Submission of the Australian Government

Draft General Comment No. 38

Article 22: right to freedom of association

1. The Australian Government presents its compliments to the United Nations Human Rights Committee (**the Committee**) and has the honour to refer to the Committee's call for written comments on its draft General Comment No. 38 on the right to freedom of association (**draft General Comment**) under the *International Covenant on Civil and Political Rights* (**ICCPR** or **Covenant**).[1]

2. Australia is a longstanding party to the ICCPR and is firmly committed to upholding its obligations under the Covenant.

3. The Australian Government appreciates the Committee's work in preparing this draft General Comment and welcomes the Committee's clarification on the obligations of States parties to the ICCPR as they pertain to the right to freedom of association.

4. The Australian Government thanks the Committee for the opportunity to provide written comments on the draft General Comment. The Australian Governments sets out its views below and invites the Committee to clarify certain statements in the draft General Comment regarding the scope of particular legal obligations under the Covenant.

Scope and Interpretation of Article 22

Meaning of 'association'

5. The draft General Comment contains several references which suggest that associations themselves are afforded rights under the ICCPR. For example, at paragraph 14, the draft General Comment refers to 'the right of such associations to carry out their activities freely.' Similarly, paragraph 15 states 'associations have the right to freely determine their membership.'

6. The Australian Government respectfully submits that the ICCPR concerns the rights of individuals, rather than the rights of entities. In this regard, the Committee should make clear the distinction between an 'association' as an entity, and more relevantly for the purpose of Article 22, the right to 'association' as the right of individuals to form and join associations to pursue common goals.

Correct rules for treaty interpretation

7. As with all human rights obligations, the Australian Government considers that the obligation under Article 22 of the Covenant must be interpreted consistently with the

[1] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

general rule for treaty interpretation as set out in the *Vienna Convention on the Law of Treaties* (**VCLT**).[2]

8. Paragraph 4 of the Draft General Comment states that 'given the "generally recognized principle that, when several rules bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations", the right to freedom of association as guaranteed under article 22 of the Covenant must be construed and implemented by States Parties in present day conditions and in harmony with their universal and regional obligations and other international instruments.'

9. At paragraph 20, the draft General Comment then suggests that ILO Convention No. 98 is relevant for the purposes of interpreting Article 22 of the Covenant, stating that '[t]he Right to Organise and Collective Bargaining Convention, 1949 (No. 98), although not mentioned in article 22(3), supplemented ILO Convention No. 87 and is therefore relevant for the interpretation and implementation of article 22 of the Covenant, alongside other conventions and norms adopted by the ILO.'

10. It further provides at paragraph 59 that States Parties' obligations under Article 22 of the Covenant extend to those obligations contained in ILO Convention Nos. 87 and 98, stating that '[i]nsofar as the Covenant is a living instrument, the safeguard extends to the ILO Conventions and norms drafted after the adoption of the Covenant that complement ILO Convention No. 87, in particular ILO Convention No. 98.'

11. In our view, it is important to clarify that rules of international law external to a treaty are only relevant to its interpretation under Article 31(3)(c) of the VCLT where they constitute 'relevant rules of international law applicable in the relations between the parties.'[3] This does not permit the incorporation of obligations from one treaty, or from customary international law, into another treaty. Further, we emphasise that Article 31(3)(c) is only applicable in respect of questions of interpretation of a treaty, as opposed to the implementation of treaties, as is suggested by paragraph 4. Accordingly, the Australian Government suggests the draft General Comment be amended to reflect the rules for treaty interpretation as reflected in the VCLT.

12. The Australian Government notes that paragraphs 9 and 42 of the draft General Comment also suggest that the obligation under Article 22 is to be interpreted in a way which extends beyond the scope of what is required under the VCLT:

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[2] Vienna Convention on the Law of Treaties, opened for signature 23 May 1968, 1155 UNTS 331 (entered into force 27 January 1980). Although the VCLT is not applicable to treaties concluded before its entry into force, it is well established that Articles 31 and 32 reflect rules of customary international law applicable to such treaties. See, eg, *Right to Strike under ILO Convention No. 87* (Advisory Opinion) ICJ [2026] [62].

[3] See *Right to Strike under ILO Convention No. 87* (Advisory Opinion) ICJ [2026] [90]. We also note that this excerpt is supported by the International Court of Justice's Advisory Opinion on the Obligations of States in respect of Climate Change. The Australian Government would like to clarify that while the reference is correct, the Court in that excerpt was affirming the view expressed by the ILC Study Group on the Fragmentation of International Law. The Australian Government suggests updating this reference (and the reference at footnote 164) to more accurately reflect the source of the principle.

a. Paragraph 9 states 'the right to freedom of association must be interpreted and implemented by taking into consideration the structural and intersecting barriers that might hamper the concrete and effective realization of the right for these persons, groups and communities.'

b. Paragraph 42 states 'this long-standing strict interpretation of restrictions implies a general presumption in favour of the lawfulness of the creation of associations, their objectives and their activities that must guide the interpretation and implementation of article 22.'

13. The Australian Government respectfully submits that application of the general rule of interpretation under the VCLT does not require that Article 22 is interpreted by taking into account 'structural and intersecting barriers' or 'the lawfulness of the creation of associations, their objectives and their activities.' We therefore recommend that the Committee avoid the use of terms such as 'must' when referring to the interpretation of Article 22 in terms that fall outside the scope of what is required under the VCLT.

14. We also note that a number of the Committee's comments are supported by jurisprudence of the European Court of Human Rights (**ECtHR**).[4] We take this opportunity to note that the jurisprudence of the ECtHR is only binding on States Parties to the *European Convention on Human Rights* (**ECHR**). This jurisprudence is not relevant for the purpose of interpreting Article 22 including in respect of States Parties that are not parties to the ECHR, including Australia.

Extraterritorial Application

15. The Australian Government agrees with the Committee's general statement at paragraph 32 that 'the obligation to respect Covenant rights is not limited to a State Party's territory,' however, notes that some statements in the draft General Comment suggest that a State Party will always owe obligations to individuals extraterritorially. For example:

a. Paragraph 29 provides that the 'State Party's obligations extend to multilateral levels for associations acting transnationally and before international bodies.'

b. Paragraph 32 states that Article 22 prohibits a State Party from taking certain actions in relation individuals abroad.

16. The Australian Government acknowledges that a State may owe international human rights obligations extraterritorially when a person is within its jurisdiction.[5] In Australia's view, a very high degree of control is required to establish that a State exercises effective control over a person, such that it will owe international human rights obligations in respect of that person. Whether a State has effective control over territory or persons is a question of fact. For that reason, the Australian Government recommends that the Committee qualify its statements in the draft General Comment

[4] See eg at paragraph 27.
[5] ICCPR (n 1) art 2(1).

to make clear that States Parties will only owe human rights obligations extraterritorially in certain circumstances.

17. We also note that the draft General Comment states at paragraph 29 that States Parties may exercise effective control over 'a situation.' The Australian Government respectfully disagrees with this characterisation. As a matter of international law, a State may generally only exercise effective control in respect of territory or persons.[6]

Specificity of measures to fulfil obligations

18. The Australian Government is of the view that the draft General Comment would benefit from being less prescriptive in recognition of the different circumstances of each State Party. Australia appreciates the examples that the Committee has provided of ways in which States Parties could fulfil their obligations under Article 22. From a policy perspective, States may support some of these examples. However, the Australian Government is concerned about the framing of these examples in mandatory terms. For example:

    a. Paragraph 9 states '[t]he right to freedom of association must be…implemented by taking into consideration the structural and intersecting barriers that might hamper the concrete and effective realization of the right for these persons.'

    b. Paragraph 33 states that '[c]reating such an environment requires a wide range of actions to facilitate the implementation of the right, including relating to registration, policies on tax incentives…'

    c. Paragraph 35 provides that '[States Parties]…are also obliged to address hostile actions, discourses and narratives, including online…'

19. Terms including 'must,' 'require' and 'obliged' should only be used to refer to legally binding provisions in the Covenant to which States Parties have explicitly consented to be bound. As a result, the Australian Government considers that some parts of the draft General Comment purport to extend the responsibilities of States Parties beyond the legal obligations in the text of the Covenant. The Australian Government therefore invites the Committee to clarify the statements in the draft General Comment regarding the scope of the legal obligations of States Parties under the Covenant and to reframe these as recommendations only.

Permissible limitations on the right to freedom of association

20. The Australian Government respectfully disagrees with assertions that certain acts on behalf of States Parties would necessarily constitute violations of the Covenant, for example:

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[6] See Human Rights Committee, Views: Communication No. 3042/2017, UN Doc CCPR/C/130/D/3042/2017 (4 November 2020) ('A.S., D.I., O.I. and G.D. v Italy') [7.4]-[7.7]; UN Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 [10].

d. Paragraph 15 provides '[a] law granting the Government undue power or influence to decide on the registration or deregistration of an association and on authorization of public or foreign funding for an association would be at odds with article 22.'

e. Paragraph 24 provides '…legislation allowing the authorities excessive control over the creation, functioning and activities of trade unions, including surveillance and interception of trade union data, sanctions such as the deregistration of trade unions for exercising their right to strike or criminal prosecution of their members, would be contrary to article 22.'

f. Paragraph 30 provides '…measures that are prohibited include arbitrarily refusing to register an association, imposing a travel ban on association members or making it compulsory for them to request travel authorization…'

21. In that regard, and as set out in paragraph 42 of the draft General Comment, the Australian Government notes that not all limitations on the right to freedom of association will be inconsistent with the Covenant in circumstances where such limitations are 'prescribed by law' and are 'necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.'[7]

22. We further note that paragraph 14 of the draft General Comment appears to conflict with the rule on permissible limitations under Article 22 of the Covenant. It states that Article 22 'covers the right to seek, receive and expend funding and other material resources, including those coming from outside the State party, without the risk of being labelled a "foreign agent" or a threat to national security.'

23. The Australian Government emphasises that there may be circumstances in which the right to freedom of association may be limited because such a limitation may be necessary in a democratic society in the interests of national security. For that reason, the Australian Government would appreciate the Committee making clear that a State Party may not necessarily violate an individual's right to freedom of association in circumstances where permissible limitations on that right are applied in accordance with the requirements of the Covenant.

24. The Australian Government respectfully disagrees with the Committee's comments at paragraph 46, which suggest that the existence of any reasonable and objective justification for limiting the right to freedom of association is not sufficient. The Australian Government's view is that a limitation of the right to freedom of association will be permissible where it can be demonstrated that the limitation is reasonable, necessary and proportionate to achieving one of the objectives set out in Article 22(2) of the Covenant. We respectfully request that the Committee make this

[7] ICCPR (n 1) art 22(2).

clear when setting out the rule of permissible limitations on the right to freedom of association.

25. We note the Committee's reference to the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*. While reference to these principles may assist in guiding States Parties on the application of the ICCPR, we note that they are not binding as a matter of international law.

Derogations from Article 22

26. Paragraph 53 provides '[t]herefore, even in emergency contexts, including when States Parties face a threat that endangers the life of the nation, "they must comply with their obligations under international law, in particular their obligations to respect international humanitarian law and international human rights law."'

27. We further note that from an international human rights law perspective, this could be read as being at odds with Article 4(1) of the Covenant which explicitly states that 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.' It also conflicts with points made under paragraph 55 of the General Comment which state that 'all measures derogating from their obligations under the Covenant are strictly required by the exigencies of the situation and comply with the conditions set out in article 4.'

28. The Australian Government respectfully submits that the Committee should clarify in paragraph 53 that the ICJ's statement was made in respect of a particular emergency situation in the context of matters raised in those proceedings, and that any derogations from a State's Party's international human rights law obligations in emergency settings will need to be proportionate to the exigencies of the situation.

Public and Private Actors

29. The draft General Comment contains a number of references to the relationship between States and private entities.[8] While the Australian Government acknowledges that, in some circumstances, States may bear responsibility for the conduct of private entities, it is important to note that international human rights law imposes obligations on States rather than private entities.

30. The Australian Government notes that at paragraph 37, the draft General Comment stipulates that States are 'obliged not only to adopt measures to require business enterprises to perform human rights due diligence assessments, but also to investigate

[8] See eg paragraphs 35 and 39.

human rights abuses committed by those enterprises both on their territory and abroad.'

31. The Australian Government respectfully submits that this purported obligation is not derived from the text of the Covenant, and therefore should be amended so as to clarify that the measures suggested with respect to addressing the actions of private persons or actors reflect the recommendation of the Committee, rather than a legally binding obligation under Article 22.

References to Indigenous Peoples

32. Paragraph 2 of the draft General Comment provides '[t]he full realization of the right to freedom of association is equally instrumental for the enjoyment, exercise and operationalization of the right to self-determination, including land rights.' This statement appears to conflate the definition of self-determination as contained in the *United Nations Declarations on the Rights of Indigenous Peoples* (**UNDRIP**), with the meaning of self-determination under the ICCPR, which does not make any reference to land rights. Accordingly, the Australian Government suggests the draft General Comment be amended to reflect the scope of the right to self-determination as reflected in Article 1 of the ICCPR.

Right not to join an association

33. At paragraph 18, the draft General Comment states that '[t]he right to freedom of association includes the right not to join any association,' citing the Universal Declaration of Human Rights (**UDHR**), the African Charter on Human and Peoples' Rights as well as the Human Rights Committee's General Comment No. 22 and various guidelines. While many States Parties, including Australia, protect the right not to join an association as a matter of domestic law, the Australian Government respectfully submits that Article 22, on its face, does not clearly support the existence of such a right, and the draft General Comment does not sufficiently explain how this proposition is derived from the terms of the Covenant.

34. The Australian Government notes that the UDHR is a resolution of the United Nations General Assembly and is not legally binding on States. While many rights enumerated in the UDHR are given binding force in international human rights treaties, such as the ICCPR, we do not consider that this is the case in respect of a general negative right not to join an association under Article 22 of the ICCPR. Further, we note that not all States Parties to the ICCPR are bound by the African Charter on Human and Peoples' Rights and that the guidelines cited are not binding as a matter of international law.

35. General Comment No. 22 is also cited in support of the proposition that Article 22 contains a right not to join an association. The Australian Government respectfully submits that General Comment No. 22 concerns the right to freedom of thought, conscience or religion under Article 18 of the ICCPR and does not provide any legal basis for the view that the right to freedom of association includes the right not to join an association.

36. In light of this, the Australian Government respectfully submits that the draft General Comment should reconsider the statement in paragraph 18 or clarify the legal basis for the asserted right.[9]

37. Australia reiterates its support for the work of the Committee and avails itself of this opportunity to renew to the Committee the assurances of its highest consideration.

[9] The travaux préparatoires of the ICCPR supports the view that at the very least, the question of whether the right of freedom of association includes the right not to join an association, remains unsettled as a matter of international law. It indicates that the inclusion of an explicit right not to join an association was considered but ultimately not adopted. See eg, M.J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant of Civil and Political Rights* (Martinus Nijhoff Publishers, 1987) 425.