

Your Ref:

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31 May 2012

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

By Post and Email: legcon.sen@aph.gov.au

Dear Committee Secretary

INQUIRY INTO THE DETENTION OF INDONESIAN MINORS IN AUSTRALIA

Thank you for your email of 11 May 2012 to our Chief Executive Officer, Ms Noela L'Estrange, inviting the Society to make submissions to the Senate Standing Committee on Legal and Constitutional Affairs on the Inquiry into the Detention of Indonesian Minors in Australia.

We note the terms of reference are as follows:

- 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 that detention;
- b) what information the Australian authorities possessed or had knowledge of when it was determined that a suspect or convicted person was a minor;
- c) whether there have been cases where information that a person is a minor was not put before the court;
- 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;
- e) the relevant procedures across agencies relating to cases where there is a suggestion that a minor has been imprisoned in an adult facility; and
- f) options for reparation and repatriation for any minor who has been charged (contrary to current government policy) and convicted.

Our responses to some of the terms of reference are set out below.

- 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 that detention**

Public data on numbers of Indonesian minors in Australian detention centres

There have been numerous reports in the media that approximately 100 Indonesian boys under the age of 18 are detained in adult prisons in Australia. According to reports,¹ these boys – some allegedly as young as 13 and mostly either cooks or deckhands on vessels carrying refugees to Australia, face the possibility of conviction for people smuggling as adults, after controversial wrist x-rays were used to determine their age.

Despite the media reports, the Society does not have access to conclusive evidence which would indicate that Indonesian minors are currently being held in Australian prisons, remand centres or detention centres where adults are also held. The Department of Immigration and Citizenship and the Consulate of Indonesia would be the relevant organisations to contact in regard to this data. In this regard, we suggest that data be made publicly available on the numbers of age assessments, the numbers of individuals who claim to be children, the results of disputed age assessments and the results of any appeals.

Detention

With respect to the detention of children and young people, we note section 4AA, *Migration Act 1958*. In accordance with article 37(a), Convention on the Rights of the Child, this provision holds that minors should only be detained as a last resort. The Society has heard reports that pre-charge detention periods, which allow the Australian Federal Police to investigate matters, generally range from 2 – 9 months. We understand that this detention period allows the Australian Federal Police to gather evidence. However, we consider it is inappropriate to detain individuals for such lengthy periods of time, without charge and in light of our obligations under international treaty law and custom. Therefore, detention should be used as a last resort and only in circumstances where it is reasonable, necessary and proportionate. In our view, if pre-charge detention is reasonable and necessary, it should be limited to a maximum of 14 days, after which a decision should be made as to whether charges will be laid.

We understand that if there is a suggestion that an individual is a minor, the Commonwealth Director of Public Prosecutions has a policy which allows these young people to elect to be detained in an immigration detention facility. However, the time spent in immigration detention will not be considered “time served” if an individual is found guilty as an adult. This is a serious issue that should be remedied.

Mandatory sentencing

The Society opposes mandatory sentencing for all offences, including people smuggling offences. The arguments and research against mandatory sentencing are well publicised and documented. We **enclose** a copy of the cogent and persuasive arguments articulated in Parliament by Queensland’s former Attorney-General, Mr Cameron Dick when he spoke against the then Opposition’s *Criminal Code (Serious Assaults on Police & Particular Other Persons) Amendment Bill 2010*.

¹ AAP 17 October 2011 – report by Isobel Hayes *100 Indonesian boys in Australian prisons*.

There are compelling arguments against mandatory sentencing in addition to those articulated by the Honourable Cameron Dick MP:

- Australian experiments in mandatory sentencing in both the Northern Territory and Western Australia have failed because of their manifest unfairness and unworkability.
- To the extent that mandatory sentencing is a response to the public concerns about crime, the most appropriate response is to educate the public about sentencing, not to impose an inflexible and unfair sentencing regime. This is demonstrated by Australian and overseas research. A study published by Professor Kate Warner from the University of Tasmania asked jurors (who were fully informed about the facts of the case) to assess the appropriateness of the judge's sentence. More than half of the jurors surveyed would have imposed a more lenient sentence than the trial judge imposed. When the jurors were informed of the actual sentence, 90% said that the judge's sentence was fairly appropriate.²
- In addition, mandatory sentencing encourages judges, prosecutors and juries to circumvent mandatory sentencing when they consider the result unjust. In some circumstances when an offender is faced with a mandatory penalty, juries have refused to convict. Furthermore, prosecutors have deliberately charged with lesser offences than the conduct would warrant to avoid the mandatory sentence. In effect, this shifts sentencing discretion from an appropriately trained and paid judicial officer to a prosecutor. This process is called "de-mandatorising".
- The inevitable increase in prison population as a result of the mandatory sentencing. This is one of many additional costs to the community without any commensurate benefit.
- Mandatory sentencing reduces the proportion of pleas of guilty, thus increasing court costs, court delays, prosecution costs, defence costs and the stress upon victims and other witnesses.

b) What information the Australian authorities possessed or had knowledge of when it was determined that a suspect or convicted person was a minor

Age determination

The Society shares the concerns in the publicly available letter of the Australasian Paediatric Endocrine Group, the Royal Australasian College of Physicians, the Australian and New Zealand Society for Paediatric Radiology, and the Royal Australian and New Zealand College of Radiologists in their letter dated 19 August 2011 to the Honourable Chris Bowen MP (which is **enclosed** for your reference). The Society joins these organisations in calling for the discontinuation of ionizing radiation and genital examination as a means of age assessment by Australian Federal Government agencies. As the enclosed letter argues, these medical investigations have been labelled inaccurate and their use has been deemed unethical when used for non-therapeutic purposes.

We consider that employing appropriate medical methods to assess the age of children and young people is essential. The Federal Government should look to overseas jurisdictions for guidance on the techniques they employ to assess age. The field of sports medicine might also be an appropriate

² Warner K, *Public Judgment on Sentencing; final results from the Tasmanian Jury Sentencing Study*. Trends and Issues in Crime and Criminal Justice, AIC, February 2011 Trends and issues in crime and criminal justice, AIC, Feb 2011.

discipline to approach with respect to more reliable age assessment techniques. Substantial research should be undertaken before any other age assessment technique is adopted.

We have also heard reports from our legal practitioner members that evidence that a person is in fact a minor is not readily accepted by various Federal Government authorities. For example, there have been instances where it has taken weeks and months to verify the authenticity of birth certificates and baptism certificates that have been provided by foreign governments. This delay is inappropriate, especially as these documents are presented by legal practitioners. Solicitors are officers of the court. As such, they must accord with strict professional and ethical standards to gain entry and maintain employment in the legal profession. We consider that these strict ethical duties impose a sufficient standard to ensure that legal practitioners do not engage in unprofessional conduct, such as provision of false documentation.

Accuracy and timeliness in age determination is fundamentally important as it determines how the individual will be treated by the State. This is especially critical in the area of criminal law where deprivation of liberty is a penalty for offences. In addition to these civil liberties concerns, early and accurate age determination methods would result in significant economic saving. For example, the Australian Federal Police would be spared the expense of investigating and charging individuals for these crimes, only to later find out that these individuals are minors. Similarly, there would be savings for the corrective services and prosecution branches of the Federal Government.

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

'Benefit of the doubt' principle

The Society agrees with the Human Rights Law Centre's 'benefit of the doubt' principle. This principle holds that suspects who claim to be children must be treated as children, unless proven otherwise. This is in line with the range of protections offered by our criminal justice system.

Access to services

The Society holds that during any detention period or legal proceeding, detainees should have full access to health, counselling, legal, translation and interpretation services. The provision of these services should not be restricted by geography. That is, these services should be offered regardless of whether the young person has been detained in a regional or metropolitan area. Access to legal services should include access to free Legal Aid. In this regard, Legal Aid should be properly resourced to deal with these matters. Failure to provide these essential services might have a serious impact on the well-being and the rights and liberties of detainees.

Appeals

In order to preserve the rights of detainees to procedural fairness and natural justice, all decisions must be appealable and be subject to judicial review.

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

Section 6, *Immigration (Guardianship of Children) Act 1946* states:

The Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of this Act to the exclusion of the parents and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens.

With respect to options for repatriation, we note that children and young people who have been wrongly convicted of these offences should have ready access to health, education, support, trauma and counselling services in Australia.

It is important to note that the detainees themselves are potential refugees. Once declared a refugee, these detainees will enjoy the benefits and protections of the 1951 *Refugee Convention*. In the case of Indonesian minors, article 22(1), *Convention on the Rights of the Child* may be relevant. This provision holds that unaccompanied children, particularly those seeking asylum, need special protection and mandates that:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

The Minister as the legal guardian of all unaccompanied children seeking asylum in Australia has the same rights and duties as a natural guardian (including the duty to act in the child's best interests) and remains the child's guardian from the moment of arrival until he or she turns 18 or leaves Australia. The Minister is able to delegate this guardianship role to another representative of the Commonwealth government or a representative of a State or Territory government. Since 1999 guardianship has been formally delegated to State child welfare authorities and since 2002 to the Department's Managers or Deputy Managers. However, since 1999, day-to-day care of unaccompanied children in detention centres has generally been understood to be the responsibility of Australasian Correctional Management.

The Minister's role as guardian of unaccompanied children raises a significant conflict of interest as the Minister is also the detention authority and the visa decision-maker. Given these multiple roles, it is difficult for the Minister, or Departmental delegate, to make the best interests of the child the primary consideration when making decisions concerning unaccompanied children. This conflict is not resolved by delegating the guardianship function to the Department Managers. Indeed, those Managers are placed in the impossible position of trying to gain the trust of the unaccompanied children when the same children view them as the people responsible for their detention.

The Commonwealth is potentially in breach of its obligations under the Convention on the Rights of the Child by failing to take all appropriate measures to ensure that the Indonesians under the age of 18 held in detention receive the special protection and assistance they need to enjoy their rights.

Thank you again for allowing us to provide submissions to your Inquiry. We look forward to receiving the Senate Committee's report on this issue.

Yours faithfully

Dr John de Groot
President