

3 March 2021

Universal Periodic Review team
Human Rights Unit
Attorney-General's Department
upr@ag.gov.au

Dear UPR team,

Save the Children feedback on Universal Periodic Review outcomes

Save the Children appreciates the opportunity to provide feedback to inform input on Australia's third cycle Universal Periodic Review (UPR) outcomes. This feedback is further to that provided on 18 February 2021 during a consultation meeting with the Attorney-General's Department (AGD) and other Commonwealth departments. Our feedback also builds on comments Save the Children has provided in formal correspondence to AGD on 13 January 2020,¹ 29 July 2020,² as well as meetings on 29 July 2020 and on 19 November 2020.

Beyond the UPR outcomes, Save the Children's feedback is guided by relevant human rights treaties, principles and authoritative statements, particularly the Convention on the Rights of the Child (CRC) and the Committee on the Rights of the Child's concluding observations on Australia.³ Our views are also informed by the *Joint NGO Submission on behalf of the Australian NGO Coalition: Australia's Human Rights Score Card* dated April 2020 and subsequently updated in July 2020.⁴ Save the Children has been an Advisory Committee member of the Coalition and the lead on children's rights.

Save the Children's feedback in this letter covers:

- UPR consultation process;
- Australia's positioning on "support" or "note" of recommendations;
- UPR recommendations made by states on children's rights;
- UPR questions in advance on children's rights; and
- next steps in engaging with civil society on the UPR outcomes.

UPR consultation process

Save the Children acknowledges that the Australian government is facing tight deadlines in preparing its comments to inform the Human Rights Council (HRC) on its position towards the recommendations. According to standard practice, States under review are offered the possibility to choose between two

¹ Save the Children Australia, 'Save the Children feedback on Universal Periodic Review draft report', 13 January 2020.

² Save the Children Australia, 'Save the Children feedback on Universal Periodic Review (UPR) draft national report', 29 July 2020. Available at: https://www.savethechildren.org.au/getmedia/d21c38f2-3f14-4ae4-aa90-da9fb86ca5c4/2020-07-29-letter-agd-save-the-children-draft-upr-report_1183904938.pdf.aspx.

³ United Nations Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Australia, CRC/C/AUS/CO/5-6, 1 November 2019. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fCO%2f5-6&Lang=en.

⁴ Australian UPR NGO Coalition, 'Joint NGO Submission on behalf of the Australian NGO Coalition', April 2020. Available at: <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/602b2a925246cb1b62bc23a4/1613441688187/UPR+++Australian+NGO+Coalition+Submission+-+domestic+publication+version+-July+2020+%28new%29.pdf>

deadlines for submission of their position on UPR recommendations in the form of an addendum to the Working Group report. The first deadline is usually set approximately 12-10 weeks prior to the HRC plenary session. The second deadline is for submission of addenda for processing in the original language only and it is closer to the HRC Session, approximately 4-5 weeks. Combined with the need to consult with the states and territories, as well as the Attorney-General and Prime Minister, it provides limited time to provide civil society feedback.

However, even considering the challenging deadlines, Save the Children is concerned about the way in which consultation has been conducted during the UPR process, not just in response to the UPR recommendations. We note that during Australia's UPR Adoption on 22 January 2021, that Sally Mansfield, Ambassador, Australian Permanent Mission to the Office of the United Nations highlighted the importance of its engagement with civil society:

“Australia will give careful thought and consideration to each of the recommendations presented to us. While containing and recovering from the COVID-19 pandemic remains the top priority of the Australian government, Australia will engage in domestic consultation on recommendations received, both within federal government, with state and territory governments, and with civil society. The government of Australia deeply values our engagement with civil society on human rights and is committed to consultation with civil society in considering these recommendations. The government will dedicate its next NGO forum on human rights to be hosted by the Attorney-General's Department to discussion of UPR recommendations received and Australia's response, noting that consultation in this forum has been impacted by the COVID-19 pandemic.”⁵

It was disappointing that notification for the NGO forum on human rights hosted by AGD on 18 February 2020 was provided on 11 February 2021, just one week in advance. Invitations were only sent to Australian UPR NGO Steering Committee members, with a request to pass those onto relevant NGOs. This was instead of sending the invitation out to the broader email list of NGOs. The timing and limited distribution list led to a low turnout. Considering that during the Adoption hearing on 22 January 2021 an AGD human rights forum was already committed to, earlier planning and notification should have been undertaken. This would have generated greater feedback from civil society. Acknowledging the deadline of 26 February 2021 to provide written feedback, more could have been done to undertake considered consultation with civil society on the recommendations.

Additionally, Save the Children notes that during other meetings, Commonwealth officials have on occasions not been forthcoming, despite requesting civil society to do so. For example, during the 19 November 2020 meeting, government officials asked questions of representatives, including Save the Children, on the priority issues that were being considered by foreign governments. This information was provided. However, when Save the Children asked whether climate change would be included in the National Report for Australia's third cycle UPR,⁶ government officials refused to confirm or deny whether it was to be included. Upon the release of the National Report on 28 December 2020, there was no provision made for inclusion of civil society comments on the draft in an annex, such as in the case of Canada during its UPR third cycle review.⁷

⁵ UN Web TV, 'Australia UPR Adoption - 37th Session of Universal Periodic Review', 22 January 2021. Available at: <http://webtv.un.org/meetings-events/human-rights-council/watch/australia-upr-adoption-37th-session-of-universal-periodic-review/6225287359001/?term=&lan=english>.

⁶ See further, *ibid* n2.

⁷ 'What we heard - views on Canada's draft national report under the Universal Periodic Review', A/HRC/WG.6/30/CAN/1/Canada/Annex.2/E, 3 April 2018. Available at: <https://www.ohchr.org/EN/HRBodies/UPR/Pages/CAindex.aspx>.

Finally, the consultation process on the voluntary commitments questions the value to which AGD and the Attorney-General considers engagement with civil society on the UPR process. Feedback was provided early in the process by Save the Children, in our letter of 29 July 2020,⁸ and was also provided by other civil society organisations over several months, including verbally in the meeting on 19 November 2020 and in subsequent emails. Disappointingly, the views of civil society were not reflected in the final voluntary commitments delivered on 20 January 2021, with commitments that were already given or were otherwise anticipated to take place. None of the voluntary commitments were new.

Australia still has some way to progress in adopting a best practice approach towards consultation with civil society on the UPR and demonstrating that it deeply values engagement with civil society through the UPR process. Save the Children would welcome an opportunity to discuss this further and has outlined some proposals at the end of this letter to improve consultation on the next steps.

Australia's position on "support" or "note" of recommendations

Correspondence received on 18 February 2020 officials from AGD that Australia considers four possible responses to recommendations, that is "accepts", "notes (for further consideration)", "notes" and "notes (not for further consideration)". Save the Children considers that the definitions provided in that email are self-imposed and not reflective of UPR practice, including information provided by the HRC.

As AGD would be aware, the institutional package establishing the UPR provides only two options in response to recommendations, either "supported" or "noted". Other formulations should not be used by any state, including Australia. While Save the Children acknowledges the position put forward in the 18 February 2020 towards recommendations that it deems to be political, and such an approach has previously been used, other states have continued to remain consistent with the position of only using "supported" or "noted". Examples include; the United Kingdom, New Zealand, Canada and Germany during their third cycle review.

While acknowledging that in the end all recommendations are listed as either being "supported" or "noted", Save the Children views Australia's approach as an outlier and recommends against using its self-imposed responses towards the UPR process.

UPR recommendations made by states on children's rights

The third cycle UPR for Australia was unprecedented in the amount of attention given to child rights recommendations. 122 participating United Nations members made a total of 344 recommendations to Australia. Of those, 58⁹ (or 17%) were primarily or directly focused on children's rights. Meanwhile, another 34¹⁰ (or 10%) mentioned children's rights or issues primarily relevant to children.

This result sends a strong signal to the Australian government that substantial policy, legislative and administrative changes need to be undertaken to enhance the protection of children's rights. Many of these recommendations reiterate concluding observations that were issued to Australia by the United Nations Committee on the Rights of the Child, reports by other UN committees or special rapporteurs, raised consistently over multiple years. The failure to address such gaps in Australia's child rights protection

⁸ Ibid n2.

⁹ Counts are based on the wording of formal recommendations made by States. However, some individual recommendations raised multiple issues (e.g., in a single recommendation, Italy called on Australia to withdraw its CRC reservation, ratify the CRC's 3rd Optional Protocol, and raise its minimum age of criminal responsibility).

¹⁰ Ibid.

framework and address long standing child rights violations, serves to undermine Australia's commitments to the UN human rights architecture and its human rights record.

The Australian government should also ensure that in its response to the recommendations that it is cognisant that the UPR is a review of Australia's fulfilment of its human rights obligations as a whole, across all jurisdictions. Save the Children urges against the use of language in comments that could be read as the Commonwealth absolving itself of responsibility for the lack of actions of states or territories.

The following sections outline some of the key thematic child rights issues arising from Australia's third cycle UPR.

Raise the minimum age of criminal responsibility

Raising the minimum age of criminal responsibility was the single most specific recommendation made during the third cycle, with thirty recommendations. Raising the age was the equivalent of the calls to ratify the Optional Protocol to the Convention Against Torture during the second cycle. The states that recommended raising the age include; Canada, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Lithuania, Luxembourg, Malta, Mexico, Moldova, North Macedonia, Norway, Poland, Portugal, Slovakia, Spain, Sri Lanka, Sweden, Switzerland, Uruguay, Venezuela and Zambia.

Save the Children supports accepting all recommendations that called upon Australia to raise the age to at least 14 years of age or otherwise specifically called upon Australia to raise the age of criminal responsibility. Australia's age of criminal responsibility of 10 is in contrast to UN recommendations, the UN Global Study on Children Deprived of Liberty,¹¹ and medical evidence about children's development. It is below the global median. It disproportionately harms disadvantaged children, including Aboriginal and Torres Strait Islander children – Australia's Indigenous peoples.

Given the prominence of the recommendation as part of the third cycle UPR, it would be concerning to the international community and damaging to Australia's reputation if a decision was made only to "note" such recommendations. That would signify through its response to the HRC that Australia is not committed to raising the age in the next five years. Given the momentum for reform throughout the states and territories, most recently with the ACT committing to raise the age, this is likely to be an area where change will take place in coming years.

Reform youth justice

Reforming the youth justice system was raised by twelve states. Many of those states called on Australia to bring Australia's youth justice system in line with the CRC or international standards, such as Finland, Lithuania, Mexico, Moldova and Slovenia. While others, such as Canada, Chile, Czech Republic, France, Iceland, Venezuela and Zambia, called on specific youth justice systems reform.

Save the Children supports accepting all recommendations that have called upon Australia to reform its youth justice system. Australia's youth justice system needs further reform to ensure that it is fully compliant with the CRC, especially Article 37(b), which refers to ensuring that detention is used only as a measure to last resort. Several reviews have provided advice to the Commonwealth, State and Territory governments on what reforms need to be undertaken, including the Royal Commission into the Detention

¹¹ United Nations, 'Global Study on Children Deprived of Liberty', November 2019. Available at: <https://childrendeprivedofliberty.info/>.

and Protection of Children in the Northern Territory,¹² the Australian Law Reform Commission Report ‘Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples’ (ALRC Report 133)¹³ and many more. Save the Children would welcome the opportunity to work with the Commonwealth, State and Territories on how recommendations arising from such reports, as well as those provided by various UN experts and committees could be implemented.

Reduce violence against women and children

Eleven countries called upon Australia to take stronger measures to reduce violence against women and children, including; Bahamas, Bosnia and Herzegovina, Burkina Faso, Czech Republic, Iran, Jordan, Kazakhstan, Laos, Marshall Islands, Peru and Qatar. Of those, Burkina Faso specifically mention girls or children, while Marshall Islands and Peru mentioned Indigenous women and girls.

Save the Children supports accepting all recommendations that have called upon Australia to take stronger measures to reduce violence against women and children. While acknowledging the National Framework for Protecting Australia’s Children 2009-2020, it is important to note that it is limited to protecting children from abuse and neglect. It does not aim to comprehensively protect children’s rights and does not focus on children’s economic, social and cultural rights, non-discrimination, or participatory rights. Save the Children urges AGD, in cooperation with other Commonwealth agencies, state and territory governments, to develop a National Plan for Children to comprehensively protect children’s rights in Australia to give effect to these recommendations to reduce violence. This would also give effect to other recommendations calling for incorporation of the CRC outlined below.¹⁴

Rights of migrant, refugee and asylum-seeking children

Ten countries raised concerns regarding the treatment of migrant, refugee and asylum-seeking children. Issues raised, include detention of children by Costa Rica, Rwanda, Thailand and Uruguay, family reunification by Costa Rica, Mexico and Montenegro, as well as other matters such as healthcare access by the United States of America or special protection measures from Somalia.

Save the Children supports accepting all recommendations that have called upon Australia to better protect the rights of migrant, refugee and asylum-seeking children. In particular, we call upon Australia to legislative reform to prohibit the detention of minors, noting the recommendation from Rwanda:

“Amend the Migration Act 1958 to prohibit placing children in immigration detention”

As well as the recommendation from Costa Rica:

“Consider amending the Migration Act in order to prohibit the detention of minors and prioritize family reunification.”

And finally, the recommendation from Uruguay:

¹² Royal Commission into the Detention and Protection of Children in the Northern Territory, ‘Final Report’, 17 November 2017. Available at: <https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>.

¹³ Australian Law Reform Commission, Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133), 27 March 2018. Available at: <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>.

¹⁴ Ibid n4.

“Amend legislation on migration in order to prohibit the detention of children in immigration centres, and in exceptional cases, that such detention be in the shortest time possible.”

Ratify the Third Optional Protocol to the Convention on the Rights of the Child

Seven countries called upon Australia to ratify the Third Optional Protocol to the Rights of the Child, including; Albania, Cyprus, El Salvador, Italy, North Macedonia, Slovakia, Ukraine.

Save the Children supports accepting all recommendations that have called upon Australia to ratify the Third Optional Protocol to the CRC. Considering that Australia has already ratified other communication procedures, including for the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it should be a relatively easy to accept and implement recommendations supporting ratification of the Third Optional Protocol to the CRC.

Additionally, in response to Annex 1 of the National Report,¹⁵ it is noted that that the rights recognised in the CRC are clearly directed at children, and are not comprehensively included in other treaties, either as a matter of principle or in the practice of children’s access to rights. For example, and incompletely, the rights of children to have their best interests be a primary consideration in all actions concerning them, the specific rights of children to be heard and taken seriously. As a result, acceptance of these recommendations and working towards ratification would be a positive step in strengthening Australia’s commitment to protecting the rights of children, especially Articles 12 and 13 under the CRC.

Incorporate the Convention on the Rights of the Child domestically

Four countries called upon Australia to incorporate the CRC into domestic legislation, including; Greece, Qatar, Romania, Slovenia.

Save the Children supports accepting all the recommendations that have called upon Australia to incorporate the CRC into domestic legislation. Australia has not fully incorporated the CRC into domestic legislation and policy, and does not have a national plan, strategy or policy for children that comprehensively protects children’s rights. The Committee on the Rights of the Child has highlighted these deficiencies. Australia received several second cycle UPR recommendations to better protect children’s rights overall. However, during the third cycle, they were given much more prominence, with clear language provided by states. For example, Greece recommended:

“Complete the incorporation of the CRC into domestic legislation and policy.”

More than 30 years after Australia signed and ratified the CRC, there continues to be substantial gaps in in Australia’s laws, contributing to significant ongoing child rights violations. Accepting recommendations on the CRC and working with civil society on implementation, including supporting the establishment of a gaps analysis review by AGD or the Australian Law Reform Commission, would be a positive step forward. Additionally, Save the Children supports the development of a National Plan for Children to

¹⁵ Commonwealth of Australia, ‘National Report of Australia – Universal Periodic Review 2021: Annex 1’, 24 December 2021. Available at: <https://www.ag.gov.au/rights-and-protections/publications/universal-periodic-review-national-report-australia-2020>.

comprehensively protect children's rights and provide a means to give effect to Australia's commitments under the CRC.¹⁶ Such a proposal was also included in Qatar's recommendation:

"Develop a national plan to comprehensively protect the rights of children, including by integrating the CRC into national legislation and policies."

Remove the reservation to Article 37(c) of the Convention on the Rights of the Child

Three countries called upon Australia to remove the reservation to Article 37(c) of the CRC, including; Estonia, Italy and Spain.

Save the Children supports accepting all recommendations on removing the reservation to Article 37(c), which requires children to be detained separately from adults. Australia has maintained its reservation despite repeated recommendations by the Committee on the Rights of the Child and during Australia's second cycle UPR to withdraw the reservation. Annex 1 to the National Report states that the Australian Government considers "the reservation remains necessary" and that Australia periodically reviews its reservations to the CRC.¹⁷ However, no such review has taken place since the second cycle which has involved civil society organisations, including Save the Children. Conducting a review with civil society organisations while accepting this recommendation and looking towards removing this reservation would be an important step forward in strengthening Australia's human rights treaty-based commitments.

Climate change and children's rights

During the second cycle no country made recommendations on climate change. However, in the third cycle, seven countries chose to do so, including; Cuba, Fiji, France, Haiti, Uruguay, Switzerland and Vanuatu. This was a clear message to Australia that climate change is a human rights issue, which engages human rights treaties to which Australia is a party to, including the CRC.

Save the Children supports accepting all recommendations on climate change. Of particular note, we refer to the recommendation from Fiji which references the importance of the participation of children, calling on Australia to:

"Intensify efforts to develop and strengthen the necessary legislative frameworks that address cross-sectoral environmental challenges, including climate change and disaster risk reduction frameworks, and ensure the full and meaningful participation of wide diverse groups, including but not limited to women, children, persons with disabilities, elderly persons and Aboriginal and Torres Strait Islander communities, in its implementation."

Additionally, it is noteworthy that Vanuatu made a recommendation in the third cycle, after not doing so during Australia's first and second cycle. Vanuatu called upon Australia to:

"Implement more effective climate change policies based on a long term plan on lowering fossil fuel use, and reducing pollution, which are contributing to adverse effects on the right to life and the right to health of people due to global warming, as well as toxic emissions."

¹⁶ Ibid n4.

¹⁷ Ibid n15.

Save the Children urges the Commonwealth to work collectively with civil society on implementing the recommendations on climate change, in particular to ensure that all supporting frameworks include involve full and meaningful participation of children.

Repatriation of women and children from detention camps in North East Syria

Syria recommended that Australia:

“Adopt a comprehensive strategy to deal with its nationals from foreign terrorist fighters and their families, including their repatriation for prosecution, rehabilitation, and preventing a new wave of terrorism abroad.”

Save the Children recommends Australia accepts this recommendation. More than 60 Australians, including 43 children, are still detained in Al Roj camp in North East Syria. Many of the children are under five years old and are extremely vulnerable to disease, malnutrition and physical harm. States have a primary responsibility to act with due diligence and take positive steps and effective measures to protect individuals in vulnerable situations, notably women and children, located outside of their territory where they are at risk of serious human rights violations or abuses, where States’ actions or omissions can positively impact on these individuals’ human rights.¹⁸ To give effect to these responsibilities, Save the Children supports the development of a comprehensive strategy that would include a focus on their repatriation. We are willing to work collaboratively to achieve such an objective, noting our longstanding work in Syria, including operations in Al Roj and Al Hol camps, treating children for malnutrition, providing education facilities, and child protection services.

UPR questions in advance

Save the Children notes that Australia received five questions in advance on children’s rights raised by foreign governments prior to the UPR hearing. Those questions included:

- Measures to taken to ensure compliance with CEDAW including to reduce the level of gender-based violence against women and violence against children, especially in Aboriginal and Torres Strait Islanders communities (Sweden).
- Measures to improve the functioning of juvenile justice and preventative measures to stop children from entering the justice system in the first place (Poland).
- Measures intended to solve the issue of continuous policy of mandatory detention in cases of children involved (Slovenia).
- Mechanisms to address the rights of children, including the best interests of the child, in matters of extradition to another country (Iran).
- Efforts undertaken to address multiple and intersectional forms of discrimination against women and girls with disabilities, indigenous women and girls, and to end harmful practices on children with intersex variations, in line with the recommendations of the Committee on the Rights of Persons with Disabilities (Panama).

Save the Children is of the view that the above questions have still not been have not adequately been answered or not answered and recommends that further details on how each of these questions has been addressed when Australia appears again before the HRC during the 47th session.

¹⁸ United Nations Office of the High Commissioner for Human Rights, ‘Syria: UN experts urge 57 States to repatriate women and children from squalid camps’, 8 February 2021. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26730&LangID=E>.

Next steps in engaging with civil society on the UPR outcomes

Save the Children urges AGD and other Commonwealth departments to engage in genuine and considered consultation with civil society organisations throughout the UPR process, upholding the public pronouncements made during the Adoption hearing. As noted by Ambassador Mansfield on 22 January 2021:

“The Australian government remains committed to the ongoing process for the implementation and monitoring of recommendations through our Standing National Human Rights Mechanism, to ensure that the UPR process remains a key part of Australia’s ongoing domestic policy debate.”¹⁹

Commitment to the implementation and monitoring of recommendations should involve a more structured response process to the UPR outcomes. For example, Australia has no monitoring mechanism to understand government responses to UPR recommendations. In November 2015, AGD released a publicly accessible United Nations human rights recommendations database that draws together UN human rights treaty body recommendations for Australia from treaties and reviews that Australia is a party to. Disappointingly, that document has not been updated since its release. Save the Children has raised the need for the database to be regularly updated, including at AGD human rights forums on 12 December 2019 and 18 February 2021. Save the Children recommends that the database is updated, includes UPR recommendations and importantly outlines the government response and government action, which is currently missing from the database.

Additionally, Save the Children recommends that regular meetings are held with civil society, AGD, states and territories, to identify how these recommendations will be implemented. If the monitoring and implementation is left just to the annual AGD human rights forum then there will be gaps in accountability. Save the Children supports the development of a smaller UPR Advisory Group, which would work collaboratively to assist with the implementation and monitoring process. It is critical that support this work, that states and territories are involved in such an Advisory Group. Such a process would be valuable leading up to the mid-cycle process, which Save the Children strongly encourages Australia to engage in.

Save the Children looks forward to working closely with the Australian government and the international community to implement policy, legislation and administrative measures made in response to any of the recommendations, statements or questions in advance.

Kind regards,



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¹⁹ Ibid n5.