another car never came.

By the time I arrived at Christmas Island my wife and kids were already in the community in Australia.

I told the immigration people that my family was in Australia in the community and I just assumed that I would be reunited with them. But at the boarding gate they told me I was going to Manus.

I felt numb. My heart and brain stopped working. I couldn't muster the strength to say a word. I was completely frozen.

All I want in this life is to be together with my kids and family.

I spent more than five years on Manus Island, away from my family.



b. Separation during a medical evacuation

The Australian Government has deliberately separated families in situations where one family member needed to be evacuated from offshore detention in Papua New Guinea or Nauru for urgent medical treatment in Australia.

Under the Migration Act, the Australian Government has the power to transfer refugees held in Nauru and Papua New Guinea to Australia for a temporary purpose.¹⁵ Usually, the purpose of transfers is to provide access to medical treatment in Australia, as the medical facilities available in offshore detention are inadequate for treating serious medical conditions and cannot cater to the complex health needs of people who have been detained for many years.

Until late 2016, the Australian Government's practice was to transfer people needing medical treatment with their immediate family unit. However, from late 2016, the Australian Government began refusing to allow family members to travel. This shift occurred in the context of a deepening health crisis in Papua New Guinea and Nauru and an increase in acute medical needs, as well as resistance to the Government's attempts to return

people to offshore detention before their medical treatment in Australia was complete. 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.¹⁶

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.

In most cases, a person's medical condition, psychological trauma or newborn child has meant it is unsafe for them to be returned to offshore detention. Yet for years, the Australian Government refused to reunite people in Australia with family members who remained in offshore detention, even where doctors recommended that families be reunited for health reasons.

This has forced people to choose between being with their family or doing what is best for their health and safety.

While many families have been reunited since late 2018, this has only occurred because of sustained legal action – through court cases based on medical need and a major UN complaint – and through continued public advocacy. Until the Australian Government shuts down offshore detention, there is no certainty that families will not be separated this way again in the future.

▲ Hani's wife Dima was evacuated from Nauru to Australia with pregnancy complications. Hani, pictured here on Nauru, was forced to stay behind and missed the birth of their child.

“I was so confused because I didn’t want to risk her life, but at the same time I didn’t want to leave her alone.”

Hani

► Dima, Hani and their son Mohammed were finally reunited after years of separation.

Dima’s story:

After years spent on Nauru, Dima found out that she was pregnant. She experienced pregnancy complications and had to be medically evacuated to Australia. The Australian Government forced her husband, Hani, to stay behind.

Dima

The day that I was leaving Nauru, they told me only I could go on the plane. I was devastated.

When they told us only I could go on the plane, Hani and I were together, and he said to me, “You should go.”

We were both crying. But Hani said to me, “This is for your best and you should go without me.” He said that he almost expected that he might not be allowed to go, but he said, “It’s alright, you will be alright with the baby.” He didn’t want us to be in that environment on Nauru.

I was left for more than a year to care for our baby by myself.

Hani

On the day she was leaving, they told us that I was not allowed to go with her.

I really missed her on that day when she left.

At the time, I was so excited to have this special moment with her and with the new baby – but I could not be there. The Australian Border Force had blackmailed us. They just gave us just two options – you can have your baby on Nauru, or you have to go alone to Australia. They twisted our arm.

I was so confused because I didn’t want to risk her life, but at the same time I didn’t want to leave her alone. But I prefer for her to be in good health and in a good situation with the baby. Because the situation here is so hard. She was crying when she left. I told her, sooner or later, we will be together.

► Dima and Hani’s son Mohammed met his dad for the first time when he was two years old.



Chapter 2

Family separation is harmful

Key Summary

- ▶ There is clear evidence that Australia's deliberate policies of separating families are harmful to adults and children, including newborns.
- ▶ Medical evidence shows that the trauma of separation increases the risk of self-harm and suicidal ideation in adults and children, both acutely and in the long term.
- ▶ Medical evidence shows that family separation has a serious, long lasting impact on children.
- ▶ Separation from parents and family members can result in children experiencing a range of mental health issues including grief, anxiety and depression.
- ▶ Separation and loss in childhood has a detrimental impact on a child's brain development, with developmental consequences.
- ▶ 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.



◀
Credit: P&F
Photography –
Alamy Stock Photo

Deliberate immigration policies that forcibly separate families or prevent them from reuniting have been shown to have a devastating impact on the mental health of adults and children who are in the care of the Australian Government.

It is not difficult to see how these circumstances can have serious and lasting impacts on any family, when fathers wait for years to bring their families to safety in Australia, pregnant women are taken to give birth alone in Australia thousands of kilometres from their husbands who remain trapped on Nauru, and newborns and toddlers were not allowed to meet their fathers.

We know that family separation causes harm – the medical evidence is clear.

This chapter presents expert opinion about the health impacts of family separation from three psychiatrists who have worked with people harmed by the Australian Government's policies.

A firsthand account of the harmful impact of family separation from Australia's offshore detention camps in Nauru

“The parents watched their child deteriorate and feared their child would die.”



Dr Beth O'Connor, Médecins Sans Frontières – Psychiatrist

Dr Beth O'Connor is a psychiatrist who spent almost a year working on Nauru with Médecins Sans Frontières/Doctors Without Borders (MSF). She was part of a team providing mental health care to over 200 refugees and people seeking asylum in the Australian Government's care. Almost 40% of these patients were separated from a partner, child or other close family member.¹⁷

“The patients I treated on Nauru who had family members in Australia mainly suffered from symptoms of depression and anxiety. Some patients had never experienced a depressive episode before becoming separated from their loved ones under the Australian Government's policy. Others experienced a worsening of pre-existing depressive episodes, some to the extent that they developed psychotic symptoms, for example, hearing negative voices when no one was present. The depressive symptoms resulted in a decline in people's functioning with diminished ability to care for themselves, isolation from other people, suicidal thoughts and in some cases multiple suicide attempts.

Suicidal thoughts were unfortunately very common amongst all our refugee and asylum seeker patients, with 60% experiencing suicidal thoughts and 30% attempting suicide during our time on Nauru. Amongst those families who were separated due to medical evacuations to Australia, the family members left on Nauru were 40% more likely to have suicidal thoughts and/or make suicide attempts compared to those who were not separated from family members.¹³

Many of our refugee and asylum seeker patients were separated because a family member required medical care that was not available on Nauru. The patient would be

taken to Australia alone, or if they were a child, with one of their parents or an older sibling. The other parent and siblings were left behind.

On arrival in Australia, the patient would usually be informed by their doctor that return to Nauru was inadvisable, due to the inadequate medical care available for their condition on the island. They would therefore remain in Australia. For the family members stranded on Nauru, knowing their loved one was unwell and not being able to help them was simply unbearable.

The first few children whom I met with Resignation Syndrome had been separated from a parent who was medically evacuated to Australia. Resignation Syndrome, also known as Traumatic Withdrawal Syndrome, is a condition in which the child becomes more depressed, socially withdraws and eventually stops eating and drinking, is mute and lies in bed not responding to people. The parents watched their child deteriorate and feared their child would die. The strain on the parent caring for their child alone while also struggling with being separated from their spouse was immense.

Working as a psychiatrist with these separated families, there were common themes I heard. Sadness and loss was commonly discussed as family members were unable to share their lives with their

“Every birthday, anniversary or milestone deepened their sadness.”

family members. Every birthday, anniversary or milestone deepened their sadness. They showed me photos and videos of family members, and any joy shown in these moments was transient and surrounded by grief.

Another common theme was hopelessness and despair. Throughout our time on the island the hopelessness and despair amongst refugees and asylum seekers worsened due to the indefinite nature of the detention, particularly after a large number of applications for resettlement in the United States were rejected. I recall that the separated families already had profound levels of hopelessness when we arrived. There were families who had been separated for over five years and fathers who had never met their children, who had given up hope that they would ever be allowed to reunite.

Frequently I heard my patients talk about guilt. People with depression are more likely to blame themselves inappropriately and excessively, and my patients unfairly blamed themselves for this situation which was out of their control. Fathers felt guilty that they had not supported their wife through the final trimester of her pregnancy, through the birth, and not been there to witness their baby's first breath, first smile, first chuckle, first word, first step... These fathers felt guilty their wives were struggling with the pressures of caring for

their newborn and they were not there to help. The separated family members were also fearful of how their relationships would ever be able to recover if they were reunited with their family. They tried to protect their family members in Australia by telling them that they were managing on Nauru in order to prevent their loved ones worrying. They tried to hide their severe depressive symptoms and avoid disclosing their overwhelming hopelessness, suicidal thoughts and suicide attempts. They guessed their family members in Australia were also lying to them about how they were coping alone, which increased their worries further.

Another common theme was that these families felt they were being punished and bullied by the Australian Government. The patients could not find a rational explanation as to why they were being separated from their family members when their family members were unwell and needed their support. They felt their family was being punished because they needed medical care or because their wife was pregnant. These families had often fled their home countries due to fear their family would be separated by family members being imprisoned or killed if they stayed. However, remaining under indefinite offshore detention as refugees, their fear became a reality and they were forcibly separated from their families by the Australian Government.

As a doctor, I know that a supportive family is a significant asset to patient recovery and the unwell family members will likely experience longer and more difficult periods of recovery from both physical and mental illnesses without family support in Australia.

When my patients asked me why their family had been separated, I joined them in being unable to find a reasonable explanation. I remain at a loss to understand why vulnerable refugees who suffered trauma in their home country and on the migration journey, were subjected to further trauma through family separation during indefinite detention on Nauru.'

The medical experts

Professor Louise Newman and Dr Sarah Mares have witnessed the harmful impact of family separation and other restrictive Australian Government policies on the health of men, women and children over the course of many years.

Below is an edited extract of the full article by Drs Newman and Mares



Professor Louise Newman AM is the Director of the Centre for Women's Mental Health at the Royal Women's Hospital and Professor of Psychiatry, University of Melbourne.



Dr Sarah Mares is a Child and Family Psychiatrist, Conjoint Senior Lecturer, School of Psychiatry, University of NSW and Doctoral Candidate at Flinders University.

Mental health and wellbeing implications of family separation for children and adults seeking asylum

Family separation¹⁸ and limited opportunities for family reunion are increasingly enacted as components of restrictive immigration practices for people seeking asylum. There is growing evidence regarding the negative impact this separation has on refugees and people seeking asylum at both the individual and family level.

This summary of our detailed article sets out:

- How family separation is linked to impacts on mental health;
- The impact of family separation in early childhood;
- The impact of loss and bereavement in the context of family separation;
- Policy considerations for refugee family separation from a mental health perspective.

1. Family separation and mental health

Human beings are social creatures; our identities and functioning are shaped and supported through social and emotional bonds. The extended family is the key site of child rearing, support, nurture and resilience for most people. Children develop within the context of families and their relationships. Early experiences and the quality of care they receive shape the development of their brain,

behaviour and personality.

Displaced people are likely to have had multiple traumatic exposures in their life before seeking asylum, including separation from and loss of family, community and culture. This is compounded when reception countries such as Australia implement restrictive, deterrent immigration policies. The importance of contact with remaining family members and other significant people is therefore increased. Displaced people are particularly vulnerable to further separation and loss. Complex grief can compound the severity of mental illness including Post Traumatic Stress and depression. Separation from and loss of parental figures and family members has an additional and significant developmental impact for children.

People seeking asylum and those who are refugees are exposed to cumulative adversity and trauma. They are particularly vulnerable to stress related mental disorders and the longer-term impacts of displacement, loss and complex grief. This can result in significant distress, mental illness and ongoing, chronic difficulties, limiting recovery and the capacity to adapt and resettle. Family separation affects people at all ages, and particularly impacts children.

“Separation from and loss of parental figures and family members has an additional and significant developmental impact for children.”

2. Refugee children and family separation

Children and attachment

Attachment relationships are enduring emotional connections between children and carers which shape ongoing development and neurodevelopmental and psychosocial functioning. These bonds to caregivers form in infancy and early childhood. The quality of early care and the availability of consistent and responsive parental figures is vital for a child’s healthy development and helps to establish resilience in the face of stress and adversity. It is a key pillar of psychological health.

Separation from family members impacts negatively on a parent’s ability to focus on their child, often as a result of their own symptoms of depression and grief. In these situations, the infant experiences a form of emotional neglect. When there are no alternative, adequate carers available to look after the child (for example, where the child and their carer(s) are held in immigration detention), children develop distress and developmental problems.

Infants separated from a parent prior to their birth (such as cases where the mother is transferred to Australia to give birth and the father remains detained offshore) will not develop attachment relationships with the missing parent as they have not had contact with them. They may grow up

knowing about them, but they will not know them, nor will they have had the benefit of this relationship.

Separation at or prior to birth from fathers and other family members robs both the child and the parent of the opportunity for the particular closeness associated with early attachment relationships. This is because infants and children under three who are not with a parent, are unlikely to develop an attachment relationship with that person. Children become attached to the people who care for them and share their daily lives.

There is a clear association between early deprivation of care and a range of mental health and developmental problems. These include depression, anxiety and ongoing difficulties relating to others.¹⁹ Children have been studied in a variety of environments characterised by deprivation and circumstances of separation from consistent caregivers, which have been shown to have had detrimental effects on their brain and physiological development.²⁰

For children, neglect and the absence of carers is a major form of psychological trauma and physical stress with significant implications for ongoing health. Separation and loss can be a form of ‘toxic stress’ for children, causing unmanageable physiological arousal and distress with lasting impacts on their brain, development and behaviour.

Hani’s story:

Hani was left in Nauru for the first two years of his son’s life, and was denied the chance to bond with his baby and support his wife.

I was so happy when my son was born. But at the same time, so frustrated.

Dima told me, “You have a beautiful baby boy”, and I was so happy and I started crying. I was crying because I was happy but also because I was sad at the same time. I was so upset. I was so upset because the Government had stolen my moment with my first baby from me.

He doesn’t realise who I am, so I can’t speak with him too much.

Each time, I found out about a first step or a first time online. Each time I feel I am so happy but something is missing. I wish I could be with him at that moment. Each thing is just online. I can’t be there with him.

If I was there, it would be totally different – I would help her in the house, clean, sometimes cooking – when she goes shopping with our son, because she can’t look after him and do shopping at the same time. I could help her with that.

“Separation at or prior to birth from fathers and other family members robs both the child and the parent of the opportunity for the particular closeness associated with early attachment relationships.”

Separation from a parent

Children’s needs for attachment relationships are biologically programmed; attachment seeking behaviour and signalling is seen from birth. The attachment relationship functions to support the child in managing stress and emotions and disruption of care. Inconsistent care is associated with release of stress-related hormones which directly impacts upon brain development.

Children at all ages grieve the loss of attachment figures and demonstrate this in age dependent ways. On a psychological level, removal of a child from an attachment figure is a major stress with a pattern of responses including an initial stage of protest, followed by despair and then detachment.

Disruption of care and attachment is particularly significant during the crucial infant (0-3 year) period of development. Infancy is the period where the child is developing a core understanding or model of relationships as well as the beginnings of emotional and stress regulation. Severe neglect and lack of care in this period has a broad range of effects including cognitive delay and social and emotional withdrawal. It is also associated with behavioural and emotional problems in later childhood.

Loss of an attachment figure in infancy, in cases such as a death, abandonment, or where a parent is psychiatrically unwell can produce the pattern of responses described above, with the additional impact of stress on brain development.

Ali’s story:

Ali worries constantly about his children, who are growing up without their father. Because Ali holds a temporary protection visa, he has no way to bring his family to Australia.

It is very difficult for my wife. She has been the sole parent to our children since I left. She has a lot of responsibility. I wish I was able to take some of the load for her.

I was forced to flee my home country when my youngest child was just one month old. Those years that I missed in my children’s lives, I will never get back.

Now, my children are 13 and 14 years old. They are living in the refugee camp without education or safety. In our culture, the father is the guardian. If kids are missing their father, it is like being blind. As the guardian it is my responsibility to guide them, to show them how to be in life.

But I am not there, and I cannot guide them.

“Separation and loss can be a form of ‘toxic stress’ for children, causing unmanageable physiological arousal and distress with lasting impacts on their brain, development and behaviour.”

Mental health and parenting in refugee families

Parental mental health is also affected by family separation and loss. It is accepted that the state of a parent’s mental health can impact on the quality of parenting interactions they have with their child, and therefore a child’s development. For example, recent research on the impact of a refugee parent’s mental health on their children indicates a link between the parent’s experience of Post Traumatic Stress Disorder (PTSD) and a poorer quality of parenting.²¹ Women who are pregnant and displaced or detained have high levels of stress and anxiety with a direct negative impact on foetal development and neonatal outcomes. They are also not able to prepare psychologically for the baby. Contemplating parenting in these circumstances is associated with feelings of guilt and distress. Rates of so-called Post Natal Depression are high and the mother’s low mood directly impacts on her capacity to focus on and interact sensitively with the baby.

Long term implications of attachment disruption and loss for children

The sudden and enforced separation of a child from an attachment figure (such as a parent) constitutes a major trauma and stress to the child’s sense of safety and security. Such separation can result in a child experiencing behavioural disturbances such as anger, aggression and disorders of social interaction. These children may have long-term problems as a result of the disruption to their neurobiological development. The trauma of separation also increases the risk of self-harm and suicidal ideation in children. These problems with stress tolerance or adaptation can persist into adult life with major implications for mental health, interpersonal functioning and adaptation.

Nayser’s story:

Nayser was sent to offshore detention while his wife and children rebuilt their lives in the Australian community. Now, his children are showing signs of the impact of separation.

At home, I was the head of our family. Every day I shared meals with my family, I walked my children to school, we celebrated special religious holidays together. Being apart has brought great stress to my family. It is not good for my children to be without a father figure.

Two of my children were very young when we were separated. They have grown up without a father during important years of their childhood. My youngest has experienced what the doctors call ‘developmental delays’ and has been diagnosed with Attention Deficit Hyperactivity Disorder. My wife thinks maybe his problems are because of the stress of what happened to us.

“The sudden and enforced separation of a child from an attachment figure (such as a parent) constitutes a major trauma and stress to the child’s sense of safety and security.”

3. The impact of family separation on refugee adults

PTSD, depression and complicated grief

Prolonged and indefinite separation from family members increases the risk of complicated grief, persisting PTSD and depression. It can be associated with continuing anxiety about the lost family member, adds to a sense of powerlessness and can be associated with a continuing sense of injustice. At a practical level it reduces the support available to the adults in their roles as parents, friends and members of their new community.

Loss and grief can have multiple social, psychological and physiological consequences.²² In addition to PTSD and depression, grief and complicated grief have more recently been acknowledged as a significant element of the distress experienced by forcibly displaced people.

In addition, the social networks and institutions that can support the recovery process following trauma are often lost or compromised by displacement meaning that family can have additional importance in supporting individuals both in adjusting to new circumstances and in psychological recovery. Family functioning in the wake of loss and trauma is therefore particularly important, and the impacts of ongoing separation from family are particularly harmful.

Family separation undermines safety and security, disrupts central social bonds, networks, and identity (eg as spouse, parent, child) and may be associated with deep feelings of injustice.²³

Hassan’s story:

Since being separated from his children, and losing his wife, Hassan’s mental health hasn’t been the same.

Being away from my family has been bad for my health. I have suffered depression and PTSD, and the worry about my family makes it worse. Two years ago, I received a phone call and found out that my youngest son, in Pakistan, had gone missing. I was so stressed that I fainted on the street when I heard the news. A stranger had to call an ambulance for me.

I went to see a psychiatrist and a psychologist, because this was not the only time it happened. Whenever I get bad news now, I react like that.

“Children at all ages grieve the loss of attachment figures.”

4. Policy and practice implications

There is clear evidence that a broad family and community perspective is necessary when considering trauma and loss in displaced adults and children. Loss of one member of a family has lasting impacts not only on the individuals in the family but also on the nature of family interactions and the capacity of adults and children to come to terms with and make sense of the loss and other adversities associated with displacement, flight, and resettlement. Indefinite and unresolved separation is a risk factor for complicated grief which in turn can prolong or intensify depression and complicate recovery from PTSD.

Reducing experiences of separation and loss, including by enabling family reunion, is an important way to contribute to recovery and reduce additional burdens of suffering and disease in refugee adults and children. War, persecution and other forms of organised violence that precede displacement often impact on the whole family, rather than just one member, and once displaced from past community and culture, family ties become even more important.

Identification of unresolved grief, prevention of additional stress and loss related to family separations and provision of appropriate early interventions may have the potential to limit long-term morbidity and assist in resettlement.

Conclusion

Sudden, prolonged or permanent family separation is an additional stress in adults and children who have already experienced considerable loss and trauma. It reduces the support available to remaining family. It can increase anxiety about the wellbeing of the missing family member and adds to and prolongs the symptoms and incapacities associated with depression and PTSD. It adds to distress in the remaining parent, further undermining their own mental health and parenting capacity, doubly disadvantaging children who then have not only lost a family member but may be impacted by persisting mental illness in the remaining adult or adults. In addition, their sense of themselves, who they are, where they belong and the story that they are part of can remain unresolved or be constituted around loss, rather than adaptation.

Refugee and asylum-seeking adults and children face multiple losses, including of home, language, culture, family and friends in the course of seeking safety. They are known to have increased health and mental health needs as a consequence of exposure to multiple and cumulative adversities before and during flight and post arrival. This is compounded in countries such as Australia which implement harsh and punitive policies and practices.

When refugee resettlement includes financial, social and psychological supports, mental and physical illness in adults and children is identified and treated, and rates of these illnesses reduce over time, which supports social and community engagement.

Resilience and recovery are supported by family friendly practices that recognise the centrality of key attachment relationships to wellbeing and survival.

The full version of this article is available at hrlc.org.au/family-separation-health-impacts.

Chapter 3

Family separation is unlawful

Key Summary

- ▶ The Australian Government's deliberate policies of separating families are unlawful under international law.
- ▶ An overlapping matrix of international law provisions protect the right to family. The different ways in which the Australian Government separates families breach this right.
- ▶ The harm caused by family separation can be so severe that in certain circumstances it amounts to torture under international law.



◀
Credit: Norma Jean
Gargasz – Alamy
Stock Photo

Australia played a leading role in the drafting of the Universal Declaration of Human Rights (UDHR) – the document in which countries from around the world came together to agree on the basic freedoms that Governments must respect to allow everyone to live safely and without fear.

Australia is also a signatory to various human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT) and the Convention on the Rights of the Child (CRC).

These treaties protect the right to have a family and be with your family.²⁴

In this chapter, two leading international law barristers conclude that the Australian Government's separation of families is illegal under international law.

Caoilfhionn Gallagher QC and Jennifer Robinson are leading international law barristers based at Doughty Street Chambers in London, which is focused on improving access to justice and promoting human rights and civil liberties through the law.

Below is an edited extract of Caoilfhionn Gallagher QC and Jennifer Robinson's detailed legal opinion dated February 2020.²⁵



Caoilfhionn Gallagher QC specialises in human rights, international, media and public law. She has particular expertise in children's rights and has acted in many of the leading cases in this field in domestic and regional courts, and internationally. This has included acting in international cases for children facing deportation and children arbitrarily detained for exercising their rights to peaceful protest.



Jennifer Robinson specialises in human rights, media law, public law and international law. She has acted in a range of cases before international and regional courts, including before the International Court of Justice. She regularly acts for a range of state, individual and non-governmental organisation clients in relation to cases requiring engagement with UN treaty bodies and special mechanisms.

Family separation in Australia and International Law

In Australia, the separation of refugee and asylum seeker families is widespread and systematic – and has been occurring for many years. Indeed, many consider that Australia provided the inspiration for the family separation policies implemented under the Trump Administration.²⁶

Australia's mandatory detention policies have been widely condemned.²⁷ Our opinion focuses on the specific question of the issue of family separation and prohibitions on family reunification which has not yet been the subject of international adjudication.

This edited extract of our detailed advice summarises relevant international law and Australia's binding obligations, and describes the application of international law to each form of family separation in Australia. It concludes that Australia is in breach of its international law obligations.

The relevant international law

An overlapping matrix of international law protections apply to the refugee or asylum seeker family member, from the general (such as the right to dignity) to the particular (such as the right to family life). A collection of rights – including rights to dignity and freedom from torture and cruel, inhuman and degrading treatment, right to liberty and security of person and right to privacy and 'family life' – cumulatively, along with other international soft law, establish a right to family unity and family reunification.

Since 1983, the United Nations High Commissioner for Refugees has adopted a policy of promoting family reunification based on 'humanitarian and practical considerations'.²⁸ This is stated to be based on a recognition that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.²⁹

The most relevant specific obligations to this 'essential right' are set out below.

1. Breach of the right to family life

The ICCPR contains a number of provisions that interact to guarantee the right to family life.

The most relevant is Article 17, which states:

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

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

“In light of the hardship and injustice caused to the families, we consider that all three methods of family separation amount to an arbitrary interference with the right to family life.”

Hassan’s story:

Hassan applied to bring his wife and children to Australia in 2013, but his application was deemed ‘lowest priority’ and was not processed before his wife passed away. The Australian Government’s actions have impacted his family irreversibly.

Family is the most important thing for me.

I have had a hard life. Despite this, I always tried to provide for my family. I work here as a bricklayer, and send money to make sure my children receive an education in Pakistan even though they are refugees. My oldest son has now finished school, but there is nothing else for him to go onto as a refugee. Day by day, he is losing his future and the chance to build a life for himself. He feels depressed and lost.

My younger son is in Year 12. He will face the same situation when school finishes. It will be the same for the youngest one too

I want to be there for my children. I am so concerned for their mental health and their future. I call them often to check that they are okay.

But there is only so much you can do over a phone as a father.

I don’t know why the Government is keeping us apart for no good reason.

As outlined in the Attorney-General’s Department’s ‘Public Sector Guidance Sheet: Right to respect for the family’, the Australian Government’s position is that ‘the legitimate application of migration laws will not result in a breach of Articles 17 and 23, even if it causes the separation of family members’.³⁰ This assertion does not stand up to scrutiny as a rule of general application: each case requires individualised assessment of the personal circumstances of the family in question, with a particular emphasis on the best interests of the children affected. It also does not stand up to scrutiny in the context of refugees.

For Australia’s policy of family separation to be incompatible with Articles 17, 23 and 24, in each individual case:

- there must be an interference with family life; and,
- that interference must be arbitrary.³¹

A determination of whether there has been an ‘arbitrary interference’ under the ICCPR involves a balancing exercise of whether the purpose of the interference is reasonable and in accordance with the aims and objectives of the ICCPR, and, if so, whether the significance of the State Party’s reasons for enforcing the interference are outweighed by the hardship and injustice caused to the specific complainant(s).³²

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

The Australian Government claims that interference with the right to family life is justified by the need for migration and border protection policies which deter people smuggling and prevent deaths at sea. The Australian Government must also demonstrate that the measures adopted to achieve these aims are necessary in a democratic society, reasonable and proportionate to the end sought; that is, that they are not incompatible with the aims and objectives of the ICCPR and are the least intrusive measure available to achieve that aim.

In light of the hardship and injustice caused to the families, we consider that all three methods of family separation amount to an arbitrary interference with the right to family life.

Separation by offshore detention

It is highly relevant that in earlier Human Rights Committee jurisprudence on Australia, the deportation of family members where another family member was pursuing domestic proceedings³³ or settled in Australia³⁴ has been found to be arbitrary. The circumstances of separation by offshore detention – no prospect of reunification, no prospects of family contact, no access to judicial review and indefinite detention – are clearly inconsistent with the aims of the ICCPR, which protects these rights.

In the case of Australia, the effect of the separation and the blanket prohibition on family reunification with the family member who is in Australia also has the effect of leaving their family members, including children, in a situation where they are suffering inhuman and degrading treatment – which is in itself a clear violation of the aims of the ICCPR and CAT.

In addition, this separation applies generally and with rigidity (and thus, arbitrarily), without any regard to the particular circumstances or to whether the hardship caused by family separation is proportionate to the State Party's legitimate reasons. This argument is particularly strong in the case of offshore detention separation where one member of the family arrived prior to the policy being introduced, which permanently separates families merely because they arrived in Australia on different dates.

Separation by a complete bar on family reunion for temporary visa holders

As is the case for those separated by offshore detention, the interference with the right to family life of those granted temporary protection visas (including safe haven enterprise visas) applies generally and with rigidity (and thus, arbitrarily), without any regard to the particular circumstances or to whether the hardship caused by family separation is proportionate to the State Party's legitimate reasons.

It has been described as particularly 'egregious' to impose limits on the right to family reunification based strictly on forms of legal status. It cannot meet the standard of reasonableness for a State to rely strictly upon a punitive label assigned by the State to an individual to grant or withhold rights to family life.³⁵

The complete bar on family reunion for temporary visa holders also breaches the ICESCR. The Committee on Economic, Social and Cultural Rights has criticised a restrictive approach to family reunification of refugees or the denial of reunification to those authorised to stay on the basis of subsidiary protection³⁶ or on humanitarian grounds.³⁷ This applies directly to this group on temporary protection visas.

Separation by endless deprioritisation

In the case of those separated by endless deprioritisation (and for some temporary visa holders), there is a theoretical pathway to citizenship and then family reunification.

However, the time and expense involved is unreasonable and must be regarded as an arbitrary interference with family life. In *Winata v Australia*,³⁸ it was sufficient that the separation would be for an extended period of time, for the interference to be considered arbitrary. In this instance, the separation is at least extended. In some cases, it is indefinite. Delays for family reunification for even three years have been criticised by the United Nations Human Rights Committee.³⁹

2. Breach of the prohibition on torture

While Australia's mandatory and indefinite detention policies – and the conditions in detention – have been found to violate the right to be free from torture or cruel, inhuman or degrading treatment,⁴⁰ this has not been analysed with respect to the more specific issue of family separation.

As defined by international law in Article 1 of the CAT, torture comprises the following essential elements:

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

Spotlight:

Family separation as torture in a US context



In response to child detention and family separation in the context of US immigration policy, a group of UN experts and academic commentators have suggested that such actions could amount to torture. For example, in a joint statement, UN experts stated that that *'[d]etention of children is punitive, severely hampers their development, and in some cases may amount to torture...Children are being used as a deterrent to irregular migration, which is unacceptable.'*⁴¹ In relation to the specific issue of separating children, Professor Daniel Keating, a professor of psychology, said that *'[t]he avoidable infliction of long-lasting physical or mental harm by any state actor in order to obtain a policy goal, such as information or coercion, is a clear definition of torture under the United Nations Convention Against Torture.'*⁴²

The argument that the separation of minor children from their asylum-seeking parents amounts to torture has been put persuasively in a number of cases in the US challenging the former Trump Administration's family separation policy. For instance, in a case in October 2018, a habeas corpus challenge was taken to the separation of a father and son in separate detention facilities in the US for a period of five months. In that case, the claim was made on the basis that the US Government was knowingly causing the child and his father to endure wrenching trauma as punishment for seeking asylum and to coerce and deter others from seeking similar relief, causing them severe mental pain or suffering that meets the statutory and international law definitions of torture. A US Federal Court judge ordered their immediate reunification and described the measure of family separation as *'the most cruel of cruelties'*.

▲ Credit: iStock.com – CHRISadowski

We consider that each method of family separation meets the three essential elements of torture.

Severe pain and suffering

There is strong evidence of immediate and long-term impacts of the Australian Government's family separation policy. It is clear that this can surpass the gravity threshold of severe physical or mental pain and suffering, particularly when it comes to children.

The pain and suffering inflicted by each method of family separation is compounded by Australia's policies which create situations in which children experience repeated, or prolonged, traumas such as that occasioned by indefinite immigration detention. There is medical evidence that people subjected to these policies will suffer irreparable damage due to the serious adverse psychological, physical, and family life impacts.⁴³

It is worth noting that family separation is recognised by the jurisprudence of other international tribunals as constituting torture of the parents as well as the children.⁴⁴

Hassan's story:

Hassan knows the cruelty of being separated from his children in Pakistan.

My situation causes me so much pain. And this situation is very bad for my children. They are missing out on building a future. Since their mother's death, I think their mental health is suffering. I worry about their safety.

People say that the Taliban are heartless and cruel people, which is right, but this separation is also very cruel. The Australian Government does not know the pain that they are causing me and my family.

Prohibited purpose – specific intent

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

The publicly stated purpose of the Australian Government's policy is to deter people smugglers and to 'stop the boats' and deaths at sea, but there is evidence that the separation policy is in fact being used to deter asylum seekers from asserting their right to seek protection once physically in Australia, and to deter others from seeking to come to Australia (i.e. 'coercing him or a third person'). The separated children are therefore suffering for the movements of their parents to deter and/or coerce future potential people seeking asylum.

Consent or acquiescence of the State

The various immigration policies applying to refugees and people seeking asylum and the statutory instruments which implement them do not expressly state a policy of family separation, but the practical impact of these policies has the effect of separating families and is acknowledged as such. This meets the requirement of consent and certainly of acquiescence.

Mary's story:

Mary is in Australia with her young daughter, Sarah, on a temporary protection visa. Her three other daughters and husband are in a refugee camp in Africa with no pathway to reunite.

Every day – every moment, I miss my children.

When I take Sarah to the park I see families – a mother, a father, children playing happily and think "why am I so different?"

I am a woman on my own here in Australia, with no family and a small child to take care of. I don't get any help from the Government. If my family was here, we could look after ourselves.

Sometimes I think life doesn't make any sense. Sometimes, the pain is too much, I think, when will it end? At times like this I look at my daughter and realise I have to stay strong for her. So I take a deep breath and tell her as I kiss her goodnight, "Maybe one day they will come. One day."

3. Breach of the rights of the child

Article 3(1) of the CRC provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration ('the best interests principle').

The explicit language of '*all actions concerning children*' makes clear that the best interests principle is engaged not only where a decision directly affects a child, but also when any child or children are affected by State policy. Australia is obliged to ensure that the best interests of the child is a primary consideration in its decision-making concerning and impacting upon children.

Several provisions within the CRC specifically address the rights of children to be with their parents and family. Most relevantly, Article 9 of the CRC specifically bans separation of parents from children except in limited circumstances and only when it is necessary to ensure the best interests of the child, for example, to safeguard them from parental neglect ('the principle of non-separation').

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

The policy of family separation clearly and directly violates Article 9. Australia is not separating children from their parents in their best interests – the only permitted reason to separate a parent and child – but as a deterrent and punishment for their parents' entry to Australia.

Moreover, in cases of family separation, Australia provides no opportunity for children to 'maintain personal relations and direct contact with both parents on a regular basis' or at all, as is required by Article 9.

Article 10 of the CRC contains the principle of family reunification. In relation to refugee children, the CRC Committee makes clear that family reunification in the country of origin should not be pursued where 'there is a "reasonable risk" that such a return would lead to the violation of fundamental human rights of the child' and that 'the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein'.⁴⁵ In such circumstances, Articles 9 and 10 of the CRC apply and govern Australia's obligations, requiring that family reunification applications from children or their parents to enter the country 'shall be dealt with by States parties in a positive, humane and expeditious manner'.⁴⁶ In Australia, the Australian Government has made clear that family reunification is not an option for the three different methods of family separation, and there is no process to challenge these decisions.

Conclusion

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

- violates the essential right to family unity, found in international human rights instruments to which Australia is a party, including the UDHR, ICCPR, ICESCR, CRC and CAT, and customary international law;
- violates Australia's international law obligations under Articles 17, 23 and 24 of the ICCPR;
- violates Australia's international law obligations under Article 9 of the CRC; and
- in certain circumstances, violates the absolute prohibition on torture under the CAT and the jus cogens norm of international law.

The full version of this advice is available at hrlc.org.au/family-separation-international-law.

Family separation is unparalleled

Key Summary

- ▶ Australia stands alone in its cruel and punitive approach to family separation.
- ▶ Countries including France, Canada, the United Kingdom and the United States do not routinely ban refugees from applying for family reunion, as Australia has done to those with temporary protection visas or no visas.
- ▶ These nations also do not punish refugees for their mode of arrival by imposing harsher family reunion policies.
- ▶ While refugees in Australia spend years, sometimes decades, waiting to reunite with family, some other nations process family reunion applications in a matter of months.



◀
Credit: Frederik
Franz – Alamy Stock
Photo

The Australian Government's systematic separation of refugee families is unparalleled in comparable jurisdictions. Denying some people with refugee status the right to ever apply for family reunion, and deliberately delaying application processing times for others, leaves Australia out of step with its international peers.

Comparative approaches to family reunion

An analysis of family reunion laws in Canada, France, the United Kingdom and the United States reveals that while improvements are needed in all of these countries to sufficiently protect the right to family, Australia has by far the harshest and most punitive approach.

| | Canada | UK | US | France | Australia |
|---|--|---|--|---|--|
| Equal access to refugee and humanitarian family reunion | Equal rights in practice, but laws exist which allow different treatment in some circumstances | Equal rights to family reunion for all people with refugee or humanitarian status | Equal rights to family reunion for all people with refugee or humanitarian status, but systematic campaigns to deter people seeking safety | Equal rights to family reunion for all people with refugee or humanitarian status | Discrimination based on mode of arrival, temporary protection visa holders barred from ever applying for family reunion, and many refugees endlessly deprioritised in family visa processing queue |
| Processing times for refugee and humanitarian family reunion applications | 1-4 years | 12 weeks | 3-5 years | 2 months | Indefinite for all 'onshore' refugees, who are lowest priority for the Special Humanitarian Program or ineligible to apply as temporary visa holders |
| Number of asylum applications received in 2019 ⁴⁷ | 58,400 | 44,500 | 301,000 | 123,900 | 27,400 |

UNITED KINGDOM

People in the United Kingdom are eligible to apply for reunion with their partners and children as soon as they receive refugee or humanitarian protection status.⁵² No application fees, waiting periods or sponsorship requirements are imposed. A major gap in the UK's family reunion framework, however, is the inability of unaccompanied minors to sponsor their parents.

Other relatives can be brought to the United Kingdom through the general family migration scheme, if they meet the relevant requirements. Both pathways to family reunion are available to people with refugee status regardless of whether they entered the United Kingdom lawfully, or whether they hold temporary or permanent residence status. Whether the United Kingdom's exit from the European Union will impact on refugee family reunion policy currently remains to be seen.

The United Kingdom processes most family reunion applications within just 12 weeks.⁵³ These processing times show that Australia's backlog of refugee family reunion applications for those able to apply, and the complete prevention of family reunion for people who arrived by boat, are inexcusable.

FRANCE

In France, the right to family unity is recognised in law.⁴⁸ There are no waiting periods before people with refugee status are eligible apply to reunite with immediate family members, and no deadline for doing so.⁴⁹ People with refugee status do not need to meet the requirements imposed on general family migration, such as minimum accommodation and income levels.⁵⁰

Family reunion is available regardless of how people seeking asylum enter France. The processing time for family reunion applications is just two – four months, subject to the verification of civil status documents.⁵¹ France takes this approach to family reunion despite receiving nearly four times as many applications for asylum as Australia.

In striking contrast to Australia, Canadian law expressly aims to reunite separated refugee families.

CANADA

In striking contrast to Australia, Canadian law expressly aims to reunite separated refugee families.⁵⁴ People can apply for reunion with immediate family members at any time within the first 12 months of their resettlement or grant of refugee status, without needing to meet the usual family sponsorship requirements or fees.⁵⁵ Alternatively, once refugees gain citizenship or permanent residence, they can apply to bring relatives to Canada via the general family migration program.⁵⁶

Based on the most recent available data, family reunion applications in Canada are generally processed in one to four years.⁵⁷ These periods are considered by the UNHCR to be 'lengthy'⁵⁸ and by the Canadian Council for Refugees to be 'extraordinarily slow',⁵⁹ yet still provide more certainty than Australia's indefinite waiting periods.

Although people frequently cross the border from the USA without a visa to seek protection in Canada, the Canadian Government acknowledges that despite irregular entry, it is 'bound to assess all claims for protection made within Canada and to provide asylum seekers with due process'.⁶⁰ Refugees who enter Canada without a visa are not routinely prevented from or deprioritised in applying for family reunion.⁶¹ Where instances of human smuggling into Canada are suspected, the Government is able to designate a group of persons as an 'irregular arrival',⁶² the consequences of which include delaying eligibility for family reunion by five years.⁶³ Although this power operates to unfairly punish people who are owed protection, as a means of deterring other persons from engaging in criminal activity, it has rarely been invoked – five designations were made on 4 December 2012, and none have been made since.⁶⁴

UNITED STATES

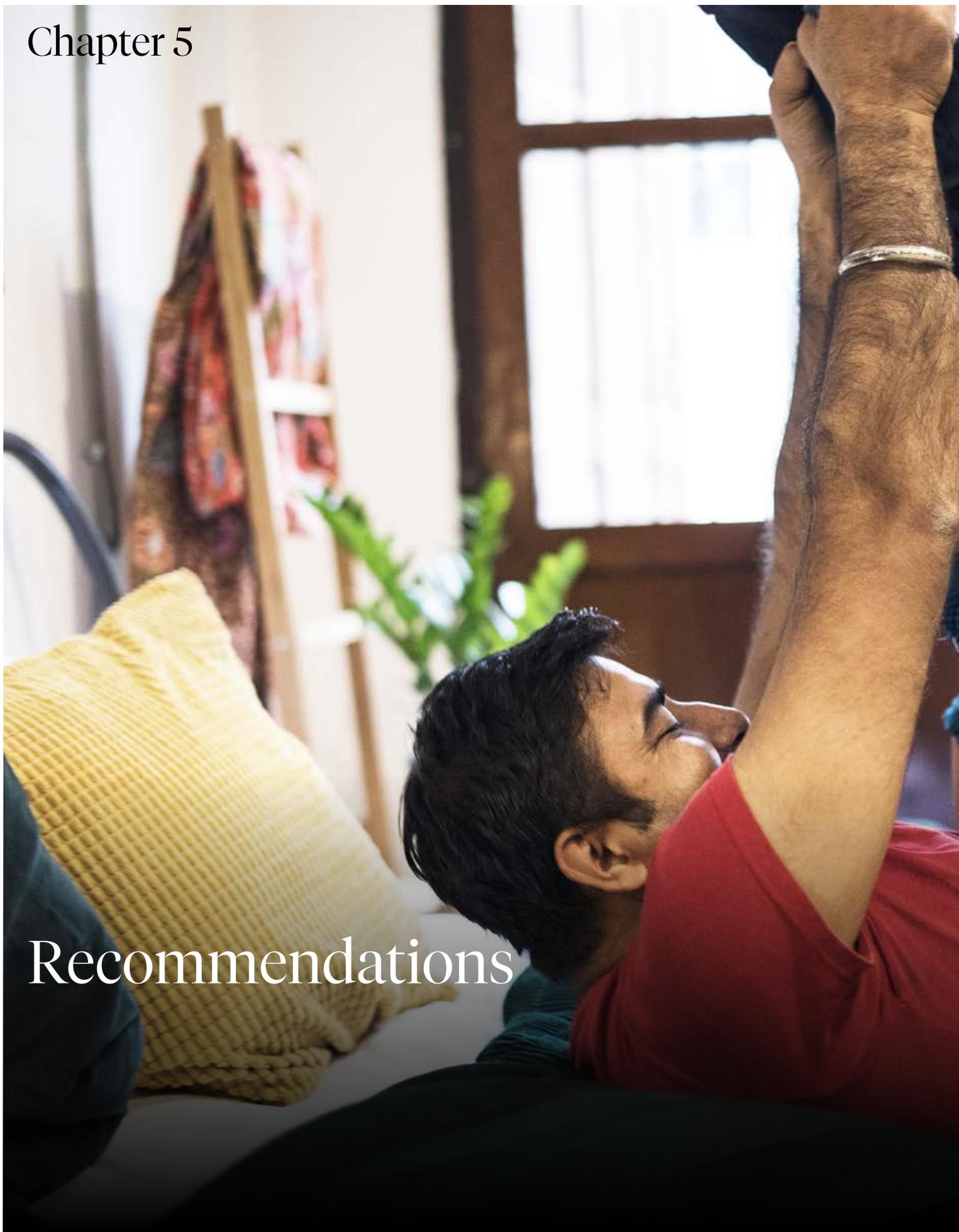
In April 2018, the former Trump administration provoked international condemnation when it announced a 'zero tolerance' policy, which aimed to detain and criminally prosecute all people attempting to cross the border outside an authorised port of entry, including people seeking asylum. As the administration expected, this policy led to the separation of thousands of children from their parents at the border.⁶⁵ Although legal pressure and widespread condemnation forced the Trump administration to back down, the damage is still far from undone – hundreds of families remain separated and for others, the traumatic experience will remain for a lifetime.

Despite the inhumane approach exemplified by the Trump administration, people recognised as refugees or 'asylees' (those who apply for protection after arrival)⁶⁶ in the United States still have a pathway to family reunion, regardless of their mode of arrival. Unfortunately, other changes to refugee policy such as the drastic reduction in refugee intake, refusal to accept applications for asylum at ports of entry, and the dangerous 'Remain in Mexico' policy, mean fewer people will be recognised as refugees or asylees or will ever be eligible to bring their families to safety in the United States.

People who do have refugee or asylee status in the United States can apply for reunification with partners or children at any time during the first two years after the grant of protection, through the 'follow-to-join' process.⁶⁷ Exceptions to the two-year deadline are possible on humanitarian grounds. One year after resettlement or grant of asylum, refugees and asylees are eligible to become permanent residents, at which point they may also apply for reunification with a broader range of family members. In addition, refugees and asylees of certain designated nationalities are able to apply for family reunion via the Priority 3 Family Reunification program of the US Refugee Admissions Program.⁶⁸ Despite the harsh policies at the border, a number of family reunion pathways are available regardless of the mode of arrival.

Chapter 5

Recommendations





◀ Credit: iStock.com – Rawpixel

Recommendations

Families thrive when they are together. We call on the Australian Government to take these five steps and stop using family separation to punish people seeking safety.

1

End discrimination against refugees based on how they arrived in Australia

No one should be punished for seeking safety in Australia. No family is less deserving of the right to build their lives together.

Yet people who arrived in Australia by boat or who arrive by plane and seek asylum at the airport, are subject to the cruel and deliberate use of family separation as a deterrent.

The same pathway to family reunion must be available to all refugees living in Australia, regardless of how they arrived. Australia must offer a consistent pathway to family reunion and must stop using separation to punish families.

2

End offshore processing, to ensure families are never again deliberately torn apart

Today, refugee families who have reunited in Australia after separation by offshore detention remain at risk of being torn apart again in future if family members are returned to Nauru or Papua New Guinea.

The offshore processing framework must be dismantled, and all refugees affected should be brought to Australia or a safe third country, to ensure that these families remain together and are never separated between Australia and places of offshore detention in the future.

3

Grant permanent status to long-term temporary visa holders and refugees who are barred from applying for protection visas, to enable family sponsorship.

Denying some families the right to ever apply for reunion is both unlawful by international standards and unjustifiably cruel.

In addition to barring people from reuniting with their loved ones, short term visas and lack of visa pathways rob people of certainty and prevent them building a long-term future in the community.

Temporary protection visas must be abolished, and the legal limbo for people brought to Australia from offshore detention must come to an end, 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.

4

Stop endless deprioritisation and drastically improve processing times

Family reunion applicants must not be treated as the lowest priority simply because of their mode of arrival. As a start, the Government must replace Direction 80 with a policy that does not separate some Australian residents from their families indefinitely. It must also reform the processing priorities applicable to the Special Humanitarian Program.

Applications must then be considered equitably, and processed in acceptable timeframes in line with comparable international jurisdictions.

5

Create a new humanitarian family reunion visa stream

The current family reunion pathways are inadequate and plagued by delays, discrimination, insufficient quotas, red tape and hidden costs. Australia needs a new, uncapped humanitarian family reunion visa stream, available to all refugees regardless of visa status or mode of arrival. This must be a fair, fast and accessible process that reflects an inclusive understanding of 'family'.

“All I want is to hold my kids and my wife again, and to be safe together as a family.”

Ali

Ali's story:

Ali has spent years in Australia and wants to share that safety with his children.

There is no way I can give thanks to the people of Australia. They are so kind, and I am so grateful that I was given protection here.

I think that if the Australian people knew what has happened to me, and how I am separated from my family for so many years, they would understand my situation. Everyone has a family. They would understand.

All I want is to hold my kids and my wife again, and to be safe together as a family.

Dima's story:

After legal action, Dima and baby Mohammad were finally reunited with Hani in Australia. The family was accepted for resettlement in Canada, and they are now rebuilding their lives together in safety and freedom.

The first time we saw each other again, we were crying. It was totally different to seeing each other on camera. It was really emotional - both happy and sad.

When Mohammad first saw Hani, he just fell in love with him and it was beautiful. Hani is a wonderful parent for Mohammad. And now Mohammad has two persons that he feels safe and trusted and loved by.

When we were separated, both of us had really difficult times. Now we have to rebuild our life again. We are still doing that. When we look back at the photos of Mohammad, Hani is missing. It is hard to get over that period. This separation impacted us, but we are working together to get over it.

We couldn't believe it when we found out about Canada. After so many disappointments, from the Australian Government, from Nauru, you cannot believe this is happening to me. At last we are free, we can do it, we can live our life.

Now Mohammad has a future, he can be whatever he wants to be. We can work, we can live wherever we want, we can leave whenever we want. The Australian Government took our freedom and our choices. I am most excited about our freedom, our freedom of choice. We can choose whatever we want.

▶ Dima, Hani and Mohammed on arrival in Canada where they are now rebuilding their lives in safety.



Endnotes

- 1 Liberal Party of Australia and the Nationals, *The Coalition's Policy for a Regional Deterrence Framework to Combat People Smuggling* (political party document, August 2013) <<https://parlinfo.aph.gov.au/parlinfo/search/display/display.w3p;query=Id%3A%22library%2Fparty%2F2686733%22;rec=0>>.
- 2 This Minister's title has variously been: Minister for Immigration, Citizenship and Multicultural Affairs; Minister for Home Affairs; Minister for Immigration and Border Protection; Minister for Immigration and Citizenship, and others.
- 3 Minister for Immigration, Citizenship and Multicultural Affairs, *Direction no 80: Order for considering and disposing of Family visa applications under s 47 and 51 of the Migration Act 1958* (21 December 2018), para 8(g).
- 4 Refugee Council of Australia, *Denying Family Reunion for Refugees: Impact of Direction 80* (factsheet, 15 April 2019) <<https://www.refugeecouncil.org.au/direction-80/>>.
- 5 Limited to a spouse or de facto partner, a dependent child, or a parent if the proposer is under 18 years of age (*Migration Regulations 1994* (Cth), reg 1.12AA).
- 6 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. In 2018-19, 48,760 new applications for Global Special Humanitarian visas were lodged, and only 7,661 visas were granted. Just seven of those visas were granted to applicants sponsored by a person who travelled to Australia by boat: see Department of Home Affairs, *Australia's Offshore Humanitarian Program: 2018-19* (web page, undated) <<https://www.homeaffairs.gov.au/research-and-stats/files/australia-offshore-humanitarian-program-2018-19.pdf>>; Department of Home Affairs response to FOI Request FA 19/12/01191 (7 February 2020); 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.
- 7 This length of time fluctuates according to two variable time periods: waiting to become eligible to apply for citizenship (one to four years after becoming a permanent resident) and waiting for citizenship to be approved (one to four years or longer). To be eligible for citizenship by conferral, a person must live in Australia on a valid visa for at least four years before applying, including as a permanent resident for at least 12 months. At a minimum, permanent protection visa holders must wait one year following the grant of their visa before applying for citizenship. Many others who were held in detention while their visa applications were processed must wait the full four years before applying. Once lodged, the Department of Home Affairs indicates that 90% of applications are processed within 23 months, but the remaining 10% can take as long as 4.8 years: see *Australian Citizenship Act 2007* (Cth), s 22; Department of Home Affairs, *Citizenship Visa Processing Times* (web page, current to 31 December 2019) <<https://immi.homeaffairs.gov.au/citizenship/citizenship-processing-times>>; Department of Home Affairs, *Freedom of Information Request FA 19/10/00736* (13 November 2019) <<https://www.homeaffairs.gov.au/foi/files/2019/fa191000736-document-released.PDF>>.
- 8 The Australian National Audit Office consistently found periods of unexplained inactivity (averaging 15 months) on applications lodged by people who arrived by boat. At 30 June 2018, applications from the humanitarian stream accounted for 77% of citizenship applications which had been pending for longer than two years, despite comprising just 9% of all lodgements: Australian National Audit Office, *Efficiency of the processing of applications for citizenship by conferral* (Auditor-General Report No.25 2018-19) pp 27, 39 <https://www.anao.gov.au/sites/default/files/Auditor-General_Report_2018-2019_25.pdf>; see also *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 in which the Federal Court found there had been unreasonable delays in processing the applicants' citizenship applications, which had been pending for 18 and 23 months.
- 9 Where a person presents to immigration authorities at an airport and declares or is suspected to have an intention to seek protection, the visa on which they have travelled is often cancelled and they are placed in immigration detention. They are then only eligible to apply for a temporary protection visa: *Migration Regulations 1994* (Cth), sch 1, item 1401(3)(d).
- 10 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.
- 11 A holder of a Safe Haven Enterprise Visa may apply for a limited group of visas (such as a student visa or skilled visa) after several years if they meet specific requirements. While this may provide a pathway to family reunion for some people, it is highly uncertain and only open to the select few refugees who are able to meet the criteria for the subsequent visa. Even a person who is successful is likely to experience a decade of separation from their partner or children.
- 12 Section 198AD of the *Migration Act 1958* (Cth) requires that 'unauthorised maritime arrivals' be taken to a 'regional processing country'.
- 13 See eg 'Turnbull on the Asylum Seeker Deal with the US', 7:30 Report (Australian Broadcasting Corporation, 14 November 2016) <<http://www.abc.net.au/7.30/turnbull-on-the-asylum-seeker-deal-with-the-us/8024956>>.
- 14 Liberal Party of Australia and the Nationals, *The Coalition's Operation Sovereign Borders Policy* (political party document, July 2013) <https://parlinfo.aph.gov.au/parlinfo/download/library/party%2F2616180/upload_binary/2616180.pdf;fileType=application%2Fpdf#search=%22library/party%2F2616180%22>.
- 15 *Migration Act 1958* (Cth), s 198B.
- 16 Ben Doherty, 'Border Force tells Nauru refugees to separate from family if they want to settle in US', *The Guardian* (6 December 2017) <<https://www.theguardian.com/world/2017/dec/06/border-force-tells-nauru-refugees-to-separate-from-family-if-they-want-to-settle-in-us>>.
- 17 Médecins Sans Frontières, *Indefinite Despair: The tragic mental health consequences of offshore processing on Nauru* (December 2018) <<https://www.msf.org/indefinite-despair-report-and-executive-summary-nauru>>.
- 18 Family is used to indicate the significant attachment and care relationships identified by the individuals concerned. This includes extended family and potentially other significant individuals unrelated by birth but with ongoing attachments and duties of care to each other.
- 19 CH Zeanah and MM Gleason, 'Annual Research Review: Attachment disorders in early childhood—clinical presentation, causes, correlates, and treatment', (2015) 56(3) *Journal of Child Psychology and Psychiatry*, 207-222.
- 20 KL Humphreys et al, 'Signs of reactive attachment disorder and disinhibited social engagement disorder at age 12 years: Effects of institutional care history and high-quality foster care', (2017) 29(2) *Development and Psychopathology*, 675-684.
- 21 RA Bryant et al, 'The effect of post-traumatic stress disorder on refugees' parenting and their children's mental health: a cohort study', (2018) 3(5) *The Lancet Public Health*, e249-e258; S Eruyar, J Maltby and P Vostanis, 'Mental health problems of Syrian refugee children: the role of parental factors', (2018) 27(4) *European Child and Adolescent Psychiatry*, 401-409; A Sim et al, 'Pathways linking war and displacement to parenting and child adjustment: A qualitative study with Syrian refugees in Lebanon', (2018) *Social Science and Medicine*, 200, 19-26; E van Ee et al, 'Parental PTSD, adverse parenting and child attachment in a refugee sample', (2016) 18(3) *Attachment & Human Development*, 273-291.
- 22 S Zisook et al, 'Bereavement: course, consequences, and care', (2014) 16 (10) *Current Psychiatry Reports*, 482, 1-10.
- 23 D Silove, P Ventevogel and S Rees, 'The contemporary refugee crisis: an overview of mental health challenges', (2017) 16(2) *World Psychiatry*, 130-139.
- 24 See discussion regarding the right to family in the full version of this advice available at www.hrlc.org.au/family-separation-international-law.

- 25 This summary and the detailed legal opinion were prepared in February 2020, and have not considered any potential impact of the Coronavirus pandemic. The full legal opinion is available at www.hrlc.org.au/family-separation-international-law.
- 26 See Luke Henriques-Gomes, “Donald Trump says ‘much can be learned’ from Australia’s hardline asylum seeker policies”, *The Guardian* (27 June 2019), <<https://www.theguardian.com/us-news/2019/jun/27/donald-trump-says-much-can-be-learned-from-australia-hardline-asylum-seeker-policies>>.
- 27 See eg UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, 13 January 2016, A/HRC/31/14; UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, 24 March 2011, A/HRC/17/10.
- 28 Office of the United Nations High Commissioner for Refugees, *UNHCR Guidelines on Reunification of Refugees Families* (July 1983) <<https://www.unhcr.org/3bd0378f4.pdf>>.
- 29 *Ibid.* See also, UDHR art 16(3) and ICCPR, art 23.
- 30 Australian Government Attorney-General’s Department, *Right to respect for the family* (web page, undated) <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttorespectforthefamily.aspx>>.
- 31 UN Human Rights Council, ‘CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses’, 27 July 1990, [3] <<http://www.refworld.org/docid/45139bd74.html>> (GC 16).
- 32 See, eg, *Nicholas Toonen v Australia*, No. 488/1992, CCPR/C/50/D/488/1992 (1994) [8.3].
- 33 *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v Australia*, No. 1069/2002, CCPR/C/79/D/1069/2002 (2003).
- 34 *Hendrick Winata and So Lan Li v Australia*, No. 930/2000, CCPR/C/72/D/930/2000 (2001).
- 35 James C Hathaway, *The Rights of Refugees under International Law*, (Cambridge University Press, 2005), 558.
- 36 Committee on Economic, Social and Cultural Rights, *Concluding Observations: Hungary*, E/C.12/HUN/CO/3 (16 January 2008), [21].
- 37 Committee on Economic, Social and Cultural Rights, *Concluding Observations: Norway*, E/C.12/1/Add.109 (23 June 2005), [16].
- 38 *Hendrick Winata and So Lan Li v Australia*, No. 930/2000, CCPR/C/72/D/930/2000 (2001).
- 39 UN Human Rights Committee, *Concluding Observations: France*, CCPR/C/FRA/CO/4 (2008) [21]; HRC, *Concluding Observations: Denmark*, CCPR/C/DNK/CO/6 (2016) [35].
- 40 UN Human Rights Committee, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E Méndez, Addendum, 6 March 2015, A/HRC/28/68/Add.1 [19].
- 41 Office of the High Commissioner for Human Rights, *UN experts to US: ‘Release migrant children from detention and stop using them to deter irregular migration’*, (media release, 22 June 2018) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23245&LangID=E>>.
- 42 Daniel Keating, ‘Why separating kids from parents is a form of torture’, CNN (online, 21 June 2018) <<https://edition.cnn.com/2018/06/21/opinions/separating-children-at-border-is-torture-opinion-keating/index.html>>.
- 43 See chapter 2: ‘Family Separation is Harmful’.
- 44 See eg *Kurt v Turkey*, Application No. 15/1997/799/1002, 25 May 1998.
- 45 Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 2005, CRC/GC/2005/6, [82] (GC 6).
- 46 GC 6, [83].
- 47 United Nations High Commissioner for Refugees, *Global Trends: Forced Displacement in 2019* <<https://www.unhcr.org/5ee200e37.pdf>> and Refugee Data Finder <<https://www.unhcr.org/refugee-statistics/download/?url=S7Jc>>
- 48 *Code de l’Entrée et du Séjour des Étrangers et du Droit d’Asile* (France) (CESEDA), art L.752-1, L.812-5.
- 49 CESEDA, art L.752-1(1).
- 50 *Ibid.*
- 51 Office Français de Protection des Réfugiés et Apatrides, *Family Reunification Process* (8 February 2018) <<https://www.ofpra.gouv.fr/fr/protection-etat-civil/reunification-familiale>>. If civil status documents require verification, the process may take an additional 4 – 8 months.
- 52 Immigration Rules (UK), ss 352A – 352FI. Notably, minors in the United Kingdom are unable to sponsor parents or guardians under the Immigration Rules.
- 53 UK Visas and Immigration, *About Our Services* (web page, undated) <<https://www.gov.uk/government/organisations/uk-visas-and-immigration/about-our-services>>; Independent Chief Inspector of Borders and Immigration, *An Inspection of Family Reunion Applications* (May 2016) <<https://www.asylumineurope.org/sites/default/files/resources/an-inspection-of-family-reunion-applications-january-to-may-2016.pdf>>.
- 54 *Immigration and Refugee Protection Act*, SC 2001, c 27, s 3(1)(d) (Canada) (IRPA).
- 55 *Immigration and Refugee Protection Regulations*, (SOR/2002-227), ss 141, 176(2) (Canada) (IRPR). See also, Government of Canada, UNHCR Resettlement Handbook – *Canada Country Chapter* (February 2018) <<https://www.unhcr.org/3c5e55594.html>>.
- 56 IRPA, s 12(1).
- 57 Canadian Council for Refugees, *Refugee Family Reunification* (web page, undated) <<https://ccrweb.ca/en/refugee-family-reunification>>; Canadian Council for Refugees, *We Need Express Family Reunification* (web page, undated) <<https://ccrweb.ca/en/express-entry-family-reunification>>.
- 58 Frances Nicholson, ‘The “Essential Right” to Family Unit of Refugees and Others in Need of International Protection in the Context of Family Reunification’, *UNHCR Legal and Protection Policy Research Series* (January 2018), <<https://www.unhcr.org/5a8c413a7.pdf>>.
- 59 Canadian Council for Refugees, *We Need Express Family Reunification* (web page, undated) <<https://ccrweb.ca/en/express-entry-family-reunification>>.
- 60 Government of Canada, *Irregular Border Crossings – What is Canada Doing?* (web page, 8 October 2019) <<https://www.canada.ca/en/immigration-refugees-citizenship/news/2018/07/irregular-border-crossings--what-is-canada-doing.html>>. We note that in June 2019, the IRPA was amended to exclude some people who have previously applied for refugee protection in other countries from applying for protection in Canada. People affected by this amendment remain in legal limbo and are unable to sponsor family.
- 61 We note that Canada does however have a long-standing return arrangement with the United States through the ‘Canada-United States Safe Third Country Agreement’ and that people who present at the Canadian border to the United States can be turned away. However, this agreement was found to be unconstitutional by the Federal Court in July 2020 and at the time of writing, an appeal from the Court’s decision is pending.
- 62 IRPA, s 20.1(1).
- 63 IRPA, s 20.2.
- 64 Canadian Government, *Canada Gazette*, Part 1: Vol 146, No 50 (2012). An order designating an ‘irregular arrival’ must be published in the *Canada Gazette* (IRPA, s 20.1(3)). A search of the *Canada Gazette* returns no other orders.
- 65 Refugees International, *The Trump Zero Tolerance Policy: A Cruel Approach with Humane and Viable Alternatives* (31 July 2018) <<https://www.refugeesinternational.org/reports/2018/7/31/trump-zero-tolerance-policy>>.
- 66 In the United States, ‘refugee’ refers to a person whose status is recognised while they are outside the United States, and ‘asylee’ is a person whose status is recognised while they are within the United States: US Department of State, *Refugee Admissions* (web page, undated) <<https://www.state.gov/refugee-admissions/>>.
- 67 8 U.S.C. § 1157(c)(2); 8 U.S.C. § 1158(b)(3).
- 68 US Department of State, *U.S. Refugee Admissions Program Access Categories* (web page, undated) <<https://www.state.gov/refugee-admissions-program-access-categories/>>.

Human
Rights
Law
Centre.