UN Special Rapporteur on the human rights of migrants concludes his official visit to Australia

1-18 November 2016

Good morning ladies and gentlemen,

I would like to acknowledge the traditional owners of the land we are gathered upon today and pay my respects to their Elders past, present and future.

I would like to thank the Government of Australia for inviting me to undertake an official mission, which took place from 1 to 18 November 2016. Let me also express my gratitude for its cooperation throughout the visit and extend my gratitude for the cooperation from state and territory governments that I visited.

The objective of my visit was to assess, in a spirit of cooperation and dialogue, the situation of migrants and asylum seekers. Today, I will confine myself to preliminary observations and recommendations on some of the main issues, which will be elaborated in more detail in a report to be presented to the UN Human Rights Council in Geneva, during the June 2017 session.

I am grateful for the opportunity of meeting with high-level representatives of various federal and state ministries and institutions. Furthermore, I had a chance to meet with a wide range of civil society organisations, as well as migrants themselves in Sydney, Canberra, Perth, Melbourne and Brisbane. I visited the following detention centres: Yongah Hill, Maribyrnong Immigration Detention Centre, Melbourne Immigration Transit Accommodation, Brisbane Immigration Transit Accommodation and Villawood Immigration Detention Centre. I was also able to travel to Nauru where I met with government officials and visited the Regional Processing Centres ("RPCs") and spoke to migrants and asylum seekers. I would like to thank everyone who helped in organizing this visit and who took the time to meet with me and share their valuable experiences and insights.

While Australia has the power to admit, deny entry or return migrants, it equally has an obligation to respect the human rights of all migrants in the process, as well as the fundamental principles of non-refoulement, of non-discrimination and of the best interest of the child.

Australia's migration policies present many positive examples such as Australia's resettlement program, granting humanitarian protection to a high number of refugees with the objective of increasing the numbers to 18,750 visas per year from 2018, assisting them in their integration process with generous and well thought-through integration programs. The welcoming of 12,000 refugees from Syria and Iraq is also a positive contribution to the global response to refugee movements. I received information about Australia's huge temporary migration programme which includes 300,000 students, 200,000 working holiday visas and

up to 150, 000 visas for skilled temporary workers. I was informed that at any one time there are approximately two million people in the country that hold temporary visas. Many of these visas include pathways to permanent residency and citizenship.

I was particularly impressed with the energy, imagination, dedication and commitment of civil society organisations working with migrants, with or without contracts with the Australian authorities to deliver integration programmes and services to them. They deploy treasures of imagination in order to serve the interests of migrants despite often difficult financial circumstances. Their intimate knowledge of the migrants' difficult journeys, complex life conditions and numerous aspiration for the future allowed them to provide me with a refined analysis, very relevant conclusions and most welcome recommendations regarding changes in policy and practice. I urge the authorities to increase funding to such organisations.

During my mission, I also observed that some of Australia's migration policies have increasingly eroded the human rights of migrants in contravention of its international human rights and humanitarian obligations. For all the progress made by Australia in all other areas of life, several of Australia's migration policies and laws are regressive and fall behind international standards.

Non-refoulement

The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 contains provisions which are in violation of Australia's international human rights and humanitarian obligations. Australia must guarantee that all asylum claims are thoroughly examined through an individual assessment mechanism and that the persons concerned have a real opportunity to effectively challenge any adverse decisions adopted concerning their claims. Push-backs and screening processes at High Sea do not meet these requirements. Australia must refrain from intercepting and pushing back boats – by any means necessary – in order to prevent them arriving on Australian territory.

A punitive approach to unauthorised maritime arrivals

The Australian authorities have put in place a very punitive approach to unauthorised maritime arrivals, with the explicit intention to deter other potential candidates. Unauthorised maritime arrivals are treated very differently from unauthorised air arrivals, especially when these arrivals result in protection claims. This distinction is unjustifiable in international refugee and human rights law and amounts to discrimination based on a criterion – mode of arrival – which has no connection with the protection claim. At all levels, unauthorised maritime arrivals face obstacles that other refugees do not face, including mandatory and prolonged detention periods, transfer to RPCs in foreign countries (Papua New Guinea and Nauru), indefinite separation from their family, restrictions in the social services and no-access to citizenship.

This treatment is predicated on the idea that it sends a message to the smugglers and the potential candidates for maritime smuggling operation. However, it is a fundamental principle of human rights law that one person cannot be punished only for the reason of deterring another. This is based on Emmanuel Kant's categorical imperative, at the root of the conception of human dignity which underlies the whole of the human rights regime: "Never treat another only as a means, but also always as an end".

Immigration detention

Australia must be commended for reducing the number of people in detention by developing alternatives to detention and providing detainees with bridging visas. I urge Australia to repeal the policy of mandatory detention of all undocumented migrants, including "unauthorised maritime arrivals" and asylum-seekers. A policy of mandatory detention leaves no space for considering the particular circumstances of each detainee's case or for applying all procedural safeguards applicable to persons deprived of their liberty. Migrants should be given the opportunity and empowered to contest the legality of the detention decision, through effective access to regular review mechanisms with appropriate legal representation and interpreting services, publicly funded if needed, in order to ensure that detention remains at all times legal, necessary, proportional, reasonable and a "measure of last resort".

Australia should also adopt all necessary measures to ensure that stateless persons whose asylum claims were refused and refugees with adverse security or character assessments are not detained indefinitely, including by resorting to non-custodial alternatives to closed immigration detention.

The average time in immigration detention is 454 days and the majority of people held in detention have been there for more than 730 days. Administrative detention for prolonged and indefinite periods has a profound effect on migrants' mental wellbeing, with many cases reported of self-harm, PTSD, anxiety and depression: it is not the right environment for often already traumatised people. Those who leave detention after a prolonged period often continue to suffer from low self-esteem, taking from them the opportunity to rebuild their lives. I join the voices of other UN human rights mechanisms in saying that such conditions amount to cruel, inhuman and degrading treatment. I urge the Government to introduce a statutory time limit on immigration detention and offer a meaningful judicial review process.

I also met with detainees who had been given indefinite administrative detention either because they were refugees who had failed their adverse security or character assessments or stateless persons whose asylum claims were refused. Australia must ensure that there is a judicial review process for this group of detainees and wherever possible opt for the possibility of non-custodial measures and alternatives to closed immigration detention. The geographical isolation of most detention centres means that access to the detention centres by lawyers, civil society organisations and families is sometimes incredibly difficult.

Many testified to the increased "securitisation" ("garrison mind set" as presented by a government official) of the immigration detention centres. The arrival of the Australian Border Force and the increased number of foreigners in immigration detention after having served a prison sentence (the "501s") has driven a considerable increase of security control procedures. Mixing asylum seekers and undocumented migrants with the "501s" should be avoided at all costs. It was readily acknowledged that a "prison culture" had changed the atmosphere of detention centres. I commend Australian authorities for the increased use of alternatives to onshore detention, through placement in "community detention". However, the release of unauthorised maritime arrivals into "community detention" or with bridging visas or temporary protection visas should be meaningful in terms of work rights and length of visas. Visas without work rights or visas issued for only a limited period of time which need to be renewed every few months, lead to deteriorating mental health, homelessness and destitution. "Permanent temporary" situations should be avoided at all costs.

I have observed in several occasions that migrants are re-detained from community for "character violations", with lack of clarity on the criteria used. This constant fear about status

but also the possibility to be returned, leads to an increased level of instability which further reflects in migrants' mental health.

Children in detention

Australia's strong push over the past two years to significantly reduce the number of on-shore children in detention to what has been reported to be a handful is great progress and exemplary. I urge the Government to strengthen this commitment into law and always find alternatives for all children at all times and ensure that they receive appropriate services for their care.

Children should be kept with their families or close to their family or those with whom they have a familial bond. As determined by the Committee on the Rights of the Child, administrative detention based on the immigration status of the child or of their parents can never ever be in the best interest of a child. Given the incalculable detrimental effects it has on children's mental and physical health and development, it is utterly unacceptable for migrant children to be administratively detained.

Against their best interests, many children are however still kept in the RPCs and settlements in Nauru in detention-like conditions. The RPC's resemble military barracks, are fenced, are guarded by security officers and inhabitants have to sign in and out at each time they leave or enter the camp. Children held in Nauru show signs of PTSD, anxiety and depression, and exhibit symptoms such as insomnia, nightmares and bed-wetting. Feelings of hopelessness and frustration can be manifested in acts of violence against themselves or others. I have heard of attempts of suicide and self-harm, mental disorder and developmental problems, including severe attachment disorder. Many of the parents I met despair over the impossibility of offering their children a realistic future and feel guilty, which may manifest itself in severe depression and poor parenting.

Regardless of the conditions in which children are held, detention has a profound and negative impact on child health and development. Even very short periods of detention can undermine the child's psychological and physical well-being and compromise cognitive development. The threshold at which treatment or punishment may be classified as cruel, inhuman or degrading treatment or punishment is therefore lower in the case of children, and in particular in the case of children deprived of their liberty.

In order for them to live a normal life in any country capable of offering them adequate opportunities to build a future, prolonged mental health care – way beyond the administration of antidepressant or anxiolytic medication – will be necessary.

Regional processing centres

All persons who are under the effective control of Australia, because inter alia they were transferred by Australia to RPCs which are funded by Australia and with the involvement of private contractors of its choice, enjoy the same protection from torture and ill-treatment under the Convention against Torture. This is not only my own analysis but also that of the Australian Senate Inquiry of Nauru and a number of United Nations (UN) human rights mechanisms such as the U.N. Committee against Torture. If human rights violations occur in RPCs based in Nauru and PNG, the Australian government should be held accountable. The combination of the harsh conditions on Nauru or Manus, the protracted periods of closed detention and the uncertainty about the future, reportedly creates serious physical and mental anguish and suffering. There are approximately 1233 detainees in the RPCs in Nauru and Manus Island in Papua New Guinea. Each year, approximately 900 million USD is spent on

health care in RPCs in Nauru and Manus. It is estimated that 865,000 AUD are spent on each man, woman and child in RPCs. Quickly closing these centres is the only solution.

The Regional Processing Centre in Nauru

Australia has made a considerable investment in order to develop the infrastructures necessary for over a thousand asylum seekers and process their refugee determination claims. The RPCs were initially closed detention facilities, but have since been opened: although the estimated 410 asylum seekers are still required to live in the RPCs, the opening of the RPCs has reduced some of the stress experienced by detainees. The geographical and psychological isolation of Nauru, the equatorial heat bearing on often still un-air-conditioned tent dwellings, the length of the processing (soon four years since their arrival) and, the absence of any solution towards durable resettlement in a country where they can imagine a future for themselves and their children, makes the unresolved situation extremely difficult to bear.

The testimonies I heard were often of despair due to the lack of or contradictory information concerning about their future. Mental health issues are rife, with PTSD, anxiety and depression being the most common ailments. Many refugees and asylum seekers are on a constant diet of sleeping tablets and antidepressants. Children also show signs of mental distress.

Considering that this situation is purposely engineered by Australian authorities so as to serve as a deterrent for potential future unauthorised maritime arrivals ("we stopped the boats"), considering the incredible hardship that most of these refugees already endured in their countries of origin and in transit countries on their way towards Australia, and considering that Australian authorities have been alerted to such serious issues by numerous reports from international and civil society organisations, there's no avoiding the statement of fact that Australia is responsible for the damage inflicted to these asylum seekers and refugees and that the involuntary geographical and psychological confinement (although not detention anymore) in which refugees are maintained constitutes cruel, inhuman and degrading treatment or punishment according to international human rights law standards. Australia would vehemently protest if such a treatment was inflicted on Australian citizens – and in particular Australian children – by any other State.

Ultimately, Australia has the responsibility to settle those from the RPCs in Nauru and Manus who are found to be refugees. Any agreement regarding third country resettlement must be meaningful – in terms of numbers, timeliness and opportunities to rebuild – and adhere to Australia's international humanitarian and human rights obligations. I urge Australia to take family linkage and individual vulnerabilities into account and provide appropriate protection to particular vulnerable migrants.

Complaints against abuse in immigration detention and regional processing centres

The detainees have little trust for the complaints mechanism and therefore often refrain from denouncing abuse. I urge the Australian Border Force to look into having an independent oversight mechanism with public reporting that allows for complaints to be effectively dealt with. I also recommend that the service providers receive enhanced human rights training.

Accounts of rape and sexual abuse of female asylum seekers and refugees by security guards, service providers, refugees and asylum seekers or by the local community, without providing a proper and independent investigation mechanism makes life of women in the RPCs unbearable. Moreover, the internal complaint mechanism within the RPC's concerning

abusive behaviour of service providers and guards does not provide sufficient guarantees of a due and independent investigation.

Australia must ensure that reports of abuse in the detention centres and RPCs are investigated by an independent mechanism and persons found guilty held accountable.

Australia must also ensure respect in on-shore and off-shore detention facilities of the Guiding Principles on Business and Human Rights adopted by the Human Rights Council in 2011 which underscores as one of its foundational principles, the corporate responsibility of business enterprises to respect human rights and in order to meet this responsibility, business enterprises should have in place policies and processes appropriate to their size and circumstances including, inter alia, policies on human rights due diligence and processes to enable the remediation of any adverse human rights impact they cause or to which they contribute.

Oversight mechanisms

Australia has put in place an important number of internal oversight mechanisms for on and off-shore detention centres, but many of them do not make their reports public, or have a limited jurisdiction. There is urgent need for independent oversight mechanisms.

The Australian Human Rights Commission should be able to inquire at will in RPCs on the actions of Australian authorities or of service providers directly or indirectly funded by Australian taxpayers' money.

I also urge Australia to ratify the Optional Protocol to the Convention against Torture and establish an independent national preventative mechanism.

Guardianship system for unaccompanied children

Child protection is more important than border protection and should not be tainted by immigration concerns. Unaccompanied children should be provided with guardians who are specialists of child protection. The Minister of Immigration, the employees of the Department of Immigration and Border Protection (DIBP) or persons under contract with DIBP are in a situation of conflict of interest, as their duty to deport unauthorised migrants conflicts with their duty to protect children. Guardians should either be independent and competent personalities or social workers employed in Australia's child protection system.

Family reunion

The right to live with one's family is a fundamental right for all, Australians and non-citizens alike. It is in the best interest of the child to live with both their parents and separation for long periods of time has a huge impact on the development of children left behind. Barriers to family reunion should thus be lifted at all levels and family unity should be systematically fostered and actively facilitated. Families should never be separated for immigration purposes for long periods of time. In particular, families of vulnerable migrants should never be separated at all. Family reunion should be available to all permanent residents, as well as to all temporary migrant workers who effectively spend more than one year in Australia. Children should always benefit from the most favourable immigration status offered to one or both of their parents, in order to guarantee family unity. Moreover, children or family members with disabilities should not be systematically considered as a health risk preventing the child or the family from settling in Australia.

Visa refusal and cancellations

I met with detainees who had their visa cancelled, revoked or not renewed as a result of minor offences committed, sometimes many years previously, such as traffic offences or misdemeanours. This legislation has resulted in detainees being treated as if they have committed serious non-compliance with the law. I am also deeply concerned about those who find themselves in detention because they are alleged to have committed an offence, despite the fact they have been granted bail or parole by an Australian court, or have been acquitted, or have seen the charges dropped.

The Migration Amendment (Character and General Visa Cancellation) Act creates broad and punitive provisions in relation to visa refusal and cancellation. Grounds for the refusal or cancellation of visas include previous criminal activity in any country, providing incorrect information in a visa application and associations with people or groups who have been or may have been involved in criminal conduct. The inclusion of criminal offences from abroad with no corresponding safeguard to undertake due diligence in relation to the actual circumstances of each case risks penalising and/or resulting in the detention of people that have been charged or prosecuted criminally for acts relating to their legitimate exercise of their human rights. People could be fleeing persecution from countries where homosexuality, or peaceful assembly and association is criminalised, or where the independence of the judiciary is not respected.

Article 10 of this Act states that the Minister can revoke or refuse a visa when they "reasonably suspect" that "the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person involved in criminal conduct". These broad powers to refuse and cancel visas on the basis of people's previous participation in or link to associations or groups, regardless of whether they have been individually involved in any form of criminal activity, risks compromising the right to freedom of peaceful assembly and association.

Furthermore, the powers awarded to the Minister and the lack of provisions for merits review and legal challenge of relevant ministerial decisions does not give the appropriate level of oversight to Australia's judiciary.

In addition, I remain concerned as to the lack of clarity regarding how the information gathered from asylum seekers to assess risk and the criteria used to make decisions in relation to visa refusals and cancellations will be used and what safeguards will be put in place to protect vulnerable people in situations of undocumented migration. Privacy and confidentiality are of particular importance to people who have left their home country because of persecution and abuses of their human rights, due to the risk of reprisals towards family members and sensitivities related to prior trauma.

The reported quota ceilings on the number of protection visas issued by the DIBP are not in adherence with international standards. These quota ceilings could create the potential for asylum seekers' visa applications to be treated differently depending on the time of the calendar year they are made as opposed to their merits, therefore risking contravention of the right to equality before the law.

Access to justice and equality before the law

Immigration administrative decisions can have consequences which are worse than criminal law decisions: an erroneous immigration decision can send someone to arbitrary detention, torture or even death, all outcomes which have been banned from Australian criminal law. To avoid such outcomes, criminal law has evolved guarantees of fair trial and of the rights of the

defence. Administrative law must provide similar guarantees when the consequences of the decision can be similar or worse.

I welcome the efforts by the Government to try and quickly process asylum claims referred to as the Legacy Caseload involving 30,000 asylum seekers which reintroduced the temporary protection visas and established a 'fast track' process. However, I am concerned that fast track process does not incorporate appropriate procedural safeguards, including the opportunity to be heard in person.

I commend Australian authorities for the increased use of alternatives to onshore detention, through placement in "community detention" or release with bridging visas or temporary protection visas. I urge the government to give this cohort visas with working rights and for a reasonable duration so that they can support themselves and their families while waiting in prolonged uncertainty to apply for or to receive a decision. Three month visas do not make them employable and result in situations of destitution. "Permanent temporary" situations should be avoided at all costs.

Moreover, territorial sovereignty and the control of borders cannot justify any and all distinctions between foreigners and citizens. The only way to ensure that a distinction is not discrimination is to ensure that courts and tribunals can effectively review the decisions made that affects the rights of individuals, whatever their status, and check whether discrimination has occurred. This can only happen if access to justice, as required by international law, is available to all, regardless of immigration status.

Australia should ensure that migrants have easy and quick access to competent lawyers and interpreters, and that legal aid programmes are put in place to ensure that such lawyers and interpreters are adequately remunerated. Access of civil society organisations to detention centres should also be facilitated and encouraged, in order to reinforce the information migrants need to make appropriate choices regarding their legal options.

Administrative law is so complicated and migrants already face such barriers – including language, lack of legal information and information about their rights, social isolation, absence of financial means, and physical separation for those who are in detention – that there's no effective access to justice without such support. In detention centres, the explanation of a case manager under contract from DIBP is not sufficient, as they represent the same Department that will ultimately take the decision of the migrant's immigration status.

Therefore, Australia must, in immigration matters, divest itself of all barriers to judicial review and appeals and of the exception to the rules of natural justice. The Migration Act gives wide ranging Ministerial powers of discretion which are non-compellable and non-reviewable. I caution that such powers must not undermine the fundamental role of the judiciary. Moreover, Australia should repeal section 52 of the Disability Discrimination Act 1992 which exempts migration laws, regulations, policies and practices, from the effects of the Act.

Freedom of information procedures should also be strengthened, in order to ensure that no decision is taken which could affect the rights of individuals, where they have not been able to obtain all the information needed for an adequate legal representation. Australia should assess the viability of providing on-site interpreters in all immigration detention facilities, at least for frequently spoken languages, which would render all services more accessible and appropriate for detainees lacking English language skills.

Access to citizenship

I received information that access to citizenship has been made more complicated in recent times. In particular, applications for citizenship from refugees who were unauthorised maritime arrivals but have received permanent residence status are systematically deprioritised and delays are therefore accumulating. It is also reported that refugees often face increased requirements for identification papers from their country of origin, requirements which were not present for obtaining permanent residence. Cases were reported of refugee status being cancelled when refugees requested identification documents from their country of origin in order to satisfy the citizenship requirements (as it was alleged that such requests proved that the refugees availed themselves of the protection of their government): such "Catch-22" situations are unworthy of as well-administered a country as Australia.

Unauthorised maritime arrivals who receive a temporary protection visa are not eligible for permanent residency or citizenship at all, however long they remain in Australia. The DIBP should consider giving greater weight to time spent living in Australia in consideration of applications for permanent residency, as well as setting a timeline after which any holder of a temporary visa could automatically access a pathway to permanent residency and later to citizenship. It has also been reported that migrants with disabilities found it difficult to access permanent residency or citizenship. All in all, Australia should facilitate access to citizenship and integration into society, rather than making it more difficult: making integration more difficult will have a long term human and financial consequences for Australian society.

The Border Force Act

Civil society organisations, whistleblowers, trade unionists, teachers, social workers and lawyers, among many others, may face criminal charges under the Border Force Act for speaking out and denouncing the violation of the rights of migrants. I welcome the fact that health professionals have very recently been excluded from these provisions and hope that this will also extend to other service providers who are working to defend the rights of migrants in a vulnerable situation.

Labour exploitation

I welcome the various types of visa options available for migrants to come and work in Australia, such as temporary work skilled visa (457), working holiday visas and seasonal worker visas.

I came across information about the exploitation of migrants on working holiday visas, as well as of asylum seekers on bridging visas, by employers in Australia, as migrants in general refrain from reporting, protesting and mobilising due to their fear of seeing their visa cancelled, being held in immigration detention, or deported. They are made to work long hours and paid wages that are below the minimum wage in Australia, often in the construction, agricultural and hospitality industries. Temporary work visas may therefore increase the vulnerability of migrant workers. Competent oversight mechanisms, including the Fair Work Ombudsman, need to be better deployed and funded to combat such exploitation.

I commend the Government's commitment to counter exploitation through its Taskforce Cadena which has been successful in dealing with cases of forced labour and trafficking. In order to be more effective and have a clearer understanding of the nature and degree of exploitation taking place, I recommend that the government implement "firewalls" between public services and immigration enforcement, thus offering better access to effective labour inspection, to justice, and to other public services such as housing, healthcare, education and

social services, for all migrants, regardless of status, without fear of detection, detention and deportation. It would consequently allow for better collection of disaggregated data by government agencies.

Xenophobic speech and acts

Australia has a rich history of migration and I acknowledge Australia's profound commitment to multiculturalism. However, if one in two Australians is either born overseas or has a parent born overseas, one in five Australians has experienced race-hate speech and one in twenty has been physically attacked because of their race.

Language matters. Xenophobia and hate speech have increased, creating a significant trend in the negative perceptions of migrants. Politicians who have engaged in this negative discourse seem to have given permission to many to act in xenophobic ways and allow for the rise of nationalist populist voices.

Australia must work to fight xenophobia, discrimination and violence against migrants, in acts and speech. Maintaining section 18 c of the Racial Discrimination Act sets the tone of an inclusive Australia committed to implementing its multicultural policies and programmes and respecting, protecting and promoting the human rights of all: if issues arise as to its interpretation, it should be for the judiciary to resolve the issue.

Constitutional or legislative human rights guarantees

The best way of ensuring the legitimacy of laws, policies and practices is to have their conformity to human rights standards assessed by courts and ultimately by the High Court of Australia. Australian authorities should consider the adoption of a constitutional guarantee of human rights, a Bill of Rights, or at least a legislative guarantee of human rights, a Human Rights Act, with a clause of precedence over all other legislation. Such guarantees could be invoked by anyone, citizen or foreigner, whose rights are threatened by a decision of Australian authorities, at any time, before any court of law or tribunal. This would provide better protection for the rights of all, regardless of immigration status.