

Inquiry Into the Detention of Indonesian Minors in Australia

Standing Committee on Legal and Constitutional Affairs

1. Executive Summary

I wish to make practical suggestions to improve the process for age assessments for young Indonesian crew charged with people smuggling offences that lead to more efficient outcomes for government, and equitable outcomes for detainees. These suggestions will also help Australia to better meet its human rights obligations under the *Convention on the Rights of the Child* (CRC) and the relevant articles of the UN Committee on the Rights of the Child (UN Committee).

2. Background

I write this submission from my own experience defending a young Indonesian person (Luco)¹ charged with people smuggling as an adult and later found to be a juvenile and deported back to his village in Indonesia.

3. Outline of the case of Luco

- Luco was apprehended by the Australian navy near Ashmore reef on or about 20 February 2010.
- When asked his age by navy personnel, Luco replied that he was 15.
- He was taken to Christmas Island and detained at the Northern Immigration Detention Centre on 24 February.
- He participated in a Department of Immigration and Citizenship (DIAC) Entry Interview on 25 February.
- On 1 April he was taken to Sir Charles Gairdner Hospital and underwent a wrist x-ray. The wrist x-ray was examined by Dr Vincent Seng Hock Low who determined Luco to be 19 years or older.
- He remained in immigration detention for a further 6 months before being taken to Sydney on 14 October 2010 and charged with people smuggling.
- Following this he was taken into custody at MRRC located at Silverwater, NSW.
- It was not until late December 2010 that my firm was given carriage of his matter
- Following a second attempt at representation, the Commonwealth withdrew proceedings against Luco.
- Luco was formally discharged in court on 8 November 2011 and deported home.

¹ NB – This is not the real name of my client. As he is a juvenile his name shall remain private.

Court Chronology

19 January 2011: This was the first time the matter was heard at Bankstown Local Court, NSW. On this date we requested an adjournment so we could obtain the CD of the x-ray of Luco's wrist.

7 February 2011: The matter was adjourned until 7 March 2011 on the advice of the NSW Legal Aid Commission who were waiting on an advice from Senior Counsel on the constitutionality of the mandatory legislation.

7 March 2011: As we were still waiting on the x-ray CD, we had the matter adjourned.

4 April 2011: Matter was adjourned until 2 May to give defence time to obtain our own expert report from a radiologist as well as an expert report from a cultural expert and a forensic psychologist.

2 May 2011: Matter was set down for an age determination hearing 20 June 2011 with a mention date of 23 May 2011 for a return of subpoenaed material from the AFP and Dr Low.

23 May 2011: Subpoena material returned and matter adjourned until 6 June 2011 to confirm the age determination hearing date.

6 June 2011: The Legal Aid Commission NSW had not granted funding for expert reports so the hearing of 20 June was vacated. Matter adjourned until 11 July for expert reports to be filed with the court and the CDPP and to obtain a new hearing date.

11 July 2011: Obtained hearing dates of 15 and 16 August.

Late July 2011: Representations made to the Director of the CDPP to withdraw charges based on the evidence obtained in the radiologist, cultural and psychologist report. Representations were unsuccessful.

15 August 2011: Age determination hearing. Defence lost this hearing and we received a date at the Sydney District Court for arraignment.

8 September 2011: Defence filed an application for bail at the Sydney District Court.

9 September 2011: Luco arraigned and given the trial date of 12 June 2011. Defence requested a date in September for the bail hearing but the CDPP requested October when their expert would be available. I was in a trial in October so the date of 8 November was selected for the bail hearing.

Between 9/9/11 and 21/10/11 defence engaged Medical statistician Dr Timothy Cole to provide a report.

21 October 2011: Defence made a 2nd attempt at representations to the CDPP with the report of Dr Cole and the psychologist report and requested the charges be immediately withdrawn.

23 October 2011: I flew to Indonesia and obtained affidavit evidence of Luco's age from his family.

2 November 2011: Defence served the CDPP with the affidavits to be considered with the other reports served with the representations.

8 November 2011: Charges were formally withdrawn at Sydney District Court and Luco was subsequently released to Villawood Detention Centre and flown to Denpasar.

4. Evidence in Luco's case against issues raised in the discussion paper

The following points are raised in relation to the issues outlined in the discussion paper, arising from my experience.

a. Time Spent in Detention prior to formal arrest

Luco was detained in immigration detention for 8 months. I am deeply concerned as to the amount of time spent in detention before the charging process began.

8 months is an unreasonable amount of time to wait to be charged and there has been no reasonable explanation as to why it took so long. It is unreasonable because Luco was identified as a crew-member of a vessel bringing asylum seekers into Australian territorial waters. There existed enough physical evidence for the AFP to lay charges upon apprehension.

b. No attempts made to verify Luco's age besides sole reliance on results of a wrist x-ray

The AFP abided by Regulation 6C solely to establish Luco's age.

None of the Australian authorities and their officers (AFP and DIAC) made any attempt to verify Luco's claim that he was a juvenile, such as obtaining documentary evidence, conducting inquiries with Luco himself which could be obtained by conducting psychological testing or engaging anthropological, cultural or linguistic expertise to conduct focused age interviews.

No attempts were made to contact Luco's family members to verify his claim.

c. Expertise of officers carrying out assessments

Currently, the *Migration Act 1958* (Cth) delegates power to any 'officer' as defined by the Act in section 5 as being authorised to make age assessments.

As per section 5, an officer can be an officer of DIAC, AFP, state police or any other officer authorised by the Minister.

There is no requirement for any 'officer' to hold any expertise in age assessment practices.

d. Requirement of expertise to conduct x-ray procedure as prescribed by Regulation 6C(5)

Given, the inquiry will receive submissions from medical practitioners on the x-ray technique there is no need for me to outline my criticisms of this technique currently used by 'officers' to assess age. Those criticisms involve the fact that the use of the x-ray technique to determine chronological age has been condemned worldwide because of it is an inappropriate and unreliable tool to determine chronological age.

However, I must express my concern at the AFP's engaged radiologist, Dr Vincent Low, in carrying out these procedures. In the age determination case of Luco, it became apparent to the defence that Dr Low does not have the relevant expertise required by the regulations.

6C(5) of the regulations states that the radiograph must be interpreted by an appropriately qualified person. Dr Low postulates himself to be an expert in paediatric radiology. However, evidence from many cases, including in Luco's hearing revealed that Dr Low is a gastro-radiologist.

5. Incorrect age assessment may lead to significant human rights breaches. (9.1)

In the case of Luco, significant human rights breaches have occurred.

Luco was treated as an adult in the criminal justice system, and was imprisoned in an adult prison because of an error made in age assessment processes.

le: from the time of his x-ray, Luco was treated as an adult and spent 13 months in an adult maximum-security remand facility (MRRC).

Luco was not afforded any protection as a vulnerable juvenile or otherwise vulnerable individual.

Documentary and affidavit evidence of age (12.3)

Birth Records, School Records, Church Records

Just prior to Luca's 15 August age hearing, the CDPP disclosed 2 birth certificates. Neither were admitted by his honour at Bankstown Local Court as they were not sighted or certified by an Australian legal practitioner.

It is common knowledge that the young crew recruited on these boats are poached from impoverished villages where there is a lack of reliable documentary evidence of birth.

It is also common knowledge amongst Australian Legal Practitioners, of the standard expected when tendering evidence.

My experience in the Local Court is that the court will not accept documentary evidence unless it is accredited by Australian legal practitioners. This places an unreasonable burden on defence lawyers and their clients to produce documentary evidence that is viewed as credible before a western court.

The accused are not able to produce the kind of 'western style' documentary evidence that magistrates are prepared to accept. His Honour, in my case indicated that his hands were tied and had no choice but to rely on the documentary evidence of the x-ray technique.

Affidavit Evidence

I am aware that there was a case in QLD where barristers flew to Indonesia to obtain affidavit evidence of age for their clients.

I approached NSW LAC for funding and this was approved. I returned with affidavits from my clients caregivers, his Aunt, Uncle and his blood sister.

Although the CDPP do not disclose reasons for withdrawing the charges, it is clear that they were withdrawn as a result of the service of affidavits.

Practical Suggestions

- a. The period of time between apprehension and arrest should be a matter of weeks not months. If there is enough evidence, physical or otherwise, the accused should be charged immediately. If there is not enough physical or other evidence, they should be returned home immediately.
- b. There needs to be a permanent legal aid employee/(s) based at Christmas Island to provide legal representation prior to any DIAC or other AFP interviews. This is necessary because it is apparent that crew apprehended have no independent legal representative available to them. The Indonesian crew of these boats come from impoverished villages. They have no understanding of Australia's criminal justice system. They should be cautioned appropriately which would mean proceeding with an understanding of their cultural background, their linguistic limitations and their ability to defend themselves.
- c. If there is a claim from any individual that they are under the age of 18, this should be treated with the benefit of the doubt and all efforts should be made by the Commonwealth to obtain evidence of their age.
- d. The *Migration Act 1958* (Cth) should replace the definition of 'officer' in regards to age determination assessments in s5 with an 'officer' with *expertise* in age assessment practices.
- e. Any 'officer' undertaking age assessment interviews should be a person qualified to do so.
- f. The 'officer' should undertake to conduct focused age interviews with the support of an independent person with legal knowledge.
- g. Regulation 6C of the Crimes Act should be removed immediately because it has been discredited worldwide as an inaccurate determiner of chronological age.
- h. The CDPP need to make clear what they will accept to rebut the presumption they hold that every individual is an adult – aka the 'benefit of the doubt policy'.

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