

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

26 June 2012

Dear Ms Dennett,

Submission to the Inquiry into the Detention of Indonesian Minors in Australia

Please find attached a response from the Immigration Advice & Rights Centre to the Inquiry into the Detention of Indonesian Minors in Australia.

We thank you for the opportunity to provide a submission in regards to this review and welcome any further opportunity to provide consultation regarding the Committee's findings.

Kind regards,

Anthony Hughes
Chief Executive Officer
Registered Migration Agent

Louisa McKimm
Solicitor
Registered Migration Agent

Introduction

1. The Immigration Advice & Rights Centre (“IARC”) was established in 1986 as a specialist immigration law community legal centre. Due to its extensive knowledge of Australia’s immigration law and policy, IARC has made contributions to law reform discussions enhancing the operation of migration and refugee law.

Detention (TOR: a,d, e)

Consular Assistance

2. There are cases currently in the public discourse that illustrate federal authorities may not be establishing contact with the Indonesian Consulate within a reasonable time after their nationals are detained. For example *The Jakarta Post* reported, on 15 June 2011, that “the Australian Government violated the 1963 Vienna Convention on Consular Relations (“the Convention”) by informing the Indonesian government months after they had jailed three Indonesian children”.
3. Article 36 of the Convention “stipulates that if a detained person so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other matter”. The receiving state is also required by Article 36 of the Convention to inform the detained person of their right to consular assistance.
4. The ability of the Indonesian consulate to safeguard the rights of minors, pursuant to Article 5 of the Convention, will be hampered should federal authorities fail to inform the detained person of their right to consular assistance. Therefore IARC recommends that, where age is an issue, Federal authorities work together with Indonesian officials to investigate age, and safeguard the rights of the accused.

Age Determination Processes

5. IARC is concerned by the estimate of some refugee advocates that there are approximately 32 cases in which minors are being held in detention facilities, without a guardian, in relation to people smuggling charges. These cases raise serious concerns about the adequacy of age determination processes employed by federal authorities when an individual is detained on suspicion of people smuggling. For example, in one case a journalist remarked, “it was obvious to anyone who met him that Ali Jasmin was just a boy”.¹
6. IARC recognises that “age determination is an inexact science involving some margin of error, irrespective of the method used”.² The process is made particularly difficult by the fact “the accused may be from a developing country where births are not routinely registered”.³ However, the wrist x-ray is the only prescribed procedure, for age determination, under the *Crimes Regulations* 1990.⁴

¹ Sydney Morning Herald, “He was 13 years-old when Australia locked him in an adult prison for people smuggling”, May 20 2012.

² Attorney General’s Department, Australian Federal Police and Commonwealth Director of Public Prosecutions, *Joint submission to the Australian Human Rights Commission Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children*, February 2012.

³ *Ibid.*

⁴ *Ibid.*

Immigration Advice & Rights Centre Inc.

7. On 17 February 2011 the President of the Australian Human Rights Commission wrote to the Federal Attorney General to raise concerns about the reliability of the wrist x-ray in determining age.⁵ In response, the Government announced a series of new age determination techniques, to supplement the wrist x-ray, which included voluntary dental x-rays, taking early steps to investigate the age of the accused and voluntary interviews.⁶
8. IARC supports the introduction of the above supplementary methods of age determination⁷ but recommends, when consent is to be obtained from the accused for each method, that the official considers their vulnerability and the many reasons why they may not provide their consent to age determination procedures. Anecdotal evidence obtained by IARC suggests that minors may withhold consent to age determination procedures because, in adult correctional facilities, they can smoke and are placed with other Indonesian nationals.
9. IARC submits it is important, where age remains a concern, that Federal authorities seek the help of the Indonesian consulate to investigate the matter further, or to facilitate an interview with the minor in question.

Adult Correctional Facilities

10. IARC is concerned that, without consular assistance, Indonesian minors are spending time in adult correctional facilities on people smuggling charges. The Australian Human Rights Commission "is aware of a number of cases where individuals suspected of people smuggling offences were acknowledged to be children after they had spent long periods of time in detention, including adult correctional facilities".⁸ Of the reported cases, one minor spent 21 months in detention before his lawyer intervened and travelled to Indonesia to get affidavit evidence about his age.⁹ Further, in a case from Queensland, a minor spent 15 months in Arthur Gorrie Correctional Centre before his lawyer intervened and travelled to Indonesia to obtain affidavit evidence.¹⁰
11. Of even more concern, than the initial detention of minors, are the conditions they are exposed to in adult correctional facilities. Anecdotal evidence, obtained by IARC, from one refugee advocate¹¹ suggests that Indonesian minors are working in the laundry, of at least one adult prison, alongside convicted sex offenders. Further, that the minors, in question, are not being paid the standard wage for their work in the laundry.
12. IARC recommends the implementation of procedural safeguards against exposing potential minors to the risk of abuse by convicted sex offenders until their age can be conclusively determined as being over 18. For example, it may be appropriate to house potential minors in juvenile correctional facilities until it can be determined that they are adults. Even if the anecdotal evidence quoted above cannot be verified, the risk of exposure of minors to sex offenders is simply too great to house potential minors in adult correctional facilities.

Age before Australian Courts (TOR: c)

⁵ Ibid.

⁶ Ibid.

⁷ However, we stand by our comments on the dental x-ray in our submission to the Inquiry into the *Crimes Amendment (Fairness for Minors) Bill 2011* dated 31 January 2012. In particular: "In light of the issues raised by many peak Australian medical bodies, the use of dental x-rays as a method to determine age is unethical and unreliable".

⁸ Australian Human Rights Commission, *Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children*, Discussion Paper, December 2011, 8.

⁹ Ibid.

¹⁰ Ibid.

¹¹ *Name of the advocate is protected.

Immigration Advice & Rights Centre Inc.

13. There is concern, amongst refugee advocates, that age is not being brought before the court. One advocate¹² told our Centre that she had been involved in the case of one 16 year-old boy where the legal representative had advised the accused to plead guilty rather than go through the rigmarole of proving age.
14. To prove that their client is a minor, it seems that, legal representatives must go to extraordinary lengths. In paragraph 13, we referred to two cases where the legal representative was forced to travel to Indonesia to obtain affidavit evidence regarding their client's age. We submit that not all legal representatives will have the resources at hand to enable them to travel to Indonesia to obtain evidence.
15. IARC recommends that more should be done to support the capacity of legal representatives to obtain evidence of age, and represent the best interests of their clients. In some cases it may be appropriate to facilitate communication between the legal representative and Indonesian consulate.
16. Article 37 of the *United Nations Convention of The Rights of the Child* (CROC) states that:
 1. *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 time.*
 2. *That every child deprived of his or her liberty shall be treated with humanity and respect of the 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.*
17. It is our submission that anecdotal evidence, which suggests children are being detained for lengthy periods, not as a measure of last resort and alongside convicted sex offenders in adult prisons, is inconsistent with Australia's obligations under Article 37 of CROC.
18. IARC recommends that potential minors, who are being held on suspicion of people smuggling, be placed into juvenile correctional facilities, pending the outcome of age determination proceedings.
19. Article 27 of CROC states that:

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance.
20. Anecdotal evidence that suggests authorities are not complying with Australia's obligations under the 1963 *Vienna Convention on Consular Relations* is inconsistent with Australia's obligations under Article 27 of CROC. IARC recommends that federal authorities should work with the Indonesian consulate from the outset of age determination proceedings to ensure Australia is complying with its international obligations.
21. *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* 128 ALR 353 highlights Australia's obligations to apply ratified conventions in national law. The High Court of Australia held that ratification of CROC created an expectation that in all cases involving children Article 3.1 of CROC would be upheld where "the best interests of the child would be a primary concern".
22. In line with this decision IARC believes, with regard to policy on the detention of Indonesian minors, that the best interests of the child must be of primary consideration. IARC supports any amendments to procedures for the prosecution of minors for people smuggling offences that aim to protect the child and in particular strengthen procedures that determine the age of potential minors.

^{12*}Name of the advocate is protected.

Immigration Advice & Rights Centre Inc.

Conclusion:

23. As an organisation that advocates on behalf of foreign nationals seeking to remain in Australia, on both family and humanitarian grounds, we regularly represent, or give advice to unaccompanied minors. Thus, IARC is supportive of improving procedures for objective assessment of age dispute cases in order that a proper determination of the issue can be made by the authorities.
24. Our Centre believes that age determination procedures must be updated to take into account the inherent vulnerability of a minor who is detained on suspicion of people smuggling.

Recommendations:

25. IARC recommends that federal authorities investigate the age of potential minors beyond the issue of consent through cooperation with the Indonesian consulate, and their own investigations.
26. IARC recommends that federal authorities facilitate a closer relationship with the Indonesian consulate so as to ensure that Australia complies with its international obligations under the *1963 Vienna Convention on Consular Relations*.
27. IARC recommends the institution of procedural safeguards against exposing minors to the risk of abuse by convicted sex offenders until their age can be conclusively determined. For example, it may be appropriate to house potential minors in juvenile correctional facilities until it can be determined that they adults.
28. IARC recommends that more should be done to support the capacity of legal representatives to obtain evidence of age, and represent the best interests of their clients.
29. IARC continues to support the use of objective methods to determine age where it is in dispute.
30. Finally, IARC supports any amendments to procedures for the prosecution of minors, for people smuggling offences, which aim to protect the child and in particular strengthen procedures that determine the age of potential minors.