



Australian Government

Submission by the Attorney-General's Department and Australian Federal Police

*Senate Legal and Constitutional Affairs References Committee
inquiry into detention of Indonesian minors in Australia*

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Table of Contents

1. Executive Summary	3
2. Introduction	4
3. Terms of reference and further questions	6
3.1 Terms of reference	6
4. Legislative and policy framework	13
4.1 People smuggling offences.....	13
4.2 Charging and prosecuting minors for people smuggling offences.....	13
4.3 Onus of proof in establishing age.....	14
4.4 Legislative basis for establishing age under the <i>Crimes Act 1914</i>	14
5. Criminal process for crew claiming to be minors	20
5.2 Immigration detention	20
5.3 Investigation by the Australian Federal Police	21
5.4 Arrest and charge	23
5.5 Prosecution and age determination by the court.....	23
5.6 Legal aid arrangements	24
6. Guardianship, consular and international obligations	25
6.1 Detention of crew claiming to be minors.....	25
6.2 Guardianship	26
6.3 Consular notification and representation	26
7. Review of convicted crew	26
7.1 Context for commencing a review	26
7.2 Nature and process for review.....	27
7.3 Initial outcomes of the review.....	29
8. Conclusion	29

1. Executive Summary

The Australian Government is committed to targeting criminal groups and investigating individuals who organise, participate in and benefit from people smuggling activities. People smuggling is a threat to the security of Australia's borders and poses a grave risk to the lives of the passengers and crew of people smuggling ventures. In 2010, 50 people perished when Suspected Irregular Entry Vessel (SIEV) 221 hit the rocks at Christmas Island. A further boat sank off the coast of Indonesia in December 2011, with over 100 people drowning and a further 100 reported missing.

Age is not relevant to whether the offence of people smuggling has been committed, although the mandatory minimum penalties that apply to aggravated people smuggling offences under the *Migration Act 1958* do not apply to minors. Government policy is that any people smuggling crew member assessed to be a minor by Australian Government agencies, or determined to be a minor by a court on the balance of probabilities, is removed to their country of origin without charge unless exceptional circumstances apply (such as having crewed more than one vessel). Whether a suspected people smuggler may be an adult is critical to decisions about the facilities in which they are held and how they progress through the criminal justice system.

A significant number of crew on SIEVs claim to be minors, either on arrival or during the course of an investigation or prosecution, although it is also common for crew to repeatedly change their claims. In developing its age determination policy, the Government has sought to balance the need to appropriately penalise people smuggling activity against the Australian Government's primary obligations to protect the interests of children held in Australian facilities. However, there continue to be a number of significant challenges in establishing whether people smuggling crew are adults or minors, particularly given crew are generally from countries where births are not routinely registered. It may be that neither individual crew nor their families know their age, and there may be no existing documentation of age in their home country.

This submission provides an overview of the legislative and policy framework for people smuggling offences and age determination. It also sets out how information about a person's age is dealt with by Commonwealth agencies and the courts, and the detention arrangements for suspected crew as they progress through immigration, investigation and prosecution processes. The submission directly addresses the inquiry's terms of reference and further questions from the Committee's Secretariat, and cross-references the overview material where relevant.

The Attorney-General's Department (AGD) prepared this submission in collaboration with the Australian Federal Police (AFP). The Commonwealth Director of Public Prosecutions (CDPP), the Department of Foreign Affairs and Trade (DFAT), the Department of Immigration and Citizenship (DIAC), the Department of the Prime Minister and Cabinet, the Department of Health and Ageing, the Australian Customs and Border Protection Service (Customs), the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) and the Office of the Chief Scientist were consulted in preparing this submission. DIAC, AFP and CDPP have also lodged separate submissions to the inquiry, and cross-references are included where relevant, to avoid duplication.

The Commonwealth notes that this inquiry is taking place concurrently with the Australian Human Rights Commission (AHRC) inquiry into the treatment of suspected people smugglers who claim to be children, which was announced on 21 November 2011 and is due to report in mid-2012. It also follows two Senate Standing Committee on Legal and Constitutional Affairs inquiries into the Crimes Amendment (Fairness for Minors) Bill 2011, and the Migration Amendment (Fairness for Minors) Bill 2012, which reported on 4 April 2012. The Australian Government is currently preparing its formal response to these reports.

2. Introduction

People smuggling is a serious crime that risks heavy loss of life. On 17 December 2011, a vessel carrying asylum seekers capsized in Indonesian waters south of Java. Of the 250 passengers on board the vessel, 100 died and 103 are still missing. This followed an incident on 15 December 2010, where a vessel known as SIEV 221 carrying 92 passengers foundered on rocks at Christmas Island, resulting in the death of 50 people and a significant search and rescue effort. These tragic events reinforce the need for the strongest possible deterrents to people smuggling, to prevent vessels from embarking on dangerous journeys to Australia.

On 4 December 2008, the former Prime Minister, the Hon Kevin Rudd MP, delivered Australia's first National Security Statement. The statement outlined the Government's national security policy framework, including the Government's plan to address the ongoing challenges of transnational crime and its commitment to deploying all necessary resources to prosecute people smugglers and others involved in undermining Australia's border security. The statement reinforced that Australia would 'work with partners in the region to shut down the illegal operations of people smugglers and see them put in gaol where they belong'.¹

Australia's border protection framework contains a range of people smuggling deterrence measures, including activities to raise awareness in 'hot spot' locations. For example, in 2009-2010, an Australian Government public information campaign was delivered in Indonesia by the International Organization for Migration, which targeted potential crew members and coastal industry workers in 14 villages, as well as law enforcement officials. The 2010 campaign has been successful at providing an enduring message in target villages about the risks involved with people smuggling.

The Government's anti-people smuggling measures also include mandatory minimum penalties for aggravated people smuggling offences under the Migration Act. These penalties comprise a five year sentence (with a three year non-parole period) for first-time offenders, and an eight year sentence (with a five year non-parole period), for repeat offenders. Mandatory minimum penalties for aggravated people smuggling offences were introduced in 2001 with bipartisan support, and were aimed at ensuring sentences imposed for people smuggling offences reflect the seriousness of the crime. They were also intended to be a deterrent, as there was evidence that a number of individuals had committed repeat offences after being released from prison.

Mandatory minimum penalties under the Migration Act do not apply to minors (persons under the age of 18 years old). Determining the age of suspects has been a key issue for law enforcement officials and courts, and has contributed to delays in investigations during peak periods of people smuggling activity. Since mandatory minimum penalties were introduced in 2001, Commonwealth agencies have sought to improve the age determination techniques available, while recognising the inherent limitations in all techniques, including wrist X-rays. There is no method available to categorically establish age.

On 8 July 2011, following recommendations by a Commonwealth agencies working group, the Government announced² a series of enhanced age determination measures to supplement existing procedures, including:

- taking steps as early as possible to seek information from the individual's country of origin, including birth certificates, school records and statements of relatives

¹ Australia's first National Security Statement delivered to the Australian Parliament on 4 December 2008, p.21.

² Media release by former Attorney-General and former Minister for Home Affairs and Justice, *Improved process for age determination in people smuggling matters*, 8 July 2011, viewed 23 January 2012, <http://pandora.nla.gov.au/pan/21248/20110723-0001/www.attorneygeneral.gov.au/www/ministers/mccllland.nsf/Page/MediaReleases_2011_ThirdQuarter_8July2011-Improvedprocessforagedeterminationinpeoplesmugglingmatters.html>.

- offering voluntary dental X-rays to people smuggling crew claiming to be minors, and offering voluntary interviews, using enhanced interview techniques, to help determine whether a person is a minor.

The Government also commenced proactively giving the benefit of the doubt about age where the available evidence could not clearly establish that the person was a minor.

Further, in accordance with Government policy implemented from 8 December 2011, any suspected crew assessed to be minors by DIAC on the basis of an age assessment interview and any available documentation are removed to their country of origin, unless exceptional circumstances apply (for example, the person was a crew member on more than one venture). This removal policy also applies to persons subsequently assessed or determined to be minors by the AFP or a court, or given the benefit of the doubt about whether they are likely to be a minor, and no exceptional circumstances apply that warrant their prosecution.

Within this legislative and policy framework, assessing and determining whether people smuggling crew are minors has become fundamentally important. A person's age affects where they are detained in immigration detention and criminal custody, whether they are removed to their country of origin, how they may be prosecuted, and what sentence they should receive. Some crew have indicated an awareness of these issues, for example advising DIAC or the AFP that they were told by the organisers of the venture to claim that they were minors and that they would then be returned to Indonesia, and there has been an increase in the number of people smuggling crew who claim to be minors.

Establishing age is an extremely complex undertaking. Most people smuggling crew from Indonesia are unable to prove their true age and are often unaware of their date of birth, and their families may similarly be unaware of their actual age or date of birth. All age determination techniques carry inherent limitations. Medical procedures to establish age have a margin of error, and interviews and statements from relatives rely on truthfulness and memory. Further, Indonesian identity documents may be produced without any formal verification of identity, including on the basis of oral statements by relatives, and in some cases many years after the person was born. Obtaining formal identity documents from Indonesia can also take several months, particularly where documents are often held in remote and decentralised locations.

Accordingly, formulating an age determination policy that ensures minors are treated appropriately, while also facilitating people smuggling prosecutions, is challenging. In particular, authorities must seek to provide the court with all the available evidence, while recognising that collecting evidence takes time, during which the defendant is held in immigration or correctional facilities.

For the purpose of this submission, it is useful to distinguish between the two processes of age 'assessment' and age 'determination'. Age *assessments* are undertaken by agencies in order to make decisions about the person's treatment as they progress through immigration and investigation processes. However, such assessments are not conclusive. Age *determinations* are made by courts on the basis of the available evidence before the court. Age determination *procedures* can be arranged by agencies with the person's consent or pursuant to a court order, and inform decisions by the court and law enforcement officials about the person's age. As there is no way of unequivocally stating whether a person is a minor, except on the balance of probabilities, this submission instead refers to persons who claim, or are assessed by agencies or determined by courts to be minors.

3. Terms of reference and further questions

3.1 Terms of reference

This section sets out the Commonwealth's responses to the inquiry's specific Terms of Reference.

(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

There are no Indonesian nationals who have been assessed as minors by DIAC currently being detained in adult immigration facilities pending removal or prosecution. There are also no Indonesian nationals who have been assessed by the AFP as minors or determined by a court to be minors in adult corrections facilities. The AFP has advised that it is currently investigating two persons suspected of being repeat offenders who the AFP considers may be minors, and who are being treated as minors while they are held in immigration detention.

Since December 2011, all people smuggling crew assessed as minors by DIAC upon arrival have been removed, or are currently in the process of being removed, to their country of origin. Pending removal, crew assessed as minors are generally held in Alternative Places of Detention (APODs) with other minors. In some instances, DIAC may decide that it is in the best interests of the minor to be detained in a facility where adults are also held, for example, to be near family members or fellow crew members. However, DIAC has advised that there are currently no Indonesian minors being detained in adult immigration detention facilities (as at 8 June 2012).

In accordance with Government policy and the Prosecution Policy of the Commonwealth, the AFP and CDPP do not proceed with an investigation and prosecution of a suspected crew member where the person has been assessed as a minor, or has been given the benefit of the doubt about their age, unless there are exceptional circumstances. Investigating officials decide whether to give a person the benefit of the doubt about their age based on a range of information, including any statements from the person and documentary evidence if available.

There are currently no Indonesian nationals assessed as minors who are being prosecuted for people smuggling offences, or being held in adult correctional facilities pending prosecution (as at 8 June 2012). The CDPP has provided information in its submission concerning current prosecutions of defendants who at some point in the process from interception have claimed to be a minor.

AGD is currently reviewing 28 cases of convicted crew where age was raised at some point. Of these, the Attorney-General has released four crew from prison early on license (as at 8 June 2012), on the basis that information that has become available since their conviction has raised doubts about whether they may have been a minor at the time of their offence. These individuals have been removed to Indonesia. The review is ongoing for 18 cases of convicted crew currently in Australian prisons. [See Part 7 for further details on the AGD review].

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

Australian agencies generally possess a range of information about a defendant's age when the court makes a determination about whether that person is a minor. The information possessed by the Commonwealth in each case varies. There have been nine cases since September 2008 where a court has not been satisfied that an Indonesian national charged with a people smuggling offence is 18 years or older. Where a court has determined a person to be a minor, on the balance of probabilities, the prosecution has then been

discontinued and the person returned to their home country. The CDPP has provided information and documentation in relation to these matters in its submission.

Assessments by agencies about whether a person may be a minor, and whether it is possible to secure a conviction, are made regularly throughout the investigation and prosecution processes. Unless exceptional circumstances apply, any person who is assessed to be a minor at any stage is removed to their country of origin.

(c) whether there have been cases where information that a person is a minor was not put before the court

There have been cases where information that appeared to suggest a defendant was a minor was not put before the court, because it lacked probative value.

This has occurred primarily in relation to Indonesian identity documents. As set out below at 4.5.3(d), Indonesian birth certificates and other identity documents may be produced on the basis of oral testimony alone, including by a relative of the person, at any time after the birth has occurred. This means there is a wide scope for error, as the information on which Indonesian authorities are required to base an identity document may be inaccurate.

For example, in the case of Ali Jasmin, the defendant was charged as an adult with a people smuggling offence on 29 March 2010. On 24 August 2010, the AFP and CDPP received an extract of Mr Jasmin's birth certificate from the Indonesian Consulate, which indicated Mr Jasmin was a minor. The document indicated that the birth had been registered sometime between 2006 and 2010.

While the authenticity of the record was not in question, the accuracy of the information contained in the document was uncertain given the time between the alleged date of birth and the date of the record. Mr Jasmin's lawyer has publicly acknowledged that this was the case.³ The CDPP was aware the defendant had a copy of the document on 24 August 2010, and provided a translation when it was available. Given the concerns about the veracity of the information contained in the document, the prosecution did not put the document before the court. It is understood the defence also did not put the document before the court on similar grounds.

Further, information gathered by DIAC as part of the entry-interview process may establish important information about a person's age. However, given the fact that they are conducted without a criminal caution or the presence of a legal representative, the CDPP considers that information gathered during these interviews may not be admissible as evidence in an age determination hearing before a court.

In its submission, the CDPP has provided information about prosecutions for people smuggling offences involving a conviction, acquittal or an age determination hearing, where there were documents from Indonesia concerning the age of the defendant which the CDPP was aware of but were not provided to the courts.

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

Each agency involved in the investigation, prosecution and detention of suspected people smugglers has procedures to ensure that evidence of a person's age is considered and followed up appropriately.

³ For example, see statements of David McKenzie, defence lawyer for Ali Jasmin, as reported by Hamish McDonald, 16 April 2012 at <<http://www.theglobalmail.org/feature/an-age-of-uncertainty/190/>>.

DIAC encourages and supports individuals to provide DIAC with verifiable documents about their age at any time. If credible new information is brought to a DIAC officer's attention it is forwarded to a senior officer in the DIAC Age Determination Unit for review. Where the reviewing officer finds the new material to be persuasive the person's age assessment may be altered accordingly.

An extract from DIAC's Detention Services Manual, in relation to action to be taken when a minor is identified, is as follows:

11 Identifying a minor

11.1 Action to be taken when a minor is identified

All departmental staff and the DSP must:

- take reasonable measures to identify any person in immigration detention who is under the age of 18 and*
- if they are informed, or have a reasonable suspicion that a person in immigration detention may be under the age of 18, immediately escalate to the relevant Deputy State/Territory Director (who will in turn brief the AS, Case Management and Review Branch).*

After escalating the reasonable suspicion that a person is known to be or suspected to be under the age of 18, all staff must:

- seek to determine if the minor is accompanied. This may require staff to ask families and other people in immigration detention whether they are caring for minors other than their own, or whether they know of any minors who are separated from their parents or relatives*
- if the minor is accompanied, separate the minor with their guardian or nominated minder to another area inaccessible from the general immigration detention population*
- if the minor is unaccompanied, separate the minor from the general immigration detention population with an appointed carer*
- assess and address any immediate special needs of the minor, taking into account the minor's age, gender and background. For example, food, clothing, footwear, health requirements, religious needs, mental and emotional needs through age appropriate recreational activities*
- treat the person suspected of being a minor, or claiming to be a minor, as though they are a minor until the actual age is established*
- manage the minor in accordance with instructions provided by the Department and*
- not separate the minor from their family unit or guardian unless directed to do so by the Department.⁴*

⁴ DIAC Detention Services Manual, Chapter 2 Client Placement, Minors in Detention, Roles and Responsibilities, Section 11 'Identifying a Minor'.

The AFP gathers a range of age determination information through the course of an investigation, which is used to prepare a brief of evidence for the CDPP [see 5.3.2]. If during this process the AFP uncovers information that suggests the person may be a minor, the AFP will consider whether to give the person the benefit of the doubt and discontinue the investigation. This may occur at any stage of the investigation process.

Similarly, if during the course of a prosecution the CDPP is provided with evidence that suggests the person may be a minor, the CDPP will consider whether the prosecution should be discontinued. This involves consideration of whether a court is likely to be satisfied on the balance of probabilities that the defendant was an adult, and whether there is a reasonable prospect of conviction in accordance with the Prosecution Policy. While in some circumstances, the decision to discontinue a people smuggling prosecution can be made by senior officers in the CDPP, these decisions are usually made by the Director. Information may come to the attention of the CDPP through counsel for the defence, or any Commonwealth agency.

In addition to review processes initiated by Commonwealth agencies, a defendant may dispute age at any time. Where an issue about age arises, the court schedules an age determination hearing. This can occur at any stage of the prosecution, including at sentencing, and even where a court has previously determined at an earlier hearing that the person is an adult.

Individuals who have been convicted and sentenced for people smuggling offences as adults may appeal their conviction and sentence on the basis of age. Alternatively, a person may apply to the Attorney-General for a pardon or early release on license. These processes are discussed further below under (f).

As federal offenders are housed in State and Territory corrections facilities, in accordance with section 120 of the Constitution, corrections authorities are responsible for assessing each prisoner's security classification and whether it is desirable to physically separate certain classes of prisoners, such as minors. Where a suspected crew member has been charged as an adult but claims to be a minor, the AFP provides State and Territory correctional authorities with all available information concerning the person's claims to age. This enables State and Territory correctional authorities to manage that person 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

There are two scenarios where there may be a suggestion that a minor has been imprisoned in an adult facility.

The first scenario is where there is a suggestion that a person has been incorrectly assessed as an adult. On the basis of that assessment, the person is being held in an adult facility.

In these circumstances, where there is some information available that was not available upon the initial assessment, this information will be taken into account and the person's age will be re-assessed by agencies or the court in accordance with the processes identified above under (d).

If the person is subsequently found to be a minor and no exceptional circumstances apply, he or she will be removed from Australia by DIAC. If exceptional circumstances do apply, for example the person is a repeat offender, the person will be transferred to remand facilities for minors or granted bail into immigration detention, and their case will be removed to the relevant children's court.

Where a person continues to be assessed as an adult following these processes, it is still within the discretion of DIAC and State and Territory correctional facilities to hold the person in facilities for minors, depending on the person's unique circumstances, including their physical vulnerability and mental state.

The second possible scenario is where a person, who has been assessed as a minor and does not claim to be an adult, is being mistakenly detained in an adult facility. No persons assessed by the AFP to be minors are currently being prosecuted, and no person determined by a court to be a minor is currently serving a sentence. As such, the Commonwealth is not aware that this situation has arisen in State and Territory correctional facilities.

Further, DIAC is not aware of this situation ever occurring in the immigration context; however, if it were to occur, DIAC's protocol is to immediately segregate the person from adults while DIAC records are checked, and then placed appropriately in facilities for minors as soon as possible after the person's age has been confirmed.

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

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 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.

For young people who are found to be held in adult prisons, the legal options in relation to release from prison are set out below. Where persons are released from prison, and do not make any claims for protection, they are removed by DIAC.

i. Appeal

A prisoner can appeal their sentence and conviction in the Court of Criminal Appeal, and seek compensation if they have grounds to do so.

ii. Statutory referral to a Court of Appeal

In accordance with section 68 of the *Judiciary Act 1903* (Cth), State and Territory criminal legislation providing for the review of a conviction and sentence is available to federal offenders convicted of Commonwealth offences. For example, under section 140 of the *Sentencing Act 1995* (WA), the Attorney-General may refer a case to the Court of Appeal for the whole case to be heard and determined as if it were an appeal by the offender against the conviction or sentence. There is no specific criteria listed in the WA provision to guide the Attorney-General's decision in making a referral to the court. Accordingly, case law would need to be considered.

iii. Early release on licence

Under subsection 19AP(1) of the Crimes Act, the Attorney-General may grant a licence for a federal offender to be released from prison. Under subsection 19AP(4) of the Crimes Act, a licence cannot be granted unless the Attorney-General is satisfied that exceptional circumstances exist that justify the grant of the licence. Release on licence occurs before the expiry of the period of imprisonment set by the sentencing court.

Exceptional circumstances are not defined in the Crimes Act. However, the Explanatory Memorandum to section 19AP states that exceptional circumstances 'are intended to cover matters that occur, usually post-sentence, that significantly affect an offender's circumstances, such as extensive cooperation with law enforcement agencies or development of a serious medical condition which cannot be adequately treated within the prison system'. The Explanatory Memorandum further provides that 'excellent conduct in prison,

remorse or contrition, liability to deportation, prospects of employment, or family hardship, unless of an extreme kind ... would not normally constitute exceptional circumstances’.

The Attorney-General can determine that exceptional circumstances exist in cases where new evidence about the age of the convicted people smugglers becomes available, which, had it been available at the time of prosecution, may have led to:

- the prosecution being discontinued, or
- the person not being subject to mandatory minimum penalties.

Under subsections 19AP(2) and (3) of the Crimes Act, applications for early release must be made in writing setting out the exceptional circumstances upon which they are relying. However, AGD considers that under subsection 19AP(1) the Attorney-General may grant a licence irrespective of whether a written application has been received under subsection 19AP(2).

iv. The Royal Prerogative of Mercy

Under the Royal Prerogative of Mercy (RPM), the Governor-General may grant a pardon to a federal offender. The Governor-General acts on the advice of the Commonwealth Government. The RPM is a broad and discretionary power vested in the Governor-General. The RPM is not established under any particular piece of Commonwealth legislation; it simply exists at common law. The RPM can be exercised in the following ways:

- the grant of a free, absolute and unconditional pardon
- the grant of a conditional pardon
- the remission or partial remission of a penalty (i.e. sentence or fine), and
- the ordering of an inquiry.

In the past, a free and absolute pardon has only been recommended where the Attorney-General was satisfied that the convicted person is:

- morally and technically innocent of the offence, and there is no remaining avenue of appeal against conviction, or
- morally and technically innocent of the offence, and there are exceptional circumstances justifying the grant of the pardon, despite the existence of avenues of appeal, taking into account the need to respect the separation of powers between the executive and judiciary.

3.2 Further questions by the Senate Committee Secretariat

This section addresses the specific further questions by the Senate Committee Secretariat, emailed to AGD on 29 May 2012.

- a) any reviews that AGD have conducted and the timelines around when they started, why they started, what they covered, and what the outcomes were**

See Part 7 for details.

b) when the issue of young boat crew in adult prisons was first raised with AGD and by whom

See Part 7 for details.

c) the extent of investigations that AGD have undertaken, or been involved in, relating to finding out details about possible minors currently in adult prisons (eg whose files does AGD have, why were those ones selected, and on what grounds)

See Part 7 for details.

d) the advice AGD has regarding the legal options for young people (such as Ali Jasmin) who are found to be in adult prisons; and

See above under term of reference (f) for details concerning the legal options for young people.

e) any meetings or discussions that have been had with international representatives (government or consulate) in relation to these issues.

DFAT is committed to assisting the Indonesian Government provide consular assistance to its citizens, in accordance with the Vienna Convention on Consular Relations. To add greater clarity to each country's consular obligations, Australian and Indonesian Foreign Ministers signed an Arrangement on Consular Notification and Assistance on 10 March 2010.

DFAT is in regular and close contact with the Indonesian Embassy and its consular staff. The principal formal mechanism for discussing consular issues is the annual Australian-Indonesian Consular Consultations, where DFAT leads a whole of government delegation. Australia is the only country with which Indonesia holds annual talks about consular issues at this level. The first meeting took place in Perth in June 2011 and the second took place in Bali in April 2012. These meetings canvass the full range of consular issues for each country. Indonesia raised issues related to minors in detention in 2011 and 2012. During the 2012 Bali talks, Indonesia noted the significant progress that had been made on the Australian side in relation to improved age assessment processes and the amount of time minors spent in detention before being returned to Indonesia.

Aside from the Australian-Indonesian Consular Consultations, DFAT also attends, along with other relevant Australian agencies (AGD, DIAC, AFP), working level meetings at the Indonesian Embassy convened by the Embassy's consular staff. These working level meetings are held on an ad-hoc basis typically before significant events, including the Consular Consultations, Ministerial visits and the annual Leaders' Meeting. DFAT has also initiated and coordinated visits by Indonesian Embassy staff to Australian states to facilitate contact with relevant state government officials (for example in Corrective Services) and to explain the role of the Indonesian consulates and the Embassy. To date these state visits have taken place in Perth, Darwin, Sydney and Melbourne. Plans are being made for the next visit to Brisbane in August 2012.

Most recently, President Yudhoyono raised the treatment of minors at his meeting with Prime Minister Gillard in Bali in November 2011. The Indonesian Foreign Minister, Dr Marty Natalegawa raised issues related to minors with the Minister for Foreign Affairs, Senator Bob Carr, in their last meeting in March 2012 and the Indonesian Ambassador has raised similar issues with DFAT. The Indonesian Government has been robust in making its concerns about the treatment of its minors known to the Australian Government and Indonesian consular officials are in regular contact with DFAT and other agencies on a wide range of consular issues, including on minors. DFAT's engagement with Indonesian leaders and officials that have registered concerns about Indonesian citizens' welfare, particularly minors, has been productive and friendly, and discussions have been characterised by mutual trust and goodwill.

4. Legislative and policy framework

4.1 People smuggling offences

Australia's domestic legislative framework criminalising people smuggling is set out in the Migration Act for ventures entering Australia, and the Criminal Code for ventures entering foreign countries, whether or not via Australia. Key offences relevant to potential claims involving age are as follows:

- A primary offence, whereby a person is guilty if he or she organises or facilitates the illegal entry to Australia of a non-citizen.⁵ The offence carries a maximum penalty of imprisonment for 10 years, a \$110,000 fine, or both.
- An aggravated people smuggling offence involving exploitation or danger of death or serious harm.⁶ The maximum penalty is imprisonment for 20 years, a \$220,000 fine, or both. For offences under the Migration Act, a mandatory minimum penalty of eight years' imprisonment also applies, with a five year non-parole period.
- An aggravated offence involving smuggling five or more persons.⁷ This offence has a maximum penalty of imprisonment for 20 years, a \$220,000 fine, or both. Additionally, the offence under the Migration Act has a mandatory minimum penalty of five years' imprisonment, and a three year non-parole period for first time offenders.

Where the court determines on the balance of probabilities that the accused was a minor when the offence was committed, the mandatory minimum penalties under the Migration Act do not apply.⁸

4.2 Charging and prosecuting minors for people smuggling offences

The decision to charge a person for people smuggling offences is made by the AFP. The matter is then referred to the CDDP to conduct the prosecution. The CDDP conducts all prosecutions in accordance with the *Prosecution Policy of the Commonwealth* (the Prosecution Policy), which provides that in order to commence or continue a prosecution, there must be a reasonable prospect of conviction and the prosecution must be in the public interest.

Under the Prosecution Policy, prosecuting a minor is regarded as a severe step and regard must be had to the public interest. In deciding whether the public interest warrants the prosecution of a minor, a range of factors are taken into account, including the seriousness of the offence, the sentencing options available in the relevant children's court of the State or Territory, the minor's family circumstances, and whether prosecution would have an unduly harsh effect on the minor. The AFP applies the same standard to its decision to charge individuals with people smuggling offences.

In applying the Prosecution Policy in the people smuggling area since late 2010, the CDDP's position has been that minors should not be prosecuted for people smuggling offences unless there are exceptional

⁵ Section 73.1 of the Criminal Code and section 233A of the Migration Act (maximum penalty: imprisonment for 10 years, a \$110,000 fine, or both).

⁶ Section 73.2 of the Criminal Code and section 233B of the Migration Act (maximum penalty: imprisonment for 20 years, a \$220,000 fine, or both. Offences under the Migration Act also carry a mandatory minimum penalty of eight years' imprisonment applies, with a five year non-parole period).

⁷ Section 73.3 of the Criminal Code and section 233C of the Migration Act (maximum penalty: imprisonment for 20 years, a \$220,000 fine, or both. Offences under the Migration Act also carry a mandatory minimum penalty of five years' imprisonment, and a three year non-parole period for first time offenders).

⁸ Section 236B(2) of the Migration Act.

circumstances, on the basis of their significant involvement in a people smuggling venture (for example, the person is involved in the death or serious harm of another person), or involvement in multiple ventures.

4.3 Onus of proof in establishing age

Under subsection 236B(1) of the Migration Act, mandatory minimum penalties do not apply 'if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed'. The Act does not specify which party bears the onus of proof.

In practice, the onus of proof has generally been attributed to the prosecution. However, this issue has been dealt with inconsistently by the courts in each jurisdiction. To encourage consistency, consideration is being given to possible amendments to the Migration Act to expressly provide that, where a defendant raises the issue of age during proceedings, the prosecution bears the legal burden to establish on the balance of probabilities that the defendant was an adult at the time the offence was committed.

4.4 Legislative basis for establishing age under the *Crimes Act 1914*

Division 4A of Part 1AA of the Crimes Act, enacted by the *Crimes Amendment (Age Determination) Act 2001*, provides the legislative basis for determining a person's age for criminal justice purposes. The provisions are not specific to offences for people smuggling, and may be used whenever it is necessary to determine a person's age for federal criminal justice purposes.

The Crimes Regulations 1990 set out the procedures that may be used to determine a person's age, which are defined as 'prescribed procedures'.⁹ Currently, wrist X-rays are the only prescribed procedure.¹⁰

During the course of an investigation, an investigating official may arrange a prescribed procedure, where the official has first obtained consent to the procedure from the suspect and their parent, guardian or an independent person.¹¹ Life Without Barriers representatives have generally performed the role of 'independent person' for the purposes of consent.

In the absence of consent, a judge or magistrate may, upon the application of the investigating official or on their own initiative, order the carrying out of a prescribed procedure where he or she is satisfied that such a procedure is necessary to ascertain whether or not a person is, or was at the time of the offence, under 18 years of age.¹²

4.4.1 *Crimes Amendment (Age Determination) Act 2001*

Prior to the enactment of the Crimes Amendment (Age Determination) Act, there were no express provisions in the Crimes Act for how to determine whether a person is a minor. While wrist X-rays had previously been used by the AFP for age determination purposes on the basis of a power under section 261AA of the Crimes Act to take photographs, the Northern Territory Supreme Court held in *R v Hatim, Kadir and Others* [2000] NTSC 53 that this power did not extend to taking X-rays.

With increasing numbers of people smuggling ventures arriving in Australia at that time, it was becoming critical that investigating officials had the power to use available age determination techniques. The Crimes Amendment (Age Determination) Bill 2001 was introduced to provide a legislative basis to undertake age determination procedures during the investigation and prosecution of Commonwealth offences, and to

⁹ Section 3ZA, *Crimes Act 1994*.

¹⁰ Regulation 6C, *Crimes Regulations 1990*.

¹¹ Sections 3ZQB and 3ZQC, *Crimes Act 1994*

¹² Paragraph 3ZQB(1)(d), *Crimes Act 1994*

prescribe age determination procedures. To allow flexibility and improvements in technology, the amendments did not limit the types of age determination procedures that could be prescribed.

Prior to introducing the Bill, AGD consulted with the former Department of Health and Aged Care, the former Australian Customs Service, the former Department of Immigration, Multicultural and Indigenous Affairs, the Therapeutic Goods Administration, the former National Crime Authority, and internally within AGD. Those agencies did not oppose the legislation.

In considering the Bill, the Senate Legal and Constitutional Affairs Legislation Committee heard evidence that there were minimal health risks associated with exposure to ionising radiation from wrist X-rays. On the basis of that evidence, the Committee did not make any recommendations on the issue of radiation exposure from wrist X-rays in its report, and recommended wrist X-rays be used as a prescribed procedure.

The Committee queried whether a better approach would be to liaise with the country of the nationality of the alleged offender to obtain identity documents, to which the AFP responded: 'If it is possible to do that, we always do that. But it is not always reliable and it is not always available'.¹³ The AFP indicated that, in practice, wrist X-rays would only be used after all other reasonable means had been carried out. However, to avoid technical legal challenges on this basis, this practice was not reflected in the legislation but was instead set out in the Senate Committee's report and in the Revised Explanatory Memorandum for the Bill.¹⁴ The AFP also indicated wrist X-rays would only be used as evidence to establish a person was an adult if the results indicated they were at least 19 years old, however this practice was not reflected in the Revised Explanatory Memorandum for the Bill.

The Gruelich and Pyle Atlas¹⁵ was presented to the Committee as the most commonly used reference tool for estimating age on the basis of a wrist X-ray. The limitations of the Atlas were recognised, including that the Atlas was prepared for the purpose of evaluating bone maturity (not chronological age) and that it may be subject to a margin of error. The Committee also heard evidence from Dr Kevin Osbourne¹⁶, a member of the Royal Australia New Zealand College of Radiologists, that the Atlas was considered to be the most practical and reliable of the available methods. The Revised Explanatory Memorandum to the Bill clearly indicates that the legislation was drafted to accommodate future developments in age determination. In particular, the methodology for interpreting age determination procedure results was not codified, to allow flexibility for scientific improvements.¹⁷

¹³ See Senate Committee Transcript, 23 March 2001, evidence of Ms Victoria Linabury, AFP, page 17-18: The AFP then explained why the information, even if verified by the relevant overseas authorities, may not be reliable. This included the fact that there are no extant records of birth or reliable systemic data about a person's identity and some people travel with false documentation.

¹⁴ Revised Explanatory Memorandum for the Crimes Amendment (Age Determination) Bill 2001 (at paragraphs 9-10):
*'The Bill does not contain an express requirement to exhaust all other avenues before seeking a person's consent to, or magisterial authorisation for, a prescribed procedure. However, in practice, investigating officials will seek to determine a person's age by all reasonable means before exercising the powers contained in the Bill. For example, if reliable documentary evidence of a person's age is available then this may suffice. If an investigating official is required to exhaust alternative avenues this will frustrate the intention of the proposed measures, which are predicated on determining a person's age early in the investigatory process.
Including an express obligation to exhaust other avenues would also open the door to technical legal challenges based on whether law enforcement did exhaust all possibilities to determine a person's age by other means. It also implies the x-ray is determinative when, in fact, it is one of a number of considerations that may be put before a court attempting to assess a person's true age.'*

¹⁵ WW Gruelich and SI Pyle, *Radiographic atlas of skeletal development of the hand and wrist*, Stanford University Press, Stanford, 1959.

¹⁶ Evidence by Dr Kevin Osbourne, Hansard transcript, Senate Legal and Constitutional Affairs Committee hearing, Crimes Amendment (Age Determination) Bill 2001, 23 March 2001.

¹⁷ Senate Legal and Constitutional Affairs Committee Report into the Crimes Amendment (Age Determination) Bill 2001 at p.19, paragraphs 3.40-3.41,

The Greulich and Pyle Atlas and Tanner and Whitehouse Manual (TW3)¹⁸ are still the most commonly used reference tools internationally for assessing skeletal maturity and chronological age, though both indicate that there may be some margin of error in assessing chronological age on the basis of skeletal maturity. Given the possibility of a margin of error, there are some concerns about the reliability of wrist X-ray analysis to assess whether a person is over 18 years of age for criminal justice purposes. There are also discrepancies between medical experts over the most accurate methodology for interpreting wrist X-rays. In particular, the comparison of wrist X-rays against the Greulich and Pyle Atlas has been criticised as a basis for drawing statistical conclusions about the probability that a fully-fused wrist indicates that the person is at least 19 years old. AGD is currently consulting with the Office of the Chief Scientist on these issues.

4.5 Policy framework for age determination and removal of minor crew

The AFP and DIAC require information about the age of suspected people smuggling crew for different reasons. DIAC assesses age to make decisions about detention and removal arrangements. The AFP gathers evidence of age to inform decisions about whether to lay charges for people smuggling offences, and to provide to State and Territory corrections authorities to make decisions about appropriate detention arrangements.

4.5.1 Age determination policy in the criminal justice context

The AFP has relied upon the prescribed age determination procedure introduced by the Australian Government in 2001, being a wrist x-ray. The Australian Government had been aware of criticisms about the use of wrist X-rays as an age determination procedure since their introduction in 2001 [further discussion at 4.4.1], and these issues were considered by the Committee at the time. However, public criticism of the age determination processes, including the reliability of wrist X-ray analysis, increased from November 2010.

On 1 March 2011, a working group chaired by AGD with representatives from the AFP, CDPD and DIAC met to address concerns over the age determination process. At the meeting, agencies concluded that, given the limitations inherent in all age determination procedures, the best method was a holistic approach using a combination of procedures. It was further agreed that agencies should proactively give the benefit of the doubt about age where it could not be clearly established that a person was a minor.

On 8 July 2011, pursuant to recommendations by the Commonwealth agencies working group, the Government announced¹⁹ a series of enhanced age determination measures to formally supplement the prescribed wrist X-ray procedure, including:

- offering voluntary dental X-rays to people smuggling crew claiming to be minors
- taking steps as early as possible to seek information from the individual's country of origin, including birth certificates, school records and statements of relatives, and
- offering voluntary interviews, using enhanced interview techniques, to help determine whether a person is a minor.

Additionally, the Government announced that agencies would proactively give the benefit of the doubt about age where the available evidence could not clearly establish that a person was a minor.

¹⁸ Tanner and Whitehouse et al, *Assessment of Skeletal Maturity and Prediction of Adult Height (TW3 Method)*, 3rd Edition, 2001.

¹⁹ Media release by former Attorney-General and former Minister for Home Affairs and Justice, *Improved process for age determination in people smuggling matters*, 8 July 2011, viewed 23 January 2012, <http://pandora.nla.gov.au/pan/21248/20110723-0001/www.attorneygeneral.gov.au/www/ministers/mccllland.nsf/Page/MediaReleases_2011_ThirdQuarter_8July2011-Improvedprocessforagedeterminationinpeoplesmugglingmatters.html>.

4.5.2 DIAC age assessment policy

There are no statutorily prescribed procedures for assessing age in the immigration context. Prior to 8 December 2011, DIAC's detention placement decisions were informed by a person's claim about their age, and any available documentary evidence.

In the second half of 2010, DIAC piloted a focused interview-based assessment that was endorsed by stakeholders, including the Australian Human Rights Commission (AHRC). Since 8 December 2011, DIAC's age assessment process has comprised a focused interview, and examination of any documents and other information carried by the person. [See DIAC's submission for further details of this process].

Crew assessed as minors following a DIAC age assessment are removed to their country of origin without referral to the AFP, unless exceptional circumstances apply (for example, where the person is a repeat offender or a serious incident occurred on board the vessel they arrived on). The person's removal is facilitated with the assistance of the International Organization for Migration.

From 8 December 2011 to 8 June 2012, 78 Indonesian crew have been assessed under DIAC's new processes. Of these, 35 were assessed as minors and 43 as adults. As at 8 June 2012, 30 of these 35 minors have since been removed to Indonesia.

4.5.3 Material which may be relevant to age determination in the criminal justice context:

Courts consider a range of evidence in determining the age of defendants. These procedures and methods are set out below.

a) Wrist X-rays

Wrist X-rays are currently the only prescribed procedure for determining whether a person is a minor under the Crimes Act. [See 4.4.1 for details on the introduction of wrist X-rays as a prescribed age determination procedure]. As at 8 June 2012, 128 wrist X-rays have been undertaken with only two requiring an application for a court order.

Where the CDPP has relied upon wrist X-ray analysis in court, a report from a radiologist has been obtained outlining the radiologist's conclusion about the person's age, their qualifications, the procedure for making age determinations using an X-ray, and details of the Greulich and Pyle Atlas. Where wrist X-ray evidence has been presented to the court for evaluation, it has been open to the defendant's legal representatives to challenge that evidence. The expert has also been available for cross-examination by the defence, which may call its own experts to challenge the CDPP's evidence. After considering the X-ray evidence and any other evidence that may be available, the court has then made a determination of the person's age on the balance of probabilities.

b) Dental X-rays

As dental X-rays are not a prescribed procedure, the AFP has been offering them on a voluntary basis to people smuggling crew claiming to be minors since the announcement of the enhanced age determination procedures on 8 July 2011. While the AFP has offered 24 dental X-rays to date, none have been accepted.

The dental X-ray procedure involves the radiographic analysis of developing and developed teeth. The procedure utilises a radiograph of the type routinely used by dentists and dental specialists, and involves an external X-ray moving around the jaw line area of the face without any physical contact or intrusion. No X-ray films are placed inside the mouth of the person being X-rayed.

The dental X-ray is then compared to a reference database compiled by specialist forensic odontologists, all of whom are members of the Australian Society of Forensic Odontology (AuSFO). The AuSFO guidelines for age estimation require that an examining orthodontist, having reached a conclusion, must refer the matter to another forensic specialist for a second opinion.²⁰ Accordingly, if a dental X-ray were to be used for age determination purposes, two forensic specialists would need to agree to the assessed age.

c) Interviews

The AFP offers anyone suspected of committing a Commonwealth offence an opportunity to participate in an interview as part of the normal course of an investigation. The AFP asks questions about age in cases where age is in dispute, including about the person's background, education, family and work experience. [See AFP's submission for further details].

Interviews with the AFP are conducted in accordance with Part IC of the Crimes Act, which imposes obligations on investigating officials that protect the rights of people under arrest, including:

- the right to communicate with a friend, relative and legal practitioner²¹
- the right to have a parent, guardian, legal practitioner or independent person present for the interview²²
- the right to an interpreter²³
- the right to communicate with a consular office,²⁴ and
- the right to remain silent.²⁵

To comply with the requirements of Part IC, participation in an interview with the AFP is voluntary. Accordingly, the use of interviews with the AFP for age determination purposes is limited to circumstances where the crew member consents. Typically, crew decline to be interviewed.

d) Identity documents from the country of origin

Credible documentary evidence is not always available to support the claims of people smuggling crew about their age. In these circumstances, the AFP seeks to verify the authenticity of the information provided with the country of origin, usually Indonesia. However, in addition to concerns over the veracity of some Indonesian identity documents, there are often delays in obtaining this information.

Indonesian law requires a child's birth to be reported to the civil registry authorities within one month of the birth. However, this process is often prohibitive because of cost, illiteracy or a lack of access to the Civil Registry Office, and UNICEF has reported that only 55 per cent of Indonesian births were recorded between 2000 and 2008.²⁶

According to Professor Tim Lindsey, an expert on Indonesian law from the University of Melbourne, there is a widespread practice among Indonesian citizens of obtaining numerous identity documents (including birth certificates and drivers licenses) without any requirement for identity verification or sighting by a Government official. In addition, identity documents may be produced on the basis of oral information,

²⁰ AuSFO, *Recommended Guidelines for Age Estimation*, December 2010, viewed 23 January 2012, <http://www.ausfo.com.au/images/members_only/AuSFO_Age_Guidelines.pdf>.

²¹ Section 23G of the Crimes Act.

²² Section 23K of the Crimes Act.

²³ Section 23N of the Crimes Act.

²⁴ Section 23P of the Crimes Act.

²⁵ Section 23S of the Crimes Act.

²⁶ A Veneman (UNICEF Childinfo), *Progress for Children: A Report Card on Child Protection: Number 8*, September 2009, viewed 31 January 2009, <http://www.childinfo.org/files/Progress_for_Children-No.8_EN.pdf>.

without formal verification, in some cases years after the person's birth. Professor Lindsey has also indicated there is a prevalence of illicit production of fake identity documents throughout Indonesia.

Professor Lindsey has also stated that the Gregorian calendar is not the only calendar used in Indonesia and that the other forms of calendar do not easily correlate with the Gregorian calendar, that many in rural poor communities in Indonesia have limited literacy and rarely keep formal records of birth, and that many adopt nominal birthdays for convenience, choosing a convenient date and year that may have little or no connection to their true age.

Since July 2011, the AFP has sought documents from the Indonesian National Police (INP) on a police-to-police basis. Recently the AFP commenced seeking documents from Indonesian consular officials in Australia. Where documents received through these processes indicate the person may be a minor, the AFP considers this material in deciding whether to give the person the benefit of the doubt. However, INP officials have advised the AFP that a mutual assistance request is required to obtain documents for use as evidence in prosecutions (in most cases, documents indicating the person is an adult). Even where a mutual assistance request is urgent and prioritised, it can take up to several months to receive the material sought.

The defence may also seek to present as evidence documents that it has obtained from Indonesia containing information about the defendant's age. Under the laws of evidence, documents are normally only admissible in court proceedings if there is evidence to support the documents. In the case of documents obtained overseas under a mutual assistance request, the documents may be admitted pursuant to the *Foreign Evidence Act 1994*. In age determination matters the CDPP has developed an approach that the CDPP will not dispute the admissibility of documentary evidence that the defendant wishes to tender, unless there are very cogent reasons. However, it may be appropriate for the CDPP to comment about the weight a court should give to any evidence where it is hearsay evidence or is unable to be tested.

Commentary in the media has suggested that the AFP should undertake age inquiries in Indonesia independently of the INP. However, while journalists and other individuals may travel to Indonesia to source documents in relatively short timeframes, AFP officers cannot similarly travel to Indonesia in their private capacity.

Indonesia is a sovereign nation and the AFP cannot conduct investigations without the cooperation of the Indonesian Government. Similarly, Australia would not permit INP officers to conduct investigations in Australia without the cooperation of the AFP. In the absence of an agreement with Indonesia, and legislation enabling the AFP to exercise police powers in a foreign country, there is no lawful basis for the AFP to obtain documentary evidence other than through formal channels.

e) Statements from relatives

It is open to Australian authorities to seek the assistance of foreign authorities on a police-to-police basis to obtain voluntary witness statements from relatives. Further, assistance may be sought by Australia through the mutual assistance process for witnesses to provide statements either voluntarily or with the use of coercive powers by the foreign country.

The defence can also seek to present statements or affidavits from relatives as evidence. Under the laws of evidence documents such as statements are normally not admissible in court proceedings, unless the witness gives evidence and is able to be cross-examined in person. However, if the testimony has been obtained pursuant to a mutual assistance request, the testimony may be admitted pursuant to the *Foreign Evidence Act*. As noted above, in age determination matters the CDPP has developed an approach that the CDPP will not dispute the admissibility of documentary evidence that the defendant wishes to tender, unless there are very cogent reasons.

f) Other material

Other types of evidence that may be considered includes clavicle X-rays, the crew member's physical appearance, psychological and behavioural assessments, DIAC age assessments, the crew member's evidence, evidence from cultural experts and passenger witness statements.

Since September 2008, 147 people smuggling crew have been removed to their country of origin because they were assessed to be a minor, given the benefit of the doubt by law enforcement authorities, or were found by a court to be a minor (as at 8 June 2012). Of these, 95 or almost 65% have been removed in the last 11 months since July 2011. Thirty-seven individuals have been removed because a wrist X-ray has indicated the person is likely to have been a minor at the time of the offence.

5. Criminal process for crew claiming to be minors

5.1 Interception by Border Protection Command

Border Protection Command (BPC) personnel, comprising officers from the Australian Customs and Border Protection Service (Customs) and the Royal Australian Navy (RAN), typically intercept SIEVs between Indonesia and Christmas Island or Ashmore Reef.

Upon interception, BPC identifies and secures items of evidentiary significance on the vessel and, where possible, creates nominal rolls of all passengers and crew on the vessel. Following transfer to Christmas Island, passengers and crew are processed by Customs and the Australian Quarantine and Inspection Service, before being placed in immigration detention. BPC also arranges transfer of evidentiary items to Serco, DIAC's immigration detention service provider.

Crew detained by BPC personnel are held under section 189 of the Migration Act, which requires the detention of unlawful non-citizens.

5.2 Immigration detention

5.2.1 Processing new arrivals

Upon arrival at Christmas Island, suspected people smuggling crew are taken into immigration detention and initially held in low security 'alternative places of detention' (APODs), pending a DIAC age assessment.

Crew assessed as minors are removed to their country of origin as soon as possible, unless exceptional circumstances apply. In many cases, the process of removal can take some time, as DIAC must arrange an escort during their travel and appropriate institutional care in their country of origin. Any crew assessed as adults (or as minors and exceptional circumstances apply), are referred to the AFP for criminal investigation.

Crew assessed as minors continue to be held in an APOD until they are removed (or charged). Crew assessed as adults may be transferred to an immigration detention centre (IDC) while the AFP finalises its investigation. Where a person claims to be a minor, but a DIAC age assessment indicates they are an adult, the interests of the person are balanced carefully against the interests of other minors. No minors are held in adult detention facilities unless they specifically request to remain with members of their crew, and DIAC makes an assessment that this is in the person's best interests.

It is critical for DIAC to establish age as accurately as possible for appropriate placement and care arrangements in administrative detention. The Australian Government has a duty of care requirement to ensure, as far as possible, that minors are not knowingly accommodated with unrelated adults. Accordingly,

it is open to alleged people smuggling crew to change their personal information at any stage, including their date of birth.

5.2.2 Detention and removal power

Crew held in immigration detention, prior to criminal investigation, are detained under section 189 of the Migration Act. Once a criminal investigation begins, the person is detained under sections 189 and 250 of the Migration Act. Section 250 permits the immigration detention of unlawful non-citizens pending a criminal investigation, prosecution, or completion of a custodial sentence.

Section 198(1) of the Migration Act requires that all unlawful non-citizens who request removal in writing must be removed from Australia as soon as practicable. To stay the removal of the person while they are required by the AFP to remain in Australia for the purposes of AFP conducting its investigations and potentially referring the matter to CDPP for prosecution, a criminal justice stay certificate may be issued by the Attorney-General or her delegate, which prevents removal while the certificate remains in force. [See 5.3.1 for further details on criminal justice stay certificates].

5.3 Investigation by the Australian Federal Police

Where the AFP accepts a referral from DIAC, the AFP commences an investigation into the alleged people smuggling offence. If the person claims to be a minor, the AFP also gathers evidence of the person's age. If the AFP forms the view that the person is a minor (and no exceptional circumstances apply), the investigation is discontinued and DIAC commences removal processes.

Alleged people smuggling crew are generally charged under section 233C of the Migration Act, which is an aggravated offence of smuggling five or more persons into Australia. An AFP investigation into an offence under section 233C usually involves the following processes:

- interviewing suspects under caution
- executing a warrant upon Serco to obtain all the evidentiary material secured on interception
- arranging photo boards for witness identification purposes (noting that line ups on Christmas Island would be unfair to the suspect, as the pool of possible suspects is limited)
- taking witness statements from passengers on board the vessel (at least five, in order to establish the elements of the offence of people smuggling five or more people)
- obtaining witness statements from BPC personnel.

Where the person claims to be a minor, the AFP also requests documentary evidence from Indonesia (such as birth certificates and school records), offers the suspect an interview about their age, and may also conduct a wrist X-ray and offer a voluntary dental X-ray.

The AFP prepares a full brief of evidence prior to laying charges, to ensure the CDPP is able to make a thorough assessment of the matter in accordance with the Prosecution Policy.

5.3.1 Powers of detention and criminal justice stay certificates

As noted above, throughout the investigation the person is held in immigration detention under sections 189 and 250 of the Migration Act. Typically, the removal of the person during this period is prevented by the operation of a CJSC issued in respect of the person at the request of the AFP. Such a CJSC would need to be cancelled in order for DIAC to conduct any removal process.

When deciding whether to issue a criminal justice stay certificate (CJSC) to prevent the removal of a suspect who claims to be a minor by DIAC, the Attorney-General's delegate within AGD requires the AFP to confirm that it is aware the person claims to be a minor and that the AFP still intends to proceed with its criminal investigation.

The status of persons subject to CJSCs is regularly reviewed by AGD and requesting agencies. This process of review is amended from time to time, according to operational needs. For example, previously AGD actively followed up with the AFP about the status of each CJSC holder three months after the CJSC was issued. In peak times, the AFP has provided weekly updates on the status of all CJSC holders. Currently, the AFP conducts its own reviews internally, and provides AGD with status updates as necessary. The AFP also provides AGD with a monthly report listing the crew that have been issued CJSCs but have not yet been charged.

The Attorney-General or her delegate must cancel a CJSC when the person is no longer required for the administration of criminal justice. The decision to cancel a CJSC is based on information provided by the requesting agency. The AFP or CDPP may request cancellation of a CJSC where an investigation has been completed without proceeding to a prosecution, where a prosecution has been discontinued, or where a person has been acquitted of an offence. This includes situations where the investigation or prosecution has been discontinued because the person has been assessed as a minor by the AFP, the CDPP has decided not to prosecute on the basis of insufficient evidence that the person is an adult, or the person has been determined to be a minor by a court.

5.3.2 Timeframes for investigation and preparing a brief of evidence

The AFP has worked hard to reduce the amount of time taken to investigate people smuggling offences and prepare a brief of evidence, with a benchmark of 90 days from the date of arrival on Christmas Island to the laying of charges. In February 2011, the AFP implemented a new strategy for the management of briefs of evidence for from SEIV 223 onwards involving:

- Investigators from regional offices (Sydney, Melbourne, Perth and Brisbane) being deployed to Christmas Island on a five week rotational basis and taking responsibility for briefs for all SIEVs that arrive during their deployment period.
- Dedicated one part-time member stationed on Christmas Island in a liaison role with DIAC and Serco. This member is responsible for the coordination of exhibit management, obtaining photos for photo boards and operational assistance as required.

The average time taken by AFP to complete an investigation in relation to an individual crew member is currently 104.5 days from the time of arrival on Christmas Island to date of charge. This figure was historically 161 days, but has been reduced due to enhanced inter-agency procedures. This timeframe is reliant on the alignment of all interagency procedures and processes. The AFP constantly reviews these procedures.

However, the Commonwealth considers there are still a number of procedural requirements that delay the laying of charges for people smuggling offences. The AFP, AGD, CDPP and DIAC are currently reviewing these requirements to facilitate more expeditious investigations.

In particular, possible technical legislative amendments are being considered to streamline evidentiary requirements in people smuggling prosecutions, including the introduction of evidentiary certificates for BPC personnel who intercept people smuggling vessels. Currently, these personnel are required to give individual statements to the AFP identifying people smuggling crew and other evidentiary items. This

process significantly delays the compilation of a brief of evidence, as BPC personnel are often at sea for several weeks at a time without access to adequate email facilities.

The Commonwealth is also developing non-legislative solutions to address delays in investigations. For example, the AFP is working closely with Indonesian consular officials to obtain identity documents about age informally, and not by way of a mutual assistance request, which can take some time. Where these documents indicate the person is a minor, the AFP will consider whether to give the person the benefit of the doubt about their age on that basis.

While the Commonwealth is continuing to develop legislative and policy solutions to streamline investigations, there are often environmental constraints that are unavoidable. For example, weather conditions cause delays in transferring crew and passengers to Christmas Island; there may be limited availability of interpreters on Christmas Island fluent in particular dialects or languages; and passengers may be unwilling or unable to provide statements. There are also significant impediments to obtaining formal and accurate identity documents from Indonesia [see further information at 5.3.5(d)].

5.4 Arrest and charge

After the AFP has completed its investigation and is satisfied that there is sufficient evidence to proceed, the person is transported from immigration detention to the corrections facility of the State or Territory in which the person will be charged. The timeframes for charging a person may be impacted by the number of crew to be transported, and the availability of beds in the jurisdiction's remand facilities.

The AFP seeks to ensure that a completed brief of evidence is available to the CDPP prior to charge. The process between finalising the brief and charging the suspect before the court takes approximately two weeks.

After the suspect is charged the court dictates the progress of the matter. While accelerated timeframes may apply because the defendant is in custody, even the most efficient court will be curtailed by timetabling and availability. The quickest matters generally progress from charge to trial in approximately six months.

5.5 Prosecution and age determination by the court

If the AFP charges a person as an adult, the defendant can challenge the jurisdiction of the court to hear the matter on the basis that they are a minor. The timing of the age determination hearing is at the discretion of the court.

There have been a number of cases where people smuggling crew have not raised age as an issue until they are before the court, sometimes late in proceedings. In response to this issue, in November 2011 the CDPP wrote to the legal representatives of all people smuggling crew before the courts who were not actively claiming to be a minor but had previously indicated age as an issue. In these letters, the CDPP asked the defendants' legal representatives to clarify whether age was an issue. The CDPP also wrote to the legal representatives of all people smuggling crew before the courts who were actively claiming to be a minor, to outline its position not to oppose bail in relation to people smuggling defendants who claimed to be minors.

The Statement on Prosecution Disclosure requires the CDPP to disclose to a defendant the prosecution's case against him or her, and any information about the credibility or reliability of the prosecution witnesses. The CDPP must also disclose to the defence any unused material relevant to the charge, which has been gathered in the course of the investigation and which the prosecution does not intend to rely on as part of its case. This material may run counter to the prosecution case, or it might reasonably be expected to assist the defendant in advancing a defence. Material in relation to the age of the defendant is disclosed by the CDPP to the defendant's legal representatives in accordance with this requirement.

In determining whether to proceed with a prosecution when a defendant has made a claim to be a minor, the CDPP has regard to all of the available information about the person's age. If the CDPP decides to proceed with the prosecution, it is then open to the defence to lead any information they possess as evidence, and call any witnesses in support of the defendant's claim to be a minor at an age determination hearing. The person's age is then decided by the court on the basis of the available evidence.

If a defendant is determined by the court to be a minor, the CDPP will discontinue the prosecution unless there are exceptional circumstances that warrant the prosecution continuing. Where a person is determined to be an adult at the committal stage, the defendant may also raise the issue at the trial stage, and again at sentencing if additional evidence becomes available to support their claim. Otherwise, the defendant may appeal the decision to a higher court.

The CDPP generally does not oppose applications for bail made by people smuggling defendants who claim to have been a minor at the time of the offence. Provided the defendant's legal representative makes an application for bail, and this is granted by the court, the defendant will be released into immigration detention as an unlawful non-citizen until the court either reconsiders the issue of bail or the outcome of their prosecution is known.

Time spent in immigration detention and on remand by persons convicted of people smuggling offences is generally taken into account at sentencing. However, there is potential for inconsistent application across some jurisdictions. Consideration is currently being given to possible amendments to the Migration Act to ensure that pre-sentence custody must be taken into account by courts at sentencing.

5.6 Legal aid arrangements

Following the High Court's decision in *Dietrich v The Queen* (1992) 177 CLR 292, the provision of legal representation for people charged with serious Commonwealth criminal offences, including people smuggling, is necessary to avoid the risk of prosecutions being stayed indefinitely.

Legal aid funded lawyers provide legal advice and representation to people smuggling crew, both prior to charge and during court proceedings. This includes providing advice on whether to raise age as an issue and the most appropriate way to do so. Legal aid lawyers are also required to interrogate the evidence led by the CDPP and challenge it where appropriate.

Legal aid is generally engaged after the person has been referred to the AFP for investigation. Lawyers are not required earlier throughout DIAC processes, such as age assessment interviews, as these processes are administrative in nature and not undertaken for criminal justice purposes. Where a person is referred to the AFP for investigation while they are detained on Christmas Island, representation is provided by Legal Aid WA.

The Commonwealth reimburses legal aid commissions in each State and Territory for the cost of representing people smuggling crew, from the Expensive Commonwealth Criminal Cases Fund (ECCCF). The ECCCF ensures that people smuggling prosecutions do not impact on the ability of legal aid commissions to provide other types of assistance to disadvantaged and vulnerable people. Commissions are able to claim legal fees and the costs of reasonable disbursements, such as calling expert witnesses and gathering evidence in Indonesia to establish a defendant's age. All costs claimed to date have been approved for reimbursement.

6. Guardianship, consular and international obligations

6.1 Detention of crew claiming to be minors

The appropriate management and safety of detainees, prisoners and remandees is a priority for all Australian authorities, and the Commonwealth is responsible for ensuring Australia meets its international legal obligations towards children. In accordance with Article 3 of the *Convention on the Rights of the Child* (CRC) to which Australia is party, Australia considers the best interests of the child in every decision that affects minors, including decisions about the person's detention arrangements.²⁷

To determine what is in the best interests of the child, the Committee on the Rights of the Child has indicated that authorities must conduct a clear and comprehensive assessment of the child's identity, including nationality, upbringing, ethnic, cultural and linguistic background, particularly vulnerabilities and protection needs.²⁸

The CRC contains several requirements for the treatment of children in detention, which complement the 'best interests of the child' principle. In particular, Article 37 of the CRC requires authorities to separate children in detention from adults, unless it is considered in the child's best interest not to do so. The *International Covenant on Civil and Political Rights* (ICCPR) also contains separation requirements in paragraphs 2(b) and 3 of article 10. The Commonwealth, upon ratification of the CRC and ICCPR, made reservations to the effect that Australia accepts the obligation to separate minors from adults, only to the extent that such segregation is considered by the responsible authorities to be feasible and beneficial to the minors or adults concerned.²⁹ Australia's Human Rights Action Plan commits Australia to conducting a review of its reservations to human rights treaties, involving consultation with States and Territories.

The Commonwealth aims to ensure that the age of a person is assessed at the earliest possible stage. In conformity with the views of the Committee for the Rights of the Child, Australian authorities take into account a range of considerations for borderline cases, including a person's claim about age, the physical appearance of the individual, as well as his or her psychological maturity. In the event of remaining uncertainty about the person's age, the individual is given the benefit of the doubt that he or she is in fact a minor.³⁰

In the immigration context, DIAC seeks to ensure crew who are assessed as minors are housed in facilities appropriate for minors. Where a person is charged and remanded to a State or Territory detention facility, the Commonwealth works closely with relevant correctional authorities to ensure appropriate detention arrangements, by providing all available information about age. In both immigration and criminal justice contexts, where a person claims to be a minor but the available evidence indicates the person is an adult, the interests of the person are balanced carefully against the interests of other minors in determining appropriate housing arrangements.

²⁷ Article 3(1) of the CRC.

²⁸ Committee on the Rights of the Child (UN High Commissioner for Human Rights), *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, 1 September 2005, viewed 30 January 2012, <<http://tb.ohchr.org/default.aspx?Symbol=CRC/GC/2005/6>>, 20.

²⁹ See UN Treaties Collection for details of reservations, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en>.

³⁰ Committee on the Rights of the Child (UN High Commissioner for Human Rights), *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, 1 September 2005, viewed 30 January 2012, <<http://tb.ohchr.org/default.aspx?Symbol=CRC/GC/2005/6>>, 31(i).

6.2 Guardianship

Under the *Immigration Guardianship of Children Act 1946* (the IGOC Act), the Minister for Immigration and Citizenship is the guardian of certain unaccompanied non-citizen minors who arrive in Australia with an intention to permanently reside. Alleged people smuggling crew claiming to be minors generally do not fall within the scope of the IGOC Act as they do not intend to permanently reside in Australia. However, as DIAC has a duty of care towards crew claiming to be minors, Life Without Barriers is engaged as an independent observer for them while they undergo any formal processes in immigration facilities, including criminal justice processes such as interviews with the AFP. Life Without Barriers ensures the treatment of individuals in immigration detention is fair, appropriate and reasonable, but has no custody, guardianship or advocacy responsibilities. [See DIAC's separate submission for further information on Life Without Barriers].

6.3 Consular notification and representation

Indonesians detained in Australia for people smuggling are able to access consular assistance in accordance with the *Vienna Convention on Consular Relations* (VCCR) and Australia's *Arrangement on Consular Notification and Assistance* (the Consular Arrangement) with Indonesia, signed on 10 March 2010. Individuals who are detained are provided with advice about how to exercise their right to consular assistance.

Australian officials keep the Indonesian Embassy and consulates informed about its nationals and their status in Australia at all times. With regard to people smuggling crew, DFAT provides the initial notification to the Indonesian Embassy that a SIEV has been boarded by Australian authorities and that Indonesian nationals, normally the crew of the vessel, are believed to be on board. DFAT provides this notification within three working days of the interception of the vessel, in accordance with the provisions of the Consular Arrangement. This notification is usually provided before the crew enter immigration detention and before any age assessment process has commenced. DFAT's notification makes no distinction between potential adults and minors.

Australia's obligations under the VCCR and the *Privacy Act 1988* prevent Australia from providing the personal particulars of any Indonesian national detained in Australia for people smuggling to Indonesian consular officials without that person's consent. This is reflected in the Consular Arrangement with Indonesia, and similar arrangements exist with other countries in accordance with the VCCR. Accordingly, where the person does not consent to consular assistance, information about Indonesian crew is supplied to the Indonesian Embassy in a generic manner, such as the date of arrival, the number of individuals concerned, and their current location. This information is updated regularly to reflect changes in status, and those updates are provided to the Indonesian Embassy. For example, when an Indonesian national is moved between immigration detention facilities, the Indonesian Embassy is advised as soon as practicable.

7. Review of convicted crew

7.1 Context for commencing a review

The President of the AHRC, the Hon Catherine Branson QC, first wrote to the former Attorney-General, the Hon Robert McClelland MP, to raise concerns about the use of wrist X-rays for age determination purposes on 17 February 2011. In subsequent correspondence, the AHRC also raised concerns about the possibility that minors may have already been convicted of people smuggling offences, because they were incorrectly determined to be adults.

In late 2011, the AHRC notified AGD of 12 convicted crew who were claiming to be minors. AGD subsequently prepared a factual summary of these 12 crew, but did not make any formal recommendations

about their management as the AHRC subsequently announced its inquiry on 21 November 2011 into the treatment of people smuggling crew who claim to be minors.

On 16 March 2012, following hearings held as part of the AHRC inquiry, the AHRC President wrote to the Attorney-General, the Hon Nicola Roxon MP, to request an 'independent assessment of age' for 17 convicted people smuggling crew. The AHRC expressed the concern that:

- three of the crew were determined by courts to be adults either wholly or substantially on the basis of wrist X-ray evidence, and
- the remaining 14 crew either admitted to being over 18, or their legal representatives appeared not to have contested the issue, possibly following advice on the weight the court would give to wrist X-ray evidence.

The Indonesian Embassy subsequently advised AGD that it had identified a further two convicted crew who have maintained claims of being minors. The President of the AHRC wrote again on 1 May 2012 to request an additional five convicted crew have their cases reviewed. On 2 May 2012, the Attorney-General announced that AGD would conduct a review of 24 cases of convicted people smuggling crew who raised the issue of age at some point. As the CDPP had identified a total of 28 convicted people smuggling crew who had raised age at some point, a further four cases were included in the review.

7.2 Nature and process for review

7.2.1 Collection of new information

Commonwealth agencies are undertaking a range of processes to gather further information about each individual's age, which AGD will consider as part of the review. These processes are as follows:

- DIAC is conducting age assessment interviews for crew who consent to be interviewed, during which DIAC officers are seeking to form a view as to whether the person is likely to be a minor both at the time of the assessment and at the time of arrival in Australia.

DIAC uses a focussed interview process similar to that used for other Indonesian crew. The process involved two highly trained officers making an age assessment that is thorough but remains subjective and is based on the balance of probabilities. A rating out of five is used to demonstrate the level of confidence in their assessments. However, the influence of incarceration in a correctional institution for several years impacts the client's physical appearance and behaviour and makes assessing the clients age on arrival complex. Accordingly the views expressed on age at time of arrival are always based on the balance of probabilities, and DIAC has recommended that decisions on release or continued incarceration should not be based solely on DIAC's advice on age but also consider all other information before action is taken.

- The AFP is seeking verified age documents from the INP. The AFP has already provided existing age documents in their possession to AGD, and will make further inquiries to the INP to locate additional documents for each case. Given difficulties locating documents in Indonesia, this process is likely to take a number of months. In some cases it may be that no documents become available or exist. Further, there may be some issues with the content of these documents when received [see 5.3.5(d)].
- The Indonesian Embassy and Consulates-General are providing any documents relevant to age to AGD where crew have consented to consular notification and assistance.
- The CDPP is providing relevant case information and chronologies to AGD for each crew member.

Using this information, AGD will prepare a case summary setting out:

- the current status of the case (including whether the crew member has been released)
- details of the investigation conducted by the AFP (including the evidence obtained regarding age)
- the claims to age made by the crew member and available supporting evidence
- details of the prosecution by the CDPP (including the plea, whether age was raised at trial, whether age was determined by the court, and what evidence was adduced regarding age), and
- the overall AGD assessment and recommended outcome of the review.

7.2.2 Recommendations on early release

AGD examines this material as it comes available, and advises the Attorney-General on the extent to which there is doubt about whether a crew member was a minor at the time of the offence, and at the time of review. AGD makes a recommendation to the Attorney-General about how to proceed in each case, which may include early release on licence for crew who are still imprisoned in Australia. Where a decision is made to release crew on license, any criminal justice stay certificate in place must be cancelled prior to removal of the person from Australia.

Within AGD, the First Assistant Secretary of the Criminal Justice Division is the primary decision maker for making recommendations in each case. All recommendations are internally reviewed by the Office of Corporate Counsel in AGD. If the internal reviewer does not endorse the primary decision, the decision will be reconsidered by the First Assistant Secretary of the Criminal Justice Division, having regard to the matters raised by the Office of Corporate Counsel.

7.2.3 Arrangements where no further information is available

Where the Attorney-General agrees to early release on licence of crew subject to the review, AGD liaises with DIAC, the Indonesian Embassy and the relevant State and Territory corrections authority to ensure prompt removal of the crew member to their country of origin.

If information provided as part of the review does not raise a doubt about an individual being an adult at the time of interception, but there is still further information outstanding as part of the review, the individual will remain subject to the review pending the outstanding information.

7.2.4 Prioritisation

The cases under review are being prioritised according to whether:

- information has been received indicating that the crew member may currently be a minor or may have been at the time of the offence, and the crew member is still serving their sentence
- a specific concern has been identified independently of the review (for example, by the AHRC), and
- there is an upcoming release date for the crew member that has already been scheduled.

7.3 Initial outcomes of the review

Of the 28 cases being considered as part of the review, 21 are currently imprisoned in Australia (as at 8 June 2012). Ten crew under review have either been released from prison and removed to Indonesia, or will imminently be released.

The Attorney-General on 17 May and 8 June 2012 announced provided the initial outcomes of the review:

- five individuals were given the benefit of the doubt based on further information that was not previously available, indicating they may have been minors at the time they committed the offence
- two have been granted early release from prison on parole, and
- three completed their non-parole periods.

DIAC completed conducting age assessment interviews for the initial 19 crew on 13 April 2012. DIAC assessed that four crew were likely to be minors at the time of interception, and all 19 crew were likely to be adults at the time of assessment. DIAC is currently in the process of completing the remaining nine assessments for the review.

The *Privacy Act 1988* prevents the Government from identifying the cases that are being reviewed or commenting further on individual cases.

8. Conclusion

The Australian Government is sensitive to the need for robust mechanisms to ensure that persons who may be under 18 years of age are known to Australian authorities and that appropriate arrangements are made for their detention and, where appropriate, their passage through the criminal justice system. However, in establishing these mechanisms, the Australian Government must have regard to the seriousness of people smuggling offences, particularly the risk that these activities pose to the lives of passengers and crew on board these vessels.

Age determination is an inexact science involving some margin of error irrespective of the method used. Recognising these limitations, the Government considers the best approach is to adopt a combination of age determination procedures and to give defendants the benefit of the doubt. This ensures that people smuggling crew are only treated as adults where they are assessed on the available evidence to be an adult. It also means the court will have the widest range of evidence to assess in making an age determination.

The Commonwealth has implemented a number of measures designed to resolve the claims of people smuggling crew who claim to be minors before they reach court. These measures are also intended to ensure that where such claims do proceed to an age determination hearing, the court has the best available evidence on which to base a decision.

Commonwealth agencies have robust mechanisms in place to ensure that new information about a person's age is followed up appropriately. The Australian Government also seeks to ensure all available information on a person's age is provided to relevant State and Territory corrections authorities, to inform decisions about how the person is managed while in criminal custody.