

CHAPTER 4

Options for assisting affected individuals

4.1 Paragraph (f) of the committee's terms of reference relates to options for reparation and repatriation of any minor who has been charged (contrary to current government policy) and convicted. This chapter outlines the legal options for releasing Indonesian minors who have been wrongly imprisoned or detained in Australia, the current process of repatriation for boat crew returned to Indonesia, and the options proposed by submitters and witnesses for compensating affected individuals.

Options for the early release and repatriation of convicted prisoners

4.2 The Attorney-General's Department (AGD) and the Australian Federal Police (AFP) informed the committee that there are several legal options for facilitating the release of imprisoned persons who have been convicted as adults on people smuggling charges but later found to be minors. These options are:

- the prisoner lodging an appeal in the relevant state or territory court of criminal appeal;
- the relevant state or territory Attorney-General referring a case to the court of appeal to be heard again;
- the federal Attorney-General granting a licence for the offender to be released from prison where exceptional circumstances exist (under the powers of subsection 19AP(1) of the *Crimes Act 1914*); or
- the Governor-General, on the advice of the Australian Government, exercising the Royal Prerogative of Mercy to grant a pardon to a federal offender.¹

4.3 As noted previously,² 15 individuals have been released from prison on licence granted by the Attorney-General, as a result of the recent AGD review of 28 cases in which individuals who claimed to be minors had been convicted of people smuggling offences.

Processes for returning individuals to Indonesia

4.4 Upon an Indonesian prisoner's release from prison, they are returned to their home country by the Department of Immigration and Citizenship (DIAC), unless they make a claim for protection to remain in Australia.³ DIAC informed the committee that, prior to removal from Australia, family tracing and contact with the individual's parents or guardian to confirm reception arrangements is conducted, either by DIAC

1 *Submission 21*, pp 10-11.

2 See chapter 1, paragraph 1.28.

3 *Submission 21*, p. 10.

itself with the client, through the International Organization for Migration (IOM), or through the Indonesian consulate.⁴

4.5 DIAC advised that minors returned to Indonesia are accompanied throughout the journey, from departure to reunion with their parent or guardian:

A DIAC officer accompanies the minor to Indonesia. In circumstances where a parent(s) or guardians are unable to meet the client at the airport, DIAC arranges for IOM to accompany the minor to their home and to ensure that the minor is reunited with their parents or guardian.⁵

4.6 DIAC also observed that post-arrival care arrangements including reception, transport and escort services are organised and funded by DIAC through the services of IOM.⁶

4.7 With regards to the removal of individuals from Australia, Australian Lawyers for Human Rights (ALHR) suggested that repatriation arrangements should include engagement with Indonesian authorities to return children directly to their villages and families, and that children should ideally be accompanied by a guardian fluent in the relevant language or dialect.⁷

Options for providing support to wrongly detained minors

4.8 As described in chapter 2, Australia is subject to obligations under the UN Convention on the Rights of the Child (CRC) in its dealings with minors detained in Australia. The Migrant and Refugee Rights Project observed that the UN Committee on the Rights of the Child has commented:

- that, for rights to have meaning, effective remedies must be made available to redress violations; and
- 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.⁸

4.9 Ms Bassina Farbenblum from the Migrant and Refugee Rights Project also remarked that, under the International Covenant on Civil and Political Rights (ICCPR), Australia has a 'specific obligation to ensure that anyone who has been the victim of arbitrary detention has an enforceable right to compensation'.⁹

4 Response to questions on notice, received 31 August 2012, p. 2.

5 Response to questions on notice, received 31 August 2012, p. 2.

6 Response to questions on notice, received 31 August 2012, p. 2.

7 *Submission 20*, p. 7.

8 *Submission 11*, pp 3-4, citing: Committee on the Rights of the Child, *General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (Articles 4, 42 and 44(6))*, paragraphs 24-25, [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.5.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.5.En) (accessed 5 September 2012).

9 *Committee Hansard*, 24 August 2012, p. 23.

4.10 The Migrant and Refugee Rights Project, along with other submitters and witnesses, expressed the view that Indonesian minors who have been detained in Australia have been the subject of human rights breaches under the CRC and, as such, should be entitled to effective reparation for those breaches.¹⁰ Ms Farbenblum explained further:

I think there is no question in these cases that there are multiple violations beginning with arbitrary detention but also, in the case of children, relating to their detention in adult facilities and the fact that obviously the decisions all the entire way along as to their detention, prosecution and conviction were not made in their best interests...Obviously, in the case of children the harm suffered by prolonged detention in adult facilities in a foreign country—and of course in the case of abuse—would be especially egregious.¹¹

4.11 The Migrant and Refugee Rights Project argued that Australia should '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';¹² and should ensure that claimants have the necessary assistance to effectively use these procedures, even if they have already returned to Indonesia.¹³

Compensation

4.12 Several submitters argued that minors who are wrongly detained may be entitled to compensation. For example, National Legal Aid argued that, where a minor has been held with adult detainees, the minor should be assisted with repatriation and provided with an ex-gratia payment:¹⁴

...these people were minors who did spend a significant amount of time in detention, in some cases quite unjustly, and in some cases they spent time in adult detention as well. In those circumstances, it is the view of National Legal Aid that some form of ex gratia payment may be appropriate. Obviously some sort of process would need to be set up to assess that, but it would not be inappropriate to consider that sort of payment, given the experience of some of these minors who were held in detention for long periods of time.¹⁵

10 *Submission 11*, p. 4. See also Australian Lawyers Alliance, *Submission 26*, p. 14; Australian Lawyers for Human Rights, *Submission 20*, pp 6-7.

11 *Committee Hansard*, 24 August 2012, p. 26.

12 *Submission 11*, p. 4.

13 *Submission 11*, p. 5.

14 *Submission 19*, p. 5.

15 Ms Nicole Rich, Victoria Legal Aid (representing National Legal Aid), *Committee Hansard*, 24 August 2012, p. 15.

4.13 ALHR contended that children detained in adult facilities should be entitled to monetary compensation. ALHR also argued that, in some cases, the detention of minors may have been the result of negligence on the part of the government, and as such may amount to a breach of the government's duty of care towards detainees, necessitating compensation which takes this negligence into account.¹⁶

4.14 The Australian Lawyers Alliance (ALA) outlined several possible mechanisms through which the right to compensation could be pursued, namely:

- automatic granting of rights for compensation for minors charged with people smuggling;
- the creation of a statutory compensation fund for Commonwealth breach of guardianship;
- strengthening the powers of the Australian Human Rights Commission;
- developing federal human rights legislation, and rights to redress under such legislation;
- the right of individuals to sue for unlawful imprisonment or for breaches of the Commonwealth's duty of care; and
- redress under relevant state-based Civil Liability Acts.¹⁷

4.15 Submitters also raised the issue of compensation for the families of minors who have been incorrectly detained or imprisoned. The Indonesia Institute argued that financial compensation should be made available to the families of jailed minors in order to allow their families to rebuild their lives and to recover from the trauma of having a child 'locked-up' for up to five years.¹⁸ Mr Ross Taylor from the Indonesia Institute suggested:

For those children who have been sent home...we believe it would be a very good act for the Australian government to acknowledge the mistakes that have been made; facilitate some financial payments progressively to these children to allow them to complete their education and seek full-time work; and to provide some security for their family. In Australian dollar terms, that is not big money and we believe that would be a good, proper and correct thing to do.¹⁹

4.16 AGD and the AFP noted that individual claims for compensation from wrongly detained or imprisoned minors might be made in the future:

People are free to make claims at any time against any government if they believe that a government has acted wrongly. Claims for reparation are regularly made against all governments. Governments have a duty to

16 *Submission 20*, pp 6-7.

17 *Submission 26*, p. 14.

18 *Submission 4*, p. 3.

19 *Committee Hansard*, 24 August 2012, p. 20.

properly consider such claims, as well as to properly defend themselves if such claims have no basis.

If claims for reparations are made by crew convicted of people smuggling offences, who are subsequently released on the basis that they may have been a minor at the time of the offence, the Government will consider the merits of those claims on a case-by case basis.²⁰

4.17 It has been recently reported that a civil compensation suit against the Australian Government has been launched in relation to the cases of two young Indonesian boat crew detained in Australia during 2011.²¹ The two individuals were reportedly detained for a total of 10 months, including six months in an adult prison in NSW, before being returned to Indonesia due to concerns regarding their age.

A public apology

4.18 Some submitters and witnesses argued that the Australian Government should publicly apologise to individuals who have been detained or imprisoned in Australia, only to have been later released and repatriated to Indonesia due to concerns they may have been minors at the time of offending.

4.19 Ms Edwina Lloyd asserted her view to the committee that 'a public apology by the government should be offered to those persons who have later been determined to be children'.²² Mr Mark Plunkett agreed:

The parliament in 2009 apologised for the treatment of children who were abused between the 1920s and 1970s and made a solemn pledge never to allow child abuse to go unchecked, but in a few years the agencies of the Commonwealth were engaging in a mass, almost industrial sized perpetration of abuse against these vulnerable Indonesian children. The shameful stain on Australia's reputation will not be cleansed until Australia makes a similar apology to these children, to their parents and to Indonesia.²³

Additional support for individuals returned to Indonesia

4.20 The issue of additional psychological or other support for wrongly detained minors who have been returned to Indonesia was also presented in evidence. ALHR contended that children detained in adult facilities should be entitled to compensation which adequately takes into account the nature of any psychological trauma suffered as a result of this detention.²⁴

20 *Submission 21*, p. 10.

21 Kesha West, 'Asylum boat boys sue Australia', *Australia Network Newswire*, 12 September 2012, <http://www.abc.net.au/news/2012-09-11/an-australian-government-to-face-civil-compensation-suit/4255490> (accessed 13 September 2012).

22 *Committee Hansard*, 24 August 2012, p. 1.

23 *Committee Hansard*, 24 August 2012, p. 4.

24 *Submission 20*, p. 6.

4.21 Ms Farbenblum from the Migrant and Refugee Rights Project was supportive of the idea of providing support to help such individuals recover from psychological trauma, but noted that any support 'would have to happen in Indonesia in a culturally appropriate context', and that the nature and delivery of support services 'would be best determined in consultation with experts in Indonesia'.²⁵

25 *Committee Hansard*, 24 August 2012, p. 26.

