

31 May 2012

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

Dear Ms Dennett,

INQUIRY INTO THE DETENTION OF INDONESIAN MINORS IN AUSTRALIA

The Law Council of Australia is pleased to provide the following brief comments in response to the Senate Legal and Constitutional Affairs Committee's inquiry into the Detention of Indonesian Minors in Australia.

The Law Council shares the concerns of the Australian Human Rights Commission and others relating to the rights and wellbeing of a number of Indonesians who claim to be minors, who are currently being held in Australian adult detention facilities. Reports suggest that these young men have been, or are currently, being detained on the basis of their suspected involvement in people smuggling activities, while they await the determination of any charges for people smuggling offences and following conviction on the basis of having been determined to be adults.¹

The Law Council supports the establishment of this inquiry to shed light on a range of matters including: whether any Indonesian minors are currently being held in Australian detention centres where adults are also held; and the way information regarding the age of detainees is obtained, considered and acted upon by Australian authorities. The Law Council notes that this inquiry is taking place against a background of related inquiries, such as the recently completed inquiry into the *Crimes Amendment (Fairness for Minors) Bill 2011*², and an inquiry currently being undertaken by the Australian Human Rights

¹ See Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* (27 February 2012) available at: http://www.hreoc.gov.au/legal/submissions/2012/20120227_migration_amendment.html#Heading96; Attorney General, the Hon Nicola Roxon MP, Media Release, *Review of convicted people smuggling crew queried to be minors*, (2 May 2012), available at <http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/2-May-2012---Review-of-convicted-people-smuggling-crew-queried-to-be-minors.aspx>;

The Hon Nicola Roxon MP, Media Release, *Initial results of people smuggling convictions review*, (17 May 2012),

Nicola Berkovic, 'Indonesian people-smugglers returned over age concerns' (18 May 2012) *The Australian*, available at <http://www.theaustralian.com.au/national-affairs/immigration/indonesian-people-smugglers-returned-over-age-concerns/story-fn9hm1qu-1226359357408>.

² Information about this inquiry is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/fairness_for_minors/index.htm

Commission into the treatment of suspected people smugglers who say that they are children.³

The Law Council has previously made submissions on related issues concerning the *Anti People Smuggling and Other Measures Bill 2010*, the *Deterring People Smuggling Bill 2011*, the *Commonwealth Commissioner for Children and Young People Bill 2010*, the Inquiry into Australia's Immigration Detention Network and the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*.⁴

The Law Council notes that a number of other organisations and individuals are well placed to provide information in response to this inquiry's particular terms of reference. The Council wishes to use this opportunity to re-iterate its concerns in relation to the current offence provisions relating to people smuggling in the *Migration Act 1958* (Cth) (the Migration Act), and to draw attention to the obligations Australia has assumed under *the Convention on the Rights of the Child* (CROC) that may be breached if children are being detained alongside adults in relation to people smuggling activities.

Concerns relating to the prosecution and sentencing of persons charged with or convicted of people smuggling offences

The Law Council has been concerned by recent developments that indicate that there may be up to 28 cases in which minors have been held in detention facilities with adults either on suspicion of involvement in people smuggling activities, awaiting trial in relation to people smuggling offences or following conviction.

These cases, which have been brought to the attention of the public and the parliament by the Australian Human Rights Commission and the Indonesian Government, suggest serious inadequacies in relation to the age determination processes employed by Australian authorities and in relation to the approach taken to prosecuting and sentencing persons who claim to be minors for people smuggling offences.

These cases underline the importance of ensuring the most appropriate age determination techniques are available to anyone detained on suspicion of involvement in people smuggling activities and that checks and procedures exist to ensure that information given to an Australian authority or department about the age of a defendant or suspect is followed up appropriately. They also reinforce the need for careful consideration to be given to the way people smuggling prosecutions are undertaken in relation to persons who claim to be minors.

The Law Council notes that on 2 December 2011, the Commonwealth Director of Public Prosecutions (CDPP) announced a policy of not opposing bail for individuals being prosecuted for people smuggling offences, who claim to be minors, and that he would not authorise any further prosecutions for people smuggling offences unless he was personally satisfied that the accused is at least 19 years of age.⁵ The CDPP reaffirmed these policies in its 2012 submission to the Australian Human Rights Commission inquiry

³ On 21 November 2011, the Commission announced an *Inquiry into the treatment of individuals suspected of people smuggling who say that they are children*. The Inquiry is expected to release a report in mid-2012. Information about the inquiry is available at www.humanrights.gov.au/ageassessment.

⁴ Submissions available at <http://www.lawcouncil.asn.au/library/submissions.cfm>.

⁵ Paul Maley, 'New DPP policy gives Indonesian minors bail,' *The Australian*, (2 December 2011) available at <http://www.theaustralian.com.au/national-affairs/immigration/new-dpp-policy-gives-indonesian-minors-bail/story-fn9hm1gu-1226211747202>.

into the treatment of individuals suspected of people smuggling offences who say that they are children.⁶

On 17 May 2012 the Attorney-General issued a media release which stated that three Indonesian nationals convicted of people smuggling, who claim they were minors at the time of their interception, will be released from prison and returned to Indonesia following a review of their cases completed by the Attorney-General's Department.

The Law Council welcomes these announcements and urges this Committee to recommend that the CDPP's current approach to these matters at least be formalised as part of the CDPP's prosecution policy.

However, without legislative change, these changes can only go so far in terms of preventing the detention of minors in adult facilities. For this reason, the Law Council supports the recommendations made by this Committee following its recent inquiry into the provisions of the *Crimes Amendment (Fairness for Minors) Bill 2011* where it was recommended that the Australian Government:

- review the Australian Federal Police's procedural and legislative requirements in dealing with persons suspected of people smuggling offences, with a view to facilitating the prompt laying of charges where appropriate;
- introduce legislation to expressly provide that, where a person raises the issue of age during criminal proceedings, the prosecution bears the burden of proof to establish that the person was an adult at the time of the relevant offence; and
- review options to support the capacity of the legal representatives of persons accused of people smuggling offences who claim to be underage at the time of the offence to gather evidence of age from their place of origin.

The Law Council also suggests that these issues could be addressed by removing the mandatory penalty provisions for certain people smuggling offences in the Migration Act. This would restore appropriate judicial discretion in the sentencing process, and allow matters such as the age and maturity of the defendant to be given proper consideration.⁷ Without change to the mandatory sentencing provisions, they leave open the possibility that young, impoverished Indonesians, who are at the bottom of the hierarchy of people smuggling operations can face considerable periods of incarceration.⁸

While section 236A and sub-section 236B (2) of the Migration Act aim to limit the impact of mandatory minimum sentences on persons proved to be under 18, the burden of proving age is placed on the defendant. Experience suggests that many vulnerable, impoverished young Indonesians who have made the voyage to Australia by sea – either as paid members of a people smuggling operation or as passengers - are unable to obtain the requisite documentation or other proof needed to show that they were under 18 at the

⁶ The CDPP generally does not oppose applications for bail made by people smuggling defendants who claim to have been a minor at the time of the offence. Provided the defendant's legal representative makes an application for bail, and this is granted by the court, the defendant will be released into immigration detention as an unlawful non-citizen until the court either reconsiders the issue of bail or the outcome of their prosecution is known. 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 that they are children (February 2012) available at <http://www.hreoc.gov.au/ageassessment/submissions.html>.

⁷ See the Law Council's Submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiring into the Migration Amendment (Removal of Minimum Mandatory Penalties) Bill 2012, available at <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/detention.cfm>.

⁸ Ibid.

time.⁹ Section 236A and sub-section 236B (2) therefore have limited effect and the Law Council suggests that changes should be made to the age determination process to overcome the difficulties experienced in proving age. Changes should also be made to allow for judicial discretion in sentencing persons who are over 18 but still young and vulnerable.

Concerns relating to Australia's obligations under the *Convention of the Rights of the Child* (CROC)

The Law Council is also concerned that the detention of minors with adult prisoners on suspicion of people smuggling offences, awaiting the determination of any charges for such offences, or following conviction may constitute a contravention of Australia's obligations under the *Convention of the Rights of the Child* (CROC).¹⁰

The CROC recognises that children, as well as adults, are entitled to protection of their basic human rights, but that children require special protection because of their vulnerability to exploitation and abuse.

Article 1 of the CROC provides that children generally are those persons under 18, so a failure to recognise a person as a child prevents them from benefitting from the rights set out in the CROC.

One of the fundamental core principles of the CROC is contained in Article 3 which provides that in all actions concerning children, the best interests of the child shall be a primary consideration. The detention of minors with adults cannot be said to be in the best interests of the child.

More specifically, Article 37(c) of the CROC includes requirements that a child deprived of his or her liberty be treated in a manner which takes into account the needs of a person of his or her age and that the child should generally be separated from adults. Although Australia has entered a reservation in relation to Article 37 (c), the written reply of Australia to the List of Issues identified by the United Nations Committee on the Rights of the Child (the UN Committee) for its forthcoming appearance in relation to its compliance with the CROC, indicates that it is reviewing this reservation.¹¹

There is a range of commentary on the CROC generally which indicates that it obliges a state party to undertake steps to accurately determine age and to make a meaningful distinction in terms of decisions to detain and the conditions of detention, depending on whether the person is an adult or a child.¹²

For example, in General Comment No 6 on the Treatment of Unaccompanied and Separated Children outside their Country of Origin, the UN Committee states that a child needs to be identified as separated or unaccompanied as soon as their presence in the country becomes known. This general comment also states that age identification measures should not only take into account the physical appearance of the individual, but also his or her psychological maturity and be conducted in a scientific, safe, child and gender-sensitive and fair manner.¹³ While the general comment is addressed more to particular situations where children are unaccompanied, such as seeking asylum, than to

⁹ For further discussion of this issue see Australian Human Rights Commission, Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children, Discussion Paper: December 2011, available at http://www.hreoc.gov.au/ageassessment/downloads/AgeAssessment_DP20111206.pdf.

¹⁰ See *Convention of the Rights of the Child* available at <http://www2.ohchr.org/english/law/crc.htm>.

¹¹ See http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC_C_AUS_Q_4_Add1.pdf.

¹² See UNICEF, 'Age Assessment practices: a literature review & annotated bibliography' at http://www.unicef.org/protection/Age_Assessment_Practices_2010.pdf.

¹³ See General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside of their Country of Origin <http://www.unhcr.ch/tbs/doc.nsf/%28symbol%29/CRC.GC.2005.6.En?OpenDocument>.

the situation of minors who have been recruited as crew for vessels, which have been used for people smuggling, its emphasis on the careful conduct of age assessment is nevertheless relevant to the latter situation.¹⁴

The Law Council considers that this commentary on the obligations under the CROC means that Australia needs to review its approach to the age determination of persons who claim to be minors in the context of investigations, prosecutions and convictions of such persons for people smuggling.

The current Australian approach to detaining young Indonesian fisherman believed to be involved in people smuggling or charged with people smuggling offences has seen the use of inaccurate age determination processes. The current approach also places the burden on the detainee to establish age and removes the court's discretion to take into account the age and maturity of the defendant when sentencing. It has also resulted in over 20 cases where it is suspected that vulnerable minors have been detained for significant periods in adult detention facilities.

The Law Council is of the view that, as a signatory to the CROC and on the eve of its appearance before the UN Committee on the Rights of the Child, the Australian Government must take immediate action to ensure that it is strictly adhering to its international obligations with respect to the detention of minors. This is particularly critical in the context of people smuggling, which has given rise to the apprehension and detention of vulnerable young impoverished Indonesian fishermen, who are often unable to be certain of their own age and in many cases have very little in common with the sophisticated organisers of the people smuggling trade.

The Law Council urges this Committee to consider the detention of Indonesian minors in adult detention facilities against the background of the mandatory minimum penalty provisions in the Migration Act that apply to certain people smuggling and related offences and recommend that these provisions be repealed. The Law Council also supports the swift implementation of the recommendations previously made in by this committee in respect of the *Crimes Amendment (Fairness for Minors) Bill 2011*.

Yours sincerely,

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Acting Secretary-General

¹⁴ In General Comment 10 in relation to Juvenile Justice, the UN Committee on the Convention on the Rights of the Child specifically commented that all children detained for criminal matters must be able to quickly and effectively challenge the legality of their detention. The Committee has further observed that: 'If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt.' See <http://www.defenceforchildren.org/juvenile-justice/general-comment-no-10-project.html>. Rule 17 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (1985) also provides that in sentencing juveniles, the reaction must be proportionate to the circumstances and to the gravity of the offence, and also take into account the needs and circumstances of the juvenile. Further requirements include that the juvenile only be incarcerated in serious cases or those involving violence, and that the wellbeing of the juvenile should be the guiding consideration. See <http://www.un.org/documents/ga/res/40/a40r033.htm>. The United Nations High Commissioner for Refugees (UNHCR) has also produced documents which provide guidance on the use of age assessment processes for refugee and migrant children. See UNHCR, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, (22 December 2009); UNHCR: *Guidelines on Policies and Procedures on Dealing with Unaccompanied Children Seeking Asylum*, February 1997, p 5; UNHCR, *Refugee Children: Guidelines on Protection and Care Preface*, 1994, Geneva.