# Putting the 'Protection' in 'Temporary Protection Visa'

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**Abstract**

*This article considers the legality of Australia's second TPV regime (introduced by the* Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 *(Cth)) under the* Convention Relating to the Status of Refugees *and accompanying International Human Rights Law instruments. It is argued that the current regime suffers from three defects. First, it unlawfully interferes with the rights of refugees to mental and physical health, and to family reunification. Second, the policy is unlawfully discriminatory pursuant to the* International Covenant on Civil and Political Rights *(read with the* Convention Relating to the Status of Refugees*). Third, as a result of these conclusions, TPVs constitute unlawful penalties under the Refugee Convention. The result is that for Australia's domestic regime to comply with its protection obligations under international law, Australia must significantly amend its asylum seeker and refugee policy.*

## I Introduction

According to Goodwin-Gill and McAdam, 'it is for international law … to substitute its own protection for that which the [refugee's] country of origin cannot or will not provide'.[1] The necessary counterpart to this aphorism, aspirational as it may be, is that State signatories to the *Convention Relating to the Status of Refugees*[2] must abide by their international law protection obligations to refugees. This article analyses one important facet of Australia's onshore refugee program,[3] the Temporary Protection Visa ('TPV'), within the framework of critically

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1 Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 421.

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

3 This refers to the program by which asylum seekers who physically arrive in Australian territory are processed.

assessing Australia's treatment of refugees with respect to its international law protection obligations.[4]

TPVs are three-year visas with limited social and economic entitlements that are granted to unauthorised asylum seekers entering Australia,[5] when officially 'recognised' as refugees. The three-year visas are ostensibly aimed at deterring irregular maritime migration to Australia.[6] The first TPV regime, introduced in 1999, was abolished in 2007 after extensive socioeconomic and legal criticism.[7] Nonetheless, the Abbott Government was successful in legislatively reintroducing TPVs in late 2014.[8] TPV's may be contrasted with the permanent visas available to authorised asylum seekers pursuant to Australia's offshore refugee program, and refugees who seek asylum after entering Australia on valid visas.

Australia's use of temporary protection for recognised refugees must be distinguished from the conventional use of temporary protection as a complementary or interim protection mechanism, offering short-term group-based protection where individual assessment under the *Refugee Convention* is both impractical and untimely.[9] When used in the

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4 In this article the term 'refugee' is used to describe any person to whom Australia owes protection obligations, whether by reason of the *Refugee Convention* or the complementary protection regime.

5 For the purposes of this article, 'unauthorised' asylum seekers are those who seek to enter Australia without prior authorisation. That is, those who seek to enter the country without a valid visa. 'Authorised' asylum seekers are those who arrive with visas after being selected as part of the offshore refugee program. Quite apart from this binary group are refugees who apply for asylum after entering Australia on a valid visa.

6 This is subject to one qualification. As will be explained below, TPVs are also granted to select unauthorized air arrivals.

7 See below Part III. Key publications include Savitri Taylor, 'The Human Rights Implications of the Psycho-Social Harm Caused by Australia's Temporary Protection Regime' (2005) 11(1) *Australian Journal of Human Rights* 8; Greg Marston, *Temporary Protection, Permanent Uncertainty: The Experience of Refugees Living on Temporary Protection Visas* (RMIT University, 2003); Greg Marston, 'A Punitive Policy: Labour Force Participation of Refugees on Temporary Protection Visas' (2004) 15(1) *Labour & Industry* 65; Don McMaster, 'Temporary Protection Visas: The Bastard Child of the One Nation Party!' (Paper presented at the Australasian Political Studies Association Conference, University of Adelaide, 29 September 2004) <https://www.adelaide.edu.au/apsa/docs_papers/Aust%20Pol/McMaster.pdf>; Fethi Mansouri and Michael Leach, *Lives in Limbo: Voices of Refugees under Temporary Protection* (University of New South Wales Press, 2004). The Legal and Constitutional References Committee has referred to the 'considerable cost in terms of human suffering' of TPVs: Senate Legal and Constitutional References Committee, Parliament of Australia, *Administration and Operation of the Migration Act 1958* (2006) 252 [8.33].

8 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). This Act made many changes to Australian immigration and refugee law. Many of these changes, such as the new 'fast track' assessment process and the codified definition of a refugee, raise a number of issues regarding Australia's compliance with its obligations under international law. This article is specifically concerned with the re-introduction of TPVs.

9 Fethi Mansouri and Michael Leach, 'The Evolution of the Temporary Protection Visa Regime in Australia' (2009) 47(2) *International Migration* 101, 101; Alice Edwards, 'Temporary Protection, Derogation and the 1951 Refugee Convention' (2012) 13 *Melbourne Journal of International Law* 1, 11.

conventional sense, temporary protection has a great deal of support from academics and the UNHCR,[10] but when used as a 'diluted substitute protection for Convention refugees' it is seen as a threat to the *Refugee Convention* itself.[11] Given the increasing use of temporary protection in this way by Western States, the arguments in this article are also relevant outside the Australian context.[12]

Crock and Bones have recently reviewed the historic use of temporary protection, and reflected on what a *Refugee Convention*-compliant regime could look like.[13] This article goes further, and critically examines the legality of the second TPV regime under the Refugee Convention and accompanying International Human Rights Law ('IHRL') instruments. While there is no express prohibition on temporary protection in the *Refugee Convention*,[14] this article considers three ways in which Australia's second TPV regime is, nonetheless, inconsistent with Australia's protection obligations under the *Refugee Convention* and other IHRL instruments. In the absence of enforceable human rights norms to ensure the basic rights of refugees,[15] it is especially important that Australian law, policy and practice reflect Australia's obligations under the Refugee Convention and other IHRL instruments.

This article considers three potential inconsistencies between the second TPV regime and Australia's international law obligations, and examines whether the regime is consistent with some of the wider human rights norms that are protected by IHRL. It will be argued that Australia's use of TPVs constitutes unlawful discrimination pursuant to the *Refugee Convention* and IHRL, and that TPVs may constitute an unlawful penalty under the *Refugee Convention*.

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10 See, eg, Pirkko Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited* (Martinus Nijhoff Publishers, 1997) 104–110; Stephen H Legomsky, *Immigration and Refugee Law and Policy* (Foundation Press, 4th ed, 2005) 1164–83.

11 A term coined in Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94 *American Journal of International Law* 279, 280.

12 Temporary protection is already used in this way by Denmark, Germany, the United States and New Zealand. Taylor has also noted that 'the rhetoric of all Western States increasingly emphasises that repatriation is preferable to all other durable solutions': Taylor, above n 7, 4.

13 Mary Crock and Kate Bones, 'Australian Exceptionalism: Temporary Protection and the Rights of Refugees' (2015) 16(2) *Melbourne Journal of International Law* 522.

14 Manuel Angel Castillo and James C Hathaway, 'Temporary Protection' in James C Hathaway, *Reconceiving International Refugee Law* (Kluwer Law, 1997) 1, 2; Fitzpatrick, above n 11; James C Hathaway, 'The Meaning of Repatriation' (1997) 9(4) *International Journal of Refugee Law* 551. The UNHCR has supported the use of temporary protection in the conventional sense, and the need for durable solutions to be achieved for refugees: Executive Committee Conclusion No. 15 (XXX) (1979): Refugees Without an Asylum Country; Executive Committee Conclusion No. 19 (XXXI) (1980): Temporary Refuge; Executive Committee Conclusion No. 90 (LII) (2001): Conclusion on International Protection, para.(j).

15 The Australian position may be compared with the human rights norms contained in the *Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*ECHR*').

## II History of TPVs in Australia

### A *First TPV Regime*

Although Australia had used conventional temporary protection for a number of years prior,[16] the original TPV regime (at least in terms of a departure from the conventional use of temporary protection)[17] was formally introduced by the Howard Government in October 1999.[18] The Government relied on the need to preserve humanitarian resettlement places for more deserving offshore refugees awaiting protection in other countries, and the deterrence of 'unlawful' onshore arrivals.[19] TPVs were granted to asylum seekers entering Australia without a valid visa, who were subsequently recognised as refugees. After 30 months, they were able to apply for a permanent protection visa ('PPV').[20] PPVs were only available at first instance to offshore refugees who were awaiting protection in other countries, or those who entered Australia with a valid visa.

Substantial legislative amendments were made in late September 2001, after the September 11 terrorist attacks and the Tampa incident.[21] These amendments implemented two changes. First, they prohibited the issuance of a PPV to any refugee who, since leaving their home country,

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16 In 1990, the Hawke Government introduced temporary humanitarian protection visas in response to the massacre at Tiananmen Square: Mansouri and Leach, above n 9, 102. The *Migration Regulations 1989* (Cth) contained two categories of visa of present importance: the Refugee A (restricted) visa or entry permit (reg 116) and the Refugee B (restricted) visa or entry permit (reg 117). The validity of these visas was restricted to four years by the *Migration Regulations (Amendment) 1990* (Cth). Subsequently the *Migration Regulations (Amendment) 1991* (Cth), which took effect from 27 February 1991, introduced into the *Migration Regulations 1989* (Cth) two new categories of visa: the domestic protection (temporary) entry permit (reg 117A) and the domestic protection (temporary) visa (reg 118A). Each lasted for only four years. This regime, with certain changes, continued until 1993.

17 The temporary protection regime used by the Hawke Government in the 1990s (described in the previous footnote) is not addressed in this article. Australia's use of temporary protection at that time was more conventional, and broadly in line with 'some of the thinking about temporary protection that was occurring internationally, with an emphasis on sudden and large-scale influx': Crock and Bones, above n 13, 9. It has been said that it 'reflected a standard use of temporary protection, offering short-term group-based protection': Mansouri and Leach, above n 9, 102. The regime introduced in 1999 by the Howard Government, on the other hand, was unparalleled when considered in light of comparative international practices. It was driven by domestic political concerns and had an 'overt focus on deterrence rather than the management of asylum seekers': Crock and Bones, above n 13, 10. The 2014 regime is of a similar character. This article is restricted in scope to these more exceptional TPV regimes. It is in that sense that it refers to the 'first' and 'second' TPV regimes.

18 This was done by the introduction of visa subclass 785 (temporary protection), the 'TPV': *Migration Amendment Regulations 1999 (No. 12)* (Cth); Janet Phillips, *Temporary Protection Visas* (Research Note No. 51, Parliamentary Library, 11 May 2004) 1.

19 Mansouri and Leach, above n 9, 104.

20 Ibid 105–7.

21 See, eg, *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth); *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth).

had resided for seven days or more in a country where they could have sought and obtained protection (the 'seven day rule').[22] Such refugees were only eligible for a further TPV after the expiration of their original TPV.[23] Second, the amendments excised certain Australian territories from the migration zone ('excised offshore places'),[24] with the result that asylum seekers arriving at these territories ('offshore entry persons') were ineligible for any type of visa in the absence of an exercise of ministerial discretion (a 'statutory bar').[25] Instead, offshore entry persons were removed to detention centres offshore and processed (either in Nauru or Manus Island, Papua New Guinea).[26] The only mechanism by which asylum seekers who were processed offshore could be considered for re-entry to Australia was a three-year temporary humanitarian visa ('THV') (visa subclass 447) for offshore entry persons. After its expiry, the asylum seeker was, absent ministerial approval, only eligible for a further TPV.[27]

Offshore processing and TPVs, when combined with the excision of Australian territories from the migration zone and Operation Relex (interception at sea), constituted the Howard Government's infamous 'Pacific Solution'.[28] As Crock and Ghezelbash have noted, 'there can be no doubt that the policies of interdiction, excision and offshore processing were successful in reducing the number of unauthorised boat arrivals between 2002 and 2005'.[29] When the Rudd Government came to power after the federal election of November 2007, there were almost no boats arriving.[30] That election brought with it the next major change,[31] when the Rudd Government committed to restoring the integrity of the migration

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22 *Migration Regulations 1994* (Cth) sch 2 sub-clauses 200.212, 202.212 and 204.213; Janet Phillips, 'Temporary Protection Visas' (Research Note No 51, Parliamentary Library, Parliament of Australia, 2004) 1; Mansouri and Leach, above n 9, 105–8.

23 Phillips, above n 22, 1; Mansouri and Leach, above n 9, 105–8.

24 To date, the entire Australian mainland has been excised from the migration zone. This is further discussed below.

25 Pursuant to *Migration Act 1958* (Cth) s 46A, which was introduced by the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); Mansouri and Leach, above n 9, 105–7.

26 Pursuant to *Migration Act 1958* (Cth) s 198A, which was introduced by the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth).

27 A five-year THV (visa subclass 451) was also created for persons reserved for resettlement by the UNHCR in Indonesia, and such visa holders were able to apply for a PPV after four and a half years: Mansouri and Leach, above n 9, 108; Vrachnas et al, *Migration and Refugee Law* (Cambridge University Press, 3rd ed, 2012) 331.

28 Vrachnas et al, above n 27, 185.

29 Mary Crock and Daniel Ghezelbash, 'Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals' (2010) 19(2) *Griffith Law Review* 238, 267.

30 Janet Phillips, *A Comparison of Coalition and Labor Government Asylum Policies in Australia Since 2001* (Research Paper, Parliamentary Library, Parliament of Australia, 2014) 4.

31 Apart from some minor policy changes which are detailed in Mansouri and Leach, above n 9, 108–19.

system[32] and dismantling the 'cynical, costly and ultimately unsuccessful'[33] Pacific Solution. Offshore processing ceased,[34] TPVs and THVs were abolished and replaced with PPVs,[35] and the seven day rule was repealed.[36] This was largely in response to a lack of evidence demonstrating any deterrent effect, and human rights concerns.[37]

### B *Second TPV Regime*

The Rudd and Gillard Governments tried alternative policies, but these were abandoned after successful legal challenges in the High Court.[38] Facing ever-increasing levels of boat arrivals, the Gillard Government commissioned the Houston Report, which advocated a 'no advantage' principle for irregular maritime migrants.[39] Labor subsequently retreated from its humanitarian principles and reinstated offshore processing.[40] Offshore entry persons were subject to the statutory bar on lodging valid visa applications and could be removed to regional processing facilities in the Pacific (first in Nauru, and then in Papua New Guinea).[41] In May 2013, the entire Australian mainland was excised from the migration zone (with respect to irregular maritime migrants).[42] The effect of this was to extend the statutory bar to all arrivals at an Australian territory or the Australian mainland, such that all 'unauthorised maritime arrivals' ('UMAs')[43] were ineligible for any type of visa in the absence of an exercise of ministerial discretion. In June 2013, it was announced that all UMAs would be sent offshore for processing and resettlement and those found to be refugees would not be resettled in Australia (the 'Regional Transfer and Resettlement'). An agreement concerning such offshore

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32 Peter Billings, 'Irregular Maritime Migration and the Pacific Solution Mark II: Back to the Future for Refugee Law and Policy in Australia?' (2013) 20 *International Journal on Minority and Group Rights* 279, 279.

33 In the words of then Minister for Immigration and Citizenship Chris Evans: see 'Flight From Nauru Ends Pacific Solution', *The Sydney Morning Herald* (online), 8 February 2008 < http://www.smh.com.au/national/flight-from-nauru-ends-pacific-solution-20080207-1qww.html>.

34 Future unauthorised boat arrivals were processed on Christmas Island pursuant to s 46A of the *Migration Act 1958* (Cth).

35 *Migration Amendment Regulations 2008 (No 5)* (Cth).

36 Ibid.

37 Concerns regarding, for example, the health of refugees, their ability to work and their ability to sponsor family members for resettlement. These are further discussed in Part III. See also Mansouri and Leach, above n 9, 119.

38 See, eg, *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

39 A Houston, *Report of the Expert Panel on Asylum Seekers* (Australian Government, August 2012).

40 *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).

41 Phillips, above n 30, 5.

42 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth). It should be noted that the Howard Government tried unsuccessfully to do this in 2006 with the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth).

43 Now defined in s 5AA of the *Migration Act 1958* (Cth).

processing and resettlement was first brokered with Papua New Guinea in July 2013,[44] and later with Nauru in August 2013.[45]

After the federal election of September 2013, offshore processing remained in place and was augmented by Operation Sovereign Borders.[46] On 17 October 2013, the Abbott Government attempted to reintroduce TPVs by regulation,[47] but this was disallowed by the Senate on 2 December 2013.[48] There was another attempt on 12 December 2013,[49] which was disallowed on 27 March 2014. Other regulatory devices, such as visa capping, were also attempted. This scheme gave the Minister the power to 'cap' or limit the number of visas in a particular subclass that could be granted each year. Once the cap was reached, no further visas could be granted, and applicants waited in a queue to be considered in the next year. Visa capping was ruled unlawful by the High Court at the time.[50] In December 2014, however, substantial amendments to the *Migration Act 1958* (Cth) (the 'Act') were passed.[51] In addition to removing most references to the *Refugee Convention* from the Act and codifying a narrow interpretation of Australia's protection obligations,[52]

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44 Kevin Rudd, 'Australia and Papua New Guinea Regional Settlement Arrangement' (Media Release, 19 July 2013) <http://egypt.embassy.gov.au/files/caro/nn.pdf>; Department of Immigration and Citizenship, *Regional Resettlement Arrangement* (July 2013) <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/2611766/upload_binary/2611766.pdf;fileType=application%2Fpdf#search=%22media/pressrel/2611766%22>.

45 Kevin Rudd, 'New Arrangement with Nauru Government' (Media Release, 3 August 2013) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F2643063%22>.

46 Operation Sovereign Borders is a border protection operation aimed at preventing the arrival of unauthorised maritime arrivals. It is led by the Australian Defence Force, and was implemented by the Abbott Government in accordance with its election policy.

47 *Migration Amendment (Temporary Protection Visas) Regulation 2013* (Cth).

48 Australian Human Rights Commission, *Temporary Protection Visas* (December 2013) <https://www.humanrights.gov.au/sites/default/files/document/publication/TPV_FactSheet.pdf>. In the time the regulation was in force, at least 3 TPVs were granted to UMAs recognised as refugees, which remain valid despite the disallowance: Evidence to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 19 November 2013 (Senator Boyce) [9]; (Senator Cash) [33].

49 *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth).

50 *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 225. Greater power and discretion was given to the Government by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), considered below.

51 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

52 It is perhaps telling that sch 5 of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), which made these changes, is titled 'Clarifying Australia's International Law Obligations'. It is also notable that Australia did not withdraw from the Refugee Convention or any IHRL instruments. Freckelton has noted that the purpose of these amendments may be 'to 'freeze' the law at the date the Act comes into effect, and prevent courts from applying any future overseas developments in Australia': Alan Freckelton, *Administrative Decision-Making in Australian Migration Law* (ANU Press, 2015) 110. These developments raise many concerns regarding Australia's compliance with its international law obligations, which fall beyond the scope of this article.

the amendments legislatively reinstated TPVs (visa subclass 785) and introduced Safe Haven Enterprise Visas ('SHEVs') (visa subclass 790). TPVs were said to be 'a key element of the Government's border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia'.[53]

Recipients of TPVs under the new regime fall into three categories:

First, there are specific groups of UMAs. Those UMAs that arrived before 13 August 2012 (the date of the Houston Report) generally had the statutory bar lifted,[54] and were able to lodge a valid PPV application.[55] These applications are now deemed to be nullities and are automatically converted into TPV applications.[56] Those UMAs that arrived after 19 July 2013 are subject to the Regional Transfer and Resettlement policy, and are liable to be removed, processed and potentially resettled offshore. This cohort continues to be ineligible for any Australian visa.[57] The critical group is composed of those UMAs that arrived between 13 August 2012 and December 2013, who were *not* transferred offshore (the 'legacy caseload') due to capacity issues in the offshore processing centres on Nauru and Manus Island.[58] The Minister began 'lifting the bar' for these people in May 2015, enabling the legacy caseload cohort to lodge visa applications.[59] Significantly, they are assessed under the new 'fast-track assessment process' with limited review rights.[60] If successful, they are granted TPVs or SHEVs.

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53 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) s 6.

54 The bar on valid visa applications was imposed by *Migration Act 1958* (Cth) s 46A.

55 Refugee Advice & Casework Service, *Chronology of Recent Changes Affecting Asylum Seekers* <http://www.racs.org.au/wp-content/uploads/RACS-FACT-SHEET-Chronology-of-legal-changes-affecting-asylum-seekers-26-May-2014.pdf>.

56 This is done by operation of the *Migration Act 1958* (Cth) s 45AA. Although inapplicable on the facts, the conversion rule was considered by the High Court in *Plaintiff S297-2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231.

57 Above n 44; This is subject to one caveat: the Government has indicated that some asylum seekers currently in detention in Australia pending their transfer to Nauru may instead be assessed in Australia and be eligible for TPVs or SHEVs: Refugee Advice & Casework Service, *Radical New Refugee Laws Have Now Been Passed by Parliament*, 2 <http://www.racs.org.au/wp-content/uploads/RACS-FACT-SHEET-The-Asylum-Legacy-Caseload-Act-18-February-2015.pdf>.

58 Many were released from detention into the community on bridging visas without work rights (BVEs) while they waited for an outcome on their asylum claims.

59 Refugee Advice & Casework Service, *Refugee Law Timeline: Legal Changes and Changes to Processing Procedures Affecting Asylum Seekers Arriving by Boat* (13 October 2015) <http://www.racs.org.au/wp-content/uploads/RACS-FACT-SHEET-Chronology-of-legal-changes-affecting-boat-arrivals-13.10.20151.pdf>.

60 The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) introduced a 'fast-track assessment process'. If the primary assessment of a 'fast-track applicant' is negative, there is no right of review to the Refugee Review Tribunal ('RRT'), only to the newly established Immigration Assessment Authority ('IAA'). The IAA is a statutory body providing more limited merits review (no hearings and no new information) than the RRT, with the objective of being quick, efficient and free of bias.

Second, there are those asylum seekers who do not hold a visa or have not cleared immigration on arrival into Australia (such as unauthorised air arrivals). If recognised as refugees, these asylum seekers can only be granted TPVs.

Third, there are asylum seekers who have previously held certain types of temporary visas listed in the *Migration Regulations 1994* (Cth) (the 'Regulations').[61] This provides the mechanism whereby TPVs can be renewed after expiry, and refugees on other temporary visas can be transferred to TPVs.

These three classes of refugees are ineligible for the grant of a PPV, as the criteria require that a PPV applicant:[62]

> does not hold, and has not ever held, certain listed types of temporary visas;
>
> held a visa that was in effect on the person's last entry into Australia;
>
> is not an unauthorised maritime arrival; and
>
> was immigration cleared on the person's last entry into Australia.

As before, TPV-holders 'face the prospect of having their immigration status periodically reviewed and hence have hanging over them the permanent threat of possible repatriation'.[63] For completeness it should be noted that SHEVs theoretically provide a pathway to permanent protection.[64] If a SHEV holder does not receive any social security benefits for a period totalling 42 months, and/or is engaged in employment or full time study in a specified regional area, they may be eligible to apply for a range of general migration visas.[65] However, former Minister for Immigration Scott Morrison indicated that the 'benchmarks of working or studying in … regional areas are very high' and that this is a 'very limited opportunity' with a 'very high bar'.[66]

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61 *Migration Regulations 1994* (Cth) sch 1 subclause 1403(3)(d).

62 Ibid subclause 1401(3)(d).

63 Taylor, above n 7, 1.

64 Refugee Advice & Casework Service, above n 57; Andrew & Renata Kaldor Centre for International Refugee Law, *Factsheet: Temporary Protection Visas*, University of New South Wales <http://www.kaldorcentre.unsw.edu.au/sites/default/files/Temporary%20Protection%20Visas%20rev%2025.07.12014.pdf>.

65 Refugee Advice & Casework Service, above n 57; University of New South Wales, above n 64.

66 Scott Morrison, 'Press Conference at Parliament House 25 September 2014' (Press Conference, 25 September 2014) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F3414551%22>; University of New South Wales, above n 64.

## C *Rights and Obligations Under a TPV*

### 1 *First TPV Regime*

Under the Howard Government's TPV regime, TPVs granted three years of residence,[67] and the right to return was lost if the refugee left the country.[68] TPV-holders were usually able to apply for PPVs after 30 months, subject to the changes effected by the 2001 amendments. There was no right to family reunification, but TPV-holders were granted the right to work, and access to job matching by Centrelink.[69] Subject to the policy of individual States, they had access to school education, but the imposition of full fees effectively excluded them from universities.[70]

TPV-holders were only eligible for some of the federally funded special settlement services designed to assist new arrivals in Australia.[71] These included the Special Benefit, Rent Assistance, the Family Tax Benefit, the Child Care Benefit, Medicare, the Early Health Assessment and Intervention Program, torture and trauma counselling, and English as a Second Language classes (for TPV minors only).[72] They were denied access to most federally funded English language classes (including the Adult Migrant English Program and the Advanced English for Migrants Program),[73] housing assistance, Migrant Resource Centre support schemes, and other programs offered under the Integrated Humanitarian Settlement Scheme.[74] Furthermore, they were not eligible for Newstart, Sickness Allowance, the Parenting Payment, Youth Allowance, Austudy or a range of other benefits.[75]

### 2 *Second TPV Regime*

Under the current regime, a TPV entitles the holder to stay in Australia for three years, or a lesser period specified by the Minister.[76] A TPV-holder is not entitled to be granted a substantive visa or a PPV.[77] They may only travel outside of Australia where the Minister is satisfied that there are 'compassionate or compelling circumstances' justifying the

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67 Mansouri and Leach, above n 9, 104.
68 Ibid 104–6.
69 Refugee Council of Australia, *Position Paper on Australia's use of Temporary Protection Visas for Convention Refugees,* the Council, September 2003; Phillips, above n 22, 1; Mansouri and Leach, above n 9, 104–6.
70 Refugee Council of Australia, above n 69.
71 Phillips, above n 22, 1.
72 Ibid.
73 Refugee Council of Australia, above n 69.
74 Mansouri and Leach, above n 9, 106; Phillips, above n 22, 1.
75 Refugee Council of Australia, above n 69.
76 *Migration Regulations 1994* (Cth) sch 2 cl 785.511. Pursuant to that clause, if the TPV-holder makes an application for a subsequent TPV or SHEV, the first TPV remains on foot throughout the application process.
77 *Migration Regulations 1994* (Cth) sch 8 condition 8503, imposed by sch 2 cl 785.611.

travel,[78] and, if a TPV-holder travels to the country where they fear persecution, their visa will be cancelled.[79] TPV-holders otherwise enjoy freedom of movement within Australia, but must notify the Department of Immigration of any change of address within 28 days.[80]

There is no right to family reunification, but TPV-holders are granted the right to work, access to employment support services, and job matching by Centrelink.[81] TPV-holders have the same access to primary and secondary education as permanent residents, but are limited in tertiary education due to their ineligibility for Federal Government higher education loans and Commonwealth-supported places.[82] They also have access to social security benefits (Centrelink), and short-term counselling for torture or trauma.[83] They are eligible for Medicare, the Special Benefit, the Family Tax Benefit and a range of ancillary income support payments, subject to relevant eligibility requirements.[84] While they are given access to the Skills for Education and Employment program, they do not have access to the Adult Migrant English Program or settlement services.[85] Against this background, the first challenge to the current regime may be considered.

## III Consistency with Human Rights Norms

### A *Introduction*

The task of ensuring that Australian domestic law is compliant with *all* of its international law protection obligations to refugees falls to the Commonwealth Parliament.[86] It must ensure that domestic legislation implements in good faith all of Australia's international law obligations.[87] Accordingly, it is particularly important that developments in domestic

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78 Ibid, sch 8 condition 8570, imposed by sch 2 cl 785.611.

79 Ibid.

80 Ibid, sch 8 condition 8565, imposed by sch 2 cl 785.611.

81 Refugee Council of Australia, *Migration and Maritime Power Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014: What it means for Asylum Seekers* <http://www.refugeecouncil.org.au/wp-content/uploads/2015/02/1502-Legacy-Caseload.pdf>; Refugee Advice & Casework Service, above n 57; University of New South Wales, above n 64.

82 Refugee Council of Australia, above n 81.

83 Refugee Advice & Casework Service, above n 57.

84 Refugee Council of Australia, above n 81.

85 Ibid.

86 It is the competent legislature: *Australian Constitution* ss 51(xix), (xxvii). It is doubtful that the judiciary alone can accomplish the task; see the analysis of its limited interpretive tools in John Azzi, 'Domestic Legislation and Australia's International Obligations' (2015) 131 *Law Quarterly Review* 524.

87 On this note see art 26 of the *Vienna Convention on the Law of Treaties,* opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*Vienna Convention*').

law occur by reference to a clear understanding of Australia's international obligations.[88]

The *Refugee Convention* 'operates within the framework of international human rights law'.[89] Two fundamental ideas are often overlooked in discussions regarding refugees in Australia. First, the *Refugee Convention* is primarily a human rights instrument,[90] and must be interpreted as such.[91] Second, it operates not in isolation, but as part of a larger governing framework of IHRL, which is also a primary source of rights for refugees.[92] It has been said that 'keeping international refugee law distinct from [IHRL] has played into the hands of governments choosing to flout minimum standards'.[93] Contracting States are obliged to grant refugees the rights guaranteed under both the *Refugee Convention* and IHRL.[94]

This Part examines the compliance of the TPV regime with two human rights norms that are not explicitly protected by the *Refugee Convention*: the right to health, and the right to protection of the family.[95]

### B *Right to Health*

The *Refugee Convention*[96] and the *International Covenant on Civil and Political Rights*[97] do not expressly safeguard the right to health.[98] Article

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88 Although it is clear that there can be significant disagreements among and between academics and the judiciary on what those obligations are: see *Plaintiff M47-2012 v Director General of Security* (2012) 251 CLR 1, 117–8 (Heydon J).

89 James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005) 154; see also Goodwin-Gill and McAdam, above n 1, 285; Rafiqul Islam and Jahid Hossain Bhuiyan, *An Introduction to International Refugee Law* (Martinus Nijhoff Publishers, 2013) 78. The benefit of rights outside the Refugee Convention is provided by article 5: Tom Clark, 'Mainstreaming Refugee Rights - The 1951 Refugee Convention and International Human Rights Law' (1999) 17(4) *Netherlands Quarterly of Human Rights* 389, 400.

90 Mary Crock, 'Shadow Plays: Shifting Sands and International Refugee Law: Convergences in the Asia-Pacific' (2014) 63 *International and Comparative Law Quarterly* 247, 253; Susan Kneebone, 'The Pacific Plan: The Provision of 'Effective Protection?' (2006) *International Journal of Refugee Law* 696, 705.

91 *R v Asfaw* [2008] AC 1061, 1079-80 [11]; see also UNHCR, Conclusions Adopted By The Executive Committee on The International Protection of Refugees, 1975 – 2008 (Conclusion No. 1 – 109), No. 82 (XLVIII) (1997): Safeguarding Asylum, para. (d)(vi); No. 19 (XXXI) (1980): Temporary Refuge, para. (e); No. 22 (XXXII) (1981): Protection of Asylum-Seekers in Situations of Large-Scale Influx, para. B; No. 36 (XXXVI) (1985): General Conclusion on International Protection, para. (f).

92 Hathaway, above n 89, 154; Castillo and Hathaway, above n 14, 7.

93 Alice Edwards, 'Human Rights, Refugees and The Right 'To Enjoy' Asylum' (2005) 17(2) *International Journal of Refugee Law* 293, 294.

94 These points were aptly made by the Supreme Court of Canada in *Suresh v Canada* [2002] 1 SCR 3, 44 [72].

95 For other potential breaches of human rights norms, further reading that may be consulted includes: Marston, 'A Punitive Policy', above n 7; Louise Humpage and Greg Marston, *The Situated Politics of Belonging* (SAGE, 2006).

96 The *Refugee Convention* only contains a provision dealing with health care services in art 24.

97 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

7 of the *ICCPR* does prohibit 'cruel, inhuman or degrading treatment,' and TPVs have been unfavourably assessed in this context elsewhere.[99] This section instead focuses on the *International Covenant on Economic, Social and Cultural Rights*,[100] which expressly safeguards the right to health in art 12(1):[101]

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

This obliges Australia to 'take steps … to the maximum of [its] available resources, with a view to achieving progressively the full realisation of [this right]'.[102] On the assumption that Australia has sufficient resources,[103] it may not lawfully refrain from taking the necessary steps to fully implement the right to health.[104]

The Committee on Economic, Social and Cultural Rights ('CESCR') has noted that the right to health contains both freedoms and entitlements.[105] In his report on the right to health, Special Rapporteur Paul Hunt noted the entitlement to 'a system of health protection, including health care and the underlying determinants of health, which provides equality of opportunity for people to enjoy the highest attainable standard of health.'[106] Among other things,[107] the right to health requires States to 'refrain from interfering directly or indirectly with the enjoyment of the right to health'.[108] The obligation applies in respect of 'asylum seekers and illegal immigrants'.[109]

The social conditions imposed by TPVs have adverse impacts on the mental health of TPV-holders,[110] and it is contended that this constitutes a

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98 Although the *ICCPR* does contain some direct (arts 7–8) and indirect (arts 2–3, 6, 9, 12, 17–9, 21–4) links.

99 Taylor has argued that the TPV regime is flawed because it is not designed to ensure that the ensuing psychosocial harm (further discussed below) will never reach the threshold of 'cruel, inhuman or degrading treatment': Taylor, above n 7, 8.

100 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

101 Article 12(2) lists certain steps to be taken by States to achieve full realisation of this right.

102 *ICESCR* art 2(1).

103 Any challenge to this assumption is outside the scope of this article.

104 Hathaway, above n 89, 512.

105 Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, 22nd sess, UN Doc E/C12/2000/4 (2000) [8].

106 Commission on Human Rights, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, E/CN.4/2005/51 (2005) [42]; see also Committee on Economic, Social and Cultural Rights, *General Comment 14: The right to the highest attainable standard of health*, 22nd sess, UN Doc. E/C.12/2000/4 (2000) [8].

107 It also imposes obligations to protect and fulfil: Committee on Economic, Social and Cultural Rights, *General Comment 14: The right to the highest attainable standard of health*, 22nd sess, UN Doc. E/C.12/2000/4 (2000) [33].

108 Ibid.

109 Ibid [34].

110 That is not to suggest that the physical health of refugees may not also be affected. One particular issue which arises with refugees is the increasing levels of family violence. This is

breach of Australia's obligations under art 12. The existing literature (detailed below) demonstrates that TPVs under the first regime negatively affected the mental health of refugees. While the studies discussed were conducted in the context of the first TPV regime, the findings nonetheless remain relevant to the second regime.

For instance, one study found that temporary protection impacted dramatically on the mental health of the visa-holders, and that the temporary status was the greatest single contributor to post-traumatic stress disorder ('PTSD').[111] Another study indicated that TPV-holders had a 700% increased risk of developing depression and PTSD when compared with PPV-holders; it was said that these extended periods of temporary protection operated to 'lock individuals into an unresolvable future-oriented' stress, undermining standard treatments and therapies for trauma.[112]

A mixed-methods study showed that 46% of temporary visa holders, compared with 25% of permanent visa holders, reported symptoms consistent with a diagnosis of clinical depression.[113] Research has also shown that TPV-holders have a higher level of trauma exposure, twice the risk of PTSD of permanent residents, and significantly heightened levels of anticipatory stress.[114] Restrictions on access to settlement services combined with uncertainty about the future have also been found to impact negatively on the integration of TPV-holders into the community.[115]

While it is beyond the scope of this article to canvas all of the existing research to demonstrate the point,[116] there appears to be a general consensus among health practitioners that the social conditions imposed by TPVs tend to impact negatively on the mental health of refugees. This

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likely to be more prevalent with PPV-holders than TPV-holders, as the former are permitted to make family visa sponsorship applications. Any consideration of this issue would need to take account of recent changes to the obligations of such sponsors.

111 See generally Shakeh Momartin et al, 'A Comparison of the Mental Health of Refugees with Temporary Versus Permanent Protection Visas' (2006) 185(7) *Medical Journal of Australia* 357.

112 Derrick Silove and Zachary Steel, 'Temporary Protection Visas Compromise Refugees: New Research' (University of New South Wales Media Release, 30 January 2004).

113 See generally Vanessa Johnston et al, 'Measuring the Health Impact of Human Rights Violations Related to Australian Asylum Policies and Practices: a Mixed Methods Study' (2009) 9 *BMC International Health and Human Rights* 1.

114 Zachary Steele, 'The Politics of Exclusion and Denial: The Mental Health Costs of Australia's Refugee Policy' (Paper presented at 38th Congress of the Royal Australian and New Zealand College of Psychiatrists, Hobart, 12–15 May 2003) 16–7.

115 Marston, *Temporary Protection,* above n 7.

116 For further reading, see generally: Mansouri and Leach, above n 7; D Barnes, 'A Life Devoid of Meaning: Living on a Temporary Protection Visa In Western Sydney' (Research Paper, Centre for Refugee Research, University of New South Wales, December 2002); Sharon Pickering et al, ''We're Working with People Here': The Impact of the TPV Regime on Refugee Settlement Service Provision in NSW' (Research Paper, Charles Sturt University, date omitted); Fethi Mansouri and Stephanie Cauchi, 'The Psychological Impact of Extended Temporary Protection' (2006) 23(3) *Refuge* 81; Stuart Murray and Susan Skull, 'Immigrant and Refugee Health' (2002) 2(3) *Environmental Health* 47.

is attributable, in large part, to the perpetual state of uncertainty that follows from having to re-establish a refugee claim every 3 years.[117] However, the uncertainty produced by TPVs is not the sole cause of health issues.[118] Other factors include the traumatic experience of mandatory detention,[119] time spent in the community on bridging visas without work rights ('BVEs'),[120] the refugee status determination process, lack of family reunification,[121] and fear of returning home.[122]

Australia's TPV policy may, therefore, constitute a breach of its obligation under article 12 to refrain from interfering with the enjoyment of the right to health. Although most article 12 jurisprudence deals with a failure to take positive steps to provide an adequate system of health protection and care, Australia's policy goes one step further and actively prevents the attainment of the highest standard of physical and mental health. While the Government has claimed that the right to health is implemented through Medicare and the Australian public health system, the Parliamentary Joint Committee on Human Rights has noted that this fails to address the negative mental health effects of TPVs.[123]

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117 On the legality under international law of the refugee having to re-establish their claim, see generally: *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1; United Nations High Commissioner for Refugees, 'UNHCR Concerned About Confirmation of TPV System by High Court' (Press Release, 20 November 2006); Hossein Esmaeeili and Suzanne Carlton, 'Safe to go Home? The Implications of the High Court Decision for Afghan and Iraqi Temporary Refugees, MIMA v QAAH of 2004' (2007) 32(3) *Alternative Law Journal* 66; Emily Hay and Susan Kneebone, 'Refugee Status in Australia and the Cessation Provisions: QAAH of 2004 v MIMIA' (2006) 31(3) *Alternative Law Journal* 147; Maria O'Sullivan, 'Before the High Court: Minister for Immigration and Multicultural and Indigenous Affairs v QAAH: Cessation of Refugee Status' (2006) 28 *Sydney Law Review* 359; Maria O'Sullivan, 'Withdrawing Protection Under Article 1C(5) of the 1951 Convention: Lessons from Australia' (2008) 20 *International Journal of Refugee Law* 586.

118 This is so even though at least one study has shown that temporary protection contributes, independently of detention, to the risk of ongoing PTSD, depression and mental health-related disability: Zachary Steel et al, 'Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees' (2006) 188 *British Journal of Psychiatry* 58. Further, in the context of Bosnian refugees resettled in Australia see also Shakeh Momartin et al, 'Dimensions of Trauma Associated with Posttraumatic Stress Disorder (PTSD) Caseness, Severity and Functional Impairment: A Study of Bosnian Refugees Resettled in Australia' (2003) 57 *Social Science & Medicine* 775.

119 Tom Mann, *Desert Sorrow* (Wakefield Press, 2004).

120 Derrick Silove, 'Mental Health of Asylum Seekers: Australia in a Global Context' in P Allotey (ed), *The Health of Refugees: Public Health Perspectives from Crisis to Settlement* (Oxford University Press, 2003) 68, 76.

121 McMaster, above n 7, 16–7; K Dixon-Fyle, 'Reunification: Putting the Family First' (1994) 95 *Refugees* 6, 9; Stuart Turner, 'Torture, Refuge and Trust' in E V Daniel and J C Knudsen (eds), *Mistrusting Refugees* (University of California Press, 1995) 56, 62, 67; Derrick Silove, 'The Psychological Effects of Torture, Mass Human Rights Violations and Refugee Trauma: Toward an Integrated Conceptual Framework' (1999) 187 *Journal of Nervous and Mental Disease* 200, 202; Marston, *Temporary Protection,* above n 7, 25–8; Ida Kaplan and Kim Webster, 'Refugee Women and Settlement: Gender and Mental Health' in P Allotey (ed), *The Health of Refugees: Public Health Perspectives from Crisis to Settlement* (Oxford University Press, 2003) 104, 109.

122 Fethi Mansouri, Michael Leach and Amy Nethery, 'Temporary Protection and the Refugee Convention in Australia, Denmark, and Germany' (2009) 26(1) *Refuge* 135, 145.

123 In the Statement of Compatibility accompanying the bill.

The only possible escape from the preceding conclusion lies in art 4 ICESCR, which allows States to impose limitations 'as determined by law' on rights 'solely for the purpose of promoting the general welfare in a democratic society'. It is doubtful that the purpose of deterring irregular migration meets this high threshold. Even if it is assumed that it does, the inherent proportionality requirement is unlikely to be satisfied given the negative effects on refugee mental health.[124] Furthermore, the second TPV regime appears to be more restrictive than the first because it removes any practical possibility of attaining permanent protection. It may be that the first TPV regime reflected the Howard Government's judgment that three years on a TPV was about as much adversity as it could inflict without breaching ICESCR art 12.[125] Under the second TPV regime, however, there is potentially no end to the 'existential moratorium'[126] imposed on refugees, and the resultant mental health effects are likely to be aggravated accordingly.

### C *Protection of the Family*

In fleeing from persecution, refugees run the very real risk of separation from their families.[127] While the *Refugee Convention* itself does not grant any rights relating to protection of a refugee's family,[128] the *ICCPR* and *ICESCR* do grant such a right.[129] The analysis in this section focuses on the *ICCPR*, which contains two relevant provisions. Article 17(1)[130] provides that:

> No one shall be subjected to arbitrary or unlawful interference with his … family …

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124 For an analysis of the inherent proportionality requirement, see Amrei Muller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9(4) *Human Rights Law Review* 557, 560.

125 A similar argument was made by Taylor in respect of *ICCPR* art 7: Taylor, above n 7, 10.

126 Mansouri, Leach and Nethery, above n 122, 141.

127 K Jastram and K Newland, 'Family Unity and Refugee Protection' in E Feller, V Turk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 555, 555.

128 It instead focuses on the rights and protection of the individual. See, eg, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S134/2002* (2003) 195 ALR 1; Hathaway, above n 89, 254. At 541, Hathaway points out that the drafters of the *Refugee Convention* assumed that the family members of a refugee would benefit from its protection even if they did not qualify as refugees. The argument that family reunification is emerging as a norm of customary international law in the refugee context has been covered elsewhere: See, eg, Edwards, above n 93, 309–10.

129 See arts 23 and 17 of the *ICCPR* and art 10 of the ICESCR. Special considerations also arise under the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*'), but these are outside the scope of this article due to space constraints.

130 Article 17(2) provides a right to the protection of the law against such interference or attacks.

Article 23(1)[131] provides that:

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Both arts apply to non-citizens.[132] Article 17 requires that any interference with the family be carried out on the basis of legal authority, 'which must itself comply with the provisions, aims and objectives of the Covenant'.[133] Even if lawful, the interference must not be arbitrary. The Human Rights Committee ('HRC') is of the opinion that lawful interference is only non-arbitrary if it is 'in accordance with the provisions, aims and objectives of the Covenant'[134] and Nowak has said that 'arbitrary interference contains elements of injustice, unpredictability, and unreasonableness'.[135]

Article 23 entails a positive duty to protect the family,[136] by adopting 'legislative, administrative or other measures.'[137] Although the article is 'economically relative', in that the level of entitlement will vary with the economic circumstances of the State,[138] it is assumed for the purposes of this article that Australia will not be able to rely on this feature to justify any failure to implement the right. The HRC has adopted a broad definition of family, such that it must include all those comprising the family as understood in the society of the State.[139]

In the refugee context, the right to protection of the family manifests itself in the form of the right to family reunification,[140] which is the ability to sponsor family members for resettlement in Australia. Article 23 should be read as compelling States to take measures to 'ensure the unity or reunification of refugee families in the state of asylum' to be assessed at the standard of reasonableness.[141] The HRC has taken a broad

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131 Articles 23(2)–(4) deal with various aspects of marriage. While there is a right to family reunification in art 23(2), is it subsumed within article 23(1), and for this reason is not expressly considered here.

132 Human Rights Committee, *General Comment 15: The Position of Aliens Under the Covenant,* 27th sess, UN Doc. HRI/GEN/1/Rev.7 at 140 (2004) [5], [7].

133 Human Rights Committee, *General Comment 16: Article 17 (Right to Privacy),* 32th sess, UN Doc. HRI/GEN/1/Rev.7 at 142 (2004) [3].

134 Ibid [4].

135 Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N.P. Engel Publishing, 2005 rev ed) 291.

136 Human Rights Committee, *General Comment 19: Article 23 (The Family),* 39th sess, UN Doc. HRI/GEN/1/Rev.6 at 149 (2003) [1].

137 Ibid [3].

138 Human Rights Committee, *Views: Communication No 35/1978*, 12th sess, UN Doc. Supp. No. 40 (A/36/40) at 134 (1981) ('*Aumeeruddy-Cziffra et al v Mauritius*') [9.2].

139 Human Rights Committee, *General Comment 16,* 35th sess, UN Doc. HRI/GEN/1/Rev.6 at 142 (2003) [5]; Human Rights Committee, *General Comment 19: Article 23 (The Family),* 39th sess, UN Doc. HRI/GEN/1/Rev.6 at 149 (2003) [2].

140 In similar vein, Edwards considers that 'family unity is a subset or characteristic of having a family life' and that family reunification may be the only way of giving effect to the right to protection of the family: Edwards, above n 93, 311, 314; see also Human Rights Committee, *General Comment 19: Article 23 (The Family),* 39th sess, UN Doc. HRI/GEN/1/Rev.6 at 149 (2003) [5].

141 Hathaway, above n 89, 552, 557.

approach to applying the right to family reunification, using it as the basis for making adverse comments against a Swiss law (that only allowed foreign workers family reunification after 18 months),[142] a Zimbabwean law (that denied automatic residential rights to all foreign spouses),[143] and an Austrian law (that allowed family reunification only for nuclear family members).[144]

While there is no right to enter and reside in another country for the purposes of family reunification,[145] Australia is arguably in breach of its international protection obligations by failing to afford TPV-holders the right to sponsor family members for resettlement. Without adequate justification, Australia's blanket prohibition on family reunification for TPV-holders does not implement the right in a reasonable way, and falls foul of arts 17 and 23. Australia's justification for denying family reunification when a family sends out one member in search of asylum is as follows:

> [A UMA] becomes separated from their family when they choose to travel to Australia without their family. To this end, Australia does not consider that Articles 17 and 23 were engaged. Even if … engaged, the change … simply places [UMAs] on an equal footing with all other Australian citizens and permanent residents wanting their family to join them in Australia. Australia considers that this is a necessary, reasonable and proportionate measure to achieve the legitimate aim of preventing [UMAs] from making the dangerous journey to Australia by boat. To the extent that this might amount to interference with the family, Australia maintains that any interference is not arbitrary.[146]

This rationale for restricting family reunion is unpersuasive for several reasons:

First, the claim that refugees *choose* to leave their families does not reflect the realities of forced migration and the prohibitive costs of using people smugglers. The assertion that the prohibition on family reunification does not, of itself, cause separation of families fails to acknowledge that genuine refugees cannot be expected to return to their countries of origin.[147] While the statement is true when taken at face value, Australia's practice is nonetheless at odds with its obligations

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142 Human Rights Committee, *Concluding Comment on Switzerland,* UN Doc. CCPR/C/79/Add.70 (1996) [18].

143 Human Rights Committee, *Concluding Comments on Zimbabwe,* UN Doc. CCPR/C/79/Add.89 (1998) [19].

144 Human Rights Committee, *Concluding Observations on Austria,* UN Doc. CCPR/C/AUT/CO/4 (2007) [19].

145 Edwards, above n 93, 309.

146 Explanatory Statement to Migration Amendment Regulation 2012 (No 5), Select Legislative Instrument 2012 No 230 issued by the Minister for Immigration and Citizenship under the *Migration Act 1958* (Cth).

147 This was noted by the HRC in Human Rights Committee, *Views: Communication No 1143/2002*, 90th sess, UN Doc. CCPR/C/89/D/1043/2002 (2007) ('*El Dernawi v Libyan Arab Jamahiriya*') [6.3].

under the ICCPR to take positive steps to 'ensure the unity or reunification of [refugee] families'.[148]

Second, the statement that the laws places UMAs on 'equal footing' with other citizens and permanent residents again fundamentally misconceives the situation in which a refugee finds himself or herself. While citizens and permanent residents may have the option of achieving family reunification by travelling overseas, this is often not a path open to refugees on protection visas. The travel restrictions on a TPV were outlined in Part II. The unique situation of refugees requires Australia to take unique measures to safeguard their rights.

Third, the stated aim of deterring UMAs does not rationally support and sustain the second regime. This is further considered in Part V. Fourth, even if the prohibition on family reunion were not in breach of international obligations, it is not clear that such interference with the family can be said to be non-arbitrary, as Australia claims. In view of the 'legal right of refugees to seek protection without advance permission and the duty of states to protect all refugees under their … jurisdiction'[149] there is no rational reason why unauthorised asylum seekers recognised as refugees are any less deserving of permanent protection than 'offshore' refugees.[150]

Australia may, therefore, be in breach of its obligation to facilitate family reunification under international law, as noted by the Parliamentary Joint Committee on Human Rights.[151] Another potential challenge to the legality of the TPV regime is that the distinction drawn between unauthorised and authorised asylum seekers may constitute unlawful discrimination.[152]

## IV Unlawful Discrimination

As noted in Part II, TPVs are used only for unauthorised asylum seekers who are recognised as refugees. This raises the possibility that Australia's use of TPVs for only these classes of refugees, while others may access PPVs, constitutes unlawful discrimination under international law.

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148 Human Rights Committee, *General Comment 19: Article 23 (The Family)*, 39th sess, UN Doc. HRI/GEN/1/Rev.6 at 149 (2003) [5].

149 Hathaway, above n 89, 558.

150 It might also be argued that unauthorized asylum seekers are no less deserving of permanent protection than refugees who apply for asylum after entering Australia on valid visas.

151 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills Introduced 30 September – 2 October 2014* (2014) 83–5.

152 One issue which arises with respect to family visa applications made by PPV-holders is that the Minister has issued Direction 62, which provides that such applications are to be afforded the lowest processing priority. This issue was to be considered in the High Court, where proceeding S61/2016 was listed for final hearing on 7 October 2016. That hearing date has now been vacated, as the Minister revoked Direction 62 on 13 September 2016 and replaced it with Direction 72. That Direction allows decision-makers to depart from the processing order in certain circumstances. This issue does not arise for TPV-holders, who are subject to a blanket ban on making such applications.

Mansouri and Leach, for example, note that '[illegal boat people were] targeted for discriminatory treatment in Australia.'[153] Kneebone has argued that '[TPVs are] another instance of discrimination of this group of refugees in contrast to other aliens and nationals.'[154] According to Crock 'it is very difficult to see how Australia's approach to UMAs does not amount to discrimination'.[155]

There is a tendency to interpret the *Refugee Convention* 'according to its own internal logic and objectives in isolation from [IHRL]'.[156] As such, this Part first considers whether Australia's TPV policy is unlawfully discriminatory under the *Refugee Convention* and then goes on to consider the same question under the *ICCPR*.

### A *Refugee Convention*

Article 3 of the *Refugee Convention* provides that:

> The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

As the meaning and substantive reach of art 3 is not clarified by its drafting history, guidance may be drawn from the parameters of non-discrimination duties under cognate treaties.[157] This is largely because treaties must be interpreted in their contemporary international legal context,[158] and it is clear that the *Refugee Convention* is first and foremost a human rights instrument and must be interpreted as such.[159]

Parallel non-discrimination provisions include arts 2 and 26 of the *ICCPR* and art 2 of the *ICESCR*. Drawing on the recommendation of Marx and Staff,[160] it is submitted that the following (modified) HRC definition is apt: discrimination is 'any distinction, exclusion, restriction or preference which is based on any [prohibited] ground, and which has the purpose or effect of nullifying or impairing the recognition,

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153 Mansouri and Leach, above n 9, 106. Although Mansouri and Leach appear to have come to this view by comparing unauthorised boat arrivals with refugees who arrived legally, they do go on to note the far greater number of air arrivals claiming asylum after arrival.

154 Kneebone, above n 90, 719–20.

155 Crock, above n 90, 272. Although Crock's article was written before the reintroduction of TPVs, offshore processing had been reinstated at the time.

156 Clark, above n 89, 389.

157 Hathaway, above n 89, 244–5; Reinhard Marx and Wiebke Staff, 'Article 3 (Non-Discrimination)' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 643, 644–5.

158 Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 82; Hathaway, above n 89, 64.

159 *R v Asfaw* [2008] 1 AC 1061, 6–7 [11]; Crock, above n 90, 253; Kneebone, above n 90, 705; Vrachnas et al, above n 27, 250. The point was also made by the Supreme Court of Canada in *Suresh v Canada* [2002] 1 SCR 3, as noted above.

160 Reinhard Marx and Wiebke Staff, 'Article 3 (Non-Discrimination)' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 643, 652.

enjoyment or exercise by all [refugees], on an equal footing, of all rights and freedoms [guaranteed under the Refugee Convention]'.[161]

Article 3 of the *Refugee Convention* is concerned with discrimination *among and between* refugees, and does not require that refugees receive the same treatment as nationals or other aliens.[162] Such protection arises from other sources.[163] Nonetheless, the challenge with which this section is concerned is that Australia's use of TPVs for unauthorised arrivals constitutes discrimination *between* classes of refugees.[164] It may constitute positive discrimination because PPV-holders are granted greater rights than TPV-holders. This is encompassed by the above definition.

Although the draft provision of art 3 contained a territorial limitation, this was later removed.[165] Combined with the fact that not all provisions of the *Refugee Convention* are restricted to State Parties' territories, this weighs in favour of a broad interpretation of discrimination, thereby extending the scope of application of art 3 to TPV-holders even if they are outside of Australian territory, as long as they are within Australia's legal jurisdiction.

Prima facie, Australia's TPV policy does discriminate between classes of refugees. TPVs are only offered to unauthorised asylum seekers who are recognised as refugees. Asylum seekers who are authorised, on the other hand, are eligible for PPVs.[166] It is doubtful, however, that this constitutes unlawful discrimination pursuant to art 3. Article 3 is not a general prohibition on discrimination; rather, it prohibits discrimination based on three enumerated grounds of race, religion or country of origin. The 'mode of arrival' discrimination evident in the offering of TPVs is not (at least, not directly) based on any of the relevant grounds. It might be argued that the effect of the policy is to discriminate against refugees of a particular race,[167] religion or country of origin,[168] given that most unauthorised arrivals are of Afghan, Iranian, Sri Lankan or South-East Asian origin. This argument is unlikely to succeed, however, as it is not

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161 Human Rights Committee, *General Comment 18: Non-discrimination,* 37th sess, UN Doc. HRI/GEN/1/Rev.1 at 26 (1994).

162 Hathaway, above n 89, 246–51; Marx and Staff, above n 157, 645.

163 Protection against discrimination on the basis of refugee status is provided by art 7 of the *Refugee Convention* and non-discrimination provisions in other IHRL instruments. Furthermore, some articles of the *Refugee Convention* itself mandate parallel treatment of refugees and nationals or other aliens. Hathaway has noted that the *Refugee Convention* presumes the legitimacy of treating refugees less favourably than nationals to the extent that some articles grant rights defined by a contingent standard less than nationality (eg art 17).

164 Discrimination against refugees, in general, as a class is outside the scope of this article.

165 Marx and Staff, above n 157, 651.

166 Although outside the scope of this article, it might also be argued that the policy discriminates between unauthorised asylum seekers and refugees who apply for asylum after entering Australia on valid visas.

167 McMaster, above n 7, 2–3.

168 J-P Fonteyne, 'Illegal Refugees or Illegal Policy?', in, William Maley, Alan Dupont, Jean-Pierre Fonteyne et al., *Refugees and the Myth of the Borderless World* (Australian National University Department of International Relations, 2002) 16.

yet clear if the HRC has adopted an effects-based approach to the discrimination analysis.[169] Hathaway has referred to the HRC as having only a 'nascent preparedness to take seriously the discriminatory effects of facially neutral laws'.[170]

Furthermore, the scope of art 3 is limited to the *Refugee Convention* itself. It is an accessory prohibition of discrimination and only becomes relevant if another provision of the *Refugee Convention* is affected.[171] It is difficult to contend that the alleged discrimination relates to any specific provisions of the Refugee Convention. There is no explicit requirement that permanent protection be granted. TPV-holders enjoy freedom of movement within Australia,[172] subject only to the caveat that they must notify the Department of Immigration of any change of address within 28 days.[173] They have the same access to primary and secondary education as permanent residents.[174] While they are limited in tertiary education due to their ineligibility for Federal Government higher education loans and Commonwealth-supported places, this is the case for all aliens.[175] Furthermore, it is not clear that TPV-holders' religious, property or association rights are impaired.[176]

The two rights considered in Part III (above) are not found in the *Refugee Convention*. It might be argued, however, that art 34 (naturalisation) is applied in a discriminatory fashion, given that TPV-holders, unlike PPV-holders, are not usually able to attain permanent protection. Article 34 is breached 'where a State party simply does not allow refugees to secure its citizenship, and refuses to provide a *cogent explanation* for that inaccessibility.'[177] Although Australia has advanced a rationale of deterrence, it lacks coherence given that, among other things, the policy applies retrospectively. These deficiencies are further explored in Part V. At any rate, any argument is further weakened by the HRC's practice of deferring to State perceptions of 'reasonableness' in determining whether certain action amounts to discrimination.[178]

In summary, it is unlikely that Australia's TPV regime constitutes unlawful discrimination under art 3 of the Refugee Convention, at least when viewed in isolation.

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169 Hathaway maintains that the HRC has yet to adopt such an approach, while certain communications of the HRC suggest otherwise: see Hathaway, above n 89, 133–9, 257; Human Rights Committee, *Views: Communication No 998/2001*, 78th sess, UN Doc. CCPR/C/78/D/998/2001 ('*Althammer v Austria*').

170 Hathaway, above n 89, 238.

171 Ibid 252; Marx and Staff, above n 157, 647; *Report of the Committee Appointed to Study Article 3,* UN Doc. A/CONF.2/72, 11 July 1951, 3; *R v Immigration Officer at Prague Airport; Ex parte European Roma Rights Central* [2005] 2 AC 1, 45 [43] (Lord Steyn).

172 For the right to freedom of movement see art 26.

173 *Migration Regulations 1994* (Cth) sch 8 condition 8565, imposed by sch 2 cl 785.611.

174 For the right to education see art 22.

175 Refugee Council of Australia, above n 81.

176 Respectively, arts 22, 4, 13, and 15.

177 Hathaway, above n 89, 252.

178 Ibid 245, 251, 258.

### B *International Covenant on Civil and Political Rights*

The two central non-discrimination provisions of the *ICCPR* are arts 2(1) and 26.[179] Article 2(1) prohibits discrimination in respecting and ensuring the rights recognised in the *ICCPR*. Article 26, however, is an 'independent and autonomous right'[180] extending beyond specific *ICCPR* rights[181] and prohibiting discrimination 'in law or in fact in any field regulated and protected by public authorities'.[182] It provides that:

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

Article 26 is the focus of this section due to its broad scope, which obviates the need to establish a denial of *ICCPR* rights to refugees who are issued with TPVs.[183] The argument here can simply proceed on the assumption that TPVs constitute less favourable treatment.[184] While art 26 might also be invoked in asserting that Australian law discriminates against refugees as a class, this possibility is outside the scope of this article.[185]

The HRC defines discrimination as

> any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms (emphasis added).[186]

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179 They reinforce the other more specific provisions in arts 3, 4(1), 20, 23, 24, and 25.

180 Nowak, above n 135, 628.

181 Human Rights Committee, *Views: Communication No 172/1984*, 29th sess, UN Doc. CCPR/C/OP/2 at 196 (1990) ('*Broeks v The Netherlands*'); this was confirmed in Human Rights Committee, *General Comment 18: Non-discrimination,* 37th sess, UN Doc. HRI/GEN/1/Rev.1 at 26 (1994) [12].

182 Human Rights Committee, *General Comment 18: Non-discrimination,* 37th sess, UN Doc. HRI/GEN/1/Rev.1 at 26 (1994) [12].

183 Although, as Part III has sought to demonstrate, this may very well be the case.

184 See, eg, Penelope Matthew, 'Australian Refugee Protection in the Wake of the *Tampa*' (2002) 96(3) *American Journal of International Law* 661; Peter Mares, *Borderline: Australia's Treatment of Refugees and Asylum Seekers* (UNSW Press, 2002); C Steven, 'Asylum-Seeking in Australia' (2002) 36(3) *International Migration Review* 864.

185 The argument might be made that Australia fails to afford to refugees certain *ICCPR* rights that it accords to citizens and nationals. Given the scope of art 26, this argument may also be extended to the provisions of the *ICESCR* and other IHRL instruments.

186 Human Rights Committee, *General Comment 18: Non-discrimination,* 37th sess, UN Doc. HRI/GEN/1/Rev.1 at 26 (1994) [7].

The HRC has not issued detailed guidance on what constitutes an 'other status',[187] but has noted that art 26 provides protection against discrimination 'whenever laws differentiating among groups or categories of individuals do not correspond to objective criteria'.[188] It has indicated that States may permissibly treat a class differently from another whose 'status' is relevantly 'distinguishable'.[189]

As mode of arrival is not an enumerated ground capable of giving rise to discrimination under the *ICCPR*, any potential argument would rely on it being caught by the 'other status' provision. The issue was not determined by the HRC in *A v Australia*,[190] and the position remains unclear. It is difficult to see how differentiation based on mode of arrival can be said to rest upon objective criteria. There appears to be no rational reason why these refugees are any less deserving of permanent protection than offshore refugees. Overtaking the pre-selection of offshore refugees for resettlement, the dominant pattern of refugee flow has today become the 'unplanned and unauthorised arrival of refugees at state's borders'.[191] Furthermore, in contrast to offshore refugees, asylum seekers who physically arrive at the territory of a State directly engage the international obligations of that State.[192] Academic analysis has also shown that the perception that onshore asylum seekers are 'jumping the queue' is unfounded, ostensibly due to the absence of such a queue.[193] In short, mode of arrival is not a feature rendering the two groups relevantly 'distinguishable.'

It follows that mode of arrival should be seen as discrimination on the basis of 'other status', removing the need to pursue an argument (under art 3 of the *Refugee Convention*) that the effect of Australian domestic law is to discriminate against a class of refugee based on their race or nationality. If this is correct, there is no need to address the debate about whether indirect (or effects-based) discrimination is covered by art 26. While the HRC has expressly adopted an indirect discrimination approach

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187 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights* (Oxford University Press, 3rd ed, 2013) 771.

188 Human Rights Committee, *Views: Communication No 218/1986*, 66th sess, UN Doc. CCPR/C/66/D/786/1997 (29 July 1999) ('*Vos v Netherlands*') [1] (Messrs Aguilar Urbina and Wennergren).

189 Human Rights Committee, *Views: Communication No 658/1995*, 60th sess, UN Doc. CCPR/C/60/D/658/1995 ('*Van Oord v The Netherlands*') [8.5].

190 Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc. CCPR/C/59/D/560/1993 (30 April 1997) ('*A v Australia*'). This case concerned a Cambodian asylum seeker who alleged that Australia had violated his *ICCPR* rights by keeping him in immigration detention for more than four years. The HRC held that Australia had violated art 9 of the *ICCPR*.

191 Hathaway, above n 89, 157.

192 Crock, above n 90, 279; Mansouri, Leach and Nethery, above n 122, 137.

193 See, eg, Billings, above n 32, 304 citing S Taylor and B Rafferty-Brown, 'Difficult Journeys: Accessing Refugee Protection in Indonesia' (2010) 36(3) *Monash University Law Review* 138.

in some communications,[194] it has focused on the formally neutral application of laws in others.[195]

On this basis it could be argued that Australia's treatment of unauthorised arrivals is discriminatory. However, the HRC has noted that differential treatment will not constitute discrimination if the criteria by which the distinction is made are 'reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR].'[196] It is not easy to use the existing case law to predict the future application of the 'reasonable and objective' test.[197] Hathaway points to the deference traditionally afforded to States to engage in differential treatment based upon non-citizen status, and posits that this would likely result in a finding of reasonable justification, thereby defeating the proposed claim.[198]

For the reasons given above, it is unlikely that the distinction is 'reasonable and objective'. This conclusion can be further reinforced by reference to art 3 of the *Refugee Convention*. It has been said that art 3 provides a presumption that the denial to a group of refugees of any rights guaranteed under the *Refugee Convention* to all refugees is not 'reasonable'.[199] The question, then, is whether discrimination between groups of refugees is *legitimate*. There are a number of grounds that the Australian Government might, and has, relied upon to legitimise the distinction.

It is often argued that discriminating against unauthorised refugees will have the effect of reducing the instances of asylum seekers undertaking dangerous maritime voyages, thereby saving lives.[200] Another plausible argument might be that the irregular migration of unauthorised refugees directly contributes to and facilitates an illegal trade in people smuggling. The key point to note, however, is that both of these arguments presuppose that the TPV regime deters irregular migration. This was the purpose identified in the Statement of Compatibility: 'the need to maintain the integrity of Australia's migration system and encouraging the use of regular migration pathways to enter Australia'. Even on the assumption that that purpose is legitimate because

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194 See, eg, Human Rights Committee, *Views: Communication No 998/2001*, 78th sess, UN Doc. CCPR/C/78/D/998/2001 ('*Althammer v Austria*') [10.2].

195 See, eg, Human Rights Committee, *Views: Communication No 418/1990*, 49th sess, UN Doc. CCPR/C/49/D/418/1990 (1993) ('*Araujo-Jongen v The Netherlands*'); Human Rights Committee, *Views: Communication No 218/1986*, 66th sess, UN Doc. CCPR/C/66/D/786/1997 (29 July 1999) ('*Vos v Netherlands*'); Human Rights Committee, *Views: Communication No 477/1991*, 50th sess, UN Doc. CCPR/C/50/D/477/1991 (1994) ('*JAMB-R v The Netherlands*'); Human Rights Committee, *Views: Communication No 478/1991*, 48th sess, UN Doc. CCPR/C/48/D/478/1991 (1993) ('*APL-v dM v The Netherlands*'); see further the materials cited at Joseph and Castan, above n 187, 779–781.

196 Human Rights Committee, *General Comment 18: Non-discrimination,* 37th sess, UN Doc. HRI/GEN/1/Rev.1 at 26 (1994) [13].

197 Joseph and Castan, above n 187, 781.

198 Hathaway, above n 89, 258.

199 Ibid 257–8.

200 See, eg, Billings, above n 32, 295.

the UNHCR has so accepted,[201] it is still possible to argue that the means employed by Australia to achieve the legitimate aim are not proportionate. As outlined in Part V below, the deterrence rationale is undermined by the application of the second TPV regime to a group of asylum seekers already present in Australia, with retrospective effect.

Therefore, the advent of the second TPV regime negates any rational argument that Australia's distinction is reasonable and objective, pursuant to a purpose which is legitimate under the *ICCPR*. Australia's TPV regime may well constitute unlawful discrimination under art 26 of the ICCPR, when read with art 3 of the *Refugee Convention*. Having dealt with two challenges to the TPV regime under international law, the argument that TPVs constitute an unlawful penalty can now be considered.

## V Unlawful Penalty

Article 31(1) of the *Refugee Convention* provides that:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Those refugees subjected to Australia's second TPV regime may be exposed to an unlawful penalty within the meaning of art 31. Arguments to this effect were made in the context of the first regime.[202] Edwards, for example, has noted that the term 'penalty' may have a broad meaning in art 31, extending to the denial of certain benefits vis-à-vis other refugees, and cites Executive Committee Conclusions to support this.[203] In a similar vein, Billings has argued that 'treating boat arrivals less favourably than air arrivals (for reasons that are irrelevant to their protection needs) is tantamount to 'penalising' them on account of their illegal entry'.[204]

### A *Scope of Article 31*

Academic and judicial opinion suggests that art 31's application to 'refugees' extends to asylum seekers as well as recognised refugees.[205] At

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[201] UNHCR, Conclusions Adopted By The Executive Committee on The International Protection of Refugees, 1975 – 2008 (Conclusion No. 1 – 109), No. 97 (LIV) (2003): Conclusion on Protection Safeguards in Interception Measures.

[202] See, eg, Mansouri and Leach, above n 9, 105; Kneebone, above n 90, 719–20.

[203] Alice Edwards, 'Tampering with Refugee Protection: The Case of Australia' (2003) 15 *International Journal of Refugee Law* 192, 197–9.

[204] Billings, above n 32, 296. The second TPV regime has extended the 'penalisation' to unauthorised air arrivals as well as unauthorised maritime arrivals. This 'penalisation' constitutes the unfavourable treatment afforded to these groups in the form of TPVs.

[205] *R v Uxbridge Magistrates' Court; Ex parte Adimi* [1999] 4 All ER 520, 527 (Simon Brown LJ); *Alimas Khaboka v Secretary of State for the Home Department* [1993] Imm AR 484,

any rate, given that TPVs are only granted to those unauthorised asylum seekers (arriving by air or by sea) who are subsequently recognised as refugees, art 31 applies to them.

Article 31 provides protection for refugees 'coming directly' from a territory of persecution. The scope of this requirement is contentious. Hathaway notes that there is a consensus that the 'coming directly' requirement does not authorise penalisation on the basis of brief periods of time spent in other safe countries before arrival in a contracting State.[206] In the leading English case, *R v Uxbridge Magistrates' Court; Ex parte Adimi*, the main touchstones by which exclusion from art 31 protection on this ground should be judged were said to be 'the length of stay in the intermediate country, the reasons for delaying there … and whether or not the refugee sought or found there protection *de jure* or *de facto* from the persecution they were fleeing'.[207]

For Hathaway, the requirement excludes from protection those refugees who enter a State unlawfully simply because they have been unable to find permanent protection in the country of first asylum.[208] Goodwin-Gill has said that article 31 applies to 'persons who have briefly transited other countries, who are unable to find protection in the first country or countries to which they flee, or who have 'good cause' for not applying in such country or countries'.[209] This 'good cause' requirement (discussed below) allows consideration of the refugee's circumstances in the third country.[210] Noll contends for a wider interpretation, that such protection is lost by those 'who have been accorded refugee status and lawful residence in a transit State to which they can safely return.'[211] A 2001 UNHCR expert roundtable concluded that 'immunity from penalty should not apply to refugees who found asylum, or who were settled, temporarily or permanently, in another country.'[212]

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489; Guy S Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection' in E Feller, V Turk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 185, 193; Hathaway, above n 89, 389; Gregor Noll, 'Article 31 (Refugees Unlawfully in the Country of Refuge)' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 1243, 1253.

206 Hathaway, above n 89, 394.

207 [1999] 4 All ER 520, 527–8 (Simon Brown LJ) ('*Adimi*'); this was also quoted in *R v Zanzoul (No. 2)* [2006] CA 297/06 (NZ) and *R v Asfaw* [2008] AC 1061.

208 Hathaway, above n 89, 396.

209 Goodwin-Gill, above n 205, 218 quoted in *R v Asfaw* [2008] AC 1061, 1083–4 [19] (Lord Bingham).

210 Ibid 194; Hathaway, above n 89, 397.

211 Noll, above n 205, 1257.

212 'Expert Roundtable, Geneva' in E Feller, V Turk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 253, 255 [10(c)] quoted in *R v Asfaw* [2008] AC 1061, 1093–4 [50] (Lord Hope).

The role of transit countries is well established in irregular international migration today.[213] A particularly important example is Indonesia, which has been recognised as a 'quintessential transit migration country'[214] for asylum seekers seeking to reach Australia since the wave of Indo-Chinese boat people in the 1970s, 1980s and 1990s.[215] Before undertaking the maritime voyage to Australia, asylum seekers arrive in Indonesia in a variety of ways. Some travel there directly, while others seek passage through Malaysia or Thailand.[216] However, it is not possible to deny the protection of art 31 based on a temporary stay in Indonesia, given that it is not a signatory to the Refugee Convention.

Although certain other countries that asylum seekers pass through en route to Australia are signatories to the *Refugee Convention*, asylum seekers subject to the new TPV regime will likely be able to show 'good cause' for illegally entering Australia. Courts have accepted as reasonable decisions not to seek asylum in transit countries that were not secure, did not respect basic human rights, were culturally or linguistically foreign to the refugee, or in which they lacked social/familial connections.[217] It is submitted that unauthorised asylum seekers who are eventually granted TPVs do not meet the high threshold required to forfeit the protection of art 31 on this ground.

In construing art 31, guidance might be drawn from domestic jurisprudence concerning the seven day rule,[218] or the High Court's judgment in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*.[219] In that case, the High Court interpreted the requirement that a country provide 'protection' to refugees. While French CJ referred to the key protection being protection from refoulement,[220] the plurality referred more broadly to Australia's obligations under the *Refugee Convention*, as did Heydon J (albeit with more caution).[221] Even on the narrower approach, it is likely that most but not necessarily all non-signatory transit States would fail to meet the threshold of providing

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213 Bimal Ghosh, *Huddled Masses and Uncertain Shores: Insights Into Irregular Migration* (Martinus Nijhoff Publishers, 1998) 70–2; Franck Duvell, 'Transit Migration: A Blurred and Politicised Concept' (2012) 18 *Population, Space and Place* 415; Michael Collyer, Frank Duvell and Hein de Haas, 'Critical Approaches to Transit Migration' (2012) 18 *Population, Space and Place* 407.

214 Graeme Hugo, George Tan and Caven Jonathan Napitupulu, 'Indonesia as a Transit Country in Irregular Migration to Australia' (Policy Brief, 2(3), Department of Immigration and Border Protection, May/June 2014) 3.

215 Ibid.

216 Ibid.

217 Hathaway, above n 89, 398.

218 A detailed discussion of the seven day rule is outside the scope of this article due to space constraints.

219 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ('*Plaintiff M70*').

220 Ibid 181–2 [63], 182–3 [66] (French CJ).

221 Ibid 195–197 [118]–[119] (Gummow, Hayne, Crennan and Bell JJ); 207–208 [157] (Heydon J), 211–212 [166]–[167] (Heydon J).

protection from refoulement.[222] However, it is important that in construing art 31, regard is had to its status as international law, and its unique aims and objectives. Domestic jurisprudence should not necessarily be determinative.

It is a further requirement of art 31 that the refugees 'enter or are present in their territory without authorisation.' The exclusion of the Australian mainland and islands from the migration zone cannot be used to argue that entry or presence in State territory is not satisfied, as it is well-established that territory-based norms of international law are assessed with respect to a State's territory under international law rather than some other means of unilateral definition such as a migration zone.[223] Even where such asylum seekers are intercepted by State authorities in the course of an entry attempt, the refugee will be protected under art 31 as long as the interception is attributable to the State under international law.[224] 'Without authorisation' is to be judged by domestic Australian law and is clearly satisfied in the case of refugees granted TPVs.

Article 31 also requires refugees to 'present themselves without delay to the authorities and show good cause for their illegal entry or presence.' There is no doubt that the entry or presence is 'illegal'.[225] Although the relevant asylum seekers are intercepted before they can present to the authorities without delay, there is an exception where a 'refugee is arrested or detained before he or she could reasonably be expected to seek regularisation of status'.[226]

With respect to the requirement that refugees show good cause for their illegal entry or presence, Goodwin-Gill argues that refugee status due to a well-founded fear of persecution is sufficient.[227] On the other hand, the non-redundancy rule suggests that being a refugee in itself is not sufficient,[228] as art 31 already contains a separate requirement that persons be Convention refugees.[229] Hathaway charts a middle path, noting that art 31 requires that protection from penalties be reserved for

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222 An example of a group which might be denied the protection of art 31 is that considered in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514. That group seemingly had protection from refoulement in India.

223 *Vienna Convention* art 27; *Amuur v France*, (European Court of Human Rights, Court, Application No. 19776/92, 25 June 1996), 851 [52]; *Gebremedhin v France*, (European Court of Human Rights, Court, Application No. 25389/05, 25 April 2007), 41 [74]–[75]; Noll, above n 205, 1258.

224 Specifically, under pt I, ch II of the *Articles on the Responsibility of States for Internationally Wrongful Acts*.

225 See *Migration Act 1958* (Cth) s 14.

226 Hathaway, above n 89, 391.

227 Pursuant to *Refugee Convention* art 1A.

228 Discussed in Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer Science & Business Media, 2007) 110.

229 Noll, above n 205, 1260.

refugees 'whose illegal entry is the result of some form of compulsion.'[230] Flight from persecution is one possible 'good cause'.[231]

On this approach, the refugee has to show good cause as to why their entry or presence was illegal rather than legal; that is, why it was not regularised beforehand.[232] Unauthorised asylum seekers seeking to enter Australia would likely be able to show that it was impossible to obtain authorised entry or presence, or that it would increase the risk of persecution.[233] As discussed above, they would likely also be able to demonstrate that they were unable to obtain asylum (or effective protection) in a transit country.

### B *Effect of Article 31*

Unauthorised asylum seekers recognised as refugees and granted TPVs may have come directly from a territory where they fear persecution, and may be able to show 'good cause' for their illegal entry or presence in Australia. They may therefore fall within the scope of art 31. The question then is whether TPVs themselves, which are imposed on account of illegal entry or presence, constitute an unlawful 'penalty' within art 31.

Arguments have been made, based on the French language version of the Convention's inclusion of the term '*sanctions pénales*' and case law,[234] that the term 'penalties' should be confined to criminal penalties.[235] However, the term 'penalties', in the English text, is capable of a wider interpretation. Where there is a difference between the English and French texts,[236] and that difference cannot be resolved by the application of ordinary treaty interpretation principles,[237] 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty' must be adopted.[238] Goodwin-Gill, relying on parallel deliberations of the HRC,[239] and the work of scholars,[240] argues that a wider interpretation ought to be adopted to suit the object and purpose of the Refugee Convention.[241]

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230 Hathaway, above n 89, 393.

231 Ibid 393. All parties in *Adimi* [1999] 4 All ER 520 agreed that the 'good cause' clause had a limited role to play: Goodwin-Gill, above n 205, 204.

232 Atle Grahl-Madsen, *Commentary on Refugee Convention 1951: Articles 2-11, 13-37* (UNHCR, 1997); Noll, above n 205, 1261.

233 Noll, above n 205, 1261.

234 See, eg, *R v Secretary of State for the Home Department; Ex parte Makoyi* (Unreported, England and Wales High Court, 21 November 1991).

235 Goodwin-Gill, above n 205, 194.

236 The English and French texts are equally applicable, pursuant to the concluding paragraph of the *Refugee Convention*.

237 *Vienna Convention* arts 31–32.

238 Ibid art 33(4).

239 Regarding the same term in article 15(1) of the *ICCPR*: Human Rights Committee, *Views: Communication No 50/1979*, UN Doc. Supp. No. 40 (A/37/40) at 150 (1982) ('*Van Duzen v Canada*').

240 Nowak, above n 135.

241 Goodwin-Gill, above n 205, 195–6; Hathaway, above n 89, 411.

Hathaway has also argued for a broad interpretation, namely that penalty connotes a 'loss inflicted for violation of a law',[242] and that art 31 prohibits the imposition on refugees of '*any detriment* for reasons of their unauthorised entry or presence'.[243] Furthermore, the English Social Security Commissioner has accepted as a penalty '*any treatment that was less favourable* than that accorded to others … unless objectively justifiable on administrative grounds'.[244] This is in line with the Executive Committee Conclusion that asylum seekers should 'not be penalised or exposed to *any unfavourable treatment* solely on the ground that their presence in the country is considered unlawful'.[245] The Supreme Court of Canada has also recently endorsed a similar broad interpretation.[246]

If this broad interpretation of 'penalty' is adopted, it is likely that TPVs do constitute a form of penalty in violation of art 31. As Parts III and IV of this article have sought to demonstrate, TPVs are certainly a form of 'less favourable' treatment for unauthorised asylum seekers who are subsequently recognised as refugees than that received by those who were authorised to come to Australia in the first place. This leads to the conclusion that TPV-holders are unlawfully discriminated against under international law. In contrast to PPV-holders, TPV-holders are only granted three years stay after which they must re-establish their claim, and they are denied access to permanent protection. The very language used implies the imposition of a penalty — the inverse of 'no advantage' is disadvantage.[247] TPV-holders are also denied certain economic and social rights — for example, they are denied the right to family reunification, and it has been established that this has adverse effects on the mental and physical health of such refugees. Such treatment can constitute a penalty.[248]

It is further submitted that there are differences between the first and second TPV regime that tend to strengthen this argument. That is, there are grounds for suggesting that TPVs under the second regime are decidedly more punitive than the first. As noted above, there is no avenue for TPV-holders to obtain permanent protection in Australia, other than the very limited opportunity of a SHEV. This is in stark contrast to the first regime, under which some refugees were eligible to transfer to PPVs. This lengthens (potentially indefinitely) the limitations on economic and

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242 Hathaway, above n 89, 410.

243 Ibid 410–1.

244 Decision of the Social Security Commissioner in Case No. CIS 4439/98, 25 November 1999, Commissioner Rowland, [16].

245 UNHCR, Conclusions Adopted By The Executive Committee on The International Protection of Refugees, 1975 – 2008 (Conclusion No. 1 – 109), No. 22 (XXXII) (1981): Protection of Asylum-Seekers in Situations of Large-Scale Influx, para B.2(a).

246 *B010 v Canada (Citizenship and Immigration)* [2015] 3 SCR 704, 731 [63] (McLachlin CJ).

247 Crock, above n 90, 272.

248 Ryszard Cholewinski, 'Economic and Social Rights of Refugees and Asylum Seekers in Europe' (1999) 14 *Georgetown Immigration Law Journal* 709, 713.

social entitlements, and the discriminatory treatment of these refugees. Furthermore, one of the primary justifications the Australian Government has provided for both the old[249] and new[250] TPV regimes is one of deterrence — specifically the deterrence of irregular migration, high-risk voyages and people smuggling. The Government has also emphasised the importance of maintaining the integrity of the immigration system and protection visa regime by promoting orderly migration.[251] It is submitted that an examination of this rationale in the context of the second regime yields the inevitable conclusion that TPVs can only be explained as a punitive measure.

Three factors support the conclusion that the deterrence justification does not logically support the second regime.[252] First, as was made clear above, the main cohort subject to TPVs is the legacy caseload, which is in the process of lodging valid visa applications in Australia. Since the Regional Transfer and Resettlement policy became operational, all new maritime arrivals to Australia are processed and potentially resettled offshore. In effect, and as was argued by Labor and the Greens in opposing the reintroduction of TPVs, '[i]f TPVs are not to apply to any new arrivals in Australia … then TPVs cannot act as a deterrent. They will only apply to a cohort which is already in Australia'.[253] Second, while TPVs under the first regime were of prospective effect only, the second regime operates retrospectively. It applies to a cohort of refugees already present in the country, and the accompanying conversion regime converts any existing PPV applications into TPV applications. Third, mention must be made of the empirical arguments made in the context of the first regime (which may still be applicable) that any decrease in boat arrivals is attributable not to the TPV policy but to the naval blockade of Australia.[254]

For these reasons, it is doubtful that the second TPV regime can be justified solely on the grounds of deterrence, and there does not appear to be any 'objective justification on administrative grounds' for such a regime.[255] Indeed, it has been suggested that, much like the 2001 amendments to the TPV regime promulgated by the Howard Government, the second TPV regime imposes 'punishment for punishment's sake'.[256]

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249 See, eg, Sharon Pickering and Caroline Lambert, 'Deterrence: Australia's Refugee Policy' (2002) 14(1) *Current Issues in Criminal Justice* 65.

250 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 12.

251 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Migration Amendment (Temporary Protection Visas) Regulation 2013* (2013) [2.21], [2.30].

252 See also Crock and Bones, above n 13.

253 Richard Marles, 'TPVs no Deterrent to Boat Arrivals' (Media Release, 3 December 2013).

254 See, eg, Chris Sidoti, 'One Year after Tampa: Refugees, Deportees and TPVs' in Michael Leach and Fethi Mansouri (eds), in Institute for Citizenship and Globalisation, Deakin University, *Critical Perspectives on Refugee Policy in Australia* (2003), 23, 27.

255 In the context of the first regime see also Goodwin-Gill, above n 205, 209.

256 Right Now Human Rights in Australia, *Punishment For Punishment's Sake: The New Guiding Principles Of Australia's Immigration Policy* (24 January 2014)

## VI Conclusion

Despite a turbulent past laden with criticism, Australia's TPV policy lives on. Not only do the concerns regarding the legality of TPVs under international law that plagued the first regime apply equally to the second, it also suffers from additional potential defects. The current regime unlawfully interferes with the rights of refugees to mental and physical health, and to family reunification. These negative effects are exacerbated in the second regime by the inability of TPV-holders to access permanent protection, other than through the limited possibility of acquiring a SHEV. Furthermore, the fact that the stated aim of deterrence cannot rationally sustain and support the second regime strengthens the argument that the policy is unlawfully discriminatory pursuant to the *ICCPR*, read in conjunction with the *Refugee Convention*. These same characteristics also render the second regime more overtly punitive than the first.

The test for compliance with Australia's international law obligations is 'whether, in the light of domestic law and practice [it] has attained the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned'.[257] Australia has not yet met this standard. TPV-holders are stuck in three-year cycles of anxiety and uncertainty, they are deprived of fundamental human rights through the application of a discriminatory policy, and they are unlawfully penalised for seeking protection from persecution.

If international law is truly to substitute its own protection for that which the refugee's country of origin cannot provide, Australia must amend its asylum seeker and refugee policy to give effect to its obligations under international law.

<http://rightnow.org.au/topics/asylum-seekers/punishment-for-punishments-sake-the-new-guiding-principles-of-australias-immigration-policy>.

257 Goodwin-Gill, above n 205, 216.