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Committee Secretary
Select Committee on Australia's Disaster Resilience
Parliament of Australia

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Dear Committee Secretary,

As the Director of the Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney, I am pleased to provide a submission to the inquiry into Australia's disaster resilience.

The Kaldor Centre is the world's first and only research centre dedicated to the study of international refugee law. The Centre was established in October 2013 to undertake rigorous research to support the development of legal, sustainable and humane solutions for displaced people, and to contribute to public policy involving the most pressing displacement issues in Australia, the Asia-Pacific region and the world. A core area of the Centre's expertise is mobility in the context of climate change and disasters. This includes evacuations, which are the focus of the present submission.

This submission argues that Australian laws and policies do not pay sufficient attention to the propensity for evacuations to displace people, nor to relevant international legal frameworks that protect people's rights and needs when they are displaced. It provides recommendations for reform, noting that there are ready-made international frameworks that could enhance Australia's protection responses before, during and after evacuations.

The submission draws directly on the following article: Jane McAdam, '[Exploring the Legal Basis in Australia for Evacuations from Disasters: Avoiding Arbitrary Displacement](#)' (2022) 45 *UNSW Law Journal* 1329–66 (which provides a more detailed examination of state and federal evacuation powers in Australia and makes recommendations for legal and policy reform). A companion piece may also be of interest to the Committee: Jane McAdam, '[Evacuations and Relocations after Disasters: Safeguarding Lives and Rights](#)' (2022) 37 *Australian Environment Review* 46–49 (which argues that Australian authorities should undertake a more holistic assessment of the hazards facing people living in disaster-prone areas).

Please do not hesitate to contact me if I can be of further assistance.

Yours sincerely,

Professor Jane McAdam AO

1. Australia's devastating bushfires of 2019–20 and unprecedented floods in 2022 saw record numbers of evacuations. As climate change amplifies the frequency and/or severity of extreme weather events, evacuations are likely to become increasingly common. If governments are to bolster resilience, avert displacement and plan effectively, 'more needs to be done when evacuations are required to ensure that the community, especially the more vulnerable, are appropriately looked after'.ⁱ Physically moving people out of harm's way is only one aspect: recognizing and protecting people's rights is the more fundamental challenge.
2. Since evacuations can displace people, sometimes for prolonged periods, it is crucial that law- and policymakers 'see' the displacement aspect. Otherwise, prevention and preparedness strategies may be ill-targeted and costly,ⁱⁱ and people's protection needs may be overlooked.
3. By conceptualizing evacuations as a form of displacement, it becomes clear that Australia's evacuation frameworks pay insufficient attention to protection needs that may arise – particularly for groups that may find themselves in vulnerable situations, such as children and people with a disability, and for people whose displacement becomes prolonged. None of Australia's national, state or territory legislation or guidelines engages directly with international law or standards at all – not even with domestic human rights charters (in Victoria, Queensland and the ACT). While Australian law safeguards the right to life in the emergency phase, it is otherwise silent on the protection needs of evacuees.
4. International legal standards reflected in the Guiding Principles on Internal Displacement,ⁱⁱⁱ and human rights law more generally,^{iv} are directly relevant to protecting evacuees – before, during and after evacuation. Incorporating more overt references to such standards into Australian legal, policy and operational frameworks on evacuations would give greater prominence to (and promote awareness of) the human rights obligations that Australian authorities are required to respect – and provide greater measures of accountability. At the very least, state, territory and federal guidelines on evacuations should acknowledge and reflect Australia's obligations under international law, and underscore the importance of understanding and responding to evacuations within a human rights framework. This would enable authorities to confront protection gaps head-on and thereby enhance the promotion of people's rights, well-being and recovery.
5. Under international law, States have a fundamental, non-derogable duty to protect the right to life.^v This may require the authorities to evacuate people from foreseeable hazards,^{vi} including with proportionate force in limited circumstances,^{vii} and with 'full respect for the life, dignity, liberty, and security of evacuees.'^{viii} Such restrictions on people's right to free movement are only lawful if 'necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others'.^{ix} Evacuations will constitute arbitrary displacement unless they are required to ensure 'the safety and health of those affected'.^x
6. The Convention on the Rights of Persons with Disabilities is even more explicit in requiring States to take 'all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.'^{xi} People with disabilities may be especially vulnerable to displacement, including on account of '[l]imited knowledge of evacuation processes, a lack of accessible evacuation shelters and delays in fleeing because of functional impairments'.^{xii} This is why the Sendai Framework for Disaster Risk Reduction encourages States to adopt 'an inclusive and

all-of-society disaster risk management',^{xiii} recognising the important role that women, children, people with disabilities, older people, indigenous peoples, and migrants can play when it comes to managing disaster risk, and designing and implementing disaster risk reduction policies. Indeed, one of the guiding principles of the Sendai Framework stresses the need for 'inclusive, accessible and non discriminatory participation' in disaster risk reduction,^{xiv} noting the importance of integrating a 'gender, age, disability and cultural perspective ... in all policies and practices' and promoting 'women and youth leadership'.^{xv} Other international guidance emphasises that communities should be involved in the consultation and planning stages to ensure that relevant local input and knowledge is incorporated, and to heighten the chances that people will be aware of, and 'on board' with an evacuation plan if it needs to be executed.^{xvi} In all cases, clear communication is essential.^{xvii}

7. The greater the risk to life, the greater the imperative for States to intervene.^{xviii} That is why, as an emergency measure, evacuations require particularly careful oversight: the authorities are given extraordinary powers that go far beyond what the law ordinarily permits. Under international law, any restrictions on human rights are permissible only to the extent that they are necessary, reasonable, proportionate to the risk and based on clear legal criteria.^{xix} Without careful monitoring, there is a danger that evacuations may transform into protracted displacement or de facto relocations. Indeed, the Guiding Principles on Internal Displacement, which reflect binding international law and provide detailed guidance for the protection and assistance of those 'forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of ... natural or human-made disasters',^{xx} provide that evacuations from disasters will be arbitrary unless necessary to protect people's health and safety.^{xxi} Thus, an evacuation that is permissible in the face of imminent harm may become unlawful if people are displaced for longer than is necessary and face on-going rights restrictions. It is therefore imperative that protective legal principles are incorporated into the conception, planning and implementation of evacuations.
8. The UN Guiding Principles on Internal Displacement provide a ready-made framework for action that could enhance Australia's protection responses before, during and after an evacuation has been carried out. A report published in the aftermath of Hurricane Katrina in the US examined in detail how the Guiding Principles could 'greatly strengthen the U.S. government's ability to quickly, adequately and equitably address the ongoing crises that continue to plague tens of thousands of people displaced'.^{xxii} It emphasized that utilizing this framework would better enable the US to recognize displaced people; bring domestic law into line with the Guiding Principles (and, in turn, with international law); enhance protection from displacement; enhance protection during displacement; direct humanitarian assistance; safeguard the right to return, resettlement and reintegration; and improve collection of and access to information.^{xxiii} These recommendations are pertinent to the Australian context as well, where the invisibility of 'evacuation as displacement' means a host of protection issues may be ignored.
9. The multi-jurisdictional nature of disaster response in Australia means that gaps, overlap and confusion may arise between local, state, territory and federal actors.^{xxiv} During the 2019–20 bushfires, the challenges created by differing policies and approaches to evacuations were all too clear, including confusion caused by different terminology and people not being allowed to cross a state border to their nearest evacuation centre.^{xxv} Some of the practical difficulties were partly attributable to multiple jurisdictions, actors and policies; even inconsistencies in data collection and sharing made coordinating approaches problematic.^{xxvi} International guidelines have not addressed these issues in any depth, noting only the need for cooperation where

multiple domestic actors are involved.^{xxvii} Given that the federal government retains ultimate responsibility under international law to ensure that people are not arbitrarily displaced and that their right to life (among others) is protected,^{xxviii} this is clearly an area that warrants further attention.

10. Finally, consistent with global trends, poor data-collection practices in Australia mean that we have an incomplete picture of what happens to evacuees after the initial emergency phase.^{xxix} The Internal Displacement Monitoring Centre has noted that what little data is gathered tends to lack detail about people's background, socio-economic status and so on,^{xxx} which hampers the development of well-targeted policies and interventions. Accurate data is vital 'to learn lessons and improve planning, preparedness and responses to future displacement crises'^{xxxi} and 'to foster the meaningful participation of various groups in the planning and design of support programmes'.^{xxxii} Australian authorities should also be transparent about their decisions and calculations in responding to disasters, particularly when they involve restrictions on people's human rights so that their necessity, proportionality and reasonableness can be assessed.
11. Without a clear rights-based framework, the emergency nature of evacuations means that governments may provide initial assistance but end up evading their longer-term responsibilities, leaving people in legal, physical and emotional limbo. It is imperative that protection principles derived from international refugee, human rights and humanitarian law are incorporated into the conception, planning and implementation of evacuations to safeguard against such risks.

ⁱ 2022 Flood Inquiry: Volume One: Summary Report (29 July 2022) 5 <https://www.nsw.gov.au/nsw-government/projects-and-initiatives/floodinquiry>

ⁱⁱ For instance, they may not take into account the economic costs of evacuations, especially if livelihoods are disrupted over a prolonged period. Following the 2019–20 bushfires, it was estimated that the cost of providing a year's temporary housing for those who lost their homes was A\$60–72 million, and for each day that a person could not work, the loss was A\$705 per person: Internal Displacement Monitoring Centre (IDMC), *The 2019–2020 Australian Bushfires: From Temporary Evacuation to Longer-Term Displacement* (September 2020) 4 www.internaldisplacement.org/publications/the-2019-2020-australian-bushfiresfrom-temporary-evacuation-to-longer-term.

ⁱⁱⁱ UN Guiding Principles on Internal Displacement, UN doc E/CN.4/1998/53/Add.2 (11 February 1998).

^{iv} In addition to international treaty law, see *The MEND Guide: Comprehensive Guide for Planning Mass Evacuations in Natural Disasters* (IASC Camp Coordination and Camp Management Cluster, 2014); Inter-Agency Standing Committee (IASC) Operational Guidelines on the Protection of Persons in Situations of Natural Disasters (Brookings–Bern Project on Internal Displacement, January 2011); Sphere Association, *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response* (4th edn 2018); Sendai Framework for Disaster Risk Reduction 2015–2030, GA Res 69/283, UN doc A/RES/69/283 (23 June 2015) annex II, [33(h)], [33(m)]. Note also International Law Commission (ILC), *Protection of Persons in the Event of Disasters: Draft Articles and Commentary*, UN doc A/71/10 (2016). While evacuations are not mentioned expressly, the draft articles do detail States' responsibilities to undertake preventive and remedial action in the context of disasters. The *MEND Guide* provides the comprehensive international guidance on evacuations. Although specifically developed for 'mass evacuations' – namely, 'the evacuation of whole communities, neighborhoods or geographical areas' (17) – it is relevant to all types of evacuations.

^v International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR), art 6; Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (CRC), art 6; Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) (CRPD), art 10.

^{vi} 'The duty to protect the life and security of persons entails, in particular, an obligation to evacuate persons from zones where they face imminent dangers for life and limb caused by a disaster. A failure to assist persons who cannot leave such zones on their own may amount to a human rights violation if competent authorities knew or should have known the danger and would have had the capacity to act': Walter Kälin, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons: Protection of Internally Displaced Persons in Situations of Natural Disasters*, UN doc A/HRC/10/13/Add.1 (5 March 2009) para 42.

^{vii} *MEND Guide* (n iv) 30–31. See also Bruce Burson, Walter Kälin, Jane McAdam and Sanjula Weerasinghe, 'The Duty to Move People out of Harm's Way in the context of Climate Change and Disasters' (2018) 37(4) *Refugee Survey Quarterly* 379; Guiding Principles (n iii) principle 6(2)(d).

^{viii} Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, International Law Association Resolution 6/2018 (August 2018) principle 5(3).

^{ix} ICCPR, art 12(3); Universal Declaration of Human Rights, GA Res 217A(III), 10 December 1948, art 13. Note UN Human Rights Committee (HRC), 'General Comment No. 27: Article 12 (Freedom of Movement)', UN doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) para 7: 'Subject to the provisions of article 12, paragraph 3, the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement.' See further Burson et al (n vii) 395ff. For an overview of relevant international standards and legal considerations, see *MEND Guide* (n iv) 27–33.

^x Guiding Principles (n iii) principle 6(2)(d); see also principles 6(3), 8; IASC Operational Guidelines (n iv) A.1.5.

^{xi} CRPD, art 11. The Human Rights Committee (n ix) para 24 notes: 'Persons with disabilities, including psychosocial and intellectual disabilities, are also entitled to specific measures of protection so as to ensure their effective enjoyment of the right to life on equal basis with others. Such measures of protection shall include the provision of reasonable accommodation when necessary to ensure the right to life, such as ensuring access of persons with disabilities to essential facilities and services, and specific measures designed to prevent unwarranted use of force by law enforcement agents against persons with disabilities', referring *inter alia* to CRPD, arts 5(3), 9, 10. See also Guiding Principles (n iii) principle 4(2).

^{xii} IDMC, *Global Report on Internal Displacement (GRID) 2021* (IDMC, 2021) 81 (fn omitted).

^{xiii} Sendai Framework (n iv) art 36(a).

^{xiv} *Ibid* art 19(d).

^{xv} *Ibid*.

^{xvi} See IASC Operational Guidelines (n iv) A.1.4; Australian Institute for Disaster Resilience (AIDR), *Evacuation Planning* (Australian Disaster Resilience Handbook Collection, Handbook 4, 2017) 3–6.

^{xvii} *Royal Commission into Natural Disaster Arrangements* (Final Report, October 2020) 269. This is a feature of state evacuation manuals. For instance, Queensland's Evacuation Manual contains instructive lists of 'key messages' for decision-makers to consider in evacuation planning, ranging from political to economic to legislative: Queensland Government, *Evacuation: Responsibilities, Arrangements and Management Manual. 1.190* (Manual, 18 September 2018) 11–12.

^{xviii} Burson et al (n vii) 387.

^{xix} See eg American Association for the International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (April 1985).

^{xx} Guiding Principles (n iii) para 3; see also para 2.

^{xxi} *Ibid* principle 6(2)(d). The Guiding Principles set out the rights and guarantees of people who are displaced within their own countries, drawing on international human rights law, refugee law and humanitarian law to 'restate existing norms and seek to clarify grey areas and fill in the gaps': 'Introductory Note by the Representative of the Secretary-General on Internally Displaced Persons, Mr Frances M Deng' (June 2001) in Guiding Principles (n iii). See also HRC, 'General Comment No. 35: Article 9 (Liberty and Security of Person)', UN doc CCPR/C/GC/35 (October 2014) para 12 (fn omitted): 'The notion of "arbitrariness" is not to be equated with "against the law", but must be

interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, 24 as well as elements of reasonableness, necessity and proportionality.'

^{xxii} Chris Kromm and Sue Sturgis, *Hurricane Katrina and the Guiding Principles on Internal Displacement: A Global Human Rights Perspective on a National Disaster* (Institute for Southern Studies, 2008) 5.

^{xxiii} *Ibid* 28–29.

^{xxiv} It has been observed that in crises, federal systems of government face particular 'challenges related to horizontal and vertical collaboration and coordination': Davia Cox Downey and William M Myers, 'Federalism, Intergovernmental Relationships, and Emergency Response: A Comparison of Australia and the United States' (2020) 50(6–7) *American Review of Public Administration* 526, 526 (fns omitted).

^{xxv} Public submissions to the Royal Commission detailed the frustration of border communities when it came to their evacuation experiences, for instance: *Royal Commission* (n xvii) 281. There was considerable confusion (even at times among emergency services personnel) caused by different terminology used to describe sheltering facilities in NSW and Victoria, including the level of protection that particular facilities could provide: *Royal Commission* (n xvii) 274, 276.

^{xxvi} Royal Commission into National Natural Disaster Arrangements, *Interim Observations* (31 August 2020) para 10.

^{xxvii} See eg *MEND Guide* (n iv) 23, 27, 32, 41ff.

^{xxviii} ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, UN doc A/56/10 (2001), 35: 'In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law.' See also *Guiding Principles* (n iii) principle 3.

^{xxix} IDMC 2021 (n xii) 78; IDMC 2020 (n ii) 20.

^{xxx} IDMC 2020 (n ii) 20.

^{xxxi} IDMC 2020 (n ii) 20.

^{xxxii} IDMC 2021 (n xii) 79.