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COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

**JOINT SUBMISSION TO THE SENATE COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS INQUIRY INTO THE
CRIMES AMENDMENT (FAIRNESS FOR MINORS) BILL 2011**

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EXECUTIVE SUMMARY

This submission was prepared by the Attorney-General's Department in collaboration with the Commonwealth Director of Public Prosecutions and the Australian Federal Police. The Department of Immigration and Citizenship, Department of Prime Minister and Cabinet, Australian Customs and Border Protection Service, Department of Foreign Affairs and Trade, and Department of Health and Ageing, Australian Radiation and Nuclear Safety Agency and the Office of the Chief Scientist were also consulted. The submission reflects the views of the Commonwealth, recognising that the Australian Human Rights Commission is currently conducting a separate inquiry into the treatment of people smuggling crew claiming to be minors.

The Crimes Amendment (Fairness for Minors) Bill 2011 seeks to amend the *Crimes Act 1914* by defining timeframes and establishing evidentiary procedures for the age determination and prosecution of non-citizens who are suspected or accused of people smuggling offences under the *Migration Act 1958*, and who claim to have been a minor (under the age of 18 years) at the time of the alleged commission of the offence.

The Commonwealth recommends that the amendments proposed in the Bill are not adopted. While the overall purpose of the Bill is to ensure the timely age determination and arrest of non-citizens accused of people smuggling offences, the amendments proposed in the Bill do not achieve this objective.

This submission sets out the Commonwealth's current legislative and policy framework for the age determination and prosecution of persons who are suspected or accused of people smuggling offences, who claim to be minors. It also outlines the Commonwealth's concerns with the text of the Explanatory Memorandum, and the specific items in the Bill's Schedule.

The Commonwealth's key concerns are that the proposed timeframes in the Bill for age determination and arrest, and the proposed presumption of age, are impractical and, in some cases, impossible to comply with without undermining the ability of the AFP to effectively investigate people smuggling offences.

The Commonwealth also strongly objects to the proposal to remove wrist X-rays as a prescribed procedure for age determination under the *Crimes Regulations 1990*, and to prevent any X-ray procedures from being reintroduced. Given the ramifications of age determination outcomes for individuals, and the large number of cases to date which have not proceeded on the basis of a wrist X-ray indicating that the suspect is a minor, the Commonwealth considers that concerns over the reliability of X-ray technology are outweighed by the need for all available evidence to be presented to the court.

The Commonwealth has in place a robust system of gathering evidence of a person's age from a range of sources. However, age determination is an inexact science, irrespective of the method used. As such, the Commonwealth is continuing to develop measures to improve and streamline the processes for age determination and arrest. The Commonwealth welcomes input from stakeholders on how to improve the current system, and thanks the Committee for the opportunity to make a submission on the Bill.

1. LEGISLATIVE, POLICY AND OPERATIONAL FRAMEWORK

1.1 People smuggling offences

Australia's domestic legislative framework criminalising people smuggling is set out in the *Migration Act 1958* for ventures entering Australia, and the *Criminal Code Act 1995* for ventures entering foreign countries, whether or not via Australia.

There are three relevant people smuggling offences for the purposes of age assessment in Australia:

- a primary offence of organising or facilitating the irregular entry to Australia of a non-citizen¹
- an aggravated people smuggling offence involving exploitation or danger of death or serious harm,² and
- an aggravated people smuggling offence involving smuggling five or more persons.³

The offences and maximum penalties are harmonised in both Acts. Mandatory minimum penalties also apply to persons convicted of either of the aggravated offences under the Migration Act. However, where the court determines on the balance of probabilities that the accused was a minor when the offence was committed, the mandatory minimum penalties do not apply.⁴ No one currently serving a sentence for a people smuggling offence has been determined by a court to be a minor.

1.2 Age determination in the criminal justice context

This submission refers to the processes of age 'assessment' and age 'determination', and it is useful to make the distinction between the two. An age assessment is undertaken by an agency for the purpose of making decisions about the person's treatment as they progress through immigration and investigation processes. However, such assessments are not conclusive. Age determinations are made by the court on the basis of all available evidence, including age assessments by agencies, and are determinative of age. Age determination procedures are those which are undertaken by agencies for the purpose of presenting evidence to the court.

¹ Section 73.1 of the Criminal Code; section 233A of the Migration Act (maximum penalty: imprisonment for 10 years, a \$110,000 fine, or both).

² Section 73.2 of the Criminal Code; section 233B of the Migration Act (maximum penalty: imprisonment for 20 years, a \$220,000 fine, or both. Offences under the Migration Act also carry a mandatory minimum penalty of eight years' imprisonment applies, with a five year non-parole period).

³ Section 73.3 of the Criminal Code; section 233C of the Migration Act (maximum penalty: imprisonment for 20 years, a \$220,000 fine, or both. Offences under the Migration Act also carry a mandatory minimum penalty of five years' imprisonment, and a three year non-parole period for first time offenders).

⁴Section 236B(2) of the Migration Act.

1.2.1 Prescribed procedures for age determination

Division 4A of Part IAA of the Crimes Act, enacted by the *Crimes Amendment (Age Determination) Act 2001*, sets out the process for prescribing age determination procedures under the *Crimes Regulations 1990*. Wrist X-rays were prescribed in the Crimes Regulations in 2001,⁵ and are currently the only prescribed age determination procedure.

In practice, investigating officials use a suite of methods to assess a suspect's age, including offering voluntary dental X-rays, voluntary interviews, and obtaining documents from the person's country of origin (such as birth certificates, school records and statements from relatives). These measures are used in addition to wrist X-rays, and were implemented in mid-2011 following their announcement by the Government on 8 July 2011.⁶ The Commonwealth is continuing to consider further ways to improve the age determination process, including the option of adding dental X-rays as a prescribed procedure in the Crimes Regulations.

In accordance with the Crimes Act, prescribed procedures may be undertaken by investigating officials with the person's consent and the consent of a parent, guardian, or independent adult, or by court order.⁷ An investigating official may only arrange for the carrying out of a prescribed procedure where the person is suspected of a serious Commonwealth offence, and it is necessary to establish the age of the person for criminal justice purposes, such as determining the applicable investigatory safeguards, the appropriate court and detention facilities, and whether any mandatory minimum penalties apply.

During the investigation and prosecution stages, if a person's age is in dispute and there is insufficient evidence to establish that the person is an adult, the person is given the benefit of the doubt about their age and treated as a minor. This approach reflects comments by the Committee on the Rights of the Child,⁸ as well as a recommendation made by the Senate Legal and Constitutional Affairs Legislation Committee in its inquiry into the Crimes Amendment (Age Determination) Bill 2001,⁹ that persons who claim to be minors and whose age cannot be established, should be given the benefit of the doubt.

1.2.2 Operational stages of investigating a person's age

When a crew member arrives on Christmas Island and claims to be a minor, the Department of Immigration and Citizenship (DIAC) assesses the person's age and, if it assesses the person as a minor and no exceptional circumstances apply, the person is removed to their country of origin. In many cases, this process of removal can take some time, as DIAC must find an adult (parent or guardian) to accept responsibility for the minor or arrange appropriate institutional care in their country of origin, and arrange for the person to be accompanied during their travel.

⁵Regulation 6C of the Crimes Regulations.

⁶ Media release by former Attorney-General and former Minister for Home Affairs and Justice dated 8 July 2011, '*Improved process for age determination in people smuggling matters*', viewed 23 January 2012, <http://pandora.nla.gov.au/pan/21248/20110723-0001/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2011_ThirdQuarter_8July2011-Improvedprocessforagedeterminationinpeoplesmugglingmatters.html>.

⁷Section 3ZQB of the Crimes Act sets out the circumstances in which investigating officials may carry out a prescribed procedure, and the requisite conditions to be satisfied before a magistrate can make an order on application by an investigating official. The consent requirements are set out in sections 3ZQC-3ZQD of the Crimes Act.

⁸ Committee on the Rights of the Child, *General Comment No. 6* (2005), 1 September 2005, 31(i).

⁹Senate Legal and Constitutional Committee Report, *Inquiry into the Crimes Amendment (Age Determination) Bill 2001*, March 2001, paragraph 4.9 and Recommendation 8.

If DIAC forms the view that the person is an adult, the person is referred to the Australian Federal Police (AFP), which considers whether to commence a criminal investigation. If the person makes an application to DIAC to be removed to their country of origin, it is necessary for the AFP to seek a criminal justice stay certificate to prevent their removal in accordance with the Migration Act. While this certificate is in force DIAC will not remove the crew member, thus allowing time for the AFP to conduct its investigation. In cases where the person disputes DIAC's age assessment, the AFP may also commence an investigation to gather evidence of the person's age.

Once the AFP has obtained consent, or a court order, to carry out a wrist X-ray, the AFP makes arrangements with DIAC to have the person transported to an appropriate location where wrist X-rays are carried out by a qualified radiographer, and interpreted by a radiologist who writes a report. If the X-ray report indicates the person is a minor, they are removed to their country of origin as soon as practicable unless exceptional circumstances apply. If the X-ray indicates that the person has reached skeletal maturity, the AFP obtains a further report from an expert radiologist, whose opinion forms part of the brief of evidence about the person's age.

As the investigation progresses, the AFP continues to gather evidence of the person's age through other channels, including interviewing the person and seeking documents from the person's country of origin. Where the origin of the suspected irregular entry vessel (SIEV) is Indonesia, the AFP seeks the assistance of the Indonesian National Police (INP) to conduct inquiries in Indonesia and obtain relevant certified material, such as birth certificates, school records, and statements from family members. As SIEV crew typically come from remote villages in Indonesia, it often takes a considerable amount of time for the INP to travel to these locations to seek documents and the necessary statements. Accordingly, the INP may be in a position to provide assistance within two weeks. However, this is subject to competing operational priorities and may take much longer.¹⁰

If the AFP makes an assessment on the available evidence that the person is likely to be an adult, and there is sufficient evidence that the person facilitated bringing non-citizens to Australia without a visa in effect, the AFP arrests and charges the person and a prosecution commences. A chart of the AFP age assessment process following a referral by DIAC is at **Attachment A**.

1.3 Prosecution of minors charged with people smuggling offences

Decisions to prosecute are made by the Commonwealth Director of Public Prosecutions (CDPP), independently of government. The *Prosecution Policy of the Commonwealth*¹¹ (Prosecution Policy) provides guidance on the prosecution of minors. In particular, the prosecution of a minor should always be 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.

¹⁰ The process of making police-to-police and mutual legal assistance requests for assistance to foreign countries is discussed below at 1.3.1(c).

¹¹ Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process*, viewed 23 January 2012, <<http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>>.

In accordance with the Prosecution Policy, minors are only prosecuted for people smuggling offences in exceptional circumstances on the basis of their significant involvement in a people smuggling venture or their involvement in multiple ventures. Other circumstances could include situations where the person is alleged to have been involved in a serious incident onboard the SIEV, such as death, sexual assault or an incident involving serious harm. In the absence of exceptional circumstances, and provided the person has not sought to engage Australia's protection obligations, if a person is assessed by an agency or determined by a court to be a minor, the person is returned by DIAC to their country of origin without charge.

While a wrist X-ray that indicates the person is a minor results in the discontinuance of criminal proceedings (other than in exceptional circumstances), a wrist X-ray that indicates the person is an adult is not determinative. The CDPP only proceeds with a prosecution against a person who claims to be a minor, where the wrist X-ray indicates full skeletal maturity and where there is other probative evidence to support the position that the person was an adult at the time of the offending. The AFP and CDPP do not proceed on the basis of wrist X-ray evidence alone. If the accused continues to raise age as an issue after being charged, an age determination hearing is scheduled and the court makes a determination on the balance of probabilities about whether the person is a minor.

In determining whether a person is a minor in a people smuggling criminal proceeding, there has been some lack of consistency as to which party, if any, bears the onus of proof. The current position is that courts have generally attributed the onus of proof to the prosecution. However, this issue has been dealt with inconsistently by the courts.¹² To create consistency between the courts in each jurisdiction, the Commonwealth is considering possible amendments to the Migration Act to expressly provide that, where a defendant raises the issue of age during proceedings, the prosecution bears the legal burden to establish the defendant was an adult at the time the offence was committed.

In the period 1 September 2008 to 27 January 2012, 208 people smuggling crew claimed to be minors. Of these, 123 had wrist X-rays undertaken. These wrist X-rays indicated that 86 persons were skeletally mature, of which:

1. six did not proceed to prosecution
2. eight are currently before court (not all of whom are claiming to be minors)
3. 44 had their prosecutions discontinued
4. 25 were convicted, and
5. three were found not guilty.

In the same period, 118 people smuggling crew have been returned to their country of origin because they were assessed to be a minor, were given the benefit of the doubt by law enforcement authorities, or were found by a court to be a minor. Of these, 37 people were assessed as minors on the basis of their wrist X-ray results.

No one currently serving a sentence for a people smuggling offence has been determined by a court to be a minor. As at 27 January 2012, there were six people before the courts on people smuggling charges who were actively claiming to be minors. Consideration of these claims

¹² For example, see *R v Rayan Abdul* [2011]WADC 95 in which the court held that the onus of establishing age rested on the defendant.

by the courts is at various stages.

1.3.1 Operational stages of investigation: people smuggling offences

The brief of evidence for a people smuggling offence includes evidence taken from every stage of agency contact with the person, from detection and interception through to prosecution. The sections below set out the operational stages of evidence gathering, prior to laying charges for a people smuggling offence.

a) Detection and interception

The detection and interception stage occurs before the person is taken into immigration detention, and is handled by either the Australian Customs and Border Protection Service (Customs) or the Royal Australian Navy (Navy), as they are most often the agencies responsible for intercepting SIEVs and taking vessels and passengers into their custody. Interception often occurs in very remote locations, and the logistics of transporting the passengers and the SIEV to Christmas Island can be a time consuming and complicated process, sometimes requiring people to be transferred and transported by several vessels. This process is also heavily impacted by weather conditions.

To obtain the best evidence possible, Customs and Navy personnel involved in a SIEV interception make every effort to complete nominal rolls of all persons onboard the vessel, collect and secure items of evidentiary significance, and identify passengers and crew, immediately after the interception occurs. However, this is often extremely difficult to achieve when SIEVs are intercepted in the vicinity of Christmas Island. The weather conditions and associated safety issues in this environment mean it is often necessary to move the passengers and crew of the SIEV ashore as quickly as possible. Accordingly, often only basic inquiries can be undertaken prior to arriving at Christmas Island.

All evidence gathering and record keeping conducted by Navy and Customs personnel is captured in statements, compliant with jurisdictional court requirements, and duly sworn and attested to. To satisfy continuity requirements, care is taken to record all movement or exchange of items of evidentiary significance, so that the integrity of any evidence is not compromised. Proof of continuity is an essential requirement, and enables the prosecution to prove beyond reasonable doubt that evidence located onboard a SIEV, such as a passenger's diary, is the same evidence exhibited in court.

It is Navy policy that all statements prepared by Navy personnel are delivered to the AFP via Northern Command in Darwin, where they are processed. There are often delays in obtaining records and statements from personnel involved in intercepting a SIEV, as facilities onboard Customs and Navy ships for the preparation of documents are limited, and personnel are frequently delayed from returning to shore by competing operational requirements. As such, while the detection and interception phase generally takes approximately 10 days, collecting the evidence that is produced during this phase can take significantly longer.

b) Initial processing

When the SIEV and its passengers arrive at Christmas Island, a transfer process takes place between those who intercepted the SIEV and Serco, a private company outsourced by DIAC

to operate Australia's immigration detention facilities. This process is documented carefully to maintain continuity.

Receiving passengers at Christmas Island involves processes similar to any passenger arrival in Australia. Passengers and crew of the SIEV are first processed by Customs and the Australian Quarantine and Inspection Service. This can be a lengthy process where no-one onboard the SIEV possesses any documentation. Once this process is complete, DIAC conducts intelligence-gathering and age assessment interviews, and collects biometric data from each person. If DIAC does not consider a crew member to be a minor, the person is referred to the AFP to commence a criminal investigation.

The average timeframe for processing upon arrival at Christmas Island is two days. However, this is heavily influenced by the number of SIEV arrivals at any one time and the number of passengers onboard.

c) Investigation and preparing a brief of evidence

Once Serco has custody of the SIEV and its passengers, and DIAC has made a referral to the AFP, the AFP executes a search warrant upon Serco to obtain all the evidentiary material secured on interception. The AFP ensures this process is properly documented and that it complies with the normal legislative requirements for the execution of search warrants.

Investigating officials rely heavily upon translators and interpreters, who are also utilised by other agencies on Christmas Island. While agencies can often anticipate the languages spoken by passengers and crew, this is not always the case and delays may occur in the investigation process if an interpreter is required for a language other than those catered for by existing interpreters.

A SIEV generally has approximately 50 to 100 passengers onboard. The AFP assesses information provided by passengers on the SIEV to determine who may be able to identify crew members and particularise the nature of each people smuggling offence. The most commonly prosecuted offence is the aggravated people smuggling offence of smuggling five or more persons. Where a person is being investigated for this offence, the AFP requires at least five witness statements from passengers about the person's role in facilitating the venture.

The AFP makes arrangements with Serco to escort witnesses in immigration detention to the location where statements are obtained or interviews conducted. This process involves booking an escort, a location for the interview and the services of an interpreter. In the case of Indonesian nationals, it is also a consular requirement that a legal advisor is notified to attend any interview. The statement and interview process must also be conducted at times of the days suitable to the detention centre.

Investigating officials are required by law to conduct a line up for the purpose of having the witness identify the suspect. Because it would be unfair to the suspect to conduct a line up on Christmas Island, where there are insufficient numbers of similar looking people to participate, a photo board is prepared instead. The AFP relies on NSW Police to create photo boards for this purpose, as they are the only police force with a sufficient database of images to make the process fair to the suspects. Once the photo board is created and supplied, the AFP obtains a witness statement. The identification process is recorded, and witness statements reflect and attest to the process.

Often, items of evidence require interrogation and analysis. For example, mobile phones and GPS equipment are analysed by an expert, and in some cases forensic examination is necessary. Experts and forensic analysis tools are not generally available on Christmas Island, and items of evidence have to be moved to another location for examination. Often there are delays in conveying the materials off Christmas Island and having the analysis conducted, as these services are in great demand. The process of analysis itself can be lengthy.

Sometimes evidence needs to be sought from overseas. This can be done either through police-to-police cooperation or through a formal mutual assistance request to another country. Mutual assistance requests are made by the Attorney-General or her delegate on behalf of operational agencies. This process is governed by the *Mutual Assistance in Criminal Matters Act 1987*. A formal mutual assistance request is required where evidence is needed in an admissible form, or where the foreign country requires a formal request to provide the assistance sought. The *Foreign Evidence Act 1994* provides a mechanism for adducing material received from a foreign country in response to a mutual assistance request.

The AFP works with foreign law enforcement agencies through its international network on a police-to-police basis to provide preliminary assistance with the execution of mutual assistance requests (where required), and obtain and verify documents, such as birth certificates and school records.

Even where a mutual assistance request is urgent and prioritised, it can take several months or years to receive material sought. Police-to-police cooperation is generally faster, and the Indonesian National Police (INP) is sometimes able to provide assistance within two weeks of a request for assistance. However, this timeframe is subject to competing operational priorities, and environmental factors such as road and telecommunications infrastructure, record-keeping practices and geography. Accordingly, a response may take much longer. To manage the risk of delays, the AFP seeks documentation as soon as it becomes aware that a people smuggling crew member claims to be a minor, and cooperates closely with the INP prioritise requests for assistance.

Despite the numerous factors that can cause delay, the AFP has, after considerable effort, reduced the time it takes to investigate and prepare a brief of evidence to approximately 90 days from the point of interception.

d) Charge and prosecution

One week prior to charge, the AFP notifies the relevant police and corrections authorities of the State or Territory in which the person will be charged. Arrangements are then made to transport the person to the relevant jurisdiction. The timeframes for charging a person may be impacted by the number of crew to be transported, and the availability of beds in the jurisdiction's remand facilities. The AFP seeks to ensure that a completed brief of evidence is available to the CDPP prior to charge.¹³

The process between when the brief is finalised and when the suspect is charged before the court takes approximately two weeks. After the suspect is charged the court dictates the progress of the matter. That is, the AFP has no control over the process or associated

¹³ State and Territory correctional authorities generally hold remandees on the basis of the date of birth listed on the lawful warrant issued at the time of charge.

timeframes. Accelerated timeframes may apply because the defendant is in custody but even the most efficient court will be curtailed by timetabling and availability. A matter conducted relatively quickly is likely to progress from charge to trial in approximately six months.

1.4 Legal aid

Following the High Court's decision in *Dietrich v The Queen*,¹⁴ the Commonwealth must provide legal representation for people charged with serious Commonwealth criminal offences, in order to avoid the risk of prosecutions being stayed indefinitely. Legal aid funded lawyers are responsible for providing legal advice and representing people smuggling crew in court. This includes providing advice, both prior to charge and during the prosecution, on whether to raise age as an issue and the most appropriate way to do so. It is also the responsibility of legal aid funded lawyers to interrogate the evidence led by the CDPD and challenge it where appropriate.

1.5 Detention of persons claiming to be minors who are suspected of people smuggling offences

The appropriate management and safety of detainees, prisoners and remandees is a priority for all Australian authorities, and the Commonwealth is responsible for ensuring Australia meets its international legal obligations towards children.

Under the *Convention on the Rights of the Child* (CRC), the best interests of the child must be a primary consideration in every decision that affects minors, including persons in detention.¹⁵ To determine what is in the best interests of the child, the Committee on the Rights of the Child has indicated that authorities must conduct a clear and comprehensive assessment of the child's identity, including nationality, upbringing, ethnic, cultural and linguistic background, particularly vulnerabilities and protection needs.¹⁶

The CRC contains several requirements for the treatment of children in detention, which complement the 'best interests of the child' principle. In particular, article 37 of the CRC requires authorities to separate children in detention from adults, unless it is considered in the child's best interest not to do so. The International Covenant on Civil and Political Rights (ICCPR) also contains separation requirements in paragraphs 2(b) and 3 of article 10. The Australian Government, upon ratification of the CRC and ICCPR, made reservations to the effect that Australia accepts the obligation to separate minors from adults, only to the extent that such separation is considered by the responsible authorities to be feasible and beneficial to the minors or adults concerned.¹⁷

The Commonwealth aims to ensure that age determination of a person is made at the earliest possible stage. In conformity with the views of the Committee for the Rights of the Child, Australian authorities take into account a range of considerations for borderline cases, including a person's claim about age, the physical appearance of the individual, as well as his

¹⁴ *Dietrich v The Queen* (1992) 177 CLR 292.

¹⁵ Article 3(1) of the CRC.

¹⁶ Committee on the Rights of the Child, *General Comment No. 6* (2005), 1 September 2005, 20.

¹⁷ Reservation made by Australia on Article 10(2)(b) of the ICCPR can be found at the United Nations Treaty Collection: <http://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#EndDec>. Reservation made by Australia on Article 37(c) of the CRC can be found at the United Nations Treaty Collection: <http://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=IV-11&chapter=4&lang=en#EndDec>.

or her psychological maturity. In the event of remaining uncertainty about the person's age, the individual is given the benefit of the doubt that he or she is in fact a minor.¹⁸

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

While people smuggling crew may apply to the court for bail, they are typically remanded into the custody of the relevant State or Territory correctional authorities. State and Territory correctional authorities generally hold remandees on the basis of the date of birth listed on the lawful warrant issued at the time of arrest.

The CDPP generally does not oppose applications for bail made by people smuggling defendants who claim to have been a minor at the time of the offence. Where bail is granted, the person is returned to immigration detention to be housed in an appropriate facility for minors.

Throughout interviews and other formal processes, Life Without Barriers, the contracted service provider of independent observer services on Christmas Island and mainland Australia, provides pastoral or physical support to minors (or persons who claim to be minors), and aims to ensure the treatment of individuals during formal processes in immigration detention is fair, appropriate and reasonable.

1.6 Age determination frameworks in like-minded countries

Age determination processes and procedures are conducted in a number of countries facing similar challenges to Australia in both immigration and criminal justice contexts.

It is particularly useful to consider the age determination frameworks in like-minded countries. Accordingly, discussion of the current frameworks in the United Kingdom (UK) and the United States of America (US) is also set out below. A broader summary of age determination procedures in a selected group of countries (for which information is available) is set out at **Attachment B**, noting that these are procedures that may be undertaken in those countries but are not necessarily prescribed by law.

1.6.1 United Kingdom

The UK does not have a statutory framework to assess the age of persons who claim to be minors.¹⁹ While UK immigration and welfare agencies, courts and investigative bodies have

¹⁸ Committee on the Rights of the Child, *General Comment No. 6* (2005), 1 September 2005, 31(i).

¹⁹ The absence of a well-established process to determine the age of unaccompanied asylum seeking children is discussed at length in A Kvittingen (Oxford University Refugee Studies Centre Working Paper Series No. 67), *Negotiating childhood: Age assessment in the UK asylum system*, November 2010, viewed 30 January 2012, <http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper67.pdf>, and is noted consistently in case law, for example, *R, R (on the application of) v London Borough of Croydon* [2011] EWHC 1473 (Admin) (14 June 2011) at [14-17].

statutory powers to assess age, there is no prescribed methodology.²⁰ Age determination procedures throughout the UK are based on a combination of policies produced by the UK Home Office, policies and practices of local authorities, and judicial guidance.²¹

The UK has adopted a holistic approach to age assessment. While the UK Home Office occasionally used X-rays in the 1970s and early 1980s to help determine age, the practice was discontinued because it seemed at the time that, while posing negligible health risks, they offered limited extra value over other age assessment techniques.²² However, following increased pressures on immigration and support systems, and in consideration of wider European Union practice and research indicating that X-ray analysis may be more reliable than previously thought, the issue was re-examined by the UK Government in public consultations throughout 2007 and 2008.²³ The UK Border Agency (UKBA), which processes unlawful non-citizen arrivals in the UK, published guidelines in August 2011 that do not impose obligations on authorities to conduct X-ray examinations. However, they do permit authorities to consider such evidence if submitted by a person disputing an age assessment by the UKBA or a local authority.²⁴

UKBA policy is to conduct an initial age assessment on all unlawful non-citizen arrivals who claim to be minors, where there is little or no evidence of their claim and their claim is doubted. UKBA officers are instructed to treat the person as an adult if their 'physical appearance and demeanour very strongly suggests that they are significantly over 18 years of age'.²⁵ All other persons are to be afforded the benefit of the doubt and treated as minors.²⁶

²⁰The following UK legislative provisions give power to the courts to inquire about the person's age and make a determination on the available evidence, but do not contain guidance about the nature of the inquiry: section 164(1) of the *Powers of Criminal Courts (Sentencing) Act 2000*; section 305(2) of the *Criminal Justice Act 2003*; section 99(2) of the *Criminal Justice Act 1991*; section 150(4) of the *Magistrates' Courts Act 1980*; s94(7) of the *Immigration and Asylum Act 1999*.

²¹The UK High Court of Justice has provided guidance on appropriate age assessment methodologies in respect of persons seeking asylum, and persons charged with immigration offences, in the absence of a statutory framework for age assessment. See for example, *B, R (on the application of) v London Borough of Merton* [2003] EWHC 1689 (Admin) (14 July 2003); *A, R v Croydon (Rev 1)* [2009] UKSC 8 (26 November 2009); *Croydon*, 2011; *KN, R (on the application of) v London Borough of Barnet* [2011] EWHC 2019 (Admin) (29 July 2011).

²²See UK Home Office, *Planning better outcomes and support for unaccompanied asylum seeking children*, February 2007, viewed 27 January 2012, <<http://www.cfab.uk.net/resources/documents/PlanningBetterOutcomesConsultation.pdf>>; and UK Parliament Hansard, HC Deb 22 February 1982 vol 18 cc279-80W, in which the Secretary of State for the Home Department stated that the Chief Medical Officer had advised that 'although the risk from bone X-ray examinations remains negligible, they are unlikely to provide more accurate evidence of age than the assessment of other physical characteristics of an individual. ... [and] their continued use in the immigration context can no longer be justified', viewed 30 January 2012, <http://hansard.millbanksystems.com/written_answers/1982/feb/22/immigrants-x-ray-examinations>.

²³UK Home Office, 2007; UK Home Office, *Better outcomes: the way forward improving the care of unaccompanied asylum seeking children*, January 2008, viewed 27 January 2012, <<http://dera.ioe.ac.uk/228/1/4416-8866.pdf>>.

²⁴This is comparable with the practice in Australia of offering voluntary dental X-rays; while authorities are not able to compel a person to undergo a dental X-ray, it is not illegal to take it with the person's consent and submit it as evidence in court.

²⁵UKBA, *Assessing Age*, August 2011, viewed 28 January 2012, <<http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/assessing-age?view=Binary>>. According to UKBA, *Change age of applicant or dependant*, 17 November 2011, viewed 28 January 2012, <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/asylum-support/section-95/change-of-age-or-dependant.pdf?view=Binary>>, the *Assessing Age* instruction was introduced in August 2011 to replace the previous asylum instruction, Policy Bulletin 33 *Age Disputes*, which is referred to in some earlier case-law.

²⁶The 'benefit of the doubt' approach is designed to reflect the statutory duty contained in section 55 of the *Borders, Citizenship and Immigration Act 2009*, which creates obligations on officials to safeguard and promote the welfare of children who are in the UK. See also UKBA, *Assessing Age*, 2011 at [2.2].

Local authorities throughout the UK also conduct age assessments, in order to determine eligibility for services under the *Children Act 1989*.²⁷ While there is no prescribed way in which local authority assessments must be carried out, the courts have provided general guidance. The leading case is *B, R (on the application of) v London Borough of Merton*,²⁸ in which the UK High Court set out basic requirements for the assessment of individuals claiming to be minors, including procedural fairness requirements. The court also held that local authorities cannot determine age solely on the basis of the applicant's appearance, except in clear cases, and the decision maker must seek to elicit the applicant's general background, including family circumstances and cultural information. If there is reason to doubt the applicant's claimed age, the decision-maker must assess the applicant's credibility, and local authorities must not apply a presumption of age prior to making an age assessment.²⁹

Persons come to the attention of local authorities in a number of ways. For example, a person may be referred to a local authority by UKBA after being initially assessed as a minor, while others may approach local authorities independently, either before or after an UKBA initial age assessment. The UKBA is able to accept local authority age assessments as evidence of age.³⁰

In addition to interviews conducted by social workers, a range of other evidence of the person's age may be considered by local authorities and by the UKBA. This evidence includes travel and identity documents, birth certificates, visa applications and biometric data, paediatrician reports and dental age assessments and X-ray reports. The UKBA recommends that care is taken in considering all of these sources of evidence. For example, documents may have been obtained improperly, and paediatrician reports and dental and X-ray reports have a margin of error.³¹

There are several 'facilitation' offences under the UK *Immigration Act 1971*, including an offence for facilitating entry by asylum seekers to the UK for gain.³² Where the defendant in a criminal proceeding appears to be a minor, or claims to be a minor, the court is required to inquire into their age, and the age presumed or declared by the court is deemed to be their

²⁷See UKBA, *Assessing Age*, at [5]. Local authorities provide accommodation and other support to minors, and conduct age assessments of persons involved in criminal proceedings, asylum seekers and other persons eligible for services under the *Children Act*.

²⁸*Merton*, 2003.

²⁹*Ibid* at [38].

³⁰UKBA, *Assessing Age*, at [5.2].

³¹*Ibid* at [6].

³²The facilitation offences under the *Immigration Act (UK)* are as follows: assisting unlawful immigration to an EU member state (s25), facilitating entry by asylum seekers to the UK for gain (section 25A), and assisting entry to the UK in breach of a deportation or exclusion order (section 25B). The offence under section 25A(1) is comparable with Australia's people smuggling offences. Under section 25A(1), it is an offence if a person knowingly and for gain facilitates the arrival in or the entry into the UK of an individual, and knows or has reasonable cause to believe that the individual is an asylum seeker. The offence may be tried on indictment and carries a maximum penalty of 14 years imprisonment and/or an unlimited fine. There is no minimum penalty or time limit for prosecution. Police and immigration officers can arrest for this offence, and prosecutions are conducted by the Crown Prosecution Service (CPS). See CPS, *Human Trafficking and Smuggling*, viewed 30 January 2012, <http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/>; UKBA, *Enforcement Instructions and Guidance*, Chapter 10, viewed 30 January 2012, <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsectiona/chapter10?view=Binary>>.

true age. The statutory provisions for sentencing also require that a defendant's age is deemed to be that which the court determines after considering any available evidence.³³

UKBA age assessments inform the decision to refer a case to the Crown Prosecution Service for prosecution.³⁴ However, any decision about age in criminal proceedings must be based on more than simply the person's physical appearance and demeanour.³⁵ In making an age determination, the court may consider UKBA and local authority age assessments.³⁶ However, as in Australia, the probative value for all evidence is a matter for the courts. While evidence from dental examinations and bone X-rays is admissible in the UK, courts have indicated such evidence should not be considered strongly persuasive of establishing a claimant's age.³⁷ Similarly, recent case-law indicates that paediatric evidence must not be given more weight than *Merton* compliant age assessments,³⁸ and documentary evidence does not carry a presumption of authenticity.³⁹

The legislative provisions requiring courts to determine age do not indicate which party bears the onus of proof. Recent cases indicate that in civil proceedings, the court makes an age determination after assessing the available evidence. If a decision cannot be made on that basis, the person seeking to establish his or her age bears the onus of proof.⁴⁰ However, this rule is not settled,⁴¹ and it is unclear whether the burden of proof generally applied in the civil context also applies to prosecuting immigration offences in the criminal context.⁴²

1.6.2 United States of America

The age determination process in the US is regulated by a legislative and policy framework, and there is prescribed methodology that agencies must use in the age determination process. The framework is similar to the current arrangements in Australia.

The Department of Homeland Security's Immigration and Customs Enforcement (ICE)

³³See section 164(1) of the *Powers of Criminal Courts (Sentencing) Act 2000*; section 305(2) of the *Criminal Justice Act 2003*; section 99(2) of the *Criminal Justice Act 1991*; section 150(4) of the *Magistrates' Courts Act 1980*; s94(7) of the *Immigration and Asylum Act 1999*.

³⁴The nexus between the age determination processes in the immigration and criminal justice contexts is discussed in *HBH, R (on the application of) v The Secretary of State for the Home Department & Anor* [2009] EWHC 928 (Admin) (06 May 2009), wherein Keith J noted that age assessments made for immigration purposes generally informs the decision to prosecute: 'The emphasis is on establishing at the outset whether someone who arrives in the UK is an adult or not. If they are not, they are unlikely to be prosecuted' [41-46]. Similarly, an age assessment made by DIAC upon arrival informs whether a case is referred for investigation and prosecution.

³⁵*HBH*, 2009 at [45-46].

³⁶See CPS legal guidance 'Human Trafficking and Smuggling' (retrieved on 30 January 2012 from <http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/>), and UKBA Enforcement Instructions and Guidance, Chapter 10. Retrieved on 30 January 2012 from <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsectiona/chapter10?view=Binary>>.

³⁷For example, dental X-ray evidence was considered by the Court in *Barnett*, 2011; *A, R (on the application of) v Liverpool City Council* [2007] EWHC 1477 (Admin) (26 June 2007).

³⁸See *R(A) and (WK) v LB Croydon and Kent CC* [2009] EWHC 939 (Admin); *Croydon*, 2011.

³⁹*R (CJ) v Cardiff CC* [2011] EWHC 23 (Admin) at [113].

⁴⁰See for example, *Barnett*, 2011; *Croydon*, 2011; *R(Y) v LB Hillingdon* [2011] EWHC 1477.

⁴¹See *R (CJ) v Cardiff CC* [2011] EWCA Civ 1590, handed down on 20 December 2011, wherein the Court of Appeal held that neither party bore the onus of proving the person's age. However, this case was strictly limited to decisions under the Children Act, and the Court emphasised that 'whether a burden of proof should be applied at all and, if so, where it should rest, will depend upon the terms of the statute conferring the power to act'.

⁴²The relevant case-law on age determination in the criminal context refers to civil cases such as *Merton*, and the court in *HBH* noted that the *Merton* case was not context specific and may apply in the criminal context. However, the CPS indicates that where the issue of age is unclear, defendants should be given the benefit of the doubt in accordance with the CRC.

enforces US immigration law. Where ICE apprehends unaccompanied unlawful non-citizens⁴³ under the age of 18 years, they must be transferred into the custody of the Department of Health and Human Services Office of Refugee Resettlement (ORR) to await deportation or transfer to a legal guardian in the United States for asylum processing or criminal prosecution.⁴⁴

The need to verify a detained individual's age can arise at any point between apprehension, and release from custody or conviction. Accordingly, both the ICE and the ORR may be required to conduct an age assessment of a person not readily identifiable as an adult or a minor. The age determination process is governed by the following arrangements:

1. The *Flores Settlement Agreement* (1997)⁴⁵ between the Department of Justice and a coalition of immigrants' rights groups establishes guidance on the treatment of minors in the custody of immigration officials, including a requirement that minors be detained separately from unrelated adults. While the agreement does not describe exact procedures for establishing age, it instructs that if a 'reasonable person' would conclude that an unlawful non-citizen detained by immigration officials is an adult, despite their claim to be a minor, the individual shall be treated as an adult. The agreement also provides that immigration officials may require an unlawful non-citizen to submit to a medical or dental examination conducted by a medical professional, or to other appropriate procedures, to verify his or her age.
2. The *William Wilberforce Trafficking Victims Protection and Reauthorization Act of 2008*, effective 23 March 2009, requires the Department of Health and Human Services to develop procedures for making a 'prompt determination of the age of an alien' in consultation with the Department of Homeland Security. While the Act did not specify which methods to use in the age determination process, it established a minimum requirement that the government's procedures take into account multiple forms of evidence, including the nonexclusive use of radiographs for age determinations.⁴⁶
3. The Department of Health and Human Services issued program instructions on 15 September 2010,⁴⁷ which noted the challenges in determining the age of persons in immigration custody, including unavailable documentation, contradictory or fraudulent identity documentation and/or statements, physical appearance, and the diminished capacity of the person. The instructions also listed the types of information that must be sought by officials as evidence of age (noting it is not necessary to provide information from every category):
 - Government-issued documents such as birth certificates, and other objective documentation that indicates the person's date of birth (for example, baptismal certificates, school records and medical records).

⁴³ Note the US uses the term 'alien', however for the purpose of this submission, the term 'illegal non-citizen' is used herein.

⁴⁴ *Homeland Security Act of 2002* (Public Law 107-296) November 25, 2002.

⁴⁵ *Jenny Lisette Flores, et al. v. Janet Reno, Attorney General of the United States, et al*, Stipulation of Settlement Agreement, Case No. CV 85-4544-RJK(Px) (1997), viewed 30 January 2012, <http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf?bcsi_scan_F94AEFAC0DC62116=by5EjDgVd xMK28KWokQZgscLqDlVAAAaZaG5NA==&bcsi_scan_filename=flores_v_meese_agreement.pdf>.

⁴⁶ *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* (Public Law 110-457) (23 December 2008).

⁴⁷ Department of Health and Human Services Program Instructions dated 15 September 2010, viewed 30 January 2012, <http://www.acf.hhs.gov/programs/orr/whatsnew/ORR_Program_Instructions_on_Age_Determination_of_UAC.pdf>.

- Statements by the person, individuals determined to have personal knowledge of the person's age, the person's parent or legal guardian, and other persons.
- Information from another government agency, including from Federal, State, local or foreign governments, such as state/local arrest records and child welfare agency records.
- Medical age determination procedures, including dental examinations and bone age determinations such as hand wrist radiographs. These procedures may be used as a last resort if no other information is available. Ambiguous, debatable or borderline results will be resolved in favor of determining the person as a minor. The examining doctor must submit a written report indicating the probability percentage that the unlawful non-citizen is a minor or an adult.

As in Australia, the use of skeletal X-rays in the US has received scrutiny from medical bodies and congressional committees on the basis that the results are not reliable and could lead to individuals being inappropriately assigned to adult or minor facilities. In 2008, the House Appropriations Committee suggested that ICE employ 'holistic age-determination methodologies'.⁴⁸ In 2009, the House Committee, 'concerned that the the Department has not ceased its reliance on bone and dental forensics for child age determination', directed ICE to conduct a review of age determination practices.⁴⁹ The Department of Homeland Security and ICE conducted reviews into what might constitute a holistic approach to age determination, but neither agency was able to identify a single, authoritative definition of what might constitute such an approach.⁵⁰

Both ICE and the Department of Homeland Security have recognised the limits of radiography for age determination purposes, including biological, nutritional, racial and socioeconomic variants. However, acknowledging that radiographic exams can provide a usable age range, rather than an exact age, ICE regards radiographs as a useful age assessment tool to be used in conjunction with other assessment methods. An additional advantage noted by the Department of Homeland Security is they can be completed quickly, which assists officials to meet the time constraints in the Flores Settlement Agreement.⁵¹

1.6.3 Comparison of the Australian system with the UK and US systems

While it is important not to directly compare age assessment procedures conducted for very different civil, humanitarian and criminal justice purposes, there are several useful observations to be made from a comparison of the Australian, UK and US systems.

Firstly, in the UK, the person claiming age as an issue is required to present evidence to the UKBA and local authorities, which make age assessments on the available evidence. Without a positive obligation on authorities to establish age, or any requirement to conduct X-rays for age determination purposes, any X-ray evidence that is submitted to the UK

⁴⁸House Appropriations Committee Report 110-862, *Inappropriate Treatment of Unaccompanied Alien Children*, 2008, viewed 30 January 2012, <http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp110&sid=cp1101ICnd&refer=&r_n=hr181.110&item=&&&sel=TOC_131739&>>).

⁴⁹House Appropriations Committee Report 110-181, *Inappropriate Treatment of Children in ICE Custody*, 2009, viewed 30 January 2012, <http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp110&sid=cp110MdQpb&refer=&r_n=hr862.110&item=&&&sel=TOC_186160&>>).

⁵⁰ Office of Inspector General (Department of Homeland Security), *Age Determination Practices for Unaccompanied Alien Children in ICE Custody*, November 2009, viewed 30 January 2012, <<http://trac.syr.edu/immigration/library/P4226.pdf>>.

⁵¹ *Ibid.*

authorities or courts is brought forward by the applicant. The ongoing prevalence of dental age assessment and X-ray evidence in the UK courts suggests that, while the veracity of such evidence may be disputed, applicants relying on such evidence accept the reliability and ethical underpinnings of such techniques.

Secondly, while there is significant advocacy for a holistic approach to age assessment, research conducted by the US authorities revealed there is no one authoritative definition of such an approach. Certainly, there is no uniform method across like-minded countries. For example, the UKBA relies heavily on the person's physical appearance and demeanour in initial age assessments, while the courts in the UK have indicated a different approach. The US specifically describes the person's physical appearance as a challenge to effective age determination. Courts in Australia consider the person's physical appearance as one of several factors in the age assessment process.

Thirdly, the holistic approach to age determination in the UK does not appear to have resulted in fewer disputes about age, and the UK faces a number of challenges arising from its largely unregulated approach. These include the lack of consistency in age determinations across its jurisdictions, and concerns about preserving the integrity of the welfare and immigration systems, while acknowledging the close link between the two in the age determination context.⁵² In addition, like other forms of age assessment, *Merton* compliant assessments also have a margin of error, due to each social worker's subjective interpretation of how certain behaviour indicates chronological age.⁵³ The unique challenges faced in each jurisdiction reflect the difficulty of formulating effective age determination policy, and the careful balancing of interests required by law-makers.⁵⁴

Further, with significant incentives for persons to be assessed as minors—noting the observations by Justice Stanley Burnton in *Merton* that it would 'be naïve to assume that the applicant is unaware of the advantages of being thought to be a child'⁵⁵—the age determination debate appears to be unduly focussed on the reliability of X-ray evidence. However, as the above discussion indicates, the problem is perhaps more accurately reflected in the fact that age assessment is an inexact science, yet has significant ramifications for the individuals involved. This dichotomy poses a challenge for any country seeking to balance immigration objectives with safeguarding the needs and welfare of children.

2. SUMMARY OF PROPOSED AMENDMENTS IN THE BILL

The Bill proposes that any non-citizen taken into immigration detention who claims to be a minor and is suspected of committing a people smuggling offence under the Migration Act, must be charged for the offence within 14 days after being taken into immigration detention (item 6). The person must be presumed to be a minor based on his or her claim (item 3) and, once charged, be remanded to a 'youth justice facility' (item 5).

⁵²See Kvittingen, 2010, and UK Home Office, 2010, for further discussion on the ramifications for local authorities under the current system.

⁵³ Kvittingen, 2010, cites the example of one social worker who regards fidgeting as evidence that a person is lying about his or her age, and another social worker who considers it to be an example of youthful nervousness.

⁵⁴ In *HBH*, 2009, Keith J noted at [41], 'the formulation of policy is a gradual process. It evolves over a period of years and changes from time to time. A change in policy does not necessarily mean that the previous policy was recognised to have been unlawful'.

⁵⁵*Merton*, 2003 at [29].

To challenge the person's claim, investigating officials must apply for an order from a magistrate (who will determine the person's age on the balance of probabilities), within 30 days after the person has been taken into immigration detention (item 3). In making an order, the magistrate may consider evidence including, but not limited to, birth certificates, affidavits from family members of the person, school records and medical records (item 3).

Skeletal X-rays may not be taken by investigating officials for the purpose of age determination, nor submitted in evidence (items 1 and 2).

3. SCHEDULE

3.1 Items 1 and 2: Removal of skeletal X-rays as a prescribed procedure

Items 1 and 2 remove skeletal X-rays as a prescribed procedure for age determination under the Crimes Regulations, and prevent their re-introduction in the future. The items are underpinned by assertions, set out in the Explanatory Memorandum, that skeletal X-rays for age determination purposes are 'discredited and unethical'.

The Commonwealth does not agree with these assertions, or support the removal of X-rays as a prescribed procedure for age determination. Removing X-ray procedures would eliminate both the scientific basis for assessing age and the ability to conduct quick age assessments, potentially to the detriment of the defendant. If skeletal X-rays are removed as an age determination procedure, the AFP and CDPP will have to rely on interviews and information collected from the person's country of origin. As set out under 1.2.2, gathering evidence using these methods can be a lengthy process, and unachievable in the proposed timeframes for age determination.

3.1.1 Future prescribed procedures

The Commonwealth is committed to ensuring that all the available evidence is presented to the courts when making age determinations. In addition to introducing a suite of improved age assessment measures in mid-2011, including offering voluntary dental X-rays and interviews, the Commonwealth is also considering adding dental X-rays as a prescribed procedure in the Crimes Regulations. This would allow investigating officials to seek an order from a court to conduct a dental X-ray and subject them to the same procedural safeguards as wrist X-rays.

The proposed amendments in item 2 would prevent X-rays of any body part from being used for age determination purposes in the future. Given the serious consequences of the age determination process for individuals, it is essential that the court is able to consider all evidence available. Accordingly, the Crimes Act and Crimes Regulations need to be flexible enough to account for changing technology, including developments in X-ray age determination techniques.

3.1.2 Reliability of wrist X-rays for age determination purposes

The use of wrist X-ray analysis for age determination was originally considered by the Senate Legal and Constitutional Affairs Committee in its 2001 inquiry into the Crimes Amendment (Age Determination) Bill 2001. At that time, a representative of the Royal Australian and New Zealand College of Radiologists gave evidence in Senate Committee hearings in support of the use of wrist X-rays. After considering the Senate Committee's report recommending

wrist X-rays as a suitable procedure for determining age, subject to procedural safeguards, the Parliament enacted Division 4A of Part IAA of the Crimes Act.

Wrist X-rays are used to estimate age by indicating the rate of development of the bones in the hand and wrist. These bones initially develop as cartilage, which is not visible on X-ray. As development occurs, the cartilage progressively forms bone, which is readily visible on X-ray. A determination of skeletal age is made by comparing an X-ray of the wrist and hand to a reference atlas. The Greulich and Pyle Atlas⁵⁶ is the most commonly used reference atlas for assessing skeletal maturity. In the absence of any disease process that affects skeletal development, there is a good correlation between the degree of bone formation and the person's true chronological age. Based on expert advice the Commonwealth has sought, a wrist X-ray procedure can assist in determining whether a person is 19 years or older as male wrist skeletal maturation occurs on average at that age.

The use of wrist X-rays for age determination purposes has been criticised in the media and on the public record, on the basis that the Greulich and Pyle Atlas is not appropriate except for white male groups in the United States of America (the sample group used in the atlas studies), and that the data used to develop the atlas (collected from 1931 to 1942), is outdated.

While there is no consensus view, there are a number of studies and papers that validate the Greulich and Pyle Atlas across racial and ethnic groups.⁵⁷ The CDPP has previously received advice from an expert radiologist that a substantial body of scientific and medical opinion supports the view that there is no significant difference in skeletal development between ethnic groups and that socioeconomic factors such as malnutrition may impact on skeletal development, but only by increasing the time taken to reach skeletal maturity. On the basis of this body of opinion, socioeconomic factors would have no adverse effect on the person concerned, as it would, if anything, indicate the person is younger than they actually are. The CDPP has also been advised that the age of the Greulich and Pyle Atlas study is not considered significant because, anthropologically, the period of time since the data was compiled is insufficient to see a change in skeletal development.

The reliability of all age determination methods is subject to a margin of error. For example, the veracity of interviews and statements of relatives depends on an individual's truthfulness and memory; documents produced to establish age may be forged or inaccurate; and X-ray analysis may be affected by socioeconomic factors. As such, while wrist X-rays and other measures of age are not individually conclusive, in combination they all play a valuable role in the age determination process.

3.1.3 Ethical implications of using wrist X-rays for age determination purposes

Some medical experts and professional associations have expressed an ethical objection to the use of X-rays for age determination purposes.⁵⁸ This objection is based on the view that a

⁵⁶WW Greulich and SI Pyle, *Radiographic atlas of skeletal development of the hand and wrist*, Stanford University Press, Stanford, 1959.

⁵⁷See for example A Schmeling, W Reisinger, D Loreck, K Vendura, W Markus and G Geserick, 'Effects of ethnicity on skeletal maturation: consequences for forensic age estimations' (2000) *International Journal of Legal Medicine*, pp 253-58; R van Rijn, M Lequin Anors, 'Is the Greulich & Pyle Atlas still valid for Dutch Caucasian children today', (2001) *Pediatric Radiol* 748-752.

⁵⁸See for example R Levenson and A Sharma, (Royal College of Paediatrics and Child Health), *The Health of Refugee Children - Guidelines for Paediatricians*, 1999, viewed 23 January 2012, <http://www.rcpch.ac.uk/sites/default/files/refugee_1.pdf>.

person should only be exposed to ionising radiation from X-rays where it is medically required and not for an administrative purpose such as age determination.

The Commonwealth has received expert advice that the radiation exposure from wrist and dental X-rays is minimal. Research also indicates that there is wide acceptance in the scientific community that the dosage of radiation from a wrist X-ray poses negligible risks to a person's health. The Australian Radiation and Nuclear Safety Agency (ARPANSA) estimates that the radiation dose received from a single X-ray examination of the hand is approximately 0.01 millisievert (mSv). This dosage is comparable to flying from Darwin to Singapore and is significantly less than flying from Melbourne to London, which is about 0.07 mSv.⁵⁹ In its 2001 report, the Senate Legal and Constitutional Affairs Legislation Committee was also presented with evidence that there are minimal health risks associated with exposure to radiation from wrist X-rays. Accordingly, the Committee did not make any recommendations on the issue of radiation exposure in its report.

ARPANSA has advised that the use of wrist and dental X-rays for age determination purposes satisfy internationally accepted principles of radiation protection. This includes the principles of justification and optimisation which require that any exposure must do more good than harm overall, and be the least dose of radiation needed to achieve the necessary goal.

People smuggling crew claiming to be minors typically consent to having a wrist X-ray performed where age is disputed during an investigation. For those cases where crew members do not consent to the taking of an X-ray, it is necessary to balance the ethical issues raised by taking an involuntary X-ray, against the need to ensure the effective operation of the criminal justice system. In enacting the Crimes Amendment (Age Determination) Act, the Parliament decided that the ability of an investigating official to seek an order from a court requiring a person to undergo a prescribed procedure in these circumstances is appropriate, provided the legislative safeguards are met. These safeguards include the requirement that the X-rays are taken by qualified radiographers.

In supporting the current arrangements, the Commonwealth gives substantial weight to the impact of age determination on individuals. In many cases, being assessed as an adult can result in the application of mandatory minimum penalties under the Migration Act. Conversely, being assessed as a minor will result in the person's return to their country of origin, provided there are no exceptional circumstances that would warrant the person's prosecution. Accordingly, it is important to both the individual and the integrity of the criminal justice system for courts to be presented with the all of the available evidence of a person's age.

⁵⁹See also S Black, J Payne-James and A Aggrawal, *Age Estimation in the Living: The Practitioner's Guide*, 2010, Wiley-Blackwell, London, in which the authors state that the effective dose from an X-ray examination of the hand is 0.1 microsievert (mSv), while the radiation exposure from an intercontinental flight at an altitude of 12 000 metres is 0.008 mSv per hour. It follows, say the authors, that the dose for a flight from Frankfurt to New York is 0.05 mSv; half of the radiation dosage of an X-ray examination of a hand (p.132). UNICEF has also accepted that 'the exposure to radiation during an X-ray in relation to an age assessment is minimal', but nonetheless maintains ethical concerns around exposing children to any level of radiation: T Smith and L Brownless (UNICEF), *Age assessment practices: a literature review & annotated bibliography*, April 2011, viewed 23 January 2011, <http://www.unicef.org/protection/Age_Assessment_Practices_2010.pdf>.

In addition, wrist X-rays are beneficial not only as evidence that a person is an adult, but also as evidence that a person is a minor. This is particularly relevant, given 37 of the 118 minors returned to their country of origin since September 2008 (as 27 January 2012) were determined to be minors on the basis of wrist X-ray evidence.

In consideration of the above, the Commonwealth is of the view that the health risks associated with wrist X-rays are outweighed by the serious consequences to the individual, and the criminal justice system more broadly, of an age determination made on the basis of insufficient evidence.

3.2 Item 3: Age determination

3.2.1 Paragraph 7: Presumption of age

Paragraph 7 of item 3 of the Bill provides that for the purposes of criminal proceedings under the Migration Act (including bail, committal, trial, sentencing and appeal proceedings), a person who claims to be a minor is presumed to be a minor, unless a magistrate decides that the person was an adult at the time of the alleged offence. The presumption does not apply to a person who claims to be a minor prior to being charged.

The effect of item 3 is that a person, regardless of their physical appearance or any documentary evidence of their age, could claim to be a minor and would have to be treated as such, including being remanded to a 'youth justice facility' (see 3.4 below for discussion of this term). Investigating officials would not have any recourse to challenge the person's claim, other than to gather a brief of evidence and apply for an age determination order from a magistrate. Until the magistrate makes an order, investigating officials would be required to detain the person in the youth justice facility with other minors.

Where the person makes a late claim about age and the 30 day time limit for age determination has expired, or is about to expire and there is insufficient time to collect evidence of the person's age, there is no recourse to challenge the person's claim. It is not clear in these circumstances how the criminal proceedings would be dealt with.

The Commonwealth considers it inappropriate that the administration of justice should be affected on the basis of a person's claim alone, particularly where there are significant incentives for making the claim, such as avoiding mandatory minimum penalties. More importantly, a presumption of age creates a serious risk for other minors detained in youth justice facilities, where the person claiming to be a minor is an adult.

As discussed under 1.5 above, Australia has obligations under the CRC to consider the best interests of the child in all decisions affecting that person. The presumption of risk in item 3 effectively ignores the interests of those minors detained with a person to whom the presumption applies, where that person is falsely claiming to be a minor. To meet its obligations under the CRC, detaining authorities must balance the interests of the accused with the interests of other detainees housed in the same facilities.

Further, the proposal ignores objective considerations of the person's age, such as physical appearance and demeanour. As noted under 1.5 above, the Committee on the Rights of the Child has recommended that age assessments 'should not only take into account the physical

appearance of the individual, but also his or her psychological maturity’.⁶⁰ By creating a presumption of age based on the person’s claim alone, these important considerations cannot be taken into account by detaining authorities.

As discussed above at 1.6, the UK courts have indicated that age assessments for the purpose of prosecuting immigration offences must be made on the basis of more than simply the person’s demeanour and physical appearance.⁶¹ There also must not be any presumption of age prior to an assessment by local authorities.⁶² In the US, the Flores Settlement Agreement instructs that if a ‘reasonable person’ would conclude that an unlawful non-citizen detained by immigration officials is an adult, the individual shall be treated as an adult despite his or her claim to be a minor.

On the basis of the above, the Commonwealth does not support inserting a presumption of age into Part 1AA of the Crimes Act.

3.2.2 Reference to Migration Act offences only

Items 3 and 5 impose time limits on the laying of charges and age determination processes in respect of a person suspected of committing an offence against Subdivision A of Division 12 of Part 2 of the Migration Act.

The Commonwealth recommends that any amendments to the age determination process in the criminal justice context should be applied to all Commonwealth offences, and not limited to specific offences. This reflects the current framework in Division 4A of the Crimes Act, which sets out the age determination process for persons charged with any Commonwealth offence.

At a minimum, any amendments to people smuggling offences under Subdivision A of the Migration Act should be reflected in the Crimes Act, given the people smuggling offences in both Acts are harmonised [see 1.1 above].

3.2.3 Paragraph 8: 30-day time limit

Paragraph 8 of item 3 proposes a 30 day time limit for an investigating official to make an application to a magistrate challenging a person’s claim about age.

a) Meaning of ‘application’

It is not clear whether an ‘application’ to a magistrate in item 3 is referring to the filing of an originating application by an investigating official, the age determination hearing before a magistrate, or both.

If it is referring to both, the 30 day time limit would be particularly burdensome on courts, as well as investigating officials. Courts may not have availability to hear the applications within the prescribed time-frame, and may be forced to prioritise the applications above more urgent matters. This has serious ramifications for the integrity of the criminal justice system, and interferes with the independence of the courts in setting their own calendars and priorities.

⁶⁰Committee on the Rights of the Child, *General Comment No. 6* (2005), 1 September 2005, 11.

⁶¹In *HBH*, 2009 at [45-46], Keith J held that age assessment on physical appearance and demeanour alone was sufficient for provisional assessments by immigration officers, but not for immigration prosecution purposes.

⁶²*Merton*, 2003 at [38].

b) Operational concerns

The proposed time limit of 30 days is insufficient for investigating officials to gather a thorough brief of evidence, particularly where the collection of evidence requires travel to the person's country of origin. This time limit is even more difficult to comply with if an age determination hearing is also required within the 30 day period.

The operational stages of the age determination process are outlined above at 1.2.2. As indicated, there are many stages to the age determination process, and at each stage delays may occur that are out of the control of agencies. While agencies endeavour to reduce delays, each stage of the process is necessary to ensure the investigation is thorough, and agencies and the courts are able to consider all available evidence, noting that an investigation only proceeds where there is doubt about the person's claim to be a minor.

The proposed deadline is neither practical nor realistic, and would jeopardise the opportunity for all parties to obtain the evidence necessary to substantiate their claims.

c) False or delayed claims about age

A person in immigration detention, or in remand in a criminal justice detention facility, can claim to be a minor at any time. It is not always the case that detainees claim to be minors at the point of interception, and it is not uncommon for claims about age to be made after the person has been detained for a period of time. Often challenges to the court's jurisdiction on the basis of age are made late in the proceedings, and in some cases the person's claim about age changes several times.

The proposed amendments do not take into account these circumstances. As the time limit runs from the date the person is taken into immigration detention, no challenge could be made after the expiration of the 30 day limit, regardless of when the person raises age as an issue.

There is also no recourse under the Bill against an adult who falsely claims to be a minor and then withdraws his or her claim, potentially after being remanded to a youth justice facility, and after investigating officials have expended resources on compiling a brief of evidence about the person's age.

d) Reference to 'magistrate'

Item 3 provides that a person who claims to be a child is presumed to be a child unless a magistrate makes an age determination order that the person is an adult.

Under section 3ZQB of the Crimes Act, an investigating official may, during the course of an investigation, obtain a person's consent to carry out a prescribed procedure, or obtain an order from a magistrate. However, under section 3ZQF of the Crimes Act, where criminal proceedings have been commenced, a magistrate *or a judge* may make an order requiring the carrying out of a prescribed procedure.

As item 3 relates to age determination orders for the purposes of criminal proceedings, for consistency with section 3ZQF of the Crimes Act it would be preferable for both magistrates and judges to have the power to make the order described in item 3.

3.3 Item 4: Formatting amendment

Item 4 inserts an amendment for formatting clarity. The Commonwealth has no comment.

3.4 Item 5: ‘Youth justice facilities’

Under Item 5, a person charged with a people smuggling offence who claims to have been under the age of 18 years at the time of the offence, must be remanded to a ‘youth justice facility’. ‘Youth justice facility’ is not currently a defined term in either the Crimes Act or the Bill.

Persons suspected or convicted of federal offences, including minors, are remanded in State and Territory prisons in accordance with section 120 of the Australian Constitution. The correctional authorities within each State and Territory are responsible for managing these individuals, including assessing each person’s security classification and whether it is desirable to physically separate certain classes of prisoners, such as crew claiming to be minors. The rules governing the detention of minors in each State and Territory are not uniform. As such, any definition of the term ‘youth justice facility’ will require State and Territory consultation.

The Commonwealth further notes that item 5 refers to the remand of *accused* minors in ‘youth justice facilities’, but does not refer to the detention of *convicted* minors. Presumably, convicted minors will be imprisoned in accordance with the applicable rules in each State and Territory. However, this raises issues of consistency as there are different age thresholds for detention facilities in each State and Territory.

For example, a 17 year old person charged with people smuggling offences is remanded to a youth facility in Queensland in accordance with Item 5. If convicted, the prisoner will be removed to an adult facility despite being 17 years old, as adult facilities in Queensland have an age threshold of 17 years. This outcome appears contrary to the intention of the Bill, which defines a minor as a person under the age of 18 years.

The Commonwealth also has concerns with the reference to Migration Act offences only [see 3.2.2].

3.5 Item 6: 14-day time limit

Item 6 proposes a 14 day time limit for laying charges against a person for an alleged people smuggling offence under the Migration Act. The 14 day period runs from the date the person is taken into immigration detention.

3.5.1 Time for commencement of prosecutions under criminal law

Under section 15B(1)(a) of the Crimes Act, a prosecution may commence at any time for a Commonwealth offence that carries a maximum penalty of imprisonment for six months or more for a first conviction. As all of the people smuggling offences under the Migration Act and the Crimes Act carry maximum penalties of at least 10 years imprisonment, a time limit on prosecuting these offences would be inconsistent with section 15B(1)(a) of the Crimes Act. There are currently no such time limits applicable to any other serious Commonwealth offences.

A report by the Senate Community Affairs Reference Committee in 1999 titled ‘Lost Innocents: Righting the Record - Report on child migration’, confirmed that limitation statutes do not generally apply to criminal proceedings, except in the case of minor or summary offences. Moreover, the Committee noted that any limitation period in respect of a criminal matter does not affect the jurisdiction of the court but merely provides a good defence to the charge.⁶³

Limitations on prosecuting serious Commonwealth offences have been phased out, primarily because evidence of a person’s culpability may not arise for some time, or may take time to obtain, and a person who has committed an offence should not be able to escape punishment simply by waiting for a time limit to expire. The absence of these limitations also allows investigating officials the flexibility to conduct thorough investigations, and make informed decisions about whether to lay charges. The Commonwealth is not aware of any time limits for prosecuting equivalent indictable people smuggling offences in like-minded countries.

If the proposed time limit comes into force, there will be a high risk that investigating officials will be forced to either submit an inadequate or incomplete brief of evidence, or terminate the investigation altogether. This will have serious consequences for the administration of criminal justice, the independence and effectiveness of investigating officials, and may undermine the Commonwealth’s ability to conduct people smuggling prosecutions.

3.5.2 Operational concerns

In addition to concerns over the legal validity of a limitation period for people smuggling offences, the Commonwealth is of the view that operationally, the proposed time limit would not be feasible.

Firstly, a criminal investigation does not commence from the date the person is taken into immigration detention. Upon arrival of a person suspected of a people smuggling offence, DIAC conducts a bio-data collection interview and where the person is claiming to be a minor, assesses the crew member’s age using any available documentation and a focussed age interview. If DIAC forms a view that the person is an adult, DIAC refers the case to the AFP for criminal investigation.

Accordingly, under the proposed timeframe, the AFP would only have those days within the 14 day period after the case has been referred from DIAC, to conduct a full investigation. It follows that if the AFP does not receive the case for investigation within the 14 day timeframe, then charges cannot be laid (noting the issues raised by the Senate Committee in respect of limitation periods, discussed above under 3.5.1). The AFP would be unable to lay charges at all, or have insufficient time to prepare a brief of evidence. The effect would be that claims of age, regardless of their merits, could create incentives for alleged people smuggling offenders to raise age to avoid prosecution.

Secondly, the imposition of a timeframe for laying charges, especially one as short as 14 days, does not take into account the operational requirements of an investigation. As set out

⁶³Senate Community Affairs Reference Committee Report, ‘Lost Innocents: Righting the Record - Report on child migration’ (1999), viewed on 27 January 2012, <http://www.aph.gov.au/SEnate/committee/clac_ctte/completed_inquiries/1999-02/child_migrat/report/index.htm>.

above under 1.3.1, law enforcement officers face a number of challenges and delays in the investigation of people smuggling offences.

In particular, evidence must be sourced from a range of Australian and overseas government agencies, which can take some time. Suspects and witnesses, particularly passengers on people smuggling vessels, are often unwilling or unable to cooperate with investigating officials, in many cases due to trauma suffered en route or in their home countries. In addition, there are usually significant language barriers, with many suspects and witnesses facing literacy challenges in their own language as well as in English.

In accordance with the Prosecution Policy, for a prosecution to be commenced or continued there must be a reasonable prospect of conviction and the prosecution must be in the public interest. The AFP generally provides the CDPP with a full brief of evidence prior to the AFP arresting and charging the person with a people smuggling offence. Where the suspect claims to be a minor, the brief must comprise evidence that the CDPP considers capable of establishing that the suspect is an adult and committed each element of the people smuggling offence. Once the suspect is charged, if age is still an issue in dispute the court will conduct an age determination hearing as part of the general process of preparing the matter for committal and trial. This is procedurally necessary because the defendant is not known to the court until charged and there would be no basis upon which the court could consider the issue.

The Bill sets out different processes and timeframes for age determination and criminal investigation, creating an artificial distinction between the two. However, as set out above, the age determination hearing cannot be conducted in a vacuum and is intrinsically linked to the people smuggling charges before the court. The Bill also does not take into account the time it takes to conduct an investigation, even without unforeseen delays.

3.6 Item 7: Commencement

Under item 7, the ability to determine a person's age by X-ray will be removed from the date of the Bill's commencement, no matter when the person was charged or taken into immigration detention.

As noted above, 37 of the 118 people returned to their country of origin were found to be minors based on X-ray evidence. Removing the ability to use X-ray evidence already obtained could cause delays in current cases where X-ray analysis is likely to be key evidence in determining the age of the person, whether as a minor or an adult.

4. EXPLANATORY MEMORANDUM

The Explanatory Memorandum refers to the 'current lack of legislative procedures around the treatment of minors in relation to alleged people smuggling', and to the detention of 'hundreds of children' in adult facilities for 'prolonged periods of time without charge or age determination'. It also describes skeletal X-rays as 'discredited and unethical'.

The Commonwealth recommends removing this wording, on the basis that it does not accurately reflect Australia's current legislative and operational framework, which has been set out in detail in this submission.

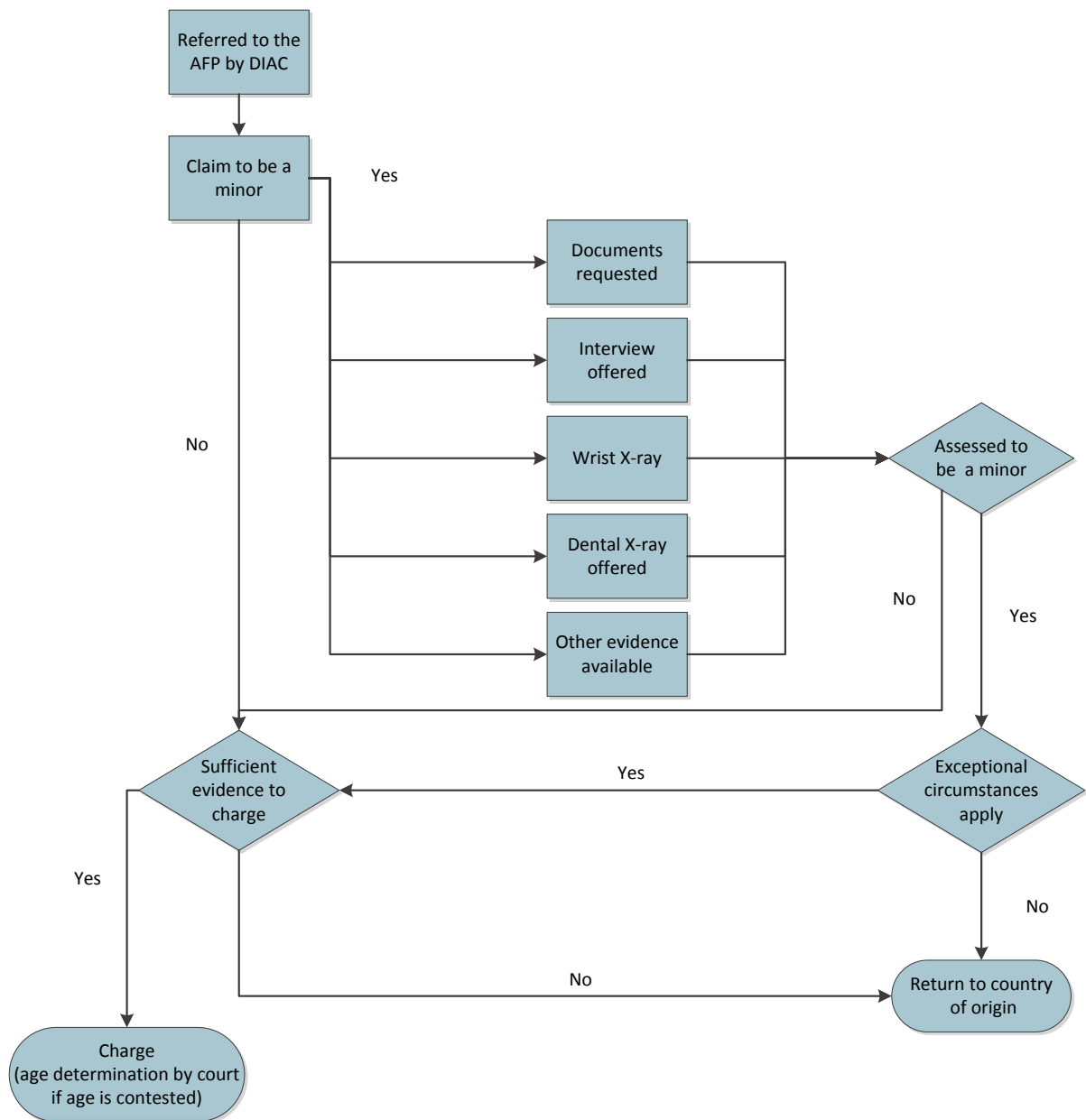
5. CONCLUSION

Age determination is a difficult process and each individual method has its limitations. Recognising these limitations, the best approach is to adopt a combination of age determination procedures and to give defendants the benefit of the doubt where age is not established on the balance of probabilities. This ensures that people smuggling crew are only treated as adults where the available credible evidence indicates that they are adults. It also means that the AFP and CDPP consider all available evidence and wrist X-rays are not exclusively relied upon.

In conclusion, the Commonwealth does not support the Bill. The proposed amendments create a presumption of age, and timeframes for age determination and arrest, that are neither practical nor achievable. The Bill is also inconsistent with section 15B(1)(a) of the Crimes Act, which permits prosecutions for serious Commonwealth offences to commence at any time. Further, the Bill jeopardises the Commonwealth's ability to meet its international obligations under the CRC. The proposal to remove skeletal X-rays as a prescribed procedure under the Crimes Regulations, as well as preventing the inclusion of future X-ray technology, do not take into account changing techniques in age determination, or the criminal justice imperative to present all available evidence to the court.

The Commonwealth once again thanks the Committee for the opportunity to make recommendations on the Bill.

ATTACHMENT A: AFP AGE ASSESSMENT PROCESSES



ATTACHMENT B: AGE DETERMINATION PROCEDURES IN SELECTED COUNTRIES

Country ⁶⁴	Wrist X-ray	Dental observance	Dental X-ray	Clavicle X-ray	Physical appearance	Sexual maturity	Psychological examination	Behavioural assessment	Person's testimony	Paediatrician involved	Social worker	Cultural mediator
Austria	✓	✓	✓	✓	✓	✓						
Belgium	✓		✓	✓								
Canada									✓			
Denmark	✓	✓	✓		✓							✓
Estonia					✓			✓	✓			
Finland	✓	✓	✓									
Germany	✓	✓	✓	✓	✓		✓			✓		
Greece							✓		✓		✓	
Hungary		✓			✓	✓				✓		
Ireland					✓		✓	✓	✓		✓	
Italy	✓	✓			✓	✓				✓		
Malta	✓								✓		✓	
The Netherlands	✓			✓	✓							
New Zealand	✓		✓									
Norway	✓	✓	✓							✓		
Poland	✓	✓	✓									
Portugal	✓	✓	✓									
Slovenia									✓			
Spain	✓	✓				✓						
Sweden	✓	✓	✓								✓	
Switzerland	✓		✓	✓					✓			
United Kingdom		✓	✓		✓	✓	✓	✓	✓	✓	✓	
United States	✓	✓	✓		✓		✓	✓	✓			

⁶⁴ See D Maio, *Review of current laws, policies and practices relating to age assessment in sixteen European Countries*, Separated Children in Europe Programme; Intergovernmental Consultations on Migration, Asylum and Refugees (Save the Children), 2011; Kvittingen, 2010; *Age Determination of Aliens in the Custody of HHS and DHS*, 2010; *Assessing Age*, 2011.