

**NATIONS UNIES  
HAUT COMMISSARIAT DES NATIONS UNIES  
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**PROCEDURES SPECIALES DU  
CONSEIL DES DROITS DE L'HOMME**

**UNITED NATIONS  
OFFICE OF THE UNITED NATIONS  
HIGH COMMISSIONER FOR HUMAN RIGHTS**

**SPECIAL PROCEDURES OF THE  
HUMAN RIGHTS COUNCIL**

**Mandates of the Special Rapporteur on the human rights of migrants and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health**

REFERENCE: AL Health (2002-7) G/SO 214 (106-10)  
AUS 1/2011

26 April 2011

Excellency,

We have the honor to address you in our capacities as Special Rapporteur on the human rights of migrants and Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health pursuant to Human Rights Council resolutions 8/10 and 15/22 respectively.

In this connection, we would like to bring to your Excellency's Government's attention information we have received about **the mandatory detention system in Australia**.

According to information received;

Mandatory detention for unauthorized arrivals was first introduced in Australia through the Migration Amendment Act of 1992. The legislation was amended in 1994 (Migration Legislation Amendment Act (No. 4) 1994) retaining its mandatory character and reinforcing the indefinite character of the detention regime. These amendments ensured that asylum seekers arriving in Australia without prior authorization could be detained for unspecified and prolonged periods of time. Allegedly, as of March 2011, there were 6500 people in immigration detention in Australia, as many as 1000 of them, children. Reports indicate that more than forty percent of them had been detained for longer than six months. More than 200 people, including children, had been detained for longer than twelve months. Reports indicate that some persons have been held in detention for as long as 7 years.

In 2008 the Australian Government launched new guidelines regarding mandatory detention. According to the "New Directions in Detention" immigration detention should only be used for the shortest practicable period and asylum seekers should only be held in detention while health, identity and security checks are conducted. These "New Directions in Detention" recognize that once health, security and

identity checks have been successfully completed “continued detention while immigration status is resolved is unwarranted.” However, reports indicate that these guidelines are yet to be implemented.

In addition, reports indicate that the Government continues to implement one of the strictest immigration detention regimes in the world. Allegedly there are no possibilities to challenge the legality of migrants’ detention in court. It is further reported that the Australian legal system does not provide access to such review of the legality of detention. Although persons in immigration detention may be able to seek judicial review of the domestic legality of their detention, Australian courts have no authority to order that a person be released from immigration detention on the grounds that the person’s detention is found to be arbitrary. To avoid being arbitrary, detention must be necessary and reasonable in all the circumstances of the case, and a proportionate means of achieving a legitimate aim. It is reported that the mandatory detention system fails to provide an individual assessment mechanism to determine whether the immigration detention of each person is necessary, reasonable or proportionate.

Although each person in detention is entitled to medical care and treatment, concern is expressed about the health condition of detainees and access to adequate health care in a number of detention centres. It is alleged that persons detained in Leonora Detention Centre are held in small and remote locations. For certain medical services, detainees require a referral and an escorted transportation. It is reported that detainees in the Darwin detention centre express extreme frustration about the length of time they have been in detention and the indefinite nature of this detention, which is allegedly affecting their psychological state of mind. It is reported that six deaths have occurred in seven months in detention centres; allegedly five of these were by suicide. It is further reported that on 29 March 2011 a 19-year-old detainee allegedly committed suicide after a period of ten months in detention in Curtin.

While we do not wish to prejudice the accuracy of these allegations, we urge your Excellency’s Government to take all necessary measures to guarantee that the human rights of the persons concerned are respected and that accountability of any person found responsible for the alleged violations is ensured. We also request that your Excellency’s Government adopts effective measures to prevent the recurrence of these acts.

We would like to draw attention of your Excellency’s Government to the International Covenant on Civil and Political Rights (ICCPR), ratified by Australia, which provides that every individual has the right to life and security of the person, that this right shall be protected by law, and that no person shall be arbitrarily deprived of his or her life (article 6). In this connection, we would also like to refer to article 9 which states that “1. Everyone has the right to liberty and security of persons. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone arrested or detained on a criminal charge should be brought promptly before a judge or

other officer authorized by law to exercise.” Furthermore, paragraph 4 of article 9 ICCPR provides that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

We wish to refer your Government to article 12 of the International Covenant on Economic, Social and Cultural Rights (acceded to on 18 December 1972) that specifically provides for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This includes an obligation on the part of all States parties to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially the most vulnerable or marginalized sections of the population, without discrimination. In addition, we would like to draw your attention to General Comment No. 14 of the Committee on Economic, Social and Cultural Rights (E/C.12/2000/4), which holds that States are under the obligation to respect the right to health by, inter alia, refraining from interfering directly or indirectly with the enjoyment of the right to health and to refrain from denying or limiting equal access for all persons to preventative, curative and palliative health services.

We would like to take this opportunity to recall recent concluding observations provided by international human rights mechanisms regarding the mandatory detention system. In 2009, the Committee on Economic, Social and Cultural Rights encouraged the State party to implement without delay its new “seven values” policy, and carry out the Australian Human Rights Commission's recommendations adopted in its 2008 Immigration Detention Report, including the repeal of the mandatory immigration detention system and the closure of the Christmas Island Detention Centre. In the same year, the Human Rights Committee made similar recommendations, and added that the State party should enact in legislation a comprehensive immigration framework in compliance with the Covenant. We also recall that your Excellency's Government has undertaken to examine recommendations made regarding the mandatory immigration detention system during the Universal Periodic Review, and to provide responses no later than the 17th session of the Human Rights Council.

As it is our responsibility under the mandates provided to us by the Human Rights Council to seek to clarify all cases brought to our attention, we would be grateful for your cooperation and your observations on the following matters:

1. Are the facts alleged in the above summary of the case accurate?
2. Please explain how the mandatory detention system provides individual assessment mechanisms in order to determine the necessity and reasonableness of detention of persons in immigration detention. In particular, please provide information on how review of the legality of detention is being made available for persons in immigration detention and how domestic courts can order a person to be released from immigration detention on the grounds that this detention may be arbitrary.

3. What measures are being taken to ensure the enjoyment of the right to health of persons in immigration detention?

We would appreciate a response within sixty days. We undertake to ensure that your Excellency's Government's response to each of these questions is accurately reflected in the reports we will submit to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Jorge A. Bustamante  
Special Rapporteur on the human rights of migrants

Anand Grover  
Special Rapporteur on the right of everyone to the enjoyment of the  
highest attainable standard of physical and mental health