

**Senate Legal and Constitutional Affairs Committee Inquiry
into the *Crimes Amendment (Fairness for Minors) Bill 2011***

Introduction

VLA is grateful for the opportunity to respond to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Crimes Amendment (Fairness for Minors) Bill 2011* (the Bill).

VLA's interest in this Bill stems from the fact that, by virtue of our obligations under clauses 28 and 29 of the National Partnership Agreement on Legal Assistance Services¹ (NPA), we are arranging legal representation for the accused charged in all but two of the 54 cases of alleged people smuggling currently before the courts in Victoria². VLA's staff practice acts for the majority of the Indonesian men charged with those offences. More specifically we have assisted eight children who were charged as adults, but whose charges were subsequently withdrawn after the Commonwealth accepted that they were in fact children at the time of the alleged offence.

Of the 63 prosecutions of crew initiated in Victoria to date, eight have been discontinued because the accused were found to be children³. This equates to 12.7%, or more than one in ten, accused having been found to be minors.

This submission is directed to the unreliable methods of determining the age of accused people smugglers and the unclear standards and burdens of proof for the determination of age in these cases. We will also address the unacceptable delays in charging accused people smugglers that lead to lengthy periods of arbitrary detention. The first part of the submission focuses on understanding the way in which people smuggling from Indonesia comes to involve children both generally and using the experiences of two of our clients who have been recently returned home.

Summary of recommendations

- I. Where x-ray analysis indicates a likelihood that a suspect or accused is an adult, this evidence should not be relied on in isolation and must be supported by other evidence. Assessments should include gathering information from families and relevant Indonesian authorities, and interviews by appropriate experts (such as psychologists) to internationally accepted standards;
- II. Suspects must have access to legal advice prior to being asked to consent to x-ray or other age determination assessments;
- III. The Crown should bear the onus of proving that an accused was 18 years or older when the offence was alleged to have been committed;
- IV. The Crown should prove the age of the accused *beyond reasonable doubt*;
- V. A time limit of 14 days should apply for the charging of an accused people smuggler who claims to be a child;

¹ http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/other.aspx

² Victoria Legal Aid has arranged legal representation in a total of 61 alleged people smuggling cases

³ One other prosecution was withdrawn after it was accepted that the accused was so cognitively impaired that he was incapable of forming the requisite intent to commit the offence.

- VI. A time limit of 30 days should apply for the Commonwealth to make application to a Magistrate for an age determination order; and
- VII. Initial investigation and charging of all people suspected of people smuggling by bringing asylum seeker to Australia by boat must be expedited so that no suspected people smuggler can be detained for more than 14 days before being charged.

The role of Victoria Legal Aid

People smuggling prosecutions arrive in Victoria

In February 2011 we received advice from the Commonwealth Director of Public Prosecutions (CDPP) that Victoria could expect to receive a significant number of people smuggling prosecutions as a result of the Northern Territory courts being unable to deal with the numbers of cases. The next day eight accused were brought to Victoria. Over the following months many more followed. In total 63 crew charged with people smuggling offences have been legally aided in Victoria. The majority are being represented by lawyers from VLA's staff practice with the rest represented on grants of legal aid by private law firms.

These accused men are all eligible for legal aid because they face serious charges and have no assets or income. Under Clause 28(b) of the NPA the Commonwealth maintains separate funding for legal aid commissions for expensive Commonwealth criminal cases accessible on a reimbursement basis (the ECCCCF noted above). The Commonwealth therefore bears all the costs for people smuggling cases.

The cases are at various stages. Some have been through committal in the Magistrates' Court of Victoria and are awaiting trial in the County Court of Victoria. Others will follow. We have worked closely with the CDPP and the County Court to schedule the trials in as efficient way as possible and they will be heard in blocks of three over the course of 2012/13.

There are two kinds of people smuggling offences. The simple version of the offence carries no mandatory term of imprisonment. On the other hand, Aggravated People Smuggling carries a mandatory term of five years with a minimum non-parole period of three years. The offence is aggravated if five or more people are brought to Australia. The practical reality is that all boats intercepted have significantly more than five people. Everyone we fund and act for is therefore charged with Aggravated People Smuggling and faces, on conviction, mandatory imprisonment⁴.

Once a staff lawyer is assigned to a client they have, under section 16 of the *Victorian Legal Aid Act 1978*, the same professional obligations and duties as any other legal practitioner acting for a client, including the obligation to properly represent the interests of the accused person. As noted above, this means that, uniquely to legal aid commissions, staff employed by a public sector agency must at times act against the interests of the State. It is one of the hallmarks of a civilised society that the state helps people who the state itself charges with criminal offences.

⁴ *Migration Act 1958* (Cth) s233C(c).

People smuggling generally

Our experience

By virtue of acting for the majority of people charged with these offences in Victoria we have come to learn a lot about the way in which people smuggling operates, the roles played by the Indonesian fisherman and how they are recruited. This knowledge comes both from reviewing multiple briefs from the CDPP and from obtaining instructions from a large number of clients. There are a small number of repeating scenarios that have emerged from that experience:

- The crew are told that they will be transporting cargo and the asylum seekers are only brought onboard once at sea.
- The crew are only transferred onto the boat shortly before Australian waters and the organisers then depart on a second boat.
- The crew are only told that that the people they are transporting are to be taken to Australia once they are on the High Seas and cannot return.
- The crew are told that once they transport people to Christmas Island, Ashmore Reef or Cartier Island that they will be paid and allowed to return home.

It is also our experience that the organisers usually recruit crew members who are vulnerable to exploitation by virtue of their poverty, age or, sometimes, cognitive impairment.

The process of people smuggling through Indonesia

Most of the asylum seekers who come to Australia by boat are from Iraq, Afghanistan and other parts of the Middle East. They are usually fleeing persecution. The asylum seekers are guided through a sophisticated network of 'true' people smugglers operating between the Middle East and Indonesia before being placed on a boat that ultimately brings them to within Australian territory.

Asylum seekers typically pay an agent in the Middle East a first instalment of up to \$5000 to be issued a false passport and fly to Malaysia. They then pass through immigration officials in other countries by illegal means. A network of people smugglers then facilitates their transport by land and sea through a series of safe houses to Java or other islands further east along the Indonesian archipelago. Dozens of people will assist in managing the secret movement of asylum seekers to the point at which they board the boat to Australia. None of the 54 accused currently being assisted by VLA are alleged to have been involved in the movement of asylum seekers through Indonesia. Their involvement is limited to the final leg of the journey to Australia on the boats themselves.

Crew are recruited by organisers from the islands of the Indonesian archipelago. The crew are often misled into going onto the boats. They have an expectation of returning; an expectation not shared by the organisers.

Arrival and treatment in Australia

Inevitably, the boats are apprehended in off-shore waters by Australian authorities and the crew and passengers are detained because they are “*reasonably suspected of being unlawful citizens*”⁵. They must then be kept in immigration detention until removed from Australia or provided with a visa⁶. In the case of suspected people smugglers, the Attorney General usually stays their removal or deportation for the purposes of “*the administration of criminal justice*”⁷.

People smuggling accused in Victoria have a prima facie entitlement to bail⁸. Ordinary accused people in a like situation of no prior convictions, no history of bail breaches, low risk of re-offending and likely delay to trial of one to two years, would easily achieve bail. However, for people smuggling accused, there is no practical right to freedom from incarceration pre-trial. Bail would mean a return to immigration detention and in Victoria this means housing in the Maribyrnong Immigration Detention Centre, currently the most secure and prison-like immigration detention facility in Australia. When delays to trial are added in, there will be people ultimately acquitted at trial who will have spent close to three years in custody.

Children who sail to Australia

The families

One way of understanding how children end up on the boats, and the true circumstances from which they come, is to speak with those that they have left behind. VLA lawyers have recently travelled to Rote Island to fulfil their professional obligations in acting for accused, including to establish the age of a number of our clients who claim to be under 18. As discussed below, the Commonwealth rely in age determination hearings on wrist X-ray analysis that has been internationally discredited. Obtaining direct evidence of age is almost impossible from a distance and neither the AFP, nor the Commonwealth, themselves travel to these communities to obtain first hand evidence. The relative cost of an investigative trip to Indonesia is much less than the cost of a committal hearing and trial which are avoided when a person is demonstrated to be under 18.

VLA investigated the claims of a number of clients on the most recent trip in order to maximise the benefit. The trip was supported and facilitated by the Indonesian government. What we confirmed was the extreme poverty from which these men come and why the villagers of Rote are such easy targets for people smuggling organisers. The experience also illustrated the generational poverty that is being created by the removal of ‘bread winners’ from the villages for three years or more. This is particularly so given that about 45% of these men are under 30 years old.

For example, in one village our staff spoke to twelve women who had male family members (husbands, brothers and sons) ranging in age from 14 to over 75 years old in detention in Australia on people smuggling charges. A number of the men had already been working in other provinces when they were recruited by ‘organisers’, while others were recruited from the village itself by outsiders who came to the village in search of fishing crews.

⁵ *Migration Act 1958* s189.

⁶ *Migration Act 1958* s196.

⁷ *Migration Act 1958* s147.

⁸ *Bail Act 1977* (Vic), s4.

These families reported having received sums of around of 1-3 million rupiah (\$100-330) from the 'organisers'. However, there was no evidence of enrichment to the families. Most of the women indicated that the money received had been used to pay off debts or to purchase food. These families were clearly suffering financially when compared to families who did not have relatives in Australian detention. Many of the women were in the practice of incurring debt at the local store to buy cooking ingredients, which they would then bake into cakes to be sold at the local market, so as to buy other foodstuffs and repay the store. All of the affected families with school aged children reported having been forced to remove one or more children from primary or junior secondary school so that the children could begin to work to support the family.

The children

It is instructive to learn from the stories of two of our clients who were both ultimately accepted as being children after spending significant periods in custody. Both children have provided express permission for their names and stories to be made public.

Case study one -

Background

() family have worked as fishermen for as long as he knows. He was born and raised in the village of Oelaba on Rote Island in the remote south east of the Indonesian archipelago. Oelaba Desa has a population of about 1000 people and is predominantly Muslim. There is no arable land to grow food and no sanitation or running water. Water is fetched by hand from a nearby well. There is no hospital or medical clinic. Electricity is shared between the houses. Some houses have television but () family could not afford this. The only electricity in house comes from a cable strung from a neighbour's house.

According to () it's hard to live in his village. He was often hungry. If the family didn't have money they can't afford to buy rice or vegetables and must subsist on the fish they catch.

() is one of four children born to his mother and father, of which three remain alive. His elder sister () helped to raise him when his parents went away to sea on extended fishing trips to feed the family. She married shortly before () came in Australia and she lives on another island with her husband and baby.

() elder brother drowned at sea during a fishing trip between Rote and Sulawesi when he was about 13 years old. He was one of two young boys who disappeared overboard in a storm. Their bodies were never found.

() has a much younger brother who is still going to school. His mother adopted her sister's baby when her sister died during childbirth. () considers this boy to also be a brother.

No one in his family has a birth certificate. () had heard of the KTP (Indonesian Identity Card) but he does not have one. () went to primary school in the neighbouring village of Oelua and started the first year of junior high school. He had to leave school because there wasn't enough money.

His mother and father asked him to leave school and start working as a fisherman about the time the tsunami hit Indonesia (26 December 2004). He thinks he was about 12 or 13 when he left school to become a fisherman. He is barely literate and says he has “problems with counting and numbers”. He is fluent in Rotinese dialect and speaks basic Bahasa Indonesian.

After he left school learned to work as a fisherman until he got his first job as a cook on a cargo boat taking palm sugar from Rote Island to Sulawesi. The round trip took about one month and he was paid 200,000 rupiah (AUD\$22.35) to cook for the crew of five or six and help unload the boat in Sulawesi. He injured his foot badly in an accident while unloading the boat and was taken to hospital on Sulawesi.

The palm sugar boat makes the trip from Rote to Sulawesi twice a year and got a regular job as cook on the boat. Everything else he did to support the family was based on subsistence fishing. He mostly fishes from a small canoe or sampan within a kilometre of the shore. He takes the boat out each night about 8.00pm and fishes all night, coming back the next morning. Any fish left over after feeding the family, he takes by motorbike to the port town of Ba’a to sell at the market.

For 3 to 4 months each year during the wet season it’s too dangerous to go to sea and its difficult for fishermen to find any work. had one job in 2007 when he worked as a building labourer on a house in his village during the wet season. He was paid 300,000 rupiah (AUD \$33.48) for a month’s work which was the best paid job he’d had.

More recently, his mother’s health began to deteriorate and his father remained absent from the family for long periods. There was little money coming in and became the main breadwinner for the family.

About two months after returning from the palm sugar trip in May 2010, an Indonesian man came to the village and offered 5 million IDR (\$540 AUD) to work on a boat out of Java. accepted because he wanted to earn money for his family. He was paid half the money which he gave to his mother, and promised the balance when he returned. He was told he’d be away for a few weeks fishing. The man organised for to catch the ferry from Rote Island to Kupang and then fly to Java. It was the first time he had been on the ferry to Kupang or on a plane. He was terrified the plane would fall out of the sky.

When he arrived in Java he was taken by bus to the boat with other crew and told he was going fishing. The boat sailed to another location and anchored. Small boats approached at night carrying passengers who got on board. didn’t know he would be working on a boat with passengers and was shocked at the size of the men who got on board. They were big and he felt intimidated.

The boat began sailing out to sea and within a day or so began leaking badly and the engine kept stopping. was asked by the passengers to go overboard and swim to some nearby Indonesian fishing boats to ask for help. He agreed to do this because he felt he had no choice. The fishermen were unable to help and despite his fear returned to the disabled boat. Later that day the steering on the boat broke and the engine stopped completely. Then the boat drifted for up to 7 days and the weather deteriorated. thought that he was going to die.

The passengers told [redacted] and another crew member to go overboard and try to fix the broken rudder. The waves were big and [redacted] hit his head on the underside of the boat. It was impossible to fix the boat and it continued to drift until they were rescued.

Entry into Australia and detention

The boat was intercepted by the Royal Australian Navy (RAN) on 28 July 2010 in the Indian Ocean. When located it was sinking approximately 60 nautical miles outside the Australian Contiguous Zone surrounding Christmas Island. The boat was designated Suspected Illegal Entry Vessel (SIEV) 173.

On board there were 82 Afghan male asylum seekers in addition to [redacted] and three other Indonesian crew. The boat was too unsafe to be towed and all the people on board were transferred to navy vessels and taken to Christmas Island where they were put into immigration detention.

On 29 July 2010 [redacted] was recorded by an officer of Department of Immigration (DIAC) on Christmas Island as having a date of birth of 1 January 1993 (17 years old). He was searched and his wallet was taken away. His wallet contained a piece of paper with his brother's phone number on it. The wallet was later returned but the piece of paper was missing. He didn't know how to contact his family to tell them where he was.

On 3 August 2010 he was processed as a minor by a SERCO client services officer on Christmas Island. An independent person was present and [redacted] was photographed. His image was uploaded onto the DIAC biometrics data base. [redacted] gave signed consent to DIAC for his identification information to be used. The Australian Federal Police asked for and received the photograph on 6 August 2010⁹.

On 8 August 2010 [redacted] was interviewed by a DIAC officer in the presence of a responsible adult. The interview took the form of prescribed questioning for an "Unauthorised Arrival" (DIAC Entry Interview). [redacted] was told that he was "expected to give true and correct answers to the questions" asked of him. He was told that the answers he gave would be used to carry out checks with international humanitarian agencies and disclosed to Australian government agencies including in relation to foreign affairs, border control, health, security and law enforcement¹⁰.

During this interview, [redacted] stated his full name, his date of birth as 1 January 1993, his age as being 17 years old. He provided the name and address of his village on the Island of Rote and the names and approximate ages of his mother and father. He provided the names of his brothers and sister. The officer noted that he asked for help to contact his family. He didn't receive any help and was unable to speak to his family while he remained on Christmas Island. When he was finally able to contact his brother from detention in Darwin his family hadn't heard from him for about four months and they thought he was dead.

On 14 October 2010 [redacted] was interviewed on Christmas Island by a senior DIAC officer, with the designation Age Determination Interviewing Officer. The purpose of the interview was to decide

⁹ Statement of [redacted], page 156 brief of evidence

¹⁰ Unauthorised Arrival interview form – Introductory remarks page 1

where to detain based on a determination of his age as under or over 18¹¹. This officer later produced a report in which he found that it was likely that was under the age of 18¹².

On 14 December 2010 was interviewed by Australian Federal Police at the Northern Immigration Detention Centre in Darwin. He told police that he was 17 years old and gave the same date of birth he had earlier given to DIAC. His left wrist was x-rayed and the radiologist reported that his skeletal age was ‘thought to be 19 years’ based on the Greulich and Pyle radiographic atlas (the Atlas)¹³.

Prosecution for aggravated people smuggling

remained in immigration detention without charge for about nine months until 13 April 2011 when he was transferred to Melbourne and charged by the Australian Federal Police. He was by then 18 years old. He was remanded in adult custody.

date of birth was recorded on the charge sheet as 1 January 1993 which meant he was 17 years old at the time he crewed on SIEV 173. The Commonwealth DPP claimed this was not his correct date of birth. On 27 April 2011 the Commonwealth obtained wrist x-ray evidence from Dr that claimed had a skeletally mature wrist therefore he must be older than 18 years of age. On 30 May 2011 the Australian Federal Police obtained a copy of a document called a Family Card which purported to record a person called with birth date of 12 April 1987. The Commonwealth DPP relied on this document to say that true age was 23 years old, although no one could explain how the document had been made or if it was correct.

On 16 June 2011 was bailed on condition that he be held in an immigration detention facility for young people in Melbourne. He was able to make contact with his sister and heard that his mother had become sick and had left Rote to go hospital. He knew his family could not afford to pay for his mother’s medical treatment and he feared she would die while he was in Australia.

On 31 August 2011 an age determination hearing commenced in the Melbourne Magistrates Court. The hearing ran over 3 separate days ending on 24 November 2011. His lawyers travelled to Rote Island on 23 October 2011 and located mother who provided an affidavit confirming date of birth.

On 1 December 2011 Magistrate Ann Collins ruled that she was not satisfied on the balance of probabilities based on the evidence before the court that had been 18 years old at the time he crewed SIEV 173 and the prosecution was withdraw. was returned to his home on Rote Island on 21 December 2011.

Please find attached an affidavit from that explains his experience whilst in Australia. has provided his consent for this to be made public.

¹¹ Transcript of evidence of

¹² Assessment Report TOW 043

¹³ Medical Imaging Report of Dr
evidence

to Melbourne Magistrates Court on 13 October 2011

dated 21 February 2011

dated 14 December 2010, page 590 brief of

Case study two -

Background

family come from the Solor archipelago in the north east of Indonesia. They were traditional whalers, who migrated south from Solor and settled in Papela Village on Rote Island in the West Timor. From Papela they fish for shark and other fish from sailing boats in the Timor Sea. Since the negotiation of sea boundaries between Indonesia and Australia in 1974, the traditional fishing grounds of the fishermen in village have been restricted and their fishing methods are tightly regulated by Australian law. The law prohibits fishermen from using technology such as GPS to navigate or engines to power their boats. This has made the work of fishing much more dangerous and the income derived from fishing in Papela Village has decreased and the families become increasingly impoverished. The fishing seasons have lengthened and men now routinely work in the open ocean during the monsoon season. It is dangerous work and many men from village have been lost at sea.

was born at home, like his younger sisters, and has lived all his life in Papela Desa. He went to primary school in his village and spent 2 years at junior high school completing the equivalent of Year 8. He passed his exams to proceed to Year 9 but his parents asked him to leave to start working as a fisherman. His first job was as 1 of 6 crew on a traditional sailing boat fishing for shark in traditional fishing grounds near Pulau Pasea (Ashmore Island) in the restricted Australian Fishing Zone. Because he was the smallest on the boat, his job was to cook and look after the other crew during the 2 week trip. That time, he was not paid anything because they didn't catch any shark. He crewed on other fishing boats a further 2 times before arriving in Australia. The 2nd time he was paid IDR250,000 (AUD \$26.55) and the 3rd time, there was a successful catch and he was paid IDR1,000,000 (AUD \$106.00).

was recruited as crew on the asylum seeker boat when a man came to his village. The smuggler offered to pay his mother money if he accepted the job. He didn't know how much money his mother would be paid. He had never left Rote Island before. He had to travel to Kendari in South East Sulawesi with other crew members to get onto the boat. He didn't know that the boat would be taking passengers and he had no idea the destination was Australia. He was told that he was expected to cook and help look after the engine on the boat.

Entry into Australia

The boat was intercepted by RAN on 21 March 2011 about 13 nautical miles off Ashmore Island in the Australian Territorial Sea and designated Suspected Illegal Entry Vessel (SIEV) 237.

On board there were 57 asylum seekers from Iran, Iraq and Afghanistan in addition to and three other Indonesian fisherman. Everyone was taken to Darwin and placed into detention. Two of the Indonesian crew were sent home immediately because it was decided they were minors.

On 31 March 2011 was processed as a minor in the Northern Detention Centre, Darwin. In the presence of an independent guardian, he signed a consent to undergo a wrist x-ray procedure for the Australian Federal Police.

On 5 April 2011 [redacted] was interviewed by an officer of Department of Immigration (DIAC) in Darwin. The interview took the form of prescribed questioning for an “Unauthorised Arrival” (DIAC Entry Interview). [redacted] was told that he was “expected to give true and correct answers to the questions” asked of him. He was told that the answers he gave would be used to carry out checks with international humanitarian agencies and disclosed to Australian government agencies including in relation to foreign affairs, border control, health, security and law enforcement.

[redacted] told DIAC that he was 15 years old and his date of birth was 9/03/1996. He provided the name and address of his village and the names and ages of his mother and father. He provided the names of his two younger sisters and their ages. He told DIAC that he had been able to telephone his mother. He said that he had had to become the breadwinner for his family because his father was unable to work as a fisherman any longer and he needed to look after his sisters and mother.

On 12 April the AFP gave the x-ray of [redacted] wrist to Consultant Radiologist Dr [redacted] Dr [redacted] stated that “examination of the bones of the hand of Mr [redacted] (sic) as derived from the radiograph taken reveals th(e) appearance of skeletal maturity. On average this is reached at 19 years. Therefore it is a reasonable interpretation that Mr [redacted] (sic) is 19 years of age or older¹⁴”.

On 4 May 2011 [redacted] was interviewed by Australian Federal Police at the Northern Immigration Detention Centre in Darwin. He told police that he was 15 years old and gave the same date of birth he had earlier given to DIAC.

The wrist x-ray was the only evidence that the Commonwealth DPP relied upon to claim that age was other than as he reported. The opinion of Dr [redacted] was not supported by medical evidence and was not statistically accurate. There was no contact made by the AFP with his family on Rote Island even though [redacted] was able to regularly speak to his mother by phone while he was in detention. DIAC did not conduct an age determination interview with [redacted] although he was processed and detained as a minor and was able to attend school while in immigration detention in Darwin.

Prosecution for aggravated people smuggling

[redacted] remained in immigration detention without charge for about six months until 15 August 2011 when he was transferred to Melbourne and charged by the Australian Federal Police. He was immediately bailed to be held in an immigration detention centre in Melbourne.

While in the detention centre in Melbourne he spoke to his mother [redacted] by phone. She told him that about three months earlier she had been visited by local Indonesian police who had asked her about [redacted] date of birth and whether she had a birth certificate for him. Although she was scared of the police, she told [redacted] that she had gone to the local police station and given a written statement attesting to his true date of birth. She told police that she had never had anything more than an informal written record of [redacted] age and that this document had been lost when the family had moved house. The statement that she gave to Indonesian police has never been produced by the Australian Federal Police.

¹⁴ Unauthorised Arrival interview form – Introductory remarks page 1

lawyer travelled to Rote Island on 23 October 2011 and located mother who provided an affidavit confirming date of birth. On 16 November 2011 the Commonwealth DPP withdrew the charge and he returned to Indonesia on 6 December 2011.

People smuggling and fairness for minors

Young people are frequently targeted by people smuggling organisers as candidates to sail boats of asylum seekers to Australia. As indicted above, more than one in ten of the accused brought to Victoria were subsequently accepted by the Commonwealth to be children.

The Bill's effect

The Bill does a number of things as follows:

- Removes the ability of the Commonwealth to obtain or rely on x-rays as a lawful means to determine the age of an accused person;
- Presumes that people who claim to be children at the time of the alleged offence are in fact children unless a Magistrate otherwise orders;
- Sets a 30 day time limit for the Commonwealth to make application to a Magistrate for age determination orders;
- Requires that the prosecution bear the burden of proving, on the balance of probabilities, that relevant accused people were adults at the time of the alleged offence;
- Requires that accused people smugglers who claim to be children must be remanded in a youth justice facility, not an adult prison;
- Sets a 14 day time limit for charging accused people smugglers who claim to be children.

Use of x-rays to determine age

X-ray techniques have been widely discredited as being accurate predictors of age¹⁵. The criticism of these techniques has come from a variety of sources, including a recent UNICEF report on age assessment practices¹⁶, Sir Al Aynsley-Green, Britain's Children's Commissioner, the Royal Australian and New Zealand College of Radiologists, Professor of Medical Statistics Tim Cole, and a raft of radiologists who have given evidence in relevant matters around Australia.

A range of expert bodies have also criticised the use of x-rays to determine age as being unethical because it unnecessarily expose children to ionizing radiation when their use is for "administrative purposes"¹⁷.

¹⁵ See for example the reasoning of Bowen DCJ in *R v Daud* [2011] WADC 175

¹⁶ UNICEF Age Assessment practices: a literature review & annotated bibliography, Terry Smith and Laura Brownlees, 2011.

¹⁷ Royal Australian College of Physicians, the Royal Australian and New Zealand College of Radiologists, the Australian and New Zealand Society for Paediatric Radiology and the Australian Paediatric Endocrine Group in a letter to the Immigration Minister, Chris Bowen, dated 19 August 2011.

The bill proposes to outlaw the use of x-ray techniques altogether. The problem with prohibiting the use of x-ray analysis is that we know that x-rays are sometimes a quick and effective mechanism to determine the veracity of a child's claim about their youth. Children have been appropriately and quickly returned to Indonesia in such situations. To avoid children being unnecessarily detained, a preferable position to outlawing the use of x-rays analysis completely would be to prohibit the reliance on such evidence in isolation should the analysis point to the claimant being an adult. Any legislation should make clear that a range of evidence can be relied on by government officials, Commonwealth prosecutors and the Courts to determine age.

Age determination mechanisms should be expanded beyond reliance entirely on wrist or other x-rays to include proactive gathering by the Commonwealth of information from families and relevant authorities in Indonesia, and the conduct of age determination assessments by appropriate experts (such as psychologists) to internationally accepted standards¹⁸.

Protections should also be put in place to ensure that suspects have ready access to legal advice prior to being asked to consent to x-ray or other age determination assessments.

The burden and standard of proof

Determination of age in a people smuggling prosecutions is a threshold question that determines whether an adult or juvenile court in a given State or Territory has jurisdiction to hear the matter. It has a direct bearing on whether the mandatory minimum penalties prescribed by the *Migration Act 1958* (the Act) apply and also whether the Commonwealth Director of Public Prosecutions implements his policy of not proceeding with people smuggling charges against children.

Age determination and specifically the standard of proof applicable to this determination is of significance in the context of the overall prosecution of people smuggling cases. This is particularly acute given the lengthy mandatory minimum sentences of imprisonment that apply to adults.

The Act allows a court to sentence an accused to a bond without conviction for the offence of aggravated people smuggling "*only if it is established on the balance of probabilities that the person charged was aged under 18 years when the offence was alleged to have been committed*"¹⁹.

The Act does not make explicit who bears the onus of proof in establishing age and the law in other States and Territories appears unclear on this point²⁰. In Victoria to date, only one age determination hearing in a people smuggling prosecution has been finalised and in that case the prosecution conceded that the Crown bore the onus of proof for the purpose of the hearing.²¹

Given the significant penal consequences of at least three years jail that can flow from the determination of age, we suggest that it would promote the interests of justice and fairness if the

¹⁸ See for example the Review of current laws, policies and practices relating to age assessment in sixteen European Countries 2011, International Save the Children Alliance in collaboration with the United Nations High Commissioner for Refugees (UNHCR)

¹⁹ Section 236A.

²⁰ See *R v Kasopa* [2002] WACC: per O'Brien J at par 7: The issue of the defendant's age is to be determined on the balance of probabilities. No burden of proof rests on either side. Also cites *Queen v Janus* [2002] WACC.

²¹ *Commonwealth v*

– Ruling of Magistrate Ann Collins 1 December 2011

Act were amended to require that the Crown bear the onus of proving an accused was 18 or older when the offence was alleged to have been committed beyond reasonable doubt.

The law currently appears settled on the question of the standard of proof which is the civil standard of the balance of probabilities. There is however strong argument for the criminal standard of beyond reasonable doubt to apply.

There are a number of authorities that have specifically considered the issue of standard of proof in relation to questions of jurisdiction: *Thompson v The Queen* (1989) 169 CLR 1, *R v Abdulla* [2010] SASC 52, *R v Daud* [2011] WADC 175²².

While in *Thompson* there were compelling policy reasons why the majority of the High Court held that the civil standard of proof applied²³, the same policy arguments do not arise in the prosecution of young Indonesian boat crew. Their circumstances bear analogy to an important exception referred to by Brennan J in *Thompson* in the following terms: (at par 20)

“...I would therefore hold that the standard of proof required to satisfy the prosecution's onus of proving locality of an element (when that issue is raised) is generally proof on the balance of probabilities. There is an exception. If the conduct charged is an offence on one side of the border but not on the other or, in one forum, exposes the offender to punishment of a higher order than in another, locality is a fact on which liability to punishment depends. In such a case, the Woolmington rule (that the Crown bears the onus of proof in criminal prosecution beyond reasonable doubt) must apply in all its protective rigour”: *bracketed note and emphasis added*

The prosecution of young boat crew charged with people smuggling can be initiated in any State or Territory of Australia. The penalty these young people face if convicted as adults remains the same regardless of which State or Territory the conviction is imposed. However, their punishment will be significantly reduced if the CDPP fail to prove they were adults at the relevant time. Proof of their age is a significant fact from which liability to punishment flows and there are sound reasons in policy and law for the criminal standard of proof to apply.

Time limits for bringing charges and determining age

The Bill proposes time limits for the bringing of charges against accused people who claim to be children and also for applications to determine their age to be brought before a Court. We support these changes.

The following statistics relate to the eight accused assisted by Victoria Legal Aid whose charges were ultimately withdrawn after they were accepted as being children by the Commonwealth²⁴:

²² In addition there is High Court transcript dismissing an application for special leave on behalf of Abdulla by High Court Justices Creenan and Bell: *Abdulla and the Queen* [2010] HCATrans 225.

²³ *Thompson v The Queen* (1989) 169 CLR 1 per Mason CJ, Dawson J: “A wrongdoer clearly subject to the laws of one of two jurisdictions would escape the laws of both, even where such laws were identical, simply because the prosecution could not prove the place of the commission of the offence beyond reasonable doubt. The prospect of this outcome would be lessened if the civil standard of proof were to be applied.” (at par 26)

²⁴ One additional accused person was assessed as cognitively impaired and charges were withdrawn. A total of 9 accused people have had charges withdrawn, eight of whom were children.

- The children spent an average of 6.9 months in immigration detention before being charged (with one child spending ten months in immigration detention before being charged);
- The children spent an average of 9.3 months immigration detention and prison before having their charges withdrawn (with one child spending 16 months in detention and prison before the charges were withdrawn).

The United Nations Convention on the Rights of the Child 1989 provides that no one is allowed to punish children in a cruel or harmful way, that they should not be put in prison with adults and should be able to keep in contact with their families²⁵. The Convention also provides that Governments are required to provide minimum guarantees for the fairness and quick resolution of judicial proceedings²⁶.

The Bill would ensure Australia's compliance with these provisions in a simple and effective way.

We recommend that Parliament go further and require that all people suspected of people smuggling by bringing asylum seekers to Australia by boat be charged without delay.

Again, we point to statistics gleaned from the 63 relevant prosecutions initiated in Victoria to date where the average time accused have spent in custody before being charged is 7.4 months. The longest period spent in custody without charge was 10.5 months.

There is little to justify these delays. The accused are readily identifiable by virtue of their Indonesian appearance and presence on a boat in Australian waters with other people who appear Middle Eastern. It is hard to conceive of a more straightforward prima facie case. It is also hard to conceive of an easier investigation given that the witnesses are accessible because they are in immigration detention and the Australian Federal Police have a permanent presence on Christmas Island. For nearly every other offence prosecuted in Australia that results in the immediate detention of an accused, a charging decision is made within hours.

If one reflects on the public outcry about the detention of Dr Mohammad Haneef for a number of days without charge in 2007 on suspicion of terrorism offences, it is difficult to reconcile how the Australian Parliament can tolerate the systematic arbitrary detention of accused people smugglers for, in the Victorian experience, an average of over seven months.

It is important to note that the *International Covenant on Civil and Political Rights* entitles all accused to be "*tried without undue delay*"²⁷. Further the *Universal Declaration of Human Rights* decrees that "*no one shall be subjected to arbitrary arrest, detention or exile*"²⁸.

We recommend that the initial investigation and charging process be expedited for all relevant suspects such that no suspected people smuggler can be detained for more than 14 days before being charged. Two weeks is sufficient time for an accused to be interviewed by the AFP on Christmas Island before being conveyed to another State or Territory for a charge to be laid and

²⁵ Article 37

²⁶ Article 40

²⁷ Article 9.1

²⁸ Article 9

prosecution commenced. The prosecuting authorities would then be given adequate time to compile a brief of evidence. In Victoria, this is typically three months.

Conclusion

The prevalence of people smugglers recruiting children to work as crew on boats from Indonesia creates a need for caution when charging suspects with people smuggling offences.

Given the mandatory imprisonment that flows from conviction of the aggravated people smuggling offences, the highest, internationally accepted standards of proof of age must apply. Wrist x-rays therefore must not be relied upon as the sole determinant of age, and other information and expert evidence must be sought. The Crown must bear the burden of proving beyond reasonable doubt that an accused was an adult at the time the offence was allegedly committed.

The Victorian experience of delay in alleged people smuggling cases suspects highlights the need for strict time limits to apply for investigation and charging of all people smuggling accused.