CRIMES AMENDMENT (FAIRNESS FOR MINORS) BILL 2011

Response to Bill

Submission on behalf of

Legal Aid NSW

to the

COMMONWEALTH SENATE STANDING COMMITTEE ON LEGAL AND CONSITUTIONAL AFFAIRS

January 2012

This submission has been prepared by Legal Aid New South Wales and is endorsed by Legal Aid Western Australia, Victoria Legal Aid, Northern Territory Legal Aid, the Legal Services Commission of South Australia, Legal Aid ACT and Legal Aid Queensland.

The endorsement by Legal Aid Queensland is subject to one exception. This relates to point 5.4 below. The exception is noted in the text of this document below at 5.4.

Legal aid commissions around Australia have extensive experience in representing people charged with people smuggling. These proceedings have been conducted for more than ten years in the Northern Territory and Western Australia (WA). Recently, as a result of agreement between Attorneys General at State, Territory and Commonwealth levels, a large number of people charged with people smuggling have been sent to New South Wales (NSW), Victoria, Queensland, and South Australia for trial. We understand that shortly some are to be sent to the ACT for trial.

Under this agreement, for example, NSW has received 106 people in total. About 15 of these have identified to their lawyers that they were under 18 years of age at the time of arrival in Australia. In Victoria 63 people have been transferred to Melbourne and charged since February 2011. Eight of these identified that they were under 18 years of age.

1. Introduction

We understand that the Committee is seeking comment on the *Crimes Amendment (Fairness for Minors) Bill 2011.* We understand that there is no Discussion Paper, and that the Committee simply seeks comment on the substance of the Bill.

These submissions consider:

1. The significance of age in people smuggling proceedings,

2. Practical difficulties in determining age,

3. The proposal to remove wrist x-rays as a prescribed procedure in the *Crimes Regulations*,

4. The appropriate burden and standard of proof in age determination proceedings,

5. Where accused persons who claim to be under 18 should be held pending trial,

6. Proposed time limits on bringing charges and

7. Access to lawyers while detained in immigration detention pending charge.

The summary of recommendations is set out at the end of this submission.

2. General background

It may be useful to the Committee to have some brief background to these types of matters, to put the comments and recommendations of this document into a meaningful context.

2.1 Usual course of a people smuggling case

Under the *Migration Act 1958 (*Cth)[1] a non-citizen who has travelled to the migration zone and who is suspected of having committed an offence may be detained for the purpose of deciding whether to institute proceedings. Currently under the *Migration Act* there is no time limit on the period of detention that a person may be held without charge. Legal Aid NSW has had clients who have been detained up to 11 months without charge. The average length of time for detention without charge for people who are later sent to NSW for trial is around four months. It appears that the waiting time before charge seems to vary with the workload and resources of the Australia Federal Police (AFP). In WA persons have been detained for periods of between six and ten months without charge. In Victoria, among the eight minors transferred to Melbourne and charged with people smuggling in 2011, the average delay between interception and charge was 6.4 months, with the longest delay in one case being nine months. Among the adult Indonesian boat crew in Victoria the longest delay pre-charge is 11 months.

We have great concern about the detention of people without charge. Apart from the consequences such detention may have on individuals, both adult and children, detention without charge raises some basic human rights issues.

<u>Process on arrival to Australia</u>

When the Navy or Customs intercept and detain an illegal vessel, all people on board including those suspected of people smuggling, are placed in immigration detention on Christmas Island and then transferred to Darwin. Both asylum seekers and people suspected of people smuggling seem to be handled similarly.

Soon after arrival on Christmas Island, the Department of Immigration and Citizenship (DIAC) interviews all people (both asylum seekers and those who are suspected of people smuggling) using a standard form designed to obtain information from people seeking asylum. These interviews are conducted without providing the detained person with the opportunity to seek legal advice. A standard question asked in the interview is the age of the detainee. The concern we have is that the questions asked in this form are designed for

[1] *Migration Act* 1958 ss189 and 250.

asylum seekers and are not appropriate for use with people suspected of people smuggling. (This is discussed in detail at 2.7 below.)

Involvement by AFP and subsequent charge

In this period in immigration custody the AFP obtain statements from passengers on the boat. They also obtain statements from other witnesses. They may interview the person while in immigration detention, or once he is moved interstate. The AFP arrange for the person to obtain legal advice. In WA an informal protocol has been in place whereby, prior to suspects being interviewed on video, Legal Aid WA receives advice from the AFP People Smuggling Team (usually by email) of impending interviews. Arrangements are then made for a staff lawyer to speak to the suspect (over the telephone) and advise him as to his legal rights with particular emphasis on the right to remain silent. Usually, the suspects accept the staff lawyer's advice to remain silent and the staff lawyer will then advise the AFP interviewer that the suspect will be exercising that right and will not be participating in the interview.

Generally in these interviews the client is not asked about his age.

Once a decision is made to charge a person, he will be brought before a court, and is usually transferred to another state or territory for this purpose.

Court process after charge

In many jurisdictions there is a committal procedure, which may take six weeks to six months or occasionally longer. In WA upon a client indicating a plea of not guilty he is remanded to a disclosure committal hearing in the Magistrates Court (which is usually a ten week remand). At the disclosure committal hearing upon a plea of not guilty being entered the client is remanded to appear in the District Court at a trial listing hearing (which is usually 10 to 12 weeks later). At the trial listing hearing in the District Court (subject to full disclosure having been provided and the matter being in all respects ready to list for trial) a trial date will be set (and this can be, generally, within two to four months thereafter).

If the person is an adult, he then has to wait for a trial date in the District or County Court, which can be significantly delayed because of the large number of trials listed. In NSW the wait for a trial date is presently six to seven months for people smuggling trials. In Victoria the first people smuggling trial to be listed has been given a trial date of May 2012. This corresponds to a delay of 20 months from interception to commencement of trial. In one matter in Victoria the trial date has been listed two years and two months from the date of interception. In WA most matters are listed for trial within 12 to 18 months from the date of detention of the suspect.

In the period between charge and trial, most people to date have been held in adult prisons, bail refused. Recently the Commonwealth Department of Public Prosecutions (CDDP) has not opposed bail applications for people charged with people smuggling who identify as being under 18 years. In a number of states this has meant that minors can be held in more appropriate conditions in immigration detention, generally outside of formal immigration detention centres. However, in NSW practical problems have meant that this is not possible and young people have remained in adult gaols. This is discussed below.

2.2 The significance of age in people smuggling proceedings

The following summary sets out how the court process differs if someone charged with people smuggling were to be treated as a juvenile within the criminal justice system.

Sentence

Age is significant because if a convicted person is under 18 years the mandatory sentencing provisions do not apply.[2]

Further, sentences imposed on children are generally much shorter than those imposed on adults for the same offence. We expect that a child convicted of people smuggling would not be likely to receive a custodial penalty.

Avoiding lengthy delays

An important, practical result of someone being under 18 years is that the lengthy delays in the trial process are effectively circumvented. The law provides that the child should be tried in the Children's Court, rather than the District Court or County Court, which means he avoids the potential for lengthy delays that currently exist in the District or County Courts. . Also in the Children's Court hearings are much shorter that trials in the District or County Courts.

Prosecution practice of withdrawing matters

Where the CDPP accepts that the person charged is under 18 years of age, their practice has been to withdraw the charges.

We appreciate this sensible approach by the CDPP.

The experience of legal aid commissions has been that since the launching of the Parliamentary Inquiry and the Australian Human Rights Commission (AHRC) Inquiry, the CDPP appears to be more willing to accept an accused's evidence-based claim that they are under 18 years.

Place of detention

A person found to be under 18 years after a preliminary age determination hearing would, theoretically, be held at a custodial facility for children. However, given the CDPP practice of withdrawing charges against children, people found to be children have been returned to Indonesia.

2.3 When age is raised as an issue in proceedings

There is no limit to the number of times the issue of age may be raised in proceedings. The issue of age may be raised in the Local Court, as part of an application to have the court mark the papers "without jurisdiction": where the person is found to be a child, the Local Court has no jurisdiction to deal with the matter.[3] Where the Local Court rules it has no jurisdiction, the prosecution may still initiate proceedings in the Children's Court.

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[2] *Migration Act s 236B*. The mandatory sentence applies only to a charge of "Aggravated people smuggling", not the simpliciter offence of People smuggling. However, the Aggravated people smuggling offence applies if five or more people are brought to Australia. Clearly almost all boats have more than five people, so almost all our clients are charged with the Aggravated offence, and are hence subject to the mandatory sentence if found guilty.

[3] The relevant NSW legislation is *Children (Criminal Proceedings) Act* 1987 (NSW) s 7.

Age may be raised in the District Court as a pre-trial application to have the young person dealt with as a child.

Age may be raised after the person is convicted, to argue that the mandatory sentence does not apply.

In NSW, it is our understanding that all the age determination hearings to date have been heard in the Local Court. However, given the willingness of magistrates to accept the evidence about age based on wrist-x-rays (this is discussed below in the case studies), we understand a number of legal practitioners have recently advised their clients to expedite matters by simply committing their matter for trial in the District Court and raising the issue of age as a pre-trial application. To our knowledge, none of these pre-trial applications have been heard, because of the recent willingness of the CDPP to withdraw charges where there is defence evidence that the accused is a child

2.4 Frequency with which age issues have arisen

We cannot confirm the exact number of matters where accused persons have identified as being under 18 years as many of the smuggling matters are assigned out to private practitioners under grants of legal aid and the in-house criminal law practice does not have information about these matters.

Legal Aid NSW is aware of about 15 matters where age has been identified as an issue. This is only an estimate, based on the matters we have in-house and from what we understand from speaking to private practitioners. We believe that about 12 matters have been withdrawn so far. (The CDPP never give reasons why charges are withdrawn.)

From an analysis of reports to Legal Aid WA from private practitioners it appears that there have been four age determination hearings where a person has been found to be under 18, three where a person has been found to be over 18, six where a person has initially provided a date of birth under 18 but it appears there has been no age determination hearing, there are four ongoing age determination cases and six cases where the Commonwealth DPP has discontinued cases due to age at various stages of the proceedings.

In Victoria 63 people have been transferred to Melbourne and charged since February 2011. Eight of these identified that they were under 18 and all eight prosecutions have been withdrawn. Of the eight cases, only one proceeded to an age determination hearing with the Magistrate's Court in Victoria ruling on 1 December 2011 that the prosecution had failed to establish on the balance of probabilities that the accused was 18 or older at the relevant time. There are currently no minors subject to people smuggling charges in Victoria.

We understand a number of young people have been sent home before charge (that is, sent home directly from immigration detention) without any court proceedings starting. We are never given the reasons as to why, as these young people do not make contact with any Legal Aid. We simply see read the Facts Sheet or brief in the matter of an adult accused and see that our adult client is alleged to have arrived with a child or another child as a crew member, and that that child is not charged.

2.5 Practical difficulties for Indonesian young people in proving their age

<u>Birth certificates</u>

In Indonesia very few births are registered. We have been advised by the Consulate that it is only recently that it has been a legal requirement to register births in Indonesia. Very few of our clients have birth certificates. All the clients we have dealt with come from impoverished

families, for whom travelling to the nearest government office to register a birth can be prohibitively expensive. Also, many people from the remote islands targeted by the smuggling operations are not fluent in Bahasa Indonesia, the official language of Indonesia which adds another layer of difficulty in registering a birth. We also understand the travelling to a government office to register a birth can be prohibitively expensive.

Obtaining material from family and local officials

Lawyers have travelled to the remote home villages of young clients and have had some success in obtaining "Family Cards", schooling and other records from family or local officials which has assisted with determining the age of our clients. We have also obtained affidavits from local officials and family members stating the date (or year) of birth. These documents have generally been accepted by the CDPP as evidence of the young person's age. Occasionally the AFP has travelled to Indonesia to confirm the information obtained and this has sometimes resulted in a dispute about the documents obtained by the defence.

Travelling to remote Indonesian villages is, however, very costly and very slow. While arrangements are made, young people are sitting in custody in adult prisons. On some occasions we have been able to obtain this information through Indonesian contacts without travelling to Indonesia, but this is generally not the case.

For some young people it has not been possible to locate families. Smuggling organisers tend to target the poorest and most vulnerable people. Most of our clients started work at age 12 or 13 years. They have sometimes lived apart from their families for a long time because of work and as a consequence have lost contact with their families and their village.

Defence lawyers have made these trips because the AFP and CDPP have not obtained this evidence, despite it being the best evidence of birth, and despite all detainees being asked by DIAC on arrival what their home address is.

The Indonesian Consulates have been very cooperative in providing assistance in obtaining this material where possible.

2.6 Wrist x-rays and age determination

Wrist x-rays are a prescribed procedure for age determination under clause 6 of the *Crimes Regulations 1900* (Cth).

Ethical concerns with exposure to radiation

A wrist x-ray exposes a child to radiation.

A letter to the Immigration Minister, Mr Chris Bowen, dated 19 August 2011 regarding "Assessment of age of refugees and those persons accused of providing refugees with illegal access to Australia: The unethical use of Ionizing Radiation (X-Rays) and / or Genital examination" states that the taking of wrist x-rays for age determination without medical benefit is "unethical when used by medical practitioners in situations when their use is for administrative purposes".[4] This letter was signed by a large number of professional medical groups: the 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.

[4] This letter has been made publicly available through the APEG website at www.apeg.org.au.

The CDPP has advised Legal Aid NSW that Justice Health NSW will no longer conduct wrist x-rays because of ethical concerns.

Unreliability

The same letter stated that "these methods are unreliable and untrustworthy when used as criminal evidence in a Court of Law". It is notable that all the prosecution experts have been radiologists, and members of the College that was a signatory to this letter.

The wrist x-ray technology generally relied on by the prosecution, and the problems involved with it, are well set out by Bowen DCJ in *R v Daud* [2011] WADC 175.

> **Consideration of the evidence**
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> The evidence called by the prosecution
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> 9 A central feature of the prosecution's submissions is Greulich & Pyles', *Radiographic Atlas of Skeletal Development of Hand and Wrist* (herein after referred to as the Atlas) and its interpretation by Dr Low and other prosecution witnesses.
>
> Greulich & Pyle, *Radiographic Atlas of Skeletal Development of the Hand and Wrist*
>
> 10 10 The second addition of the Atlas was published in *i959)* and is exhibit 19.
>
> 11 The stated aim of the Atlas was to create a method providing more precise information about the development status of a child than could be properly inferred from the child's height, weight and age alone and by the use of an x-ray film of the hand meet the need for a dependable indicator of the development status of children.
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> 12 In the study, children of a known chronological age had x-rays performed every year of their left hand.
>
> 13 It is accepted that the radius is the last post of skeletal maturity within the hand. As the skeleton matures, the radiographic appearance of the growth plates change in a well defined way and when the radial epiphysis fuses with the shaft, skeletal maturity of the hand and wrist is complete. No further growth is possible and the appearance of the x-ray will then remain the same throughout the balance of the subject's life.
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> 14 The authors chose a single x-ray as the standard for each of the 31 skeletal ages they prescribed for males. They explained:
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> Each of the standards in this Atlas was selected from 100 films of children of the same sex and age. The film of each of these series was arrayed in the order of their relative skeletal status from the least mature to the most mature. In most cases the film chosen as the standard is the one which, in our opinion, was most representative of the central tendency or anatomical mode, of the particular array. The anatomical mode was frequently but not always, at or near to the mid-point of the distribution of the 100 films. It was fartherest from the mid-point at those ages when as a result of a major change in the rate of development differences in the degree of skeletal development of the children resulted in a skewed distribution of the array. Every effort was made to ensure that each standard would depict as accurately as possible the mode or degree of skeletal development attained by the children of the same sex at that chronological age in our Research series. (32)
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> 15 The standards chosen are illustrated within the Atlas.
>
> 16 The last male standard in the Atlas is described as 'Male Standard 31, skeletal age 19 years'. At that standard, the x-ray depicted is skeletally mature. There is no point, of course, of having any further standards because once skeletally maturity is achieved there will be no further changes shown on the x-ray.

17 A radiologist using the Atlas would examine the x-ray provided to them by comparing it to the 31 standards in the Atlas. The skeletal age given by the radiologist to the x-ray will match the standard shown in the Atlas.

18 The inevitable consequence of this is that anyone with a mature skeleton will be given the standard ascribed by the Atlas to a mature skeleton, namely standard 31 and the skeletal age 19 irrespective of whether that person chronologically is aged 15, 19 or 99.

19 Within the Atlas, are standard deviations tables of skeletal ages for different chronological ages being tables (iii)-(vi), taken from two further studies which looked at a particular standard and compare that to the known chronological age of the child, thereby creating the deviation from chronological to skeletal(bone) age.

20 Each of the standard deviation charts has as its last chronological age 17 years.

21 The authors accepted and noted the limitations of their own studies stating:

> ... In any intensive study of individual children, therefore, the hand-film should be supplemented by significant physical measurements and other pertinent data which aid in appraising the child's nutritional and development status ...
>
> It should be remembered, however, that no single available technique is entirely adequate for appraising the child's physical status and all of them together occasionally fail to disclose existing insipient abnormalities which subsequently manifest themselves.
>
> They, however, must not permit their enthusiasm for a procedure which they find rewarding to obscure the limitations inherent in it.
>
> The assessment of the hand-film should be regarded as a supplement to, and not as a substitute for,, other valid methods of appraising the physical status of children. [22]

22 They also state:

> A word of caution is, perhaps justified, however in evaluating the skeletal status of children of different racial groups. There is a tendency to attribute the relative retardation in skeletal development that has been observed among children of some parts of the world at least in part to racial differences in the rate at which the skeletal developments normally proceeds. It is quite possible that this is not the correct interpretation of such differences. (41 - 42)
>
> The assessment of hand-films has of course a large subjective component. It involves making numerous judgments as to whether individual bony centres of epiphyses visible in the film are or are not as advanced in their development as the corresponding centres in one or more successive standards with which they are being compared. (43)
>
> The system designed in this Atlas for example is intended to provide merely useful estimates of skeletal status and it will do so if it is properly used. Unfortunately as in many other similar procedures there is a tendency to attribute to and to expect from it a greater degree of precision than was intended by those who devised it or indeed than is permitted by the nature of the changes which it is designed to measure. (44)
>
> Statistical methods which have contributed so much to the proper interpretation of data also suffer occasionally from the tendency to expect more from them than they are designed to provide. (48)
>
> As in other respects of human growth and development this variety inherent in the skeletal development should make us cautious about selecting one technique for evaluating 'normality' range least we lose sight of the difference in meaning of retardation and acceleration. (49)
>
> . . .

The Atlas

252 The purpose of the Atlas was to estimate the skeletal age of growing " ^ children of a known chronological age, it makes no reference to determining an unknown chronological age from skeletal maturity.

253 The link between chronological age and skeletal age is, if not weak, not well established and according to the International Olympic Committee Consensus Statement on age determination in high level young athletes there can be variations in chronological age from skeletal age of up to four years.

254 It is uncommon to determine an unknown chronological age from the skeletal age obtained solely via a single x-ray of the wrist and its comparison to the Atlas standards and there is a significant body of scientific opinion that it is inappropriate to use the Atlas to determine chronological age

255 The Atlas does not examine the chronological age that a person obtains skeletal maturity

I accept there is no definitive scientific conclusion both as to whether ethnic differences affect skeletal maturity or whether males are maturing at an earlier age than when the Atlas was released.

256 The age 19 male standard used in the atlas is the standard would be ascribed by those using the Atlas to any mature male skeleton irrespective of the chronological age of the subject.

257 The standard deviations provided in the Atlas conclude at skeletal age 17.

The medical evidence

260 As to Drs Low, Chan and Lee [the prosecution radiologists in that case] evidence I accept the x-ray of each accused showed skeletal maturity however I am not prepared to accept the findings in Dr Low's reports relating to the statistical probabilities of the accused being of the chronological age he reports for two reasons.

261 Firstly, because I accept the evidence of Professor Cole [medical statistician briefed by the defence in this case] and Dr Christie [radiologist briefed by the defence in this case], that there is an absence of scientific data to validate the use of the standard deviation provided by the Atlas for an immature skeleton to assess the chronological age of a person possessing a mature skeleton.

262 Secondly because Drs Low, Lee and Chan's [ie the prosecution radiologists] basic assumption that skeletal maturity is achieved on average at age 19 is not supported by the Atlas. I accept Professor Cole and Dr Christie's evidence that there is other research which shows that the skeletal maturity is achieved at the age of 18 or before.

263 I accept Professor Cole and Dr Christie's evidence that whilst a male aged 19 will on average show skeletal maturity that does not equate with saying the average age of obtaining skeletal maturity is 19.

264 I accept the prosecution's criticism that I could not rely on Professor Cole's calculations of probabilities as to the accuseds age based on the TW3 method because neither Mr W or Mr Idris had been assessed under TW3 and as I am unsure whether TW3 refer to a skeletally mature wrist as a wrist that has commenced the fusion process of the radial epiphysis or completed it.

265 However that does not invalidate Professor Cole's evidence which I accept that he calculated the' mean' age of skeletal maturity for males based on information in TW3 as 17.6 years with a standard deviation of 16 months.

266 The Medical Experts satisfies me on the balance of probabilities only that both Mr Idris and Mr W had skeletally mature wrist x-rays at the date they were taken and that most 19-year-old males are skeletally mature.

In that case the Judge rejected the prosecution wrist x-ray evidence as conclusive of age.

Rejection of wrist x-rays in immigration matters

The use of wrist x-rays to determine age has been rejected by courts in immigration matters because the method is deemed unreliable.[5]

2.7 Age determination by DIAC and the prosecution

Age determination by DIAC

Soon after arrival in immigration detention DIAC officer asks each person their age for the purpose of making decisions about where people should be housed. While the AFP and CDPP make independent decisions about whether to investigate and prosecute the person as an adult or a child (or whether to discontinue proceedings because the person is a child), it appears information provided during these DIAC interviews is frequently relied upon in age determination proceedings by the CDPP.

DIAC has a pro-forma set of questions designed for asylum seekers. This is administered to all detainees on arrival.

The problem with these interviews, however, is that from our experience the information obtained can be misleading as often the information obtained is lost in translation. Many Indonesians who are used in smuggling operations are from remote regions and do not speak Bahasa Indonesia fluently. In a recent smuggling trial a linguist gave evidence in relation to whether an accused adult understood questions that had been put to him by the AFP. The linguist stated the dialect the man spoke was as far from Bahasa Indonesia as contemporary English is from Eskimo, and that the regional dialect he spoke was as far from Bahasa Indonesia as contemporary English is from Chaucerian English. [6] It is not possible to obtain interpreters in our client's regional languages. We have not been able to find accredited interpreters in dialects.

Further, while criminal suspects have a right to silence, DIAC says to them "You are expected to answer all questions". This is included in the standard form. These people who are suspected of people smuggling are not provided with access to a lawyer at this early stage. (Lawyers generally speak to people before AFP interview, but these are conducted later.) (Lawyers do attend Christmas Island to assist people who want to apply for refugee status but these lawyers do not become involved with DIAC interviews or criminal matters.) This would tend to render the interviews inadmissible at an eventual trial in relation to guilt or innocence, but the CDPP try to rely on these interviews at age determination hearings.

The pro-forma questions assume that the person intended to come to Australia and most of our clients tell us they did not know that they were coming to Australia.

As can be seen from our case studies (below), the information provided in these interviews is often not reliable because of the client's difficulty in understanding the interpreters, inappropriate questioning and even immature young person's themselves inflating their ages in order to get access to cigarettes or work, without having had legal advice on the consequences of doing so.

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[5] *Applicant VFay v Minister for Immigration* [2003] FMCA 289, *Osman v Minister for Immigration and Multicultural Affairs* [2007] FCMA 1437.

[6] Transcript of proceedings in R (Commonwealth) v Joe, Kadir and Karim, Campbelltown DC, 12/7/11.

2.8 Method of age determination by the AFP and CDPP

Wrist x-rays

The AFP and CDPP rely heavily on wrist x-rays as a means to determine a person's age.

As stated above, there are serious concerns with using wrist x-rays as a means of determining age. These problems are often not fully fleshed out by the CDPP in Court. There is also general concern that they are being relied on at all.

The NSW Solicitors Rules and Bar Rules state that:

> A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

The Victorian Bar Rules of Conduct proscribe the prosecutor's duty in identical terms: *Victorian Bar Incorporated Practice Rules par 134.*

The Prosecution Policy of the Commonwealth states that, in deciding whether to prosecute and in evaluating the evidence "the prosecutor must be prepared to look beneath the surface of the statements".

Consenting to wrist x-rays

The Regulations provide that the person must consent to the procedure.

We take the position that a client needs to have a lengthy, face to face discussion with a solicitor to understand the legal and health issues involved in wrist x-rays before consent could be meaningful. It must not be forgotten that what they are consenting to is a dose of radiation. Almost none of the clients we have seen have previously seen a doctor. It is highly unlikely that they understand what an x-ray is, or what radiation is.

Birth certificates

While we understand the AFP has attempted to obtain copies of birth certificates from Indonesia, the problem is that many of our clients have not had their births registered.

Response by the CDPP and AFP to the launching of recent inquiries

It is acknowledged that since the various inquiries have been launched the CDPP seems to be more willing to accept that our clients are under 18 years where evidence is produced by the defence. However, where there is no documentary evidence of age, the CDPP continues to rely on wrist x-rays as the method of determining age in court proceedings.

In WA Ms Annie Gray (who does a regular Cocos/Christmas Island visitation) has recently advised that the then current AFP People Smuggling Team were repatriating persons claiming to be juveniles (without charges being laid). We are seeking clarification of the official AFP policy concerning this matter.

In Victoria, prosecutions have been withdrawn in some cases without evidence of age being obtained from Indonesia. In three cases, evidence was obtained from Indonesia in the form of affidavits from family. In one of these cases, family was able to also provide copies of a birth certificate and family card, although it is not common for families to have access to original identification documentation. In one case, defence reports were provided to the CDPP from a paediatric radiologist and professor of medical statistics challenging the expert

wrist x-ray evidence relied upon by the CDPP. Evidence was called from these experts at an age determination hearing before the Magistrates Court and the court ruled that the CDPP expert was using the Greulich and Pyle radiographic atlas for a purpose for which it was not intended. The evidence of the defence experts, and particularly the evidence of Professor Tim Cole of University College London, was preferred.

Dental x-rays

In response to concerns about the use of wrist x-rays, the CDPP has offered dental x-rays as an alternative. This has generally been rejected by clients on the advice of defence lawyers as the information we have obtained has been that this methodology has similar problems to wrist x-rays, in terms of unreliability and health risks.[7]

Similarly, in WA dental x-rays are generally refused. In Victoria there have been only rare requests for an accused to undergo dental x-rays and such requests have been refused on legal advice for the reasons referred to above.

Should the AFP gather affidavits and local village records?

We are aware that in a few cases the AFP and CDPP have obtained village records for the purpose of determining the age of an accused. In our experience this is generally done in response to the defence providing similar kinds of evidence.

However, it raises the question as to whether the AFP should be doing this routinely, early in proceedings, to expedite the age determination process. If the AFP were required to gather this evidence, presumably it would be through some form of cooperation with Indonesian police.

We are of the view that this process could potentially cause some problems.

Firstly, many of our clients are very fearful of authority and particularly the police. We have heard anecdotally that Indonesian police have a reputation for being violent towards suspects. Our clients might be unwilling to co-operate in circumstances where this information was being sought by the police. For our clients it may not be to the advantage of their families to have a police presence in the village.

Secondly, cooperation with foreign police forces requires the approval of the Attorney General. This is a long and laboured process. The experience in other areas of criminal law is that it can delay criminal proceedings by up to six months.

In any case defence lawyers themselves, for example, would be obliged to make inquiries on behalf of their clients. If the response from the AFP was that they could not find any information in relation to age from parents or village authorities, we would not be able to accept this at face value, and would be obliged to make inquiries ourselves.

3 International best practice

The unreliability of wrist x-rays in determining age has been recognised in a recent UNICEF publication.[8] The authors conclude that there is no single reliable medical method of

[7] UNICEF *Age assessment practices: a literature review & annotated bibliography* Terry Smith and Laura Brownlees, 2011 at 15-17.
[8] UNICEF *Age assessment practices: a literature review & annotated bibliography* Terry Smith and Laura Brownlees, 2011.

determining age. They stress the importance of obtaining material from the child's place of origin, and of using a multi-disciplinary approach.

The UNICEF report contains the following comments on international best practice guidelines:[9]

> The UN High Commissioner for Refugees (UNHCR) has developed two significant sets of guidelines relevant to the issue of age assessment. In its *Guidelines for Unaccompanied Children Seeking Asylum,* UNHCR suggests that assessments should take into account both the physical appearance and psychological maturity of the child, emphasize the need for accuracy, safety, and dignity in the use of medical assessments, and recommend that authorities acknowledge inherent margins of error in medical assessments (UNHCR, 1997:05).
>
> The Council of Europe Convention on Action against Trafficking in Human Beings (2005) also refers to the issue of age dispute and states that „when the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age (Art. 10(3)).
>
> Basing its guidance on the UNHCR guidelines and elements of the UN Committee on the Rights of the Child‟s General Comment no. 6 (paragraphs 31 & 95), the Separated Children in Europe Programme‟s Statement of Good Practice provides detailed recommendations for the practice of age assessment, stating that;
>
> _ Age assessment procedures should only be undertaken as a measure of last resort, not as standard or routine practice, where there are grounds for serious doubt and where other approaches, such as interviews and attempts to gather documentary evidence, have failed to establish the individual‟s age. If an age assessment is thought to be necessary, informed consent must be gained and the procedure should be multi-disciplinary and undertaken by independent professionals with appropriate expertise and familiarity with the child‟s ethnic and cultural background. They must balance physical, developmental, psychological, environmental and cultural factors. It is important to note that age assessment is not an exact science and a considerable margin of uncertainty will always remain inherent in any procedure. When making an age assessment, individuals whose age is being assessed should be given the benefit of the doubt. Examinations must never be forced or culturally inappropriate. The least invasive option must always be followed and the individual‟s dignity must be respected at all times. Particular care must be taken to ensure assessments are gender appropriate and that an independent guardian has oversight of the procedure and should be present if requested to attend by the individual concerned.
>
> _ The procedure, outcome and the consequences of the assessment must be explained to the individual in a language that they understand. The outcome must also be presented in writing. There should be a procedure to appeal against the decision and the provision of the necessary support to do so.
>
> _ In cases of doubt the person claiming to be less than 18 years of age should provisionally be treated as such. An individual should be allowed to refuse to undergo an assessment of age where the specific procedure would be an affront to their dignity or where the procedure would be harmful to their physical or mental health. A refusal to agree to the procedure must not prejudice the assessment of age or the outcome of the application for protection.
>
> (Separated Children in Europe Programme, 2009:25)

4 Experiences of Indonesian young people themselves

Article 12 of the *Convention on the Rights of the Child* provides "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

We have attempted below to provide some information about the experiences of our child clients. These case studies are from NSW. It is noted that all but one of the people we have represented, who the CDPP accepted were children, have been returned to Indonesia. This

[9] At pages 11 and 12.

means, for the purpose of this submission, we were unable to ask them about their experiences in custody.

Case Study 1

Boy aged 15 on arrival

Period of detention

He arrived in October 2010 and the case against him was discontinued in December 2011. At last contact, he was in immigration detention waiting to be returned to Indonesia. He had been stopped on a boat with two Indonesian boys, one of whom was returned without charge and an Indonesian adult.

This boy was held in immigration detention from October 2010 until May 2011, a period of seven months during which time he was not charged. Once charged, he was transferred to Sydney in May 2010 and housed at MRRC, an adult facility. He was moved to Villawood detention centre in late December 2011, after the case against him was discontinued.

Instructions to Legal Aid about age

This boy stated to Legal Aid that he did not know when he was born, but believed he was 17 years when he arrived in the country. He said he had never celebrated his birthday and never had a birth certificate.

Eventually Legal Aid located this boy's mother, a village official and the village head. They provided affidavits and village records which established that he was 15 year on arrival in Australia. They were able to state the date of birth.

Prosecution evidence of age

When the prosecution charged him they recorded his date of birth as 1991.

A nominal roll prepared soon after his arrival recorded his date of birth as 1989. The prosecution relied on the evidence of a radiologist who had viewed an x-ray of this boy's wrist to assert that he was 19 or over.

Problems with DIAC interview

This boy was always interviewed by DIAC in Bahasa Indonesia. However, he was not fluent in that language. He spoke a dialect from Eastern Indonesia. (It is not possible to obtain interpreters in Indonesian dialects, so DIAC, the police and his lawyers simply had to use an interpreter in a language in which he was not fluent.) It was not identified by DIAC or the police that he was not fluent in the language in which they interviewed him. He was never asked what language he spoke at home.

The CDPP relied on the notes taken at this interview for the purpose of the age determination proceedings. The boy had not been provided with legal advice before the DIAC interview, and was told "you are expected to answer all questions". He was not told of his right to silence in relation to criminal proceedings. (DIAC uses a standard form which is intended for asylum seekers, not criminal suspects.) The notes of the interview stated that he said:

- His date of birth was a certain stated day and month in 1988. (We have not included the exact date to protect his privacy.)

- He had worked as a fisherman for 13 years from 1997 to 2010. (The handwritten notes taken by the DIAC officer were wrong. When Legal Aid listened to a recording of the

interview it was clear that the DIAC officer said "so you have been working for 13 years?" and he replied "9 years".)

- He was asked if he attended school for three years from 1995 to 1998 and he responded "yes".

Legal Aid arranged for a linguist who was fluent in both Bahasa Indonesia and this boy's dialect to listen to the recorded interview. The linguist stated that his answers were "not responsive", and that he was not fluent in Bahasa Indonesia.

Legal Aid is also concerned about the way the questions were asked as "closed questions" and the possibility of "gratuitous concurrence", where some cultures try to show respect for authority by agreeing with questions asked of them.

Defence evidence and initial prosecution response

In August 2010, Legal Aid provided the prosecution with a report of a paediatric radiologist, which questioned the conclusions of the prosecution expert, Dr and also a copy of the UNICEF report (mentioned above). There had been significant delay in the defence expert as the expert needed to see the original x-ray and, despite repeated requests for the x-ray image, it took six weeks and a subpoena to the AFP to obtain a copy of the x-ray. Ordinarily items which form part of the prosecution case are served on the defence.

The CDPP declined a defence request to withdraw the matter even after being provided with the defence paediatric radiologist's report.

The matter was listed for hearing in the Local Court, but, given the outcome of previous age determination hearings at the same court, Legal Aid advised the boy to simply commit the matter for trial and seek an age determination hearing in the District Court.

Legal Aid sought further opinions from other experts, including a medical statistician and the linguist. Given the severe constraints on experts' time and the number of experts involved it was not possible to obtain a hearing date until March 2012.

In the meantime another barrister obtained the affidavits from the mother and village officials on a trip to Indonesia. This inquiry and the Parliamentary Inquiry were commenced, and the attitude of the CDPP seemed to swing more towards withdrawing matters.

Legal Aid had been asking this boy for some time for contact details for family in Indonesia. He had maintained to his lawyer that he did not have any contact details for them (despite actually being in contact with a cousin). We are not sure if this was for fear of worrying his mother, embarrassment (he was born out of wedlock and that was severely frowned up in his village), or fear of bringing officials in contact with his family. This does, however, demonstrate the severe difficulties in obtaining information and instructions from young people who suffer embarrassment, fear and severe culture shock at being involved in proceedings in a foreign place.

Boy's comments on his own case

He later stated to Legal Aid through an interpreter:

> I found living in gaol very tough. I had to share a cell with three other people. All of these other people were adult except me. The prison officers told me that because I was so small, they were worried about my safety in gaol l. I was the smallest person in the gaol. I was scared that I was going to be hit by the other inmates. The Australian inmates were much taller and stronger than me. Whilst I was in

gaol, I had to do work as a cleaner. I cleaned the tables and vacuumed the floor. I didn't mind doing this work, as it took my mind off my situation. I was often lonely in gaol and I was worried about my family back in Indonesia. My mother doesn't have a telephone at her house so I couldn't speak to her at all. I was able to call my cousins a few times whilst I was here, but she always got upset when I spoke to her so I didn't call that much because I was worried about her. I was also very sad as I was separated from my family and all the things I was familiar with. It was hard being in a foreign culture and I didn't understand any English. I can't speak any English really.

Being in immigration detention was better than the gaol. I have more freedom here in detention. I can walk around quite freely. Whilst in gaol I was put in my cell for many hours every day, and I couldn't leave. When I was in immigration detention in Darwin I was put with the other Indonesian children. All up there were 16 of us children in Darwin. I coped better in Darwin as I was always hoping that I would soon be sent back to Indonesia. I was sent to gaol in Sydney instead.

I found waiting to find out what would end up happening to me very hard. I just did my best to always hope I would get to go home.

When I was first apprehended by the Police in Australia , I told the authorities that I didn't think I was over 18. Over the last twelve or so months that I have been in Australia, I have told the Authorities many times that I am still a child. When I first spoke to the Police I was very scared because that was the first time I have ever experiences talking to the Police, here or in my own country.

I am very happy now [he was in immigration detention awaiting return to Indonesia at that point] as I have been told I can go home to my family soon. The hardest thing about being in gaol was that I did not have any freedom. Even when I was in immigration detention in Darwin the children I was with and I were watched closely by the detention officers. They said that as we were not adults we had to be supervised more closely than everyone else.

I remember that I told both the Police and Immigration officials that I had not yet turned 18. I can't remember when exactly I told them, as I have spent over one year in custody.

I should say that I first told the authorities that my date of birth was [the boy named a date of birth in 1993 but it has been redacted to protect his privacy]. I told them this date as this is what the Captain of the boat told me to say. I think the Captain made this date up.

Case Study 2

Boy aged 15 on arrival

The boy was 15 at arrival and his physical appearance was very young. Counsel said to us that he looked about 12 years old.

On interception by the Navy he informed them that he was 14. In a DIAC interview three months later he said he was 20. He told his counsel that he said this because he wanted to be able to work and to smoke. He had been held in juvenile detention at that point, but was then moved to adult immigration detention, and eventually transferred to an adult gaol.

He was detained for 9 to 12 months in total. Counsel was not able to provide us with the exact date of arrival or recall the exact number of months.

The prosecution relied on an expert of Dr radiologist, to assert that the boy was 19 or over.

The boy's counsel obtained a birth certificate and an affidavit from the local authorities in the boy's place of origin that stated a date of birth that made him 15 at arrival. (Date and month and year were specified but have not been included to protect this boy's privacy.)

There was a hearing in the Local Court in September 2011 at which the magistrate accepted the evidence of Dr , and did not accept the other evidence from the boy's home. Apparently the magistrate was not swayed by the boy's appearance nor did the magistrate accept the birth certificate as evidence of the boy's age relying instead on the evidence of Dr .

The matter was in the District Court for arraignment in October 2011 before the Chief Judge of the District Court. Counsel, being aware of how young this boy appeared, arranged for him to appear on the audio-visual link in court so the Judge could see him. The Chief Judge was so concerned that he requested a specified senior CDPP officer to attend the court so the officer could view the boy himself and make a decision about whether the prosecution should continue. The matter was adjourned for the CDPP to consider their position.

The CDPP did not initially withdraw the matter. However, after a period of time in which the ongoing inquiries seemed to lead to a change in the attitude of the CDPP, the charges were eventually withdrawn in December 2011.

This case demonstrates the different attitudes among judges and magistrates to the way wrist x-ray evidence is accepted, and the problem that some magistrates have accepted this highly questioned science even over other compelling evidence. It also demonstrates the importance of legal advice *before* suspects are interviewed by DIAC. This boy seems to have harmed his own case by stating an older age. He seems to have done so for reasons that would make good sense to a 14 year old – being able to smoke and work. Had he been given proper legal advice, however, a solicitor would no doubt have advised him that increasing his age was against his long-term legal interests.

Case Study 3

Boy aged 14 at arrival

Legal Aid represented a boy who was detained some time before March 2011 and eventually released to immigration detention for deportation in December 2011. He was released after the case against him was discontinued following representations from the defence. At our last contact with him he was still waiting to be returned home to Indonesia.

He consistently told authorities that his date of birth was a particular day in 1997. (We have not stated the date here to protect his privacy, but he stated the day, month and year.) He told this to DIAC officers in an interview in March 2011.

He was moved to Sydney in June 2011 and held in adult custody.

A wrist x-ray had been conducted in Darwin in June before he was transferred to Sydney. The prosecution relied on a report of the same Dr , opining on the x-ray.

We obtained other expert reports, but did not need to use the report as another barrister had obtained affidavits from his adoptive mother, birth sister and village head, as well as the village head's record book, which showed that his date of birth was consistent with his claim that he was 14 years of age on arrival.

Case Study 4

Boy unsure about his age-under 18 years of age

This boy was detained in March 2010. He was interviewed in November 2010 by the AFP (6 months later) and charged in December 2010 (7 months later). During this time he was held in immigration detention in Darwin. He was moved to Sydney for charge. The proceedings were withdrawn in mid-May 2011, some 14 months after his initial detention.

When Legal Aid received this matter the prosecution served a report of a Dr , opining " DOB xx/xx/1993 [dates have been removed to protect this boys privacy, but the doctor stated a date]. The bone age is assessed as mature and greater than 19 years of age'.

In an interview, attended by a support person from Life Without Barriers, he was asked

> "Are you over the age of 18?"
>
> He said, "no".
>
> He was later asked, "What is you date of birth".
>
> He said "15 of 11 2010".
>
> He was then asked, "What year were you born?"
>
> He said, "I don't know."
>
> He was asked, "How old do you think you are?"
>
> He replied, "17".

This boy told his solicitor that he had arrived with another young person, and that young person had been sent home.

The defence briefed their own paediatric radiologist to comment on Dr report. Again, there was significant delay in being able to brief our expert as it took six weeks and three requests to the CDPP to obtain a copy of the x-ray image.

There was further delay in proceedings as the CDPP had to briefed a different radiologist, Dr . He opined that:

> I reviewed these images on Wednesday [date removed] specifically with regard to determining the patients age based on the level of skeletal maturity. As background information the bones of the human skeletal develop by a process of fusion of a number of smaller components known as the growth centres. Where they fuse as the bones mature are known as growth plates. Changes are most pronounced across the years of puberty and this has been well studied and documented into reference books. The standard reference for the purpose of examination of bones to determine the age of a subject is "Radiographic Atlas of Skeletal Development of the Hand and Wrist' by WW Greulich and SI Pyle. Across the pubescent years, as the subject matures the various growth centres fuse at their growth plates in quite well defined timelines. In males , skeletal maturity at the hand is reached at approximately 19 years of age. This means that at this point in time, all growth plates have fused. Examination of the bones of the hand of Mr [x] as derived from the radiograph taken reveals this appearance of skeletal maturity. On average this is reached at 19 years. These changes are well established and therefore it is a reasonable interpretation that Mr [x] is above the age of 19 years. It should be noted that only the left wrist and hand was X rayed. "

Following this evidence, Dr [redacted] resigned and the magistrate allowed the CDPP an adjournment to brief another radiologist.

In April the defence wrote to the prosecution asking them to withdraw the proceedings. The proceedings were withdrawn in mid-May 2011, 12 months after his initial detention.

This boy did not know his age. He told his solicitor that he felt like he was 17.

His solicitor commented that:

> [This boy] always said that he had a friend [S] who was sent home. He missed his family, He was able to ring once but his parents are seldom at home and do not have a landline or mobile phone, but can be contacted via the neighbour. He shared a cell with an old Vietnamese man who could speak Indonesian. He was working at the gaol.

5 Comment on the draft bill

5.1 Section 2: Abolition of wrist x-rays as a prescribed procedure for determining a person's age

We consider it is essential to abolish *Crimes Regulation* 6C, which prescribes wrist x-rays as the procedure for age determination, because of the problems of radiation, and unreliability.

While the Regulation does not require that x-rays be conducted as a means of determining a person's age, and does not require the AFP, the CDPP, or any court to rely on them, the existence of the Regulation appears to have had the effect of giving more credence to the use of wrist x-rays as a means of determining age, the corollary of which has been a reliance by both the prosecution and some courts on the use wrist x-rays as the most valid means of determining age.

The Regulation does not require that wrist x-rays be given any particular weight in proceedings nor does it remove the obligation of the court to treat it, as it would, any evidence before the court, testing and balancing its reliability against other (contrary) evidence presented. However, the experience in the Local Courts in NSW is that magistrates have suggest that Parliament must have had some reason for making the Regulation, so therefore prefer the wrist x-ray-evidence over other evidence in their decisions about an accused person's age.

The Regulation may also lead the magistrate to disregard problems with the reliability of the x-rays, as it is incorrectly seen that the use of wrist x-rays for age determination has been preferred by Parliament. A defence solicitor in NSW referred a magistrate to the letter from the various medical colleges (mentioned above) and received the response that "We all know it's unreliable". The same magistrate, however, repeatedly accepted the prosecution evidence based on wrist x-rays in other matters.

The Regulation also seems to have led the prosecution to rely unduly on wrist x-rays without taking the holistic approach recommended by UNICEF. Counsel in proceedings in NSW received submissions from the CDPP, which read:

> In her report Dr [the defence paediatric radiologist] refers to a number of limitations when using the Atlas and skeletal maturation as an estimator of chronological age. [The same radiologist] opines that "a holistic approach is require in order to try to establish the chronological age of the Defendant . .

> However, at the outset, it must be noted that the statutory regime in Part 1AA, Division 4A of the Act, and the corresponding Regulations, specifically provides for the use of an x-ray of the hand and wrist as being the prescribed procedure for determining a person's age. No other prescribed procedure, apart from an x-ray of the hand and wrist, is referred to in regulation 6C.

On the other hand we are aware that a number of Indonesian children have been sent home very soon after an x-ray was conducted. For this reason, we would not support an outright ban on the use of wrist x-rays as a means of determining age as in some cases it is to the child's advantage, as it can ensure an early release from detention. However, prior to a child consenting to a wrist x-ray, it is essential he obtains very clear advice, in a language he can understand, about the legal implications and health risks involved. It is highly unlikely any of our clients will know what radiation is. Very few of our clients, adult or child, have ever seen a doctor.

This highlights the importance of early access to legal advice for anyone who has been detained as a suspected people smuggler. This is discussed in more detail below.

5.2 Section 3ZQAA(2): Proposal to place the burden of proof on the prosecution to disprove an accused's claim that they are under 18 years of age

We support this proposal. As discussed above, Indonesian young people face great difficulties proving their age, and the AFP and CDPP have not been proactive in obtaining the best evidence of birth date: evidence from family and "Family cards".

The present position of the law is unclear as to who bears the onus of proof, [10]although leave to appeal to the High Court in *Abdulla v R* was brought by LA South Australia without success, with the Court holding that as the age of a defendant goes to jurisdiction the issue is to be determined on the balance of probabilities consistent with *Thompson v R* (1989) 169 CLR 1.[11]

A statutory provision would assist in clarifying the law.

5.3 Section 3ZQAA(4): Proposal for standard of proof as being on the balance of probabilities

We suggest that the standard needs to be proof beyond reasonable doubt, not proof on the balance of probabilities.

As discussed above, a finding of age founds jurisdiction. If a person is found to be under 18 years of age then the Local Court or the Magistrates Court has no jurisdiction to hear the committal proceedings as the matter is in the jurisdiction of the Children's Court. Age is so essential to the conduct of proceedings that the higher "beyond reasonable doubt" standard should be adopted.

The experience in NSW has been that in court wrist x-rays have been accepted over concerns about reliability, and over concerns about statistical problems, because courts only need to be satisfied on the balance of probabilities. We submit that it is not just for a person to be tried as an adult if there is a 49% chance that they are in fact a child.

[10] *R v Daud* [2011] WADC 175, *R v Junus* [2010] WACC 2, *R v Abdulla* [2010] SASC 52.
[11] *Abdulla v R* [2010] HCATrans 225.

5.4 Section 3ZQAA(2), (3) and (4): time limits on bringing actions, and requirement that they be before magistrates (not judges)

The position outlined below is that of all Legal Aid organisations referred to in this submission except Queensland Legal Aid, which supports the suggested time limits.

We do not support this proposal. There are better ways to reduce time spent in custody. The proposal would have the unintended consequence of preventing age determination applications being made to District Court judges, as this Bill refers only to an application before a "magistrate." It would also effectively limit accused persons to only one hearing in relation to age.

At present, there is no statutory limit on the number of age determination hearings that can be made. One can make an age determination hearing in the Local Court, be refused, and request a hearing of the same issue in the District Court. In one of the case studies above a NSW Local Court Magistrate found a person was over 18, only subsequently to have that decision questioned by the District Court judge who, upon seeing the boy in person via video link, was so concerned by the boy's youthful appearance that he invited the prosecution to consider whether they intended to proceed with the matter. The case was later withdrawn.

A client may, on advice, or simply of their own volition, not raise the age issue until they are out of the magistrates jurisdiction. A client may be advised not to raise the matter until the District or County Court because of a belief that that court may provide them with a better forum. For example, in NSW magistrates have readily accepted wrist x-rays at the expense of other evidence, such as records from Indonesia. We gave an example of such a case above. District and County Courts provide a more detailed hearing procedure than Local or Magistrates Courts. District and County Courts and are staffed by judges much more experienced in hearing complex expert evidence and in discerning between competing claims to scientific expertise.

5.5 Section 3ZQAA(5): Proposal to set out kinds of evidence that may be relied on

We do not support this part of the draft Bill.

There is no need to set out the evidence that may be relied on. Defence lawyers have been very creative in obtaining novel forms of evidence. All relevant evidence in admissible, provided no valid objection is made to it.

There is a risk that if this provision is included it could be misinterpreted by courts and by the prosecution, in much the way that the Regulation for a "prescribed procedure" has distracted attention from other forms of evidence and given undue status to wrist x-rays.

We are concerned about a scenario in which the prosecution agues "section 3ZQAA(5) sets out birth certificates, affidavits from family, school records and medical records. There are none of these, so Your Honour should find the person is over 18", when evidence from the young person, the young person's appearance and other evidence suggest the young person is under 18 years. This would not be a correct interpretation of the proposed section, but including this provision risks this kind of misinterpretation.

5.6 Section 5: The proposal to house anyone who claims to be under 18 in a youth justice facility until the issue of age is determined

We support removing children (including those who claim to be under 18 years) from adult gaols, but suggest that this should be by way of bail, not by remand in a youth justice facility.

This will ensure that young people in youth justice facilities will not be placed at risk if housed with an adult claiming to be a child.

The current policy of the CDPP is not to oppose bail for people charged with people smuggling who claim to be under 18 years. In a number of states this has meant that groups of Indonesian young people have been housed in community immigration detention, in better conditions, with access to facilities like swimming pools, and excursions.

In NSW, however, no bail applications have been made because DIAC has not been able to provide clear information about suitable residence. Legal Aid NSW does not want to have young people bailed to worse conditions than gaol. We understand that there is nowhere in Sydney for unaccompanied young people. A Sydney barrister with a young person of Nepalese origin (not charged with people smuggling) had him released to bail, only to find he was removed to a remote WA facility, where she could not obtain instructions from him.

DIAC has told Legal Aid NSW that they could provide no guarantees about where the young people would be held, and alternatively, that the young people would be moved to Darwin.

We recommend that DIAC be approached to formulate with a clear and consistent policy for housing these young people in appropriate community detention in the capital city where they are being tried.

5.7 Section 6 of the Bill proposed new section 15BA: proposed time limits for bringing people smuggling charges

We support this proposed provision but suggest that legislative reform needs to go much further.

Migration Act section 250

Section 189 provides a power to detain people suspected of people smuggling, and s.250 of the *Migration Act* allows the Minister to hold any non-citizen entering the migration zone and suspected of an offence in relation to a boat indefinitely. This is extraordinary and as stated above raises basic human rights issues.

In contrast, in NSW police can only hold people they arrest on suspicion of committing and offence for four hours for investigation, and any further detention requires a warrant be issued through a court.[12] Under the Commonwealth legislation the situation is similar.[13]

In Victoria, the *Crimes Act* 1958 requires that police release on bail or unconditionally release or bring a person in custody for an offence before a bail justice or Magistrates' Court within a reasonable time of being taken into custody.[14] The *Charter of Human Rights and Responsibilities Act 2006* provides in part that a person in Victoria must not be subjected to arbitrary arrest or detention[15] and that a person charged with a criminal offence is entitled to minimum guarantees including a guarantee to be tried without unreasonable delay.[16]

Even the so-called anti-terror legislation places times limits on detention and requires court involvement in supervising extended detention for investigation.[17]

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[12] *Law Enforcement (Powers And Responsibilities) Act* 2002 (NSW) Part 9 Division 2.
[13] *Crimes Act* 1914 (Cth) Part 1AA Division 2, Subdivision A.
[14] S464A *Crimes Act 1958*
[15] *Charter of Human Rights and Responsbilities Act* (Vic) 2006 s21
[16] *Ibid* s 25.
[17] *Crimes Act* 1914 (Cth) Part 1AA Division 2, Subdivision B.

We submit that s.250 needs to be repealed, or alternatively, severely restricted, with time limits and similar judicial scrutiny.

This is as much an issue for adults as it is for children.

No need to hold before charge

The AFP and CDPP sometimes suggest that this detention period is necessary to prepare a brief of evidence and obtain witness statements before deciding whether to charge a person. However, in no other criminal proceedings is a brief prepared before charge. If a person arrives at Sydney Airport with drugs in their suitcase, they are interviewed, then immediately charged. There is no time to obtain statements. If subsequent evidence establishes their innocence charges are simply dropped.

The general law allows police to charge a person they reasonably suspect of committing an offence. When two Indonesian-speaking people arrive in Australian waters on a boat with other people who all speak Farsi or Arabic and the Navy identify them as a crew member, there is generally sufficient suspicion to charge them. Usually at this point the Navy makes informal inquiries on board to establish who the crew are and who the passengers are. The Navy hands out wrist bands to each person in order to identify each of them before they are taken to Christmas Island. At this point, anyone the AFP wants to charge should be immediately brought before a court. Witness statements can be obtained later, as happens in all other criminal matters.

6 Access to lawyers and notification of legal aid commissions about people in immigration detention

We recommend that there be a statutory obligation on DIAC to provide all people detained in immigration detention for criminal investigation with immediate access to a lawyer.

Because of the language problems involved in Indonesians accessing lawyers, Legal Aid NSW recommends that DIAC be required to notify the local Legal Aid office closest to where the people are detained of the names and locations of each of these people each time they are moved.

Legal Aid in Darwin has had great frustrations in trying to access people detained for people smuggling before they are charged. They know people are being held for investigation in immigration detention, but without knowing their names, they cannot request permission to visit them, as approval for a visit requires the lawyer give the name of the inmate they wish to see.

It is essential that all people suspected of people smuggling be visited as soon as they are detained, well before charge, so that lawyers can establish their age. If they are under 18 years, lawyers need to be able to advise them on the risks and benefits of wrist x-rays, and also assist in obtaining age information, like Family Cards and affidavits from parents as early as possible, as this has not been sought by officials.

There are, however, other benefits to legal visits:

- Lawyers can advocate for proper health care for people with health problems where clients raise concerns about lack of access to health care

- Lawyers can advise people as to their rights in custody

- Lawyers can assist in contacting family, and

- Lawyers can monitor compliance with any statutory time limits on detention and attempt to bring people before a court if there are inordinate delays.

7 Recommendations

The major recommendations that we wish to make are:

1. That *Crimes Regulations* cl 6C, that prescribes wrist x-rays, be abolished. We support the proposed new s 3ZQA(2).

2. The wrist x-ray procedure should not be entirely prohibited, but there should be general statutory requirements for DIAC:

    a. to allow all people detained in the migration zone and held for criminal investigation access to lawyers within 24 hours of interception, and

    b. to notify the relevant legal aid commission of the names of inmates each time detainees are moved

    so age determination processes can begin early and advice can be given about wrist x-rays.

3. Section 3ZQAA(2) (burden of proof) be inserted as proposed except that it include "magistrate **or judge**".

4. Section 3ZQAA(3) (time limits on applications) not be included in the draft bill. (We make alternative recommendations in relation to time limits below.) (Please note that as stated above, the position of Legal Aid Queensland is that proposed s 3ZQAA(3) should be enacted.)

5. Section 3ZQAA(4) instead be amended to read:

    > Before making an order under subsection (2), the magistrate ***or judge*** must be satisfied, ***beyond reasonable doubt***, that on the evidence before the magistrate the person was 18 years or over at the time of the alleged commission of the offence.

6. Section 3ZQAA(5) (kinds of evidence which may be relied on) not be included in the draft bill.

7. DIAC be approached to formulate a national uniform policy to house persons charged with people smuggling who claim to be under 18 years of age in suitable community detention in the same capital city as the court proceedings.

8. Section 15BA (time limits) be inserted as proposed.

9. Section 250 of the *Migration Act* be repealed, or it be amended to impose strict time limits on detention and provide for oversight of detention by courts.

10. That legislation stipulate that DIAC, before conducting an interview with any person who may be reasonable suspected of committing a criminal offence:

    a. is required to give a person contact with a solicitor, and

    b. is required to advise the person of their right to silence.

11. That DIAC be approached to develop a different pro forma interview for people suspected of people smuggling, and not to use the same form as is used for asylum seekers.

8 Concluding remarks

We welcome the opportunity to provide these comments. Should you require further information, please contact .