



31 May 2012

Senate Legal and Constitutional Affairs Committee
Via online submission

Dear Committee Secretary,

Re: Inquiry into the Detention of Indonesian Minors in Australia

Thank you for the opportunity to make a submission to the above Inquiry. This submission addresses sub-section (f) of the Inquiry's terms of reference, namely "options for reparation and repatriation for any minor who has been charged (contrary to current government policy) and convicted." In particular, the submission addresses Australia's obligations under the *International Covenant on Civil and Political Rights* ('ICCPR')¹ and the *Convention on the Rights of the Child* ('CRC')² to provide an effective remedy for violations of individuals' rights under those treaties.

1. Violations of Australia's international legal obligations under the ICCPR and CRC

We refer the Committee to our previous submissions to the Senate Legal and Constitutional Affairs Committee's Inquiries into the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, *Crimes Amendment (Fairness for Minors) Bill 2011*, *Deterring People Smuggling Bill 2011*, and the *Anti-People Smuggling and Other Measures Bill 2010*. Those submissions identified the ways in which Australia is violating its obligations under the ICCPR, CRC and other human rights treaties as a result of

- Lengthy, indefinite and arbitrary pre-charge detention of Indonesian boat crew, during which individuals are not provided with legal representation;
- Incarceration of Indonesian minors in adult facilities;

¹ *International Covenant on Civil and Political Rights*, opened for signature on 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

² *Convention on the Rights of the Child*, opened for signature on 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

- Use of unreliable age determination techniques; and
- Mandatory sentencing for people smuggling offences, disproportionate to individual culpability.

2. Australia's obligations under articles 2 and 9 of the ICCPR to provide an effective remedy, including compensation for unlawful detention

The right to an effective remedy

Under article 9 of the ICCPR Australia is obliged to provide an effective remedy to an individual whose treaty rights it violates.

Article 2(3) of the ICCPR provides:

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

This means that “in addition to effective protection of Covenant rights States parties must ensure that individuals also have **accessible, effective and enforceable** remedies to vindicate those rights.”³ In particular, Article 2(3) “requires that States Parties make reparation to individuals whose Covenant rights have been violated.”⁴ Reparation generally involves compensation, but it can also include, where appropriate, “public apologies..., guarantees of non-repetition and changes in relevant laws and practices.”⁵

³ *George Kazantzis v. Cyprus*, Communication No. 972/2001, U.N. Doc. CCPR/C/78/D/972/2001 (2003), [6.6] (emphasis added).

⁴ Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), [16].

⁵ Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), [16].

The Human Rights Committee further explained in General Comment 31 that:⁶

- Such remedies should “take account of the special vulnerability of certain categories of person, including in particular children.”
- States Parties should “establish appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.
- “A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.”
- “Cessation of an ongoing violation is an essential element of the right to an effective remedy,” and the purpose of the ICCPR would be defeated if a state were not required to “take measures to prevent a recurrence of a violation of the Covenant.” This may require changes in the State Party’s laws or practices.

The specific right to compensation for unlawful detention

Further to the general right to an effective remedy, article 9(5) provides that “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” For the purpose of this article, detention may be “unlawful’ if it constitutes arbitrary detention under the Convention, even if otherwise authorised by domestic law.”⁷

3. Rights and remedies under the Convention on the Rights of the Child

The Committee on the Rights of the Child has explained that under the Convention on the Rights of the Child,⁸

- For rights to have meaning, effective remedies must be available to redress violations.
- States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance.

⁶ Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), [15]-[17]

⁷ *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997), [9.5].

⁸ Committee on the Rights of the Child, *General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, U.N. Doc. CRC/GC/2003/5 (2003), [24]-[25].

- Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39.
- It is essential that domestic law sets out entitlements in sufficient detail to enable remedies for non-compliance to be effective.

4. Recommendations

Pursuant to Australia's obligations to children under the ICCPR and the CRC we recommend:

1. That Australia immediately repatriate any Indonesian boat crew member who is under 18 or was under 18 at the time of the commission of a suspected people smuggling offence.
2. If a person who has been detained in Australia for more than one week in relation to a people smuggling offence (or suspected offence) was under 18 at the time of his detention or at the time of the commission of the offence, that appropriate reparation is made available to the victim. This includes:
 - a. Compensation for harms arising out of relevant rights violations, including, at a minimum, compensation for emotional suffering, lost wages and harm suffered by dependant family members;
 - b. Measures to promote physical and psychological recovery, rehabilitation and reintegration; and
 - c. Where appropriate, a public apology.
3. That Australia make these reparations immediately to any such person whom Australia is currently aware was under 18 at the time of his detention or at the time of the commission of the suspected people smuggling offence.
4. That Australia thoroughly and expeditiously investigate any credible allegations in relation to such individuals, and if the person is or was a minor at the relevant time, that Australia make immediate reparations to that person.
5. That Australia establish an appropriate administrative mechanism, with judicial review, for determining claims for reparations for rights violations associated with the detention and prosecution of children for people smuggling offences.

6. That Australia ensures such procedures are effective and child-sensitive, and that any remedy is enforceable.
7. That Australia ensures claimants have necessary legal and other assistance to effectively use these procedures, particularly if the person has already returned to Indonesia.
8. That Australia takes action to ensure that such human rights violations do not occur in future. This requires changes in Australian law and policy including, at a minimum:
 - a. Implementation of a highly restricted time limit on pre-charge detention in relation to suspected people smuggling offences, and the provision of legal representation and the availability of judicial review of detention during that time;
 - b. A requirement that the government prove beyond reasonable doubt that anyone charged with a people smuggling offence was an adult at the time the offence was committed, and that such determination be made for any person who claims to be a child *before* he can be detained in an adult facility; and
 - c. The removal of mandatory minimum sentences associated with people smuggling offences.

Thank you for your time in considering this submission.

Yours sincerely,

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