RESPONSE OF THE AUSTRALIAN GOVERNMENT TO THE VIEWS OF THE HUMAN RIGHTS COMMITTEE IN COMMUNICATION NO 2233/2013 (*F.J. v AUSTRALIA*)

1. The Australian Government (Australia) presents its compliments to the members of the Human Rights Committee.
2. Australia has given careful consideration to the Views of the Committee expressed in Communication No. 2233/2013 (F.J. v Australia) transmitted on 13 April 2016. These Views have been published on the website of the Australian Attorney-General's Department.[1] Australia provides the following comments on certain aspects of the Committee's Views.

Article 9, paragraph 1

3. Australia acknowledges its obligations under the International Covenant on Civil and Political Rights (the Covenant) not to subject individuals to arbitrary detention, and further acknowledges that there are some circumstances in which the lawful and permissible detention of a person may become arbitrary if there are no longer any grounds to justify it.
4. Australia reiterates that it is entitled to take measures, including detention, to uphold Australia's national security. Security assessments can be issued when the Australian Security Intelligence Organisation (ASIO) - Australia's national security intelligence service - makes an assessment on whether it would be consistent with the requirements of security, or whether the requirements of security make it necessary or desirable, for prescribed administrative action to be taken, where an individual is directly or indirectly a risk to security.[2] It is Australia's policy that unlawful non-citizens who are the subject of adverse security assessments from ASIO will remain in held immigration detention, pending the resolution of their cases.
5. It is Australia's view that in forming its Views on article 9, paragraph 1 of the Covenant, the Committee failed to give adequate weight to various processes and policy developments outlined in Australia's submissions.

[1] Human Rights Communications, Australian Attorney-General's Department website: <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx>.
[2] Pursuant to section 35 of the *Australian Security Intelligence Organisation Act 1979* (Cth), 'prescribed administrative action' includes the exercise of any power, or the performance of any function, in relation to a person under the *Migration Act 1958* or the regulations under that Act.

6. The authors' adverse security assessments were reviewed regularly since the time they were issued. This review included regular internal review processes by ASIO and, since 2012, additional review by the Independent Reviewer of Adverse Security Assessments. An Independent Reviewer of Adverse Security Assessments was first appointed on 3 December 2012. The Reviewer provides an independent review process for those individuals who remain in immigration detention, having been found to be owed international protection obligations, but not granted a permanent visa as a result of an adverse security assessment.
7. As noted in the Committee's Views, all of the authors have been released from immigration detention.[3] In each case, the decision to release an author from immigration detention was made by the Department of Immigration and Border Protection after ASIO issued either a qualified or a non-prejudicial security assessment following its receipt of significant new information.

Article 9, paragraph 4

8. Australia disagrees with the Committee's interpretation of article 9, paragraph 4. The obligation on States Parties is, in accordance with the words of that article, to provide for review of the lawfulness of detention. In Australia's view, there can be no doubt that the term 'lawfulness' refers to lawfulness according to the Australian domestic legal system.
9. There is nothing apparent in the terms of the Covenant that suggests that 'lawfulness' was intended to mean 'lawfulness at international law' or 'not arbitrary'. Where the terms 'law', 'lawful' and 'lawfully' are used in other provisions of the Covenant they clearly refer to domestic law: see for example, article 9, paragraph 1; article 12, paragraph 1; article 13 and article 22, paragraph 2. In Australia's view, if the drafters of article 9(4) intended the concept of 'lawfulness' to be interpreted broadly to include lawfulness under international law, this would have been reflected in the debate preceding the settlement on the form of words contained in this article. Instead, the negotiating history indicates that 'the principle enunciated in paragraph 4 … did not give rise to much discussion'.[4] Accordingly, Australia does not accept the Committee's view that Australia has breached article 9, paragraph 4.

[3] *F.J. et al v Australia*, (CCPR 2233/2013), 18 April 2016, [8.1]-[8.3].
[4] Commission on Human Rights, 5th Session (1949), 6th Session (1950), 8th Session (1952); Marc J Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights*, 1987, page 212.

10. Australia notes that the Committee reached its view on article 9, paragraph 4 partially on the basis of its understanding that the outcome of the High Court of Australia's judgment in the case of *M47/2012 v Director General of Security and Ors*[5] did not result in the release of the authors from immigration detention despite the complainant's success in that case. Australia considers that this is not the correct conclusion to reach from these circumstances. In that case, the specific legal points on which the complainant was successful were not related to the lawfulness of the detention and, accordingly, did not lead to release from detention as a remedy. It is also worth noting that the Court was asked to decide whether, in furnishing the adverse security assessment, ASIO failed to comply with the requirements of procedural fairness. The Court found that there was no denial of procedural fairness in the circumstances.
11. A successful challenge to the High Court of Australia by a person who engages Australia's protection obligations, but is subject to an adverse security assessment, would result in release from detention if the Court found that the detention was unlawful. Australia further considers that the Committee placed too much weight on the outcomes of previous High Court cases in coming to its decision on the possible outcomes of review. These outcomes were based on specific factual situations and should not be read as an indication that judicial review at the High Court is not available to the authors, nor that release from detention may not be an outcome of such review. In particular, Australia considers that the Committee did not give enough weight to Australia's submissions that *Al Kateb v Godwin*[6] is precedent that could be overturned consistent with the role of the High Court as the highest independent review body in Australia.

Article 7

12. Australia is mindful of the impact of continuing detention on individuals with adverse security assessments while noting that it does not consider that detention *per se* causes harm to individuals.
13. Australia notes the Committee's finding that the authors were suffering from psychological harm and that this harm played a key role in the Committee's conclusion that the authors' treatment amounted to a violation of article 7 of the Covenant.

[5] *M47/2012 v Director General of Security and Ors* [2012] HCA 46; (2012) 292 ALR 243.
[6] *Al-Kateb v Godwin* (2004) 219 CLR 562.

14. Australia considers that the Committee should not have reached this conclusion in the absence of substantial and specific evidence that the authors personally suffered harm causally connected with their detention. The authors' submissions did not contain such evidence. Rather, the authors made generalized claims about the impact of conditions of detention and indicated that the authors would be willing to provide short personal statements and psychiatric reports on request. The Committee's Views indicate that the authors' allegations regarding the impact detention on their mental health 'are confirmed by medical reports concerning some of the authors'.[7] Australia is not aware of the Committee having been provided with any medical reports about the authors of this communication. If such reports were provided to the Committee, they were not provided to Australia.[8]
15. Australia submits further that the treatment of the authors does not meet the threshold to satisfy a violation of article 7, as steps were taken to meet the psychological health needs of the authors through medical and other health services. Australia is committed to minimising the factors that contribute to mental health deterioration of individuals in immigration detention, and ensuring that those individuals in need of medical assistance are promptly given treatment.
16. The Government provides individuals with access to health care and mental health support services, and ensures qualified health professionals conduct individual health assessments. All individuals in immigration detention have a mental health assessment upon entry to detention and are offered regular mental health screening throughout their time in detention, conducted by mental health clinicians. Concerns in respect of an individual's mental health can be raised by any party at any time, and the individual will be referred for prompt assessment.
17. All people in immigration detention facilities are supported under the Government's Psychological Support Programme (PSP) Policy. The focus of the PSP is on preventative and monitoring strategies to reduce detainee self-harm risk through:
    - supportive monitoring and engagement
    - coordinated and individual care planning
    - provision of meaningful activities, and
    - provision of a supportive environment.

[7] *F.J. et al v Australia*, (CCPR 2233/2013), 18 April 2016, [10.7].
[8] Medical reports were provided by some of the authors in the related communications of *F.K.A.G. et al v Australia* (CCPR 2094/2011), 20 August 2013 and *M.M.M. et al v Australia* (CCPR 2136/2012), 20 August 2013.

18. The PSP is an interdisciplinary approach that enhances communication and promotes integrated care between service providers. Detainees assessed to be at higher risk of self-harm receive a higher level of clinically guided support.
19. The immigration detention facilities in which the authors reside have on-site primary health care services (including general practitioner, nursing, counselling and psychological). These services are of a standard generally comparable to the health care available to the Australian community, are provided by qualified health professionals and take into account the diverse and potentially complex health care needs of people in immigration detention. Where individuals require specialist medical treatment not available on-site, they are referred to off-site specialists.
20. As set out in Australia's submissions, the authors received specific treatment and support in relation to their physical and mental health issues, pursuant to the frameworks and policies described above.
21. For the reasons outlined above, Australia submits that the treatment of the authors is not such that it has reached the threshold necessary to satisfy a finding of a violation of article 7.
22. Australia avails itself of this opportunity to renew to the Human Rights Committee the assurances of its highest consideration.