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8 June 2012

Attention; Julie Dennett
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett,

Inquiry into the Detention of Indonesian Minors in Australia

1. Australian Lawyers for Human Rights (**ALHR**) thanks the Senate Committee (**Committee**) for the opportunity to comment on the above inquiry.
2. ALHR was established in 1993 and is a network of Australian law students, lawyers and legal academics active in the practice and promotion of international human rights law standards and principles in Australia. ALHR has a national membership of over 2000 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia and its membership collectively holds extensive experience and expertise in international human rights law policy and advocacy in Australia.
3. In summary, ALHR submits as follows:
 - (a) the detention of minors in Australian prisons, remand centres or detention centres where adults are held constitutes a serious breach of the United Nations Convention on the Rights of the Child 1989 (**CRoC**);
 - (b) the excessive periods for which alleged people smugglers (whether Indonesian minors or otherwise) are being detained is contrary to international human rights law and contravenes the International Covenant on Civil and Political Rights (**ICCPR**) and the Universal Declaration of Human Rights 1948 (**UDHR**);
 - (c) available empirical evidence should lead Australian authorities to suspect with a high degree of probability that some Indonesian crewmen detained on people smuggling allegations will be under 18 years old. Persons detained on alleged people smuggling charges should be treated having regard to this probability;

- (d) based on current practices which have resulted in the mistreatment of alleged people smugglers under Australian law, it would be difficult to determine the number of cases in which information that a person was a minor was not put before the court. It is highly likely, given language, cultural, evidentiary and procedural barriers etc, that miscarriages of justice are occurring or have occurred more frequently than has actually or is likely to be detected and rectified;
- (e) wrist x-raying should not be adopted as a sole method for determining age for immigration law or criminal law purposes;
- (f) the use of ionising radiation and the deliberate exposure of children to ionising radiation for non-medical, administrative only purposes breaches the CROC;
- (g) there are insufficient checks and procedures in place to ensure evidence given to Australian authorities or departments regarding the age of defendants/suspects is followed up appropriately. Justifications for prolonged detention based on insufficient identity papers or poor English is unacceptable. The Government should adopt more direct methods of ascertaining identity and age by engaging in site visits to Indonesia;
- (h) the *Migration Act 1958 (Cth)* (***Migration Act***) should define the onus and standard of proof as 'beyond reasonable doubt' provable by the Crown;
- (i) the Government must adopt a method of reparation which ensures minors who have been illegally detained are provided with compensation which sufficiently takes into account both the fact of the illegal detention, and the Government's breach of its duty of care;
- (j) illegally detained Indonesian minors should be returned to Indonesia, including assistance with Indonesian authorities, to return to their residences.

4. Substantive comments

Term of reference 1: Are any Indonesian minors currently being held in Australian prisons, remand centres or detention centres where adults are also held. Appropriateness of detention.

ALHR notes and shares the Law Council of Australia's concerns in its submission to this inquiry that recent developments indicate there may be up to 28 cases in which minors have been held in adult detention facilities upon suspicion of involvement in people smuggling activities, or to await trial for people smuggling offences or following conviction.

ALHR also refers to the Victoria Legal Aid (VLA) paper titled 'Australian Human Rights Commission inquiry into the treatment of individuals suspected of people smuggling offences who say they are children' dated 31 January 2012 in which the VLA reported, based on eight accused minors who the VLA assisted and whose charges were ultimately dropped after the Commonwealth accepted they were minors, that those minors spent on average:

- 6.9 months in immigration detention before being charged (one spending ten months in detention before being charged); and
- 9.3 months in immigration detention and prison before their charges were withdrawn (one child spending 16 months in detention before charges were withdrawn).

ALHR submits that the detention of minors in Australian prisons, remand centres or detention centres where adults are held constitutes a serious breach of the CROC which states that no person is allowed to punish children in a cruel or harmful way, that children must not be

imprisoned with adults, and that children must be kept in contact with their families.¹ Without in any way condoning detention without charge or access to legal assistance, ALHR is concerned that the periods of detention to which minors are being subjected well exceeds what Mr Andrew Colvin of the Australian Federal Police (AFP) described to the Legislation Subcommittee of the Senate's Legal and Constitutional Affairs Committee in February 2012 as being the average time for which alleged people smugglers are held on remand before being charged or granted access to legal aid: namely, 161 days.² ALHR is deeply troubled by the fact that it appears minors are being held in detention for significantly longer periods than their legal age counterparts as a result of time spent on determining their age.

The excessive periods for which alleged people smugglers (whether Indonesian minors or otherwise) are being detained is contrary to international human rights law and contravenes (amongst other international human rights law customs and standards) Article 9.1 of the ICCPR (which says all accused must be "tried without undue delay"), and Article 9 of the UDHR (which requires that "no one shall be subjected to arbitrary arrest, detention or exile"). Excessive detention without charge also contravenes UDHR Article 3 which provides that "[e]veryone has the right to life, liberty and security of person."³

Term of reference 2: What information do Australian authorities possess or have knowledge of when it is determined that a suspect or convicted person was a minor.

ALHR is unable to comment from first hand experience regarding the information Australian authorities possess or have knowledge of when it is determined that a suspect or convicted person was a minor. Nevertheless, ALHR submits that empirical evidence which is readily available and which documents the background and circumstances surrounding the recruitment of 'crewmen' (vulnerable and unaware that they are being recruited for purposes related to people smuggling) should at least lead Australian authorities to reasonably suspect with a high degree of probability that some Indonesian crewmen detained on people smuggling allegations will be under 18 years old.⁴

¹ Article 37, United Nations Convention on the Rights of the Child 1989, [p://www2.ohchr.org/english/law/crc.htm](http://www2.ohchr.org/english/law/crc.htm).

² The AFP also claimed that the benchmark which the AFP said it wishes to achieve is 90 days; which ALHR notes is ten times the period for which a terror suspect can be held without charge. See Jeff Waters, Lateline, 'Alleged people smugglers held without charge', <http://www.abc.net.au/lateline/content/2012/s3435403.htm>.

³ <http://www.un.org/en/documents/udhr/#atop>.

⁴ See, for example: Victoria Legal Aid, Australian Human Rights Commission inquiry into the treatment of individuals suspected of people smuggling offences who say they are children', 31 January 2012, http://www.legalaid.vic.gov.au/dir.lr.20120131_Submission_AHRC_Agedetermination.pdf (VLA AHRC Submission January 2012); Senator Sarah Hanson-Young, Australian Greens, 'Dissenting Report by Senator Hanson-Young, http://webcache.googleusercontent.com/search?q=cache:yCjgtzIRjVwJ:www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees%3Furl%3Dlegcon_ctte/fairness_for_minors/report/d01.pdf+tim+cole+wrist+x-ray&cd=19&hl=en&ct=clnk&gl=au; Hagar Cohen and Rebecca Henschke, ABC News, 'Child casualties in the war against people smuggling', 29 October 2011, <http://www.abc.net.au/news/2011-10-29/casualties-in-the-war-against-smugglers/3607994>; Eric Tlozek, ABC News, 'People smuggler child crews face legal nightmare', 19 April 2012, <http://www.abc.net.au/news/2011-10-29/casualties-in-the-war-against-smugglers/3607994>; ABC News, 'People smugglers sent home over age concern', 18 May 2012, <http://www.abc.net.au/news/2012-05-18/people-smugglers-released/4019624>; ABC, 'People smugglers released over concerns over age doubts', <http://www.abc.net.au/news/2012-05-17/people-smugglers-released-over-age-doubts/4017914>; Victorian Legal Aid, 'Victoria Legal Aid wins bid to have 15-year-old boy accused of people smuggling returned home to Indonesia', 16 November 2011, <http://www.legalaid.vic.gov.au/3799.htm>; 'Casualties in the war on people smuggling', <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22emms%2Femms%2F226767%22>.

Term of reference 3: Have there been any cases where information that a person is a minor was not put before the court.

ALHR submits that based on current practices which have resulted in the mistreatment of alleged people smugglers under Australian law, it would be difficult to determine the number of cases in which information that a person was a minor was not put before the court. ALHR submits it is highly likely, given language, cultural, evidentiary and procedural barriers and so forth, that miscarriages of justice are occurring or have occurred more frequently than has actually or is likely to be detected and rectified. Of particular concern is the lack of accurate methodology adopted by authorities to determine the age of Indonesian detainees. For example, of 63 cases defended by the VLA, eight have been discontinued on the basis that the detainees were found to be minors. This equates to 12.7% (or more than one in ten) of individuals being wrongly detained on people smuggling charges. Whilst ALHR acknowledges this is only a small sample, it considers this a compelling statistic, nonetheless.⁵

Term of reference 4: What checks and procedures exist to ensure that evidence given to an Australian authority or department about the age of a defendant/suspect is followed up appropriately.

As the Committee would be aware, the AFP and Commonwealth Department of Public Prosecutions have relied on hand and wrist x-raying to determine the age of alleged Indonesian people smugglers. This method of age determination has been widely discredited by the medical community as 'inaccurate' and 'unethical'⁶, and criticism of this technique has been raised by authoritative bodies including the United Nations International Children's Emergency Fund (UNICEF)⁷; the Former Children's Commissioner for England, Professor Sir Al Aynsley-Green⁸; the Royal Australian and New Zealand College of Radiologists⁹; and Professor of Medical Statistics at University College London, Dr Tim Cole.¹⁰

Having regard to available expert opinion and empirical evidence (including the sources described above), ALHR does not support the use by Australian authorities or departments of wrist x-raying as a sole method of determining age; especially for immigration law and criminal law purposes. ALHR notes, in particular, the stories of Indonesian minors who have been wrongly detained and of the families of alleged people smugglers whose children have no choice

⁵ VLA AHRC Submission January 2012.

⁶ See, for example, Andy Coghlan, 'With no paper trail, can science determine age?', *New Scientist*, 11 May 2012, <http://www.newscientist.com/article/mg21428644.300-with-no-paper-trail-can-science-determine-age.html>; Tim Thwaites, 'Repeated errors can send kids to jail', *The Australian*, 14 April 2012, <http://www.theaustralian.com.au/news/health-science/repeated-errors-can-send-kids-to-jail/story-e6frg8y6-1226325205536>; Legal Aid New South Wales, 'Crimes Amendment (Fairness for Minors) Bill 2011 - Response to Bill: Submission on behalf of Legal Aid NSW to the Commonwealth Senate Standing Committee on Legal and Constitutional Affairs, January 2012, http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0019/11728/Crimes-Amendment-Fairness-for-Minors-Bill-2011-Senate-Committee-March-2012.pdf; Victoria Legal Aid, 'Another young Indonesian accused of people smuggling to return home', 1 December 2011, <http://www.legalaid.vic.gov.au/3904.htm>; Legal and Constitutional Affairs Legislation Committee, Transcript, 16 March 2012, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2Fd4121620-228b-4593-aac1-f455364ea2d0%2F0001%22>.

⁷ UNICEF, Terry Smith and Laura Brownless, 'Discussion Paper - Age assessment practices: a literature review & annotated bibliography', April 2011, http://www.unicef.org/protection/Age_Assessment_Practices_2010.pdf.

⁸ Sydney Morning Herald, 'Wrist X-ray won't prove child's age, says expert, 27 June 2011; Professor Sir Al Aynsley-Green, 'Expert commentary on the age assessment of John Ndollu prepared by Fisher Dore Lawyers, Brisbane, Australia', 24 June 2011, <http://www.legalaid.vic.gov.au/3904.htm>;

⁹ Nyssa Skilton, 'Doctors slam asylum-seeker age test', *Australian Doctor*, 14 October 2011.

¹⁰ Lateline, Kerry Brewster, 'Controversial X-ray method sparks detention concerns', <http://www.abc.net.au/lateline/content/2011/s3358566.htm>; Tim Cole, 'Crimes Amendment (Fairness for Minors) - Submission to the Inquiry by Professor Tim J Cole PhD ScD FMedSci.

but to leave school at an early age and work as labourers or 'sea bearers' to support their families.¹¹ It is possible that the bone density and size of the wrists and hands of children who are subject to strenuous physical labour as part of their daily activities would be greater and more mature / advanced in development than children who are not subjected to the same degree of manual labour.

Having regard to the foregoing, ALHR submits there are insufficient checks and procedures in place to ensure evidence given to Australian authorities or departments regarding the age of defendants/suspects is followed up appropriately. ALHR does not accept the Commonwealth Attorney-General Department's justification for the existence of extensive detention periods on the basis that detainees carry insufficient identity papers and speak little or no English. It considers that notwithstanding findings which address economies associated with investigating and verifying, in Indonesia, the identity and age of detainees versus the individual per detainee cost associated with pre-trial investigations, interpreters (whose use and free provision ALHR supports as a human right guaranteed under Article 14 of the ICCPR), committal hearings, detention, and trials, that the Government has acted insufficiently to address fundamental access to justice issues.¹² ALHR supports the adoption of more direct methods of ascertaining identity and age which involves organised site visits to Indonesia.

Term of reference 5: What are the relevant procedures across agencies relating to cases where there is a suggestion that a minor has been imprisoned in an adult facility.

ALHR wishes to use this term of reference to express its concerns regarding the burden and standard of proof associated with proving the age of alleged people smugglers.

Burden of proof

ALHR notes the VLA's findings that there is no explicit reference in the Migration Act to who bears the onus of proving the age of detainees and that this has led to a lack of clarity and inconsistency in relation to this issue.¹³ ALHR is concerned that no action has been taken to address this uncertainty despite the serious consequences associated with the outcome.

Standard of proof

ALHR is concerned, given the seriousness of the subject matter and the consequences associated with the outcome of court-determined age, that the civil standard of proof of 'on the balance of probabilities' has been adopted to determine the outcome of people smuggling cases. ALHR submits that there are compelling reasons why the criminal standard of proof of 'beyond reasonable doubt' should be adopted for people smuggling matters. Amongst these is the fact that adopting a civil standard of proof for what is clearly a serious crime impinges on the principle of proportionality. That principle, which is otherwise well enshrined in our legal system,¹⁴ requires that the severity of a punishment should not exceed the proportional severity of the crime for which it is imposed.

¹¹ The VLA reports that in one village on the Indonesian island of Rote VLA staff had spoken to "twelve women who had male family members (husbands, brothers and sons) ranging in age from 14 to over 75 years old in detention in Australia on people smuggling charges." It also reports that a "number of the men had already been working in other provinces when they were recruited by 'organisers', while others were recruited from the village itself by outsiders who came to the village in search of fishing crews." VLA AHRC Submission.

¹² VLA AHRC Submission January 2012.

¹³ VLA AHRC Submission January 2012. The VLA determined that as at the date of its paper, only one age determination hearing in a people smuggling prosecution had been finalised in which the prosecution conceded that the Crown bore the onus of proving a detainees age for the purposes of hearing.

¹⁴ See, for example, section 16A(1) of the *Crimes Act 1914* (Cth) which states that: "a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence."

ALHR does not deny that people smuggling (where the perpetrator achieves large financial rewards) is capable of being a serious crime. It does, however, hold serious reservations regarding the means and methodologies adopted by the Government to address what is a serious yet complicated and complex issue.

ALHR submits that adopting a lesser standard of proof to prosecute individuals who may or may not have been directly implicated or aware of their involvement in a serious crime carries the danger of wrongful conviction.

Term of reference 6: What options are there for reparation and repatriation for any minor who has been charged (contrary to current government policy) and convicted.

“Reparation” requires both compensation and restitution.¹⁵ From a compensation perspective, ALHR submits that the issue can be addressed from the injury or damage which illegally detained minors suffer as a result of the Government’s fault. It can also be addressed from a duty of care perspective.

ALHR refers to the VLA’s comments regarding the state of illegally detained minors, who are often unaware that they have been involved in a people smuggling operation, and are distressed, isolated and fearful of their plight.¹⁶ It also refers to the way in which the families of those children who are illegally detained are affected. According to the VLA:

children detained on people smuggling charges are harmed by their time in detention, particularly when they are detained in adult facilities. We know this because we have seen firsthand their distress and isolation. The children suffer by virtue of being imprisoned in a foreign country where cultural differences are huge and their native language is not spoken. The effect of having little or no contact with family, particularly at a young age, is immeasurable. It is also our experience from meeting with the families of children accused of people smuggling that they also suffer, not least because they grieve the loss of their son or sibling, but also because they must subsist without the income the child would otherwise earn.¹⁷

It is conceivable that children (in particular, those who are detained in adult facilities, who speak little or no English, and who are unaware that they have been recruited into illegal activities or of the consequences of their involvement) will suffer psychological damage as a result of their ordeal. Furthermore, it is quite possible that such children suffer physical abuse in adult institutions but are too fearful or unable (due to language or cultural barriers) to report their ordeal to overseeing authorities. ALHR submits that these children should, at the very least, be entitled to monetary compensation which adequately takes into account the psychological trauma associated with their ordeal.

Furthermore, as the Committee would be aware, the Government owes a duty of care to all individuals held in detention and must take reasonable steps to ensure their safety and wellbeing. In some cases, the detention of minors may have been not just illegal but also negligent, on the basis that the:

- fact that a minor was detained showed a less than reasonable level of care, skill, and expertise;
- minor suffered injury or damage as a result of their illegal detention; and
- the illegal detention caused the resulting psychology (and / or physical) injury or damage.

¹⁵ See, for example, New South Wales Law Reform Commission, ‘Report 102 (2003) – Sentencing: Corporate Offenders’, <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r102chp12>.

¹⁶ VLA AHRC Submission January 2012.

¹⁷ VLA AHRC Submission January 2012.

Having regard to the foregoing, and despite the difficulties associated with determining what constitutes an adequate amount of compensation, ALHR submits that the Government should adopt a method of reparation which ensures that minors who have been illegally detained are provided with compensation which sufficiently takes into account both the:

- (a) fact of illegal detention; and
- (b) Government's breach of its duty of care,

for that period during which the minor was illegally detained.

Where the Government has improperly detained children, it should make arrangements for their immediate return to Indonesia, including engaging with Indonesian authorities for the child's return to their villages and families. Ideally, this will be accompanied by a guardian versed in the relevant language or dialect.

If you would like to discuss any aspect of this submission, please contact Stephen Keim, President on

Yours faithfully,

Stephen Keim SC
President
Australian Lawyers for Human Rights

Contributors: Lily Tsen, Victorian Co-Convenor/National Co-Convenor Internship; David Mulligan, ALHR Intern.

