



**Victorian Equal Opportunity
& Human Rights Commission**

2 June 2012

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

Dear Ms Dennett

Inquiry into the detention of Indonesian minors in Australia

The Victorian Equal Opportunity and Human Rights Commission (Commission) welcomes the opportunity to provide input to the *Inquiry into the detention of Indonesian minors in Australia* (Inquiry).

The Commission is an independent statutory authority with responsibilities under three Victorian laws: the *Equal Opportunity Act 2010*, the *Charter of Human Rights and Responsibilities Act 2006* (the Charter), and the *Racial and Religious Tolerance Act 2001*. In supporting the objectives of these Acts, the Commission encourages the identification and elimination of systemic causes of discrimination, and the promotion and protection of human rights.

The Commission has serious concerns about the detention of Indonesian minors suspected of people smuggling in Australian prisons, remand centres and detention centres. While others will be in a better position to comment on the detail of cases and procedures, human rights should be central to the Committee's consideration of these issues.

The Commission seeks to make brief submissions to draw the Committee's attention to Australia's obligations under international human rights law and note the relevance of the Charter for Victorian authorities involved in the detention of Indonesian minors.

1. Victorian context

With the prosecution of alleged people smugglers now taking place under federal law across Australia, the issue before the Committee is of relevance to many States and Territories.

For example, Victoria Legal Aid has reported that as at 1 December 2011, 54 individuals charged with aggravated people smuggling were being held in detention in Victoria. There have also been reported instances of individuals suspected of people smuggling who claim to be less than 18 years old being charged and held in maximum security adult prison in Victoria pending their trial.

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Victoria Legal Aid also reports that more than one in 10 of those prosecuted in Victoria to date have been found to be minors.

In one recent case, Magistrate Collins dismissed charges against an Indonesian teenager, Syrafudin Min, who spent 16 months in detention (including two months in an adult facility), after it was found that the prosecution had not discharged the burden of proving, on the balance of probabilities, that Syrafudin was an adult when the alleged offence occurred.¹

2. Australia's international human rights obligations

Australia ratified the Convention on the Rights of the Child in 1990. This is the key treaty which sets out legal obligations under international law for States Parties to promote, protect, respect and fulfill the human rights of children. The Convention on the Rights of the Child recognises that children are entitled to all human rights and that they also have a right to special safeguards. Children are defined in the Convention as individuals who are under 18 years of age.

Under article 3 of the Convention, the best interests of the child must be a primary consideration in every decision that affects minors, including those accused of crimes or in detention.

The Convention contains more specific requirements for the treatment of children in detention. In particular, article 37 says that states must only arrest, detain and imprison a child "as a measure of last resort and for the shortest appropriate time". Article 37 also requires authorities to separate children in detention from adults, unless it is considered in the child's best interests not to do so.

The International Covenant on Civil and Political Rights also sets out these requirements in article 10(2)(b) and (3) for the separation of children from adults in detention.

The Australian Government has reservations in place in relation to these obligations. It accepts the obligation to separate minors from adults, only to the extent that such segregation is considered by the responsible authorities to be feasible "having regard to the geography and demography of Australia" and consistent with the obligation that children be able to maintain contact with their families. The relevance of this reservation is limited in these circumstances. The Australian Government is overcoming barriers of geography and demography by moving individuals to a range of jurisdictions for prosecution. It should take into account the availability of appropriate accommodation and services at the same time.

The Committee on the Rights of the Child has also given guidance about the obligations under the Convention in the context of unaccompanied minors outside their country of origin (in *General Comment No 6*). On the question of age assessments, the Committee has made clear that where there is remaining uncertainty about the person's age, the individual should be given the benefit of the doubt that he or she is a minor, so that "if there is a possibility that the individual is a child, she or he should be treated as such".²

¹ Victoria Legal Aid, Submission to the Australian Human Rights Commission Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children, 31 January 2012.

² Committee on the Rights of the Child, *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, 1 September 2005, para 31(i).

3. Obligations of Victorian Authorities under the Charter

State authorities play an important role in ensuring that Australia as a whole can fulfill its international human rights obligations. Victorian state government authorities also have human rights obligations directly under the Charter. These legal obligations apply to Victorian courts and tribunals acting in an “administrative capacity”.

Section 38(1) of the Charter provides that:

...it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

The Charter does not override requirements for Victorian authorities to act in accordance with the law and their statutory obligations under Victorian or Commonwealth law, but the Charter remains a relevant consideration when public authorities are exercising discretion and making decisions.

For example, the section 38 obligation in the Charter extends to the Magistrates’ Court when acting in an “administrative capacity”, even when applying federal law such as the *Crimes Act 1914* (Cth) or *Migration Act 1958* (Cth).

Although the Charter provides no exhaustive definition of “administrative capacity”, the term includes (but is not limited to) committal proceedings, issuing warrants, listing cases or adopting practices and procedures (section 4). The Explanatory Memorandum suggests that the term intended to exclude instances where courts or tribunals are acting in a judicial or quasi-judicial capacity.

There are a range of other decisions by Magistrates which would arguably constitute administrative actions, such as making an order to carry out a prescribed procedure for an age assessment under section 3ZQF of the *Crimes Act 1914* (Cth), or making a finding as to whether an individual is aged under 18 years when the alleged offence was committed under section 236B of the *Migration Act 1958* (Cth). Magistrates must properly consider relevant human rights when discharging administrative functions.

Relevant Charter rights when dealing with individuals suspected of people smuggling who claim to be less than 18 years old include:

Protection of families and children, because “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”: s 17(2).

Right to liberty and security, including the right not to be subjected to arbitrary arrest or detention, and the right to be promptly brought before a court and trial without unreasonable delay: s 21.

Children in the criminal process, which provides for protection of children in the criminal process. An accused child who is detained or a child detained without charge must be segregated from adults, and brought to trial as quickly as possible: s 23.

Fair hearing, which provides that all judgments and decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of the child otherwise requires: s 24.

Rights in criminal proceedings, which provides that a child charged with a criminal offence has the right to a procedure that takes account of his or her age and desirability of promoting the child's rehabilitation: s 25.

The Supreme Court of Victoria has provided some useful guidance about the scope and character of the obligation placed on public authorities under the Charter in *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346. The Court identified three distinct concepts of relevance:

1. *Engagement*: whether or not a particular decision or course of conduct actually or potentially impacts upon one of the rights protected under the Charter
2. *Limitation*: whether that impact is such as to restrict full realisation of the relevant rights, and
3. *Justification*: an analysis of whether an identified limitation is reasonable and therefore permissible in accordance with the framework specified in section 7 of the Charter.

Victorian authorities should be applying these rules when making decisions to which the Charter applies (including administrative decisions by Victorian courts).

4. Conclusions

Some important conclusions can be reached by applying a human rights framework to the issues before the Committee:

- age assessments and detention decisions involving children must be conducted in a way that supports the child's best interests
- young people accused of people smuggling must be provided with legal representation and interpreters where needed
- where a person raises the issue of age during criminal proceedings, the prosecution should bear the burden of proof to establish that the person was an adult at the time of the offence
- interviews aimed at establishing the age of an individual must be undertaken with regard to the cultural context of the person's country of origin and the typical experiences of children in that country
- where there is doubt about whether a person is over 18, he or she must be afforded the protections of a minor
- unaccompanied children should be provided with an independent guardian to act in the child's best interests, and
- children must not be incarcerated in adult facilities, unless it is in the best interests of the young person to do so.

While the Australian Government has addressed some of these issues, the experience to date suggests that there is not a consistent approach to the rights of the child.

When considering the system as a whole, it will be important for the Committee to put human rights in the *legal* framework within which countries, governments and parliaments have agreed to operate. In this framework, the rights of children must be guaranteed, not applied by discretion.

Thank you for the opportunity to make these comments. I would be happy to discuss these issues further if required. I can be contacted on

Yours sincerely

Karen Toohey
Acting Commissioner