

**RESPONSE OF AUSTRALIA TO THE VIEWS OF THE COMMITTEE AGAINST
TORTURE IN COMMUNICATION NO. 681/2015 (M.K.M. v AUSTRALIA)**

1. The Australian Government (Australia) presents its compliments to the members of the Committee against Torture (the Committee).
2. Australia has given careful consideration to the Views of the Committee expressed in Communication No. 681/2015 (*M.K.M. v Australia*) (the Communication), adopted on 10 May 2017 and transmitted to Australia on 31 May 2017 (the Views). The Views and this response will be published on the website of the Australian Attorney-General's Department.¹
3. Australia acknowledges its obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention), including its obligation under article 3 of the Convention not to return a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. Australia takes its obligations under international human rights law seriously, including the obligation under article 3 of the Convention, and has implemented these obligations in good faith through its domestic law and migration processes.
4. In its Views, the Committee concluded that the removal of the author to Afghanistan would constitute a violation of article 3 of the Convention.² Australia respectfully disagrees with this conclusion, as well as the findings and reasoning that the Committee has presented in its Views.
5. Having carefully considered the Committee's Views, Australia wishes to express the following particular concerns relating to the Committee's consideration of the Communication:
 - a. The Committee has not consistently applied the test, as provided for in article 3 of the Convention, to its consideration of the author's Communication.

¹ Human Rights Communications, Australian Commonwealth Attorney-General's Department website: <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx>.

² Committee against Torture, Communication No. 681/2015 (*M.K.M. v Australia*), decision adopted on 10 May 2017, paragraphs 8.9, 9 (Committee's Views).

- b. The Views demonstrate a limited application of the legal principles articulated by the Committee to the author's particular circumstances and a limited and selected consideration of country information.
- c. The Committee has, erroneously in Australia's view, stated that Australia's domestic decision-makers failed to adequately assess, or contest, particular aspects of the author's claims.
- d. The Committee has extended the scope of the *non-refoulement* obligation in article 3 of the Convention to encompass mental health treatment.
- e. The Committee has found, without sufficient evidence, that article 1 of the Convention applies in this particular case, including in respect of the alleged conduct of non-State actors.
- f. The Committee has espoused a position on the well-established international law principle of internal relocation which fundamentally differs from that of other human rights treaty bodies and of Australia.

6. Australia provides the following further comments on these matters.

The Committee's application of the test under article 3 of the Convention

7. At the outset of its consideration of the author's Communication, the Committee notes that it 'must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to *torture* upon return to Afghanistan'.³ However, the Committee goes on to apply different tests and standards of treatment to its consideration of the author's case that do not arise under the Convention. The following statements of the Committee demonstrate the tests and standards (italicised for emphasis) that the Committee has applied in its Views:

- 'The Committee further notes the complainant's submission that the decision-makers of the State party failed to consider whether his mental health condition could be treated in Afghanistan, and *whether the lack of adequate treatment would amount to cruel, inhuman or degrading treatment in his case*'.⁴

³ Committee's Views, paragraph 8.3 (emphasis added).

⁴ Committee's Views, paragraph 8.5.

- ‘... *the risk of torture or of significant harm* could not be excluded as he was recommended internal relocation alternative by the State party’.⁵
 - Australia failed to consider whether an aspect of the complainant’s claim could ‘represent a current risk profile due to *exposure to serious or significant harm* if returned to Afghanistan’.⁶
 - ‘The Committee therefore considers that, by rejecting the complainant’s asylum application without giving sufficient weight to the fact that Afghan authorities are not in condition to *protect the complainant from further persecution* by the Taliban, the State party failed to sufficiently investigate whether the complainant would be in danger of being *subjected to torture or ill-treatment* if returned to Afghanistan’.⁷
8. Australia respectfully submits that the Committee has erred in applying the test in article 3 of the Convention, as outlined above. The test for assessing whether or not conduct or treatment engages the *non-refoulement* obligation under article 3 is not whether it would amount to cruel, inhuman or degrading treatment or punishment (CIDTP). Nor is it whether a person would suffer serious or significant harm, persecution, or ill-treatment upon return to his or her country. Rather, Australia recalls that the test under article 3 of the Convention is whether or not there are substantial grounds for believing that a person would be personally in danger of being subjected to torture, as defined in article 1, upon return to his or her country.
9. As with all human rights obligations, Australia considers that the obligations contained in article 3 of the Convention must be interpreted consistently with the widely accepted principles of treaty interpretation reflected in the 1969 *Vienna Convention on the Law of Treaties* (the Vienna Convention).⁸ Article 31(1) of the Vienna Convention provides that a ‘treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty’. In this regard, Australia encourages the Committee to base its interpretations more closely on the text of article 3 of the Convention.

⁵ Committee’s Views, paragraph 8.8.

⁶ Committee’s Views, paragraph 8.9.

⁷ Ibid.

⁸ 1155 UNTS 331.

10. Article 16 of the Convention provides that a State Party must prevent acts constituting CIDTP that do not amount to torture, but only in relation to any territory under the State Party's jurisdiction. Australia notes that article 16 does not impose a *non-refoulement* obligation and that article 3 does not apply to CIDTP.

Application of legal principles to the author's circumstances and consideration of country information

11. Australia has noted very few linkages between the legal principles that the Committee articulates and the factual circumstances of the author. Furthermore, the Committee referred to very little country information in its Views.⁹ Where it did so, it was selective and the country information was used to establish a pattern of human rights violations in Afghanistan. However, the Committee has not established how such information supports its conclusion that the author would be at a personal risk of torture upon return to Afghanistan.

12. For example, the Committee noted 'information contained in the available reports on torture and ill-treatment, arbitrary detention and the violation of fair trial rights in Afghanistan, as well as reports concerning the mistreatment of failed asylum seekers who have profiles similar to the author'.¹⁰ To support this last point on reports concerning failed asylum seekers who have profiles similar to the author, the Committee cited an article from *The Guardian* which relates to the general security situation in Afghanistan and the particular risk to Hazara returnees.¹¹ However, as noted at paragraph 2.1 of the Views, the author is Tajik by ethnicity and has not claimed to be Hazara. Accordingly, it is not evident, and the Committee has not explained, how this country information is applicable to the author.

⁹ The only country information that the Committee refers to is: the second periodic report of Afghanistan under the Convention against Torture, due in 1996, of 13 May 2016; the Report of the United Nations High Commissioner for Human Rights (UNHCR) on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights in 2015, A/HRC/31/46, of 11 February 2016, page 10; the concluding observations by the Committee on the second periodic report of Afghanistan; the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan (19 April 2016), pages 31-32; and a Guardian article on the deportations of Hazaras from Australia to Afghanistan: see Committee's Views, paragraphs 8.7-8.9.

¹⁰ Committee's Views, paragraph 8.7.

¹¹ The Guardian (Ben Doherty), 'Hazara asylum seeker to be forcibly deported from Australia to Afghanistan', 14 March 2016, available at <https://www.theguardian.com/australia-news/2016/mar/14/hazara-asylum-seeker-to-be-forcibly-deported-from-australia-to-afghanistan>. Australia notes that the date of the article referred to in the Committee's Views is 23 November 2015 but that the article of the same name online is dated 14 March 2016.

13. Importantly, the Committee has not engaged with country information in assessing the author's Communication. Nor did the Committee explain how such country information enabled it to come to a different conclusion from that of domestic decision-makers in regards to the author's risk of torture. As recognised by the Committee in its Views and in its 1997 General Comment No. 1, the Committee gives 'considerable weight ... to findings of fact that are made by ... organs of the State party concerned'.¹² In Australia's view, the Committee has not explained why it considers that Australia's domestic decision-makers had erred in their findings.

Australia's assessment of and response to the author's claims

14. The Committee made several statements to the effect that Australia's domestic decision-makers had not adequately assessed, or that Australia had failed to contest, the following aspects of the author's claims.

15. First, the Committee asserted that Australia did not 'giv[e] sufficient weight to the fact that Afghan authorities are not in condition to protect the complainant from further persecution by the Taliban'.¹³ Australia respectfully submits that it was not necessary for Australia to consider this matter, as it determined that the author would not be at risk of torture so as to require protection by the Afghan Government.

16. Second, in the Committee's view, Australia 'did not contest the complainant's claims regarding the risk of torture or ill-treatment for him as a returned failed asylum-seeker'.¹⁴ Australia respectfully submits that it did consider the author's risk of harm as a failed asylum seeker. In response to the author's claim that, as a failed asylum seeker, he fears that he will face harassment, persecution and isolation if he is returned to Afghanistan,¹⁵ Australia submitted in the Australian Government's Submission on Admissibility and Merits to the Committee (Australian Government Submission) that 'the issues raised by the author relating to the human rights violations in, and the return of asylum seekers to, Afghanistan' were considered in all domestic processes.¹⁶ During a second Independent Merits Review of the author's negative Refugee Status Assessment, the reviewer did not

¹² Committee's Views, paragraph 8.4; Committee against Torture, 'General Comment No. 1: Implementation of article 3 of the Convention in the context of article 22', 21 November 1997, paragraph 9(a).

¹³ Committee's Views, paragraph 8.9.

¹⁴ Committee's Views, paragraph 8.6. See also paragraph 8.7.

¹⁵ Communication No. 681/2015 (*M.K.M. v Australia*), submitted 18 May 2015, paragraph 12, page 8 (Author's Communication).

¹⁶ Australian Government Submission on Admissibility and Merits to the United Nations Committee, Communication No. 681/2015 (*M.K.M. v Australia*), 10 December 2015, paragraph 47 (Australian Government Submission).

accept that the author would be targeted on return to Afghanistan for being a former asylum seeker in Australia.¹⁷ The author did raise additional information in his Communication, but Australia considered and addressed this information in its Australian Government Submission.¹⁸ In addition, as discussed above, harassment, persecution and isolation, even if founded, would not necessarily amount to torture.

17. Third, the Committee stated that Australia's 'authorities did not adequately assess the mental health condition of the complainant, the actual availability of adequate treatment in Afghanistan, and the potential consequences for the complainant's mental health of his forced removal to the country of origin'.¹⁹ Contrary to the Committee's Views, the author's health condition was considered by domestic decision-makers. In the Australian Government Submission, it was noted that in the Post-Review Protection Claims assessment:

The Department noted the author's health concerns and considered that there was no reason to suggest that the author would be denied medical care or treatment in Afghanistan, nor would his condition expose him to serious or significant harm in Afghanistan in the reasonably foreseeable future.²⁰

18. Australia reviewed the material provided by the author in his Communication and determined that it did not establish 'additional grounds to show that the author is at a foreseeable, real and personal risk of torture if returned to Afghanistan'.²¹
19. Australia takes this opportunity to reiterate that the author's claims have been considered through a series of domestic processes, including by way of an Independent Merits Review, and have been subject to judicial review by the Federal Circuit Court of Australia and the Federal Court of Australia. Robust domestic processes have considered and determined that the author's claims were not credible and did not engage Australia's *non-refoulement* obligations. In particular, the author's claims have been assessed under the complementary protection provisions contained in subparagraph 36(2)(aa) of the *Migration Act 1958* (Cth), which reflect Australia's *non-refoulement* obligations

¹⁷ Independent Merits Review, *Statement of Reasons*, 22 October 2012, paragraph 131.

¹⁸ Australian Government Submission, paragraphs 43-51.

¹⁹ Committee's Views, paragraph 8.9.

²⁰ Australian Government Submission, paragraph 41.

²¹ Australian Government Submission, paragraph 47.

expressed in article 3 of the Convention and implied in articles 6 and 7 of the *International Covenant on Civil and Political Rights*.²²

Mental health treatment and article 3 of the Convention

20. In concluding that returning the author to Afghanistan would amount to a violation of article 3 of the Convention, the Committee has placed significant weight on its finding that ‘no adequate treatment would be available in Afghanistan to attend his [mental health] needs’.²³
21. Australia disagrees with the Committee’s reasoning on two grounds. As a matter of law, the absence of ‘adequate treatment’ (or any treatment at all) in Afghanistan does not meet the definition of torture in article 1 of the Convention and does not engage Australia’s *non-refoulement* obligation under article 3. Australia’s view is that article 3 must be read in conjunction with the definition of torture in article 1 of the Convention. Therefore, article 3 does not cover health concerns more broadly and, as noted at paragraphs 8 to 10 above, the *non-refoulement* obligation in article 3 does not extend to CIDTP. The Committee’s reasoning in this regard represents an unfounded expansion of the scope of the *non-refoulement* obligation under article 3 of the Convention to conduct or acts that do not constitute torture.²⁴ Even as a matter of fact, the Committee has not provided any country information to support its finding that there is no adequate medical treatment available in Afghanistan. Accordingly, this finding is insufficiently supported.
22. Although the Committee has not cited its draft revised General Comment No. 1 (2017) (draft General Comment) in its Views, Australia notes that the Committee’s findings relating to medical treatment in its Views are reflected in its draft General Comment.²⁵ In this draft General Comment, the Committee seeks to extend the scope of the *non-refoulement* obligation in article 3 to victims of torture who require ‘sustained specialized rehabilitation treatment’, whose ‘need for treatment has been medically certified’ and in circumstances where ‘adequate medical services for their rehabilitation linked to their torture-related trauma are not available or not guaranteed’ in the State to

²² Australian Government Submission, paragraph 19.

²³ Committee’s Views, paragraph 8.5.

²⁴ See *Submission of the Australian Government - draft General Comment on the implementation of article 3 of the Convention in the context of article 22*, 31 March 2017, paragraph 13 (Australian Government Submission on revised draft General Comment No. 1).

²⁵ Committee against Torture, *draft General Comment No. 1 (2017) on the implementation of article 3 of the Convention in the context of article 22*, 2 February 2017, paragraph 21 (Revised draft General Comment No. 1).

which they would be returned.²⁶ As stated in the Submission of the Australian Government to the Committee's draft General Comment, Australia considers that these assertions are not consistent with, and go far beyond, States' *non-refoulement* obligations under international law.²⁷ Accordingly, Australia respectfully submitted that this statement should be removed from the draft General Comment.²⁸ Australia was not alone in its views; many States submitted comments which aligned with Australia's position, including Canada, the United States of America, Norway and Finland.²⁹

23. Australia recalls that this draft General Comment has not yet been finalised by the Committee. Accordingly, the Committee's assertions relating to medical treatment, to which many States have expressly noted their disagreement, are still under consideration. Australia is concerned that, in applying similar principles to its consideration of the author's Communication, the Committee has prejudged the outcome of its consultations on the draft General Comment and applied legal principles to which Australia has not consented to be bound.

The willingness or ability of Afghan authorities to protect the author from torture

24. Australia notes the Committee's statements at paragraph 8.7 of its Views that the author has claimed 'he was subjected to torture by non-state actors and that the State party would not be in condition to protect him in case of return to Afghanistan' and that the Committee has addressed in its previous views 'the risk of torture by non-state actors and the failure on the part of a State party to exercise due diligence to intervene and stop the abuses that were impermissible under the Convention, for which it may bear responsibility'.³⁰ In this context, the Committee considered that Australia did not 'giv[e] sufficient weight to the fact that Afghan authorities are not in condition to protect the

²⁶ Revised draft General Comment No. 1, paragraph 21.

²⁷ Australian Government Submission on revised draft General Comment No. 1, paragraph 13.

²⁸ Ibid.

²⁹ *Committee against Torture, Draft Revised General Comment No. 1 on the Implementation of Article 3 of the Convention in the Context of Article 22: Comments by the Government of Canada*, 26 April 2017, paragraph 30; *Observations of the United States of America on the Committee Against Torture's Draft General Comment No. 1 (2017) on Implementation of Article 3 in the Context of Article 22*, 5 April 2017, page 5; *Submission by the Norwegian Government: Draft General Comment No. 1 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22*, 7 April 2017, page 4; *Written Submission by the Government of Finland on the Draft Revised General Comment on the Implementation of Article 3 of the Convention in the Context of Article 22*, 31 March 2017, pages 1-2.

³⁰ Although there is no suggestion in the author's Communication that the Taliban is exercising governmental authority in Afghanistan, Australia notes that in the case of *Elmi v Australia*, the Committee considered that, in the exceptional circumstance where State authority was wholly lacking, acts by groups exercising quasi-governmental authority could fall within the definition of article 1 of the Convention: *Committee against Torture, Communication No. 120/1998 (Elmi v Australia)*, 14 May 1999, paragraph 6.5.

complainant from further persecution by the Taliban'.³¹ Australia respectfully submits that the Committee has not provided sufficient evidence to support this finding. As stated at paragraph 15 above, Australia determined that the author would not be at risk of torture so as to require protection by the Afghan Government.

Internal relocation

25. Finally, Australia notes the Committee's determination that 'the risk of torture or of significant harm could not be excluded as [the author] was recommended internal relocation alternative' by Australia.³² The Committee stated that 'internal flight or relocation does not represent a reliable and durable alternative where the lack of protection is generalised and the individual concerned would be exposed to a further risk of persecution or serious harm, in particular when the persecution of civilian population by anti-government elements is often random in [Afghanistan]'.³³ The Committee referred to its Views in *Mondal v Sweden*³⁴ as an example.³⁵

26. Australia respectfully submits that the Committee has not provided sufficient factual information to establish the personal risk to the author from alleged 'random' persecution. Australia further notes that in the *Mondal* communication, and in the present case, the Committee has espoused a position on the issue of internal relocation which fundamentally differs from that of other human rights treaty bodies. The Human Rights Committee, for instance, has recognised the 'internal flight alternative' as a well-established principle of international law and has framed it as follows:

Individuals are not in need of international protection if they can avail themselves of the protection of their own State; if resettling within the State would enable them to avoid a localized risk, and resettling would not be unreasonable under the circumstances, then returning them to a place where they can live in safety does not violate the principle of non-refoulement.³⁶

³¹ Committee's Views, paragraph 8.9.

³² Committee's Views, paragraph 8.8.

³³ Committee's Views, paragraph 8.9.

³⁴ Committee against Torture, Communication No. 338/2008 (*Uttam Mondal v Sweden*), 23 May 2011, paragraph 7.4.

³⁵ Committee's Views, paragraph 8.9.

³⁶ See, for example, Human Rights Committee, Communication No. 2053/2011 (*B.L. v Australia*), 16 October 2014, Appendix I (joint opinion of Committee members Gerald L Neuman and Yuji Iwasaw).

27. Australia agrees with the interpretation of the Human Rights Committee. Australia recalls that a State party's *non-refoulement* obligations under article 3 of the Convention will only be engaged where there are substantial grounds for believing that a person would be in danger of being subjected to torture. Australia's *non-refoulement* obligations under article 3 of the Convention will not be engaged by returning a person to a State where that person is able to live in an area where there are not substantial grounds for believing that person would face a real, foreseeable, personal and present risk of being subjected to torture.

Conclusion

28. Having considered the Committee's Views, Australia remains of the view that the return of the author to Afghanistan would not constitute a violation of article 3 of the Convention for the reasons set out in the Australian Government Submission and above.

29. It follows that Australia does not accept the Committee's view that Australia is obliged to refrain from returning the author to Afghanistan or to any other country where the author runs a real risk of being returned to Afghanistan.

30. The author is subject to Australia's domestic migration processes.

31. Australia avails itself of this opportunity to renew to the Committee the assurances of its highest consideration.