CHAPTER 5

Committee view and recommendations

5.1 Over the course of this inquiry, the committee has heard evidence from a range of lawyers, legal bodies, academics, health professionals and individuals with direct knowledge of the cases of young Indonesians who have been detained, convicted and imprisoned in Australian jails on people smuggling charges. The recent Australian Human Rights Commission (AHRC) report has also highlighted systemic issues with Australia's processes for detaining and prosecuting accused people smugglers, which have resulted in improper detention of Indonesian minors and a distinct failure to give these individuals the benefit of the doubt.

5.2 The committee agrees with the findings of the AHRC that many Indonesian nationals, who it is now accepted are likely to have been children, were detained or imprisoned for inappropriate periods in Australia between 2008 and 2012. The committee also supports the AHRC's key recommendation—namely, that all individuals detained in Australia on suspicion of people smuggling charges who claim to be minors should be treated as minors until they are determined by an Australian court to be an adult.[1]

5.3 The committee has received evidence about many aspects of this complex issue, including: age assessment procedures used by Commonwealth agencies in people smuggling cases; the processes associated with the detention of boat crew who claim to be minors; the access to fundamental services available for such individuals throughout the detention process; and options for assisting individuals who have been wrongfully detained in Australia who have now been released and returned to Indonesia.

Indonesian minors detained in Australia

5.4 The key issue in this inquiry was whether there are currently any Indonesian minors detained or imprisoned in Australia, and whether such detention has occurred in the past. The committee acknowledges that the Attorney-General's Department (AGD) has recently reviewed 28 cases where Indonesian nationals had been convicted of people smuggling offences where age was an issue. Commonwealth agencies have stated that no Indonesian nationals who are currently assessed as minors by the Department of Immigration and Citizenship (DIAC) are being held in detention or prison in Australia. The committee notes, however, that as at 15 August 2012 there were still at least 33 cases ongoing in which individuals suspected of people smuggling offences have claimed to be minors. The committee urges that these cases be finalised as soon as possible in order to ensure that any of these individuals who are minors can be expeditiously repatriated to Indonesia.

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1 Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*, July 2012, p. 12.

Age determination procedures

5.5 The committee has received considerable evidence regarding the various age assessment procedures utilised by Commonwealth agencies during the investigation of people smuggling suspects who claim to be minors.

Wrist x-rays

5.6 Many submitters and witnesses commented on the well-reported problems associated with using wrist x-ray analysis as a tool to assess whether an individual is over 18 years of age. This evidence is consistent with the findings of the recent AHRC report, which found that wrist x-ray analysis is not informative of whether an individual is over 18 years of age, and that Commonwealth agencies inappropriately relied on wrist x-ray analysis as evidence that individuals were over the age of 18 in numerous cases.[2]

5.7 The committee notes that the CDPP has now adopted a policy of not placing wrist x-ray evidence before the courts in age determination hearings. The committee welcomes this development, but considers that this decision should have been taken much earlier by the CDPP, especially given the doubts concerning wrist x-rays that have been expressed by experts over a number of years.

5.8 The Australian Federal Police (AFP) gave evidence that only one wrist x-ray has been undertaken since 2011. Further, AGD informed the committee that it is currently consulting with the Office of the Chief Scientist to obtain independent advice on the scientific and statistical approaches to age determination, including the utility of wrist x-rays.[3]

5.9 Given the significant doubts raised regarding the use of wrist x-rays as a procedure for age assessment, and noting that wrist x-rays are now rarely used by the AFP, the committee is of the view that the government should consider removing wrist x-rays as a prescribed procedure under the *Crimes Act 1914* and the Crimes Regulations 1990. The committee considers that a decision on whether to remove wrist x-rays as a prescribed procedure should not be made until the advice of the Office of the Chief Scientist on this issue has been considered by government.

Recommendation 1

5.10 Subject to the advice of the Office of the Chief Scientist regarding the utility of wrist x-rays as an age assessment tool, and noting evidence received by the committee raising significant doubts about this procedure, the committee recommends that the Australian Government consider removing wrist x-rays as a prescribed procedure for the determination of age under section 3ZQB of the *Crimes Act 1914* and regulation 6C of the Crimes Regulations 1990.

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2 Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*, July 2012, pp 8 and 10.

3 *Submission 21*, p. 16; Mr Tony Sheehan, Attorney-General's Department, *Committee Hansard*, 24 August 2012, p. 27.

Obtaining evidence from Indonesia

5.11 The committee examined in some detail the issue of obtaining documents and other age-related information from Indonesia. In relation to birth and other age-related documentation from Indonesia, the committee is of the view that where the Indonesian Government or the Indonesian National Police (INP) provide documents to Australian authorities which they believe to be genuine and accurate, the validity of those documents should be accepted at face value.

5.12 The committee notes that there can be significant delays associated with obtaining evidence through formal processes between the AFP and the INP. While these delays are sometimes unavoidable, the committee believes that options for formalising arrangements with the Indonesian Government should be explored in order to expedite these processes wherever possible.

5.13 The committee also notes evidence that several cases against people smugglers who claim to be minors have been discontinued after the defendants' legal representatives travelled to Indonesia to gather affidavits and other evidence from the defendants' home communities. The committee recognises, however, that the AFP cannot undertake similar activities in Indonesia without the express agreement of the Indonesian authorities.

Recommendation 2

5.14 The committee recommends that the Australian Government formalise arrangements with the Indonesian Government to expedite the process of gathering evidence in Indonesia relating to the age of individuals who claim to be minors and are detained in Australia suspected of people smuggling offences.

Processes for ensuring that the rights of detained individuals are upheld

5.15 Considerable evidence was received regarding the processes involved in the detention and prosecution of people smuggling suspects who claim to be minors. The committee's view is that these processes can be improved to ensure that the rights of such individuals are respected by ensuring prompt access to relevant services for detainees and making some changes to the way age determination hearings are conducted.

Access to relevant services for young Indonesians suspected of people smuggling offences

5.16 The committee has learned that, in several cases, Indonesian crew members claiming to be minors were not always able to access appropriate services such as legal assistance and consular assistance. The general view of the relevant Commonwealth agencies involved in these cases appears to be that there is 'no impediment' to individuals accessing such services. Given that these individuals are predominantly uneducated, illiterate and non-English speaking, and are being detained in a foreign and intimidating environment, the committee is of the view that such young people would often be unaware or incapable of asserting their right to avail themselves of such services. As such, proactive assistance needs to be provided

in order to assist individuals in these situations and ensure that the appropriate services are not only available, but are, in fact, utilised.

5.17 Prompt legal aid assistance should be provided to all individuals detained in Australia on suspicion of people smuggling charges who claim to be minors. The committee notes evidence from the AFP that interviews with detainees are now generally occurring on Christmas Island, giving rise to earlier notification of the individual's right to legal and consular assistance.

5.18 The committee is of the view that consular assistance should be provided to suspected people smugglers who claim to be minors as soon as practicable after their arrival in Australia. The committee notes DIAC's evidence that it offers consular assistance to individuals who enter immigration detention, and that it is obligated to notify the Indonesian consulate of nationals held in immigration detention within three business days of their arrival. The committee has also heard evidence from submitters and witnesses that in some cases consular assistance was not provided to individuals who could have benefited from it.

5.19 In addition to DIAC's current notification obligations, the committee considers that in cases where an Indonesian national in immigration detention claims to be a minor, DIAC should notify the Indonesian Embassy and relevant consular officials of that claim. The committee agrees that this should occur only with the consent of the detained individual, but urges that DIAC officials should clearly explain to all Indonesian detainees the services and benefits offered by the Indonesian consulates in Australia, so that these individuals can make a fully informed decision about whether to access consular assistance.

Recommendation 3

5.20 The committee recommends that the *Migration Act 1958* be amended to require that individuals suspected of people smuggling offences who claim to be minors be offered access to consular assistance as soon as practicable after their arrival in Australia.

Recommendation 4

5.21 The committee recommends that, in cases where an Indonesian national in immigration detention or in prison claims to be a minor, the Department of Immigration and Citizenship must notify the Indonesian Embassy and relevant consular officials of that claim as soon as practicable.

Contacting relatives in Indonesia

5.22 The committee notes DIAC's evidence that there is no restriction on individuals who arrive in Australian immigration detention facilities in relation to contacting their families in their home countries. Despite this, the committee has heard evidence of numerous cases in which individuals who claimed to be minors were unable to contact their families for months after being detained, and that no Commonwealth agencies or relevant legal aid representatives assisted them in making this contact. The committee believes that DIAC should be required to proactively assist any individual detained on suspicion of people smuggling offences who claims to be a minor to contact their relatives in Indonesia.

Recommendation 5

5.23 The committee recommends that the Department of Immigration and Citizenship:

- **explicitly inform each Indonesian crew member suspected of people smuggling of their right to contact relatives in Indonesia as soon as practicable after their arrival in Australia; and**
- **take proactive steps to assist all crew who claim to be minors to contact their families in Indonesia within seven days, or as soon as practicable, after their arrival in Australia.**

Burden of proof in age determination hearings

5.24 Regarding the burden of proof in age determination hearings, the committee notes evidence from the CDPP that it currently assumes the burden of proof in such hearings, and would be comfortable with this arrangement being codified in legislation. AGD has advised that the government is considering introducing legislation to this effect, as previously recommended by the Senate Legal and Constitutional Affairs Legislation Committee in its report in relation to the Crimes Amendment (Fairness for Minors) Bill 2011.[4] The committee believes that there is now an overwhelming case for such legislative change to be made.

Recommendation 6

5.25 In accordance with Recommendation 2 of the Senate Legal and Constitutional Affairs Legislation Committee's report into the Crimes Amendment (Fairness for Minors) Bill 2011, the committee recommends that the Australian Government introduce legislation to expressly provide that, where a person raises the issue of age during criminal proceedings, the prosecution bears the burden of proof to establish that the person was an adult at the time of the relevant offence.

Deterrence and awareness raising activities in Indonesia

5.26 In addition to the measures recommended above, the committee also endorses Recommendation 2 of the Senate Legal and Constitutional Affairs Legislation Committee's report in relation to the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012—namely, that the Australian Government should facilitate and support further educational and awareness raising activities to deter young people in rural Indonesian communities from becoming involved in people smuggling ventures.[5] The committee believes that such initiatives are important to help ensure that more Indonesian minors do not make the journey to Australia as crew on vessels carrying asylum seekers.

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4 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Amendment (Fairness for Minors) Bill 2011*, April 2012, p. 30 (Recommendation 2).

5 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Removal of mandatory Minimum Penalties) Bill 2012*, pp 22-23.

Recommendation 7

5.27 In accordance with Recommendation 2 of the Senate Legal and Constitutional Affairs Legislation Committee's report into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012, the committee recommends that the Australian Government facilitate and support further deterrence and awareness raising activities in relation to people smuggling offences, with a focus on relevant communities in Indonesia.

Senator Penny Wright

Chair