

10 November 2013

Working Group on Arbitrary Detention
Office of the High Commissioner for Human Rights
Palais des Nations
CH-1211
GENEVE 10



Human Rights
Commission
Te Kāhui Tika Tangata

By Email: braeunlich@gmx.net

Dear Chair Rapporteur

Re: Questionnaire related to the right of anyone deprived of his or her liberty to bring proceedings before court

1. The New Zealand Human Rights Commission (**Commission**) welcomes this opportunity to contribute to the Working Group on Arbitrary Detention's development of "basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty" (**Guidelines**).

A. The Commission's practice in relation to the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before the courts

2. The Commission is an independent Crown Entity mandated by the Human Rights Act 1993 (**HRA**). The long title to the HRA states that the purpose of the Act is the better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights.

3. The right to freedom from arbitrary arrest and detention is a fundamental human right and is referred to in Article 9(4) of the International Covenant on Civil and Political Rights (**ICCPR**) which states:

"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

4. The Commission therefore has an interest in monitoring New Zealand's policy and practice in relation to those deprived of their liberty.

5. The Commission does not have a mandate to bring proceedings on behalf of an individual in relation to their detention or arrest. Rather, the Commission may undertake a range of activities, including advocacy, coordination of

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human rights programmes and activities, carrying out inquiries, making public statements and reporting to the Prime Minister on any matter affecting human rights. This includes the desirability of legislative, administrative or other action to better protect human rights. The Commission also administers a dispute resolution process for complaints about unlawful discrimination.

6. The Commission is also designated as the Central National Preventive Mechanism (CNPM) under the Optional Protocol to the Convention against Torture (OPCAT). The OPCAT system provides for regular, independent monitoring of places of detention. This ensures that international standards that New Zealand has agreed to meet are met. It involves human rights-based, proactive monitoring, aimed at making practical improvements in places of detention, reducing risks and creating an environment where violations are less likely to occur.

B. Domestic protections of the right of anyone deprived of his or her liberty to bring proceedings before the courts

7. The right to freedom from arbitrary arrest and detention is a fundamental human right and is referred to in s. 22 of the New Zealand Bill of Rights Act 1990 (BoRA). Likewise the right of people arrested or detained to apply for habeas corpus is enshrined in s.23(1) (c) of BoRA.
8. The writ of habeas corpus is a writ for a person's release from unlawful detention. If it can be shown that there is insufficient cause for detention, a writ of habeas corpus is issued ordering the release of the person detained. The grant of the writ is not at the discretion of the court, but is available as a matter of right reflecting the law's presumption that there is a general right to liberty unless there is a legal basis for abridging it.

C. The most common problems individuals face in their realization of the right

9. In New Zealand legislation and policy is well developed and is generally consistent with international standards. Individuals deprived of their liberty have access to legal advice and the right to be brought promptly before a judge for a legal determination of the legality of the detention.
10. However, issues have arisen in relation to the length of time individuals are detained pending being charged, or the lawfulness of their detention being determined. The Commission has been concerned for some time about the duration of remands and the programmes and activities available to remand prisoners. In 2012, the Commission made a submission opposing draft legislation amending bail laws. The [Bail Amendment Act 2013](#) imposes tougher bail processes, and includes provisions that young defendants aged 17 are subject to the standard (adult) test for bail.

Asylum seekers

11. International law clearly sets out the permissible purposes and conditions of immigration detention. It is a fundamental human right that no one shall be subject to arbitrary or unlawful detention. This means that detention must not only be lawful but must be necessary, reasonable and proportionate. It can only be justified when other less invasive and restrictive measures have been considered and found insufficient to safeguard the lawful objective. Criminalising illegal entry or irregular stay would exceed the legitimate interest of States.¹
12. In relation to asylum seekers the UN guidelines on detention of asylum seekers state that detention of asylum seekers is only a legitimate purpose where it relates to verification of identity or the protection of national security or public order. Even then it must only be used as a matter of last resort and on exceptional grounds - after all possible alternatives to detention have been exhausted and for the shortest time possible.
13. However, in 2013 the [Immigration Amendment Act](#) was passed. The Act introduces new provisions which require mandatory detention of asylum-seekers who arrive in New Zealand by boat as part of a 'mass group' containing 30 or more persons. An Immigration officer can now apply to the District Court for a group warrant of commitment authorising the detention for a period of not more than 6 months. The Act also removes the right of an individual to apply to the District Court to vary a warrant of commitment or to be released on conditions.
14. The Commission remains concerned that the Act may result in arbitrary and unlawful detention and that appropriate review mechanisms are either unavailable or will be inaccessible. The Commission will continue to monitor the impact of the Amendments as the Act is fully implemented over the coming months.

D. How the Commission assists individuals take claims to the courts

15. As mentioned above the Commission does not have a mandate to bring proceedings on behalf of an individual in relation to their detention or arrest. Rather the Commission uses its broader advocacy functions to address systemic issues (see below for examples).

¹ Working Group on Arbitrary Detention, Report to the Seventh Session of the Human Rights Council, A/HRC/7/4, 10 January, 2008, para. 53.

E. How the Commission promotes the realization and implementation of the right to have the lawfulness of detention determined before the courts

16. The Commission has a responsibility to monitor human rights compliance, and to provide specialist human rights advice to Parliament, government agencies and other organisations and groups.

17. For example:

- In 2012 the Commission worked with the Independent Police Conduct Authority and the Children's Commissioner on a [Joint Thematic Review of Young Persons in Police Detention](#). The review was carried out within those organisations' roles as National Preventive Mechanisms under the OPCAT and produced 24 recommendations aimed at improving police training and treatment of children of young people in police custody;
 - In 2012 the Commission made a submission on the proposed [Immigration Amendment Bill](#).
 - Recently the Commission has also undertaken a human rights analysis of the police action known as [Operation 8](#). An [investigation](#) into the matter by the Independent Police Conduct Authority, released in May 2013, found that elements of the Police action were unlawful and unjustified, including instances of unlawful detention. The Commission's report will be released in the near future.

F. The Guidelines and New Zealand

18. Notwithstanding New Zealand's general compliance with its international obligations, the Guidelines will provide an internationally agreed framework within which to assess New Zealand's practice and policy. The Commission welcomes the development of the Guidelines to assist in its monitoring and advocacy activities to ensure that the rights of those deprived of their liberty are fully realised in New Zealand.

19. Please do not hesitate to contact me should you require any further information.

Yours sincerely



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