Australian Lawyers Alliance

GPO Box 7052

Sydney NSW 2001

Committee Secretary

Senate Legal and Constitutional Affairs References Committee

PO Box 6100

Parliament House

Canberra ACT 2600

27 June 2012

Dear Committee Secretary,

Detention of Indonesian minors in Australia

The Australian Lawyers Alliance welcomes the opportunity to provide a Submission to the Senate Legal and Constitutional Affairs References Committee on the Detention of Indonesian minors in Australia.

The Australian Lawyers Alliance is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We have previously provided submissions to the Senate Legal and Constitutional Affairs Committee on this issue, within our submissions on the *Deterring People Smuggling Bill 2011* (Cth); the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* (Cth) and the *Crimes Amendment (Fairness for Minors) Bill 2011* (Cth).

We will address terms of reference (b)(c)(d)(e) in our submission, with a focus on terms of reference (a) and (f).

We would be happy to comment further on any issues we have raised within this Submission.

Yours sincerely,

Greg Barns

National President

Emily Price

Legal and Policy Officer

Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

May 2012

The detention of Indonesian children in Australian prisons

INTRODUCTION

The Australian Lawyers Alliance ("ALA") welcomes the opportunity to provide a Submission to the Senate Legal and Constitutional Affairs References Committee on the detention of Indonesian minors in Australia.

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EXECUTIVE SUMMARY

We consider that the detention of Indonesian minors in Australian adult prisons is grossly inappropriate and in clear violation of international law.

We submit that there is no appropriate legal guardian of Indonesian minors in Australia, and accordingly the Commonwealth is breaching its duty of care towards this group of detainees.

We note that there are a number of options available for minors to seek reparation and compensation for the violation of their rights. We also recommend that national legislation be developed that focuses on protecting the rights of the child.

We submit that future action must be taken to implement the optional protocols relating to the rights of the child and detention in Australia, and that more must be done to prevent the violation of children's rights.

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[1] Accessible at http://www.lawyersalliance.com.au/public.php?id=115
[2] Accessible at http://www.lawyersalliance.com.au/public.php?id=124
[3] Accessible at http://www.lawyersalliance.com.au/public.php?id=123

A. INAPPROPRIATE DETENTION

It is difficult to source the exact number of Indonesian minors, however, in November 2011, Senator Sarah Hanson Young estimated that there were 'approximately 50 people sitting in adult prisons around Australia who claim that they are less than 18 years old.'[4]

This detention is inappropriate as it is in violation of international law. It also amounts to a potential breach of the guardianship duty of the Minister for Immigration and Citizenship; breach of duty of care of the Commonwealth, and breach of the duty of care by State corrective services and governments.

International standards

First and foremost, it is grossly inappropriate and in violation of international law that Indonesian minors are currently being held in Australian prisons with adults.

This stands in direct breach of Article 37 (c) of the *Convention on the Rights of the Child* (CROC) which provides that:

> *Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.*
>
> *In particular,* ***every child deprived of liberty shall be separated from adults*** *unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.*

The best interests of the child have not been a consideration in the circumstances of detention of Indonesian minors, which is in breach of Article 3(1) of CROC, which provides that:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, **courts of law, administrative authorities or legislative bodies**, the **best interests of the child shall be a primary consideration**.

Shortest appropriate period of time

Article 37 (b) provides that:

> *No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of* ***last resort*** *and for the* ***shortest appropriate period of time****.*

[4] Senator Sarah Hanson-Young, Second reading speech, *Crimes Amendment (Fairness for Minors) Bill 2011* (Cth), 23 November 2011. Accessed 5 June 2012 at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F499387ea-6048-4777-9bed-2b1b027f8e25%2F0081%22

Persons waiting to be charged with people smuggling offences are currently detained for an average of 161 days without charge.[5] This is ten times the period of time for a person later charged with a terrorism offence. This cannot be described as the 'shortest appropriate period of time'.

The average period of time that an individual awaits an age determination hearing is unknown. However, in the case of an Indonesian minor called Mondhi,[6] it took 17 months between arrest and intercept and the hearing date. The CDPP withdrew the charges a week prior to the hearing.

This violates Article 37 (d) which provides that:

> *Every child deprived of his or her liberty shall have* ***the right to prompt access*** *to legal and other appropriate assistance, as well as the* ***right to*** *challenge the legality of the deprivation* ***of his or her liberty*** *before a court or other competent, independent and impartial authority, and to a* ***prompt decision on any such action****.*

While some individuals gain access to Legal Aid, it is questionable as to whether all persons alleging to be minors receive legal assistance.

No formal age determination system or procedure is in place that takes account of the best interests of the child.

In Victoria, the *Children, Youth and Families Act 2005* (Vic) outlines procedures for proceedings against children, including that a proceeding in relation to a summary offence must be commenced within 6 months after the alleged date of the offence.[7] This time period can be extended only where the individual has received legal advice and has consented to the extension.[8]

The *Children, Youth and Families Act 2005* (Vic) also provides that a child taken into custody must be: released unconditionally; or; released on bail; or brought before the court; or, if the court is not sitting at any convenient venue, brought before the bail justice; **within a reasonable time of being taken into custody, but not later than 24 hours after being taken into custody.**[9]

The *Children, Youth and Families Act 2005* (Vic) also provides that if a child is remanded in custody by a court of a bail justice, the child must be placed in a remand centre. If any children are remanded in custody in a police gaol they are 'entitled to be kept separate from adults who are detained there.'[10]

Indonesian minors have not been afforded the same protections as an Australian child would receive.

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[5] ABC, Lateline, 'Alleged people smugglers held without charge' 20/02/2012 http://www.abc.net.au/lateline/content/2012/s3435403.htm
[6] Pseudonym used
[7] *Children, Youth and Families Act 2005* (Vic), s344A(1)
[8] *Children, Youth and Families Act 2005* (Vic), s344A(1)(b)
[9] *Children, Youth and Families Act 2005* (Vic), s346
[10] *Children, Youth and Families Act 2005* (Vic), s347

Last resort

The detention of persons alleged to be involved in people smuggling is also a measure of first resort, rather than last resort.

Guardianship

Article 3(2) of CROC also provides that:

> *State parties undertake to **ensure the child such protection** and care as in necessary for his or her well-being, **taking into account the rights and duties** of his or her parents, **legal guardians or other individuals legally responsible** for him or her, and to this end, **shall take all appropriate legislative and administrative measures.***

This is pertinent in considering the legal guardianship of unaccompanied minors in Australia, as all 'appropriate legislative and administrative measures' have not been taken.

It is questionable as to who is the legal guardian of unaccompanied minors that are alleged to be involved in people smuggling to Australia.

Guardianship of the Minister for Immigration and Citizenship

The Minister for Immigration and Citizenship has a guardianship duty for all unaccompanied minors in Australia that are intending to become a permanent resident in Australia, under section 4AAA of the *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act).

Indonesian minors therefore do not fall under the purview of this section.

However, the role of the Minister is relevant in that his role is invested with responsibility most closely to Indonesian minors, and indicates the gaping need for legislative change in protecting the rights of non-citizen children in Australia.

For example, in a boat being crewed to Australia, any unaccompanied minor on-board seeking asylum in Australia has the Minister as their Australian legal guardian. This is a direct conflict between the Minister's role as guardian and the Minister's role in administering the *Migration Act,* and the true representation of their 'best interests' by the Minister is virtually impossible.

For Indonesian minors that are crewing the boat, there is no legal guardian.

Currently, there is scope for the development of precedent surrounding the liability of the Minister for Immigration to compensation claims for breach of guardianship. In 2011, a class action was lodged for breach of guardianship in relation to British migrant children in the 1940s.

The claimants allege that they suffered physical and sexual abuse that has had severe consequences for years after. The claimants also contended that the Commonwealth was

the legal guardian of the children and had a non-delegable duty to exercise reasonable care for their safety and welfare.[11]

There are instances where Indonesian minors have been assaulted by adults in prisons and in immigration detention.

The outcome of this case could set a precedent regarding breach of guardianship by the Minister for Immigration, and the use of class actions to remedy the breach. This would open up the Commonwealth to compensation claims to be made by every individual that is or was an unaccompanied minor intending to reside in Australia.

More widely, this could open up precedent regarding the Commonwealth duty of care in relation to failure to appoint effective guardians.

The issue of breach of guardianship was alluded to in the case of *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011), challenging the Malaysian solution, but was not addressed in full by the Court.

Justice Heydon addressed the conflict of interest, where he stated that:

> *'The general powers conferred by section 6 of the IGOC Act on a guardian do not extend to interference with the Minister in carrying out his very specific statutory functions under the [Migration] Act.'*[12]

In the case of *X v Minister for Immigration and Multicultural Affairs*[13] , the Court stated that:

> *The **responsibilities of a guardian under section 6** of the Act **include the responsibilities which are the subject of the Convention [of the Rights of the Child]**. They are **responsibilities concerned with according fundamental human rights to children**.... Once it is recognised that the rights with which s 6 is concerned are in the nature of fundamental human rights it becomes clear that **Parliament intended that if a non-citizen child were denied any of these fundamental rights, they would have access to the legal system with the minimum of formal hurdles'**[14]**.***

The potential consideration of the *Convention on the Rights of the Child* within the Minister's duties thus goes some way towards recognition of the need for effective guardianship to encapsulate and bring fulfilment to these rights.

The guardianship duty has been described as non-delegable and fiduciary in nature.

Julie Taylor in her article 'Guardianship of Child Asylum Seekers' suggested that:

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[11] *Giles & Anor v Commonwealth of Australia & Ors* [2011] NSWSC 582
[12] *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 By His Litigation Guardian, Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32, Heydon J at [195]
[13] [1999] FCA 995; (1999) 92 FCR 524 [34]
[14] Ibid [43]

> ***Although the Minister can delegate** 'powers and functions' of guardianship to State authorities under the Immigration (GOC) Act, **there is no explicit power to delegate legal responsibility for the proper performance of guardianship duties**...*
>
> *The lack of specificity as to who is legally responsible for which powers and functions in respect of which child suggests that the **Minister retains ultimate legal responsibility, as guardian, to ensure that the functions are properly fulfilled**. That is, **delegation of 'powers and functions' under the IGOC Act** arguably **does not absolve the Minister of any breach of duty by the delegated authority**. Indeed, it has been accepted that the **Minister remained responsible as guardian, despite delegation of powers** to State and Territory authorities in relation to lawful child migrants.*[15]

The non-delegable and fiduciary duty of guardianship indicates its primacy as a common law duty. Failure to implement an effective advocate for both asylum seeker children, and Indonesian minors in Australia, amounts to a large oversight by the Commonwealth.

Failure to appoint an effective guardian for unaccompanied minors; encapsulating both asylum seeker children and Indonesian minors and their counterparts, could be seen as a breach of the Commonwealth's duty of care.

Commonwealth duty of care

Addressing the issue of detaining of Indonesian minors more specifically, the legislature should take notice that from a compensation point of view, it could be alleged that the Commonwealth and state governments is either aware or should be aware that the results determining age upon which is being relied upon to incarcerate minors or potential minors is inaccurate and flawed and will therefore produce inaccurate and misleading results.

Such actual or constructive knowledge would be capable of forming at least one point of a breach of duty of care, which could potentially lead to a damage suffered and consequently compensation paid out of treasury funds.

Duty of care of State prisons and governments

We have been informed that Western Australian prisons were potentially aware or suspected that convicted persons were minors, and housed these individuals with sex offenders in order that the prison laundry may be adequately staffed.

This has been detailed in a story by *The West Australian* on April 6, 2011, which detailed that a boy claiming to be 16 in Hakea Prison was 'working alongside sex offenders in the prison laundry.'[16]

There is scope for such individuals to claim for compensation for negligence in such instances.

[15] Julie Taylor, 'Guardianship of Child Asylum Seekers' (2006) 34 (1) *Federal Law Review* 185.
[16] Jane Hammon, 'Boy in adult jail says he's scared', *The West Australian,* April 6 2011. Accessed 5 June 2012 at http://au.news.yahoo.com/thewest/a/-/breaking/9142753/boy-in-adult-jail-says-he-s-scared/

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B. REPARATION AND COMPENSATION

Before addressing the issue of a right to compensation and viable options, we wish to highlight that in Amed's[17] case, he was deported home after being held in Australian detention centres and prisons for over 17 months.

Before his return home, he was asked to sign a statement, without being given legal advice or access to his lawyer, that if he were ever to consider returning to Australia, he would be required to pay not only for the cost of his deportation, but the cost of his entire 17 month stay in detention.

This document was signed by him a few days before he left. We do not have knowledge of who facilitated this.

Such an amount would be valued at thousands of dollars and impossible for a fisherman in Indonesia to pay.

The signing of such a document appears to intimidate and threaten an individual. It also undermines any conception that an individual may have that they may be entitled to any form of reparation and compensation.

The ALA recommends that the issuing of these statements be examined by the Committee.

A right to compensation

Article 9(5) of the *International Covenant of Civil and Political Rights* (ICCPR) clearly states that any person who is subjected to unlawful arrest or detention shall have an enforceable right to compensation. However, insofar as these provisions are concerned they have no application in Australian state jurisdiction and indeed have not been adequately ratified in the federal jurisdiction.

While ratified by Australia in 1980,[18] there is still an aching gap between the rights the ICCPR purports to protect and the availability of access to compensation for breach of human rights, especially in Australian jurisdictions where there is no human rights act.

Under the *Human Rights Act 2004* (ACT), there is a provision providing for compensation for the breach of the right to liberty and security of person, under section 18(7). There is also compensation available for a wrongful conviction under section 23. The Victorian *Charter of Rights and Responsibilities 2006* (Vic) does not contain a provision that provides for compensation if these rights are breached.

However, in the case of *Morro & Ahadizad v Australian Capital Territory* [2009] ACTSC 118 (10 September 2009), Justice Grey found that 'on the facts before him, that the tort of false

[17] Pseudonym used.
[18] UN Treaty Collection, International Covenant of Civil and Political Rights http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

imprisonment provided a sufficient remedy and that additional public law compensation under the *Human Rights Act* was not necessary.'[19]

Regardless, the state based human rights legislation cannot be applied to the Commonwealth.

Options for reparation

The detention of Indonesian minors in Australian adult prisons may be resolved via a number of options. We see scope within the following avenues:

- Automatic granting of rights for compensation for minors charged with people smuggling;
- The creation of a statutory compensation fund for Commonwealth breach of guardianship;
- Strengthening the powers of the Australian Human Rights Commission;
- Developing federal human rights legislation,
- Developing rights to redress under federal human rights legislation;
- Individuals to sue for unlawful imprisonment;
- Individuals to sue the Commonwealth for breach of duty of care;
- Redress under relevant state based Civil Liability Acts.

Of these options, we see the importance in developing a federal piece of legislation protecting the rights of the child, including the development of effective redress mechanisms.

We also see the viability in ensuring easy access to compensation funds as a matter of natural justice.

Due to the location of many individuals who have been absorbed through the system and returned to Indonesia already, we see that providing assistance to them and their communities to access effective compensation without needing to go through the courts as a potential option.

Placing the onus on individuals to sue, when the problem is a systemic one relating to Australia's legislative failure is likely to lead to miscarriages of justice. It is likely that people will fall through the gaps, and their claim will rely on external factors, such as quality of legal representation; existing precedent; workload and funding of legal representation; remoteness of area; access to translators; quality advocates; connections in Indonesia etc, to gain effective redress and access to justice.

Automatic granting of compensation rights

The Guardian reported on May 12 2012, that 'a UN report will recommend next month that people seriously injured or maimed by terrorist attacks across the world would be granted

[19] Human Rights Law Centre, CaseLaw Database, *Morro & Ahadizad v Australian Capital Territory* [2009] ACTSC 118 (10 September 2009) at http://www.hrlc.org.au/year/2009/morro-ahadizad-v-australian-capital-territory-2009-actsc-118-10-september-2009/

automatic legal rights to compensation and rehabilitation under far-reaching changes to rebalance international law in favour of victims.'[20]

Given that the crime of people smuggling is principally conducted by sophisticated syndicates that are 'organising or facilitating the bringing of coming to Australia'[21] of non-citizens; one may argue that Indonesian minors are victims of criminal syndicates and have been preyed upon in their poverty.

The inadequacy and failure of Australian evidentiary processes, such as wrist X-ray determination, to effectively determine children's ages; and in some cases, the failure to tender important documents such as Indonesian birth certificates as evidence; point to a systemic weight against the legal rights of minors to be presumed innocent and amounts to a systemic breach of duty of care of the Commonwealth and the Minister for Immigration and Citizenship.

For all those Indonesian minors that have already been detained, charged and convicted under the relevant components of the *Migration Act 1958* (Cth), we recommend that a retrospective order should be implemented, providing automatic compensation to these individuals for the failure of the Australian justice system to protect their rights.

Statutory compensation fund for Commonwealth breach of guardianship

The ALA contends that the scope for a statutory compensation fund for Commonwealth breach of guardianship is continually growing. This scope is expanding in reach in the Commonwealth's policies on arbitrary detention of asylum seeker children; and the legal process of proving age, and detaining of non-citizens charged with people smuggling that are in fact, minors.

Psychiatrists have recently identified a new mental illness syndrome unique to asylum seekers.[22]

The psychological impact of children being housed in adult prisons is also severe. Not only does it impede their development and future opportunities, but being kept imprisoned alongside serious offenders causes great fear, anxiety and trauma for young boys.

Given the large number of young Indonesian boys aged between 12 and 17 that have already been returned to Indonesia, and given the great number that have continued to be caught up under Australia's inadequate laws, a statutory compensation fund is a viable option for providing compensation to these individuals.

This fund could be set up by the Commonwealth to compensate for the fact that there has not been a legal guardian for these children in Australia that has acted in the best interests of the child and in accordance with international law. This fund could provide reparation to

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[20]Toby Helm, Tracy McVeigh and Emma Craig, The Guardian, 'UN moves to compensate the victims of terrorism', Saturday May 12 2012. Accessed 30 May 2012at http://www.guardian.co.uk/world/2012/may/12/un-compensate-terrorism-victims
[21] The offence of people smuggling, as defined in s233A, *Migration Act 1958* (Cth).
[22] Linda Hunt, 'Psychiatrists identify 'asylum seeker syndrome', *ABC News*, May 22 2012. http://www.abc.net.au/news/2012-05-22/rsearch-reveals-mental-health-toll-on-asylum-seekers/4025480

unaccompanied minors in Australia, including asylum seeker children and non-citizen minors charged with/convicted of people smuggling.

The establishment of such a fund must ensure adequate compensation to claimants.

Strengthening the powers of the Australian Human Rights Commission

The federal government's current approach to ensuring Australia's international obligations are upheld, is by delegating authority to the Australian Human Rights Commission (AHRC).

The *Australian Human Rights Commission Act 1986* (Cth) delegates to the commission the power to make inquiries into 'any act or practice that may be inconsistent with or contrary to any human right'[23]. In this regard, human rights are considered to be the rights afforded under treaties to which Australia is a signatory, which includes the ICCPR and the CROC.

While there is no judicial guidance in relation to what actions of the Commonwealth would warrant financial compensation, there is an allowance for the AHRC to make recommendations for the payment of compensation.[24]

Therefore, if one adopts the reasoning that any reading of the Act should endorse, or be read consistently with, the right to compensation under the ICCPR, then there is a clear presumption in favour of compensation where detention causes injury, loss or damage.

Furthermore, the AHRC has shown that where there is a 'lack of bona fide or improper or unjustifiable conduct'[25] by the Commonwealth, then not only will damages be payable according to tortious principles but allowance can be made for aggravated damages.

The most significant issue with this process is that the AHRC may only make recommendations as to amounts of compensation and the manner in which it should be awarded. These recommendations are **not binding.**

The ALA recommends that the AHRC be granted the power to make decisions and the Commonwealth would have to table a statement in the parliament if it did not agree with the decision, as to awards of compensation when international law is breached, particularly in the case of children.

This could be a unique power granted to the new National Children's Commissioner, or to the President or Human Rights Commissioner, in the absence of any specific national legislation protecting children's rights.

Alternatively, the National Children's Commissioner could be involved in the establishment of the breach of guardianship fund.

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[23] *Australian Human Rights Commission Act 1986* (Cth), s.11 (1)(f)
[24] *Australian Human Rights Commission Act 1986* (Cth) s35.
[25] Australian Human Rights Commission Notice under s.29(2) of the *Australian Human Rights Commission Act 1986* (Cth). Complaint made by Mr Parvis Yousefi, Mrs Mehrnoosh Yousefi and Manoochehr Yousefi at 237; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1, per Clarke JA, at 15-17; *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, per Lockhart J, at 239-240.

Developing federal human rights legislation

The development of a federal Charter of Rights and/or a federal bill specifically focused on protecting the rights of the child is important to ensure Australia's compliance with the *Convention on the Rights of the Child.*

Such legislation could assist in establishing clear, structured processes for communicating the rights of children in domestic law, and in redressing breaches of the rights of the child.

The *Human Rights Act 2004* (ACT), for example, outlines the rights of children in the criminal process, including that an accused child must be separated from adults, and a child must be brought to trial as quickly as possible.[26] Section 11(2) also provides that 'every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.'

The *Charter of Rights and Responsibilities 2006* (Vic) provides that 'every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.'[27] Section 23 provides that an accused child who is detained or a child detained without charge must be segregated from all detained adults; an accused child must be brought to trial as quickly as possible; and a child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.'

No federal Act exists that protects child rights and implements the core tenements of the *Convention on the Rights of the Child.*

The Australian Human Rights Commission is currently composed of a President and 6 Commissioners, with an additional National Children's Commissioner proposed for introduction.[28] However, all of the Commissioners dedicated to a particular area of functionality (e.g. disability discrimination; race discrimination; sex discrimination) all operate with relevant discrimination Acts in place at either a federal or state level mandating the rights of individuals in Australia.

No such stand alone legislation protecting the rights of the child is afforded to children.

Child Rights wrote about this anomaly in their NGO Report:

> *'The principles of CROC are binding on Australia as part of international law but not binding on the Courts as part of domestic law. This creates a curious situation. However, to a considerable extent the relevant obligations are incorporated into local laws, and as such they are enforceable and capable of being protected in the state or federal courts.'*
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> *'The United Nations Committee on the Rights of the Child, in its comments on Australia's first (1995) and combined second and third reports (2003) emphasised the need for an overall policy and plan of action aimed at delivering to children the rights given to them in CROC.*
>
> *The case of* Teoh *established 'that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law' and that 'an international convention may play a part in the development by the courts of the common law'. As such, although CROC*

[26] *Human Rights Act 2004* (ACT), s 20
[27] *Charter of Rights and Responsibilities 2006* (Vic), s17(2)
[28] See *Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012* (Cth)

has not been officially incorporated into Australia's domestic law, it does retain some degree of influence on domestic policy.'[29]

Australia's report to the UN Committee on the Rights of the Child is currently being considered, and we believe there will be an emphasis on the need for implementation of international obligations of Australia to children to be infused into domestic law.

Rights to redress – a comparison of other human rights remedies

Damages are available for breaches of human rights in the UK, Canada and the ACT.

UK

Damages are available for breaches of human rights under the United Kingdom's *Human Rights Act*, including damages for acts of public authorities which are incompatible with human rights.

From 2001-2009, only four awards of damages were made, two of which were overturned on appeal. The quantum of damages was modest in the cases which were not overturned. £10,000 was awarded for a breach of Article 8 (respect for privacy and family life),[30] and £750 to £4,000 was awarded for a breach of Article 5(4) (right of persons deprived of liberty to be held in court).[31]

Aside from limitations on when damages will be awarded,[32] one reason for the rarity of awards may be that the House of Lords has stated that the remedy of damages plays a limited role in related to breaches of the Human Rights Act. It has been said that as human rights cases are directed at the protection of human rights, an order finding a violation and preventing the abuse will usually be sufficient and any question of compensation will be a secondary consideration.[33]

Canada

Financial compensation is available under the *Canadian Human Rights Act* in certain circumstances: for lost wages or expenses related to discrimination; for the victim's pain and suffering; and/or special compensation where the Human Rights Commission decides that the discrimination was wilful or reckless.[34]

In *City of Vancouver v Ward,*[35] the Supreme Court of Canada considered the availability of damages for a breach of human rights under the Canadian Charter of Rights and Freedom. The Court affirmed that damages could be an appropriate remedy in human rights cases;

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[29] Child Rights Australia NGO Report, 'Australia's compliance' http://www.childrights.org.au/background/australias-compliance
[30] *R (Bernard) v Enfield LBC* [2003] LGR 423.
[31] *R(KB) v Mental Health Review Tribunal* [2004] QB 936.
[32] *Human Rights Act* (1988) s 8(2) provides that damages can only be awarded by a court with the power to award damages; s8(3) provides that damages can only be awarded if they are necessary to afford 'just satisfaction' to the person aggrieved and the court must first consider whether other orders could provide that satisfaction.
[33] See Lord Bingham in *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673, paras 52, 53.
[34] *Canadian Human Rights Act* (1977) s 53(2)-(3).
[35] 2010 SCC 27.

damages could satisfy the general considerations of appropriateness and justness as required by section 24(1) in obtaining a remedy. A four-step test was established for determining when damages will be awarded. The steps include whether a Charter breach has been established, whether damages will serve a useful function or purpose, whether there are countervailing considerations that would render damages inappropriate or unjust, and what quantum of damages would be appropriate and just.

In *R v Smickle,*[36] the Ontario Superior Court refused to impose a mandatory minimum sentence established by the federal government for firearm possession, holding that imposing the mandatory sentence in this case amounted to cruel and unusual punishment prohibited by the Canadian Charter of Rights and Freedoms. Justice Molloy stated that 'the only goal or principle of sentencing that would arguably be met by the imposition of this sentence would be denunciation and general deterrence… [which] cannot justify the imposition of a sentence that is otherwise grossly disproportionate to what an offender deserves'.

ACT

Damages may be awarded for wrongful criminal conviction and unlawful arrest and/or detention under the ACT Human Rights Act.[37]

In *Morro & Ahadizad v Australian Capital Territory*,[38] three claimants sought redress for admitted false imprisonment by the ACT. After awarding damages for the civil wrong committed by the ACT (false imprisonment), the court considered whether to make compensatory orders for unlawful detention under section 18(7) of the ACT Human Rights Act. It was found that while section 18(7) does create an independent statutory right to compensation. However, the court did not make separate orders for human rights breaches, stating that the orders for damages gave effect to the right under section 18(7).

Civil Liability

At present, without the appropriate mechanism for recovering damages at international law, actions can be potentially made under the various civil liability acts in each state and territory.

However, the *Civil Liability Acts* currently precludes criminals who conduct a serious offence (loosely, those liable to imprisonment for 6 months or more), where that offence has contributed to their damages, from being awarded compensation[39]. Therefore, if an adequate legal defence is not mounted during any potential criminal proceedings arising from an alleged people smuggling charge then there may be preclusion from recovering damages for unlawful detention as a minor.

The Committee should note that there are reports where those charged with people smuggling offences are pleading guilty in circumstances where there is reasonable doubt

[36] 2010 ONSC 602.
[37] *Human Rights Act (*ACT) s23; s18(7).
[38] [2009] ACTSC 118.
[39] For example, *Civil Liability Act 2002* (NSW) s54.

that such crimes have been committed. This is of particular prominence in cases where the individuals charged are not aware of their involvement in people smuggling activities.

This is a significant issue insofar as it concerns criminal proceedings. If an individual is found guilty of an offence or pleads guilty to an offence such as people smuggling then it would potentially affect the ability to recover damages for unlawful or arbitrary detention due to the operation the Civil Liability acts, for example, section 54, *Civil Liability Act 2002* (NSW).

Whilst this may be an attractive provision the Inquiry should note that where there is a lack of understanding and knowledge of particular offences relating to people smuggling and indeed knowledge of involvement in such a crime this brings into significant question the ability to meet the criminal tests in order to secure a conviction. The ALA fears that anyone pleading guilty to such offences may be doing so without adequate advice, legal representation or proper knowledge and understanding of the crimes in which they are charged.

Without ensuring this advice and access to a proper defence is available then further breaches of international treaties concerning the right to a fair trial and indeed the rule of law in Australia will occur.

The access of individuals to legal representation, and the time frame in which it is accessible, and adequate, should also be examined, in our view, by the Committee.

In any case the ALA is of the position that the Civil Liability Act is not the appropriate mechanism for minors placed in this situation to recover damages. It is clear that the circumstances under which minors are incarcerated in Australia’s adult prisons is in direct contravention of Australia’s international obligations and should be answerable to these same obligations.

Therefore, the ALA commends its recommendation that the AHRC should be given authority to make recommendations as to damages in relation to breaches of International Law and that the government would have to table in the parliament a statement if it disagreed with that recommendation.

Compensation for false imprisonment

The ALA believe that minors housed with adults in Australian prisons, that were barred inaccessible from the protections under Federal policy and the Crimes Act, via inadequate wrist X ray age determinations, and mandatory detention provisions, may be able to claim for unlawful detention.

The High Court of Australia has held that it is a fundamental principle of Australia's constitutional law that the executive may not interfere with the liberty of an individual without valid authorisation.[40]

In *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 528-529, Justice Deane explained:

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[40] Mark A Robinson, ‘Damages in False Imprisonment Matters’ (2008). Accessed 14 September 2011 at http://www.robinson.com.au/monoartpapers/papers/MAR%20Damages%20in%20False%20Imprisonment%20Matters-as%20Delivered%2022%20February%202008.pdf

> *The* ***common law of Australia knows no lettre de cachet or executive warrant*** *pursuant* ***to which either citizen or alien can be deprived of his freedom by mere administrative decision or action.*** *Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorize or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate. ...*
>
> *It cannot be too strongly stressed that* ***these basic matters are not the stuff of empty rhetoric****.* ***They are the very fabric of the freedom under the law which is the prima facie right of every citizen and alien in this land.*** *They* ***represent a bulwark against tyranny.*** *(cited in Ruddock v Taylor (2005) 222 CLR 612 per McHugh J at [120] and Kirby J at [138].)*

As Justice Kirby stated in *Ruddock v Taylor* (2005) 222 CLR 612 at [140], 'wrongful imprisonment is a tort of strict liability'. A plaintiff is entitled to damages to remedy the action, and wrongful imprisonment actions are able to access the full range of general damages, and exemplary damages.

Comparator amounts for false imprisonment suggested *Thompson; Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 (Lord Woolf MR, Auld LJ and Sir Brian Neill), where the Court stated that:

> *In a straightforward case of wrongful arrest and imprisonment, the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour, an additional sum is to be awarded, but that sum should be on a reducing scale.... a plaintiff who has been wrongly kept in custody for twenty dour hours should for this alone normally be regarded as entitled to an award of about £3,000. For subsequent days, the daily rate will be on a progressively reducing scale.*

In a rough conversion made as at 18 February 2008, this would be equivalent to AUD **$6,441.89** for the first day.[41]

The ALA query the amounts that will be payable to children housed in adult prisons, especially given that such treatment would not be tolerated in the case of any Australian child.

[41] Ibid. 7

C. FUTURE STEPS

Providing fulfilment to Optional Protocols

Currently, there is a paucity of international mechanisms to support children in the event of breach of their rights.

The third optional protocol to the *Convention on the Rights of the Child* provides for a mechanism by which individual children may complain about breach of their rights.

Entered in for signature in February of this year, we recommend that the Australian government consider both signing and ratifying the optional protocol in the imminent future.

In addition, the ratification of the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (OPCAT) would provide increased transparency on human rights violations within prisons, as well as the development of national preventative mechanisms to prevent cruel, inhuman or degrading punishment within Australian prisons.

Proposed legislative amendments

We draw attention to, and commend, two bills previously posed to the Senate Legal and Constitutional Affairs Committee for Inquiry, that commenced to redress this issue: the *Crimes Amendment (Procedural Fairness for Minors) Bill 2011* (Cth) that recommended a presumption of age under 18 years where the individual alleges that they are under 18; and the *Mandatory Minimum Penalties Bill 2011* (Cth), that recommended the removal of mandatory penalties for people smuggling offences.

We believe that these bills provide a necessary step in preventing the continuation of such breaches of the rights of the child.

We also made additional recommendations to better secure the rights of the child, including:

- the establishment of minimum time periods of 48 hours of notifying families;
- retrospective abolition of the wrist X ray test;
- an Inquiry to be established into garnishing of prison wages of impoverished Indonesians and compensation to be paid; and
- a maximum time period be established for persons to be held without charge of 7 days; and
- all persons should be provided with effective access to translators, Consulate support and opportunity to contact their families.

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CONCLUSION

Ultimately, there needs to be a substantial political and legislative shift in attitude towards persons charged with people smuggling.

The vast majority of persons charged with people smuggling in Australia are not the main organisers and facilitators. Those being charged are the crew, the cooks, the potato peelers; that often do not have requisite knowledge of what they are doing.

The Human Rights Commissioner, Catherine Branson QC, has commented that Indonesian minors alleged to be involved in people smuggling could be viewed as victims of human trafficking.[42]

Decisions to withdraw charges against minors are policy decisions and are not necessarily because of a current legal requirement. The CDPP also does not have a sentencing regime for children in these types of matters. Sentencing principles for children generally have an emphasis on rehabilitation. General deterrence is also generally not a feature as a sentencing principle for children – however, it is a principle that underpins mandatory imprisonment terms.

The issue of people smuggling is one that intersects with other areas of public and foreign policy, including our obligations and responsibilities under international law.

It also intersects with the rights of Indonesian fishermen; Australia's territorial waters; poverty reduction and alleviation; replenishment of fish stocks; the role of natural disasters and community education. We have detailed these interconnecting issues in our previous submission to the Senate Legal and Constitutional Affairs Committee in our response to the *Deterring People Smuggling Bill 2011* (Cth).[43]

The issue of people smuggling has become highly politicised. What is needed is a rational discussion of the underlying causes of people smuggling, and how best to promote the rights of people in our region as well as in our nation.

While this Inquiry investigates options for reparation, it is our view that it would be wise for such breaches of human rights to be prevented, as well as adequately compensated.

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[42] Paul Maley, 'Asylum boat crew may be 'victims of trafficking' ', *The Australian,* May 7 2012. Accessed 5 June 2012 at http://www.theaustralian.com.au/national-affairs/asylum-boat-crew-may-be-victims-of-trafficking/story-fn59niix-1226348213436

[43] Australian Lawyers Alliance, 'Understanding the complexities: People smuggling, deterrence and intersection with Australia's maritime regulation' (November 2011). Accessible at http://www.lawyersalliance.com.au/public.php?id=115

APPENDIX 1 – AGE DETERMINATION

Anthropologically speaking, various studies have been conducted concerning the European or Western skeletal age determination system, otherwise known as the Greulich and Pyle Standard. This is the standard used to determine age of potential minors when considering the determination of age of those arrested for people smuggling, without proper documentation.

These studies have concluded that there exists significant variations in findings and has indicated unreliable results concerning bone ages and that this testing method does not accurately represent multi-ethnic child populations. For example, in a study conducted in 2001[44] concerning children of European and African American decent showed that the results using the Greulich and Pyle Standard showed that African American children had a greater bone age then those of a European decent. In affect the testing standards make no allowance for differences in genetic makeup insofar as it affects bone age. The conclusion of the study rejected the adequacy of the Greulich and Pyle Standard and that new standards are required.

What needs to be addressed, is the fact that a testing method is being used to determine age that does not take into account the individual circumstances, genetic makeup or developmental growth of children or minors from various decent including those of Indonesian origin. No study has been conducted to determine the accuracy of testing methods concerning minors of an Indonesian origin who are incarcerated pending charges and investigation. This poses a serious question as to the protection measures in place to protect minors in accordance with the CRC and indeed Australia's obligations under that convention.

The potential damage that could be suffered by minors incarcerated is extensive.

The government should take notice that if the pursuit of civil and political rights is not motivation enough then the public interest and protection of treasury funds should be considered to a greater extent in upholding and pursuing human rights recognition in Australia.

The ALA therefore strongly opposes the use of this testing method in determining age and should be abolished immediately and such abolition should be applied retrospectively. Furthermore, a judicial enquiry should be launched into previous convictions made where age, for the purposes of such conviction, has been determined using these testing methods.

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[44] Mora et al, "Skeletal Age Determinations in Children of European and African Descent: Applicability of the Greulich and Pyle Standards" Pediatric Research (2001) 50, 624-628.