



**International Covenant on  
Civil and Political Rights**

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**Human Rights Committee**

**Concluding observations on the sixth periodic report of  
Australia**

Addendum

**Information received from Australia on follow-up to the  
concluding observations\***

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\* The present document is being issued without formal editing.



### **Follow-up information relating to paragraph 34 of the concluding observations (CCPR/C/AUS/CO/6)**

**34. The State party should ensure that the non-refoulement principle is secured in law and strictly adhered to in practice, and that all asylum seekers, regardless of their mode of arrival, have access to fair and efficient refugee status determination procedures and non-refoulement determinations, including by:**

**(a) Repealing section 197 (c) of the Migration Act 1958 and introducing a legal obligation to ensure that the removal of an individual must always be consistent with the State party's non-refoulement obligations.**

1. The original purpose of section 197C of the *Migration Act 1958* (Cth) (Migration Act) was to clarify that the ability to remove an unlawful non-citizen (UNC) under section 198 of the Migration Act is set independently from the assessment of Australia's *non-refoulement* obligations. This was implemented to mitigate the risk of non-meritorious injunctions by individuals who were already found to not be owed protection.

2. The changes proposed in recommendation 34(a) may increase the risk of injunction applications from individuals seeking to make false claims to delay removal.

3. Australia remains committed to upholding its international obligations and this is reflected in current processes, which check for *non-refoulement* risks for all UNCs prior to consideration for removal from Australia.

**(b) Reviewing the policy and practices during interceptions at sea, including on-water assessments, to ensure that all persons under the State party's jurisdiction who are in need of international protection have access to fair and efficient asylum procedures within the territory of the State, including access to legal representation where appropriate, and to legal remedies. The State party should also allow monitoring of the processing of intercepted persons by international observers, including the Office of the United Nations High Commissioner for Refugees.**

4. In September 2013, the Australian Government established Operation Sovereign Borders with the aim of stemming the flow of unauthorised boat ventures to Australia and prevent further loss of lives at sea.

5. The Australian Government and Operation Sovereign Borders is committed to its international obligations, including *non-refoulement* obligations. Australia does not return people to situations where doing so would be inconsistent with Australia's *non-refoulement* obligations. Australia has protection obligations consistent with the obligations set out in the Convention relating to the Status of Refugees and its 1967 Protocol (Refugees Convention), the International Covenant on Civil and Political Rights (ICCPR), the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

6. Further, legal representation can be accessed by intercepted persons where appropriate, and legal remedies are available. The Australian Government and Operation Sovereign Borders engages meaningfully with relevant United Nations bodies.

**(c) Consider repealing the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.**

7. The Migration and Maritime Powers Legislation Amendments (Resolving the Asylum Legacy Caseload) Act 2014 supports the Australian Government's key strategies for combatting people smuggling and managing asylum seekers.

8. The measures were a continuation of the Australian Government's protection reform agenda to uphold the integrity of the humanitarian program and ensure that people no longer risk their lives by undertaking the dangerous journey to Australia on boats illegally operated by people smugglers.

9. The Australian Government is committed to efficiently assessing each protection claim on its individual merits, on a case-by-case basis, with reference to 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 have access to merits and judicial review of refusal decisions. The Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) has expressed the view that asylum processes should satisfy basic requirements including the ability to seek a reconsideration of a protection status determination decision from either an administrative body or a judicial body. The Australian Government is of the view that rights to a fair hearing and effective remedy are satisfied where either merits review or judicial review is available. There is no obligation to provide merits review where judicial review is available.

10. It is also the Australian Government's view that it is reasonable and proportionate to implement a model of merits review that is efficient, quick and cost effective, and upholds the overall integrity of Australia's protection status determination process. All fast track applicants have their protection claims fully assessed through a statutory assessment.

### **Follow-up information relating to paragraph 36 of the concluding observations**

#### **36. The State party should:**

(a) **End its offshore transfer arrangements and cease any further transfers of refugees or asylum seekers to Nauru, Papua New Guinea or any other "regional processing country";**

11. The Australian Government remains committed to its current border protection policies, including regional processing.

12. Unauthorised maritime arrivals who cannot be returned will continue to be transferred to a regional processing country for protection claims assessment.

13. Australia remains committed to supporting the governments of Papua New Guinea and Nauru to successfully implement regional processing arrangements and provide ongoing deterrence to people smugglers.

(b) **Take all the measures necessary to protect the rights of refugees and asylum seekers affected by the closure of processing centres, including against non-refoulement, ensure their transfer to Australia or their relocation to other appropriate safe countries, and closely monitor their situation after the closure of the centres;**

14. Regional processing arrangements, and the management of transferees under arrangements in the Republic of Nauru (Nauru) and the Independent State of Papua New Guinea (PNG), are the responsibility of the Governments of Nauru and PNG respectively. Both Governments are parties to the Refugees Convention and various other international human rights conventions.

15. Under respective memoranda of understanding between the Government of Australia and the Governments of Nauru and PNG relating to the transfer, assessment and settlement of certain persons, the Governments of Nauru and PNG have provided assurances to:

- Treat transferees with dignity and respect;
- Treat transferees in accordance with relevant human rights standards; and
- Not to refole a transferee, that is, the Governments of Nauru and PNG will not send transferees to another country where there is a real risk of the relevant types of harm (eg: persecution, arbitrary deprivation of life, the death penalty, torture, cruel or inhuman or degrading treatment or punishment).

16. Australia continues to support the Governments of Nauru and Papua New Guinea to reduce the residual regional processing caseload through resettlement, returns and removals.

17. Transferees under regional processing arrangements have a number of migration options available to them:

- Refugees in Papua New Guinea can settle permanently in the community.

- Refugees in Nauru can stay in Nauru for up to 20 years.
- Refugees in Nauru and Papua New Guinea may express interest in resettling in the United States.
- Transferees may return home voluntarily or to another country in which they have a right to reside, and will receive assistance to do so.

18. No one under regional processing arrangements will be permanently settled in Australia.

19. Australia continues to explore third country resettlement opportunities for refugees under regional processing arrangements.

(c) **Consider closing down the Christmas Island detention centre.**

20. The Australian Government successfully transitioned the Christmas Island immigration detention facilities to a contingency setting in October 2018. These facilities were reopened in February 2019, to provide capability in response to the passing of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018*. The Government will consider returning Christmas Island immigration detention facilities to a contingency setting once the operational capacity these facilities provide is no longer required.

### **Follow-up information relating to paragraph 38 of the concluding observations**

**38. The State party should bring its legislation and practices relating to immigration detention into compliance with article 9 of the Covenant, taking into account the Committee's general comment No. 35 (2014) on liberty and security of person (particularly para. 18). It should, inter alia:**

(a) **significantly reduce the period of initial mandatory detention and ensure that any detention beyond that initial period is justified as reasonable, necessary and proportionate in the light of the individual's circumstances and is subject to periodic judicial review;**

21. The Australian Government's position is that the detention of an individual on the basis that they are an unlawful non-citizen is neither unlawful nor arbitrary *per se* under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable.

22. Australia's mandatory detention policy serves an administrative purpose and is not a punitive mechanism. Immigration detention is used to manage unlawful non-citizens toward a foreseeable immigration outcome (removal from Australia or a visa decision).

23. Held (facility based) detention is a last resort for the management of unlawful non-citizens. Determining placement of an unlawful non-citizen into an onshore detention facility is based on a risk assessment which takes into account timely status resolutions and community protection.

24. Immigration detention is a key component of border management and assists in managing potential threats to the Australian community – including national security, health and character – and ensures people are available for removal.

25. The length and conditions of immigration detention are subject to regular review by senior departmental officers and the Commonwealth Ombudsman. These reviews consider the lawfulness and appropriateness of a person's detention, their detention arrangements and placement, health and welfare, and other matters relevant to their ongoing detention and case resolution.

26. A person in immigration detention may currently seek merits or judicial review of most visa decisions that resulted in them becoming an unlawful non-citizen and being liable for detention, or a decision to refuse a Bridging visa once detained. They may also seek

judicial review of the lawfulness of their ongoing detention, in the sense that they may challenge the exercise of the power under section 189 of the Migration Act, with the Federal or High Courts.

**(b) expand the use of alternatives to detention;**

27. The Australian Government continues to develop alternatives to held detention, so that status resolution outcomes can be achieved in the community while ensuring risks to the individual or Australian public can be managed.

28. Held (facility based) detention is a last resort for the management of unlawful non-citizens. Australia continues to explore avenues for maximising the use of alternatives to held detention, so that status resolution outcomes can be achieved from the community while ensuring risks to the individual or Australian public can be managed.

29. Bridging visas are commonly used to allow individuals to lawfully reside in the community while awaiting final determination of their claims for residency. The Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs also has the power to make a residence determination, enabling a person to reside in the community instead of held detention if specific conditions are met. Both of these measures help reduce the use of held detention.

**(c) consider introducing a time limit on the overall duration of immigration detention;**

30. Under international law, Australia is required to ensure that detention is not arbitrary.

31. The Australian Government's position is that indefinite or arbitrary immigration detention is not acceptable. The length and conditions of immigration detention are subject to regular review by senior departmental officers and the Commonwealth Ombudsman. These reviews consider the lawfulness and appropriateness of a person's detention, their detention arrangements and placement, health and welfare, and other matters relevant to their ongoing detention and case resolution. These assessments are completed as expeditiously as possible to facilitate the shortest possible timeframe for detaining people in immigration detention facilities.

32. Individuals with an adverse security assessment remain in immigration detention until they can be removed from Australia, either to their country of origin or a third country, where it is safe to do so.

33. Australia is committed to ensuring that all people in administrative immigration detention are not subjected to harsh conditions, are treated fairly and reasonably within the law, and are provided with a safe and secure environment.

**(d) provide for a meaningful right to appeal against the indefinite detention of individuals who have received adverse security assessments from the Australian Security Intelligence Organisation, including a fair opportunity to refute the claims against them; and**

34. Under international law, Australia is required to ensure that detention is not arbitrary, including for individuals who may have had an adverse security assessment. It is Australia's policy that unlawful non-citizens who are the subject of adverse security assessment from the Australian Security Intelligence Organisation (ASIO) will remain in held immigration detention, pending the resolution of their cases. Taking into account the protection of the Australian community, continued immigration detention arrangements for people who are assessed by ASIO to be directly or indirectly a risk to security are considered reasonable, necessary and proportionate to the security risk that they are found to pose.

35. Individuals with an adverse security assessment remain in immigration detention until they can be removed from Australia, either to their country of origin or a third country, where it is safe to do so.

36. The Australian Government's position is that indefinite or arbitrary immigration detention is not acceptable. The length and conditions of immigration detention are subject to regular review by senior departmental officers and the Commonwealth Ombudsman.

These reviews consider the lawfulness and appropriateness of a person's detention, their detention arrangements and placement, health and welfare, and other matters relevant to their ongoing detention and case resolution.

37. When an individual has remained in administrative immigration detention for a total period of two years (and for every six months thereafter) the Secretary of the Department of Home Affairs has a statutory obligation under the Migration Act to provide a report to the Commonwealth Ombudsman on the circumstances of an individual's detention. Based on these reports, the Ombudsman provides an assessment to the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs on the appropriateness of each individual's detention arrangements.

38. Adverse security assessments are the responsibility of ASIO and mechanisms for review of adverse security assessments are in accordance with the *ASIO Act 1979*: merits review is available for holders of a permanent or special purpose visa; and judicial review is available to all visa holders and applicants.

39. Certain categories of individuals with an adverse security assessments may also be eligible to have their cases reviewed by the Independent Reviewer of Adverse Security Assessments who is appointed by the Attorney-General's Department, where individuals satisfy the following criteria: remain in immigration detention; and have been found by Home Affairs to be owed protection obligations under international law; and are ineligible for a permanent protection visa, or have had their permanent protection visa cancelled, because they are the subject of an adverse security assessment.

40. A detainee can seek judicial review of the lawfulness of their ongoing detention, in the sense that they may challenge the exercise of the power under section 189 of the Migration Act, with the Federal or High Courts.

**(e) (i) ensure that children and unaccompanied minors are not detained, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention and their special need for care.**

41. A person who does not hold a valid visa is an unlawful non-citizen, and must be detained under the Migration Act.

42. Whether the person is placed in an immigration detention facility, or other arrangements are made, is determined using a risk-based approach.

43. Over the past 18 months, the Australian Government has made significant inroads to reducing numbers of children in detention. Since the beginning of February 2019, there has consistently been less than ten minors in held immigration detention in Australia and over a majority of this time, that number has been less than five minors in held detention.

44. Many of these children were detained briefly as a result of immigration activities such as being turned around at an airport or in preparation for removal to their country of origin.

45. The vast majority of non-citizen children and families with unresolved immigration status in Australia live in community arrangements.

46. Australia considers the best interests of children, including those who are unaccompanied, as a primary consideration in all actions taken concerning that child, where there is scope to do so, including action taken in relation to a parent or guardian which would have an effect on the child.

47. Held immigration detention of children is always a last resort and children are detained for the shortest practicable time and in alternative places of detention (APOD) wherever possible.

48. Australia routinely prioritises unaccompanied minors and family groups with minor children for consideration of a community placement. This means that vulnerable non-citizens may be able to reside in the community either under residence determination arrangements (community detention) or on a bridging visa while they resolve their immigration status.

49. The Australian Government regularly examines options to vary detention arrangements for families in detention, in line with the Minister's guidelines and taking into account health, character and security requirements. Where the circumstances of families in detention meet these requirements, it is the Australian Government's preference to expedite the transfer of children into the community.

50. This includes where a family's or minor's immigration circumstances are unlikely to allow for a substantive visa outcome. The Minister for Immigration, Citizenship, Migrants Services and Multicultural Affairs is also regularly briefed about the wellbeing and immigration circumstances of children or families in held detention.

*Education of children in immigration detention and APOD*

51. All school-age children, regardless of their immigration status, disability or learning needs, are provided access to education commensurate with Australian community standards and relevant State or Territory legislation for the State or Territory in which they are accommodated while their immigration status is being resolved. This includes children in immigration detention, community detention and children who are on bridging visas while applying for a protection visa.

52. All school-age children will start school in accordance with the school-age mandated by the relevant State or Territory. All children aged three to five years who are in held and community detention are provided access to educational programs, such as pre-school, kinder groups or playgroups, to support their growth and development. All decisions regarding the provision of education services to children who are detained in held detention are to be made on a case-by-case basis and consider the child's best interest.

53. Families in the community with children under the compulsory age for schooling are made aware of early childhood education programs and community play groups that their children may be eligible to attend in line with community standards.

54. The Australian Government recognises the important role that parents/guardians play in planning for a child's school enrolment and ongoing education. Department of Home Affairs works with parents/guardians to facilitate children's access to education while they are in immigration detention, and acknowledges the role of parents to engage with their child's school to assist their child with orientation and settling into a new school environment.

55. Children admitted to hospitals or medical facilities for treatment are encouraged, where feasible, to participate in education programs provided by these facilities. Following discharge, the Department of Home Affairs facilitates access to education commensurate with Australian community standards and the relevant State and Territory legislation.

56. The Department of Home Affairs has arrangements with all State and Territory departments of education, except in Western Australia, to provide minors in immigration detention with access to public schools. In the case of Western Australia, the Department has a standing arrangement with a range of non-government education providers.

**(e) (ii) The State party should address the conditions of detention in immigration facilities, provide adequate mental health care, refrain from applying force or physical restraints against migrants and ensure that all allegations of use of force against them are promptly investigated, that perpetrators are prosecuted and, if convicted, punished with appropriate sanctions, and that victims are offered reparation.**

*Health Services in immigration detention and APODs*

57. Health care services for detainees in immigration detention, are comparable to those available to the Australian community, under the Australian public health system.

58. Services are provided by contracted medical professionals through onsite primary and mental health clinics, with referral to allied and specialist health providers as required. All detainees receive personalised healthcare that aligns with specialist clinical advice to address all identified risk factors and health conditions. Acute care is provided by hospitals.

59. The Australian Government's contracted health services provider is responsible for mental health care and support services which are delivered by general practitioners, mental health nurses, psychologists, counsellors and psychiatrists, including those specialising in torture and trauma counselling services (on a visiting basis, or through the use of tele-health facilities or external appointments). Mental health screening is delivered in line with the relevant Australian standards.

60. For individuals residing in the community, health services are provided by community general practitioners, under contractual arrangements with a detention health service provider. Services provided are comparable to those available to the Australian community, under the Australian public health system. Community general practitioners provide primary and mental health care, with referrals to allied and specialist health providers as required. Acute care is provided by hospitals.

#### *Use of force in immigration detention settings*

61. In the immigration detention context, the range of actions comprehended by the term 'use of force' involves the application of mechanical restraints, such as handcuffs, and any verbal command or physical action to gain control of a detainee. It does not involve use of law enforcement mechanisms such as tear gas, mechanical restraint chairs, isolation rooms or force multipliers such as batons.

62. The following considerations and obligations apply to the application of force and/or restraint in the immigration detention context, where restraint refers to physical rather than legislative:

- There is a presumption against the use of force, including restraints, during movements within an immigration detention facilities (IDFs), transfers between IDFs, and during transport and escort activities outside of IDFs;
- Conflict resolution through negotiation and de-escalation, where practicable, must be considered before the use of force and/or restraint is used;
- Use of force and/or restraint should only be used as a measure of last resort;
- The amount of force used and the application of restraints must be reasonable;
- Use of force and/or restraint may be used to prevent the detainee inflicting self-injury, injury to others, escaping or destruction of property;
- Use of force and/or restraint may only be used for the shortest amount of time possible to the extent that it is both lawfully and reasonably necessary. If the management of a detainee can be achieved by other means, force must not be used;
- Use of force and/or physical restraint must not include cruel, inhumane or degrading treatments;
- Use of force and/or restraint must not be used for the purposes of punishment;
- The excessive use of force and/or restraint is unlawful and must not occur in any circumstances. Excessive force on a detainee may constitute an assault; and
- All instances where use of force and/or restraint are applied (including any follow-up action), must be reported in accordance with the relevant operational procedures.

63. Where a person in immigration detention believes they have been subjected to force that is excessive, not appropriate or unreasonable, they must be advised of, and allowed to access, the full range of complaints handling mechanisms available to all detainees.

#### *Corporal punishment as behaviour management*

64. In immigration detention or alternative residential care settings, corporal punishment is not a form of behavioural management. In circumstances that require behavioural management, officers receive behavioural management training, which includes: conflict de-escalation; duty of care responsibilities; cultural awareness; and skills on working with children.



65. Behavioural management for people in immigration detention includes the development of a Behavioural Management Plan, which takes into account the individual's background; circumstances; history; behavioural difficulties; and recommendations from the health service provider.

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