RESPONSE OF AUSTRALIA TO THE VIEWS OF THE HUMAN RIGHTS COMMITTEE IN COMMUNICATION NO. 2229/2012 (NASIR v AUSTRALIA)

1. The Australian Government (Australia) presents its compliments to the members of the Human Rights Committee (the Committee).

2. Australia has given careful consideration to the Views of the Committee expressed in Communication No. 2229/2012 (*Nasir v Australia*). These Views will be published on the website of the Australian Attorney-General's Department once publicly issued by the Committee.[1]

3. Australia acknowledges its obligations under the *International Covenant on Civil and Political Rights* (the Covenant) and takes its obligations under international human rights law seriously. Australia provides the following comments on certain aspects of the Committee's Views.

Mandatory Minimum Sentencing

4. Australia welcomes the Committee's view that mandatory minimum sentencing is not incompatible *per se* with the Covenant. Australia acknowledges and agrees with the Committee's view that the binding nature of statutory law does not *per se* amount to a violation of judicial independence[2] and that whether an author's criminal detention is arbitrary, contrary to Article 9(1), in respect of the application of a mandatory minimum sentence will depend on the individual facts of the case.[3]

Article 9(1) - Right to liberty and security and not to be subject to arbitrary detention

5. The Committee formed the view that the author's pre-charge detention violated Article 9(1) of the Covenant. The Committee stated that while detention of an individual in the course of proceedings for the control of immigration is not arbitrary *per se*, such detention must be justified as reasonable, necessary and proportionate in light of the circumstances of the case and reassessed as it extends in time.[4] In the Committee's view, Australia failed to sufficiently explain why it took almost five months before criminal charges were brought against the author.

[1] Human Rights Communications, Australian Attorney-General's Department website: https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx.
[2] Nasir Views, paragraph 6.6.
[3] Nasir views, paragraph 7.7.
[4] Nasir Views, paragraph 7.3.

6. Australia acknowledges its obligation under Article 9(1) of the Covenant not to subject individuals to unlawful or arbitrary detention. However, Australia respectfully disagrees with the Committee's view that Australia violated the author's rights under Article 9(1) of the Covenant and considers that the Committee has misconceived the basis of the author's detention.

7. As set out in Australia's submissions, the provisions of the *Migration Act 1958* (Cth), under which the author was detained, and the individual facts of his case, justify his pre-trial immigration detention. The author's immigration detention was necessary because he did not have a valid visa to enter or remain in Australia. As acknowledged in the Committee's Views, mandatory detention of unauthorised arrivals is not arbitrary *per se*.[5] The Attorney-General issued a criminal justice stay certificate in respect of the author on 6 May 2010 (with the effect of staying the removal or deportation of a non-citizen who is required for the administration of criminal justice). This did not alter the basis of the author's detention, which remained immigration detention of an unauthorised arrival to Australia, under section 189 of the Migration Act. As set out in Australia's submissions, section 189(1) of the Migration Act provides (and provided at the relevant time) that: 'If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person'.[6]

8. The author was interviewed by the Australian Federal Police on 29 June 2010 and charged on 4 August 2010. As stated in Australia's submissions, the author's case was under active investigation during the period between the issuance of a criminal justice stay certificate and when the author was charged. The day after he was charged, the author appeared before a court, which decided that he should be remanded in custody, pending his trial. As set out in Australia's submissions, review mechanisms were available in relation to the author's immigration detention and the author's detention was subject to the supervision and review of the court whilst he was on remand.

9. For these reasons Australia considers that the author's detention was consistent with Article 9(1) and that the author's immigration detention was sufficiently justified as reasonable, necessary and proportionate in light of the circumstances of the case.

[5] *A v Australia*, Communication No 560/1993, CCPR/C/59/D/560/1993 (17 April 1997), paragraph 9.3.
[6] *Migration Act 1958* (Cth), section 189(1).

Article 9(3) – Right to be brought promptly before a judge

10. The Committee formed the view that Australia violated Article 9(3) in respect of the length of time the author was detained without being brought before a judge. In reaching this conclusion, the Committee recalled that Article 9 (3) 'applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity'.[7] The Committee concluded that, pursuant to the issue of a criminal justice stay certificate in respect of the author, the author was held in immigration detention for the purpose of the administration of criminal justice without being brought promptly before a judge or other officer authorized by law to exercise judicial power, in violation of Article 9(3).

11. Australia acknowledges its obligations under Article 9(3) of the Covenant. However, Australia respectfully disagrees with the Committee's view that Australia violated the author's rights in this respect.

12. In Australia's view, the obligation in Article 9(3) is narrower than the interpretation expressed by the Committee. Australia is also of the view that the Committee's reasoning misconceives the nature of the author's detention.

13. Article 9(3) provides that:

> Anyone arrested or detained *on a criminal charge* shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release…[emphasis added].

14. On the plain meaning of the text of Article 9(3), the right to be brought promptly before a judge rests on the factual requirement that a person has been arrested or detained *on a criminal charge*. Manfred Nowak emphasises this scope, stating in relation to Article 9(3):

> Art. 5(3) of the ECHR [European Convention on Human Rights] refers to any person arrested or detained in accordance with the provisions of para. 1(c) of this article, i.e., to persons suspected of having committed an offence or having planned to do so; Art. 9(3) of the Covenant, on the other hand, speaks of persons who have been "*arrested or detained on a criminal charge*" ("tout individu arrêté ou détenu du chef d'une infraction pénale"). In contrast with the opinion of the Committee of Experts of the Council of Europe, which considered Art. 9 of the Covenant to have a more limited scope of application, the historical background of this provision shows that great efforts were made in the HRComm [UN Human Rights Commission] to come up with a formulation that would guarantee a

[7] Nasir Views, paragraph 7.5.

> personal scope of applicability analogous to that under the ECHR. Particularly noteworthy is that the earlier formulation, which related solely to criminal acts already committed, was replaced with a broader one. In any event, the special rights in Art. 9(3) refer only to persons who have been arrested or detained for the purposes of criminal justice, i.e., to persons in custody and to pre-trial detainees [emphasis in original, footnotes omitted].[8]

15. As set out in Australia's submissions and above, the author was not detained 'on a criminal charge' prior to 4 August 2010, rather, he was detained for immigration purposes, specifically, on the basis that he did not have a valid visa. The author did not have a valid visa to enter Australia when he arrived on 10 March 2010 and was therefore required to be detained under the Migration Act. Alongside others who arrived on the same vessel, he was detained in immigration detention rather than 'on a criminal charge'. The fact a criminal justice stay certificate was issued in respect of the author did not alter the legal basis of his detention, which remained section 189 of the Migration Act. As set out in the Australia's submissions, the author was promptly brought before a judge on 5 August 2010, the day after he was charged and therefore arrested and detained 'on a criminal charge'. This first appearance was before the Brisbane Magistrate's Arrest Court and resulted in the Author being remanded into custody.

16. For these reasons, Australia does not agree with the Committee's view that that Australia violated Article 9(3) in respect of the length of time the author was detained without being brought before a judge.

Article 9(4) – Right to challenge lawfulness of detention

17. In the Committee's view, the legality of author's pre-charge detention at international law could not be challenged before a court, in violation of Article 9(4) of the Covenant. In reaching this conclusion, the Committee recalled:

> its long-standing jurisprudence that judicial review of the lawfulness of detention under article 9(4) is not limited to mere compliance of the detention with domestic law, but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9(1).[9]

[8] Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, (N. P. Engel, 2005, 2nd edition), page 230, paragraph 40.
[9] Nasir Views, paragraph 7.4. The Committee referred to Communications No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, paragraph 9.4; Nos. 1255 et al, *Shams et al. v. Australia*, Views adopted on 20 July 2007, paragraph 7.3.

18. Australia acknowledges its obligations under Article 9(4) of the Covenant and reiterates its longstanding position that Article 9(4) of the Covenant requires the review of the legality of detention under domestic law.[10] Australia considers that there is nothing apparent in the terms of the Covenant that 'lawful' was intended to mean 'lawful at international law' or 'not arbitrary'. As set out in Australia's submissions, where the term 'lawful' is used in other provisions of the Covenant it clearly refers to domestic law (for example, Articles 9(1), 17(2), 18(3) and 22(2)).[11] Furthermore, there is nothing in the *travaux préparatoires* to the Covenant to support the view that lawfulness in Article 9(4) extends beyond domestic law.[12]

19. Australia remains strongly of the view that the Committee should have considered the author's claims under Article 9(4) of the Covenant to be lacking in merit.

Committee's Recommendations

20. As Australia does not agree with the Committee's view that a violation of Articles 9(1), (3) and (4) of the Covenant has occurred, Australia does not accept the Committee's view that Australia is obliged to provide adequate compensation to the author or to take steps to prevent similar violations in the future.

21. Australia avails itself of this opportunity to renew to the Human Rights Committee the assurances of its highest consideration.

[10] See for example, *Response of the Australian Government to the Views of the Committee in A v Australia, Communication No. 560/1993.*
[11] Response of the Australian Government to the Views of the Committee in *A v Australia*, Communication No. 560/1993. See also, Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, (N. P. Engel, 2005, 2nd edition), pages 171, 292, 325, 394.
[12] Marc J Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights*, (Martin Nijhoff Publishers, 1987), pages 212-216.