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HAUT COMMISSARIAT DES NATIONS UNIES  
AUX DROITS DE L'HOMME**

**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**

**Mandate of the Special Rapporteur on the human rights of migrants**

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Excellency,

I would like to express sincere thanks for the replies of Your Excellency's Government to the letters sent by the mandate of the Special Rapporteur on the human rights of migrants on 26 April 2011 and 26 August 2011 respectively. Constructive and continuous dialogue with Governments is indispensable for the effective and successful implementation of my mandate as outlined in Human Rights Council resolution 17/12.

In view of the separate but interlinked issues raised in the two letters – namely mandatory detention of irregular migrants and the Agreement between Australia and Malaysia on Transfer and Resettlement – and Your Excellency's Government replies thereto, kindly allow me to address the two issues separately while concluding with some general remarks and concerns.

**Response to Your Excellency's Government's letter dated 23 September 2011**

**Mandatory detention regime**

In regard to the mandatory detention regime, I would like to first and foremost welcome the announcement of Your Excellency's Government on 25 November 2011 to issue bridging visas to some asylum-seekers and undocumented migrants arriving by boat. I commend this shift in policy which will enable a number of migrants arriving by boat and asylum-seekers currently in detention to live in the community with the right to work and access health services while their asylum claims are being considered. I am also pleased at the announcement that Your Excellency's Government will continue to assess the detention population for suitability of community placement. I note that this announcement follows an earlier statement by Your Excellency's Government that "eligible boat arrivals who do not pose risks to the community will be progressively considered for community placement on bridging visas while their asylum claims are assessed".

I also note the positive steps taken by Australia as referred to in Your Excellency's Government's reply of 23 September 2011. In particular, I welcome the

New Directions in Detention Policy of 2008 which provides that immigration detention of unlawful entry is only to be used as a last resort and for the shortest practicable time. I take note in this regard of the reduction in the number of people in immigration detention from 6,500 in January 2011 to 5,780 in July 2011, especially children, from 1,000 to 872.

While appreciating these measures, I regret to note that Your Excellency's Government remains committed to maintaining a mandatory detention policy. In this regard, I wish to recall Your Excellency's Government of the recommendation by international human rights bodies – notably the Committee on Economic, Social and Cultural Rights (E/C.12/AUS/CO/4 (2009), para. 25), the Human Rights Committee (CCPR/C/AUS/CO/5 (2009), para. 23) and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/14/20/Add.4, p. 23) – as well as by the Australian Human Rights Commission (AHRC), that the policy of mandatory detention be reconsidered and repealed. I support fully these recommendations which remain relevant still today.

The urgency and relevance of these recommendations are reinforced by reports on the lack of implementation of the New Directions Policy, the building of new detention centres and recent reports on suicides of persons held in mandatory detention. While appreciating the policies and programmes in place to improve the health of persons held in immigration detention, especially the mental health of detainees, I am concerned that these measures do not address the main cause of mental ill-health and psychological distress of immigrant detainees, namely the prolonged and potentially indefinite nature of administrative detention, which is largely due to the lack of defined timeframes on such detention provided in law. In this regard, I note with utmost concern that, as at 31 October 2011, 38,7 per cent of persons in immigration detention had been detained for 12 months or more, out of which 14 per cent had spent 548 days or more in detention.<sup>1</sup>

Allow me to recall in this regard that research on various alternatives to detention has found that over 90 per cent compliance or cooperation rates can be achieved when persons are released to proper supervision and facilities.<sup>2</sup> A correlation has been found between some alternatives to detention and voluntary return rates. In addition, there is reportedly no empirical evidence that immigration detention deters irregular migration, or discourages people from seeking asylum. In fact, treating migrants and asylum-seekers with dignity and respect for their human rights throughout the asylum or immigration process contributes to constructive engagement in these processes.<sup>3</sup> I would like to stress that alternatives to detention should not be used as alternative forms of *detention* and neither should alternatives *to detention* become alternatives to release. Alternative measures may also impact on the enjoyment of human rights and should therefore be in line with the principles of necessity, proportionality, legitimacy and other key human

<sup>1</sup> Government of Australia, Department of Immigration and Citizenship, *Immigration Detention Statistics Summary*, 31 October 2011, p.8.

<sup>2</sup> <http://www.ohchr.org/Documents/Issues/Migration/Events/SummaryConclusions.pdf> . Please see: <http://www.ohchr.org/Documents/Issues/Migration/Events/SummaryConclusions.pdf>

<sup>3</sup> Summary Conclusions of the UNHCR-OHCHR Global Roundtable on alternatives to detention of refugees, asylum seekers, migrants and stateless persons, 11-12 May 2011 (hereinafter "Summary Conclusions 2011").

rights principles.<sup>4</sup> Alternatives to detention include registration and/or deposit of documents, bond/bail, reporting conditions, community release and supervision, designated residence, electronic monitoring or home curfew.<sup>5</sup>

I would therefore greatly appreciate information by Your Excellency's Government on steps taken to consider repealing the mandatory detention regime, as recommended by international and national bodies, in favour of human rights-respecting alternatives to detention.

Of particular relevance in this regard is General Assembly resolution 65/212 of 21 December 2010 which reaffirms "the duty of States to effectively promote and protect the human rights and fundamental freedoms of all migrants, especially those of women and children, regardless of their immigration status". The resolution calls upon all States to "review detention policies in order to avoid excessive detention of irregular migrants and to adopt, where applicable, alternative measures to detention" (para. 4). I also wish to refer to the recommendation to Australia issued on 19 August 2011 by the United Nations High Commissioner for Refugees (UNHCR) that "all efforts should be made to avoid the situation of protracted detention and possibility of indefinite detention" and that "alternatives to the detention of an asylum-seeker until status is determined should be considered".<sup>6</sup> Allow me furthermore to recall Your Excellency's Government in this respect that the United Nations Working Group on Arbitrary Detention has determined that immigration detention must in no case be for a potentially indefinite period of time (A/HRC/7/4, para. 52).

#### Children in community detention

I warmly welcome information contained in the reply of Your Excellency's Government that no children are held in immigration detention centres in line with the 2008 New Directions in Detention Policy. Nevertheless, I note that as at 31 October 2011, 370 children were living in "alternative places of detention" (out of which 128 on Christmas Island), such as immigration residential housing, immigration transit accommodation, and 512 residing in community detention arrangements.<sup>7</sup> Hence, 812 children were in some form of detention as at 31 October 2011. While further noting information contained in Your Excellency's reply that "alternative places of detention" are designed to ensure the protection of the human rights of children, I wish to recall that as a matter of principle no migrant children should be subjected to detention.<sup>8</sup> The

<sup>4</sup> Summary Conclusions 2011, paras. 18, 19.

<sup>5</sup> Ibid., para. 20.

<sup>6</sup> Submission by the Office of the United Nations High Commissioner for Refugees, Inquiry into Australia's Immigration Detention Network, Joint Select Committee on Australia's Immigration Detention Network, 19 August 2011 (hereinafter "UNHCR Submission 2011").

<sup>7</sup> Immigration Detention Statistics (no. 2 above), p. 4, information available on <http://www.immi.gov.au/managing-australias-borders/detention/facilities/about/immigration-detention-facilities.htm>, and UNHCR Submission 2011, p. 7.

<sup>8</sup> Article 37 of the Convention on the Rights of the Child and Committee on the Rights of the Child, Committee on the Rights of the Child, General Comment No. 10 on children's rights in juvenile justice; Commissioner for Human Rights, Position on the rights of minor migrants in an irregular situation. Strasbourg, 25 June 2010. CommDH/PositionPaper(2010)6, p. 5. See also Global Roundtable on

consequences of detention on their mental and physical development are incalculable. As stated by the Committee on the Rights of the Child, no child should be detained based on their migratory status or irregular entry to the country (General Comment No. 6 on Treatment of Unaccompanied and Separated Children outside Their Country of Origin, CRC/GC/2005/6, para. 61). I therefore share the deep concern expressed by UNHCR on 19 August 2011 about the on-going detention of children in Australia.<sup>9</sup>

I also note with certain concern information in the fourth periodic report of Australia to the Committee on the Rights of the Child that the July 2008 amendments were undertaken to ensure “that the best interests of *minor children* were taken into account and that any alternatives to the detention of children were considered in administering the relevant provisions” (CRC/C/AUS/4, para. 247, emphasis added). According to the report, the Government “works with NGOs to make sure that *clients* placed in Community Detention arrangements are properly supported” (CRC/C/AUS/4, paras. 248, emphasis added). Kindly allow me to recall Your Excellency’s Government that all persons under the age of 18 are children, in line with article 1 of the Convention on the Rights of the Child, ratified by Your Excellency’s Government on 17 December 1990, and as such entitled to the special protection and care which are obligations primarily of the State.

In this respect, I would very much appreciate information from Your Excellency’s Government on all measures taken to ensure alternatives *to detention* – rather than alternative forms *of detention* – for all migrant, asylum-seeking and refugee children residing in Australia.

#### Deaths and suicides in detention

I note with serious concern that during the period from 1 July 2010 to 27 April 2011 six deaths have been reported in immigration detention centres. In this respect, I would be grateful for information on any outcome of the coronial enquiries into the six deaths reported as well as measures taken by the State to prevent further cases of ill-treatment, deaths, suicides and self-harm. In this respect, I would also appreciate information from Your Excellency’s Government on the alleged suicide committed by a 19-year-old immigration detainee in Curtin Immigration Detention Centre as referred to in the letter dated 26 April 2011. I furthermore take note with utmost concern of a fourth reported suicide case at the Villawood Detention Centre since 2010 of a Sri Lankan refugee while awaiting security clearance from the Australian Security Intelligence Office before his release.

#### Individual assessment mechanism to determine the necessity and reasonableness of detention

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Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons Geneva, Switzerland, 11-12 May 2011, para. 7.

<sup>9</sup> UNHCR Submission 2011, p. 7.

I would appreciate information from Your Excellency's Government on the specific provision in domestic legislation which stipulates that "a person in immigration detention can seek judicial review of the lawfulness of their detention under domestic law in the Federal Court or High Court of Australia" and the practical implementation of such provision. I am concerned that a policy of mandatory detention leaves no or little consideration to the particular circumstances of each detainee's case with full application of procedural safeguards applicable to persons deprived of their liberty.

In this regard, I would also welcome information on the system in place to ensure that all immigrant detainees are promptly informed about their right to judicial review of his/her detention and other fundamental legal safeguard and in a language understandable to him/her. This is particularly pertinent in the light of reports on lack of access to adequate legal assistance or judicial review in respect of decisions made in excised offshore places, including decisions to deny asylum claims and deportation of asylum-seekers. Allow me to recall Your Excellency's Government in this regard that the Working Group on Arbitrary Detention considers as arbitrary deprivation of liberty "when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without possibility of administrative or judicial review or remedy" (A/HRC/16/47, para. 8(d)).

I wish to refer in this context to the concern expressed in my address to the General Assembly on 31 October 2011 concerning the legal paradox that "while some States have criminalized irregular migration [...] they have indicated no intent of providing the migrants all the guarantees that are traditionally embedded in criminal law".

### **Response to Your Excellency's Government's letter dated 14 October 2011**

#### **Offshore processing**

I take note of the High Court decision (M70/2011 and M106/2011) on the unlawfulness of the "Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement" as well as the temporary decision of Your Excellency's Government that requests of irregular maritime arrivals (IMAs) to asylum or to remain in Australia will be processed on-shore for the time being.

Nevertheless, I note with concern information that on 21 September 2011 Your Excellency's Government introduced legislation to enable the transfer of IMAs for processing their asylum claims in third countries, including Malaysia. It is also my understanding that the Agreement with Malaysia remains a policy of Your Excellency's Government. Retaining this policy would imply that Your Excellency's Government holds as acceptable off shore processing of individuals in third countries that are not party to the 1951 Refugee Convention nor to the Convention against Torture or the International Covenant on Civil and Political Rights. Allow me to recall that these international treaties provide for the strongest legal protection against refoulement.

In this regard, I take note of Your Excellency's Government's reference to the November 2010 Policy Protection Paper of UNHCR on *Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing* which discusses the circumstances where it may be appropriate for a country to transfer responsibility for asylum seekers to another country. Allow me to recall that this paper stresses that "claims for international protection may be processed in and by a State other than the State that has carried out an interception operation if the third State is a party to the 1951 Convention and has a fair and effective asylum system in place". This principle is reiterated in paragraph 43 of the same document which underscores that "[t]ransfer of responsibility to a third State is acceptable *only if that State is a party to the 1951 Convention and has an asylum procedure in place that meets international standards*" (emphasis added). This is also in keeping with the international obligations assumed by Your Excellency's Government as a State party to the 1951 Refugee Convention, the International Covenant on Civil and Political Rights and the Convention against Torture.

In view of the above, I would appreciate to learn whether the Government of Australia would be in a position to reconsider its policy with respect to entering offshore processing agreements with countries that are not parties to the 1951 Convention, 1951 Refugee Convention, the International Covenant on Civil and Political Rights and the Convention against Torture, including Malaysia. In this regard, I would also like to inquire about any steps taken by Your Excellency's Government towards repealing provisions in the 1958 Migration Act referring to off shore places or procedures.

I also consider this an appropriate opportunity to inquire about steps taken by Your Excellency's Government to incorporate the principle of non-refoulement into its national legislation (CAT/C/AUS/Q/5, para. 15).

I wish to thank Your Excellency's Government for the copy of the MOU signed on 19 August 2011 between Australia and Papua New Guinea concerning the establishment of an Assessment Centre. In particular, I note that the Memorandum aims at combating people smuggling and irregular migration in the Asia-Pacific and to provide a visible deterrent to people smugglers. While noting that the implementation of the MOU will be conducted "in accordance with international law and international obligations", I remain concerned that individual protection does not feature as a key element of the Memorandum. The absence of specific reference to international human rights law and to the prohibition of refoulement, a rule of customary international law, as guiding principles raises legitimate concerns regarding adequate safeguards in its implementation.

Concerning this MOU, I would be grateful if Your Excellency's Government could keep me informed on the measures that may be taken to implement this agreement in conformity with international human rights law and safeguards to ensure protection of individual asylum-seekers.

#### Other concerns

Considering the above concerns in their entirety, kindly allow me to take this opportunity to further request information on the Immigration Program in place in Australia. It is my understanding that the first component of this policy, the Migration Program, is set at 168 700 places, divided between: (i) family migrants who are sponsored by family members already in Australia (54,550 places); (ii) skilled migrants who gain entry essentially because of their work or business skills (113,850 places) and (iii) special eligibility migrants and people who applied under the Resolution of Status category and have lived in Australia for 10 years (300 places). While commending the increase in the number of visas granted under the second pillar of Australia's immigration programme, the Humanitarian Program for refugees and others in refugee-like situations, over the past five years, the migration policy and related detention regime remain problematic from a human rights perspective.

I consider that under such a restrictive scheme on the number of eligible immigrants there is little room to respond to humanitarian and protection needs as well as to accept diversified migration which can contribute economically, socially and culturally to Australia as a country of destination. I am of the view that such a selective migration policy may have implications on the maintenance of the mandatory detention regime and to the retained policy of offshore processing to countries which are not signatories to core international human rights treaties. In this regard, it is my view that the "circumstances" referred in UNHCR's Policy Paper as legitimizing when extraterritorial processing of international protection claims can take place – namely "to more fairly distribute responsibilities and enhance available protection space" (para. 3) – do not apply in the specific case of Australia, as suggested in the letter of Your Excellency's Government dated 14 October 2011.

As the overall legal and policy framework of asylum and migration control puts in danger the protection of internationally recognized human rights of migrants, irrespective of their status, it is my duty as Special Rapporteur to engage in dialogue with Your Excellency's Government on the interrelationship between the mandatory detention regime, the offshore agreements and the existing Immigration Programme. In this context, I would welcome any indication as to the intention of your Excellency's Government to review the Immigration Programme. In this regard, I would welcome an invitation from Your Excellency's Government to engage in a dialogue on ways to expand legal channels for regular migration which takes into account the legitimate concerns of Australia.

Noting from Your Excellency's Government's reply of 23 September 2011 that mandatory detention is based on the presumed "risks" that irregular migrants may present to the Australian society, I wish to again refer to my statement to the General Assembly on 21 October 2011 in which I called for a new and balanced discourse on migration: A discourse that recognizes the contribution of migrants to the global economy, to cultural diversity, and the importance of the circulation of talents and ideas.

I wish to conclude, in this vein, by quoting the General Assembly 65/212 in which Member States “recognizes the cultural and economic contributions made by migrants to receiving societies and their communities of origin, as well as the need to identify appropriate means of maximizing development benefits and responding to the challenges which migration poses to countries of origin, transit and destination, especially in the light of the impact of the financial and economic crisis, and committing to ensuring dignified, humane treatment with applicable protections and to strengthening mechanisms for international cooperation.”

In conclusion, allow me to recapitulate the main issues on which I would be most grateful for your cooperation and your observations:

1. Steps taken to consider repealing the mandatory detention regime, as recommended by international and national bodies, in favour of alternative systems of supervision;
2. All measures taken to ensure alternatives to detention – rather than alternative forms of detention – for all migrant, asylum-seeking and refugee children in Australia;
3. Information on the outcome coronial enquiries into the six deaths reported and on the alleged suicide committed by a 19-year-old immigration detainee in Curtin Immigration Detention Centre as well as steps taken by the State to prevent further cases of ill-treatment, deaths and suicides of persons held in immigration detention;
4. Information on whether Australia would reconsider its policy with respect to entering offshore processing agreements with countries that are not parties to the 1951 Convention, 1951 Geneva Convention, the International Covenant on Civil and Political Rights and the Convention against Torture, including Malaysia;
5. Steps taken to incorporate the principle of non-refoulement into domestic legislation;
6. Information on the measures that may be taken to implement the agreement with Papua New Guinea in conformity with international human rights law and individual safeguards for asylum-seekers; and
7. Information on the intention of Your Excellency’s Government to review the Immigration Programme of Australia.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all issues brought to my attention, I would be grateful to receive the information requested above within 60 days so that your responses may be accurately reflected in the report I will submit to the Human Rights Council.



I remain at your disposal for any further clarification you may require and hope to be able to continue this constructive dialogue with you and your Government. Please note that I can be contacted through the Office of the High Commissioner for Human Rights (Ms. Katarina Månsson at [kmansson@ohchr.org](mailto:kmansson@ohchr.org), and Ms. Federica Donati at [fdonati@ohchr.org](mailto:fdonati@ohchr.org), tel: +41.22.917.91.27 / +41.22.917.94.96; or any of them at: [migrant@ohchr.org](mailto:migrant@ohchr.org)).

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

François Crépeau  
Special Rapporteur on the human rights of migrants