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AUSTRALIAN SENATE
LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCE COMMITTEE
INQUIRY INTO DETENTION OF INDONESIAN MINORS IN AUSTRALIA

Submission of Mark Plunkett
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Introduction

1. I thank the Senate Legal and Constitutional Affairs References Committee inquiring into the Detention of Indonesian minors in Australia (the Committee), for the invitation to appear and give evidence.

2. My standing is:
   (a) as an invitee of the Committee;
   (b) as a private citizen (elector);
   (c) as a barrister-at-law of the Australian Private Bar;
   (d) as an Australian Legal Practitioner who has:
      (i) met, conferred with, and taken instructions from Indonesian minors in Australian detention;
      (ii) travelled to Indonesian to investigate and obtain evidence of their under-age status;
      (iii) attended upon their mothers and fathers, relatives, village officials, police and other Indonesian officials to obtain evidence of their age;
      (iv) obtained admissible evidence relevant to their age and release;
      (v) appeared in Australian Courts for them to establish their ages;
      (vi) obtained their liberty:
         - by orders of the Courts;
         - by administrative decision under Part IB of the *Crimes Act 1914* (Cth) which provides for the release of a federal offender on parole or licence by the Attorney-General[1];
      (vii) have instructions to raise their cases with the Committee, who for the purposes of anonymity, are referred to as:
         - client A (16 years), B (17 years), C (15 years) from Rote Island, East Nusa Tenggara, the Republic of Indonesia, detained on 26 April 2010, formerly held at the Arthur Gorrie Correction Centre 3068 Ipswich Road, WACOL QLD 4076 released by order of the Court on bail on 17 June 2011; and

[1] *Crimes Act 1914* (Cth) ss 19AL(2), 19AP(1)

- client D (16 years) from Desa Tanjung Luar, Kecemantan Keruak, Lombok Timur, of the Republic of Indonesia (born at Hu'u, Sumbawa**),** detained on 7 March 2010, formerly held at Woodford Correctional Centre, Neurum Road, Woodford PMB1, WOODFORD QLD 4514, who was released on licence of the Attorney-General on 14 June 2012.

3. From the outset, it should be observed that the *locus classicus* dealing with the matters the subject of the Terms of Reference of the Committee, is the report dated July 2012 of Catherine Branson QC, President of the Australian Human Rights Commission, entitled, *An age of uncertainty, Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children* pursuant to Part II of, and tabled to the Parliament under s. 45 of, the *Australian Human Rights Commission Act 1986* (Cth) (the Branson Report).

4. The Branson Report was provided with the case material for Clients A, B, C and D and made reference to them.

5. I commend the Branson Report to the Committee and submit that its findings and recommendations should be adopted in full by the Committee.

6. My experience in relation to the Terms of Reference concerns representation for Clients A, B, C and D who:
    (a) are all citizens of Indonesia;
    (b) were crew on fishing boats that brought refugee claimants[2] to Australia;
    (c) were charged with an offence under s. 232A(1) of the *Migration Act 1958* (Cth) for facilitating the bringing to Australia of a group of five or more people who were not non-citizens;
    (d) were minors when:
        (i) the alleged offences occurred;
        (ii) detained in adult gaols incarcerated with adult criminals, including sex offenders;
    (b) were disbelieved, or ignored, by the Commonwealth as to their stated age in circumstances where the Commonwealth failed to make due and proper inquiry as to their true age;
    (c) ultimately were accepted that they were minors by the Commonwealth, only after the work to verify their age was undertaken by the legal representatives of the children.

Clients A, B and C

7. Clients A, B and C were charged that:
    "Between 21 April 2010 and 26 April 2010, in Indonesia and the Territory of Ashmore and Cartier Islands (Australia), and some seas in between, [they] did facilitate the bringing to Australia of five or more people to whom subsection 42(1) of the *Migration Act 1958* applied, namely a group of 41 individuals

[2] people calling upon Australia to honour its protection obligations under the *Convention Relating to the Status of Refugees* adopted at Geneva on 28 July 1951, as amended by the 1967 *Protocol Relating to the Status of Refugees*, Article 1

from Afghanistan and Iran, and did so recklessly as to whether the people had a lawful right to come to Australia, contrary to section 232A(1) of the *Migration Act 1958*."

8. Clients A, B and C were born on the Island of Rote, East Nusa Tenggara (*Nusa Tenggara Timur*) in the Republic of Indonesia.

9. Rote is located off the southwestern tip of West Timor, which is the southernmost island of the Indonesian archipelago.

10. The population of Rote is just over 83,000 with another 50,000 Rotenese on Timor and Semau.

11. Clients A, B and C lived in an small impoverished village of 40 people, called Manamola, located 16 kilometres by road south west of Baa, the capita of Rote. There are no newspapers, television, radio or internet at Manamola.

12. Critically, however, as is increasingly the case in the Third World, nowadays some one in the village will have a mobile telephone used for community communication.

13. Clients A, B and C had no knowledge of Australia, let alone any laws of Australia creating criminal offences for people helping refugees come to Australia.

14. Their first language is Rotenese, but they could also speak Indonesian (Bahasa Indonesia) the official language of Indonesia, which is the lingua franca in the Indonesian archipelago.

15. One was an orphan, whose mother and father had died when he was three years old. Another only had a mother.

16. Although Clients A, B and C went to school for a few years, they were illiterate, and unable to read or write in any language.

17. From about 10 years of age, they lived by working long hours in the rice field as farmers and on the seas as fishermen, on a day to day cashless economy of subsistence survival which can only be described as ditch dirt poor.

18. On 26 April 2010 Clients A, B and C was taken into custody by the Royal Australian Navy at what Australia claims as uninhabited the Territory of Ashmore and Cartier Islands, which consists of two groups of small low-lying uninhabited tropical islands in the Indian Ocean, 170 kilometres south of Rote and 320 kilometres northwest coast of Australia.

19. This is disputed territory because the people of Rote make claim to Ashmore Reef and Cartier Island since the 1630s.[3] For many centuries and continuously to

[3] See *United States of America Central Intelligence Agency Facts Book*: https://www.cia.gov/library/publications/the-world-factbook/fields/2070.html; Arya I Made Andi Arsana, ST., MEBatas Maritim Antarnegara - Sebuah Tinjauan Teknis dan Yuridis (Gadjah Mada

this day, the Rotenese have used and occupied for collecting birds, bird's eggs, clams, holothurians (sea cucumber), shells, turtles and turtle eggs for consumption and trade on the Asian market. The Rotenese call this place *Pulau Pasir* which is considered by many Indonesians to be part of Rote Ndao Regency of East Nusa Tenggara province of Indonesia. In the Rotenese language, Ashmore Reef, is *Nusa Solokaek*, meaning *Sand Island*.

20. Relevantly, the law at the time the offence is alleged to have been committed is set out in the *Migration Act 1958 Act* (Cth) No. 62 of 1958 as amended being the compilation prepared on 9 November 2009 taking into account amendments up to Act No. 91 of 2009 creating a criminal offence as follows:

    232A Organising bringing groups of non-citizens into Australia
    (1) A person who:
    (a) organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and
    (b) does so reckless as to whether the people had, or have, a lawful right to come to Australia;
    is guilty of an offence punishable, on conviction, by imprisonment for 20 years or 2,000 penalty units, or both.
    Note: Sections 233B and 233C limit conviction and sentencing options for offences under this section.
    (2) For the purposes of subsection (1), the defendant bears an evidential burden in relation to establishing that subsection 42(1) does not apply to a person because of subsection 42(2) or (2A) or regulations made under subsection 42(3).
    Note: For ***evidential burden***, see section 13.3 of the *Criminal Code*.

21. Section 232A was added by Act No 89 of 1999, amended by Act No. 160 of 1999, and Act No 85 of 2008. The notes to s. 232A were added by Act No. 126 of 2001.

22. On 27 September 2001 the *Border Protection (Validation and Enforcement Powers) Act 2001* (No. 126, 2001) was passed as "an Act to validate the actions of the Commonwealth and others in relation to the *MV Tampa* and other vessels, and to provide increased powers to protect Australia's borders, and for related purposes was passed".

23. By Schedule 2 of the *Border Protection (Validation and Enforcement Powers) Act 2001*, by Item 5 introduced a new s. 233B which provided that a court may

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University Press, 2007); Prof. Jacub Rais and J.P. Tamtomo assert that the Indonesian Proclamation of Independence secured all the former areas of the Netherlands (not others) as people in those areas had the same experience during colonialism:Kompas, 11 April 2005; 28 May 2005: See Prof. Dr. Gerald Persoon and Prof. Dr. Cristobal Kay at the International Conference On Indigenous Claims On Water "International conference on Indigenous Claims on Water: what do the Indigenous Covention and International Law Documents say about this? (Case Study of Rotenese – Indonesia Historic Rights in Ashmore Reef and Cartier Islands and other selected cases in Southeast Asia/Pacific)" International Institute of Social Studies Erasmus University, The Hague, Netherlands, Friday 18 March 2011; There is a irony in this expensive exercise of so-called border protection relying on an ill-equipped and under resourced Navy Australia's, will ultimately call into question and create challenges to Australia's sovereignty of these far flung isolated territories, including Christmas Island located 5307 kilometres from Sydney but only 487 kilometres from Jakarta.

not make an order under section 19B of the *Crimes Act 1914* in respect of a charge for an offence under section 232A or 233A of the *Migration Act*. In summary, section 19B allows a court to discharge offenders without proceeding to conviction. However, an order under section 19B for this offence may only be made by the court if it is established, on the balance of probabilities, that the person was aged under 18 years at the time when the offence is alleged to have been committed.

24. By Schedule 2 of the *Border Protection (Validation and Enforcement Powers) Act 2001*, Item 3 introduced a minimum mandatory penalties in relation to the these offences in sections 232A and 233A of the Act as follows:

> **233C Mandatory penalties for certain offences**
>
> (1) This section applies if a person is convicted of an offence under section 232A or 233A, unless it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.
>
> (2) The court must impose a sentence of imprisonment of at least:
>
> (a) 8 years, if the conviction is for a repeat offence; or
>
> (b) 5 years, in any other case.
>
> (3) The court must also set a non-parole period of at least:
>
> (a) 5 years, if the conviction is for a repeat offence; or
>
> (b) 3 years, in any other case.
>
> (4) In this section:
>
> (a) *non-parole period* has the same meaning as it has in Part 1B of the *Crimes Act 1914*; and
>
> (b) a person's conviction for an offence is for a *repeat offence* if, on a previous occasion after the commencement of this section, a court:
>
> (i) has convicted the person of another offence, being an offence against section 232A or 233A; or
>
> (ii) has found, without recording a conviction, that the person had committed another such offence.

25. On 24 February 2010 in Parliament House, Canberra, the then Attorney-General, the Honourable Robert McClelland, in the Second Reading Speech for the *Anti-People Smuggling And Other Measures Bill 2010* said:

> "The use of mandatory minimum penalties reflects the seriousness of the activity being prosecuted. It allows the court to determine an appropriate penalty within the minimum and maximum set by the Parliament."

26. Relevantly, the mandatory minimum sentencing provisions are expressed not to apply to persons under the age of 18 years: s. 233C(1) of the old provisions and s. 236B(2) of the current provisions.

27. Critically, the proviso in s. 233C(1) in the use of words "unless it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed", means if that if the Applicant is over 18 and he is convicted of this offence he will suffer to a 5 year mandatory sentence to serve a minimum of 3 years non-parole period.

28. Justice Thomas of the Northern Territory Supreme Court has ruled that the onus rests on the Crown to establish that Mr Lani was over 18 at the time of the offence: *R v. Hatim* [2000] NTSC 54 at [30].

29. However in *Queen v Jus Balu* (*Ex tempore* 3 November 2000) Bailey J considered Thomas J's decision in *Hatim* and held that there was no onus on the Crown to establish that the accused was an adult at the date of the alleged offence and that it was a matter for the court to decide on a balance of probabilities.

30. In *R v. Hatim* [2000] NTSC 54, an Indonesian crew member argued that the Supreme Court of the Northern Territory did not have the requisite jurisdiction to hear the matter, because he was 16-years-of-age at the time of the offence. Under s. 258 of the *Migration Act 1958*, which allows an official to do "all such things as are reasonably necessary for photographing or measuring that person", an immigration officer requested the taking of an X- ray in order to facilitate identification of the person. The wrist X-ray procedure measures skeletal maturity by examining the fusing or partial fusing of the *ulna epiphysis*, a bone located in the wrist. The accused had consented to the procedure and the central issue for the court was the admissibility of the X-ray for the purpose of determining jurisdiction. Although Justice Thomas was of the view that *Migration Act 1958* provision did not permit the taking of X-rays *per se*, he considered that the consensual nature of the procedure resulted in the wrist X-ray being admissible in relation to the issue of age determination.

31. Thereafter the *Crimes Act 1914* (Cth) was amended by the insertion of Division 4A – "Determining a person's age", which provided for the use of a *prescribed procedure*, including X-rays, by an appropriately qualified person for the purpose of determining whether a suspect is, or was at the time of the offence, under the age of 18. This may occur by consent of the person or by order of a magistrate upon application.

32. If the Commonwealth had determined that Clients A, B and C were under 18 years of age on 26 April 2010 they would not be prosecuted and they would be returned to Indonesia.

33. Australia is a signatory to the United Nations *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) and signed by Australia on 22 August 1990 and ratified on 17 December 1990 (the Convention).

34. Article 3 of the Convention states that the best interests of the child must be a primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.

35. Article 37(a) provides that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

36. Article 37(b) provides no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in

conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

37. Article 37(c) provides every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

38. Article 37(d) provides every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

39. Article 40(2)(iii) of the Convention recognises the right of any child accused of having infringed the penal law to have the matter fairly determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law.

40. In the absence of any express provision to the contrary, the Commonwealth of Australia is required to act consistently with the treaty's provisions: *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

41. After the apprehension by the Royal Australian Navy of Clients A, B and C, on 26 April 2010, no one from the Commonwealth of Australia notified their next of kin or any person in their village that they were in custody in Australia charged with an offence that carries a mandatory 5 year sentence.

42. At all times Clients A, B and C stated that they were under 18 years of age.

43. As Clients A, B and C were under 18 years of age, they did not face the five year mandatory sentencing provisions to serve a minimum of three years imprisonment, if guilty of these offences of s. 233C of the *Migration Act 1958* (Cth).

44. Further as minors the prosecution policy of the Commonwealth is not to prosecute, but rather return them to Indonesia.

45. From apprehension and all subsequent DIAC and AFP interviews Clients A, B and C advised that they were children.

46. Clients A, B and C were taken from Ashmore Reef to Christmas Island and then brought 2749 kilometres from Christmas Island to Darwin.

47. On 21 May 2010 at Darwin wrist X-rays were taken of Clients A, B and C, but these were not reviewed by a consultant radiologist until 27 January 2011.

48. Relevantly, on 17 October 2010 the complainant Department of Immigration and Citizenship, made a careful assessment of his physical, appearance, demeanour, family history and education, social history and interdependence of them by an Age Determination Interviewing Officer and Clients A, B and C were assessed as being under 18 years of age.

49. The age assessment by DIAC was six months after the apprehension of Clients A, B and C.

50. This assessment should have been done in a matter of days of detention.

51. Moreover a written report of this assessment was not made until 26 February 2011 and not provided to the defence lawyers until June 2011.

52. No explanation for these extraordinary delays has ever been given for the dilatory conduct in not making the assessment earlier, the further tardiness in producing the report and the protracted delay in not furnishing the report.

53. After the DIAC age assessment determining that Clients A, B and C were minors, this should have been the end of the matter—any proposal to prosecute should have been thereafter abandoned and they should have been sent home.

54. On 27 January 2011 a consultant radiologist reviewed the wrist X-rays and by a report of that date advised Officer Bruce Jackson of the Australian Federal Police in Perth that they revealed skeletal maturity such that it was reasonable interpretation of an age "above the age of 19 years" relying on the Greulich and Pyle, *Radiographic Atlas of Skeletal Development of the hand and wrist* for Clients A, B and C.

55. Clients A, B and C were then manacled, internal body cavity searched and flown in secure custody 2850 kilometres from Darwin to Brisbane where they were charged.

56. On 30 January 2011 Clients A, B and C were brought before Magistrate Herlihy at the Brisbane Magistrates Court.

57. This was nine months after they had been detained. This was the first time they brought before a Court and seen in the public.

58. It was also the first occasion when Clients A, B and C had access to a lawyer.

59. Magistrate James Herlihy asked why Clients A, B and C were not in the Childrens Court as required by the *Juvenile Justices Act 1992*, s. 6(2); *Childrens Court Act 1992* (Q).

60. When Magistrate Herlihy referred to the dates of birth shown on the Bench Charge Sheet, showing that Clients A, B and C were minors, the prosecution asked that the Bench Charge Sheet be "amended to strike out the date of birth and leave blank" and "personal appearance of the defendant is not required" at the next adjourned date.

61. On 26 February 2011, the DIAC age assessment report of the October 2010 assessment was made concluding that Clients A, B and C were under age.

62. On 20 April 2010 Dr Vincent Hock Seng Low reported that at 21 May 2010 Clients A, B and C were probably 19 years or older because his x-ray examinations show they had reached skeletal maturity.[4]

63. Extraordinarily, Dr Low stated that the probability of Client A being less than 18 years:
    (a) at 21 May 2010 was 22 per cent;
    (b) at 26 April 2010 was 24 per cent.

64. Dr Low reported that his examination of the X-rays showed the probability of being less than 18 years was 22 per cent.

65. Dr Low admitted there were some limitations in his report because:
    (a) there may be racial differences in skeletal size;
    (b) the Atlas studies are based on well-nourished males.

66. Even on this basis, it was open to argue that the Crown could not prove "on the balance of probabilities that [Clients A, B and C] was aged under 18 years when the offence was committed 21 April 2010 to 26 April 2010": s. 233C(1) of the relevant provision.[5]

67. The total unreliability of the Greulich, W. C., and Ms Pyle, S. I., *Radiographic Atlas of Skeletal Development of the Hand and Wrist* was apparent from a simple 30 minute Google search of the term[6] and the cases referred to in Austlii[7].

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[4] referring to the Atlas methodology developed by Dr Greulich, W. C., and Ms Pyle, S. I., *Radiographic Atlas of Skeletal Development of the Hand and Wrist*, second ed. (Oxford Univ. Press, Oxford, 1959)

[5] see *Malec v. J C Hutton Pty Ltd*, (1990) 169 CLR 638, 642-643 Deane Gaudron and McHugh JJ noted "A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain". To like effect was Lord Simon in *Davies v. Taylor*, [1974] AC 207, 219 "Beneath the legal concept of probability lies the mathematical theory of probability. Only occasionally does this break surface – apart from the concept of proof on a balance of probabilities, which can be restated as the burden of showing odds of at least 51 to 49 that such-and-such has taken place or will do so". These comments were obviously raised in the context of a civil case, and it is an even more controversial issue whether probabilities can be applied in the criminal context, as we will discuss further.

[6] Greulich WW, Pyle SI,Waterhouse AM. *A radiographic standard of reference for the growing hand and wrist.* Chicago: Case Western Reserve University, 1971; Tanner JM, Whitehouse RH, Cameron N, Marshall WA, Healy MJR, Goldstein H. *Assessment of skeletal maturity and prediction of adult height*, 2nd ed. London: Academic Press, 1983; F. Cao, H.K. Huang, E. Pietka, V. Gilsanz. "Digital hand atlas and web-based bone age assessment: System design and implementation," *Computerized medical imaging and graphics,* 24 (2000): 297-307, 2000; W.W. Greulich and S.I. Pyle. "Radiographic Atlas of Skeletal Development of Hand and Wrist" Stanford University Press, 2nd edition, 1971; Milner GR, Levick RK, Kay R. Assessment of bone age: a comparison of the Greulich and Pyle and the Tanner and Whitehouse methods. *Clin Radiol* 1986;37:119-121; King DG, Steventon DM, O'Sullivan MP, *et al*. Reproducibility of bone ages when performed by radiology registrars: an audit of Tanner and Whitehouse II versus Greulich and Pyle methods. *Br J Radiol* 1994;67:848-845; Bull RK, Edwards PD, Kemp PM, Fry S, Hughes IA. Bone age assessment: a large scale comparison of the Greulich and Pyle, and Tanner and Whitehouse (TW2) methods. *Arch Dis Child* 1999;81:172 Bland JM, Altman DG.

68. The basis of the Greulich-Pyle study is the Brush Foundation studies on human growth and development, begun in 1931 and terminated in 1942, were intensively reviewed and studied by e in the formulation of this *Radiographic Atlas of Skeletal Development of the Hand and Wrist.*

69. Serial radiographs of from 2 to 20 hand-films made at successive examinations of each of 1000 boys and girls made up the radiographic material for Greulich-Pyle. Children aged between 4 and 16 years were excluded because the bone age assessment from radiographs of the wrist in this age group was considered unreliable. Standards were selected that were judged to be the most representative of the central tendency or anatomic mode of each chronologic age group from birth through 18 years.[8]

70. The validity of the age assessment method based on the Greulich-Pyle method (1st edition 1950) became a standard reference, supplanting (in most radiographic installations) the earlier Atlas by Todd (1937) and Florys 1936 monograph, but the Greulich-Pyle has been frequently questioned.[9]

71. Following this criticism Greulich and Pyle completed a revised and enlarged edition of the Atlas, characterized by more contrast in the radiographic reproductions, several additional age standards, newly redrawn pictures of individual maturity indicators, a discussion of subjective error in hand-age assessment and the heaviest coated stock outside of art reproduction.

72. Marshall, W A in *Individual Variations in Rate of Skeletal Maturation from Department of Growth and Developmen*t, Institute of Child Health, 30 Guilford Street, London WC1. Fry, E. I., *Nature*, 220, 496 (1968) was of the view that the Greulich-Pyle method, like Todd's from which it derives, reaches beyond simple counting of centers or planimeter measurement of areas, and averages the age-equivalents of individual bones and their epiphyses. Marshall observed that being keyed to a series of pictorial standards, the accuracy of individual determinations depends in part on the quality of the reproductions and on internal consistency within the original radiographs used as standards.

Statistical methods for assessing agreement between two methods of clinical measurement. *Lancet* 1986;i:307-310; www.bme.boun.edu.tr/esraguven

[7] *Dankwa, Nicholas Kissi* [2001] MRTA 421 (5 February 2001); *Osman, Musse* [2001] MRTA 538 (14 February 2001); *Jalil, Abdul* [2002] MRTA 7571 (19 December 2002) where it was observed that "Other decisions of the Tribunal have referred to the determination of bone age by X-ray examination, but have not relied on these one way or the other in the ultimate determination of the matter (*Dankwa, Nicholas Kissi* [2001] MRTA 421 (5 February 2001); *Osman, Musse* [2001] MRTA 538 (14 February 2001))"; *Stoykovski v "M" [a Child]* [2002] WASCA 193 (18 June 2002) *Aa* [2003] MRTA 3369 (28 May 2003); *Ali, Souleika Ismael* [2003] MRTA 5658 (11 August 2003) *; Applicant VFAY v Minister for Immigration* [2003] FMCA 289 (11 July 2003); *Ganyu, Halakhe* [2004] MRTA 6990 (30 June 2004); *V0504672* [2007] MRTA 385 (13 August 2007); *Osman v Minister for Immigration & Anor* [2007] FMCA 1437 (16 October 2007); *060797778* [2007] MRTA 115 (3 April 2007)

[8] see M. Maresh , A. H. Washburn, *Radiographic Atlas of Skeletal Development of the Hand and Wrist*, PEDIATRICS Vol. 6 No. 3 September 1950, pp. 505-506

[9] Age assessment by the Greulich and Pyle method compared to other skeletal X-ray and dental methods in data from Finnish child victims of the Southeast Asian Tsunami, Olli Varkkola, Helena Ranta, Mari Metsäniitty and Antti Sajantila, Forensic Science, Medicine, And Pathology, DOI: 10.1007/s12024-010-917

73. From time to time various criticisms were leveled against the Greulich-Pyle method, among them a series of papers by Donald Mainland. When Greulich and Pyle set out the of this criticism they omitted reference to potentially-competitive systems such as the "Oxford" method, where it was said the reliability of the Greulich-Pyle method was only useful if the work is done carefully and by a trained person.[10]

74. Equally pertinent to the technique is the question of secular trends in respect to skeletal age. The radiographs upon which the Greulich-Pyle norms are based were made, on the average, decades earlier. These standards were relative rather than absolute. Familial and presumably gene-determined differences in the patterning of hand ossification complicates skeletal-age assessment more when a simple carpal count is used than with the Greulich-Pyle method. Greulich-Pyle, though rightly minimizing the influence of most aberrant patterns on their system, unfortunately minimized the existence of the patterns. The pseudo-epiphysison Meta carpal I, and the atypical late appearance of the Navicular, and greater and leser Multangular cluster in kindreds, and it was not safe to assume that the latter never resulted in spuriously low age assessments.

75. Sven Schmidt, Inna Nitz, Ronald Schulz and Andreas Schmeling in the *International Journal Of Legal Medicine* Volume 122, Number 4, 309-314, DOI: 10.1007/s00414-008-0237-3 analysed the applicability of the clinically prevalent skeletal age determination method of Tanner and Whitehouse (TW2) for forensic age estimation in living individuals. For this purpose, the hand X-rays from 48 boys and 44 girls aged 12–16 years were evaluated retrospectively. The minima and maxima, the mean values with their standard deviations as well as the medians with upper and lower quartiles, were presented for the skeletal ages 12–16 years estimated by the TW2 and TW3 methods. In the relevant skeletal age group 14–16 years, the differences between the skeletal age and the mean value of the chronological age were between −0.1 and +1.4 years for the TW2 method. For the TW3 method, the differences between the skeletal age and the mean value of the chronological age were between −0.4 and +0.2 years in the relevant age group. Due to the risk of serious overestimations, the TW2 method was regarded as unsuitable for forensic age diagnostics. In the result the authors recommended the application of the TW3 method for forensic age estimations.

76. Later, Varkkola, Ranta, Metsäniitty and Sajantila using the dental methods in data from Finnish child victims of the Southeast Asian Tsunami, questioned the reliability of the widely used Greulich-Pyle method by comparing it to various dental and other skeletal age assessment methods. Forty-seven Finnish children of known ages below 16 years, who perished in Thailand in the Southeast Asian Tsunami on 26 December 2004 were examined. Every victim repatriated to Finland underwent a complete forensic autopsy including CT-scan, toxicological screening, and diatom analysis in order to establish the cause of death, as well as DNA testing and dental examination for the verification of the identification established in Thailand. Age assessment was performed by dental and skeletal

[10] W. A. Marshall in *Individual Variations in Rate of Skeletal Maturation from Department of Growth and Developmen*t, Institute of Child Health, 30 Guilford Street, London WC1. Fry, E. I., *Nature*, 220, 496 (1968)

methods. The average difference between the age assessment values obtained by the Greulich-Pyle method, and the chronological age was 9.7 months. In addition to the Greulich-Pyle method, an alternate skeletal method, Tanner and Whitehouse[11], resulted in an average age difference of 10.3 months. Dental age assessment methods were based either on the eruption (Nyström method, 8 cases, average age difference 5.6 months), or the development of the crown and roots (Demirjian method, 33 cases, average age difference 5.2 months and ABFO method, 7 cases, average differences 12.6 months). Dental methods proved to be most accurate in childhood until the teeth—with the exception of wisdom teeth—have erupted and root development is completed. Professor Fry criticized the Tanner and Whitehouse method of assessing skeletal maturity[12] on the grounds that it shows excessive fluctuation in the velocity of maturation. He stated that, in a child whose chronological age advances 6 months, the method may show no advance of skeletal age or, alternatively, a skeletal advance of 23 months.

77. It is a scientific fact that race and stature differences in the skeletal maturation of the hand and wrist may give different results. Levels of maturity of 22 bones of the hand and wrist in children aged 5 to 10 years were compared by considering the differences between each bone-specific assessment (Greulich-Pyle 1959) and the mean of all 22 bones. After elimination of the effects due to observer bias, atlas singularities, and age, comparisons were made by race (white, black, and Oriental) and stature. In all comparisons, distinct row or area effects were found, with some evidence of ray gradients also. The pattern differences between white and black children were more pronounced than those between whites and Orientals, or those among the stature groups of whites and blacks. The white-black differences were great enough to provide the basis for an effective discriminate function. The total variation in maturity within the hand (the "disharmony" or "imbalance") differs in blacks from such variation in the other races.

78. G. Pathmanathan, P. Raghavan did a study entitled *Bone Age Based Linear Growth and Weight of Under Privileged North west Indian Children Compared with their Well-Off North west Indian Peers*, Journal of the Anatomical Society of India Vol. 55, No. 2 (2006-07 - 2006-12). There the Radius, Ulna and the Short Bone Age (RUS BA, TW2 System) based linear growth – Stature, Sitting Height, Subischial Leg Length and Weight of under privileged NW Indian children (445B and 342G) were compared with their well-off peers. Contrary to the normal observations that it is the females who withstand the adverse conditions better, in that study, compared to the well-off children, the linear dimensions of the under privileged girls showed lesser attained means at each Bone Age. Surprisingly, the boys' means were more or less on par till adolescence; thence the difference sets in leading to lesser adult values in the undernourished group. This was thought probably be due to the operating social factors in this part of the world where male child is preferred and favoured. Unlike the Chronological Age based typical distance growth curves in the RUS BA based distance linear growth

[11] Tanner JM, Whitehouse RH, Cameron N, Marshall WA, Healy MJR, Goldstein H. *Assessment of skeletal maturity and prediction of adult height*, 2nd ed. London: Academic Press, 1983

[12] Tanner, J. M., Whitehouse, R. H., and Healy, M. J. R., *A New System for Estimating Skeletal Maturity from the Hand and Wrist, with Standards Derived from a Study of 2,600 Healthy British Children*, Parts 1 and 2 (International Children's Centre, Paris, 1962).

curves the boys showed larger means throughout. In weight both the sexes of the economically weaker section were more or less on par. However these children were much lighter compared to their well-off Bone Age peers.

79. In *Hormone Research* Vol. 51, No. 2, 1999 Daniel Konrad, Eugen J. Schoenle Division of Endocrinology and Diabetology, University Children's Hospital, Zürich, Switzerland in a *Case Report* Ten-Year Follow-Up in a Boy with Leydig Cell Tumor after Selective Surgery for $4^{8}/_{12}$ year-old boy with precocious puberty and an enlarged right testis, a Leydig cell tumor was diagnosed. Surgical exploration revealed an encapsulated tumor which was selectively removed without orchiectomy. Within 1 year the signs of precocious puberty disappeared. Ten years later, the patient remained free of disease and had developed normal spontaneous puberty. Despite of highly advanced bone age at the time of diagnosis (13 years according to Greulich and Pyle), his height at age 15 was in the upper normal range and within the familial target height.

80. In a study of Bone age assessment by a large scale comparison of the Greulich and Pyle, and Tanner and Whitehouse methods by R K Bull and P D Edwards from the Department of Nuclear Medicine, Addenbrooke's Hospital, P M Kemp from University of Cambridge, Department of Paediatrics, Addenbrooke's Hospital, it was concluded that the Greulich and Pyle and Tanner and Whitehouse methods produced different values for bone age, which are significant in clinical practice. This disagreed with previous smaller studies, all of which were somewhat flawed by the use of regression analysis, which is an inappropriate statistical technique for this type of study. In addition, they have shown that the TW2 method is more reproducible than the Greulich-Pyle method. They hypothesised that the rapid Greulich-Pyle method, as used in common clinical practice, is potentially less accurate than the more rigorous time consuming approach originally suggested by these authors. Therefore, they suggested that only one method of bone age assessment (preferably the Tanner and Whitehouse method) should be used when performing serial measurements on an individual patient.

81. Dr Low's use of the Greulich-Pyle method was the subject of judicial consideration in *Stoykovski v "M" [a Child]* [2002] WASCA 193 (18 June 2002) where where Templeman J observed:

> "[30] Her Honour then referred to the Atlas which was the work on which Dr Low had based his conclusions. Her Honour referred to the fact that Dr Low had said that the method of determining age in the way which I have described is not an exact science. Dr Low had conceded there was a possibility of error in conducting comparisons between x-rays of a person with a disputed age and the x-ray plates in the Atlas. That is because it seems the sample used by the authors of the Atlas was of young people who were well nourished Caucasians drawn from the United States and the United Kingdom in the 1950s. The Atlas did not contain any Asian samples at all.
>
> [31] He conceded in cross-examination that it was possible that Asians had accelerated development. The authors of the Atlas themselves had given several warnings. They said that the results should be viewed with, and I quote, "judicious scepticism until they are able to consistently duplicate or closely to approximate them by subsequent independent reassessment". The

authors warned that the method was intended merely to provide useful estimates of skeletal status and that there was a tendency to attribute to and to expect from the method a greater degree of precision than was intended by those who devised it or indeed than is permitted by the nature of the changes which it is designed to measure."

82. Federal Magistrates Phipps in *Applicant VFAY v Minister for Immigration* [2003] FMCA 289 (11 July 2003) referred to criticism of the technique in evidence from a Dr Ratcliffe, who noted at [28] the standards in the Greulich and Pyle Atlas are derived from a study of healthy white middle-class children in the Cleveland area in the United States in the years 1931 to 1942, where population of the study consisted of the 6,879 hand radiographs from girls and boys and the ages ranged from 3 months to 16 years for girls and to 17 years for boys at the time of the radiographs. In Greulich and Pyle a table is used to provide means and standard deviations for skeletal age. Dr Ratcliffe noted that Greulich and Pyle did not consider the estimation of chronological age from their data as a potential use of their data. He observed that in science it is a useful generalisation to say that to use data for purposes for which it was neither collected nor recommended by the data gatherers can be fraught with hazards. He discussed in detail events leading to skeletal maturation and various matters which may affect it. Dr Ratcliffe referred to other studies he had found in the literature. He found none on the skeletal maturity of Afghan children. One he did consider was a recent study of Turkish 16-year-old boys which showed an average skeletal maturity 11 months in advance of the standard for a 16-year-old American prior to 1942. The standard deviation for this age group was nine months. He said this gave a range of standard deviations for the normal Turkish boy up to 18 years 6 months and still at least 5% of the population with skeletal maturity greater than 18½ years using the Greulich and Pyle standards would be normal. Their cohort for 16-year-old boys was only 13 boys.[13]

83. Dr Ratcliffe considered two studies of Pakistani children. His conclusion in the summary of both reports was that Pakistani boys mature earlier after puberty than did the population of Greulich and Pyle. A paper on the skeletal maturity of 50 Asian junior youth football players, all of whom claimed to be either 15 or 16 years old, found 19 of the skeletal maturity equivalent to Greulich and Pyle's 19-year-old and a further 12 with skeletal maturity equivalent to Greulich and Pyle's 18-year-old.[14] In the result Dr Ratcliffe in *VFAY* considered that it is hazardous to use the Greulich and Pyle standards to ascertain chronological age.

84. UNICEF advised the European Society for Paediatric Endocrinology had stated that dental and skeletal maturity cannot be used for the assessment of chronological age in children, and recommended that assessments be made by interviewers who know the language and country of origin of a child referring to Professor Sir Albert Aynsley-Green, the Children's Commissioner for England warning on the inappropriate use of 'medical examinations' to assess the age of children seeking asylum in European countries. UNICEF acknowleged that medical opinion recognised that age determination is just an estimate of a person's age and there is concern among practitioners and academics that such

[13] At [31]
[14] at [32]

estimations are treated by other authorities as complete proof of the applicant's age.

85. Other authors had noted forensic age estimates should take account of the ethnic origin and socio-economic status of the person under examination.[15]

86. The *Health of Refugee Children: Guidelines for Paediatricians. Royal College of Paediatrics and Child Health – Nov 1999, par 5.6 UK guidelines* warned:
    "care is required when considering assessments of bone-age involving X-ray (most likely, of the hand) where variations may be due to differences in the timing of the onset of puberty and the whole process of skeletal maturation, which may themselves be affected by illness, nutrition and ethnic variations. The child's medical, family and social history will therefore need to have been taken into account in any such assessments." (Para. 5.6.1).

87. The guidelines were adopted by UNHCR in 1993 and set out standards for the improved protection and care of refugee children, as well as practical measures to realize these standards. The guidelines focus on children's developmental needs, their gender and cultural framework, the special requirements of unaccompanied minors and the particular problems that arise in the context of repatriation and reintegration.

88. The guidelines touched on the issue of age assessment and drew caution to "scientific procedures" such as dental or bone X-rays, emphasizing that these methods can only estimate age and that authorities must therefore allow for margins of error. They suggested that where the exact age is uncertain, the child should be given the benefit of the doubt: UNHCR, (1994) *Refugee Children: Guidelines on Protection and Care Preface*, Geneva.

89. In 2001 the Senate Legal and Constitutional Committee of the Parliament of the Commonwealth of Australia (2001) also highlighted the limited knowledge apparently available about bone age in cultures other than European stating that the Committee cannot be confident, it having only been tested on Caucasians in North America, that this process is any more certain than an appropriately qualified person giving an opinion based on other types of test" (2001:24 in Einzenberger, 2003).

90. On 24 May 2011 before the Senate Legal and Constitutional Affairs Legislation Committee the Secretary of the Department of Immigration and Citizenship stated that the wrist x-ray technique has a margin of error of up to 5 years.[16]

91. Hence, from a simple Google search, for any one who wished to look, would have discovered that the Greulich-Pyle method, which is the basis of Dr Low's work, could not be relied upon to determine the age of Client A, B and C to refute

[15] Schmeling A, Reisinger W, Geserick G, Olze A in age estimation of unaccompanied minors, Part I. General considerations 2006 May 15;159 Suppl 1:S61-4. Epub 2006 Mar 9, Institute of Legal Medicine, Charité-Universitätsmedizin Berlin, Hittorfstr. 18, D-14195 Berlin, Germany,

[16] See Legal and Constitutional Affairs Legislation Committee of the Senate dated 24 May 2011 where Mr Andrew Metcalfe, Secretary of the Department of Immigration and Citizenship and Ms Kate Pope, First Assistant Secretary, Community, Detention Implementation at pages 1,2,93-95

their statement of age and the DIAC assessment to show they were over 18 years of age.

92. Since then, as set out in various decisions of the Courts around Australia, and the Branson Report, the Greulich-Pyle method and Dr Low's work has been exposed as not to be used in age determination.

93. On 31 May 2011 on instructions from solicitors HOWDEN SAGGERS LAWYERS, with Bahasa Indonesian speaking lawyer Mr Anthony William Sheldon, I attended upon Client A at the Arthur Gorrie Correctional Centre.

94. Upon first sight, it was plain Client A was a child. He was hunched over a table in an interview room wearing soxs with thongs, shivering from the cold. Being used to a tropical climate averaging around 30 C all year round, Client A said the cold weather in Brisbane as experienced in gaol was unbearable for him.

95. When he was asked if he had suffered harm, assault, including sexual assault, Client A convulsed in tears when recounting his suffering, included being locked in cells with adult prisoners at night, not having familiar food, the cold and missing his family on Rote. Instructions were taken about his next of kin and where to find them.

96. It was learnt that one of the boys had a mobile telephone number for his father in his shoe held in the property of office of the prison.

97. This was retrieved and a Bahasa speaking interpreter, Dr Margaret Bocquet-Siek, was able, through a few simple telephone calls to make contact with the father of client B, the step uncle of client A and notified him of Clients A, B and C's incarceration by Australia.

98. The next of kin and the villagers had assumed that Clients A, B and C had perished at sea. They were overjoyed to hear that their children were alive, but totally perplexed to learn that they were being held in a prison in a country referred to as Australia about which they had no or little knowledge.

99. On 6 June 2011 with Mr Sheldon, I travelled to Indonesia and within a day arrived at Monamola, Rote and conferred with the family members, fellow villagers, the parish priest and the village officials to obtain the affidavits that deposed to their date of birth.

100. The people of Manamola and officials were very bewildered and extremely emotional about the loss of their children and their detention in Australia. They had absolutely no knowledge whatsoever of the alleged so-called people smuggling crisis in Australia.

101. Rotenese are Christians and do not refer to the use of the Gregorian calendar as a system of organizing days for social, religious, commercial, or administrative purposes. Seasonal and other village events mark their estimate of time within a year. While most people know the year and month of birth, they may be uncertain as to the precise day of the week they were born.

102. In Rote very few people are registered for birth, death or marriage certificates. As impoverished people there is no need or utility for a certificate of birth. In order to obtain a birth certificate, it is necessary to travel to the capital of Rote, Baa and to pay a fee which few villagers can afford. In order to obtain a birth certificate it is necessary for two people to swear the date of birth in application the register of births, deaths and marriages. This causes great apprehension for God-fearing Rotinese, as they are unsure of the actual date of birth according to the Gregorian calendar and do not want to commit a falsehood on oath. They may not be proficient in the Bahasa language and are apprehension about government officials.

103. The local parish priest at Manamole Father Franseka arranged for and obtained the issue of birth certificates for Clients A, B and C.

104. The age evidence gathering expedition for Clients A, B and C at Manamole was completed by Mr Sheldon and myself in a day.

105. The affidavit evidence of the next of kin, brother, step uncle, and village public servant, together with the birth certificates, established beyond any doubt that Clients A, B and C were children.

106. Clients A, B and C were being held in custody at the Arthur Gorrie Correctional Centre, Wacol, Brisbane in the State of Queensland.

107. On 17 June 2011 Magistrate Callaghan granted bail to Clients A, B and C and they were released from prison and placed in the care of the Department of Immigration and Citizenship at a Brisbane motel.

108. Thereafter the prosecution was discontinued and Clients A, B and C sent home.

109. Clients A, B and C were deprived of their liberty for 417 days of their childhood in harsh conditions. This loss of liberty represented almost 8 percent of their lives and left them psychologically scarred by their treatment by the Commonwealth.

110. An adult prison is no place for a child.

111. There are convicted murderers, rapists and pedophiles at this prison.

112. "Prisons often create institutionalisation or dependency, are a perfect training ground for criminal activity, as well as a network base for meeting criminals and leave children with no knowledge of basic life skills for reintegration into society": Australian Law Reform Commission *Seen and Heard: Priority for Children in the Legal Process* 1997 par 20.1; ibid pars. 20.14 – 20.16.

113. Lord Hope of Craighead observed in *R v Secretary of State for the Home Department; Ex parte Venables* [1998] AC 407:

> "The child's progress and development while in custody, as well as the requirements of punishment, must be kept under review throughout the

sentence. A policy which ignores at any stage the child's development and progress while in custody as a factor relevant to his eventual release date is an unlawful policy. The practice of fixing the penal element as applied to adult mandatory life prisoners, which has no regard to the development and progress of the prisoner during this period, cannot be reconciled with the requirement to keep the protection and welfare of the child under review throughout the period while he is in custody.

Client D

114. Upon information received, Client D was found by Mr Sheldon and myself in Woodford Prison serving a mandatory sentence of 5 years imprisonment.

115. On 9 June 2011 at Brisbane Client D had been convicted for the offence of facilitating the bringing to Australia of a group of five or more people who were not non-citizens in breach of s. 232A(1) of the *Migration Act 1958* (Cth), committed between February 2010 and March 2010.

116. Client D set out in a Statutory Declaration his personal circumstances and the material facts relating to his detention and imprisonment as a child.

117. Client D is a native of Desa Tanjung Luar, Kecemantan Keruak, Lombok Timur, of the Republic of Indonesia, born on 1 January 1994 at Hu'u, Sumbawa Indonesia to his mother ASIA and father MANSUR.

118. Client D's mother is now 55 years of age and works in the paddy rice fields as a labourer and scrapping sea weed fringing coral reefs for sale. His father is deceased. He is one of four children.

119. Client D was brought up and has only ever lived in extremely impoverished third world circumstances in a dirt floor hut without electricity, refrigeration, running water sewerage, in a village without the internet, television, radio or newspapers.

120. Client D's family upbringing was very poor. They grew and caught their own food, living hand to mouth day to day survival.

121. His first language is a local language from the area where he was born. He also has a working knowledge of Bahasa Indonesia language. He is unable to comprehend or speak the English language but had learnt a few words while in prison.

122. Client D has never been to school. He is illiterate and unable to read or write in any language. Prior his detention by Australian Customs at sea, Client D knew very little about Australia. The Australian culture was extremely strange to him.

123. He had never been to a hospital, doctor or dentist in Indonesia. Prior to this matter he had no knowledge of Courts or lawyers.

124. As a young child Client D worked with my mother in the rice fields. His working hours were very long for most days of the week. At 12 years of age he moved to

Lombok to try to earn a living as a fisher. At 14 years of age he moved to Desa Tanjung Luar working as a fisher working in the open boats on the seas of Indonesia.

125. Client D is a single person, has never have been married and has no children.

126. Client D had never had a bank account, or owned a vehicle, a vessel or a house. He never had a driver's licence or passport. He did not have a birth certificate until obtained by my lawyers on his behalf. Living as a simple peasant in a poor fishing village Client D had no need for these identity documents and could not have afforded the filing fees to obtain them even if these documents were required for some purpose.

127. In Indonesia village life, information of the exact date of birth, day, month and year is not ordinarily required. As to the actual day, month and year of birth Client D have relied on what his relatives had told him. In the village his people do not think in terms of calendars but local seasons. Client D had understood he was born in 1995 from what he remember being told by relatives, although his birth certificate states he was born in 1994.

128. On 7 March 2010, Client D was detained under the *Migration Act 1958* (Cth) by Australian Customs in the vessel *Holdfast Bay*, 24.9 nautical miles from Adele Island located in the Indian Ocean approximately 104 kilometres (65 miles) North of Bardi off the Kimberley coast in Western Australia, and not near Ashmore Reef as stated in the indictment, to which he was advised by Queensland Legal Aid to plead guilty.

129. Later that day Client D was transferred to the vessel *HMAS Albany* and shipped north to Christmas Island. This was the first time Client D had been on board anything other than a simple wooden vessel. The Christmas Island buildings were the largest buildings he have ever lived in.

130. On the nominal roll prepared by the Australians at the time of apprehension at sea, Client D's date of birth was recorded as 1 March 1995.

131. On 11 March 2010 at Christmas Island, Client D was interviewed by an officer of the Department of Immigration and Citizenship. He gave his date of birth as 1 January 1995. He was taken by aircraft to the main land Australia at the Darwin Northern Immigration Detention Centre. This was the first time he had flown in an airplane and he was very scared.

132. On 12 April 2010 at Darwin Australia, a person unknown to Client D, took an X-ray of his wrist without Client D understanding what was going on or why.

133. On 1 July 2010 at Darwin Detention Centre, Client D was questioned by the Australian Federal Police. In answer to their questions, Client D told them that he was not over the age of 18 years. He repeated his date of birth as 1 March 1995.

134. On 1 October 2010 Client D was charged and transported to a maximum security prison at the Arthur Gorrie Correctional Centre Brisbane, Queensland, Australia

and held with adult prisoners.

135. On 15 February 2011 on the advice of Legal Aid Queensland, Client D was told to consent to a full hand up committal in the Magistrates Court and did not enter a plea.

136. On 9 May 2011, Client D was indicted under s. 232A(1) of the *Migration Act 1958* that on and between about the twenty-eighth day of February 2010 and the eighth day of March 2010 at Indonesia and on the seas between Indonesia and Ashmore Islands, Australia he facilitated the bringing to Australia of a group of five or more people, namely a group of 28 people, who were non-citizens and who travelled to Australia without visas that were in effect, and did so reckless as to whether those people had a lawful right to come to Australia.

137. On the days set out in the indictment, Client D was under 18 years of age.

138. Client D was attended upon by Queensland Legal Aid on three occasions with an interpreter.

139. Client D told the Queensland Legal Aid lawyer that he was under 18 years of at the time of the alleged offence. He gave the lawyer the telephone number of his older brother, who has a cell telephone, and asked the lawyer to call his brother to confirm his age as being under 18 years. The lawyer wrote down the telephone number in the file and prepared a written document signed by Client D instructing Queensland Legal Aid to contact his brother and family, to disclose his charge and detention and to obtain evidence to prove that he was a minor.

140. After Client D was sentenced, he was able to speak to his brother on the telephone, who said he had not received any telephone call from Queensland Legal Aid or any one else concerning Client D's age. There is nothing in the Queensland Legal Aid file to show that Queensland Legal Aid had acted on Client D's written instructions or even tried to contact Client D's brother.

141. No one from the Australian Government, Customs, the Department of Immigration and Citizenship, the Australia Federal Police, the Commonwealth Director of Public Prosecutions, or Queensland Legal Aid:
    (a) contacted Client D's mother or any other member of his family to tell them that he was under detention, had been charged, and detained in Australia on a very serious criminal offence facing mandatory 5 years imprisonment;
    (b) tried to obtain independent evidence of his birth from Indonesia or a birth certificate.

142. If the Australian Government, Customs, the Department of Immigration and Citizenship, the Australia Federal Police, the Commonwealth Director of Public Prosecutions, or Queensland Legal Aid had inquired into Client D's age:
    (a) evidence such as his birth certificate would have been obtained to show he was under 18 years at the dates of the alleged offence;
    (b) the Commonwealth Director of Public Prosecutions would not have prosecuted him, but sent Client D home to Indonesia;
    (c) the sentencing judge would not have sentenced Client D to 5 years

mandatory jail with a non-parole period of three years;

(d) Client D would not have had to suffered two years deprivation of liberty, 22 months as a child, held with adult prisoners.

143. Before the Court hearing, Queensland Legal Aid advised Client D that:
   (a) medical evidence from a wrist x-ray showed that he was 19 years of age;
   (b) he was lying about his age and knowledge of the offence;
   (c) the wrist x-ray showed he was 19 years and that if it showed that he had lied in Court, he would be sentenced to and have to serve the full 5 years actual imprisonment;
   (d) if he pleaded guilty, he would only received 3 years imprisonment and would avoid the risk of a 5 year sentence.

144. From the outset Client D told Queensland Legal Aid that he was under 18 years of age.

145. No one advised Client D that the prosecution policy of the Australian Government was not prosecute him if he was under 18 years at the date the alleged offence.

146. Queensland Legal Aid put in front of Client D a prepared typed agreed statement of facts and instructions document and he was advised to sign it.

147. On 9 June 2011, acting of the advice of Legal Aid Queensland, Client D was convicted by his own plea of guilty in the District Court at Brisbane and was sentenced by His Honour Judge Rafter SC to 5 years mandatory imprisonment with a non-parole period of 3 years.

148. Client D's age was given to His Honour Judge Rafter SC as "approximately 19 years of age", although he was under 18 years of age.

149. Client D swore in his statutory declaration he did this "because:
   (a) I felt very isolated being very long distance from my home (5471 kilometres) having been transported by vessel from the point of apprehension in the Indian Ocean to Christmas Island, then by aircraft from Christmas Island to Darwin, Australia and then to Brisbane, Australia;
   (b) I had been held in secure custody against my will under indefinite detention without a charge made against me or brought before a Court for 465 days (from 7 March 2010 until indicted on 10 May 2011);
   (c) I was locked up on remand in a maximum security prison for 8 months with adult prisoners;
   (d) I was uneducated third world fisher in:
      (i) an alien culture;
      (ii) in a much colder climate;
      (iii) without the food I was used to; and
      (iv) in extraordinary penal circumstances;
   (e) I am illiterate and unable to read or write in any language;
   (f) I am unable to comprehend or speak the English language;
   (g) I had only been in a Court before at the committal proceedings;
   (h) I knew I was under 18 year of age but was being told that I was 19 years of

age;

(i) I did not understand the meaning of the x-ray, or how it could prove I was lying about my age;
(j) the legal issues were very complex and beyond my understanding;
(k) I did not want to go to a juvenile gaol, where I would not be with my fellow Indonesian prisoners who were my friends and where I am unable to smoke cigarettes;
(l) I was advised by Queensland Legal Aid to plead guilty;
(m) I was very stressed, scared, perplexed and confused;
(n) I was extremely vulnerable and was ultimately overborne;
(o) in the end I felt I had no choice and felt compelled to take any option available that would reduce any further suffering in custody and get myself home to my village as early as possible."

150. At the Woodford Correctional Centre, Client D have been locked up for over a year with adult prisoners who have been convicted of serious criminal offences. For six months of this time Client D was a child.

151. In the result:
(a) Client D suffered:
(i) 465 days in detention before charge;
(ii) 129 days on remand in a maximum security prison as a child;
(iii) 205 days under sentence in in a maximum security prison as a child;
(iv) 139 days since turning age to the date of these submissions
(b) Client D would have suffered another 315 days until eligibility for parole (9 April 2013);
(c) Client D would have suffered another 1045 days until his full time discharge date (9 April 2015);
(d) Client D had a compelling case requiring the exercise of the discretion to release the Applicant on licence.

152. Together, with instructing Solicitors, WOODS PRINCE, Lawyer & Public Notary, a birth certificate was obtained from Indonesia, and statutory declarations from Client D's mother and brother in Indonesian, a statutory declaration as taken from Client D and submissions prepared for release on licence.

153. On 18 May 2012 application was made to the Attorney-General to release Client D on licence.

154. On 1 June 2012 the Attorney-General released Client D on licence and he was subsequently returned to Indonesia.

Observations

155. The Commonwealth has sought to rely on crank science using the scientifically discredited wrist X-ray analysis.

156. Plainly, even putting the wrist X-ray analysis and the affidavits to one side, to see Clients A, B and C sitting in the dock in Court, it was plain for all that the defendants were but children. This would also have been the case for Client D.

157. No one from the Australian Government had attempted to make contact with the parents, next of kin, or officials in Indonesia:
    (a) to investigate the age of Clients, A, B, C and D[17];
    (b) to advise the parents, or next of kin these juvenile Indonesian fishers were:
        (i) under arrest facing a prosecution exposing them to 5 years mandatory imprisonment;[18]
        (ii) claiming to be under age; and
        (iii) would be immediately released if proved to be under 18 years.

158. The Australian Federal Police had solely relied on wrist x-ray analysis evidence to determine age.[19]

159. It is now accepted that the use of wrist x-rays was not conclusive and not reliable.

160. On 8 July 2011 following wide spread mass media coverage of the plight of Clients A, B and C, the Commonwealth Government announced new processes to help determine the age of individuals detained in Australia for suspected migration offences.[20]

161. For most Indonesian fishers, stated to be, or suspected to be minors, there are no birth certificates, public or private records because they were born in impoverished fishing villages where births are not recorded.[21]

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[17] Contrary to and in breach of the Prosecution Policy of the Commonwealth to be fair: see http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf, general principles, par 1.4; 2.3; 2.34;

[18] Indonesian Foreign Ministry spokesman Michael Tene was reported that the Australian government violated the *1963 Vienna Convention on Consular Relations*: http://www.thejakartapost.com/news/2011/06/15/oz-'violates-int'l-convention'-detaining-ri-children.html

[19] Under s. 3ZQBC of the *Crimes Act 1914* (Cth) if an investigating official suspects, on reasonable grounds, that a person may have committed a Commonwealth offence and it is necessary to determine whether or not the person is, or was, at the time of the alleged commission of the offence, under 18 because that question is relevant to the rules governing the person's detention, the investigation of the offence or the institution of criminal proceedings, the investigating official may, whether or not the person is in custody at the time, arrange for the carrying out of a prescribed procedure in respect of the person. Under 3ZQA (2) of the *Crimes Act 1914* (Cth), "age determination information" means a photograph (including an X-ray photograph) or any other record or information relating to a person that is obtained by carrying out a prescribed procedure. The procedure specified for determining a persons age is a radiograph be taken of a hand and wrist of the person whose age is to be determined: reg 6C(2)) of the *Crimes Regulations 1990* (Cth).

[20] http://www.ag.gov.au/www/ministers/oconnor.nsf/Page/MediaReleases_2011_ThirdQuarter_8July2011-Improved processforagedeterminationinpeoplesmugglingmatters Under the improved criminal justice measures, the AFP are now required to: (a) offer dental x-rays to alleged people smuggling crew claiming to be minors, in addition to the existing process, commencing as soon as possible; (b) take steps as early as possible to seek information from the individual's country of origin, including birth certificates, where age is contested, and (c) use additional interview techniques to help determine age.

[21] See http://www.unicef.org/indonesia/protection_2931.html A UNICEF has established that 6 out of 10 under-five years old babies in Indonesia do not have legal identities and half are not registered anywhere. Where a birth certificate does exist then notwithstanding ss 68 and 79 of the *Judiciary Act 1903* (Cth), requiring the laws of the State for procedure and evidence to apply to a Commonwealth prosecution in a State Court, pursuant to s 5 of the *Evidence Act 1995* (Cth) the Commonwealth Evidence Act applies in all proceedings in any Australian court relating to official documents, for example, Seals and signatures: s.150; Gazettes and other official documents: s. 153; Official records: s.

162. Nevertheless Clients A, B, C and D produced original evidence of their pedigree and birth in the form of affidavits from his next of kin, relatives, village officials and birth certificates and family identity cards were obtained.[22]

163. In the event that the Commonwealth did not act on its stated policy to release minors, if Client A, B, and D plead, or were found guilty, but proved themselves children, no Court would have sentenced them to serve any more time.

164. From the beginning, Client A, B, C and D's account of their age to the Navy, Customs, DIAC, the AFP and the CDP as being under 18, was ignored and they were treated as adults.

165. The cases of Clients A, B, C and D establish:
   (a) beyond doubt that they was under 18 years of age on the dates of the alleged offence;
   (b) they should not have been prosecuted;
   (c) they should have been sent home to Indonesia with a reasonably short time of being apprehended;
   (d) the police and prosecution;
      (i) failed to contact the parents;
      (ii) failed to properly make proper inquiry as to age from Indonesia directly or indirectly through the Indonesian authorities including;
      (iii) failed to establish the age before proceeding to charge and prosecuted the applicant in breach of:
         - standard operation procedures;
         - basic investigative requirements;
         - professionalism;
         - ethical duties;
      (iv) relied on a false and misleading procedure to establish age;
   (e) in Client D's case his defence lawyers failed:
      (i) to follow his instructions;
      (ii) to assess the prosecution basis for establishing age;
      (iii) the contest the prosecution's basis for establishing age;
      (iv) to make due and proper inquiry;

155, Public documents relating to court process: s. 157; Evidence of certain public documents: s. 158. Also Further, several other section of the Commonwealth Evidence Act have application for, faith and credit to be given to documents properly authenticated (s. 185) and swearing of affidavits before justices of the peace, notaries public and lawyers: s. 187. A party may adduce evidence of the contents of a foreign document by tendering the document in question: s. 48. Twenty-eight days notice may be required unless the Court otherwise directs: s. 49 of the *Evidence Act 1995* (Cth).

[22] In a number of old English cases it was held that witnesses could not give evidence of their age nor of the place of their birth: *R* v *Erith (Inhabitants)* (1907) 8 East 539; 103 ER 450; *R* v *Day* (1841) 9 Car & P 722; 173 ER 1026; *R* v *Rushworth (Inhabitants)* (1842) 2 QB 476; 114 ER 187; *R* v *Rogers* (1915) 111 LJ 115. More recently, however, the courts have treated such evidence as admissible: *Carlton and United Breweries Ltd* v *Cassin* [1956] VLR 186; *Smith* v *Police [1969]* NZLR 856; *Stock* v *Orcsik* [1977] VR 382 *R* v *Lachapelle* (1977) 38 CCC (2d) 369. Contra *R* v *Young* [1923] SASR 35. Logically such evidence is, of course, hearsay although it is clearly desirable that it should be received. In this context the courts choose not to carry the application of the rule to its logical conclusion: Williams, C R: *Issues at the Penumbra of Hearsay* (1987) 11(2) Adelaide Law Review 113; However, at common law such evidence is normally admitted: *Smith v Police* [1969] NZLR 856, *Rex v Turner* [1910] 1 KB 362.

- by not making contact by telephone with applicant's brother whose telephone number had been provided by Client D;
- by not otherwise making inquiry of the relatives of Client D;
- by not making inquiry of the villagers, village officials or the Indonesian Consulate-General;
- by not obtaining an X-ray report;
- by not searching on the internet, Austlii or any to see that the standard reference radiograph from Greulich & Pyle had been rejected as not valid in science and rejected as a matter of law by Courts of many jurisdictions ;

(v) to contest the age process of the prosecution

(vi) to establish he was under 18 years at the time of the alleged offence;

166. Section 23Q of the *Crime Act 1914* (Cth) required that the Indonesians were required to be treated "with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment": see also the *AFP National Guideline on persons in custody and police custodial facilities,* paras: 7.1; 8.1

167. The failure to promptly and properly investigate age resulted in Clients A, B, C and D were deprived of their liberty arbitrarily, in breach of Article 37(b) of the United Nations *Convention on the Rights of the Child*.

168. In effect, these illiterate, foreign and very vulnerable children, were subjected by the Commonwealth to what can only be described as torture, cruel, inhuman and degrading treatment and punishment in breach of Article 37(a) of the United Nations *Convention on the Rights of the Child*.

169. The *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth), consistent with the Australian Law Reform Commission recommendations in *Same Crime, Same Time: Sentencing of Federal Offenders* prohibits sentencing options in relation to federal offenders of any form of cruel, inhuman or degrading punishment (Recommendation 7-16).

170. The Commonwealth did not act in the best interests of the child as a primary consideration in all actions concerning the children in breach of Article 3.

171. The treatment of the Commonwealth in ignoring the stated age of Indonesian minors and not making due and proper inquiry as to their ages, and keeping Indonesian minors in an adult prisons was:

(a) in breach of the *United Nations Convention on the Rights of the Child*;

(b) cruelty to these children; and

(c) a form of institutionalised child abuse.

172. For these children Australia was not a safe place.

173. For Clients A, B, C and D, their liberty lost can never be regained.[23]

[23] In *Mashood v The Commonwealth of Australia* [2003] FCA 1147 Goldberg J said at [21]: "Loss or deprivation of liberty, even for a short time, is a matter of irreparable harm. The right to enjoy personal

174. This loss of childhood and the brutish indifference with which they were treated is deserving of:
   (a) further inquiry in the form of a Royal Commission, the Terms of Reference as attached hereto;
   (b) exposure and condemnation of those responsible; and
   (c) the payment of proper compensation to the Indonesian minors.

175. For clients A, B, C, it was the Queensland Courts and instrumentalities of State of Queensland that raised the alarm about the abuse of these children as federal prisoners.

176. It was State Magistrate Herlihy, on the occasion of the first presentation of these long locked up children in a public Court, who challenged their age.

177. On visits to the gaol, it was individual officers of the Queensland Corrective Services Commission who welcomed the arrival of lawyers and questioned why Clients A, B, C and D were being kept in adult prisons.

178. The Queensland Commissioner for Children and Young People, upon notification by the lawyers, moved swiftly within 24 hours of to visit Clients A, B, and C to ensure the safety.

179. The Queensland Police Service approached the lawyers to assure them that they would do all they could to ensure Clients A, B, and C would be protected and any complaint in which they were a victim of abuse by fellow prisoners would be investigated.

180. However in stark contrast there was not one Commonwealth agency prepared to take over all responsibility in a long bureaucratic process from Royal Australian

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liberty is "the most elementary and important of all common law rights": *Trobridge v Hardy* [1955] HCA 68; (1955) 94 CLR 147 at 152 per Fullagar J. *In Re Bolton; Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514 Brennan J said at 523, "The law of this country is very jealous of any infringement of personal liberty..." Liberty is a precious and valued right. Much blood has been shed in defence of liberty. In *Preston v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 420, French said at [27]:" Liberty lost is never recoverable even if partially compensable by damages." I adopt with respect his Honour's observation, although I am inclined to doubt the proposition that liberty lost can be compensated, even partially, by the award of a monetary sum." Justice French in *Preston v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 420 said at [27]: "The risk that a person may wrongfully be deprived of his or her liberty is not to be put on the same footing as the risk that a person may be required to pay an unlawful tax or fee. An unlawful tax or fee may be recoverable. Liberty lost is never recoverable even is partially compensable by damages." See also *Johnson v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 758 (22 July 2003) at [21] per French J. In *Webster v State of South Australia* No. SCCIV-03-764 [2003] SASC 347 (2 October 2003) (Full Court: Doyle CJ, Prior, Mullighan, Debelle and Gray JJ) cited with approval Iacobucci J of the Canadian Supreme Court in *R v Hall* (2002) 217 DLR (4th) 536 where His Honour observed "Liberty lost is never regained and can never be fully compensated for; therefore, where the potential exists for the loss of freedom for even a day, we, as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty." see also *Vaiangina v Commonwealth of Australia* [2004] FCA 751 (1 June 2004) cited with approval by Jacobson J at 30; see also *R v 'GLB'* [2003] NSWCCA 210 (14 August 2003) Sheller JA, James J, O'Keefe J at [98]; see also *Ryan v R* [2001] HCA 21; 206 CLR 267 per Gummow J at 98.

Navy, Customs, Department of Immigration and Citizenship, Serco Australia Pty Limited, Australian Federal Police, and the Commonwealth Director of Public Prosecutions.

181. As a fundamental starting point, the first task for the Commonwealth is to appoint some one to take responsibility as guardian for foreign minors, or persons claiming to be minors, and/or are young people, who do not have parents in Australia to ensure their safety in Australia.

182. This guardian at all times should keep a registry of the locations of each person claiming to be a child and their lawyers advised of any change of location and ready access given to their clients.

183. The detention provisions of the *Migration Act 1958* should not be used to detain the Indonesians indefinitely. Had the Indonesian fishers been found with illicit drugs, they would have been brought before a Court within days. All criminal charges should be made against Indonesian fishers within days of apprehension. Conflating the detention under the *Migration Act 1958* of Indonesian fishers with asylum seekers in an abuse of the detention power under the *Migration Act 1958* and is unlawful.

184. All Indonesian fishers detained under the *Migration Act 1958* or otherwise arrested should be provided with and given access to a lawyer upon landfall.

185. There should be judicial oversight of all detentions conducted, at least each month, to ensure against protracted delays by the AFP in bringing charges.

186. Thereafter, the critical question to be answered is: At the dates of the alleged offence was the Indonesian prisoner under 18 years of age?

187. This requires investigators:
   (a) to travel to Indonesia to the place of birth/and or residence of the Indonesian detainee or prisoner and inquire of the mothers, fathers, relatives, neighbours, and Indonesian officials as to the prisoner's age; and
   (b) to bring admissible evidence including birth certificates to Australian Courts to establish age.[24]

188. No explanation has been given why the AFP and the CDPP, with the resources of the Commonwealth, will not even pick up the telephone and call the mums and dads of these minors.

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[24] Birth evidence is admissible: *Carlton and United Breweries Ltd* v *Cassin* [1956] VLR 186; *Smith* v *Police [1969]* NZLR 856; *Stock* v *Orcsik* [1977] VR 382 *R* v *Lachapelle* (1977) 38 CCC (2d) 369. Contra *R* v *Young* [1923] SASR 35. In a strict sense such evidence is, of course, hearsay but in this context the courts choose not to carry the application of the rule to its logical conclusion as it is clearly desirable that it should be received: Williams, C R, *Issues at the Penumbra of Hearsay* [1987] Adelaide Law Review 7; (1987) 11(2) Adelaide Law Review 113; At common law such evidence is admitted: *Smith v Police* [1969] NZLR 856, *Rex v Turner* [1910] 1 KB 362, although previously it was held that witnesses could not give evidence of their age nor of the place of their birth: *R* v *Erith (Inhabitants)* (1907) 8 East 539; 103 ER 450; *R* v *Day* (1841) 9 Car & P 722; 173 ER 1026; *R* v *Rushworth (Inhabitants)* (1842) 2 QB 476; 114 ER 187; *R* v *Rogers* (1915) 111 LJ 115.

189. If volunteer interpreters and defence lawyers, at their own expense, can make due and proper inquiry by telephone and travel to Indonesia, why cannot the AFP and CDPP do likewise at taxpayers expense. Surely this most basic inquiry is necessary to discharge their professional obligations as investigators gathering all relevant material before deciding to prosecute and in pursuance of their ethical duty to bring all relevant evidence to the Court. Age of these children was most relevant.

190. Age determination investigations require:
   (a) careful cross-cultural interviews with the Indonesian detainees making inquiry as to their villages and next of kin:
   (b) the conduct of field survey missions travelling to the relevant villages in Indonesia to obtain:
      (i) proper affidavits from the next of kin (with or without corroborating personal documents, eg. school reports, photographs) that can be used on the Australian Courts; and
      (ii) apply for, and obtain, birth certificates from the Indonesian authorities.

191. The major difficulty for the field survey mission is to ensure the witnesses will be available on the days of visit. Many will be working in the fields, at sea or elsewhere.

192. It is not anticipated that there will be documents to support the testimony of the witnesses as the Indonesian fishers come from impoverished third world conditions where there are no records of birth, no or little schooling, which would document their lives in the way Australians would assume.

193. Applications can be made for a birth certificate to be issued, but this usually involves both parents travelling making application on oath in circumstances where the local administrative centre may not be staffed. This will involve time, travel, accommodation expenses and frequent waiting time unless local Indonesian cooperation is closely coordinated.

194. There should be instituted a prosecution requirement, as exists in the United Kingdom Crown Prosecutions Service Director's Guidance to Police Officers and Crown Prosecutors Issued by the Director of Public Prosecution on Charging 2011 - fourth edition, January 2011 (revised arrangements), that:

> "The police will undertake effective early investigations to ensure that the key evidence required to make informed decisions in cases is obtained as soon as possible. All reasonable lines of enquiry should be pursued to ensure that any evidence or material likely to undermine the prosecution case or assist the defence is provided to the prosecutor and taken into account during any referral for investigative advice or charging."[25]

195. The continued failure to make due and proper inquiry of the parents of the Indonesian fishers who claim to be minors will result in considerable cost of:
   (a) serious miscarriages of justice whereby:
      (i) children would be mistaken as adults:

[25] http://www.cps.gov.uk/publications/directors_guidance/dpp_guidance_4.html

- sent to adult prisons;
- at risk of abuse from fellow prisoners who are sex offenders;
- should have been immediately released;
- upon conviction would be sentenced to the minimum mandatory 5 years imprisonment when otherwise would be released upon a good behavior bond having already served (in most cases) 12-18 months in prison awaiting trial;

(ii) Australia's relationship with Indonesia will be severely damaged;
(iii) Australia's reputation as fair society tarnished.

(b) serious breaches of the United Nations *Convention on the Rights of the Child* occurring;
(c) the Commonwealth being the subject of further Australian Human Rights Commission investigations;
(d) large compensation pay outs will be required for *Defective Administration*[26];
(e) legal action for civil claims against the Commonwealth for damages;
(f) legal action against legal representatives:
(i) by complaint for disciplinary complaints;
(ii) civil claims for negligence.
(g) Australia's relationship with Indonesia will be imperiled;
(h) Australia's international reputation will be tarnished.[27]

196. It is very much to be regretted that upon the release and return of minors to Indonesia the rhetoric of spin doctors prepared for Government spokesman, has ignored the presumption of innocence, by stating that no apology is made for being hard on so-called people smugglers, when on the Government's own actions the criminal charges dropped and the children released.

197. In 2009, the Australian Parliament apologized to the forgotten Australians who were physically, sexually, and emotionally abused in state and charitable-run orphanages between the 1920s and 1970s. The apology was accompanied by solemn pledges to never again allow child abuse to go unchecked.[28] Within a few years the Commonwealth in this context was perpetrating similar categories of neglect to a new category of vulnerable children for which had direct responsibility and a legal duty of care.

198. This shameful stain on Australian reputation will not be complete until the

[26] under the *Compensation for Detriment Caused by Defective Administration (CDDA) Scheme*; see *Department of Finance and Administration Finance Circular 2006/5* compensation where unreasonably failed to follow appropriate procedures; unreasonably failed to institute appropriate procedures in the first place, unreasonably gave incorrect or ambiguous advice, or unreasonably failed to give advice that should have been given; see also grace payments under section 33, *Financial Management and Accountability Act 1997* and *Financial Management and Accountability Regulations 1977,* regulation 9; *Commonwealth policy for handling monetary claims* (Attorney General, December 1997); $570,000 to a child held in mandatory detention for two years:
see http://www.hreoc.gov.au/legal/humanrightsreports/hrc_25.html

[28] see: http://www.smh.com.au/opinion/politics/flawed-system-harming-a-new-generation-of-forgotten-children-20111102-1mvjd.html#ixzz1catVtL8n
http://www.smh.com.au/opinion/politics/flawed-system-harming-a-new-generation-of-forgotten-children-20111102-1mvjd.html. For a background Note 'Forgotten Australians' and 'Lost Innocents': child migrants and children in institutional care in Australia 11 November 2009, see http://www.aph.gov.au/Library/pubs/BN/sp/ChildMigrants.htm

Australian Parliament makes a similar apology to the children, their parents and to Indonesia.

199. Since 2008, 164 Indonesian crew have been returned to Indonesia as minors.[29]

200. The Attorney-General's recent review into persons convicted for helping refugees and who claimed to be minors, examined 28 cases, following requests from the Australian Human Rights Commission and the Indonesian Government resulted in:
   (a) 15 crew being released early from prison on licence as there was a doubt they may have been minors on arrival in Australia;
   (b) two crew were released early on parole;
   (c) three crew completed their non-parole periods.[30]

201. This is an extraordinary revelation of failure by the AFP and the CDPP, to make the most basic of inquiries, that could have averted unspeakable suffering for some of the most illiterate, impoverished and vulnerable children, Australia had a duty of care for, by the simple expediency of a telephone call and/or visit to their mums and dads.

202. With a prosecution discharge and acquittal rate of over 50 per cent, this mass federal prosecution of poor illiterate Indonesian fishers is emerging as the Commonwealth's most ill-conceived, embarrassing and costly prosecution fiasco since the Greek Conspiracy prosecution scandal of the late 1970s.[31]

WITH COMPLIMENTS

MARK PLUNKETT
BARRISTER-AT-LAW

[29] Information on minors in detention - from Minister Clare as Acting Attorney-General [SEC=UNCLASSIFIED] 3 July 2012 6:15
[30] Ibid
[31] Australia 1986, *Commission of Inquiry into Compensation arising from Social Security Conspiracy Prosecutions: Report - Volume I*, (Dame Roma Mitchell, Commissioner), Australian Government Publishing Service, Canberra; Commonwealth Ombudsman 1984, *Report Pursuant to Section 15 of the Ombudsman Act 1976 on a Complaint by Dr Y. Lucire about the Actions of the Department of Social Security*, Ombudsman's Office, Canberra.

ROYAL COMMISSION OF INQUIRY INTO INDONESIAN CHILDREN IN AUSTRALIAN CUSTODY

ELIZABETH THE SECOND, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth:

TO the Honourable [*here insert name of appointee retired judge, QC or SC*]

WHEREAS it is desired to have an inquiry into certain matters relating to age determination, the prosecution, the holding in custody, harm suffered, and the release of children who are citizens of the Republic of Indonesian charged with offences associated with asylum seekers:

By these Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and pursuant to the Constitution of the Commonwealth of Australia, the *Royal Commissions Act 1902* and other enabling powers, We appoint you to be a Commissioner to inquire into and report and make recommendations on the following matters in relation citizens of the Republic of Indonesia, aged under 18 years, or who claimed to be under 18 years of age, who since 1 January 2008 were suspected of, or charged under the *Migration Act 1958*, the *Criminal Code 1995*, or any other law of the Commonwealth of with an offence of organising or facilitating the bringing or coming to Australia, or the entry or proposed entry into Australia of asylum-seekers:

(a) the nature, extent and effect of any unlawful or otherwise inappropriate practice or conduct relating to:
    (i) apprehension, detention, investigation (including age determination), arrest, charging, holding and treatment in custody (including any harm suffered by them) and prosecution;
    (ii) the efficacy, reliability or otherwise of any age determination procedures used, including any medical and/or biometric assessments at

Christmas Island, Darwin or any other place in Australia;

(iii) the use of, including any breach of, any provision of Division 4A of the *Crimes Act 1914* and/or s. 6C of the *Crimes Regulations 1990* or any other law;

(b) whether there has happened any harm suffered, unsafe, improper or unlawful care or treatment, including any breach of any relevant statutory obligation has occurred during the course of the care, protection, detention, holding or incarceration in detention or prison and/or prosecution;

(c) whether there have been any breaches, and if so, in what way, and by whom, of:

(i) the United Nations *Convention on the Rights of the Child*;

(ii) the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;

(iii) the *Vienna Convention on Consular Relations*;

(d) after such inquiry as is deemed appropriate, refer to the appropriate authorities any instances where there appears to be sufficient evidence to prosecute for a criminal offence, take disciplinary proceedings, or pursue a charge of official misconduct against any person under any Act in respect of such lack of safety, impropriety or unlawful care or treatment of children;

(e) to make any recommendations as may be considered appropriate in relation to:

(i) age determination;

(ii) any systemic factors which contribute to any child abuse or neglect in institutions, detention centres and/or prisons;

(iii) any failure to detect or prevent any child abuse or neglect in institutions, detention centres and/or prisons; and

(iv) necessary changes to current policies, legislation and practices;

(v) persons in custody claiming to be children;

(vi) compensation in individual cases.

AND We declare that, in these Letters Patent:

A reference to an 'asylum seeker' means a person who asks Australia, or who comes to Australia, and makes application or claim relying on the *Convention Relating to the Status of Refugees* adopted at Geneva on 28 July

1951, as amended by the 1967 *Protocol Relating to the Status of Refugees*.
A reference to a 'child' means any person under 18 years of age.
A reference to 'law' includes a law of the Commonwealth, a State or a Territory and the common law;
A reference to 'practice or conduct' includes acts or omissions;
A reference to 'treatment' includes 'mistreatment;'

AND We declare that the Commission established by these Letters Patent is a relevant Commission for the purposes of sections 4 and 5 of the *Royal Commission Act 1902*.

AND We direct that you conduct your inquiry, to the extent possible, so as to avoid unnecessary public disclosure of the identity of any children or any sensitive or confidential material about any child which your inquiry requires to be produced to it.

AND We direct that you inquire into whether any practice of conduct that might have constituted a breach of any law should be referred to the relevant Commonwealth, State or Territory agency.

AND We require you to begin your inquiry as soon as practicable, to conduct your inquiry as expeditiously as possible, and, not later than 30 December 2013, to furnish to Our Governor-General of the Commonwealth of Australia the report of the results of your inquiry and such recommendations as you consider appropriate.

WITNESS Her Excellency Ms Quentin Bryce, Companion of the Order of Australia, Governor-General of the Commonwealth of Australia.

Dated August 2012

(Quentin Bryce AO)
Governor-General

By Her Excellency's Command

(Nicola Roxon MP)
Attorney-General