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6 April 2022

Excellency,

In my capacity as Special Rapporteur for Follow-up to Concluding Observations of the Human Rights Committee, I have the honour to refer to the follow-up to the recommendations contained in paragraphs 34, 36 and 38 of the concluding observations on the report submitted by Australia (CCPR/C/AUS/CO/6), adopted by the Committee at its 121st session held from 16 October to 10 November 2017.

On 8 November 2019, the Committee received the reply of the State party. At its 134th session (28 February to 25 March 2022), the Committee evaluated this information. The assessment of the Committee and the additional information requested from the State party are reflected in the Addendum 1 (see CCPR/C/134/3/Add.1) to the Report on follow-up to concluding observations (see CCPR/C/134/3). I hereby include a copy of the Addendum 1 (advance unedited version).

The Committee considered that the recommendations selected for the follow-up procedure have not been fully implemented and decided to request additional information on their implementation. Given that the State party accepted the simplified reporting procedure, the requests for additional information will be included, as appropriate, in the list of issues prior to submission of the seventh periodic report of the State party.

The Committee looks forward to pursuing its constructive dialogue with the State party on the implementation of the Covenant.

Please accept, Excellency, the assurances of my highest consideration.

Vasilka SANCIN
Special Rapporteur for Follow-up to Concluding Observations
Human Rights Committee

H.E. Ms. Amanda GORELY
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Evaluation of the information on follow-up to the concluding observations on Australia

Concluding observations (121st session):	CCPR/C/AUS/CO/6, 3 and 6 November 2017
Follow-up paragraphs:	34, 36 and 38
Information received from State party:	CCPR/C/AUS/CO/6/Add.1, 8 November 2019
Information received from stakeholders:	Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney et al (JS1), 31 January 2022
Committee's evaluation:	34[**C**], 36[**E**][**C**][**B**] and 38[**C**][**B**][**B**]

The text of the follow-up paragraphs, containing the Committee's recommendations, is not reproduced due to the word limit.[1]

Paragraph 34: Non-refoulement[2]

Summary of information received from the State party

(a) Section 197 (c) of the Migration Act 1958 was designed to provide legal clarity about the circumstances under which persons considered to be unlawful non-citizens could be removed from Australia. The Act ensures that the power to remove unlawful non-citizens is established independently from the obligation to respect the principle of non-refoulement. Provisions within the Act mitigate the risk of non-meritorious injunctions by individuals who have already been assessed to be ineligible for international protection. The recommended changes might increase the risk of receiving injunction applications from individuals seeking to make false claims in order to delay their removal from Australia. Australia upholds its international obligations, as reflected in its current processes, which offer institutional safeguards against violations of the non-refoulement principle.

(b) Australia established Operation Sovereign Borders in September 2013 to reduce unauthorized arrivals by boat and prevent further loss of life at sea. It does not return individuals to situations that violate the non-refoulement principle. Individuals intercepted at sea can access legal representation and remedies. Australia engages meaningfully with the relevant United Nations entities.

(c) The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 is an important part of the strategy to combat people smuggling and manage asylum claims. It is designed to uphold humanitarian principles and prevent people from risking their lives by undertaking illegally operated dangerous journeys by sea. Australia is committed to assessing each individual protection claim on its merits, taking into account up-to-date information on conditions in the applicant's home country. Principles of procedural fairness apply at all stages of visa decision-making and most individuals whose application for international protection is refused have access to merits or judicial review.

Summary of information received from stakeholders

(a) JS1 indicated that the 2021 amendments to the Migration Act did not repeal section 197 (c). A person who cannot be removed but has not been granted a visa is subject to mandatory detention, possibly indefinite detention if no safe country would accept the person.

[1] A/RES/68/268, para. 15.
[2] CCPR/C/AUS/CO/6, para. 34.

(b) JS1 stated that Australia's claims were not supported by its law or practice at sea and its law authorized secret and indefinite detention of asylum seekers on the high seas without procedural safeguards or access to legal remedies.

(c) JS1 claimed that Australia had expressed no intention to repeal the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 or to amend the 'fast track' assessment process. It added that comparisons of the remittal rates of negative asylum decisions between the 'fast track' system and the previous merits review system reinforced concerns about deficiencies in the fast-track system.

Committee's evaluation

[**C**]: (a), (b) and (c)

The Committee notes the State party's commitment to international protection and to upholding the principle of non-refoulement. Nevertheless, it regrets that section 197 (c) of the Migration Act has not been repealed. It reiterates its recommendation.

The Committee notes the information on Operation Sovereign Borders, but regrets the lack of specific information on measures taken during the reporting period to review the State party's policy and practices during interceptions at sea. The Committee reiterates its recommendation and requests information on any concrete measures taken within the reporting period to review relevant policies and practices.

The Committee notes the information on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act and its role within the State party's protection reform agenda. It regrets that the Act has not been repealed and reiterates its recommendation.

Paragraph 36: Offshore immigration processing facilities and Christmas Island[3]

Summary of information received from the State party

(a) Australia remains committed to its current border protection policies. Unauthorized maritime arrivals who cannot be returned to their country of origin will continue to be transferred to countries in the region for assessment of their protection claims. Australia will continue to support Nauru and Papua New Guinea (PNG) to implement regional processing arrangements.

(b) Regional processing arrangements are the responsibility of Nauru and PNG. Assurances of compliance with human rights are included in relevant memorandums of understanding between Australia and Nauru and PNG, and Australia continues to support both to reduce the residual regional processing caseload through resettlement, returns and removals. No individuals assessed under regional processing arrangements will be permanently resettled in Australia. Australia will continue to explore third country resettlement opportunities.

(c) Australia transitioned the Christmas Island detention centre to a contingency setting in October 2018. The centre was reopened in February 2019, following the passing into law of the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018. Australia will consider returning the centre to a contingency setting once its capacity is no longer required.

Summary of information received from stakeholders

(a) JS1 stated that, in September 2021, Australia and Nauru signed 'a memorandum of understanding to establish an enduring regional processing capability in Nauru', which had not been made public. It added that, in October 2021, Australia and PNG announced the end of Australia's regional processing contracts in PNG on 31 December 2021 and its non-

[3] CCPR/C/AUS/CO/6, para. 36.

renewal. JS1 noted Australia's attempts to shirk or deny its responsibility for the people it forcibly transferred to PNG in 2013-14.

(b) JS1 noted the continued refusal by Australia of an offer from New Zealand to resettle people subject to offshore processing, despite the lack of durable protection measures for those in Nauru and PNG or in Australia as transitory persons.

(c) JS1 stated that 226 people were in the Christmas Island detention centre as of 30 September 2021 and several riots and protests took place, including owing to living conditions and treatment of detainees there.

Committee's evaluation

[**E**]: (a)

The Committee notes the information on the support the State party provides to Nauru and Papua New Guinea, and regrets that the State party remains committed to regional processing, which indicates no intention to implement the Committee's recommendation. The Committee reiterates its recommendation.

[**C**]: (b)

The Committee notes the information on the arrangements governing regional processing centres and notes the lack of specific information about measures taken within the reporting period to implement its recommendation to take measures to protect the rights of refugees and asylum seekers affected by the closure of processing centres, including on Manus Island. The Committee reiterates its recommendation.

[**B**]: (c)

The Committee notes the information on the transition of the Christmas Island detention centre to a contingency setting in October 2018 and welcomes the indication that although it was reopened in 2019 the State party may consider returning it to that setting if its operational capacity is no longer required. It reiterates its recommendation that the State party should consider closing down the Christmas Island detention centre.

Paragraph 38: Mandatory immigration detention[4]

Summary of information received from the State party

(a) Australia's position is that the detention of an individual based on his or her status as an unlawful non-citizen is neither automatically unlawful nor arbitrary under international law. The determining factor is the justifiability of the detention, rather than its length. Australia's mandatory detention policy serves an administrative not a punitive purpose. Immigration detention is used to manage unlawful non-citizens before they are either removed from Australia's territory or granted a visa. Detention in a facility is used as a last resort. Immigration detention is a key component of border management and assists in managing possible threats to the Australian community.

The length and conditions of immigration detention are subject to regular review by senior departmental officials and the Commonwealth Ombudsman, who consider the lawfulness and appropriateness of individuals' detention, their detention arrangements, health, welfare and other relevant matters. Detained individuals can seek merits or judicial review of most visa decisions, and judicial review of their ongoing detention under section 189 of the Migration Act.

(b) Australia continues to develop alternatives to detention, such as bridging visas. The Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs also has the power to make a residence determination, enabling an individual to reside in the community if specific conditions are met.

[4] CCPR/C/AUS/CO/6, para. 38.

(c) The Government's position is that indefinite or arbitrary detention is not acceptable. The regular reviews by senior government officials and the Commonwealth Ombudsman are completed as quickly as possible to ensure that individuals are held in immigration detention for the shortest possible period.

(d) Unlawful non-citizens who are the subject of an adverse security assessment from the Australian Security Intelligence Organisation remain in immigration detention pending the resolution of their cases. To protect the public, continued detention for those deemed to pose a direct or indirect security risk is considered reasonable, necessary and proportionate. After two years of such detention, and every six months thereafter, the Secretary of the Department of Home Affairs is obliged, under the Migration Act, to report to the Commonwealth Ombudsman on the circumstances of such detention.

Adverse security assessments are the responsibility of the Australian Security Intelligence Organisation. Merits review is available for holders of a permanent or special purpose visa and judicial review is available to all visa holders and applicants. Individuals who meet certain criteria may also be eligible to have their cases reviewed by the Independent Reviewer of Adverse Security Assessments, appointed by the Attorney-General's Department. Detained individuals can seek judicial review of the lawfulness of their ongoing detention.

(e) (i) Australia has reduced the number of detained children and unaccompanied minors; since 2019, with fewer than 10 minors in detention, with the majority only temporarily detained. Unaccompanied minors and families with minors are prioritized for community placements. Australia considers the best interests of the child in all decisions and uses immigration detention only as a last resort.

(e) (ii) The health-care services available to individuals in immigration detention and those living in the community are comparable to those available to the public. Several considerations and obligations are applied with regard to the use of force and restraint in immigration detention. In cases where individuals in immigration detention believe they have been subjected to excessive, inappropriate or unreasonable use of force, they must be advised of and allowed access to the full range of complaint handling mechanisms.

Summary of information received from stakeholders

(a)-(c) JS1 noted the continued mandatory immigration detention regime and the increased average detention period. It considered unsubstantiated Australia's claim about held (facility based) detention being a last resort, and added that the Migration Act required detention of unlawful non-citizens on arrival without any individual assessment. It noted the lack of domestic recourse to challenge immigration detention, which amounted to arbitrary deprivation of liberty.

(d) JS1 indicated that, having been assessed to be a security risk and the subject of an 'adverse security assessment' or a 'qualified security assessment', detainees could not appeal against such assessment or receive reasons or evidence.

(e) (i) JS1 noted that alternatives to detention of children (e.g. 'community detention') were pursued at discretion and not as required by law.

(e) (ii) JS1 stated that health care services for people in immigration detention were not comparable to those for the public, and refugees and asylum seekers in the 'medevac cohort' experienced delays in accessing healthcare. It noted the widespread practice of excessive and arbitrary use of restraints in immigration detention, contrary to the 'last resort' principles developed by the Commonwealth's Detention Services Manual for safety and security management and the use of force, and stated that such use of restraints and force restricted people's access to healthcare.

Committee's evaluation

[**C**]: (a), (c), (d) and (e) (ii)

The Committee notes the information on the management of immigration detention and the means by which the lawfulness and appropriateness are monitored. It also notes the

information on the availability of judicial review of ongoing detention, on measures taken to avoid prolonged immigration detention, and on mechanisms to oversee immigration detention and provide access to review of decisions related to adverse security assessments. Nevertheless, the Committee is concerned at the lack of information on measures taken to reduce the period of initial mandatory detention, to strengthen institutional safeguards to ensure that all immigration detention is reasonable, necessary and proportionate, specific information on steps taken to introduce a time limit for the overall duration of immigration detention, and to strengthen procedures that ensure meaningful appeals against the material findings of adverse security assessments and any resulting detention.

The Committee notes the information on the health care available to those in immigration detention, and on the considerations and obligations applied with regard to the use of force and restraint. Nevertheless, it notes the lack of specific information on measures taken to address issues relating to the conditions faced by individuals in immigration detention. It is also concerned by the lack of precise information about steps taken to provide access to remedies for victims of excessive use of force.

The Committee reiterates its recommendation.

[**B**]: (b)

The Committee notes the information on the efforts to make alternatives to detention available, including bridging visas and the determination of residency by the Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs. Nevertheless, it requests additional information on the steps taken to expand the use of alternatives to detention, including statistics for each year within the reporting period on the number and proportion of cases in which alternatives to detention have been used.

[**B**]: (e) (i)

The Committee notes the information on the measures taken to ensure that children and accompanied minors are detained only as a matter of last resort and for the shortest appropriate period, taking into account their best interests. It commends the State party on the reported reduction in the number of children and unaccompanied minors in immigration detention. It requests that the State party provide up-to-date information on the number of children and unaccompanied minors who are subject to immigration detention and 'community detention' for each year within the reporting period.

Recommended action: A letter should be sent informing the State party of the discontinuation of the follow-up procedure. The information requested should be included in the State party's next periodic report.

Next periodic report due: 2026 (country review in 2027, in accordance with the predictable review cycle).