



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

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7 June 2012

Dear Committee Secretary,

Re: Detention of Indonesian Minors in Australia

Thank you for the opportunity to contribute to this Inquiry.

This submission contains some background to National Legal Aid (NLA) and the involvement of the legal aid commissions in matters relating to the detention of Indonesian people in Australia. It addresses the terms of reference from the perspective of our experience, concludes that improved communications between all agencies/organisations would assist to minimise issues, and contains some recommendations based on experience.

Background

NLA represents the Directors of each of the eight state and territory legal aid commissions (commissions) in Australia. The commissions are independent statutory authorities established under respective state or territory enabling legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- Obtain access to independent legal advice;
- Afford the financial cost of appropriate legal representation;
- Obtain access to the Federal and State and Territory legal systems; or
- Obtain adequate information about access to the law and legal system.

Commissions have made submissions to the following inquiries which it is suggested are relevant to this Inquiry:

- Inquiry into the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012, June 2012
- Crimes Amendment (Fairness for Minors) Bill 2011, January 2012

- AHRC Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children, January 2012
- Inquiry into Australia's Immigration Detention Network (NLA) August 2011
- Migration Amendment (Strengthening the Character Test and Other Provisions) Bill (NLA) June 2011

Commission representatives also met with the Indonesian Ambassador. The purpose of this meeting was to identify how to best assist Indonesian people who had been apprehended in relation to possible people smuggling or fishing offences, including people who were saying that they were minors. Recommendations arising out of that meeting are attached.

Terms of reference

Whilst this Inquiry is broader than the Inquiry into the Crimes Amendment (Fairness for Minors) Bill and includes detention of Indonesian minors in Australia, we submit that much of the information provided by commissions in relation to that Bill is applicable to this Inquiry and that the recommendations of the Committee in relation to that Bill, which are attached, should be accepted by this Inquiry.

(a) Whether any Indonesian minors are currently being held in Australian prisons, remand centres or detention centres where adults are also held, and the appropriateness of such detention.

We respectfully suggest that this term of reference can best be answered by the relevant Australian, State and Territory Governments.

Legal aid commissions will only become aware of people in detention, including minors, if either a notification is provided to the commission by either the police or authority at the place of detention or the detainee becomes aware that the commission might be able to assist and is able to make contact with the commission.

Currently, we understand that there might be 7 or 8 children being held in Darwin at Berrimah House. The Legal Services Commission of South Australia (LSCSA) is also involved in matters where 2 people who say that they are minors, but whose age is disputed, are being held at Airport Lodge Detention Centre in Darwin, and Victoria Legal Aid (VLA) is currently involved in 1 case where age is in dispute, with that person detained in Darwin having been bailed in Victoria and with the Department of Immigration and Citizenship (DIAC) advising that the person cannot be detained in Melbourne because there is no suitable low security age appropriate detention facility available.

In relation to the appropriateness of detention, Article 37 of the Convention on the Rights of the Child (CROC) provides:

States Parties shall ensure that:

(b) 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;

(c) 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;

(d) 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.

VLA has experience of clients, including minors, who had asked for assistance to contact family and not received it, and knows of cases where families have been left to assume that the detained person has been lost at sea or dead for months before contact was made.

In accordance with this Convention, we submit that Indonesian minors should be detained as a last resort and, pending age determination or charge, should reside outside of detention facilities unless all other avenues have been exhausted and it is absolutely necessary for security purposes.

- (b) What information the Australian authorities possessed or had knowledge of when it was determined that a suspect or convicted person was a minor; and**
- (c) Whether there have been cases where information that a person is a minor was not put before the court.**

In the past significant reliance has been placed on wrist x-rays as evidence that a person is an adult. Issues in relation to the reliability of this evidence generally and in the context of particular cases, have been raised in some of the previous inquiries referred to in this submission. The concern is that people who have had age determined primarily on the basis of wrist x-ray evidence might have wrongly been determined to be adults.

We are aware of a small number of cases where people convicted continued to maintain that they were minors. Cases which came to our attention after sentence and detention of the individual concerned were referred to the AHRC. It is understood that those cases have been enquired into and resolved, with the Commonwealth Attorney-General deciding to effect release of 3 people from detention on the basis of age¹.

- (d) 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?**

We understand that non-citizen unaccompanied minors seeking residency in Australia come under the guardianship of the Minister for Immigration in accordance with the *Immigration (Guardianship of Children) Act*. While we have concerns about the arrangements in place to protect the interests of these children, we note that detained Indonesian minors in Australia do not fall under the protection of a guardian in Australia. In these circumstances we understand that the child's legal guardian remains their parent or guardian in Indonesia. Indonesian minors in detention in Australia should have an independent guardian in Australia responsible for their wellbeing and to ensure that their best interests are protected. We suggest that there is a role for the National Children's Commissioner in monitoring such guardianship arrangements.

¹ Attorney-General for Australia, Media Release, Initial results of people smuggling convictions, 17 May 2012

Timely and transparent procedures should be established in relation to evidence-gathering for age determinations, including for those held or convicted in relation to people smuggling or illegal fishing. A consistent approach should be adopted so that the same procedures apply to age determinations for non-citizen children seeking asylum.

Natural justice and procedural fairness require that people have access to independent legal advice and are provided with reasons for decision including as to their age, and the opportunity to seek independent review of that decision through a legal representative. If this access is enabled early, it could be expected to assist in the earliest possible resolution of issues including those issues in relation to age determination.

Early access to independent legal advice would also assist in the satisfaction of Article 12 of CROC which provides:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or inappropriate body, in a manner consistent with the procedural rules of national law.

(e) The relevant procedures across agencies relating to cases where there is a suggestion that a minor has been imprisoned in an adult facility.

Indonesian consular representatives have been very helpful in assisting in the gathering of further information concerning age. However, it is considered that the primary obligation should be upon the Australian Federal Police to conduct a full investigation in relation to age and provide relevant material obtained to the defence. Further there needs to be an on-going obligation of disclosure so that relevant material continues to be disclosed to the defence including after conviction, and so there can be investigation as to whether an appeal is necessary.

It is suggested that preliminary procedures should involve notification of the Indonesian consulate and the local legal aid commission that a person has been detained. This is because there are ongoing concerns that the detention of particular individuals, including minors or people who might be minors, is not being brought to the attention of either the consulate or legal aid commissions, and that some people, including minors, are spending more time in detention, and possibly inappropriate places of detention, than necessary.

Whilst we have experience that some young people whose age is in dispute are, being transferred to alternative and more appropriate places of detention, and it is also understood that there are resourcing issues, there is concern that existing arrangements do not facilitate ease of communication between legal representatives and the person detained. For example, a young person detained in Darwin whose case will be heard in Melbourne, with the legal representatives based in Melbourne. Commissions endeavour to minimise such issues by way of using each other as agents, and taking advantage of video communications wherever possible.

It is suggested that protocols between all relevant agencies should be established to first ensure timely notification of detention and then the response/s that should follow,

which will enable early identification of any age related issue, and appropriate legal and non-legal supports to the young person detained.

(f) Options for reparation and repatriation for any minor who has been charged (contrary to current government policy) and convicted.

It is considered that where a minor has been detained in an adult prison, especially in cases where there has been non-disclosure of relevant evidence concerning age, then they should be assisted with repatriation and provided with an appropriate ex-gratia payment.

Conclusion

Commissions are able to assist in ensuring that any age related issues are identified, that young people are provided with legal advice and assistance as appropriate, and that the Convention on the Rights of the Child is met. To achieve this, and the earliest proper resolution of all matters, it is necessary for us to be advised early that a person has been detained, for all agencies/organisations to fully understand the role that each has in relation to the detained person, and for all relevant information to be appropriately obtained/disclosed.

Recommendations:

1. **That recommendations of the Senate Legal and Constitutional Affairs Committee Inquiry into the Crimes Amendment (Fairness for Minors) Bill 2011 (attached) be implemented.**
2. **That all stakeholders, including the Australian Federal Police, Department of Immigration and Citizenship, Commonwealth Department of Public Prosecutions, Legal Aid Commissions, and Indonesian Consular officials be requested to convene to confirm/improve existing protocols in relation to the apprehension and detention of Indonesian people, including those claiming to be minors, and that the protocols address matters such as the early notification that a person has been detained, age determination, and the provision of legal advice and assistance to those people.**
3. **That minors, should be detained as a last resort and, pending age determination or charge, should reside outside of detention facilities unless all other avenues have been exhausted and it is absolutely necessary for security purposes.**
4. **That those who say they are minors, should be provided with an independent guardian, and that guardianship arrangements should be monitored by the National Children's Commissioner, until age is appropriately determined otherwise.**
5. **That repatriation and appropriate ex-gratia payments should be made where minors have been improperly detained.**

We thank you for the opportunity to make this submission. Please do not hesitate to contact us if you require any further information.

Yours sincerely

Bevan Warner
Chair

RECOMMENDATION

MEETING BETWEEN INDONESIAN REPRESENTATIVES IN AUSTRALIA AND LEGAL AID/LAWYERS

CANBERRA, 14 DECEMBER 2011

The Indonesian Government highly appreciates the efforts of Legal Aid/Lawyers in defending the cases of individuals suspected of people smuggling offences, particularly Indonesian nationals. In order to further enhancing such efforts, the meeting recommends the followings:

1. The meeting acknowledges the works done by private lawyers and pro bono lawyers in defending the Indonesian nationals allegedly involved in people smuggling, and the Legal Aid funding from the Commonwealth of Australia.
2. The Indonesian representatives in Australia will seek formal legal advice from Australian legal experts in order to find the best options available to address the challenges in obtaining the data of Indonesian nationals detained in Australia as constrained by the Privacy Act.
3. Legal aid lawyers will share the data of Indonesian nationals detained in their respective jurisdiction, with understanding that this will be applied based on the consent of the individuals concerned.
4. The Indonesian Government will provide assistance in the collection of documents in Indonesia to support the Indonesian nationals who say that they are minors. The term of reference regarding this collaboration will be discussed in due course.
5. The meeting acknowledges the benefit from regular visit to detention/prison as already implemented in Northern Territory through a fortnightly meeting between Indonesian Consulates in Darwin and Indonesian nationals detained at IDC and recommends the presence of the Legal Aid lawyers at the meeting.
6. The Indonesian Missions will provide names and details of the Indonesian nationals to the legal Aid at the time of their apprehension.
7. The Indonesian Government welcomes the interest from Indonesian origins' lawyers to take part in defending Indonesian nationals detained in Australia for their knowledge about the nationals economic, social and cultural background.
8. The Indonesian Missions in Australia will provide the consent form to the Legal Aid Lawyers for them to pass on to the Indonesian nationals in order to assist the missions in obtaining their personal information.

9. The meeting supports the idea to ensure early intervention from Legal Aid Lawyers since Indonesian nationals arrived at Christmas Island, to provide advocacy and legal advice. Indonesian mission will discuss this with the relevant Australian agencies.
10. The meeting agrees that alleged minors should not be placed in the maximum security adult prisons. A grant of bail will be the best alternative to ensure that juveniles are accommodated in an appropriate facility.
11. The meeting has a significant concern about the mandatory sentencing.
12. The mandatory sentencing is disincentive to the early resolution of matters.
13. The meeting expresses significant concerns about the delay in the charging and placing before the Court of persons detained for the purpose of investigation.
14. The meeting also encourages the lawyers to write submission to Australian Human Rights Commission's inquiry including the compensation towards minors, as well as submission to the inquiry into the Crimes Amendment (Fairness for Minors) Bill 2011 by Standing Committee on Legal and Constitutional Affairs, Senate Australia.
15. The meeting supports the idea from lawyers to establish a working group to discuss the issue of the restriction on remittance of gratuities and cost of removal.

RECOMMENDATIONS

Recommendation 1

2.75 The committee recommends 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.

Recommendation 2

2.76 The committee recommends that the Australian Government 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.

Recommendation 3

2.77 The committee recommends that the Australian Government 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.

Recommendation 4

2.78 The committee recommends that the Senate should not pass the Bill.