Australian Permanent Mission
and Consulate-General
Geneva

26 November 2019

Ms Beatriz Balbin
Chief, Special Procedurs Brnach
Office of the High Commissioner for Human Rights
Palais des Nations
1211 GENEVA 20
Switzerland

Dear Ms Balbin

Response to joint special procedures communication (UA AUS 9/2009) – Tran

I refer to the joint communication of 15 November 2019 (your reference UAAUS9/2019) from the Working Group on Arbitrary Detention, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the human rights of migrants and the special rapporteur on violence against women, its causes and consequences, concerning Ms Thu Thi Huyen Tran (date of birth 10 April 1989) and [redacted] (date of birth 15 March 2018).

The Australian Government has always engaged in good faith with the Human Rights Council Special Procedures Mandate Holders, and in this spirit we have endeavoured to respond to this joint communication.

In this regard, please see attached a copy of Australia's response to the opinion adopted in accordance with paragraph 18 of the Methods of Work (A/HRC/33/66) of the Working Group on Arbitrary Detention in relation to a communication regarding Ms Tran and [redacted] (reference WGAD/2019/AUS/OPN/2 of 27 May 2019).

This response can be read by the respective special procedures mandate holders as the response to their joint communication.

Yours sincerely

Elizabeth Wilde

Elizabeth Wilde
Chargé d'affaires ad interim

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and Consulate-General
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26 November 2019

Mr José Antonio Guevara Bermúdez
Chair-Rapporteur
Working Group on Arbitrary Detention
c/o Office of the High Commissioner for Human Rights
Palais Des Nations
1211 Geneva 10, Switzerland

Dear Chair-Rapporteur

Transmission of opinion adopted in accordance with paragraph 18 of the Methods of Work (A/HRC/33/66) of the Working Group on Arbitrary Detention

I refer to the Working Groups correspondence (your reference WGAD/2019/AUS/OPN/2) of 27 May 2019, and the joint communication of 15 November 2019 (your reference UAAUS9/2019) from the Working Group on Arbitrary Detention, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the human rights of migrants and the special rapporteur on violence against women, its causes and consequences, concerning Ms Thu Thi Huyen Tran (date of birth 10 April 1989) and [redacted] (date of birth 15 March 2018).

The Australian Government has always engaged in good faith with the Working Group, and in this spirit we have endeavoured to respond to your Opinion.

The Australian Government has a long-standing commitment to cooperating with the United Nations and has a strong human rights record. The Australian Government remains committed to an effective and robust international protection program – recognising the dual humanitarian imperative to both afford protection where it is engaged, and to protect people from abuse and exploitation.

Since our submission of 17 December 2018, Ms Tran's immigration matters remain finally determined as she does not have any matters before the Australian courts or merits review tribunals. Ms Tran has been referred for involuntary removal from Australia to Vietnam and removal planning is progressing. It is noted that it is open to [redacted] parents to decide whether she depart with her mother, by registering her birth with the Vietnamese authorities and obtaining travel documents, or remain in Australia with her father, as a dependent on his visa.

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Ms Tran's case has been considered by the Department for possible referral to the Minister under section 195A of the *Migration Act 1958* (the Migration Act) on two occasions, but it was determined (on 17 July 2018 and 26 July 2019) that the circumstances of Ms Tran's case did not meet the guidelines for referral to the Minister. Under section 195A of the Migration Act, the Minister has the power to grant a person in immigration detention a visa if the Minister thinks it is in the public interest to do so. The Minister's power is non-compellable, meaning the Minister is under no obligation to exercise or to consider exercising the power in any case. What is in the public interest is a matter for the Minister to determine. The Minister has issued the Department with guidelines that outline the types of cases that should or should not be referred for consideration under section 195A of the Migration Act. Generally, Ministerial Intervention powers are reserved for unique or exceptional circumstances where there are no other visa pathways available.

Respectfully, the Australian Government disputes the Working Group's conclusion that Ms Tran's immigration detention was based on her exercise of the right to seek asylum. It is the Australian Government's view that Ms Tran was initially detained as a consequence of the operation of Australia's domestic laws upon unlawful non-citizens, and not by reason of her intention to seek protection in accordance with Australia's international obligations.

The Australian Government takes its obligations regarding *non-refoulement* very seriously. Ms Tran's case was assessed against Australia's protection obligations on three occasions and it was found that Australia did not owe her protection. An initial case assessment was completed on 3 April 2011 and her first case review was completed by the Detention Review Committee on 4 July 2011, to ensure the lawfulness and reasonableness of that detention. Ms Tran's subsequent immigration detention in held detention was because she is an unlawful non-citizen (as she did not hold a valid visa) and her history of absconding from community detention under residence determination arrangements under section 197AB of the Migration Act.

In relation to the Working Group's comments on *Al-Kateb v Godwin* (2004) 219 CLR 562 (*Al-Kateb*), and the comments made in paragraphs 97 to 101 of the Working Group's Opinion No. 2/2019 (Opinion), the Australian Government does not agree that the effect of this decision is such that non-citizens have no ability to challenge the lawfulness of their continued administrative detention or that *Al-Kateb* discriminates between Australian citizens and non-citizens. As discussed in other submissions to the Working Group, section 75(v) of the *Australian Constitution* provides that the High Court of Australia has original jurisdiction in relation to every matter where a writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth. Section 39B(1) of the *Judiciary Act 1901* (Cth) grants the Federal Court of Australia the same jurisdiction as the High Court under section 75(v) of the Constitution. It is these provisions that constitute the legal mechanism through which a non-citizen may challenge the lawfulness of their detention, that is, to challenge the legal application of section 189 of the Act. This right to seek a remedy against an officer of the Commonwealth under the Australian Constitution or in the Federal Court of Australia is available to Australian citizens and non-citizens alike. The decision in *Al-Kateb* does not alter a non-citizen's ability to access and use these provisions to challenge the lawfulness of their detention. As such there is no discrimination between Australian citizens and non-citizens in their ability to challenge the lawfulness of detention in the Australian judicial system. Thus, Australia's judicial system allows for Ms Tran to challenge the legality of her immigration detention even though she has not done so to date.

The Australian Government notes the Working Group has found Australia to be in contravention of the *Universal Declaration of Human Rights* (UDHR), but observes that the UDHR is not a legally binding instrument, although articles of the UDHR reflect international law, such as by being codified in other legally binding instruments at international law.

The Australian Government notes the statements that the Working Group has made at paragraph 80 of the Opinion regarding article 14 of the UDHR and the Convention relating to the Status of Refugees and its 1967 Protocol (*Refugees Convention*). The Australian Government does not dispute that legally binding obligations, including those regarding the non-refoulement of refugees, arise from the *Refugees Convention* to which Australia is a party, and the Australian Government takes its international obligations under the *Refugees Convention* seriously. Further, the Australian Government acknowledges and does not dispute that the effect of Article 31(1) of the *Refugees Convention* is that a person determined to be a refugee cannot be penalised on account of their illegal entry or presence if they have come directly from a territory where their life or freedom was threatened and have presented themselves without delay and show good cause for their illegal entry or presence. As noted in our previous submission, detention under the Act is administrative, not criminal nor punitive and neither seeking asylum nor entering Australia unlawfully is a criminal offence under Australian domestic law. Further, as mentioned previously, Ms Tran was assessed against Australia's protection obligations on three occasions and it was found that Australia did not owe her protection.

The Australian Government also respectfully disagrees with the Working Group's assertion that the requirement for Ms Tran to sign the request to allow her child to remain with her as a "guest" in the detention facility is nothing more than an attempt to circumvent the prohibition of detention of children in the context of migration. As stated in our previous submission, [redacted] is a lawful non-citizen, as she is currently the holder of a Temporary (Skilled) (subclass 457) visa (granted as a dependant of her father who also holds a Temporary (Skilled) (subclass 457) visa. [redacted] is not detained, but rather resides at the detention facility as a guest with the consent of her mother. Ms Tran also consulted with her lawyer and husband before signing the consent form. As noted in our last submission, [redacted] is eligible to claim both Vietnamese and Mauritian citizenship as a child born to citizens of these states and we reiterate that it is a matter for Ms Tran and her husband to decide where [redacted] resides, and they may request that she depart the detention facility at any time.

For reasons given in our submission of 17 December 2018, it is the position of the Australian Government that Ms Tran's immigration detention is justifiable. It is a matter for the Australian Government to determine who may enter its territory and under what conditions, including by requiring that a non-citizen hold a visa in order to lawfully enter and remain in Australia and that in the circumstance that a visa is not held, a non-citizen is subject to immigration detention.

The Australian Government has always engaged in good faith with the Working Group. The Australian Government respectfully disagrees with the recommendations set out in paragraphs 119 to 125 of the Working Group's Opinion of 24 April 2019 and accordingly has not acted upon them.

Yours sincerely

Elizabeth Wilde
Chargé d'affaires ad interim