



Commissioner for Children and Young People
Western Australia

All enquiries

Ms 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

Thank you for the opportunity to submit to this Inquiry.

As Commissioner for Children and Young People in Western Australia my role is one of broad advocacy for all children and young people under the age of 18 years. In undertaking my role I must also have special regard for Aboriginal children and young people and those children and young people who are vulnerable or disadvantaged in some way. I must also have regard for the United Nations Convention on the Rights of the Child (the CRC).

It is not a function of my office to investigate or otherwise deal with matters concerning an individual child or young person. I therefore do not have specific information in regards to the Inquiry's Terms of Reference relating to specific cases or procedures. However, I would like to provide some broader comments for the Committee's consideration which, I believe, should underpin any reforms to legislation, policy or practice in regard to this matter.

Treatment of children and young people in the justice system

The United Nations Declaration of the Rights of the Child establishes the need for children and young people to be afforded a higher level of protection and care due to their physical and mental vulnerability. This is reflected in the CRC which sets out a range of provisions to enhance the protection of children and to promote their wellbeing and development.

Central to the CRC are the principles that the best interests of the child should be a primary consideration in actions concerning children. The CRC also makes it clear that that people under the age of 18 years should be treated differently by the justice system due to their increased vulnerability, that they should only be incarcerated for

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the shortest appropriate time, that they should not be detained with adults and that they should be provided with legal and other appropriate assistance.

Although Australia has ratified the CRC, it has done so with a reservation regarding Article 37 (c) claiming that for geographical and demographical reasons it is not always possible to incarcerate young people separately from adults and still facilitate contact with their families¹.

I am not aware of the specific details in regard to the current numbers of Indonesian minors currently being held in adult prisons in Western Australia. It was stated in the WA Parliament in November 2011 that at that time it was alleged that there were 14 Indonesian prisoners currently detained in WA adult prisons, who say that they are under 18 years.² I note the Federal Attorney General's review of alleged minors in adult prisons which was announced on the 2 May 2012. I understand that, to date, three minors have been released from an adult prison in WA as a result of this review.³

It is clear from this, and similar instances in other jurisdictions, that the process to determine the age of some individuals accused of people smuggling offences has resulted in the incarceration of minors in adult facilities, contrary to the provisions of the CRC.

Young people should not be incarcerated in adult facilities, unless it is in the best interests of the young person to do so. During the process of establishing the age of an individual they should also be held in facilities suitable for a minor and not in adult correctional facilities.

Procedures for assessing the age of an individual

The procedures for assessing the age of an individual was the subject of a detailed submission that I made to the Australian Human Rights Commission's *Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children*. This can be accessed from my website at www.cyp.wa.gov.au.

Where it is suggested that a person accused of an offence is a minor, the age of the person should be subjected to a robust and comprehensive investigation to establish the actual age of the person, alternatively the person should be treated as a minor.

The processes for determining the age of people accused of offences should be reliable and timely. The use of various medical procedures to establish chronological age has been the subject of much consideration and has largely been discredited. Due to the limitations of medical age assessment procedures in providing an accurate determination of age, and the legal and ethical concerns with obtaining this information, these methods should not be used as a part of the age assessment process.

Where uncertainty remains the person should be given the benefit of the doubt and treated as a minor.

Agency procedures where it is suggested that a person is a minor

It is a requirement of the CRC that children and young people deprived of their liberty is provided with prompt access to legal and other appropriate assistance and that they are able to maintain contact with their family.

I note that the Commonwealth Government has announced a number of changes over the last 12 months to procedures for age assessment including the use of focused age interviews, seeking documentation as early as possible, and a more proactive use of the 'benefit of the doubt' where there is uncertainty. Whilst such changes are welcomed it is important that there is external oversight of the implementation of these changes to ensure that vulnerable young people are protected. Young people should be provided with independent legal counsel and other support (such as interpreters). It is also crucial that interviews aimed at establishing the age of an individual are undertaken with regard to the cultural context of childhood in the individual's country of origin so that any differences in typical experiences compared to an Australian child can be taken into consideration.

Given the Federal nature of the legislation regarding people smuggling offences, those accused of these offences can be located across all jurisdictions and, at times, may be transferred between jurisdictions. Ensuring that the needs of vulnerable young people are not overlooked, an independent guardian should be appointed with statutory responsibilities to protect the rights and to monitor the treatment and wellbeing of children and young people under the jurisdiction of the Commonwealth Government throughout the process and ensure consistency in the application of legislation, policy and processes.

I appreciate the opportunity to provide these comments and would be happy to provide further comments if required.

Yours sincerely

MICHELLE SCOTT

Commissioner for Children and Young People WA

MS

May 2012

¹ United Nations Treaty. Status of Treaties. Human Rights. Convention on the Rights of the Child. Status as at 21 May 2012 <http://treaties.un.org/pages/UNTSOnline.aspx?id=3>

² The Hon. Alison Xamon MLC. Legislative Council, Parliament of Western Australia. Hasard, Wednesday 30 November 2011.

³ The West Australian. Friday 18 May 2012 pp14.