

# CHAPTER 1

## Introduction

### Referral of the inquiry

1.1 On 10 May 2012, the Senate referred to the Legal and Constitutional Affairs References Committee the matter of the detention of Indonesian minors in Australia, for inquiry and report by 28 June 2012. The Senate subsequently agreed to extend the reporting date for the inquiry to 4 October 2012.<sup>1</sup>

1.2 The terms of reference for the inquiry were:

- (a) whether any Indonesian minors are currently being held in Australian prisons, remand centres or detention centres where adults are also held, and the appropriateness of that detention;
- (b) what information the Australian authorities possessed or had knowledge of when it was determined that a suspect or convicted person was a minor;
- (c) whether there have been cases where information that a person is a minor was not put before the court;
- (d) what checks and procedures exist to ensure that evidence given to an Australian authority or department about the age of a defendant/suspect is followed up appropriately;
- (e) the relevant procedures across agencies relating to cases where there is a suggestion that a minor has been imprisoned in an adult facility; and
- (f) options for reparation and repatriation of any minor who has been charged (contrary to current government policy) and convicted.

### Background

1.3 The number of individuals arriving by boat to seek asylum in Australia has increased markedly since 2008.<sup>2</sup> The Suspected Irregular Entry Vessels (SIEV) that these asylum seekers travel on are generally crewed by Indonesian nationals, predominantly from poor fishing communities across the Indonesian archipelago.<sup>3</sup>

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1 *Journals of the Senate*, 10 May 2012, p. 2426; *Journals of the Senate*, 19 June 2012, p. 2531; *Journals of the Senate*, 18 September 2012, p. 3010.

2 Department of Immigration and Citizenship, *Submission to the Joint Select Committee on Australia's Immigration Detention Network*, September 2011, p. 18.

3 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. 18.

Some of these boat crew are juveniles at the time they are intercepted by Australian authorities. The United Nations Office on Drugs and Crime has suggested that minors can be specifically targeted for use as crew in the smuggling of migrants by sea.<sup>4</sup>

1.4 Boat crew responsible for bringing asylum seekers into Australia can be prosecuted for people smuggling offences under Commonwealth law. While minors are generally not prosecuted for these offences, determining the age of a crew member is not straightforward, meaning that there is the potential for minors suspected of people smuggling offences to be inadvertently charged as adults. The policy of not prosecuting minors may also create an incentive for adult boat crew facing people smuggling charges to claim to be minors.<sup>5</sup>

1.5 Several high profile cases have highlighted the significance of this issue, including cases where convicted people smugglers have been released from prison and returned to Indonesia after new evidence suggested that they were likely to have been underage at the time of committing offences.<sup>6</sup> The joint submission to the inquiry from the Attorney-General's Department (AGD) and the Australian Federal Police (AFP) (AGD/AFP submission) noted the complexity of these cases, and stated that the Australian Government has 'sought to balance the need to appropriately penalise people smuggling activity against the [government's] primary obligations to protect the interests of children held in Australian facilities'.<sup>7</sup>

### ***Legislative framework for people smuggling offences***

1.6 The primary offence of people smuggling, committed where a person organises or facilitates the bringing, coming to or the entry into Australia of another person who is a non-citizen and has no lawful right to come to Australia, is contained in section 233A of the *Migration Act 1958* (Migration Act). This offence attracts a maximum penalty of 10 years imprisonment or 1,000 penalty units, or both.

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4 United Nations Office on Drugs and Crime, Issue Paper on the Smuggling of Migrants by Sea, 2011, p. 30, available at: [http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue\\_Paper\\_-\\_Smuggling\\_of\\_Migrants\\_by\\_Sea.pdf](http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf) (accessed 7 June 2012).

5 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Amendment (Fairness for Minors) Bill 2011*, April 2012, p. 11.

6 See, for example: AAP, 'More young Indonesian boat crew members sent home', *The Australian*, 8 June 2012, <http://www.theaustralian.com.au/national-affairs/more-indonesian-child-boat-crew-members-sent-home/story-fn59niix-1226389138470> (accessed 18 June 2012); Hamish MacDonald, 'Ali Jasmin comes home', *The Global Mail*, 24 May 2012, <http://www.theglobalmail.org/feature/ali-jasmin-comes-home/249/> (accessed 18 June 2012); Lindsay Murdoch, 'Kidnapped boys released from jail', *Sydney Morning Herald*, 17 June 2011, <http://www.smh.com.au/national/kidnapped-boys-released-from-jail-20110617-1g6st.html> (accessed 18 June 2012).

7 *Submission 21*, p. 3.

1.7 The Migration Act also contains several aggravated people smuggling offences, including the aggravated offence of smuggling at least five non-citizens who have no lawful right to come to Australia.<sup>8</sup> This offence attracts a maximum penalty of 20 years imprisonment or 2,000 penalty units, or both. Aggravated people smuggling offences also attract mandatory minimum penalties; however, these mandatory minimum penalties do not apply if it is established on the balance of probabilities that the person was aged less than 18 years when the offence was committed.<sup>9</sup>

1.8 It has been recently reported that the Attorney-General has issued a directive that suspected people smugglers who are 'first-time offenders and low-culpability crew' should not be charged with the aggravated offences that attract mandatory minimum penalties.<sup>10</sup>

*Prosecution policy for minors suspected of people smuggling offences*

1.9 The decision to charge an individual with a people smuggling offence is made by the AFP, and the case is then referred to the Commonwealth Director of Public Prosecutions (CDPP) to conduct the prosecution in accordance with the *Prosecution Policy of the Commonwealth*:

Under the Prosecution Policy, prosecuting a minor is regarded as a severe step and regard must be had to the public interest. In deciding whether the public interest warrants the prosecution of a minor, a range of factors are taken into account, including the seriousness of the offence, the sentencing options available in the relevant children's court of the State or Territory, the minor's family circumstances, and whether prosecution would have an unduly harsh effect on the minor. The AFP applies the same standard to its decision to charge individuals with people smuggling offences.<sup>11</sup>

1.10 It has been the policy of the CDPP since late 2010 that minors should only be prosecuted with people smuggling offences in exceptional circumstances, on the basis of their significant involvement in a people smuggling venture (for example, if the person is involved in the death or serious harm of another person), or involvement in multiple ventures.<sup>12</sup> In addition, since July 2011, CDPP policy has been that it does

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8 Section 233C of the Migration Act. Offenders may also be charged with an aggravated offence of people smuggling involving exploitation, or danger of death or serious harm (section 233B of the Migration Act).

9 The mandatory minimum penalty for convictions against section 233C of the Migration Act is five years imprisonment, with a non-parole period of three years.

10 Margaret Scheikowski, 'Judges get their way on people smugglers', *Sydney Morning Herald*, 10 September 2012, <http://news.smh.com.au/breaking-news-national/judges-get-their-way-on-people-smugglers-20120910-25o07.html> (accessed 12 September 2012).

11 Attorney-General's Department and Australian Federal Police, *Submission 21*, p. 13.

12 Attorney-General's Department and Australian Federal Police, *Submission 21*, p. 13.

not oppose bail in relation to people smuggling cases where the defendant claims to be a minor.<sup>13</sup>

### ***Process of detention, charge and prosecution of people smuggling cases***

1.11 Several government agencies are involved in the interception, detention, charging and prosecution of boat crew suspected of people smuggling offences. A brief summary of the typical process involved in cases where boat crew claim to be minors is outlined below.

1.12 Vessels carrying asylum seekers are intercepted by either the Australian Customs or Border Protection Service (Customs) or the Royal Australian Navy (Navy) and the passengers, including Indonesian boat crew, are transferred to Australian facilities on Christmas Island for initial processing.<sup>14</sup> Once the passengers have been transported to Christmas Island and undergone initial processing by Customs, the Department of Immigration and Citizenship (DIAC) conducts intelligence gathering interviews and age assessment interviews for any crew claiming to be minors. If DIAC assesses an individual as being under 18 years of age and no exceptional circumstances apply, that individual is returned to their country of origin.<sup>15</sup>

1.13 If DIAC assesses an individual to be an adult, their case may be referred to the AFP to commence a criminal investigation. A Criminal Justice Stay Certificate is often issued by the Attorney-General to prevent individuals from leaving Australia until the AFP finishes conducting its investigations.<sup>16</sup>

1.14 The AFP may undertake additional age assessment procedures (outlined further below), if there is still uncertainty regarding an individual's age. If a wrist x-ray is undertaken and indicates that a person is a minor, the AFP ceases its investigation and the individual is returned to their country of origin.<sup>17</sup> If, on the basis of all the evidence before it, the AFP still considers that an individual is an adult and proceeds to charge the individual, it will refer the matter to the CDPP, which then

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13 Commonwealth Director of Public Prosecutions, *Submission 24*, p. 2.

14 Attorney-General's Department and the Australian Federal Police, *Submission 21*, p. 20.

15 Department of Immigration and Citizenship, *Submission 17*, p. 2. This removal policy has been in place since December 2011.

16 The Attorney-General may issue a Criminal Justice Stay Certificate (CJSC), under section 147 of the Migration Act, if he or she is satisfied that a non-citizen should remain in Australia 'temporarily' for the purposes of the 'administration of criminal justice in relation to an offence against the law of the Commonwealth'. Under section 150 of the Migration Act, a non-citizen cannot be removed or deported from Australia while a CJSC is in force.

17 Attorney-General's Department, Australian Federal Police, and the Commonwealth Director of Public Prosecutions, *Submission 20*, p. 6, to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Crimes Amendment (Fairness for Minors) Bill 2011.

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decides whether the prosecution should proceed on the basis of the brief of evidence prepared by the AFP.<sup>18</sup>

1.15 If the age of the individual is still contested and raised as an issue in court, an age determination hearing is held, which determines the age of an individual for the purposes of criminal justice proceedings.<sup>19</sup> The court must decide 'on the balance of probabilities' whether a suspect was an adult at the time of offence, and can take into account various forms of evidence in relation to the age of a defendant, including information or documents obtained from Indonesia.<sup>20</sup> In such cases, a court ruling that an individual is under 18 has led to the CDPP abandoning its prosecution, whereas a finding that a defendant is an adult has meant the prosecution can continue. In its submission to this inquiry, the CDPP advised that it considers the likely result of an age determination hearing in deciding whether to proceed cases to prosecution:

Where the CDPP has not been satisfied that a court would be likely to be satisfied on the balance of probabilities on all the evidence available that the defendant was an adult, the CDPP has discontinued the prosecution.<sup>21</sup>

### ***Age assessment processes for Indonesian boat crew***

1.16 The AGD/AFP submission notes that a significant number of boat crew on people smuggling vessels claim to be minors, either on arrival or during the course of an investigation or prosecution, and that it is common for crew to repeatedly change their claims regarding age.<sup>22</sup> In cases where an Indonesian crew member suspected of committing a people smuggling offence claims to be a minor, Australian officials undertake processes to attempt to ascertain the age of the individual and assess the validity of their claim. If DIAC's initial assessment is that the individual is likely to be an adult and the case is referred to the AFP, further age assessment procedures can be utilised.

1.17 Under section 3ZQB of the *Crimes Act 1914* (Crimes Act), an investigating official may carry out a prescribed procedure in relation to a person reasonably suspected of a Commonwealth offence (either with the person's consent or on application to a magistrate) to determine whether or not the person was under 18 years at the time of the alleged commission of the offence. The current prescribed procedure for age determination, as stipulated in regulation 6C of the Crimes Regulations 1990, is a radiograph taken by 'an appropriately qualified person' of 'the hand or wrist of the person whose age is to be determined' (wrist x-ray).

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18 Commonwealth Director of Public Prosecutions, *Submission 24*, p. 1.

19 However, applications can be made for an additional age determination hearing at a later stage if new evidence regarding the defendant's age is brought to light.

20 Commonwealth Director of Public Prosecutions, *Submission 24*, p. 2.

21 *Submission 24*, p. 2.

22 *Submission 21*, p. 3.

*Recent policy changes relating to age determination*

1.18 In February 2011, the then President of the Australian Human Rights Commission (AHRC), the Hon Catherine Branson QC, wrote to the Attorney-General, the Hon Nicola Roxon MP, to express concern about the use of wrist x-rays for age determination purposes. The Attorney-General requested that the issue be considered by a working group of Australian Government agencies including AGD, the AFP, the CDPD and DIAC.<sup>23</sup> On 8 July 2011, the Australian Government announced that a range of measures would be used to supplement the standard wrist x-ray procedure when assessing the age of accused people smugglers. These additional measures are:

- offering dental x-rays as a supplementary procedure to wrist x-rays;
- offering focussed age interviews conducted under caution by AFP officers; and
- the AFP taking steps as early as possible to seek information from the individual's country of origin, including birth certificates, where age is contested.<sup>24</sup>

1.19 In July 2011, the government also commenced a policy of proactively giving the benefit of the doubt in relation to age where the available evidence cannot clearly establish that the person is a minor.<sup>25</sup> This policy is complemented by the introduction in December 2011 of a removal policy, whereby an individual can be returned to Indonesia solely based on DIAC's initial age assessment, without the case being referred to the AFP.<sup>26</sup>

*Places of detention for crew who claim to be minors*

1.20 In its submission, DIAC explained that boat crew who claim to be minors are accommodated in a low security alternative place of detention (APOD) within the immigration detention network, rather than a higher security immigration detention centre (IDC), and that all boat crew are initially held in an APOD on Christmas Island upon arrival.<sup>27</sup> It was noted, however, that in some instances DIAC may decide that it would be in the best interests of an individual to be held in facilities with other adults

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23 Australian Human Rights Commission, *Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children – Discussion Paper*, December 2011, p. 11.

24 Australian Human Rights Commission, *Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children – Discussion Paper*, December 2011, p. 11.

25 Attorney-General's Department and Australian Federal Police, *Submission 21*, p. 5.

26 Attorney-General's Department and Australian Federal Police, *Submission 21*, pp 5 and 17. The DIAC age assessment interviews were introduced in 2010 but, prior to December 2011, were not determinative, with cases still being referred to the AFP for final decision even if DIAC assessed the individual as likely to be a minor.

27 *Submission 17*, p. 1.

(for example, to be near family members or fellow crew members).<sup>28</sup> DIAC stressed that it seeks to ensure that crew who are assessed as minors are housed in facilities appropriate for minors; nonetheless, in cases where a person claims to be a minor but the available evidence suggests that the person is an adult, 'the interests of the person are balanced carefully against the interests of other minors in determining appropriate housing arrangements'.<sup>29</sup>

1.21 Where DIAC assesses an individual as a minor to be returned to their country of origin, the individual remains in an APOD until return to their country can be arranged. In cases where DIAC assesses an individual to be an adult and refers their case to the AFP, those individuals may be transferred to an IDC while the AFP finalises its investigation.<sup>30</sup> Once charges have been laid, the individual is transferred to the custody of the relevant state or territory correctional authorities. The AFP has made clear that, in such cases, it provides the relevant correctional authorities with all available information concerning the person's claims to age, to enable the correctional authorities to manage that person appropriately.<sup>31</sup> Where a case is prosecuted and bail is granted while age is still in dispute, the individual is returned to immigration detention and housed in facilities appropriate for minors.<sup>32</sup>

### **Previous inquiries and reviews**

1.22 There have been a number of parliamentary and government-led inquiries in the last 12 months which have addressed the issue of Indonesian people smuggling crew who may be minors.

#### ***Senate Legal and Constitutional Affairs Legislation Committee inquiries***

1.23 The Senate Legal and Constitutional Affairs Legislation Committee (Legislation Committee) has recently inquired into, and reported on, two private senator's bills introduced by Senator Sarah Hanson-Young, which would impact upon the detention and prosecution of Indonesians arrested on people smuggling charges, including potential minors. These are:

- the Crimes Amendment (Fairness for Minors) Bill 2011, which seeks to amend the Crimes Act to establish timeframes and evidentiary protocols for the age determination and prosecution of suspected people smugglers who may be minors; and

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28 Attorney-General's Department and Australian Federal Police, *Submission 21*, p. 6.

29 *Submission 17*, p. 1.

30 Department of Immigration and Citizenship, *Submission 17*, p. 2.

31 Attorney-General's Department and Australian Federal Police, *Submission 21*, p. 9.

32 Attorney-General's Department, Australian Federal Police and the Commonwealth Director of Public Prosecutions, *Submission 20*, p. 12, to the Legislation Committee's inquiry into the Crimes Amendment (Fairness for Minors) Bill 2011, p. 12.

- the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012, which seeks to remove the mandatory minimum penalties associated with aggravated people smuggling offences under the Migration Act.

1.24 In its report on the Crimes Amendment (Fairness for Minors) Bill 2011, the Legislation Committee recommended that the Senate should not pass the bill, but also recommended that the Australian Government should:

- review the AFP's procedural and legislative requirements in dealing with persons suspected of people smuggling offences, with a view to facilitating the prompt laying of charges where appropriate;
- 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; and
- review options to support the capacity of the legal representatives of persons accused of people smuggling offences who claim to be underage at the time of the offence to gather evidence of age from their place of origin.<sup>33</sup>

1.25 In its report on the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012, the Legislation Committee recommended that the Senate should not pass the Bill, but recommended that the Australian Government should:

- review the operation of the mandatory minimum penalties which apply to people smuggling offences; and
- conduct further people smuggling deterrence and awareness raising activities in Indonesia.<sup>34</sup>

### ***Australian Human Rights Commission inquiry and report***

1.26 Following concerns that the age assessment processes used by Australian authorities may have led to the prosecution of children for people smuggling offences, the Australian Human Rights Commission (AHRC) announced on 21 November 2011 that it would conduct an inquiry into the treatment of individuals suspected of people smuggling offences who say they are children.<sup>35</sup> The inquiry received public submissions and held hearings in which key Commonwealth agencies and medical

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33 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Amendment (Fairness for Minors) Bill 2011*, April 2012, pp 30-31.

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

35 Australian Human Rights Commission, *Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children – Discussion Paper*, December 2011, p. 3, [http://www.hreoc.gov.au/ageassessment/downloads/AgeAssessment\\_DP20111206.pdf](http://www.hreoc.gov.au/ageassessment/downloads/AgeAssessment_DP20111206.pdf) (accessed 31 May 2012).

experts were examined.<sup>36</sup> On 27 July 2012, the AHRC tabled its report titled *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*.<sup>37</sup> In summary, the AHRC report found:

- wrist and dental x-rays are not sufficiently informative of whether a person is over 18 years of age;
- any use of radiation for age assessment purposes should first be justified as required by internationally accepted standards;
- there is no known biomedical marker of age which is sufficiently informative of age to be used in criminal proceedings;
- a multidisciplinary approach to age assessment is no more accurate than medical or non-medical approaches—consequently, a wide margin of benefit of the doubt should be used for individuals who are being assessed; and
- focused age interviews, if conducted appropriately, and if they afford a wide margin of benefit of the doubt to individuals who say they are children, are able to provide valuable information about a person's age.<sup>38</sup>

1.27 The AHRC report also included a number of adverse findings regarding the conduct of Commonwealth agencies in relation to the age assessment, detention, investigation and prosecution of persons accused of people smuggling offences who claim to be children. In particular, it found that 'many young Indonesians who it is now accepted were likely to have been children at the time of their apprehension spent long periods of time in immigration detention or in adult correctional facilities'.<sup>39</sup> Based on these findings, the AHRC concluded that 'the Australian Government failed to respect the rights of children'.<sup>40</sup>

1.28 The AHRC report made 17 recommendations, mainly in relation to the age assessment and the prosecution of persons accused of people smuggling offences who claim to be children. The AHRC recommendations included the following:

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36 Australian Human Rights Commission, 'Age assessment in people smuggling cases', <http://www.hreoc.gov.au/ageassessment/index.html> (accessed 31 May 2012).

37 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, <http://www.hreoc.gov.au/ageassessment/index.html> (accessed 6 August 2012).

38 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 8-9.

39 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. 10.

40 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. 10.

- amendments to the Migration Act (and if appropriate the Crimes Act) should be made to make clear that individuals claiming to be under 18 years of age must be deemed a minor unless a relevant decision-maker is 'positively satisfied' or, in the case of a judicial decision-maker, satisfied on the balance of probabilities, that the person is over 18 years of age;
- persons suspected of people smuggling offences claiming to be children 'who [are] not manifestly an adult' should be provided with 'an independent guardian';
- amendments to the Crimes Act should be made to restrict or limit procedures using x-rays as part of a prescribed procedure to determine age;
- legislative amendments should be made to ensure that expert evidence of the analysis of wrist x-rays is not admissible in legal proceedings as evidence that persons are over 18 years of age;
- investigating officials must obtain the consent of persons suspected of having committed a Commonwealth offence to participate in an age assessment interview;
- persons claiming to be underage 'who [are] not manifestly an adult' should be offered legal advice prior to any age assessment interview intended to be relied on in a legal proceeding;
- immediate efforts should be made to obtain documentary evidence of age from the country of origin of persons suspected of people smuggling who claim to be children when a decision to investigate or prosecute is made;
- the Attorney-General should set and implement an appropriate time limit between the apprehension of a person suspected of people smuggling and the bringing of a charge or charges against him or her;
- the Commonwealth should only in exceptional circumstances oppose bail where 'a person who claims to be a minor, and is not manifestly an adult, has been charged with people smuggling';
- the Attorney-General should consult with the CDPP concerning procedures to ensure that the Commonwealth does not adduce expert evidence in legal proceedings where the acceptance by the court of evidence would be inconsistent with an accused person receiving a fair trial;
- AGD should establish and maintain a process whereby there is regular and frequent review of the continuing need for each Criminal Justice Stay Certificate given by the Attorney-General or his or her delegate; and

- the Australian Government should remove Australia's reservation to Article 37(c)<sup>41</sup> of the *Convention on the Rights of the Child*.<sup>42</sup>

1.29 The AHRC circulated the findings of its inquiry to AGD, the AFP and the CDPP before reporting, and included as appendices to its published report letters from those agencies responding to the AHRC's conclusions. The responses noted recent changes to the policies relating to persons accused of people smuggling offences who claim to be underage. The responses also disputed a number of the findings made by the AHRC, particularly the conduct of Commonwealth agencies in relation to their reliance on wrist x-ray evidence in age assessment and their disinclination to take into account other information regarding the age of suspects.<sup>43</sup>

### ***Attorney-General's review of convicted people smuggling crew***

1.30 On 2 May 2012, the Attorney-General announced that AGD would undertake a review of 24 cases of Indonesian nationals convicted of people smuggling, in which concerns had been raised that the nationals may be minors.<sup>44</sup> The number of cases to be reviewed was later increased to 28.<sup>45</sup>

1.31 The review involved re-examining the cases using the new age determination processes introduced in 2011, as well as:

- the AFP seeking verified age documents from the Indonesian National Police (INP);
- DIAC conducting age assessment interviews for crew who consent to be interviewed;

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41 Article 37(c) of the *Convention on the Rights of the Child* (CRC) provides, among other things, that 'every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so'. Upon ratification of the CRC, the Commonwealth made reservations to the effect that Australia accepts the obligation to separate minors from adults, only to the extent that such segregation is considered by the responsible authorities to be feasible and beneficial to the minors or adults concerned.

42 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 12-14.

43 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, Appendix 6, pp 405-427.

44 The Hon Nicola Roxon MP, Attorney-General, 'Review of convicted people smuggling crew queried to be minors', *Media Release*, 2 May 2012, <http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/2-May-2012---Review-of-convicted-people-smuggling-crew-queried-to-be-minors.aspx> (accessed 29 May 2012).

45 The cases included 22 cases raised by the AHRC and two raised by the Indonesian Government. The four extra cases were added to the review based on information from the CDPP that age had been raised as an issue at some stage in those cases.

- the CDDP providing relevant case information and chronologies to AGD for each crew member; and
- the Indonesian Embassy and Consulates-General assisting with providing age documentation where crew have consented to consular notification and assistance.<sup>46</sup>

### *Results of the AGD review*

1.32 The Attorney-General announced the results of the review progressively between 17 May 2012 and 29 June 2012.<sup>47</sup> The final outcomes of the review were:

- 15 crew were released early from prison on licence as there was doubt they may have been minors on arrival in Australia;
- two crew were released early on parole;
- three crew completed their non-parole periods; and
- eight crew remain in prison to serve their sentences, as there was no evidence available to support claims they were minors on arrival in Australia.<sup>48</sup>

1.33 Of the crew released from prison early, the Attorney-General advised:

This is not a pardon. These individuals crewed people smuggling vessels that came to Australia, all of them went to court and were convicted of that offence. This is a decision to give these individuals the benefit of the doubt about their age when intercepted, after considering further information that was not available earlier.<sup>49</sup>

1.34 The release of these crew members has been welcomed by the Indonesian Government, as evidenced by statements from the President of the Republic of Indonesia, His Excellency Dr Susilo Bambang Yudhoyono AC.<sup>50</sup> Speaking at bilateral talks in Darwin on 3 July 2012, President Yudhoyono also urged that the repatriation of any remaining 'underage seafarers' be accelerated, and noted

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46 Attorney-General's Department and Australian Federal Police, *Submission 21*, p. 27.

47 The Hon Nicola Roxon MP, Attorney-General, 'Initial Results of people smuggling convictions review', *Media Release*, 17 May 2012; The Hon Nicola Roxon MP, Attorney-General, 'Further results of people smuggling convictions review', *Media Release*, 8 June 2012; The Hon Nicola Roxon MP, Attorney-General, 'Further results of people smuggling convictions review', *Media Release*, 18 June 2012.

48 The Hon Nicola Roxon MP, Attorney-General, 'People smuggling convictions review completed', *Media Release*, 29 June 2012.

49 The Hon Nicola Roxon MP, Attorney-General, 'People smuggling convictions review completed', *Media Release*, 29 June 2012.

50 Simon Cullen, 'SBY presses Gillard on underage people smugglers', *ABC News*, July 3 2012, <http://www.abc.net.au/news/2012-07-03/yudhoyono-gillard-finish-talks/4107424> (accessed 10 July 2012).

that there are a further 54 individuals whom Indonesia hopes will be released from detention in Australia.<sup>51</sup>

### ***Report of the Expert Panel on Asylum Seekers***

1.35 On 13 August 2012, an Expert Panel on Asylum Seekers (Expert Panel), consisting of Retired Air Chief Marshal Angus Houston AC, AFC, Mr Paris Aristotle AM, and Professor Michael L'Estrange AO, presented a report to the Australian Government, outlining policy options to prevent asylum seekers risking their lives on dangerous boat journeys to Australia.<sup>52</sup> The report made 22 recommendations, including one recommendation pertinent to the treatment of Indonesian boat crew on vessels carrying asylum seekers to Australia.

1.36 The Expert Panel recommended that bilateral cooperation on asylum seeker issues with Indonesia should be advanced as a matter of urgency, including in relation to possible changes to Australian law concerning Indonesian minors and others who crew unlawful boat voyages from Indonesia to Australia.<sup>53</sup> The Expert Panel stated:

Changes to Australian law in relation to Indonesian minors and others crewing unlawful boat voyages from Indonesia to Australia should be pursued with options including crew members being dealt with in Australian courts with their sentences to be served in Indonesia, discretion being restored to Australian courts in relation to sentencing, or returning those crews to the jurisdiction of Indonesia.<sup>54</sup>

1.37 The Australian Government has agreed in principle to all of the Expert Panel's recommendations.<sup>55</sup> The Attorney-General indicated on 15 August 2012 that the government may review the mandatory sentencing regime for people smuggling offences in accordance with the recommendation of the Expert Panel.<sup>56</sup> Recent media reports claim that the Attorney-General issued a directive on 27 August 2012, instructing the CDPP not to prosecute boat crew with aggravated people smuggling offences unless: they are repeat offenders; they had a role beyond simply being a crew

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51 Simon Cullen, 'SBY presses Gillard on underage people smugglers', *ABC News*, July 3 2012, <http://www.abc.net.au/news/2012-07-03/yudhoyono-gillard-finish-talks/4107424> (accessed 10 July 2012).

52 Australian Government, *Report of the Expert Panel on Asylum Seekers*, August 2012, p. 9, <http://expertpanelonasylumseekers.dpmc.gov.au/report> (accessed 16 August 2012).

53 Australian Government, *Report of the Expert Panel on Asylum Seekers*, August 2012, p. 15.

54 Australian Government, *Report of the Expert Panel on Asylum Seekers*, August 2012, p. 43.

55 The Hon Julia Gillard MP, Prime Minister, *Transcript of press conference*, 13 August 2012, <http://www.pm.gov.au/press-office/transcript-press-conference-canberra-28> (accessed 16 August 2012).

56 Australian Broadcasting Corporation, 'Attorney-General reacts to cigarette ruling, asylum laws', 15 August 2012, <http://www.abc.net.au/7.30/content/2012/s3568780.htm> (accessed 16 August 2012).

member; or a death occurred in relation to the people-smuggling venture.<sup>57</sup> Several prosecutions for aggravated people smuggling cases have reportedly been discontinued as a result of this directive.<sup>58</sup>

### **Conduct of the inquiry**

1.38 The committee wrote to 143 organisations and individuals, inviting submissions by 31 May 2012. Details of the inquiry were also placed on the committee's website at [www.aph.gov.au/senate\\_legalcon](http://www.aph.gov.au/senate_legalcon).

1.39 The committee received 29 submissions, and all public submissions were made available on the committee's website. A list of submissions to the inquiry is at Appendix 1. The committee held a public hearing in Canberra on 24 August 2012. A list of witnesses who appeared at the hearing is at Appendix 2, and copies of the *Hansard* transcript are available through the committee's website.

### **Acknowledgement**

1.40 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

### **Structure of the report**

1.41 This report is divided into five chapters.

1.42 Chapter 2 examines case statistics provided by Commonwealth agencies regarding cases since 2008 in which boat crew on asylum seeker vessels have claimed to be minors, and discusses the appropriateness of detention in these cases and relevant human rights issues.

1.43 Chapter 3 discusses the age assessment processes undertaken by Commonwealth agencies during the investigation and prosecution of alleged people smugglers who claim to be minors.

1.44 Chapter 4 discusses options for the repatriation and reparation of individuals who have been wrongly convicted or subjected to long periods of detention in Australia, only to be subsequently given the benefit of the doubt regarding their age.

1.45 Chapter 5 sets out the committee's views and recommendations for the inquiry.

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57 Margaret Scheikowski, 'Judges get their way on people smugglers', *Sydney Morning Herald*, 10 September 2012, <http://news.smh.com.au/breaking-news-national/judges-get-their-way-on-people-smugglers-20120910-25o07.html> (accessed 12 September 2012).

58 Mark Russell, 'Accused people smuggler weeps as charges dropped', *The Age*, <http://www.theage.com.au/victoria/accused-people-smuggler-weep-as-charges-dropped-20120904-25bs9.html> (accessed 12 September 2012).

**Note on references**

1.46 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

