



Australian Government

Submission of the Australian Government

Draft joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 21 of the Committee on the Rights of the Child on the Human Rights of Children in the Context of International Migration

1. Australia is a longstanding party to the Convention on the Rights of the Child (the CRC) and is firmly committed to upholding its obligations under the Convention. Australia is not a party to the Convention on the Rights of All Migrant Workers and Members of Their Families (the CMW). However, Australia acknowledges the rights of migrant workers and their families arising under other treaties to which Australia is a Party, including the CRC.
2. Australia was pleased to provide its general observations during the consultation with States and other stakeholders on the zero draft of the joint general comment of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child (the Committees) on 2 May 2017. Australia now provides more detailed written comments on the second draft joint general comment on children in the context of international migration dated 7 June 2017 (the draft joint general comment). This submission addresses the issues in the order in which they are addressed in the draft joint general comment, including with reference to the titles and subtitles used by the Committees.

The concept of a 'joint' general comment

3. Australia recalls that the CRC currently has 196 States Parties; the CMW has 51 States Parties. As with the majority of States, Australia is a State Party to the CRC, but not to the CMW. This gap in ratifications as between the CRC and the CMW gives rise to potential difficulties in the Committees offering a joint interpretation of obligations arising under both treaties.
4. Australia accepts that a treaty body is competent to offer guidance on the implementation and interpretation of the treaty under which it has been established and for which it is responsible for monitoring. However, Australia notes that throughout the draft joint general comment reference is made to a joint view of the CRC Committee and the CMW Committee on obligations which arise only under one treaty or the other. This raises questions of legitimacy regarding the Committees' competence to issue the draft joint general comment. Australia reiterates its concern that there is a real risk that confusing the competence of each Committee to issue views on its constituent treaty may undermine the legitimacy and authority of the draft joint general comment as a whole. This could be

corrected by clearly attributing interpretations of each treaty in the draft joint general comment to the Committee established under that treaty.

5. Australia acknowledges similarities in a number of rights arising under the CRC and CMW. Further, it is Australia's strong view that human rights treaty bodies should interpret human rights obligations consistently with one another to the extent permitted by the text of the obligation. However, Australia notes that not all the obligations which are addressed concurrently in the draft joint general comment are identical. Even where they are, it does not necessarily follow that they ought to, in all circumstances, be interpreted identically.
6. Consistent with the accepted norms of treaty interpretation, interpretation of an individual obligation should be guided by, *inter alia*, the context in which that obligation is found, including the rest of the treaty under which the obligation arises. In Australia's view, care needs to be taken in the draft joint general comment to distinguish between the particular obligations of each treaty, noting again that the vast majority of States are party to only one treaty.
7. In this respect, Australia does not accept the statement by the Committees that the joint general comment, based as it is on rights enshrined in both Conventions, applies to all States Parties of either Convention, including those that have not ratified both.¹ Australia considers that it is bound only to consider the guidance offered by the Committee on the Rights of the Child in respect of Australia's obligations under the CRC.

The primacy of children's rights within migration policies

8. Australia notes that Article 3 of the CRC requires that the best interests of the child shall be a primary consideration in all actions concerning children. Australia is committed to upholding its obligations under Article 3 of the CRC. However, Australia also considers that there is a difference between the best interests of the child being a primary consideration, and the best interests of the child being the primary consideration or paramount consideration. Australia does not accept that consideration of the child's best interests should always take priority and precedence over 'migration and policy or other administrative considerations',² nor the view that the best interests of the child shall be the paramount consideration in custody and other family law matters.³ Australia also disagrees with the Committees' statement at paragraph 26 of the draft joint general comment that in decisions regarding family unity, the best interests of the child should be paramount.

Fundamental principles

¹ Draft joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 21 of the Committee on the Rights of the Child on the Human Rights of Children in the Context of International Migration dated 7 June 2017, para 3 (Draft joint general comment).

² Draft joint general comment, paras 15, 29.

³ Draft joint general comment, para 72.

9. Australia recognises that as a State Party to the CRC it has a duty under Article 4 to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention. Australia notes the Committees' views that a dynamic interpretation of the provisions is paramount to ensuring their effective implementation,⁴ but considers that, as with all human rights obligations, the obligations contained in the CRC must be interpreted consistently with the widely accepted principles of treaty interpretation reflected in the 1969 *Vienna Convention on the Law of Treaties*.

Non-discrimination

10. Australia accepts the principle of non-discrimination and recognises that any legitimate differential treatment of migrant children must reflect the principle of the best interests of the child under Article 3 of the CRC and international human rights norms and standards.
11. Article 2 of the CRC obliges States Parties to 'take all appropriate measures' to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians, or family members. Australia considers that the Committees' interpretation of non-discrimination as imposing a positive obligation on States to adopt measures to prevent, diminish and eliminate conditions and attitudes which cause or perpetuate de facto discrimination against migrant children and children affected by migration extends beyond the legal obligation in Article 2.⁵

Best interests of the child

12. Australia is concerned at the prescriptive nature of the Committees' views in paragraph 29 of the draft joint general comment, which stresses that the Parties should, *inter alia*, 'make clear in legislation, policy and practice that the principle of the child's best interests takes priority over migration and policy or other administrative considerations', and that actors independent of the migration authorities should conduct Best Interest Assessments and Determinations in migration-related decision making affecting children. In Australia's view, the measures outlined in this paragraph expand the scope of States Parties' legal obligations beyond that which is required under Article 3 of the CRC. While States may support some of these measures as a matter of policy, Australia does not consider them to be binding under international law.

Life, survival and development

13. At paragraph 30 of the draft joint general comment, the Committees interpret Article 6 of the CRC as an obligation on the States Parties to ensure the survival, growth, and development of the child, including the physical, mental, moral, spiritual and social dimensions of their development.

⁴ Draft joint general comment, para 19.

⁵ Draft joint general comment, para 23.

14. Australia notes that Article 6 contains two concepts: the inherent right to protection from arbitrary deprivation of life in Article 6(1) and the survival and development of the child in Article 6(2). Australia considers that the Committees' interpretation in paragraph 30 could be seen to conflate these two concepts, which could be misleading. We therefore suggest the Committees provide separate comments in respect of each subparagraph.

Right to be heard, express views and participation

15. Australia notes the obligation in Article 12 of the CRC requires the child to be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child 'in a manner consistent with the procedural rules of national law'. Further, the right to express views freely in all matters affecting the child is assured to the child who is capable of forming his or her own views, the views being given due weight in accordance with the child's age and maturity.

16. In Australia's view, the Committees' statement at paragraph 27 that State Parties are obliged 'to respect fully the right of the child to be heard with regard to all the aspects of immigration and other related proceedings, in an appropriate manner, and that her or his views be adequately taken into account' extends the scope of Article 12, as it does not recognise the nuances present in the text of the Article.

Protection against expulsion: non-refoulement

17. The Australian Government takes the view that *non-refoulement* is a norm of customary international law. It accepts that *non-refoulement* obligations are central to several treaties to which Australia is a State Party, including the International Covenant on Civil and Political Rights (ICCPR) in relation to the death penalty⁶ and torture and cruel, inhuman and degrading treatment and punishment,⁷ the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment⁸ and the 1951 Convention on the Status of Refugees as amended by the 1967 Protocol.⁹ Australia is committed to upholding its *non-refoulement* obligations under these treaties, including in relation to children. These *non-refoulement* obligations apply in circumstances where there is a real risk that a person would, if removed to another country, face irreparable harm by way of

⁶ Australia accepts that Article 6 of the ICCPR, in conjunction with its Second Optional Protocol, implies an obligation on Australia not to remove a person from territory under its jurisdiction to another country where there are substantial grounds for believing that there is a real risk of the person being subjected to the death penalty in that country.

⁷ The prohibition on torture and CIDTP is contained in article 7 of the ICCPR. The UN Human Rights Committee has stated, and Australia accepts, that there is an obligation under the ICCPR not to extradite, deport, expel or otherwise remove a person from territory under its jurisdiction where there are substantial grounds for believing that there is a real risk of the person being subjected to torture or CIDTP, in violation of article 7.

⁸ Paragraph 1 of article 3 of the Convention Against Torture provides that no State Party 'shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

⁹ Paragraph 1 of article 33 of the Refugees Convention provides that no State Party 'shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion'. This obligation is subject to paragraph 2 of article 33.

arbitrary deprivation of life; application of the death penalty; torture; or cruel, inhuman or degrading treatment or punishment.

18. The Committees state, in paragraph 43 of the draft general comment, that ‘States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the CRC’. Australia considers that this statement is ambiguous and that the Committees are seeking to extend States Parties’ obligations under the CRC beyond those accepted as a matter of international law. Consequently, Australia strongly disagrees with this statement.
19. In particular, Australia observes that the rights in articles 6 and 37 of the CRC are more extensive than those provided in comparable rights under the ICCPR and the CAT in relation to which Australia has accepted that there are *non-refoulement* obligations. For example, article 6 of the CRC contains both the right to protection against arbitrary interferences with life (paragraph 1) and the right of the child to survival and development (paragraph 2). The right in paragraph 2 of article 6 is an obligation that is more aligned with the rights to health and an adequate standard of living derived from Articles 12 and 11 of the International Covenant on Economic, Social and Cultural Rights, rather than a right to protection against arbitrary deprivation of life. Consequently, Article 6 of the CRC extends far beyond the scope of the comparable right to life in article 6(1) of the ICCPR. Furthermore, Article 37 of the CRC also contains obligations related to the deprivation of liberty, including the right of detained children to legal and other assistance and to challenge the legality of their detention, and to humane treatment in detention, including the requirement to separate children prisoners from adults. These obligations reflect the comparable obligations in Articles 9 and 10 of the ICCPR, in relation to which there are not *non-refoulement* obligations.
20. The Committees further express the view that, in the case of migrant children, the principle of *non-refoulement* should be construed as including: ‘socio-economic conditions in countries of origin; and family reunification entitlements in countries of origin and destination and migrant children and their families should be protected in cases where expulsions would constitute arbitrary interference with the right to family and private life.’¹⁰ While these considerations may go to aspects which are captured under Article 6(2) of the CRC, Australia strongly disagrees that any *non-refoulement* obligations arise in these circumstances.
21. The Australian Government respectfully suggests that the Committees’ reconsider these statements in finalising the draft General Comment and encourages the Committees to provide precise, legally accurate and authoritative guidance to States Parties.

Legal obligations of States parties

¹⁰ Draft joint General Comment, para 44.

22. In respect of the Committees' comments on the legal obligations of States Parties to protect the rights of children in the context of migration in their territory, Australia makes the following observations.

Right to liberty and non-detention

23. Australia refers to the Committees' statements at paragraph 49 that Article 37(b) of the CRC only addresses situations of children in the context of juvenile justice, following a criminal offence, and that Article 37 does not apply to immigration-related detention. Australia does not agree with this interpretation of Article 37(b). Article 37(b) provides that '[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'. While 'imprisonment' clearly connotes a connection with detention in the criminal justice context, the text also refers to 'detention' more broadly. In this regard, Australia notes that according to the *travaux préparatoires*, Article 37(b) is based on Article 9(1) of the ICCPR, which the UN Human Rights Committee has stated applies with respect to all deprivations of liberty, whether in criminal cases or in other cases, such as mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.¹¹

24. Australia further submits that Article 37(b) permits the detention of children, provided that (i) such detention is both lawful and non-arbitrary and (ii) is 'used only as a measure of last resort and for the shortest appropriate period of time'. Australia adheres to the principle enshrined in its domestic law that children shall only be detained for immigration purposes as a measure of last resort. Australia further notes that community placement options are used wherever practicable to enable families and children to live in the Australian community, and emphasises that the child's best interests are a primary consideration when making placement decisions. In this regard, Australia disagrees with the Committees' statement that the detention of a child because of their or their parents' migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child.¹²

25. It is unclear on what basis the Committees consider there to be a duty of States to adopt measures directed at eradicating any kind of policy or practice of child detention in the context of migration policies and procedures.¹³ In Australia's view, this statement cannot be read consistently with the text of Article 37(b). We would welcome further clarification of this point by the Committees.

26. Australia does not consider that it is under a legal obligation to comply with the Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), annexed to General Assembly Resolution 45/113 (1990), as referenced in paragraph 56 of the draft

¹¹ Human Rights Committee, *General Comment No. 8: Article 9 (Right to liberty and security of persons)* (1982), para 1.

¹² Draft joint general comment, para 50. See also para 56.

¹³ Draft joint general comment, para 51.

joint general comment. While Australia accepts that the Rules are relevant as a matter of policy, they are not binding at international law.

Due process guarantees and access to justice

27. Australia is concerned at the prescriptive nature of the Committees' views in paragraph 59 indicating guarantees of due process that must govern any immigration and asylum proceedings, whether administrative or judicial, that involve children.¹⁴ In Australia's view, framing these matters in mandatory terms expands the scope of States Parties' legal obligations beyond what is required under the CRC. From a policy perspective States may support some of these examples. However, Australia is concerned about the framing of these matters in mandatory terms.

Right to family life

28. Australia notes that there is no right to family reunification under international law. The Committees state that Article 10 of the CRC includes a positive obligation on States Parties to facilitate the reunification of children with their parents.¹⁵ Australia considers that this characterisation is broader than the obligations contained in Article 10. Under Article 10, States Parties are obliged to deal with applications 'by a child or his or her parents to enter or leave a State Party for the purpose of family reunification ... in a positive, humane and expeditious manner.' Australia submits that Article 10 constitutes a procedural right and does not mandate the outcome of such an application, which will depend on the particular circumstances of each case.

Right to adequate standard of living

29. Australia is concerned that the Committees have been overly prescriptive in their interpretation of the right to an adequate standard of living, and in the framing of these examples in mandatory terms.¹⁶ For example:

- a. States shall not interfere with children's right to housing through measures which prevent irregular migrants from renting properties or the rental of properties to irregular migrants.¹⁷
- b. States shall take measures to ensure an adequate standard of living in temporary locations, such as reception facilities, and formal and informal camps, and ensuring that these are accessible to children and their parents or legal guardians, including for

¹⁴ See para 59 of the draft joint general comment. Australia notes that it does not consider itself bound by an Advisory Opinion of the Inter-American Court of Human Rights. See footnote 40 in para 59 of the draft joint general comment.

¹⁵ Paragraph 79 also refers to an obligation on States Parties to 'guarantee adequate support to those children and their parent(s) and/or siblings who lack means to implement their right to reunification'.

¹⁶ See draft joint general comment, paras 91-95.

¹⁷ Draft joint general comment, para 92.

persons with disabilities, older persons and pregnant, new and breastfeeding mothers.¹⁸

30. Australia notes that, under Article 4 of the CRC, economic, social and cultural rights are subject to progressive realisation.¹⁹ Accordingly, States Parties enjoy a reasonable margin of discretion in selecting methods to implement their obligations, taking into account resource considerations. While States may support measures such as the above as a matter of policy, Australia considers they should not be framed in mandatory terms.
31. In paragraph 91 the Committees appear to have also mischaracterised the obligation in Article 27(2) of the CRC. The Committees note that Article 27(2) encompasses an obligation on States to provide material assistance and support programs to assist parents and others responsible for the child to implement this right particularly with regard to nutrition, clothing and housing. Australia also notes that this obligation is subject to there being a need to provide assistance and that such measures be taken by States 'in accordance with national conditions and within their means'.

Right to education and professional training

32. In respect of the right to education, Australia notes that Article 28(1) of the CRC recognises the applicability of the principle of progressive realisation to this right. Australia is therefore of the view that the Committees' interpretation of this right as requiring States to 'put in place adequate measures to recognize the child's former education through the equivalence of previously obtained school certificates and/or the emission of new certification based on the child's capacities and capabilities'²⁰ is overly prescriptive and not consistent with the obligation under Article 28.
33. Further, Australia does not agree that the 'principle of equality of treatment', referred to in paragraph 104 of the draft joint general comment creates a positive obligation on States to 'adopt appropriate and gender-sensitive provisions to overcome barriers.' While at a policy level a gender-sensitive approach can be crucial to ensure the enjoyment of the right to education, there is no such obligation under the CRC.
34. Australia reiterates its support for the work of the Committees, especially the Committee on the Rights of the Child and avails itself of this opportunity to renew to the Committees the assurances of its highest consideration.

¹⁸ Draft joint general comment, para 93.

¹⁹ See generally Committee on Economic, Social and Cultural Rights, *General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)*, 5th session (1990).

²⁰ Draft joint general comment, para 103.