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Human Rights Committee

Report on follow-up to the concluding observations of the Human Rights Committee*

Addendum

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:	Kaldor Centre for International Refugee Law at the University of New South Wales (UNSW) Sydney and other civil society organizations, 31 January 2022
Committee's evaluation:	34[**C**], 36[**E**][**C**][**B**] and 38[**C**][**B**]

Paragraph 34: Non-refoulement[1]

Summary of the 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

* Adopted by the Committee at its 134th session (28 February–25 March 2022).

[1] The paragraphs containing the Committee's recommendations are not reproduced in the present document owing to the word limit specified in General Assembly resolution 68/268, para. 15.

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 the information received from stakeholders

Kaldor Centre for International Refugee Law at UNSW Sydney and other civil society organizations

(a) Section 197 (c) of the Migration Act was not repealed as part of the 2021 amendments to that Act. Persons who cannot be removed but have not been granted a visa are subject to mandatory, possibly indefinite, detention if no safe country accepts them.

(b) The claims made in the information received from the State party are not supported by its law or its practice at sea. Its law authorizes secret and indefinite detention of asylum seekers on the high seas without procedural safeguards or access to legal remedies.

(c) Australia had not indicated any plans to repeal the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 or to amend the fast-track assessment process. Comparisons between the remittal rates of negative asylum decisions between the fast-track system and the previous merits review system reinforce 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

Summary of the 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 to implement regional processing arrangements.

(b) Regional processing arrangements are the responsibility of Nauru and Papua New Guinea. Assurances of compliance with human rights are included in relevant memorandums of understanding between Australia and Nauru and Australia and Papua New Guinea, and Australia continues to support them 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 the information received from stakeholders

Kaldor Centre for International Refugee Law at UNSW Sydney and other civil society organizations

(a) In September 2021, Australia and Nauru signed a memorandum of understanding to establish an enduring regional processing capability in Nauru, which has not been made public. In October 2021, Australia and Papua New Guinea announced that Australian regional processing contracts in Papua New Guinea would end on 31 December 2021 and would not be renewed. Australia has attempted to shirk or deny its responsibility for the people it forcibly transferred to Papua New Guinea in 2013 and 2014.

(b) Australia continued to reject an offer from New Zealand to resettle people subject to offshore processing, despite the lack of durable protection measures for those in Nauru and Papua New Guinea and for those in Australia as transitory persons.

(c) Some 226 people were in the Christmas Island detention centre as at 30 September 2021. Several riots and protests have taken place, including owing to living conditions and the 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. It regrets that the State party remains committed to regional processing, which indicates that there are no plans to implement its 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. The Committee reiterates its recommendation that the State party should consider closing down the Christmas Island detention centre.

Paragraph 38: Mandatory immigration detention

Summary of the information received from the State party

(a) Australia takes the position 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. The 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 Australian 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.

(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, there have been 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 the information received from stakeholders

Kaldor Centre for International Refugee Law at UNSW Sydney and other civil society organizations

(a)–(c) The mandatory immigration detention regime continues to be enforced and the average detention period has increased. The claim that facility-based detention is used as a

last resort is unsubstantiated; the Migration Act provides for the detention of unlawful non-citizens on arrival without any individual assessment. The lack of domestic recourse to challenge immigration detention amounts to arbitrary deprivation of liberty.

(d) Detainees who have been assessed to be a security risk and are the subject of an adverse security assessment or a qualified security assessment cannot appeal against those assessments, receive explanations for them or see the evidence on which they were based.

(e) (i) Alternatives to the detention of children (e.g. community detention) are discretionary and not required by law.

(e) (ii) Health-care services for people in immigration detention are not comparable to those provided to the general public. Refugees and asylum seekers requiring essential health services under the Medevac legislation have experienced delays in accessing health care. Excessive and arbitrary use of restraints in immigration detention is widespread, contrary to the last resort principles set out in the Detention Services Manual on safety and security management and the use of force, and such use of restraints and force restricts people's access to health care.

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 of detention arrangements 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 and 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 information on measures taken 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 recommendations.

[**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 unaccompanied 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).