CASTAN CENTRE FOR HUMAN RIGHTS LAW

MONASH LAW

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The Efficacy, Fairness, Timeliness and Costs of the Processing and Granting of Visa Classes Which Provide for or Allow for Family and Partner Reunions

Senate Legal and Constitutional Affairs Committee

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April 2021

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1. INTRODUCTION

The Castan Centre for Human Rights Law ('Castan Centre') welcomes the Senate Legal and Constitutional Affairs Committee's inquiry into 'the efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions'.

The Castan Centre, based in the Faculty of Law at Monash University in Australia, is a research centre which aims to use its human rights expertise to create a more just world where human rights are respected and protected, allowing people to pursue their lives in freedom and with dignity. It is from this perspective that we make this submission.

In the first part of this submission, we set out some general human rights principles that the Castan Centre considers essential in this area, before highlighting, in the second part of the submission, some key concerns in relation to Australia's current practice and policy on family migration.

Our submission has a particular focus on term of reference **(h) the suitability and consistency of government policy settings for relevant visas with Australia's international obligations**. Select items of the inquiry's other terms of reference are considered from that perspective.

Given the aims of the Castan Centre and our expertise on human rights and family migration, we would welcome the opportunity to provide further detail to inform the work of the Committee's examination of family migration in Australia.

2. INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

This section explores the scope and nature of human rights involving family life. States have human rights obligations under various international legal frameworks that require them to refrain from interference with and take positive action to protect and promote the right to family life and related family rights. The rights to family life under international human rights law ('IHRL') therefore limit the generally wide powers of discretion that States have in relation to controlling immigration. These obligations must inform governments' visa schemes which facilitate family formation and reunification.

2.1 Rights related to marriage and family

The fundamental importance of the family is recognised by Article 16(3) of the *Universal Declaration of Human Rights* ('UDHR') which states that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.[1] Rights stemming from this recognition are enumerated in legally binding instruments, such as the *International Covenant on Civil and Political*

[1] *Universal Declaration of Human Rights,* GA Res 217A (III) UN GAOR, UN Doc a/810 (10 December 1948) art 16(3) ('UDHR').

Rights ('ICCPR'),[2] the *International Covenant on Economic, Social, and Cultural Rights* ('ICESCR'),[3] and the preamble to the *Convention on the Rights of the Child* ('CRC').[4]

a) The right to marry and found a family

States have obligations to recognise the right to freely enter into marriage and found a family. This right is enshrined both directly and indirectly in various treaties, including the ICCPR and ICESCR.[5]

Importantly, the right to found a family implies 'the possibility to procreate and live together'.[6] In the context of family migration, the right to marry and found a family is relevant to individuals who may wish to found a family with someone from a different country, with the subsequent aim of creating a life together. States should respect the right to marry and found a family, and have an obligation to adopt measures within the State, and in cooperation with other States, to 'ensure the unity or reunification of families particularly when their members are separated for political, economic or similar reasons'.[7]

b) Freedom from interference with family life

The right to family life under the ICCPR includes the enjoyment of family relationships without 'arbitrary' or 'unlawful' interference with privacy, family, home or correspondence.[8] 'Unlawful' means no interference can take place except in cases envisaged by the law, while 'arbitrary interference' can also extend to interference provided for under the law.[9] What is arbitrary is a question of 'reasonableness', so that any interference 'must be proportional to the end sought and be necessary in the circumstances of any given case'.[10] States also have a positive obligation to protect against such interference or attacks from others.[11] The obligation on the State therefore means they must legislate

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2 *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

3 *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

4 ICCPR (n 2) art 23(1); ICESCR (n 3) art 10(1); *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) preamble [5] ('CRC'); *International Convention on the Protection of Migrant Workers and Members of Their Families,* GA Res 4/158, UN Doc A/RES/45/185 (adopted 18 December 1990) art 44 ('CMW'). Note that Australia has not signed or ratified the CMW. See United Nations ('UN') Office of the High Commissioner for Human Rights, *Status of Ratification* at https://indicators.ohchr.org/.

5 ICCPR (n 2) art 23; ICESCR (n 3) art 10; See also *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature on 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 23 ('CERD').

6 UN Human Rights Committee, *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses,* 39th sess (27 July 1990) [5] ('*General Comment No.19*').

7 Ibid [5].

8 ICCPR (n 2) art 17(1).

9 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32nd sess (8 April 1988) [4] ('*General Comment No 16*').

10 UN Human Rights Committee, *Views: Communication No 488/1992,* 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) [8.3] ('*Toonan v Australia*').

11 ICCPR (n 2) art 17(2). See also UDHR (n 1) art 12. The UDHR frames this as both an obligation against interference and an obligation to protect.

and provide for the protection of the right.[12] Further, relevant legislation must specify in detail the precise circumstances in which any interferences may be permitted.[13]

The refusal to grant a visa may not itself be a contravention of the right to family life, but may be so in cases involve inappropriateness, lack of predictability and due process of law.[14] A violation of Article 17 may also arise where State legislation is discriminatory in character, or where State legislation is overly restrictive, even if non-discriminatory.[15] However, inquiries of a State regarding a person's private and family life upon request for a visa for family reunification do not automatically amount to arbitrary and unlawful interference.[16]

The Human Rights Committee, the expert body interpreting the ICCPR, has indicated that State obligations also apply in cases involving removal. For instance, in justifying removal, the State must weigh the significance of the reason for deportation against the hardship the family will face thereafter.[17] Where the State cannot provide a reasonable justification for interfering with family life, such interference will be arbitrary and a breach of Article 17.[18]

c) Protection of family life

Both the ICCPR and ICESCR also require protection of the family and its members. The ICCPR states that the family 'is entitled to protection by society and the State',[19] and the ICESCR requires that 'the widest possible protection and assistance should be accorded to the family… particularly for its establishment and while it is responsible for the care and education of dependent children'.[20]

As discussed below, what constitutes a family differs between States, but where legislation and/or practice defines 'family' in a particular way, that family must be given protections. Where there are diverse concepts regarding the meaning of immediate and extended family, these protections must be enumerated by the State.[21]

These obligations mean that States must create a legal, social, and economic environment conducive to family formation and stability. The Human Rights Committee has explicitly stated that this includes

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12 UN Human Rights Committee, *General Comment No. 16* (n 9) [2].

13 Ibid [8].

14 UN Human Rights Committee, *Views: Communication No 1937/2010,* 113th sess, UN Doc CCPR/C/113/D/1937/2010 (16 March 2015) [10.4] (*'Leghaei and Others* v. *Australia'*).

15 See eg, UN Human Rights Committee, *Views: Communication No 35/1978,* 12th sess UN Doc CCPR/C/12/D/35/1978 (9 April 1981) (*'Aumeeruddy-Cziffra et al v Mauritius'*); UN Human Rights Committee, *Concluding Observations on Zimbabwe*, 62nd sess, UN Doc CCPR/C/79/Add.89 (6 April 1998) [19] (*'Concluding Observations on Zimbabwe'*).

16 UN Human Rights Committee, *Views: Communication No 1179/2003,* 81st sess, UN Doc CCPR/C/81/1179/2003 (16 July 2004) (*'Ngambi and Nébol v France'*) [6.5].

17 UN Human Rights Committee, *View: Communication No 1011/2001,* 81st sess, UN Doc CCPR/C/81/D/1011/2001 (26 August 2004) [9.8] (*'Francesco Madafferi v Australia'*).

18 UN Human Rights Committee, *Views: Communication No 1143/2002,* 90th sess, UN Doc CCPR/C/90/D/1143/2002 (31 August 2007) [6.3] (*'El Dernawi v Libyan Arab Jamahiriya'*).

19 ICCPR (n 2) art 23.

20 ICESCR (n 3) art 10(1).

21 The Human Rights Committee has provided examples of unmarried couples and their children, or single parents and their children. See UN Human Rights Committee, *General Comment No. 19* (n 6) [2].

'the interest of family reunification'.[22] Other UN treaty monitoring bodies have observed the importance of family reunification in various Concluding Observations, often in the context of refugees, but generally applicable to citizens and permanent residents of a host country as well. For example, in 2004, the Committee on Economic Social and Cultural Rights found that a 2002 amendment to the *Aliens Act* in Denmark, which raised the minimum age of migrant spouses eligible for family reunification to 25 years, amounted to a violation of the State's obligation to guarantee the right to family life.[23]

The Human Rights Committee has also expressed concern regarding the length of time that family reunification procedures take.[24] For example, Swiss provisions that only permitted family reunification for migrant workers after 18 months were considered by the Committee to be 'too long a period for the foreign worker to be separated from his family'.[25] Other barriers may also contravene international human rights obligations, for instance Sweden's planned introduction of a support requirement as a condition for family immigration.[26] Family reunification may also be unduly inhibited by lack of access to procedural information.[27]

d) Children's rights

States have further obligations under IHRL in relation to children. The protection of the child because of their family relationship is guaranteed under ICCPR.[28] The best interests of the child are made an overarching concern by Article 3 of the CRC. Under the CRC, States must also respect the right of the child to 'family relations as recognized by law without unlawful interference', ensure that a child shall not be separated from parents against their will, and respect the primary responsibility of parents/guardians for promoting the development of children.[29]

In the migration context, this means that States have extensive duties to act in the best interests of the child, including by providing appropriate services to parents to assist them in their responsibilities. In addition, Article 10 of the CRC specifically requires that applications by a child or his or her parents for the purpose of family reunification shall be dealt with 'in a positive, humane and expeditious manner' and that children are able to maintain contact with both parents, with Article 22(1) further protecting asylum-seeking and refugee children.[30]

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22 UN Human Rights Committee, *Ngambi and Nébol v France* (n 16) [6.4-6.5]. The principle of family reunification has been affirmed by the General Assembly in *Resolution No. 63/188, Respect for the Right to Universal Freedom of Travel and the Vital Importance of Family Reunification* [2008] UNGA 198, UN Doc A/RES/63/188 (18 December 2008).

23 UN Committee on Economic, Social and Cultural Rights, *Concluding Observations on Denmark*, 33rd sess, UN Doc E/C.12/1/Add.102 (14 December 2004) [16].

24 See eg, UN Human Rights Committee, *Concluding Observations on France*, 93rd sess, UN Doc CCPR/C/FRA/CO/4 (31 July 2008) [21].

25 UN Human Rights Committee, *Concluding Observations on Switzerland*, UN Doc CCPR/C/79/Add.70 (8 November 1996) [18].

26 UN Committee on the Rights of the Child, *Concluding Observations on Sweden*, 51st sess, UN Doc CRC/C/SWE/CO/4, (12 June 2009) [64].

27 UN Committee on the Rights of the Child, *Concluding Observations on Ireland*, 43rd sess, UN Doc CRC/C/IRL/CO/2, (29 September 2006) [30].

28 ICCPR (n 2) arts 23, 24.

29 CRC (n 4) arts 2, 3, 5, 8, 9, 10, 18, 27.

30 CRC (n 4) arts 10, 22(1).

The Committee on the Rights of the child has highlighted that where children are concerned, the right to family life and reunification will be fulfilled where States enable contact between family members, consider maintaining family unity, and facilitate social and family cohesion.[31] Migration policies must ensure no child is separated from their parents, unless in their best interests, and States should establish family reunification policies that enable children left behind to join their parents (or parents to join their children).[32]

e) Non-discrimination

The protection of the family is inextricably linked to the principle of equality and non-discrimination.[33] Where States' policies, including immigration policies, fail to protect the right to family life and prevent family reunification on the basis of certain characteristics (i.e. race, sex or national origin), this may constitute discrimination, even in the context of immigration policy where states normally have a fair amount of discretion.[34]

Under IHRL, a discriminatory impact depends on the substantive and effective enjoyment, not the intention, of the law.[35] Discrimination 'constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing' of recognised human rights in international law.[36] Thus, discrimination may be direct, for example where a person or group of people is treated less favourably than others because of their background or certain personal characteristics, or indirect, where there is a neutral policy that is the same for all but has an unfair effect on people who share a particular attribute.[37]

The Human Rights Committee has observed that differential treatment is prima facie discriminatory, but may not constitute discrimination, if the aim of the State's policy is 'reasonable and objective and if the aim is to achieve a purpose which is legitimate under the covenant'.[38] The Committee noted in its Concluding Observations in relation to Zimbabwe that non-discriminatory laws that denied automatic residential rights to all foreign spouses also breached Article 23.[39] In its Concluding Observations regarding Israel, the Committee criticised Israel for placing legal obstacles in the way of family reunification, including long waiting periods, a 'probation' period of over five years' residence

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31 UN Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration* (Report, 28 September 2012) [39]-[42] at https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf .

32 Ibid [83], [91].

33 See eg, ICCPR (n 2) arts 2.1 24, 25 and 26; ICESCR (n 3) art 2; CRC (n 4) art 2; CERD (n 5) art 1.2.

34 See eg, CERD (n 5) art 1.2.

35 See eg, UN Committee on Economic, Social and Cultural Rights CESCR, *General Comment No 20 Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2 July 2009) [8] ('*General Comment No 20*').

36 Ibid [7]. See also UN Human Rights Committee, *CCPR General Comment No 18: Non-discrimination,* UN Doc E/C.12/GC/20 (10 November 1989) [6]-[7] ('*General Comment No 18*').

37 Ibid [10].

38 UN Human Rights Committee, *General Comment No 18* (n 36) [13].

39 UN Human Rights Committee, *Concluding Observations on Zimbabwe* (n 15) [19].

(to establish that the marriage is genuine) and a further waiting period for citizenship.[40] These were particularly problematic as it seemed they were 'applied even more rigorously in the case of Arab citizens, particularly those who marry persons resident in the occupied territories'.[41]

Additionally, the principle of equal treatment of the sexes applies to these obligations.[42] States cannot, for example, restrict the protection of foreign spouses of women but not foreign spouses of men.[43] Policies must identify women as rights-bearers, 'with particular emphasis on groups of women who are most marginalized and who may suffer from various forms of intersectional discrimination', including migrant women.[44] States also have an obligation to modify or abolish existing laws which constitute discrimination against women, noting that certain groups of women (including migrant women) are particularly vulnerable to discrimination.[45]

2.2 Family: definition and personal scope

This section explores the definition of 'the family' under IHRL, which will necessarily be broad, given that understandings of family differ between States and regions, and can change according to evolving social attitudes.[46] Human rights treaties must also be interpreted in a manner which makes their provisions practical and effective, so States cannot limit the definition of a family in ways that breach international human rights standards or constitute discrimination.[47]

a) Family as understood under international human rights law

The concept of 'family' is dependent on the society of each country and states have some leeway in determining their definition of the 'family'. However, 'when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23'.[48] While it is uncontested that family includes married couples and the parent-child relationship (and indeed some rights are specific to married couples), according to the UN Human Rights Committee, what matters is that there is a 'family bond to protect' in the eyes of the society concerned.[49] Such a

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40 UN Human Rights Committee, *Concluding Observations on Israel,* 63rd sess, UN Doc CCPR/C/79/Add.93 (18 August 1998) [26] ('*Concluding Observations on Israel 1998*').

41 Ibid. See also UN Human Rights Committee, *Concluding Observations on Israel*, 99th sess, UN doc CCPR/C/ISR/CO/3 [16].

42 See generally *Convention on the Elimination of All Forms of Discrimination against Women,* opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW').

43 *Aumeeruddy-Cziffra et al v Mauritius* (n 15) [9.2].

44 UN Committee on the Elimination of Discrimination Against Women ('CEDAW Committee'), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th sess, UN Doc CEDAW/C/GC/2816 (16 December 2010) [26].

45 Ibid, 31.

46 See eg, UN Human Rights Committee, *General Comment No. 16* (n 9) [5]. See also, UN Human Rights Committee, *General Comment No. 19* (n 6) [2].

47 UN Human Rights Committee, *Views: Communication No 549/1993,* UN Doc CCPR/C/51/D/549/1993 (30 June 1994) [3.2] ('*Hopu and Bessert v France*').

48 See eg, UN Human Rights Committee, *General Comment No. 19* (n 6); UN Human Rights Committee, *General Comment No. 16* (n 9).

49 UN Human Rights Committee, *Views: Communication No. 417/1990,* UN Doc CCPR/C/51/D/417/1990 (27 July 1994) [10.2] ('*Balaguer Santacana v Spain').*

family bond will not be affected by the absence of formal marriage bonds.[50] In *Winata v Australia* for example, the Committee accepted that a longstanding relationship which had resulted in the birth of a son was a de facto relationship 'akin to marriage'.[51]

Children do not have to cohabitate with their parents (including in the case of divorce or where the child is born outside of marriage) for a family to exist. The Committee on the Rights of the Child has further expanded the definition more broadly 'to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom'.[52] It has also interpreted protections regarding the separation of children from their parents to extend to 'any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship'.[53]

In the context of family reunification, most children arrive in a host country with a sponsored partner or spouse and are minors under 18 years of age. As noted above, children are a special interest group whose best interests must be primary consideration in all actions concerning them.[54] Often, the right to family life is couched in terms of their perspective and as mentioned above, children should not be separated from their parents and States have specific positive obligations where there are applications by a child or their parents to enter or leave a State for the purpose of family reunification.[55] The Committee on the Rights of the Child has repeatedly reminded States of the obligation to ensure that requests for family reunification shall 'entail no adverse consequences' for applicants and family members.[56]

In the case of adult children, the Human Rights Committee has found that relations between parents and their adult children can also constitute family relations.[57] However, interference with family rights in such cases must not be disproportionate, and perhaps additional elements of dependence must be found for a family to exist to justify family reunifications. For instance, in *A.S.* v. *Canada*, the Committee was unable to reach the conclusion that a daughter and grandson shared an effective family life with the applicant, given their limited time living in the same country since the daughter was adopted.[58]

With regard to dependent older family members, it is useful to remember States' obligation to 'support, protect and strengthen the family'.[59] This may, again in the context of dependency, support a family reunification application for aged parents, though such parents are generally less successful in

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50 UN Human Rights Committee, *Ngambi and Nébol v France* (n 16) [6.4].

51 UN Human Rights Committee, *Views: Communication No 930/2000,* 72nd sess, UN Doc CCPR/C/72/D/930/2000 [2.1] ('*Winata and Li v Australia*').

52 UN Committee on the Rights of the Child, *General Comment No 14: The Right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* UN Doc CRC/C/GC/14 (29 Mary 2013) [59].

53 Ibid [60].

54 CRC (n 4) art 3(1). See also ICCPR (n 2) art 24(1).

55 CRC (n 4) arts 9,10.

56 CRC (n 4) art 10(1).

57 UN Human Rights Committee, *Views: Communication No 1959/2010,* 102nd sess, UN Doc CCPR/C/102/D/1959/2010 (1 September 2011) [8.8], [8.10] ('*Warsame v Canada*').

58 UN Human Rights Committee, *Views: Communication No 68/1980,* 12th sess, UN Doc CCPR/C/12/D/68/1980 (31 March 1981) [5.1] ('*A.S. v. Canada*').

59 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, 13th sess, UN Doc t E/1996/22 (8 December 1995) [31].

applications for family reunification than partners.[60] In refugee and humanitarian contexts, it has been suggested that aged parents of refugees are normally considered family if they are living in the same household, and that those who consider themselves to be part of a family and wish to live together are deemed to belong to that family.[61]

UN treaty bodies have occasionally indicated that States have obligations to take at least some measures to enable family reunification beyond that of the nuclear family. For example, in 2008, the Committee on Economic Social and Cultural Rights recommended that Hungary review its regulations to broaden the concept of family members and to protect the right to family life of all refugees.[62] Similarly, the Committee expressed concern that the Austrian *Federal Asylum Act* 2005, which only recognised family reunification for nuclear family members (spouses, minor children, and parents of minor children) of recognised refugees, could result in hardship situations.[63]

In summary, the relationships between husband and wife, unmarried/de facto partners and parents and minor children, are unequivocally protected under IHRL as falling under family bonds, with States having an obligation to protect that bond by also ensuring possibilities for family formation migration, family reunion and family reunification. The CRC obligation to ensure that, in the best interests of the child, the family unit remains intact, places particular emphasis on children's rights in this regard. The relationship between parents and adult children or grandparents and grandchildren is less categorically established and requires an analysis of shared life and emotional ties, which are generally indicative of a family relationship.

b) Family in the context of migration: the status of sponsors

Given family migration crosses jurisdictional borders and engages at least two States' human rights obligations, the personal scope of the right and obligation to protect it is also relevant, and again not systematically delineated by IHRL. From the perspective of host country, family reunion is generally conceptualised as an obligation towards the family member already present in the State ('sponsor') to be able to be joined by members of their family. [64] This includes citizens but in principle also migrants, both with permanent and temporary status. Indeed, the starting point of IHRL is that non-citizens within the State's territory and subject to its jurisdiction are guaranteed the same rights as citizens of a State.[65]

However, States may also restrict the exercise of rights where there is a good reason. The fundamental guarantee of non-discrimination (discussed above) means States must be able to justify any differential

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60 Gareth Larsen, *Family Migration to Australia* (Report, 23 December 2013) at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/FamilyMigration.

61 Frances Nicholson, United Nations High Commissioner for Refugees ('UNHCR'), *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied* (Research Paper January 2018) 18.

62 UN Committee on Economic, Social and Cultural Rights, *Concluding Observations on Hungary*, 38th sess, UN Doc. E/C.12/HUN/CO/3 (16 January 2008) [21], [44].

63 UN Human Rights Committee, *Concluding Observations on Austria*, 91st sess, UN Doc CCPR/C/AUT/CO/4 (30 October 2007) [19].

64 I. Honohan 'Reconsidering the Claim to Family Reunification in Migration' (2009) 57(4) *Political Studies* 768–87.

65 UN Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 27th sess (11 April 1986) [2]. CERD, *General Recommendation No 30 on Discrimination Against Non-Citizens* (2004) [3-4].

treatment of migrants within their jurisdiction. Both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have emphasised that that differential treatment can only be justified with reference to a legitimate aim and that the criteria used must be reasonable and proportional to the achievement of this aim.[66] This can raise very difficult questions in the immigration policy context, where states have a fundamental right to control over their borders and discretion over the entrance of non-citizens.

In practice, most states recognise citizens and permanent residents have rights to be united with their family, especially partners and children, but family formation and reunification rights are less easily accessible to those who are admitted and reside on a temporary basis. The UN Special Rapporteur on the Human Rights of Migrants has offered comments on the family rights of migrant workers, and particularly the fact that the legislative measures of States regarding family reunification also influence the situation of family members left behind.[67] Additionally, attention has been drawn the rights of women migrant workers, often unable to access family reunification schemes.[68] States have been called upon to ensure that their family reunification schemes for migrant workers 'are not directly or indirectly discriminatory on the basis of sex'.[69]

Finally, family reunification rights for refugees (let alone asylum-seekers and stateless persons) are often either not recognised in domestic law, or inaccessible in practice. This may be in part because the *Convention Relating to the Status of Refugees* does specifically mention a right to family unity.[70] However, the Refugee Convention does provide that marriage rights previously acquired by a refugee must be recognised by the State, provided those rights would have been otherwise recognised by the law of that State.[71] Moreover, family rights under IHRL above apply to refugees insofar as the relevant instruments apply to everyone within a State's jurisdiction, meaning any limitations have to be justified as reasonable and proportionate.

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66 UN Committee on Economic, Social and Cultural Rights, *General Comment No 20* (n 35) [9]; UN Human Rights Committee, *General Comment No 18* (n 36) [13].

67 UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants: Impact of Certain Law and Administrative Measures on Migrants*, UN Doc A/61/324 (11 September 2006) [40].

68 UN Committee on the Elimination of Discrimination Against Women, *General recommendation No. 26 on Women Migrant Workers*, UN Doc CEDAW/C/2009/WP.1/R (5 December 2008) [19], [26].

69 Ibid [26(e)].

70 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954*) ('Refugee Convention'); Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

71 *Refugee Convention* (n 70) art 12(2).

3. THE SUITABILITY AND CONSISTENCY OF GOVERNMENT POLICY SETTINGS FOR RELEVANT VISAS WITH AUSTRALIA'S INTERNATIONAL OBLIGATIONS

This part of the submission will focus on 'the suitability and consistency of government policy settings for relevant visas with Australia's international obligations' as per term of reference (h). As established in the previous part, Australia has accepted that it has human rights obligations under various international treaties that impose an obligation to respect family life and promote family life, including family formation and reunification migration. These commitments, appropriately understood, should guide Australian policy in this area.

While Australian practice stands up reasonably well to international comparison, significant areas of law and practice require change if international human rights are to be fully observed in Australia's family migration policy. The core of family life under IHRL is indicated by people's ability to live together and maintain family life with those linked to them by a close family bond. Australia's current family migration policy settings raise human rights concerns because they significantly restrict individuals' ability be joined by family members, and where family reunification is possible, impose a process that is demanding, expensive and lengthy.

This section contains some statistics from the Department of Home Affairs against specific criteria, including the rate at which family visas are granted in Australia, the cost of family visas and the number of visas in the processing pipeline. To obtain a sense of how practices surrounding family visas have changed across time, these criteria are considered at three data points over a 10-year period: 2009-10; 2014-14; and 2019-20.

3.1 Eligibility to apply for relevant visas

The Family Stream facilitates the reunion of 'immediate family members' of Australian citizens, permanent residents or eligible New Zealand citizens.[72] Immediate family members refers to partners (including spouses) and dependent children. It also includes, at least in theory, the possibility to sponsor other members of the extended family, such as parents, orphaned relatives and carers. However, in practice, most places in the Family Stream go to members of the nuclear family, that is, partners and children. Family members from the other categories have been increasingly pushed to the margins of the Migration Program.

This picture can be clearly demonstrated with reference to program trends in the last decade. During the scope of 10 years (2009-10 to 2019-20), the number of family visas (including children visas)[73] granted by the Department of Home Affairs has declined significantly.[74] While there was a nominal increase in visas granted in 2009-10 versus 2014-15 from a total of 60,254 to 61,085 family visas granted, there was a sharp decline in 2019-20. In the latter year, a total of 44,442 family visas were

72 New Zealand citizens are eligible if they are protected SCV holders (established residence before 2001) or holders of permanent residence.

73 Excluding unaccompanied child visas.

74 'Migration Trends Statistical Package 2019-20', *Department of Home Affairs* (30 November 2020) at https://data.gov.au/data/dataset/australian-migration-statistics/resource/6037fa73-849d-4aa7-9cd4-f1f151300aa2 (*'Migration Trends 2019-20'*).

granted according to the Department of Home Affairs' statistics, a decrease by approximately 27% as compared to 2014-15. While some of this change in 2020 is explained by the Covid-19 pandemic, the overall trends are clear.

Table 1 – Family visas granted

Year	Partner	Parent	Child[75]	Other family	Total Family Stream (incl children)	Total Child Stream[76]	All Family Total
2009-10	44,755	9,487	3,544	2,468	60,254		**60,254**
2014-15	47,825	8,675	4,135	450	61,085		**61,085**
2019-20	37,118	4,399		444		2,481	**44,442**

The majority of family visas across all the three data points considered are granted to those falling within the 'Partner' category. At each of the three data points, this is followed by visas for 'Parents' and subsequently those falling within the 'Child' category. Very few family visas have been granted to persons falling within the 'Other family' category, particularly since 2009-10. Between 2009-10, there was a decrease of almost 82% (from 2,468 to 450) in the granting of 'Other family' visas.

It should also be noted that Parent visas above include both so-called 'non-contributory' Parent visas and 'contributory' Parent visas. In relation to contributory visas, a significant visa charge is levied in return for quicker processing (now overall close to $50,000 per applicant)[77], and non-contributory visas, for which a smaller fee is payable (currently $6,415 per applicant),[78] but where the queue is long, as the yearly number of places capped at a very low level. For instance, in 2019-20, a total 3,730 contributory Parent places were available, while only 669 non-contributory Parent places were available.[79] This means that the current 'wait time' for a non-contributory Parent visa is 30+ years, and is counted in years even for contributory visas**.**

The limited availability of places to anyone other than partners and dependent children prioritises the core family interest involving unity with partners and children. These are indeed important groups also under the understanding of 'family' under IHRL as discussed above. However, the almost exclusive focus on these groups, and lack of attention to other family members means that the current policy also makes it almost impossible for most other family members to join their family in Australia. This includes, most obviously, parents wishing to join their adult children in Australia who face impossible wait times. This is problematic from a human rights perspective. It is worth noting that this is a longstanding problem, indicative of a deliberate desire to minimise the 'care burden' aged parents are seen to impose on the Australian community.[80]

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75 'From 2015–16, Child visa outcomes (excluding Orphan Relative visas) are no longer counted within the Family stream'.

76 'From 2015–16, Child places are allocated on demand within the overall Migration Program ceiling'.

77 'Subclass 143 Contributory Parent Visa', *Department of Home Affairs* (24 March 2021) at https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/contributory-parent-143.

78 'Subclass 103 Parent Visa', *Department of Home Affairs* (24 March 2021) at https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/parent-103 ('*Parent Visas*').

79 Department of Home Affairs, *Australia's Migration Trends 2019–20 Highlights* (Report, 2020) 8.

80 H. Askola 'Who Will Care for Grandma? Older Women, Parent Visas and Australia's Migration Program' (2016) 42(2) *Australian Feminist Law Journal* 297-319.

It is also important to highlight that the family migration rights discussed above are only open to Australian citizens, permanent residents or eligible New Zealanders. While skilled worker visas allow for partners and children to accompany the primary migrant, there is no provision for sponsoring members of extended family. Most other temporary migrant workers have no entitlement to be accompanied by any family members whatsoever. This is problematic from the point of view of IHRL because it is well-known many 'temporary residents', despite their designation as temporary visa holders in fact reside in Australia permanently, but with no right to be joined by their family members.[81] This subsequently impacts on their ability to enjoy family life and may cause significant strain on their relationships and ability to integrate to Australia. Similar concerns can be expressed in relation to persons from refugee backgrounds, discussed below.

The Castan Centre for Human Rights Law recommends that:

- Greater attention be paid to the need to allow the migration of family members with whom the sponsor has a genuine family bond, including but not limited to partners and dependent children;
- Enough places to be allocated to extended family members, so that family reunion is in fact realistically possible where there are genuine family ties; and
- In deciding who is able to sponsor family members, the focus be on the sponsor's actual length of residence in Australia.

3.2 Processing and waiting times

Parliament has voted to ensure that no limitations apply to the grant of visas to the spouses/partners or dependent children of Australian citizens and other eligible residents. Moreover, even though the family stream is subject to processing priorities, partners and children are processed first. Yet processing times even for these priority applications have increased significantly in recent years.

Again, this can be demonstrated with reference to the available statistics. As at 30 June at the end of each of the data points, there has generally been an increase in the number of applications that are deemed to be 'onhand' (i.e. an application which has been lodged but not finalised).[82] The exception to this trend is in relation to child visas where there was a slight reduction in the pipeline from 2014-15 to 2019-20 (from 3,876 to 3,638).[83]

For partner and parent visas, however, there has been a marked increase from 30 June 2010 to the same date in 2015 and 2020. Partner visas in the pipeline have gone from around 27,900 in 2010, to

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81 Productivity Commission, 'Chapter 12: Interaction between temporary and permanent immigration', *Migrant Intake into Australia* (Report No 77, 13 April 2016) at https://www.pc.gov.au/inquiries/completed/migrant-intake/report/migrant-intake-report.pdf; H. Sherrell, 'Migration – permanent and temporary visa trends', in *Parliamentary Library Briefing Book: Key Issues for the 46th Parliament* (Canberra: Parliamentary Library, 2019) at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook46p/Migration.

82 Department of Home Affairs, *Migration Trends 2019-20* (n 74).

83 Department of Immigration and Border Protection, *2014-15 Migration Programme Report: Programme year to 30 June 2015* (Report, 2015) 17 at https://www.homeaffairs.gov.au/research-and-stats/files/2014-15-Migration-Programme-Report.pdf ('*2014-15 Migration Program Report*'); Department of Home Affairs, *2019 – 20 Migration Program Report: Program year to 30 June 2020* (Report, 2020) 54 at https://www.homeaffairs.gov.au/research-and-stats/files/report-migration-program-2019-20.pdf ('*2019-20 Migration Program Report*').

71,172 in 2015 and 96,361 in 2020.[84] This is a striking of 155% increase in partner visas in the pipeline between 2010 and 2015 and 245% between 2010 and 2020.

Similarly striking increases in the number of applications in the pipeline are noted in respect of parent visas where the Department has recorded over 36,000 visas to be in the pipeline in 2010, compared to 75,478 in 2015 and 108,659 in 2020.[85] The data of applications in the pipeline that fall within the 'other family' category appears to be incomplete and it was not possible to undertake a temporal comparison across the three datapoints. However, it can be noted that the applications in the pipeline in 2020 were 8,785.

Table 2 – Processing pipeline

Year	Partner	Parent	Child	Other family
2009-10	≈ 27,900	Over 36,000	≈ 2,700	-[86]
2014-15	71,172	75,478[87]	3,876	-[88]
2019-20	96,361	108,659	3,638	8,785

These figures are indicative of a significant problem affecting a large number of Australians and permanent residents and seriously impacting on their ability to enjoy family relationships in practice. The excessive increase in processing and waiting times, coupled with what is now a significant backlog of cases, means that even core members of the family face waiting times that can be measured in years. In the case of parent visas, as already noted above, the possible wait is in the decades and means many families will never be able to live together in Australia. Most concerningly, there have been suggestions that internal departmental directions have deliberately contributed to this backlog, by directing a halt on the granting of partner visas.[89]

These problems raise serious question about the practical administration of the family visa program. As discussed above, under IHRL, States are under a positive obligation to take action to facilitate family migration, and this includes the obligation to deal with visa applications appropriately and with sufficient expeditiousness and predictability. Delays related to departmental processing do not justify preventing the reunion of families for long periods, and delays that can be counted in years are plainly very problematic under IHRL, even in the absence of any further evidence of inappropriateness.

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84 Department of Immigration and Citizenship, 'Report on Migration Program, 2009-10 Program Year to 30 June 2010 (accessed 20 April 2021) 13 at https://www.homeaffairs.gov.au/research-and-stats/files/report-on-migration-program-2009-10.pdf ('*2009-10 Migration Program Report*'): Department of Home Affairs, *2019 – 20 Migration Program Report* (n 83) 50.

85 Department of Immigration and Citizenship, *2009-10 Migration Program Report* (n 84) 14; Department of Home Affairs, *2019 – 20 Migration Program Report* (n 83) 51.

86 This figure does not appear to be readily available in the 2009-10 report. See Department of Immigration and Citizenship, *2009-10 Migration Program Report* (n 84).

87 The Department has divided the pipeline for the family visa category by non-contributory and contributory parent applicants. The total of 75,478 parent applicants in the pipeline is divided into (51,191 non-contributory parents vs 24,287 contributory parents). See Department of Immigration and Border Protection, *2014-15 Migration Program Report* (n 83).

88 This figure does not appear to be readily available, but the 2014-14 Migration Programme Report does state that '[t]he pipeline increased by 4 per cent over the 2014-15 programme year' for the 'other family' category. See Department of Immigration and Border Protection, *2014-15 Migration Program Report* (n 83) 18.

89 As per the documents released under Freedom of Information request FA 19/03/00642 at https://www.homeaffairs.gov.au/foi/files/2019/fa-190300642-document-part2.PDF.

The issue of long processing times and delays is particularly crucial in relation to children, who have a right to maintain contact with both parents and not be separated from parents against their will. However, the current delays suggest a general problem that affects all family migrants, and causes considerable hardship to separated family members.

The Castan Centre for Human Rights Law recommends that:

- Immediate action is taken to reduce excessive delays in family reunions, if necessary, by the allocation of additional resources for the purpose; and
- Greater attention is be paid to the urgent needs of children to be able to join their parents, in the best interest of the child.

3.3 Cost of visas

Visa Application Charges (VAC) have increased significantly in the last decade.

In relation to partner visas, it can be noted that ten years ago (in April 2011) a subclass 820/801 pathway (for onshore applicants) cost $2,575 and subclass 309/100 pathway (for offshore applicants) cost $1,735. In 2015, when fees to apply for a partner visa were significantly increased, the government harmonised partner visa application costs between onshore and offshore visas. The cost is now the same for both subclass 820/801 and subclass 309/100 pathways. As at 20 April 2021, the 'base application charge' ('base charge') for both sets of visas is $7,715.[90] Lower charges are available for applicants who are already holders of other visa types (i.e. of a 'Prospective Marriage visa' (subclass 300)).[91]

Child visa applications are generally cheaper, with a base charge for a child visa (subclasses 101, 802 and 445) at $2,665.[92] Parent visas were already discussed above. The cost of non-contributory visas is the base application charge for a parent visa and is aligned with most other family visas ($6,415 per applicant).[93] However, these visas are not available given the extremely low cap. Meanwhile, the cost of a contributory Parent visa is approaching $50,000. This cost is unaffordable for most Australian families, yet these visas are the only realistic option for family reunion with aged parents.

While the data of previous family visa costs has not been readily available on the Department's website, the costs have increased significantly in the last 10 years and the current base application charges, (i.e. $7,715 for partners) are high and may exclude many who do not have the socio-economic means to pay for such application. Moreover, despite the alarming increase in application fees, there is no evidence that the higher fees have actually been used to increase resources that the Department dedicates to the processing of these visas. In fact, longer processing and waiting times, discussed above, suggest the opposite, and raise the concern that visa fees are in fact used for revenue raising.

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90 'Fees and charges for visas', *Department of Home Affairs* (29 April 2021) at https://immi.homeaffairs.gov.au/visas/getting-a-visa/fees-and-charges/current-visa-pricing/live.

91 Ibid.

92 Ibid.

93 Department of Home Affairs, *Parent Visas* (n 78).

The Castan Centre for Human Rights Law recommends that:

- Immediate action is taken to halt what seem to be disproportionate increases in total visa application charges;
- The cost of processing visa application be reasonable and tied to the cost of the service provided; and
- That the joint effects of cost, caps and delays be considered together in a review that centres the obligation to facilitate family migration.

3.4 The role of family reunion in the Migration Program

The exact size and composition of the Migration Program is determined by the federal government as part of the Federal Budget each year. The government has steadily prioritised skilled migration within the permanent Migration Program, with proportionally fewer family places available for family migrants.

Trends in relation to the composition and size of the program can be illustrated briefly. The rate of granting family visas has been much lower than that of skilled migration at each of the data points. At each of the data points considered, family visas range between 32-36% and skilled visas 64-68% of the visas granted.

Table 3 – Family visas versus skilled visas

Year	Total Family	Total Skilled	Approx. % Breakdown (Family / Skilled)
2009-10	**60,254**	168,122	36/64
2014-15	**61,085**	188,859	32/68
2019-20	**44,442**	140,285	32/68

The proportion of skilled migration of the Migration Program is thus reasonably steady at around two thirds of the overall program, suggesting a well-established trend that has eroded the priority given to family migration. While family migration is still an important aspect of the program, it is skilled migration that has taken priority since the 1990s.

This restriction of family migration in part explains why overwhelming majority of family migration consists of (around 80%) partners of Australians, combined with the powers to cap all sections of the program, with the exception of spouse and dependent child visas.[94] These settings have resulted in a focus that potentially undermines the ability of Australians to be joined by family members, and especially extended family members. While this is often justified in economic terms (with reference to the alleged economic benefits of skilled migrants), it underplays the importance of family for both the individuals impacted and the Australian population on the whole.

The current policy settings in this regard also raise questions about the government's efforts to provide the 'widest possible' protection and assistance to the family under IHRL, especially together with the concerns discussed above in relation to the high cost of visas and excessive delays in processing family visas.

94 Larsen (n 60).

The Castan Centre for Human Rights Law recommends that:

- The government review the Migration Program with an eye to balancing skilled and family migration; and
- More specific attention be given to the importance of family connections for the well-being of individuals as well as Australia's long-term interests in ensuring migrants' commitment to Australia and social cohesion.

3.5 Specific issues regarding people who have sought protection in Australia

There are significant limitations on the right and ability of people from refugee backgrounds to seek to reunite with family members. While noting that this inquiry is not primarily focussed on individuals from refugee backgrounds, it is worth noting that refugees and others needing international protection are often particularly vulnerable when separated from their families. It is also worth noting extended family members are often particularly important to refugees in Australia and that such individuals often have limited financial means. It is therefore imperative that they be recognised as individuals with human rights under IHRL and that their actual ability to join family members be considered from that perspective.

Given the well-known nature of refugee family reunion in Australia, this submission will simply highlight two issues. The first relates to the so-called Special Humanitarian Programme (SHP) visas, which form the main avenue for refugees' reunification with family members.[95] This program is extremely limited in terms of the numbers of visas available, and given the high demand for places, unable to provide an avenue for most people from refugee backgrounds.[96]

Second, there are some categories who are outright banned from family reunification. Asylum seekers arriving by boat who are granted temporary protection visas (reintroduced in 2014) cannot sponsor family members for the purposes of family reunification. Those who arrived by boat in Australia prior to 13 August 2012, and who hold a permanent protection visa, are also given the lowest priority processing of family applications.[97] As has already been discussed above, given the pressure on the family migration system, and the priorities given to other applicants, this again makes family reunion unrealistic for this group.

The Castan Centre for Human Rights Law recommends that:

- The current limitations on people from refugee backgrounds be urgently reviewed as posing harsh and potentially unjustifiable obstacles to family reunion for some of the most vulnerable members of the community.

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95 'The Special Humanitarian Program (SHP)', *Department of Home Affairs* (11 December 2018) at https://immi.homeaffairs.gov.au/what-we-do/refugee-and-humanitarian-program/the-special-humanitarian-program.

96 S. Okhovat, A. Hirsch, K. Hoang and R. Dowd, 'Rethinking resettlement and family reunion in Australia', (2017) 42(4) *Alternative Law Journal* 273-278.

97 Ibid.