

The Senate

Legal and Constitutional Affairs
References Committee

Detention of Indonesian minors in Australia

October 2012

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MEMBERS OF THE COMMITTEE

Members

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Senator Michaelia Cash, LP, WA

Senator Mark Furner, ALP, QLD

Senator Gary Humphries, LP, ACT

Participating members

Senator Sarah Hanson-Young, AG, SA

Senator Claire Moore, ALP, QLD

Secretariat

Ms Julie Dennett	Committee Secretary
Mr Owen Griffiths	Inquiry Secretary
Mr CJ Sautelle	Senior Research Officer
Ms Elise Williamson	Administrative Officer

Suite S1.61	Telephone: (02) 6277 3560
Parliament House	Fax: (02) 6277 5794
CANBERRA ACT 2600	Email: legcon.sen@aph.gov.au

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RECOMMENDATIONS

Recommendation 1

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

Recommendation 2

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

Recommendation 3

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

Recommendation 4

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

Recommendation 5

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

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

Recommendation 6

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

Recommendation 7

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

CHAPTER 1

Introduction

Referral of the inquiry

1.1 On 10 May 2012, the Senate referred to the Legal and Constitutional Affairs References Committee the matter of the detention of Indonesian minors in Australia, for inquiry and report by 28 June 2012. The Senate subsequently agreed to extend the reporting date for the inquiry to 4 October 2012.¹

1.2 The terms of reference for the inquiry were:

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

Background

1.3 The number of individuals arriving by boat to seek asylum in Australia has increased markedly since 2008.² The Suspected Irregular Entry Vessels (SIEV) that these asylum seekers travel on are generally crewed by Indonesian nationals, predominantly from poor fishing communities across the Indonesian archipelago.³

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

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

3 Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*, July 2012, p. 18.

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

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

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

Legislative framework for people smuggling offences

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

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

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

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

7 *Submission 21*, p. 3.

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

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

Prosecution policy for minors suspected of people smuggling offences

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

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

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

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

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

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

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

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

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

Process of detention, charge and prosecution of people smuggling cases

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

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

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

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

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

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

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

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

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

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

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

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

Age assessment processes for Indonesian boat crew

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

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

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

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

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

21 *Submission 24*, p. 2.

22 *Submission 21*, p. 3.

Recent policy changes relating to age determination

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

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

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

Places of detention for crew who claim to be minors

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

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

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

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

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

27 *Submission 17*, p. 1.

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

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

Previous inquiries and reviews

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

Senate Legal and Constitutional Affairs Legislation Committee inquiries

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

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

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

29 *Submission 17*, p. 1.

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

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

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

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

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

- review the AFP's procedural and legislative requirements in dealing with persons suspected of people smuggling offences, with a view to facilitating the prompt laying of charges where appropriate;
- introduce legislation to expressly provide that, where a person raises the issue of age during criminal proceedings, the prosecution bears the burden of proof to establish that the person was an adult at the time of the relevant offence; and
- review options to support the capacity of the legal representatives of persons accused of people smuggling offences who claim to be underage at the time of the offence to gather evidence of age from their place of origin.³³

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

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

Australian Human Rights Commission inquiry and report

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

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

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

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

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

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

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

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

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

37 Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*, July 2012, <http://www.hreoc.gov.au/ageassessment/index.html> (accessed 6 August 2012).

38 Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*, July 2012, pp 8-9.

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

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

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

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

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

Attorney-General's review of convicted people smuggling crew

1.30 On 2 May 2012, the Attorney-General announced that AGD would undertake a review of 24 cases of Indonesian nationals convicted of people smuggling, in which concerns had been raised that the nationals may be minors.⁴⁴ The number of cases to be reviewed was later increased to 28.⁴⁵

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

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

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

42 Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*, July 2012, pp 12-14.

43 Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*, July 2012, Appendix 6, pp 405-427.

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

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

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

Results of the AGD review

1.32 The Attorney-General announced the results of the review progressively between 17 May 2012 and 29 June 2012.⁴⁷ The final outcomes of the review were:

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

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

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

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

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

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

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

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

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

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

Report of the Expert Panel on Asylum Seekers

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

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

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

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

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

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

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

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

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

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

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

Conduct of the inquiry

1.38 The committee wrote to 143 organisations and individuals, inviting submissions by 31 May 2012. Details of the inquiry were also placed on the committee's website at www.aph.gov.au/senate_legalcon.

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

Acknowledgement

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

Structure of the report

1.41 This report is divided into five chapters.

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

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

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

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

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

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

Note on references

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

CHAPTER 2

Case statistics and appropriateness of detention

2.1 Paragraph (a) of the committee's terms of reference relates to whether any Indonesian minors are currently being held in Australian prisons, remand centres or detention centres where adults are also held, and the appropriateness of that detention. This chapter outlines the information provided during the inquiry by Commonwealth agencies and other stakeholders regarding the cases of Indonesian boat crew suspected of people smuggling who claim to be minors. The chapter also discusses the detention arrangements for such individuals, and the processes undertaken by the Australian Federal Police (AFP) and the Commonwealth Director of Public Prosecutions (CDPP) where the age of the suspect is in question, in light of Australia's human rights obligations under international law.

Case statistics of boat crew who claim to be minors

2.2 Several Commonwealth agencies provided the committee with information regarding the number of recent cases where individuals suspected of people smuggling have claimed to be minors at some point since their arrival in Australia. Other submitters with knowledge of such cases also made claims regarding the number of Indonesian minors currently detained or imprisoned in Australia.

Current detention of crew members who may be minors

2.3 The joint submission from the Attorney-General's Department (AGD) and the Australian Federal Police (AFP) (AGD/AFP submission) advised that, as at 8 June 2012, there were no Indonesian nationals who have been assessed as minors by the Department of Immigration and Citizenship (DIAC) currently being detained in adult immigration facilities pending removal or prosecution, and no Indonesian nationals assessed as minors who are being prosecuted for people smuggling offences, or being held in adult correctional facilities pending prosecution.¹ However, the AGD/AFP submission also stated that the AFP is currently investigating two persons suspected of being repeat offenders who may be minors, and that these individuals are being treated as minors in immigration detention.²

2.4 In response to a question on notice, AGD provided the committee with updated figures stating that, as at 15 August 2012, the Australian Government was aware of 33 ongoing cases where Indonesian nationals suspected of people smuggling offences in immigration detention or prison are currently claiming to be minors.³

1 *Submission 21*, p. 6.

2 *Submission 21*, p. 6.

3 Response to questions on notice, received 5 September 2012, p. 1.

2.5 The Human Rights Law Centre contended that, while individuals assessed to be minors by the Australian authorities may not be unlawfully detained, a number of children have previously been incarcerated in adult correctional facilities—often for long periods of time—before being able to establish their status as a minor.⁴

2.6 The International Commission of Jurists Australia (ICJA) argued that, although AGD has recently reviewed 28 cases where age has been raised, the total number of Indonesian minors held in prisons, remand centres or detention centres awaiting charge or trial, or being detained for the purposes of the 'administration of criminal justice' more broadly, is likely to be much greater.⁵

2.7 Mr Ross Taylor from the Indonesia Institute informed the committee that, based on the experience of its members working with Indonesians in prisons in Western Australia, the Indonesia Institute is of the belief that 'there are probably still four to five minors in the Albany maximum security prison today'.⁶

Information from state and territory jurisdictions

2.8 The committee received information regarding the detention of Indonesian minors in correctional facilities in several states and territories.

2.9 The Northern Territory (NT) Government observed that there are currently 37 Indonesian prisoners in NT prisons, remand centres or police facilities, none of whom are minors.⁷ The Queensland Government stated that it has no evidence to suggest that any of the 67 prisoners held in Queensland on people smuggling charges are minors. It noted that, in the past, three alleged people smugglers who claimed to be minors were held at Arthur Gorrie Correctional Centre, segregated from the general prison population, before the charges were dropped and the individuals returned to Indonesia.⁸ The Australian Capital Territory (ACT) Government stated that two individuals are currently housed in ACT correctional facilities, and that it is confident the individuals are well into adulthood.⁹

2.10 The Victorian Equal Opportunity and Human Rights Commission also provided details regarding the number of people smuggling cases prosecuted in that state. As at 1 December 2011, 54 individuals were being held in detention in Victoria on aggravated people smuggling charges, and there have been reported cases of suspected people smugglers who claim to be minors being held in maximum security

4 *Submission 10*, Attachment 1, p. 2.

5 *Submission 7*, p. 2.

6 *Committee Hansard*, 24 August 2012, p. 19.

7 *Submission 12*, p. 1.

8 *Submission 14*, p. 1.

9 *Submission 27*, p. 1.

adult prisons in Victoria pending their trial.¹⁰ It has been reported that one in ten of those prosecuted in Victoria to date have been found to be minors.¹¹

Number of minors removed from Australia since September 2008

2.11 In their submission, AGD and the AFP informed the committee that, between September 2008 and 8 June 2012, 147 people smuggling crew had been removed to their country of origin because they were assessed to be minors, given the benefit of the doubt by the AFP or the CDPP, or were found by a court to be a minor. This figure includes 95 individuals since July 2011.¹²

2.12 The AGD/AFP submission stated that between 8 December 2011 and 24 May 2012, 78 crew members had undergone the new DIAC age assessment processes, with 35 of these individuals assessed as minors and 43 as adults. As at 8 June 2012, 30 of the 35 minors had been removed to Indonesia.¹³

2.13 At the committee's public hearing on 24 August 2012, AGD officials updated the committee, advising that, as at 22 August 2012, 94 crew members had been removed to Indonesia as minors since 8 December 2011.¹⁴

CDPP prosecution statistics

2.14 The CDPP informed the committee that, since September 2008, it has conducted 405 prosecutions for people smuggling offences where the matter has resulted in a conviction, acquittal or been discontinued. As at 30 May 2012, the CDPP is prosecuting a further 158 individuals on people smuggling charges across eight Australian jurisdictions.¹⁵

2.15 Of the cases referred to the CDPP by the AFP, the CDPP advised that there have been 104 people who at some stage raised the issue of being a minor at the time of offending, or where a wrist x-ray had been conducted or referred to in the CDPP's correspondence file. Of these 104 matters:

- 28 matters resulted in conviction;
- six matters resulted in acquittal;
- two matters were never charged;
- ten matters are still before the courts; and

10 *Submission 16*, p. 1.

11 *Submission 16*, p. 2.

12 *Submission 21*, p. 20.

13 *Submission 21*, p. 6.

14 Mr Tony Sheehan, Attorney-General's Department, *Committee Hansard*, 24 August 2012, p. 28.

15 *Submission 24*, p. 2.

- 58 matters were discontinued by the CDPP.¹⁶

2.16 The CDPP also provided information regarding the number of these cases which involved a formal age determination hearing in the courts. According to the CDPP, 13 cases have involved a formal age determination hearing. In seven of these cases, the court was satisfied that the individual was over 18, while in six cases the court determined that it was not satisfied the individual was over 18 years of age.¹⁷

2.17 In all cases where the age determination hearing found that the individual was underage, the prosecution was discontinued by the CDPP. Of the seven cases where the individual was found to be over 18: three resulted in convictions; one resulted in an acquittal; and three cases were discontinued by the CDPP subsequent to the age determination hearing.¹⁸

Appropriateness of detention of minors

2.18 Submitters raised various concerns relating to the detention of boat crew who may be minors, and potential breaches of Australia's human rights obligations under the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention on the Rights of the Child (CRC). These included concerns in relation to the length and location of detention for suspected people smugglers who claim to be minors, access to prompt legal aid for these individuals, and access to judicial review of decisions in their cases.

Relevant provisions of the ICCPR and the CRC

2.19 Under Article 9 of the ICCPR, a person shall not be subject to arbitrary detention, and shall not be subject to pre-trial detention unless exceptional circumstances exist. Further, Article 10 of the ICCPR provides that persons deprived of liberty, including immigration detention, must be treated with dignity and humanity, and that juveniles in detention must be separated from adults.

2.20 Article 3 of the CRC provides that the best interests of the child must be a primary consideration in every decision that affects minors.¹⁹ It also provides that signatories must: ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians or other individuals legally responsible for him or her; and take all appropriate legislative and administrative measures to achieve this end.

16 *Submission 24*, p. 2.

17 *Submission 24*, pp 5-6. The six cases in which the court found the individual to be a minor included one case in which two age determination hearings were held: at the first hearing, the individual was held to be over 18; while at the second hearing almost 12 months later, the individual was found to be a minor and the CDPP discontinued the prosecution.

18 *Submission 24*, pp 5-6.

19 Article 3(1), UN Convention on the Rights of the Child.

2.21 Article 37 of the CRC provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily, and the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.²⁰ Article 37 also provides that every child deprived of liberty:

- shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age;²¹
- shall be separated from adults unless it is considered in the child's best interests not to do so, and shall have the right to maintain contact with his or her family, except in exceptional circumstances;²² and
- shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.²³

Length of time spent in detention for boat crew who may be minors

2.22 Several submitters claimed that in cases where individuals have been detained or imprisoned, only to be later released as minors, Australia has breached its obligations under Article 37(b) of the CRC that detention of minors shall be used only as a measure of last resort and for the shortest appropriate period of time.

2.23 For example, the Australian Lawyers Alliance argued that, under the current arrangements in Australia, the detention of persons alleged to be involved in people smuggling, including minors, is a measure of first resort rather than last resort.²⁴ In relation to the time spent in detention, the Indonesia Institute claimed that in cases where age is in dispute:

...the time taken to verify the age of the boat crew has consistently taken longer than two years. This has resulted in children being incarcerated in Australian Adult Maximum security jails for periods of 2-3 years without trial or their case being heard.²⁵

20 Article 37(b), UN Convention on the Rights of the Child.

21 Article 37(c), UN Convention on the Rights of the Child.

22 Article 37(c), UN Convention on the Rights of the Child.

23 Article 37(d), UN Convention on the Rights of the Child.

24 *Submission 26*, p. 10.

25 *Submission 4*, p. 2.

Length of pre-charge detention in these cases

2.24 At an additional estimates hearing in February 2012, a representative from the AFP informed the committee that the average length of time held in detention pre-charge for all people smuggling suspects was 161 days.²⁶ A representative from the AFP updated this figure at the public hearing for the current inquiry on 24 August 2012, stating that the average length of pre-charge detention is now 99.3 days.²⁷

2.25 Based on information provided by the CDPP in its submission to the inquiry, in the 13 relevant cases since September 2008 where age determination hearings have taken place, the average time between arrival in Australia and the age determination decision was 429 days. Of the five of these 13 cases in which the court was not satisfied at the first age determination hearing that the individual was over 18 years of age, the average time between arrival in Australia and the court's decision was 504 days.²⁸

2.26 Mr Philip Lynch from the Human Rights Law Centre (HRLC) told the committee that these timeframes are inconsistent with international standards and other comparable legal scenarios in Australia:

We note that the ICCPR requires that a person be detained for no longer than two to three days at the most without charge. Indeed, under Australia's anti-terrorism framework, [the Australian Security Intelligence Organisation] can only detain someone for the purpose of a complex terrorism investigation for a maximum period of seven days before seeking judicial renewal of detention.²⁹

2.27 Ms Nicole Rich from Victoria Legal Aid argued that such pre-charge detention is unheard of in other parts of Australia's legal system:

With Commonwealth crime in particular—and I guess that would be the most analogous situation—typically, an arrest is made with charges laid almost immediately in those kinds of cases, for example, a case where someone is suspected of an offence of drug importation of some sort that is detected at the airport upon their coming into the country. They would be arrested there and then; it is not a matter of taking them away to detention and then 10 months of investigations before charges are laid. So that is a

26 Deputy Commissioner Andrew Colvin, Australian Federal Police, *Committee Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, Additional Estimates 2011-12, 14 February 2012, p. 130.

27 Deputy Commissioner Andrew Colvin, Australian Federal Police, *Committee Hansard*, 24 August 2012, p. 46.

28 Source: data from *Submission 24*, pp 5-6.

29 *Committee Hansard*, 24 August 2012, p. 24.

good analogy and that is why it is so unusual that there is such a long period of pre-charge detention in these cases including involving minors.³⁰

2.28 Australian Lawyers for Human Rights (ALHR) expressed significant concern that 'it appears minors are being held in detention for significantly longer periods than their legal age counterparts as a result of time spent on determining their age'.³¹ The HRLC argued that this current practice amounts to arbitrary detention of children. In particular, the HRLC noted that the reliance on the issuing of Criminal Justice Stay Certificates to hold persons suspected of people smuggling in immigration detention indefinitely without charge is particularly problematic in this regard.³² The HRLC contended that the 'pre-charge detention of people smuggling suspects for long periods of time is manifestly inappropriate, unreasonable and unjust', and has led to Australia breaching its obligations under the ICCPR and the CRC.³³

2.29 The Queensland Law Society recommended that pre-charge detention should be limited to a maximum of 14 days to avoid inappropriate detention of minors.³⁴ The Migrant and Refugee Rights Project agreed that a 'highly restricted time limit on pre-charge detention in relation to people smuggling offences' should be implemented.³⁵

Access to prompt judicial review of detention decisions

2.30 Citing a recent case involving alleged people smugglers in the Northern Territory Supreme Court, the HRLC observed that for an individual detained on suspicion of people smuggling offences and held in Australia on a Criminal Justice Stay Certificate, there is no real and effective opportunity to challenge that person's detention or have it reviewed by a court. The HRLC contended that this situation is inappropriate, and in breach of Article 37(d) of the CRC.³⁶

30 *Committee Hansard*, 24 August 2012, p. 14.

31 *Submission 20*, p. 3.

32 As noted in chapter 1, the Attorney-General may issue a Criminal Justice Stay Certificate (CJSC), under section 147 of the Migration Act, to prevent a non-citizen from leaving Australia while they are under investigation for a criminal offence. Under section 150 of the Migration Act, a non-citizen cannot be removed or deported from Australia while a CJSC is in force. There is no statutory limitation on how long a CJSC can be in place in relation to a detainee.

33 *Submission 10*, p. 4. As well as being prohibited in relation to children in Article 37(b) of the CRC, arbitrary detention of any individual is prohibited under Article 9(1) of the ICCPR.

34 *Submission 18*, p. 2. See also Mr Philip Lynch, Human Rights Law Centre, *Committee Hansard*, 24 August 2012, p. 24.

35 *Submission 11*, p. 5.

36 *Submission 10*, p. 6.

2.31 Several other witnesses argued that the legislature should provide for judicial oversight of cases where foreign suspects claim to be minors, in order to avoid the possibility of human rights breaches.³⁷

Places of detention for individuals who may be minors

2.32 While Commonwealth agencies have stressed that individuals who claim to be minors are wherever possible held in facilities appropriate for minors,³⁸ several submitters commented that keeping alleged minors in any form of detention is unsatisfactory. For example, the ICJA submitted that it is 'unacceptable for minors to remain in detention while their age remains in dispute', and recommended that a presumption of minority status and removal from detention should be the norm rather than the exception where doubt as to the age of an individual exists.³⁹

2.33 The Australian Psychological Society (APS) asserted that, apart from the legal implications of detaining minors, the negative psychological impacts of detention on children and young people lead to poor mental health, developmental risks and traumatic experiences. The APS urged that Indonesian minors should not be held in detention for these reasons.⁴⁰ This view was supported by the Royal Australian and New Zealand College of Psychiatrists, which argued that minors placed in adult prison facilities are at risk of exploitation and psychological trauma.⁴¹ Submitters and witnesses also raised anecdotal evidence of cases where Indonesian minors imprisoned in adult facilities in Australia have been subjected to threats and physical or sexual abuse.⁴²

2.34 National Legal Aid (NLA) submitted that, pending age determination or charge, Indonesian minors should not reside in detention facilities unless all other avenues have been exhausted and it is absolutely necessary for security purposes.⁴³ As an alternative option to immigration detention, the Indonesia Institute suggested that suspected people smugglers who may be minors could be accommodated within the Indonesian community in Australia. It stated that it is important to investigate:

...the feasibility of these crew members being placed on 'bail' within the Indonesian community here in Australia whilst awaiting determination of

37 See, for example: Mr Mark Plunkett, *Committee Hansard*, 24 August 2012, p. 6; Ms Michelle Scott, Commissioner for Children and Young People, Western Australia, *Committee Hansard*, 24 August 2012, p. 10.

38 Department of Immigration and Citizenship, *Submission 17*, p. 1; Attorney-General's Department and Australian Federal Police, *Submission 21*, p. 25.

39 *Submission 7*, p. 2. See also Human Rights Law Centre, *Submission 10*, Attachment 1, p. 4.

40 *Submission 13*, pp 4-5.

41 *Submission 6*, p. 1.

42 See, for example: Australian Lawyers Alliance, *Submission 26*, pp 3 and 5; Mr Ross Taylor, Indonesia Institute, *Committee Hansard*, 24 August 2012, p. 21.

43 *Submission 19*, p. 3.

their age. The crew members pose no threat to the Australian community and therefore should not be detained at a great expense in adult maximum security prisons.⁴⁴

Access to legal aid and consular assistance for suspected people smugglers

2.35 Several submitters questioned whether the current policies and processes in place give Indonesian boat crew who claim to be minors prompt access to legal assistance, as required by Article 37(d) of the CRC.

2.36 AGD advised that all suspected people smugglers are given access to legal assistance, but acknowledged that this generally does not occur prior to the involvement of the AFP:

Legal aid funded lawyers provide legal advice and representation to people smuggling crew, both prior to charge and during court proceedings. This includes providing advice on whether to raise age as an issue and the most appropriate way to do so. Legal aid lawyers are also required to interrogate the evidence led by the CDPP and challenge it where appropriate.

Legal aid is generally engaged after the person has been referred to the AFP for investigation. Lawyers are not required earlier throughout DIAC processes, such as age assessment interviews, as these processes are administrative in nature and not undertaken for criminal justice purposes.⁴⁵

2.37 A representative from DIAC confirmed that boat crew who claim to be minors are not routinely given access to legal advice during their initial interactions with DIAC. The representative advised that 'they do not have a matter that they are pursuing with the Immigration Department, so we are not in a position to provide them with legal representation'.⁴⁶

2.38 The HRLC contested the assertion that legal aid is made available to individuals after their case has been referred to the AFP but before the AFP has laid formal charges, stating that 'suspects are ineligible for Legal Aid until charges are laid'.⁴⁷ Representatives from Victoria Legal Aid confirmed that Legal Aid Commissions are generally not contacted until the AFP has decided to press charges against an individual.⁴⁸ The ICJA reported anecdotal evidence that 'a number of individuals have been held in detention for 4-6 months without being charged and without having legal advice', and recommended that measures be implemented as

44 *Submission 4*, p. 2.

45 *Submission 21*, p. 24.

46 Ms Kate Pope PSM, Department of Immigration and Citizenship, *Committee Hansard*, 24 August 2012, p. 46.

47 *Submission 10*, p. 7.

48 Ms Nicole Rich, Victoria Legal Aid, *Committee Hansard*, 24 August 2012, p. 14.

soon as possible to ensure that every detainee who alleges to be a minor is provided with legal representation.⁴⁹

2.39 NLA expressed concern that the detention of particular individuals, including minors or those who may be minors, is not being brought to the attention of either the relevant Indonesian consulate or legal aid commission quickly enough, leading to some individuals spending more time than necessary in detention, including in possibly inappropriate places of detention.⁵⁰ Ms Nicole Rich from Victoria Legal Aid told the committee:

...if this process is going to continue and boat crew are going to continue to be detained and eventually charged, a very transparent process needs to be put in place so that upon initial detention the relevant legal aid commission is notified and other relevant authorities including the Indonesian consulate are notified.⁵¹

2.40 Ms Edwina Lloyd, a solicitor with extensive experience defending accused people smugglers who claim to be minors, argued that suspected people smugglers should have access to legal representation before they are formally charged. She noted that suspects can be held in detention for significant periods before being charged. Ms Lloyd also argued that there should be permanent legal aid employees based at Christmas Island to provide legal representation to boat crew prior to any DIAC and AFP interviews.⁵²

2.41 Mr Philip Lynch from the Human Rights Law Centre suggested that amendments to legislation could be made to ensure the timely notification of legal aid commissions:

There could be inserted a provision which makes it a condition of the issue of a criminal justice stay certificate that the relevant legal aid body be notified of the issue of a certificate, which is a trigger to offering assistance and representation to a person.⁵³

2.42 An AFP representative advised that recent changes in how the AFP conducts its investigations in people smuggling cases mean that suspects are now given access to legal and consular assistance much earlier in the detention process than was previously the case:

Originally we would not be interviewing an alleged crew member until well into our investigation, which could be sometime after their initial detention. This would be the first time, from an AFP perspective, that they would be offered an opportunity to contact a lawyer. We recognised that this was not

49 *Submission 7*, Attachment 1, pp 5 and 9.

50 *Submission 19*, p. 4.

51 *Committee Hansard*, 24 August 2012, p. 14.

52 *Submission 22*, pp 1 and 5.

53 *Committee Hansard*, 24 August 2012, p. 26.

an ideal situation, in consultation with the embassy who also have a concern and want to know about their citizens, but there are privacy restrictions. We now bring that interview forward. We interview on Christmas Island very early in the process so that there is no doubt and there is clarity around their ability to contact the consulate and/or to get legal advice.⁵⁴

2.43 DIAC informed the committee that consular notification generally does occur through the Department of Foreign Affairs and Trade (DFAT):

With regard to people smuggling crew, DFAT provides an initial notification to the Indonesian Embassy that a suspected illegal entry vessel has been boarded by Australian authorities and that Indonesian nationals, normally the crew of the vessel, are believed to be on board. DFAT provides this notification within three working days of the interception of the vessel, in accordance with the provisions of the Consular Arrangement. This notification is usually provided before the crew enter immigration detention and before any age assessment process has commenced. DFAT's notification makes no distinction between potential adults and minors. DFAT draws on information from Border Protection Command to alert the Indonesian Embassy.

Consistent with the obligations of the Vienna Convention on Consular Relations, DIAC offers consular access as soon as a person enters immigration detention and, when requested, facilitates consular access with the consent of the individual concerned. DIAC has an obligation to notify the Indonesian consulate of nationals held in immigration detention within three business days of their arrival.⁵⁵

2.44 DIAC commented that it alerts Indonesian consular officials of the identity of detained people smuggling suspects only when the individuals consent to their personal information being provided:

If the detainee is an Indonesian national and does not consent to consular access, or remains silent in regards to consent, DIAC will inform the Indonesian consulate that a national of Indonesia has been detained. However, in accordance with [the *Privacy Act 1988*'s] requirements, DIAC will not provide the consulate with any information that may identify the individual... Additionally, on a weekly basis, DIAC provides a list of Indonesian crew held in detention to the Indonesian Embassy and all Consulates, DFAT, AGD and Jakarta Post.⁵⁶

54 Deputy Commissioner Andrew Colvin, Australian Federal Police, *Committee Hansard*, 24 August 2012, p. 48.

55 Response to questions on notice, received 31 August 2012, p. 1.

56 Response to questions on notice, received 31 August 2012, pp 1-2.

Access to contact with family members for suspected people smugglers

2.45 Submitters and witnesses also raised the issue of access to contact with family members for suspected people smugglers who claim to be minors. Victoria Legal Aid raised the case of Syarifudin Min, who was detained from July 2010 until December 2011, and was unable to contact his family in Indonesia for four months after his arrival in Australia, by which time his family assumed he was dead.⁵⁷

2.46 Mr Mark Plunkett, a barrister with significant experience representing Indonesian nationals accused of people smuggling offences who claim to be minors, raised a case where he represented three clients who were detained in Australia and unable to contact their families in Indonesia for almost a full year:

One of the boys had a telephone number in his shoe and we obtained that. Our interpreter, through the simple expediency of making a few calls, was able to locate the parents of the child—something which had somehow defied the resources of the Commonwealth for a period of almost over a year...The parents thought their children had perished on the high seas. They were overjoyed to hear that they were alive but confused and perplexed as to why they were in prisons.⁵⁸

2.47 Mr Plunkett raised another case where an accused people smuggler who claimed to be a minor gave family telephone contact details and instructions to his legal aid representatives, who never acted on his request to contact his family in Indonesia.⁵⁹ Mr Plunkett asserted that if Australians who claimed to be children were detained by police, their families would be notified by officials immediately, and that the same courtesy should be afforded to Indonesians detained in Australia:

[If] they were children arrested in Canberra by the Australian Federal Police it would have been irresponsible of the police not to make contact with the parents. Supposing someone was found at a drinking establishment at Green Square [in Canberra], the police would contact the parents. But no effort here, at any stage, had been made by Australia to contact the parents.⁶⁰

2.48 Ms Edwina Lloyd raised another case in which an individual who claimed to be a minor was detained and imprisoned for over 18 months in Australia on people smuggling charges, without the Commonwealth agencies making any attempt to contact his family members.⁶¹

57 *Submission 23*, p. 23.

58 *Committee Hansard*, 24 August 2012, pp 2 and 3.

59 *Committee Hansard*, 24 August 2012, p. 3.

60 *Committee Hansard*, 24 August 2012, p. 2.

61 *Submission 22*, p. 3.

2.49 At the committee's public hearing, representatives from AGD and the AFP confirmed that, in general, those two agencies do not contact family members of people smuggling suspects or assist suspects in attempting to contact their families.⁶² Regarding DIAC's role, a DIAC representative advised that all individuals arriving at Christmas Island on asylum seeker vessels, including boat crew, are able to make calls to family:

The very first step is, I think you would be aware of, is the 'alive call'. Clients make calls back to family, and that includes crew, to let them know that they are safely in Australia. That is the first contact that the client can make. There is actually no restriction on a client making contact with family members from a detention centre. A crew member is in the same situation as IMAs [irregular maritime arrivals] in that regard and can make that contact... There is basically no restriction on clients contacting people outside the detention centre.⁶³

2.50 When asked why young Indonesian crew had not been able to contact their families in numerous cases raised by the AHRC and in submissions to the committee's inquiry, the DIAC representative stated:

I cannot answer that—unless the client themselves were not able to or did not make contact with their family. All I would say is there is no restriction on them making contact with their families. We would provide them with assistance to make a phone call.⁶⁴

2.51 DIAC also informed the committee that, while it may assist detainees in contacting their families, no representatives of the Australian Government provide notice to family members directly. DIAC advised that 'the Indonesian Government has the responsibility to provide notification to family members of detainees'.⁶⁵

Guardianship of minors detained in Australia

2.52 The issue of guardianship of Indonesian minors suspected of people smuggling offences was raised by various submitters. While the Minister for Immigration and Citizenship is the legal guardian of unaccompanied non-citizen minors seeking asylum in Australia under the *Immigration Guardianship of Children Act 1946*, boat crew who claim to be minors and who are not seeking to reside

62 Mr Tony Sheehan, Attorney-General's Department, *Committee Hansard*, 24 August 2012, p. 36; Deputy Commissioner Andrew Colvin, Australian Federal Police, *Committee Hansard*, 24 August 2012, pp 36 and 41.

63 Ms Kate Pope PSM, Department of Immigration and Citizenship, *Committee Hansard*, 24 August 2012, p. 46.

64 Ms Kate Pope PSM, Department of Immigration and Citizenship, *Committee Hansard*, 24 August 2012, p. 46.

65 Department of Immigration and Citizenship, response to questions on notice, received 31 August 2012.

permanently in Australia do not fall within the scope of this Act.⁶⁶ Consequently, such individuals have no formal legal guardian upon arrival in Australia.

2.53 DIAC noted that it engages an independent observer whose role is to ensure fair and reasonable treatment of suspected minors, but who ultimately has no legal responsibilities towards those individuals:

...as DIAC has a duty of care towards crew claiming to be minors, Life Without Barriers is engaged as an independent observer for them while they undergo any formal process in immigration facilities, including for criminal justice purposes of interviews and conducting wrist x-rays.

...The independent observer provides pastoral or physical support to a minor or person who claims to be a minor throughout interviews and other formal processes, and ensures the treatment of individuals in immigration detention is fair, appropriate and reasonable. However, the independent observer has no custody, guardianship or advocacy responsibilities.⁶⁷

2.54 The Australian Lawyers Alliance (ALA) contended that, under the current arrangements, all 'appropriate legislative and administrative measures' have not been taken in Australia to ensure the protection and care of detained Indonesian minors through the proper appointment of legal guardians for such children, as required by Article 3(2) of the CRC.⁶⁸ Further, the ALA argued that the failure to appoint an effective guardian for unaccompanied minors amounts to a large oversight by the Commonwealth, and could be seen as a breach of the Commonwealth's duty of care.⁶⁹

2.55 The Commissioner for Children and Young People, Western Australia suggested that, in order to ensure that the needs of vulnerable minors are not overlooked, an independent guardian with statutory responsibilities should be appointed to monitor the treatment of child detainees.⁷⁰ The Victorian Equal Opportunity and Human Rights Commission agreed that unaccompanied children should be provided with an independent guardian to act in the child's best interests.⁷¹ National Legal Aid suggested that such guardianship arrangements could be monitored by the newly established National Children's Commissioner.⁷²

66 Attorney General's Department and Australian Federal Police, *Submission 21*, p. 26.

67 *Submission 17*, pp 4-5. Life Without Barriers has reportedly been recently replaced as the provider of independent observer services. The new provider is the US-based company Maximus Solutions: See Paige Taylor, '\$29m to look after solo asylum seekers', *The Australian*, July 12, 2012, <http://www.theaustralian.com.au/national-affairs/immigration/m-to-look-after-solo-asylum-teenagers/story-fn9hmlgu-1226423858374> (accessed 13 September 2012).

68 *Submission 26*, p. 10.

69 *Submission 26*, p. 12.

70 *Submission 5*, p. 3.

71 *Submission 16*, p. 4.

72 *Submission 19*, p. 3.

Alleged mistreatment of minors in prison

2.56 Some submitters and witnesses noted anecdotal reports that some individuals who were imprisoned on people smuggling charges and who have now been released and returned to Indonesia due to concerns they may have been minors have been subjected to mistreatment or harassment during their incarceration in Australia.⁷³ It was also noted that there have been reports of several individuals making such allegations upon their return to Indonesia.⁷⁴

2.57 An AGD officer informed the committee that AGD has made enquiries of correctional authorities in New South Wales and Queensland following allegations in media reports of such behaviour, and had received no information from these state authorities to support the allegations.⁷⁵

Other issues associated with detention of boat crew who may be minors

2.58 The committee also received evidence regarding several other issues which relate to the detention of Indonesian people smuggling suspects who may be minors.

Ability of prisoners to remit monies earned in prison to family members

2.59 The committee received evidence regarding the ability of Indonesian prisoners in Australian prisons, including those who have claimed to be minors, to send back to their families in Indonesia a portion of any income earned while imprisoned. Mr Ross Taylor from the Indonesia Institute claimed that Indonesian prisoners in Western Australian prisons have been prevented from sending any money home in this way:

We know officially that DIAC actually requested the states' and territories' correction authorities to prevent people smugglers from attempting to remit money back home. Our understanding is that DIAC were unable to enforce that through federal laws, so they requested the state authorities to do so through the minister for corrections. That was the case in Western Australia, where their three or four dollars a day was garnished. This did not only apply to minors, of course, but to all Indonesian fishermen. As an organisation, we were quite frankly appalled at this—that we have a concept where if you are a murderer or a rapist or a paedophile you have the right to pass your two or three dollars through to your wife or your children, but if you are an Indonesian fisherman who has been caught up in this terrible trade you can send nothing back whatsoever. We assumed

73 See, for example: Australian Lawyers Alliance, *Submission 26*, p. 6; Mr Ross Taylor, Indonesia Institute, *Committee Hansard*, 24 August 2012, p. 21.

74 See, for example: Kate Lamb, 'Indonesian minors claim abuse', *Sydney Morning Herald*, 21 July 2012, <http://www.smh.com.au/opinion/political-news/indonesian-minors-claim-abuse-20120720-22fla.html> (accessed 31 August 2012).

75 Mr Tony Sheehan, Attorney-General's Department, *Committee Hansard*, 24 August 2012, p. 47.

the reason for that was a naïve notion that, if the money were remitted back to their home village it would simply attract even more fishermen to undertake the dangerous journey to Christmas Island. If that is the case, we would just find that completely naïve.⁷⁶

2.60 In response to this concern, AGD asserted as follows:

The Australian Government has arrangements in place to recover debts for the removal and detention of persons convicted of people smuggling. Under the Migration Act 1958, all non citizens removed from Australia are liable for the cost of their removal. In addition, persons convicted of people smuggling and illegal foreign fishing offences are liable for the costs of their detention.

To ensure removal and detention debts can be recovered, the Attorney-General's Department has requested State and Territory corrections authorities to prevent convicted people smuggling crew from remitting their gratuity earnings overseas. This request was first made during a teleconference with State and Territory authorities on 8 April 2011.

The Attorney-General's Department has, however, advised State and Territory authorities that, if they implement such a policy, persons convicted of people smuggling offences should be able to earn gratuities and use them to purchase consumables and other low-value quality of life items such as food and phone credit.⁷⁷

Access to interpreters

2.61 Mr Mark Plunkett informed the committee that, in his home state of Queensland, access to Indonesian interpreters is very limited due to the high number of people smuggling cases being prosecuted. In relation to one of his clients, Mr Plunkett stated:

I could not get to the prison for a couple of weeks because we could not get an interpreter. Interpreters are in very, very short supply. Not only has this mass prosecution clogged up the courts of my state and occupied judicial and jury time and judicial resources beyond that which we had budgeted for and prevented other litigants from getting access to justice, it has also meant that there is a complete shortage of Indonesian interpreters. We could not get one.⁷⁸

76 *Committee Hansard*, 24 August 2012, p. 21.

77 Response to questions on notice, received 5 September 2012, p. 2.

78 *Committee Hansard*, 24 August 2012, p. 2.

2.62 Ms Sarah Westwood from Victoria Legal Aid commented that, while access to interpreting services in Victoria has been adequate, the level of need for these services is high:

I think we have been fortunate in Melbourne that we have a number of very high quality Indonesian interpreters that we can turn to. I can certainly say that, at the present time, with a number of trials listed to commence simultaneously in Melbourne, the pressure on interpreting services to provide appropriate interpreting in the trial context is very great indeed.⁷⁹

79 *Committee Hansard*, 24 August 2012, p. 16.

CHAPTER 3

Issues relating to age determination

3.1 The central issue in people smuggling cases involving Indonesian crew who claim to be minors is establishing whether the individual is, in fact, a juvenile at the time the alleged offence occurred. This chapter discusses:

- the age assessment procedures and evidence used regarding age in people smuggling cases in Australia;
- the role of age determination hearings in Australian courts; and
- agency processes for dealing with information relating to the age of suspects.

Age assessment procedures

3.2 Paragraph (b) of the committee's terms of reference relates to what information the Australian authorities possessed or had knowledge of when making a determination that a suspect or convicted person was a minor. In this context, a number of submitters commented on the various processes and information used in making age assessments for alleged people smugglers who claim to be minors, and the types of tests and information available to authorities: namely, the use of wrist x-rays; dental x-rays; focussed interviews conducted by the Department of Immigration and Citizenship (DIAC); and additional documentation or information collected from Indonesia.

3.3 The submission from the Attorney-General's Department (AGD) and the Australian Federal Police (AFP) (AGD/AFP submission) commented on the difficulties associated with making age assessments:

Establishing age is an extremely complex undertaking. Most people smuggling crew from Indonesia are unable to prove their true age and are often unaware of their date of birth, and their families may similarly be unaware of their actual age or date of birth. All age determination techniques carry inherent limitations. Medical procedures to establish age have a margin of error, and interviews and statements from relatives rely on truthfulness and memory. Further, Indonesian identity documents may be produced without any formal verification of identity, including on the basis of oral statements by relatives, and in some cases many years after the person was born. Obtaining formal identity documents from Indonesia can also take several months, particularly where documents are often held in remote and decentralised locations.¹

1 *Submission 21*, p. 5.

3.4 The submission also highlighted the distinction between 'age assessment' and 'age determination'. It noted that 'age assessments' are the processes undertaken by relevant agencies in order to decide whether individuals should be treated as adults during relevant immigration and detention processes, and are not conclusive; whereas 'age determinations' are the final decisions made by courts regarding the likely age of an individual, and are decisive as to how that individual is to be treated in the Australian legal system.²

Wrist x-rays

3.5 The use of wrist x-rays in age assessments has been examined at length in recent Senate committee inquiries.³ Submitters and witnesses to this inquiry raised many of the same concerns previously canvassed relating to wrist x-rays, namely:

- the accuracy of wrist x-rays as an age assessment tool has been discredited;
- variations in skeletal maturity based on environmental and ethnic factors lead to inaccurate conclusions of wrist x-rays;
- the skeletal atlases used for most wrist x-ray age assessments are outdated and not suited to individuals of Indonesian ethnicity; and
- the use of x-rays for non-medical purposes raises serious ethical concerns.⁴

3.6 Citing these issues, numerous stakeholders argued that the use of wrist x-rays should be discontinued as an age assessment tool.⁵ The International Commission of Jurists Australia (ICJA) summarised this argument as follows:

...supplementing wrist x-rays with other methods of assessment is not an effective solution. The ICJA submits that the practical and legal difficulties of wrist x-rays...should lead to their outright rejection as a method of age assessment. The ICJA recommends that the use of x-rays to determine age should be wholly rejected by the Australian Government.⁶

2 *Submission 21*, p. 5.

3 For a detailed discussion, see Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Amendment (Fairness for Minors) Bill 2011*, April 2012, pp 11-19 and 28-29.

4 See, for example: Mr Simon Lee, *Submission 3*, pp 3-4; Australian Society of Forensic Odontology, *Submission 1*, pp 8-9; Migration Institute of Australia, *Submission 8*, p. 3; Professor Sir Albert Aynsley-Green Kt and others, *Submission 15*, pp 7-10; Indonesia Institute, *Submission 4*, p. 3.

5 See, for example: Ms Edwina Lloyd, *Committee Hansard*, 24 August 2012, p. 1; Mr Simon Lee, *Submission 3*, p. 6; Indonesia Institute, *Submission 4*, p. 3; Australian Lawyers for Human Rights, *Submission 20*, pp 4-5; Australian Lawyers Alliance, *Submission 26*, p. 17.

6 *Submission 7*, Attachment 1, p. 4.

3.7 The recent Australian Human Rights Commission report found that 'wrist x-ray analysis is not informative of whether an individual is over 18 years of age',⁷ and recommended that amendments to the Crimes Act should be made to restrict or limit procedures using x-rays as part of a prescribed procedure to determine age.⁸

3.8 AGD informed the committee that, while wrist x-rays are still the prescribed procedure for age determination in the Crimes Regulations 1990, it is currently consulting with the Office of the Chief Scientist on the scientific issues raised in relation to the use of wrist x-rays. The AGD/AFP submission also observed that wrist x-rays have been used in some cases as evidence that a suspect is a juvenile, with 37 boat crew members being removed from Australia since September 2008 because a wrist x-ray indicated the person was likely to have been a minor at the time of the offence.⁹ An AGD officer told the committee that the use of wrist x-rays has declined significantly in recent times:

Only one wrist x-ray has been carried out since 2011 and that was at the request of defence counsel...While wrist x-rays are not routinely being used by the AFP and the CDPP, they remain available upon request, as stated earlier, from the suspect or defendant.¹⁰

3.9 The Commonwealth Director of Public Prosecutions, Mr Chris Craigie SC, informed the committee that the CDPP has decided not to rely on wrist x-ray evidence in age determination cases, meaning that the CDPP will not be placing wrist x-ray evidence before the courts at all.¹¹ Mr Craigie explained the rationale for this decision:

Our decision in regard to wrist X-rays has come out of the process that often takes place where a series of cases are analysed and the outcome of the analysis of that process is one comes to the conclusion that it would be preferable not to rely upon a certain class of evidence...We had a series of cases late last year where we had concerns that another trend of opinion was developing in the judiciary, and on that basis we have ceased relying upon that evidence.¹²

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

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

9 *Submission 21*, pp 16 and 20.

10 Mr Tony Sheehan, Attorney-General's Department, *Committee Hansard*, 24 August 2012, p. 27.

11 *Committee Hansard*, 24 August 2012, p. 44.

12 *Committee Hansard*, 24 August 2012, pp 44-45.

3.10 Mr Craigie stated, however, that he believed wrist x-rays may still have some utility as a tool to show that an individual is not an adult:

My instruction to my people...is that, if a defendant undergoes an X-ray and it indicates that the wrist is not fully fused, the test has a utility in that sense to exclude that person...Whatever difficulties there may be about it as an inclusionary test, it retains value in that, if I see someone's wrist is not fused, it excludes them.¹³

Dental x-rays

3.11 Dental x-rays are one of the additional procedures included in the government's expanded suite of possible age assessment techniques since July 2011. The procedure involves the radiographic analysis of developing and developed teeth, obtained using an external x-ray around the jaw. The x-ray is then compared with a reference database and an estimate of the subject's age is made, generally based upon the stage of development of the individual's third molars (wisdom teeth).¹⁴ To date, dental x-rays have not been used in age assessments for suspected people smugglers in Australia.¹⁵

3.12 The Australian Society of Forensic Odontology urged that legislative changes should be made to facilitate the use of dental x-rays as a procedure for age determination,¹⁶ because dental x-rays provide a credible age assessment tool:

Studies have found that analysis of third molar development is accurate and sufficiently correlated with chronological age to be of forensic value...It is recognised that dental development, as opposed to skeletal development, is able to provide the most reliable indicator for chronological age.¹⁷

3.13 In their submission, however, Professor Sir Albert Aynsley-Green Kt and a number of other experts in the field noted that there is uncertainty concerning the accuracy of dental x-ray techniques in assessing age:

There is...considerable controversy amongst dental experts on the reliability and validity of the different methods for assessing dental maturity. The wide range of variability in the timing of dental development, the need or otherwise to take ethnic differences into account, and the applicability of

13 *Committee Hansard*, 24 August 2012, p. 45.

14 Attorney-General's Department and Australian Federal Police, *Submission 21*, p. 18; Australian Society of Forensic Odontology, *Submission 1*, p. 6.

15 Attorney-General's Department and Australian Federal Police, *Submission 21*, p. 17. AGD and the AFP explained that, because dental x-rays are not a prescribed procedure under the Crimes Act, consent from the recipient is required for the procedure. As such, the AFP has made 24 offers for dental x-rays on a voluntary basis since July 2011, but none of the offers have been accepted by the individuals concerned.

16 *Submission 1*, p. 9.

17 *Submission 1*, pp 3 and 5.

population standards to the assessment of the individual in the border setting create real challenges for those trying to define best practice.¹⁸

Focussed interview techniques

3.14 DIAC told the committee that its initial assessment of the age of suspected minors upon arrival at Christmas Island is based on any documentary evidence available at the time, as well as a focussed age assessment interview undertaken by two experienced DIAC officers.¹⁹ DIAC officials outlined the interview process at a 2012 Senate budget estimates hearing:

We have a detailed interview technique that works on the basis of taking [the interviewee] through a series of questions exploring schooling, the age of siblings, the date of birth and when events occurred. We track through the history in a chronological way through their life...We are not about determining an exact age; we are more about determining if someone is clearly over 18 or clearly under 18.²⁰

3.15 DIAC noted that the two officers who undertake the interview each separately form their own view about the age of the interviewee, and only share that view towards the end of the process. In cases where the two officers disagree about whether the individual is an adult, the individual is given the benefit of the doubt and continues to be treated as a minor.²¹ In addition, the interviews are conducted with the assistance of an interpreter and in the presence of an independent observer from Life Without Barriers, a service provider whose role is to represent the interests of the client.²²

3.16 The interview-based assessment approach was introduced and piloted in the second half of 2010, and was subsequently introduced as the standard approach for new boat crew arrivals.²³ Prior to December 2011, however, DIAC's interview assessment was not determinative in deciding whether crew should be returned to Indonesia in the first instance, with the AFP and AGD using information provided by DIAC in its consideration of the age of alleged people smugglers.

18 *Submission 15*, p. 19.

19 *Submission 17*, p. 3.

20 Senate Legal and Constitutional Affairs Legislation Committee, *Committee Hansard*, Budget Estimates 2012-13, 21 May 2012, p. 54.

21 *Submission 17*, p. 3.

22 *Submission 17*, p. 3.

23 Department of Immigration and Citizenship, *Submission 17*, p. 3.

3.17 Several submitters commented on the accuracy of age assessment interviews. For example, in a submission Professor Sir Aynsley-Green Kt (and others) observed that numerous factors affect the value of narrative-based interviews in making age assessments:

An individual's narrative about his or her experiences can be important in assessing age, but a properly conducted analysis demands time, often involving several separate interviews, together with effective training and expertise in the country from which [the] person originates. It is important that the interviewer comes away from the interview with a proper understanding of the individual's life, education and cultural background and experiences to date. An intimidating environment, the rigour of the process and the attitudes of staff conducting the interviews may compromise the potential value of an interview in establishing an individual's age.²⁴

3.18 The ICJA observed that information gathered in narrative interviews may vary widely, and that a 'narrative that is short and concise with little factual content may be relied on to assess age just as conclusively as a narrative that contains a large amount of information may'. The ICJA also noted that language barriers can hinder the value of information provided in interviews, even when interpreters are provided, and that age determination made on the basis of interviews can rely on a high degree of subjectivity.²⁵

3.19 At a 2012 Senate budget estimates hearing, DIAC officers noted that their interview assessment process is still relatively new, and that there has not yet been sufficient time to gather data to determine the accuracy of assessments made using the interview process.²⁶

AFP interviews

3.20 The AFP advised that it offers individuals suspected of people smuggling offences an interview with AFP officers, including asking questions about age in cases where age is in dispute. The AFP noted that, in accordance with the requirements of Part IC (Investigation of Commonwealth Offences) of the Crimes Act, participation in an interview with the AFP is voluntary, and that typically crew members decline to be interviewed.²⁷

24 *Submission 15*, p. 11.

25 *Submission 7*, Attachment 1, p. 4.

26 Senate Legal and Constitutional Affairs Legislation Committee, *Committee Hansard*, Budget Estimates 2012-13, 21 May 2012, pp 54-56.

27 *Submission 21*, p. 18.

Use of documentation from Indonesia

3.21 Many submitters and witnesses discussed the use of documentary evidence from Indonesia in people smuggling cases where age is unclear. The AFP informed the committee that credible documentary evidence is not always available to support the claims of people smuggling crew who claim to be minors, and that the AFP endeavours to verify information from Indonesia wherever possible.²⁸ The CDPP added that, in prosecuting people smuggling cases, it has been presented with a broad range of documentary evidence from Indonesia from both the AFP and defence lawyers for accused people smugglers who claim to be minors. The types of documents it has received are:

- birth certificates, retrieved from the local area of the defendant by the Indonesia National Police (INP);
- affidavits, usually provided from parents, siblings, other family members or friends;
- school records, provided to the AFP by the INP;
- citizenship or identity records; and
- other documentation such as baptismal certificates.²⁹

3.22 The CDPP stated that a 'range of issues concerning admissibility, reliability and provenance have become apparent to the CDPP in relation to the use of these types of documentary material in the criminal justice system'.³⁰

Reliability of documentary evidence from Indonesia

3.23 The issue of the reliability of documentary evidence from Indonesia was raised in the AGD/AFP submission. The submission asserted that:

- it is common for Indonesians to obtain multiple identity documents without any requirement for verification or sighting by a government official;
- identity documents may be produced on the basis of oral information, without formal verification, in some cases years after the person's birth;
- there is a prevalence of illicit production of fake identity documents in Indonesia; and
- many people in rural Indonesian communities do not keep formal records of birth, and may adopt nominal birthdays for convenience that have little or no connection to their true age.³¹

28 *Submission 21*, p. 18.

29 *Submission 24*, pp 2-3.

30 *Submission 24*, p. 3.

31 *Submission 21*, pp 18-19. The AGD/AFP submission attributes these views to Professor Tim Lindsey, Director of the Asian Law Centre at the University of Melbourne.

3.24 At the public hearing on 24 August 2012, a representative from the AFP informed the committee:

Given that in parts of Indonesia maturity to work is of far greater importance than biological age, it has been the AFP's experience that official Indonesian documentation does not necessarily provide reliable evidence of a person's age, if it actually exists. For this reason the AFP has not always relied upon Indonesian documentation. It should in no way be inferred from this that Indonesian crew or authorities have always intentionally misled investigators. In fact, it is quite logical that many of the crew do not know their own date of birth or age.³²

3.25 Mr Simon Lee, a barrister familiar with people smuggling cases, stated that, in many cases, Indonesian boat crew will only know their chronological age by reference to a major event, a volcanic eruption or similar significant historical event.³³ The Migration Institute of Australia noted that individuals who register their birth years after the fact may be given birth dates which are different by up to 18 months from their true birth date.³⁴

3.26 The AFP and AGD advised that any documents provided which suggest that an accused people smuggler may be a minor are considered in assessing whether to give that individual the benefit of the doubt.³⁵

Difficulties obtaining documentation from Indonesia

3.27 The AFP informed the committee that it has actively sought documents from the Indonesia National Police (INP) on a police-to-police basis for people smuggling cases where age is in dispute, and that it has also recently commenced requesting documents from Indonesian consular officials in Australia.³⁶ An AFP representative advised that, while the AFP regularly requests information from the INP, this does not occur in every people smuggling investigation:

[We would] not [contact the INP] in every case. It would depend on the circumstances and what other material we might have available. We may have other material available that leads us to believe that it is not a true claim or that it is a misleading claim. But if we are uncertain, or if we wish to make that inquiry to try and establish age where we are not certain of age, then we would go to the Indonesian National Police to do that.³⁷

32 Deputy Commissioner Andrew Colvin, Australian Federal Police, *Committee Hansard*, 24 August 2012, p. 28.

33 *Submission 3*, p. 4.

34 *Submission 8*, p. 2.

35 *Submission 21*, p. 19.

36 *Submission 21*, p. 19.

37 Deputy Commissioner Andrew Colvin, Australian Federal Police, *Committee Hansard*, 24 August 2012, p. 37.

3.28 Ms Sarah Westwood from Victoria Legal Aid acknowledged that it can be difficult for authorities in Australia to obtain relevant documentation from Indonesia:

...in our [practical] experience, the work of trying to obtain documentary evidence in admissible form about the question of age on behalf of our clients was a very difficult thing to do. We have no doubt that the Australian Federal Police also encountered great difficulties in obtaining information from Indonesia...We acknowledge the difficulty; we encountered the difficulty ourselves in trying to obtain evidence...There were significant delays, we know, in Indonesian authorities responding to requests for information about age from Australian authorities. Again, defence lawyers encountered exactly the same difficulties in trying to obtain, from Australia, that information out of Indonesia.³⁸

3.29 An AFP representative also noted that the INP face significant challenges in attempting to verify an individual's age, and that due to the variability in record-keeping across the Indonesian archipelago, the INP does not generally have a standard practice for determining an individual's age.³⁹

3.30 The ICJA argued that, despite the difficulties associated with obtaining documentary evidence, it is the most preferable method of age determination and, where relevant documentary evidence is produced and verified, it should be regarded as highly determinative of age.⁴⁰

Admissibility of documentary evidence in Australian courts

3.31 Without evidence supporting the authenticity of documents procured overseas, documents may not be admissible as evidence in an Australian court of law, except in prescribed circumstances. While the AFP can obtain documents from the INP on a police-to-police basis, in order for documents to be automatically admissible in an Australian court, a formal mutual assistance request to the Indonesian Government is required. Such a process is significantly more time consuming and can take up to several months.⁴¹

3.32 Ms Edwina Lloyd stated that, in the case of one young Indonesian client she represented, birth documentation was challenged by the Commonwealth prosecutor and was not admitted in court. Ms Lloyd commented that Australian courts need to be more flexible in recognising documentation from Indonesia:

...it is a ridiculous expectation of an Australian court that they see documentary evidence as the highest [standard] and what would be seen as credible; and evidence coming from Indonesia is seen as not credible at all.

38 *Committee Hansard*, 24 August 2012, pp 14-15.

39 Deputy Commissioner Andrew Colvin, Australian Federal Police, *Committee Hansard*, 24 August 2012, pp 37-38.

40 *Submission 7*, Attachment 1, p. 5.

41 Attorney-General's Department and Australian Federal Police, *Submission 21*, p. 19.

The courts need to be a little more understanding that the type of evidence that can be produced from Indonesia from these remote and impoverished villages is going to be different and that should be accepted.⁴²

3.33 A witness from Victoria Legal Aid agreed, stating that there 'has to be...a degree of flexibility in the kinds of evidence that can be used and that should be admissible in these cases'.⁴³

3.34 The CDPP noted that it has now adopted a general policy of not disputing the admissibility of evidence provided by the defence in age determination hearings:

In mid 2011, the CDPP recognised the need for a court to have all documentary material before it in determining age, rather than just that material which was admissible. The CDPP's position became that the CDPP will not dispute the admissibility of any documentary evidence that the defendant wishes to tender, however it may be appropriate for comment to be made about the weight if any which a Court may wish to give to any evidence.⁴⁴

3.35 Mr Craigie SC informed the committee that, as well as allowing defendants to tender documentary evidence in court that may not otherwise be admissible, the CDPP recognises such material when considering whether to discontinue a prosecution:

In many, many cases, including cases where inquiries have been initiated in Indonesia and they are simply, given the nature of things, going to take too long the solution is that a very large number of matters are discontinued on material that, in many instances, would not be admitted in a court even if we wanted to thrust it before the court. Some of that material might or might not be of great weight. So, to that extent, the bar has been lowered but lowered in an administrative setting where we come to a view that in order to make the process work in a timely fashion we have to be a lot more flexible about the line between material that we see is sufficient to terminate proceedings and evidence that would sustain examination in a court.⁴⁵

3.36 Mr Allan Sharp, a Deputy Director in the CDPP, also noted that different judges may take different views about whether or not they will consider material relating to a suspect's age that would not normally be admissible under rules of evidence:

Judicial officers are notoriously careful about the evidence they get. In fact, we have a mixed number of cases which we have prosecuted where evidence of an accused's statement as to his age were proffered to the courts. In some cases judicial officers have ruled that this was pure hearsay

42 *Committee Hansard*, 24 August 2012, p. 7.

43 Ms Sarah Westwood, Victoria Legal Aid, *Committee Hansard*, 24 August 2012, pp 16-17.

44 *Submission 24*, p. 10.

45 *Committee Hansard*, 24 August 2012, pp 39-40.

and would not accept it; in other cases judges said: 'It is hearsay. I will accept it for limited purposes'.⁴⁶

3.37 The CDPP noted that the length of time taken to obtain relevant documents from Indonesia can cause unacceptable delays in the prosecution process:

The CDPP is conscious of the length of time that it can take for the AFP to make inquiries and obtain documentation from Indonesia. Where material has not been available within a reasonable timeframe, the CDPP has considered whether to continue the prosecution without the benefit of that material. This has led to matters being discontinued where material was later obtained from Indonesia which supported the person being an adult.⁴⁷

3.38 The Queensland Law Society argued that the sometimes lengthy time periods taken to verify documents presented by defence lawyers are unjustified, and that documents provided by legal professionals should be accepted at face value:

Solicitors are officers of the court. As such, they must accord with strict professional and ethical standards to gain entry and maintain employment in the legal profession. We consider that these strict ethical duties impose a sufficient standard to ensure that legal practitioners do not engage in unprofessional conduct, such as provision of false documentation.⁴⁸

Ability of individuals to collect evidence from Indonesia

3.39 Several submitters raised cases where legal representatives or journalists travelled to Indonesia to obtain documentation or affidavit evidence regarding the age of an accused people smuggler. Mr Simon Lee cited four cases where solicitors had travelled to Indonesia to gather admissible evidence, which resulted in the prosecutions being discontinued in all four cases, and the individuals repatriated. Regarding the case of Dion Domum, Mr Lee stated:

His mother, at the request of his lawyers, provided an affidavit stating her son was 15 years old. He had been in detention for eight months until his release in November 2011. No attempt by the Australian prosecuting authorities was made to contact his parents to confirm his age. It was not until his lawyer travelled to the island of Rote to obtain evidence to confirm his age that Dion Domun was released.⁴⁹

3.40 Similarly, Ms Edwina Lloyd outlined a case where a client was held in detention and then imprisoned in an adult maximum security prison from February 2010 to October 2011, while the AFP investigation and subsequent prosecution proceeded. At this time, Ms Lloyd flew to Indonesia and obtained affidavit evidence from the individual's family, leading to the CDPP discontinuing the

46 *Committee Hansard*, 24 August 2012, p. 39.

47 *Submission 24*, p. 10.

48 *Submission 18*, p. 4.

49 *Submission 3*, p. 4.

prosecution within a month of this evidence being presented.⁵⁰ Ms Lloyd asserted that the Australian authorities made no attempt to verify the individual's claims that he was a minor or contact his family members prior to her travelling to Indonesia.⁵¹

3.41 Mr Mark Plunkett also raised the case of three Indonesians accused of people smuggling offences whom he represented, in which the individuals were detained in Australian immigration facilities and prison for 417 days, before being released within two weeks of Mr Plunkett obtaining affidavit evidence from Indonesia.⁵² Mr Plunkett commented:

We were able to obtain access to Indonesia within a week and return to Australia and retain all the evidence we needed. We videoed it, we filmed it and we had a member of the international press present—distinguished journalist Mr Lindsay Murdoch. We dealt with witnesses one by one, following all the ethical requirements of taking evidence from witnesses. We did it in the back of a church with the village looking on. That evidence satisfied the authorities and the charges were dropped. That simple exercise that Margaret Bocquet, Tony Sheldon and I completed in a matter of days could have been done by the Commonwealth at least a year earlier. And none of these children would have suffered by being locked up in adult jails.⁵³

3.42 Mr Simon Lee argued that the onus should be on the prosecution to prove the defendant's age using 'safe, accurate and reliable methods' including gathering relevant material from Indonesia.⁵⁴ National Legal Aid agreed that the primary obligation should be upon the AFP to conduct a full investigation and provide any relevant documentation to the defence as it comes to hand.⁵⁵ The AFP explained, however, that its officers cannot undertake investigations in Indonesia without the official cooperation of the INP:

Commentary in the media has suggested that the AFP should undertake age inquiries in Indonesia independently of the INP. However, while journalists and other individuals may travel to Indonesia to source documents in relatively short timeframes, AFP officers cannot similarly travel to Indonesia in their private capacity.

Indonesia is a sovereign nation and the AFP cannot conduct investigations without the cooperation of the Indonesian Government. Similarly, Australia would not permit INP officers to conduct investigations in Australia without the cooperation of the AFP. In the absence of an agreement with Indonesia, and legislation enabling the AFP to exercise police powers in a

50 *Submission 22*, pp 1-2.

51 *Submission 22*, p. 3.

52 *Submission 28*, pp 16-17.

53 *Committee Hansard*, 24 August 2012, p. 3.

54 *Submission 3*, p. 4.

55 *Submission 19*, p. 4.

foreign country, there is no lawful basis for the AFP to obtain documentary evidence other than through formal channels.⁵⁶

Multidisciplinary approaches to age assessment

3.43 According to AGD and the AFP, the primary challenge associated with age determination is that there is no one method available to categorically establish age, and all the techniques utilised have inherent limitations.⁵⁷ For this reason, some submitters suggested that multidisciplinary approaches to age assessment incorporating a variety of techniques are likely to be more accurate than processes which rely on a single method for age assessment.⁵⁸

3.44 The recent Australian Human Rights Commission report was more cautious regarding the utility of multidisciplinary approaches:

...there is no evidence that a multi-disciplinary approach to age assessment is more accurate than medical or non-medical approaches alone; consequently, if a multi-disciplinary approach is used, a wide margin of benefit of the doubt should be afforded to individuals whose age is being assessed.⁵⁹

3.45 The AGD/AFP submission noted that the Australian Government's overall philosophy concerning age assessment is based on a holistic approach and the benefit of the doubt principle:

Age determination is an inexact science involving some margin of error irrespective of the method used. Recognising these limitations, the Government considers the best approach is to adopt a combination of age determination procedures and to give defendants the benefit of the doubt. This ensures that people smuggling crew are only treated as adults where they are assessed on the available evidence to be an adult. It also means the court will have the widest range of evidence to assess in making an age determination.⁶⁰

56 *Submission 21*, p. 19.

57 *Submission 21*, p. 4.

58 See, for example: Victoria Legal Aid, *Submission 23*, p. 28; Professor Sir Albert Aynsley-Green Kt and others, *Submission 15*, p. 20 (although this submission notes that further validation of multidisciplinary approaches may be required).

59 Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*, July 2012, p. 9.

60 *Submission 21*, p. 29.

Age determination hearings

3.46 Paragraph (c) of the committee's terms of reference refers to whether there have been cases where information that a person is a minor was not put before the court. Submitters raised several cases in which this has occurred, and also discussed broader issues relating to age determination hearings, in particular the burden and standard of proof used in these proceedings.

Information regarding age of accused which was not raised in court

3.47 The AGD/AFP submission reported that there have been cases where information that appeared to suggest a defendant was a minor was not put before the court, because it lacked probative value.⁶¹ The submission raised the case of Ali Jasmin, where an extract of a birth certificate indicating Mr Jasmin was a minor was received from the Indonesian consulate several months after he was charged:

While the authenticity of the record was not in question, the accuracy of the information contained in the document was uncertain given the time between the alleged date of birth and the date of the record. Mr Jasmin's lawyer has publicly acknowledged that this was the case. The CDPP was aware the defendant had a copy of the document on 24 August 2010, and provided a translation when it was available. Given the concerns about the veracity of the information contained in the document, the prosecution did not put the document before the court. It is understood the defence also did not put the document before the court on similar grounds.⁶²

3.48 The AGD/AFP submission also stated that information relating to the age of defendants gathered by DIAC as part of the initial assessment interview process may not be admissible as evidence in an age determination hearing before a court, even if it establishes important details about a person's age.⁶³

3.49 The CDPP informed the committee that, in addition to the case of Ali Jasmin, it was aware of three other cases in which information relating to the age of the accused was not presented during court hearings. The CDPP noted that these involved cases where:

- the prosecution was in possession of documents which supported the defendant being 18 years or over but did not rely on them because of issues with the documents such as issues of admissibility or identification;
- documentation from Indonesia which indicated that the defendant is an adult was not put before the court because the defence accepted that the defendant was an adult; and

61 *Submission 21*, p. 7.

62 *Submission 21*, p. 7.

63 *Submission 21*, p. 7

- documentation from Indonesia was not provided to the court because it was not available until after the age determination hearing.⁶⁴

3.50 Australian Lawyers for Human Rights (ALHR) asserted that, based on current practices, it would be difficult to determine the number of cases in which information that a person was a minor was not put before the court. It argued that, given the language, cultural, evidentiary and procedural barriers in such cases, it is highly likely that miscarriages of justice have occurred more frequently than they are likely to be detected and rectified.⁶⁵

Burden and standard of proof in age determination hearings

3.51 Submitters noted that the *Migration Act 1958* (Migration Act) is not clear regarding whether the prosecution or defence bears the onus of proof regarding the age of accused people smugglers in age determination hearings.⁶⁶ The Victorian Equal Opportunity and Human Rights Commission argued that 'where a person raises the issue of age during criminal proceedings, the prosecution should bear the burden of proof to establish that the person was an adult at the time of the offence'.⁶⁷

3.52 The AGD/AFP submission noted that the government is considering possible amendments to the Migration Act to expressly provide that the prosecution bears the legal burden to establish on the balance of probabilities that the defendant was an adult at the time the offence was committed.⁶⁸

3.53 In evidence to the committee, Mr Craigie SC confirmed that the CDPP has taken the view that it should bear the burden of proof in determining a suspect to be an adult, and considered that the codification of this arrangement in legislation would be a 'comfortable step'.⁶⁹

3.54 The standard of proof used in age determination hearings was also queried. ALHR argued that, given the seriousness of the consequences associated with the outcome of court-determined age in criminal cases involving accused people smugglers, the civil standard of proof of 'on the balance of probabilities' is inappropriate for age determination hearings. ALHR submitted that the criminal standard of proof of 'beyond reasonable doubt' should be adopted for age determination hearings in these cases.⁷⁰

64 *Submission 24*, p. 9.

65 *Submission 20*, p. 2.

66 See, for example: Australian Lawyers for Human Rights, *Submission 20*, p. 5; Attorney-General's Department and Australian Federal Police, *Submission 21*, p. 14.

67 *Submission 16*, p. 4.

68 *Submission 21*, p. 14.

69 *Committee Hansard*, 24 August 2012, pp 40-41.

70 *Submission 20*, p. 5.

Processes for dealing with information regarding the age of suspects

3.55 Paragraph (d) of the committee's terms of reference relates to the types of checks and procedures that exist to ensure that evidence given to an Australian authority or department about the age of a defendant or suspect is followed up appropriately, while paragraph (e) deals with the relevant procedures across agencies relating to cases where there is a suggestion that a minor has been imprisoned in an adult facility.

3.56 Submitters cited cases where relevant information or evidence relating to a suspect's age had not been followed up appropriately. For example, the Australian Lawyers Alliance raised a case in which the CDPP denied knowledge of the receipt of a defendant's family identification card, only to later apologise, acknowledging that they did have the card but that the various authorities had failed to communicate effectively with each other concerning the existence of that document.⁷¹

3.57 The government agencies that provided submissions to the inquiry emphasised that, in each individual case, the process of age assessment for boat crew who claim to be minors is an ongoing one which incorporates new information or evidence as it comes to hand. It was noted that new evidence or information may be provided at any time by the crew member, their legal representatives or the Indonesian authorities, and that in particular:

- DIAC encourages individuals to provide verifiable documents about their age, and if persuasive new information is brought to DIAC's attention, it may result in the initial age assessment being altered accordingly;
- the AFP may decide to give the person the benefit of the doubt at any stage of its investigation process if it uncovers information that suggests the person may be a minor; and
- the CDPP may discontinue a prosecution if evidence comes to light that a person charged with people smuggling offences may be a minor.⁷²

3.58 In addition to any action taken by a Commonwealth agency to review an age assessment, a defendant can dispute their age at any time during the court process, and even after conviction can appeal their conviction and sentence on the basis of age.⁷³

3.59 Both the NT and Queensland Governments advised the committee that, if a correctional services employee suspects or discovers that an Indonesian prisoner is a minor, the matter is immediately referred to Australian Government authorities.⁷⁴

71 *Submission 26*, pp 4-5.

72 Attorney-General's Department and Australian Federal Police, *Submission 21*, pp 8-9.

73 Attorney-General's Department and Australian Federal Police, *Submission 21*, pp 9, 23. The agencies noted that there have been a number of cases where crew have not raised age as an issue until they are before the court, sometimes late in proceedings.

74 *Submission 12*, p. 1 and *Submission 14*, p. 1, respectively.

The NT Government confirmed that this has occurred in the Northern Territory in the past.⁷⁵

Application of the 'benefit of the doubt' principle

3.60 A key concept in dealing with alleged offenders who may be minors is that the benefit of the doubt should be afforded to such individuals, and that they should be treated as children until it is proved that they are adults. As noted in chapter 1, the AHRC report found that 'the Australian Government failed to ensure that the principle of the benefit of the doubt was afforded in all cases where an individual said that he was a child'.⁷⁶

3.61 Commonwealth agencies disagreed with the AHRC's assessment when the issue of the 'benefit of the doubt' principle was raised during this inquiry. AGD and the AFP noted that, in July 2011, the government commenced a policy of proactively giving the benefit of the doubt about age where the available evidence could not clearly establish that the person was a minor.⁷⁷ A representative from AGD told the committee:

The department is of the view that all the information available to agencies was considered and that the concept of the benefit of the doubt was given. The department is well aware of its obligations in respect of Rights of the Child and has always intended to act in good faith in that regard.⁷⁸

3.62 Mr Chris Craigie SC advised the committee that the CDPP actively applies the benefit of the doubt principle, stating that 'there are over 60 people who had been given the benefit of the doubt by me without going anywhere near the court', even in cases where wrist x-rays had indicated that the individuals were adults.⁷⁹

3.63 In saying this, however, Mr Allan Sharp from the CDPP commented that an individual claiming to be a certain age does not in itself warrant the benefit of the doubt being given, and that all the evidence must be weighed in such considerations. Regarding the case of Ali Jasmin, where a birth certificate claimed that he was 13 years old but a wrist x-ray assessment indicated that he was over 19 years of age, Mr Sharp observed:

[T]he issue is not whether one simply accepts the documents on the face of it. The process of assessing a benefit of the doubt and, indeed, an age and

75 *Submission 12*, p. 1.

76 Australian Human Rights Commission, *An age of uncertainty: inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*, July 2012, p. 10.

77 *Submission 21*, p. 5.

78 Mr Tony Sheehan, Attorney-General's Department, *Committee Hansard*, 24 August 2012, p. 31.

79 *Committee Hansard*, 24 August 2012, p. 35.

the probability of the success of a case, is a weighing of all that evidence and material in accordance with the normal standards of how one proceeds in these matters, and that is what part of giving the benefit of the doubt is. I do not think that mere raising of age automatically gives rise to a benefit of the doubt, and that was the position in this case.⁸⁰

CHAPTER 4

Options for assisting affected individuals

4.1 Paragraph (f) of the committee's terms of reference relates to options for reparation and repatriation of any minor who has been charged (contrary to current government policy) and convicted. This chapter outlines the legal options for releasing Indonesian minors who have been wrongly imprisoned or detained in Australia, the current process of repatriation for boat crew returned to Indonesia, and the options proposed by submitters and witnesses for compensating affected individuals.

Options for the early release and repatriation of convicted prisoners

4.2 The Attorney-General's Department (AGD) and the Australian Federal Police (AFP) informed the committee that there are several legal options for facilitating the release of imprisoned persons who have been convicted as adults on people smuggling charges but later found to be minors. These options are:

- the prisoner lodging an appeal in the relevant state or territory court of criminal appeal;
- the relevant state or territory Attorney-General referring a case to the court of appeal to be heard again;
- the federal Attorney-General granting a licence for the offender to be released from prison where exceptional circumstances exist (under the powers of subsection 19AP(1) of the *Crimes Act 1914*); or
- the Governor-General, on the advice of the Australian Government, exercising the Royal Prerogative of Mercy to grant a pardon to a federal offender.¹

4.3 As noted previously,² 15 individuals have been released from prison on licence granted by the Attorney-General, as a result of the recent AGD review of 28 cases in which individuals who claimed to be minors had been convicted of people smuggling offences.

Processes for returning individuals to Indonesia

4.4 Upon an Indonesian prisoner's release from prison, they are returned to their home country by the Department of Immigration and Citizenship (DIAC), unless they make a claim for protection to remain in Australia.³ DIAC informed the committee that, prior to removal from Australia, family tracing and contact with the individual's parents or guardian to confirm reception arrangements is conducted, either by DIAC

1 *Submission 21*, pp 10-11.

2 See chapter 1, paragraph 1.28.

3 *Submission 21*, p. 10.

itself with the client, through the International Organization for Migration (IOM), or through the Indonesian consulate.⁴

4.5 DIAC advised that minors returned to Indonesia are accompanied throughout the journey, from departure to reunion with their parent or guardian:

A DIAC officer accompanies the minor to Indonesia. In circumstances where a parent(s) or guardians are unable to meet the client at the airport, DIAC arranges for IOM to accompany the minor to their home and to ensure that the minor is reunited with their parents or guardian.⁵

4.6 DIAC also observed that post-arrival care arrangements including reception, transport and escort services are organised and funded by DIAC through the services of IOM.⁶

4.7 With regards to the removal of individuals from Australia, Australian Lawyers for Human Rights (ALHR) suggested that repatriation arrangements should include engagement with Indonesian authorities to return children directly to their villages and families, and that children should ideally be accompanied by a guardian fluent in the relevant language or dialect.⁷

Options for providing support to wrongly detained minors

4.8 As described in chapter 2, Australia is subject to obligations under the UN Convention on the Rights of the Child (CRC) in its dealings with minors detained in Australia. The Migrant and Refugee Rights Project observed that the UN Committee on the Rights of the Child has commented:

- that, for rights to have meaning, effective remedies must be made available to redress violations; and
- where rights are found to have been breached, there should be appropriate reparation, including compensation and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration.⁸

4.9 Ms Bassina Farbenblum from the Migrant and Refugee Rights Project also remarked that, under the International Covenant on Civil and Political Rights (ICCPR), Australia has a 'specific obligation to ensure that anyone who has been the victim of arbitrary detention has an enforceable right to compensation'.⁹

4 Response to questions on notice, received 31 August 2012, p. 2.

5 Response to questions on notice, received 31 August 2012, p. 2.

6 Response to questions on notice, received 31 August 2012, p. 2.

7 *Submission 20*, p. 7.

8 *Submission 11*, pp 3-4, citing: Committee on the Rights of the Child, *General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (Articles 4, 42 and 44(6))*, paragraphs 24-25, [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.5.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.5.En) (accessed 5 September 2012).

9 *Committee Hansard*, 24 August 2012, p. 23.

4.10 The Migrant and Refugee Rights Project, along with other submitters and witnesses, expressed the view that Indonesian minors who have been detained in Australia have been the subject of human rights breaches under the CRC and, as such, should be entitled to effective reparation for those breaches.¹⁰ Ms Farbenblum explained further:

I think there is no question in these cases that there are multiple violations beginning with arbitrary detention but also, in the case of children, relating to their detention in adult facilities and the fact that obviously the decisions all the entire way along as to their detention, prosecution and conviction were not made in their best interests...Obviously, in the case of children the harm suffered by prolonged detention in adult facilities in a foreign country—and of course in the case of abuse—would be especially egregious.¹¹

4.11 The Migrant and Refugee Rights Project argued that Australia should 'establish an appropriate administrative mechanism with judicial review, for determining claims for reparations for rights violations associated with the detention and prosecution of children for people smuggling offences';¹² and should ensure that claimants have the necessary assistance to effectively use these procedures, even if they have already returned to Indonesia.¹³

Compensation

4.12 Several submitters argued that minors who are wrongly detained may be entitled to compensation. For example, National Legal Aid argued that, where a minor has been held with adult detainees, the minor should be assisted with repatriation and provided with an ex-gratia payment:¹⁴

...these people were minors who did spend a significant amount of time in detention, in some cases quite unjustly, and in some cases they spent time in adult detention as well. In those circumstances, it is the view of National Legal Aid that some form of ex gratia payment may be appropriate. Obviously some sort of process would need to be set up to assess that, but it would not be inappropriate to consider that sort of payment, given the experience of some of these minors who were held in detention for long periods of time.¹⁵

10 *Submission 11*, p. 4. See also Australian Lawyers Alliance, *Submission 26*, p. 14; Australian Lawyers for Human Rights, *Submission 20*, pp 6-7.

11 *Committee Hansard*, 24 August 2012, p. 26.

12 *Submission 11*, p. 4.

13 *Submission 11*, p. 5.

14 *Submission 19*, p. 5.

15 Ms Nicole Rich, Victoria Legal Aid (representing National Legal Aid), *Committee Hansard*, 24 August 2012, p. 15.

4.13 ALHR contended that children detained in adult facilities should be entitled to monetary compensation. ALHR also argued that, in some cases, the detention of minors may have been the result of negligence on the part of the government, and as such may amount to a breach of the government's duty of care towards detainees, necessitating compensation which takes this negligence into account.¹⁶

4.14 The Australian Lawyers Alliance (ALA) outlined several possible mechanisms through which the right to compensation could be pursued, namely:

- automatic granting of rights for compensation for minors charged with people smuggling;
- the creation of a statutory compensation fund for Commonwealth breach of guardianship;
- strengthening the powers of the Australian Human Rights Commission;
- developing federal human rights legislation, and rights to redress under such legislation;
- the right of individuals to sue for unlawful imprisonment or for breaches of the Commonwealth's duty of care; and
- redress under relevant state-based Civil Liability Acts.¹⁷

4.15 Submitters also raised the issue of compensation for the families of minors who have been incorrectly detained or imprisoned. The Indonesia Institute argued that financial compensation should be made available to the families of jailed minors in order to allow their families to rebuild their lives and to recover from the trauma of having a child 'locked-up' for up to five years.¹⁸ Mr Ross Taylor from the Indonesia Institute suggested:

For those children who have been sent home...we believe it would be a very good act for the Australian government to acknowledge the mistakes that have been made; facilitate some financial payments progressively to these children to allow them to complete their education and seek full-time work; and to provide some security for their family. In Australian dollar terms, that is not big money and we believe that would be a good, proper and correct thing to do.¹⁹

4.16 AGD and the AFP noted that individual claims for compensation from wrongly detained or imprisoned minors might be made in the future:

People are free to make claims at any time against any government if they believe that a government has acted wrongly. Claims for reparation are regularly made against all governments. Governments have a duty to

16 *Submission 20*, pp 6-7.

17 *Submission 26*, p. 14.

18 *Submission 4*, p. 3.

19 *Committee Hansard*, 24 August 2012, p. 20.

properly consider such claims, as well as to properly defend themselves if such claims have no basis.

If claims for reparations are made by crew convicted of people smuggling offences, who are subsequently released on the basis that they may have been a minor at the time of the offence, the Government will consider the merits of those claims on a case-by case basis.²⁰

4.17 It has been recently reported that a civil compensation suit against the Australian Government has been launched in relation to the cases of two young Indonesian boat crew detained in Australia during 2011.²¹ The two individuals were reportedly detained for a total of 10 months, including six months in an adult prison in NSW, before being returned to Indonesia due to concerns regarding their age.

A public apology

4.18 Some submitters and witnesses argued that the Australian Government should publicly apologise to individuals who have been detained or imprisoned in Australia, only to have been later released and repatriated to Indonesia due to concerns they may have been minors at the time of offending.

4.19 Ms Edwina Lloyd asserted her view to the committee that 'a public apology by the government should be offered to those persons who have later been determined to be children'.²² Mr Mark Plunkett agreed:

The parliament in 2009 apologised for the treatment of children who were abused between the 1920s and 1970s and made a solemn pledge never to allow child abuse to go unchecked, but in a few years the agencies of the Commonwealth were engaging in a mass, almost industrial sized perpetration of abuse against these vulnerable Indonesian children. The shameful stain on Australia's reputation will not be cleansed until Australia makes a similar apology to these children, to their parents and to Indonesia.²³

Additional support for individuals returned to Indonesia

4.20 The issue of additional psychological or other support for wrongly detained minors who have been returned to Indonesia was also presented in evidence. ALHR contended that children detained in adult facilities should be entitled to compensation which adequately takes into account the nature of any psychological trauma suffered as a result of this detention.²⁴

20 *Submission 21*, p. 10.

21 Kesha West, 'Asylum boat boys sue Australia', *Australia Network Newslite*, 12 September 2012, <http://www.abc.net.au/news/2012-09-11/an-australian-government-to-face-civil-compensation-suit/4255490> (accessed 13 September 2012).

22 *Committee Hansard*, 24 August 2012, p. 1.

23 *Committee Hansard*, 24 August 2012, p. 4.

24 *Submission 20*, p. 6.

4.21 Ms Farbenblum from the Migrant and Refugee Rights Project was supportive of the idea of providing support to help such individuals recover from psychological trauma, but noted that any support 'would have to happen in Indonesia in a culturally appropriate context', and that the nature and delivery of support services 'would be best determined in consultation with experts in Indonesia'.²⁵

25 *Committee Hansard*, 24 August 2012, p. 26.

CHAPTER 5

Committee view and recommendations

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

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

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

Indonesian minors detained in Australia

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

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

Age determination procedures

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

Wrist x-rays

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

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

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

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

Recommendation 1

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

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

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

Obtaining evidence from Indonesia

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

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

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

Recommendation 2

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

Processes for ensuring that the rights of detained individuals are upheld

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

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

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

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

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

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

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

Recommendation 3

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

Recommendation 4

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

Contacting relatives in Indonesia

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

Recommendation 5

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

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

Burden of proof in age determination hearings

5.24 Regarding the burden of proof in age determination hearings, the committee notes evidence from the CDPP that it currently assumes the burden of proof in such hearings, and would be comfortable with this arrangement being codified in legislation. AGD has advised that the government is considering introducing legislation to this effect, as previously recommended by the Senate Legal and Constitutional Affairs Legislation Committee in its report in relation to the Crimes Amendment (Fairness for Minors) Bill 2011.⁴ The committee believes that there is now an overwhelming case for such legislative change to be made.

Recommendation 6

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

Deterrence and awareness raising activities in Indonesia

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

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

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

Recommendation 7

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

Senator Penny Wright

Chair

Chair's further findings and recommendations

1.1 The Chair has carefully considered all the material presented to the committee and, in addition to the seven recommendations which were agreed to by the majority of the committee, has identified further recommendations that she feels best reflect the breadth of the evidence received. The Chair of the committee believes that the evidence presented to the inquiry makes a compelling case for further changes to Australia's legislative and administrative framework for dealing with Indonesian boat crew who claim to be minors. These additional comments and recommendations should be read in conjunction with the evidence presented in the majority report.

Indonesian minors detained in Australia

1.2 While the Chair of the committee acknowledges the work of the Attorney-General's Department (AGD) in undertaking an initial review of cases where individuals who may have been minors have been convicted, a more extensive review is necessary to determine exactly how many cases there have been since 2008 where a minor has been wrongly detained in Australia. Even in cases where the individual has now been returned to Indonesia, it is important, both as a matter of principle and in fairness to any possible future compensation claims, that the government proceed with a more complete knowledge of how many minors really were detained. This review could be conducted using the existing case file information held by relevant Commonwealth agencies, and would not require calling individuals back to Australia who have now been returned to Indonesia.

Note: the number of cases involving the detention of minors is discussed in chapter 2 of the majority report at paragraphs 2.2–2.17.

Recommendation 1

1.3 The Chair of the committee recommends that the Attorney-General's Department undertake a review of all cases since 2008 where Indonesian minors may have been detained in Australia on suspicion of people smuggling offences, in order to determine:

- **the number of minors who have been inappropriately detained in Australia; and**
- **the length of time for which those individuals were detained.**

Wrist x-rays

1.4 In the interests of achieving agreement, the Chair has agreed to the recommendation contained in the majority report of the committee that the Australian Government consider removing wrist x-rays as a prescribed procedure for age determination under the *Crimes Act 1914* (Crimes Act) and the Crimes Regulations 1990, pending advice to government from the Office of the Chief Scientist.

1.5 However, the Chair notes that peak medical organisations including the Royal Australasian College of Physicians and the Royal Australian and New Zealand College of Radiologists, as well as other medical experts, are already clearly on the public record stating their opposition to the use of wrist x-rays as an age determination procedure.¹ On this basis, the Chair of the committee considers that sufficient medical and scientific evidence has already been presented to discredit the use of wrist x-rays as an age assessment tool such that there are sufficient grounds for the Australian Government to remove wrist x-rays as a prescribed procedure for age assessment.

1.6 The Chair further notes that the committee was informed during the inquiry that some individuals claiming to be minors have requested that wrist x-rays be conducted to support their claims regarding age; however, these requests do not necessitate retaining wrist x-rays as a prescribed procedure under the Crimes Act. Dental x-rays, which are not a prescribed procedure for age determination under the Crimes Act, are currently offered by the Australian Federal Police (AFP) to individuals on a voluntary basis. Hence, if wrist x-rays were removed as a prescribed procedure from the Crimes Act, there would be nothing to prevent wrist x-rays being offered on a voluntary basis, or when specifically requested by an individual, in cases where age is in dispute.

Note: evidence regarding the use of wrist x-rays is discussed in chapter 3 of the majority report at paragraphs 3.5–3.10.

Obtaining evidence from Indonesia

1.7 The majority report recommended that the Australian Government formalise arrangements with the Indonesian Government to expedite the process of gathering age-related evidence in Indonesia for individuals detained in Australia on suspicion of people smuggling offences. Additionally, the Chair of the committee considers that the activities of legal aid representatives in obtaining evidence from Indonesia should be more formally acknowledged and supported. Given that the activities of these legal aid representatives have been helpful in advancing many cases in a timely manner, Australia's eight legal aid commissions should continue to be resourced sufficiently to allow legal aid lawyers to obtain evidence directly from Indonesia where necessary.

Note: The ability of lawyers and other individuals to obtain evidence from Indonesia is discussed in chapter 3 of the majority report at paragraphs 3.39–3.42.

Recommendation 2

1.8 The Chair of the committee recommends that the Australian Government, in conjunction with state and territory governments, sufficiently resource Australia's eight legal aid commissions to enable legal aid lawyers representing suspected people smugglers who claim to be minors to travel to Indonesia to obtain relevant evidence relating to the age of their clients.

1 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Amendment (Fairness for Minors) Bill 2011*, April 2012, pp 12-13 and 39-40; Professor Sir Albert Aynsley-Green Kt and others, *Submission 15*, pp 15-17.

Guardianship issues relating to crew who claim to be minors

1.9 The Chair of the committee considers that an independent statutory guardian should be appointed for all people smuggling suspects who claim to be minors. While the independent service provider engaged by the Department of Immigration and Citizenship (DIAC) provides some support to individuals who may be minors, it has no ultimate legal or guardianship responsibility for these persons. For this reason, a codified guardianship arrangement is necessary to ensure that suspects who may be minors are provided with appropriate support and case management. The establishment of a statutory guardian was supported by numerous submitters to this inquiry,² and is consistent with Recommendation 2 of the Australian Human Rights Commission's (AHRC) recent report, which states:

An individual suspected of people smuggling who says that he is a child, and who is not manifestly an adult, should be provided with an independent guardian with responsibility for advocating for the protection of his best interests.³

Recommendation 3

1.10 The Chair of the committee recommends that the Australian Government introduce legislation to appoint an independent legal guardian for individuals suspected of people smuggling offences who claim to be minors, to represent their best interests while their age claims are assessed.

Access to legal aid and other services

1.11 As agreed in the majority report, legal assistance should be provided in person to a crew member who claims to be a minor as soon as possible after such an individual arrives on Christmas Island. The Chair of the committee considers that there should be a formal requirement for legal assistance to be provided as soon as practicable, ideally within three days of a detainee arriving in Australia. In order to facilitate this occurring, the Australian Government should appropriately resource National Legal Aid to station a full-time independent legal aid representative on Christmas Island to provide prompt legal assistance to these individuals.

Note: these issues are discussed in chapter 2 of the majority report at paragraphs 2.35–2.42.

Recommendation 4

1.12 The Chair of the committee recommends that the *Migration Act 1958* be amended to require that legal assistance be provided to all individuals suspected of people smuggling offences who claim to be minors within three days of their arrival in Australia.

2 See discussion in chapter 2 of the majority report at paragraphs 2.52–2.55.

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

Recommendation 5

1.13 The Chair of the committee recommends that the government appropriately resource National Legal Aid to station a full-time independent legal aid representative on Christmas Island, to provide legal assistance in person to all foreign boat crew who arrive there suspected of people smuggling offences.

Limits on pre-charge detention for people smuggling suspects who claim to be minors

1.14 During the inquiry, the committee heard that in a large number of cases minors have been detained in Australia for months before being charged with any Commonwealth offence. While AFP investigations relating to people smuggling offences where age is in dispute are complex, lengthy periods of detention are unacceptable in any circumstances. Additionally, lengthy pre-charge detention of suspects who claim to be minors is contrary to Australia's obligations under the UN Convention on the Rights of the Child. Recommendation 12 of the recent AHRC report states:

The Attorney-General should set and ensure the implementation of an appropriate time limit between the apprehension of a young person suspected of people smuggling who does not admit to being over the age of 18 years and the bringing of a charge or charges against him.⁴

1.15 The Chair of the committee agrees with the AHRC that pre-charge detention for suspects who claim to be minors should be subject to strict time limits. Such limits should be enshrined in legislation, rather than simply contained in government policy, to ensure that individuals who may be children cannot be subject to extensive or arbitrary pre-charge detention. A two-week time limit is reasonable in this context to ensure that human rights breaches do not occur.

Note: pre-charge detention for people smuggling suspects is discussed in chapter 2 of the majority report at paragraphs 2.24–2.29.

Recommendation 6

1.16 The Chair of the committee recommends that the *Crimes Act 1914* be amended to require that an individual suspected of people smuggling offences who claims to be a minor can only be detained in Australia for a maximum of 14 days before being charged or released from detention.

4 Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*, July 2012, pp 13-14.

Review of Criminal Justice Stay Certificates for individuals suspected of people smuggling offences

1.17 The committee has heard that through the issuing of Criminal Justice Stay Certificates, people smuggling suspects who may be minors can be held virtually indefinitely in detention without access to any administrative or judicial review. The Chair of the committee considers that this is wholly inappropriate in cases where age is in dispute, and notes that in some cases this arrangement has resulted in individuals being detained in Australia for months, only then to be released and returned to Indonesia due to concerns that they are juveniles. In cases where age is in dispute, Criminal Justice Stay Certificates issued to prevent individuals suspected of people smuggling offences from leaving Australia should be subject to periodic judicial review, to ensure that individuals in these cases are not subject to indefinite or arbitrary detention.

1.18 The AHRC recommended that AGD should 'establish and monitor a process whereby there is regular and frequent review of the continuing need for each Criminal Justice Stay Certificate' given by the Attorney-General or his or her delegates.⁵ Further, evidence was presented to this inquiry that, under Australian law, detention warrants for terrorism suspects requested by ASIO must be renewed by a federal magistrate or judge every seven days.⁶ The Chair of the committee sees no reason why Criminal Justice Stay Certificates authorising the detention of individuals suspected of people smuggling offences under the Migration Act should not be subject to similar judicial review to protect the rights of detainees.

Note: the use of Criminal Justice Stay Certificates and judicial oversight of detainees is discussed in chapter 2 of the majority report at paragraphs 2.28 and 2.30–2.31.

Recommendation 7

1.19 The Chair of the committee recommends that the *Migration Act 1958* be amended to require that, where Criminal Justice Stay Certificates are issued in respect of individuals suspected of people smuggling offences who claim to be minors, those certificates should be subject to periodic judicial review.

Places of detention for suspects who claim to be minors

1.20 The inquiry heard that Indonesian boat crew who claim to be minors have been detained in immigration detention facilities and adult correctional facilities for long periods of time. DIAC informed the committee that individuals who claim to be minors are generally held in Alternate Places of Detention rather than higher-security Immigration Detention Centres. However, the Chair of the committee believes that the government should consider options for housing any Indonesian nationals who claim

5 Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*, July 2012, p. 14 (Recommendation 15).

6 Sections 34F-34G of the *Australian Security Intelligence Organisation Act 1979*.

to be children in community-based detention arrangements, unless exceptional circumstances exist.

1.21 While DIAC should retain the discretion to keep individuals in more secure facilities if they are manifestly not children or some other presenting risk factor exists, young Indonesians who claim to be minors should be moved into community detention arrangements wherever possible while their cases are finalised.

Note: the location of detention for individuals claiming to be minors is discussed in chapter 2 of the majority report at paragraphs 2.32–2.34.

Recommendation 8

1.22 The Chair of the committee recommends that an individual detained in Australia on suspicion of people smuggling charges who claims to be a minor must be held in community detention rather than immigration detention facilities while their case is considered, unless there is a clear reason why this would be inappropriate.

Issues relating to age determination hearings

1.23 The committee also heard evidence that, in matters where age is in dispute, there is often a lengthy delay until an age determination hearing before a court is held. As noted in chapter 2 of the majority report, statistics provided by the Commonwealth Director of Public Prosecutions (CDPP) indicate that in the 13 relevant cases since September 2008 where age determination hearings have taken place, the average time between arrival in Australia and the age determination decision was 429 days. While a variety of factors may affect how quickly such a matter can come before a court, delays of this length are unacceptable.

1.24 Accordingly, the Chair of the committee concludes that appropriate time limits should be imposed for investigating officials to make applications to determine age for persons charged with people smuggling offences who claim to be less than 18 years of age. A time limit of 30 days, either from the time the individual is detained in Australia or the time at which the individual first makes the claim that they are a minor, is sufficient to allow Australian authorities to conduct investigations.

1.25 The committee also received evidence regarding cases where information held by the CDPP relating to a suspect's age was not placed before a court during an age determination hearing. The Chair of the committee believes that in cases where information relating to a suspect's age is in the possession of either the CDPP or the defence counsel, it should be offered to the court so that the relevant judicial officer can decide whether the evidence is admissible.

1.26 The Chair acknowledges the CDPP's argument that in such cases the validity and underlying provenance of the evidence was questionable, and that the CDPP has taken a more generous approach in not contesting the proffering of information relating to a suspect's age in recent cases. Nonetheless, the CDPP should continue to review its processes to ensure that all age-related evidence in its possession is available to the court during an age determination hearing, to enable the court to ultimately assess and determine the probity of that evidence.

Note: issues relating to age determination hearings are discussed in chapter 3 of the majority report at paragraphs 3.47–3.54. CDPP statistics relating to the average length of time between arrival in Australia and an age determination hearing occurring is also included in chapter 2 of the majority report at paragraph 2.25.

Recommendation 9

1.27 The Chair of the committee recommends that the *Crimes Act 1914* be amended to require that an investigating official must make an application to a magistrate or judge to determine the age of an individual charged with a people smuggling offence who claims to be a minor within 30 days of:

- the suspect being taken into immigration detention in Australia; or
- the suspect first making a claim that they are a minor.

Recommendation 10

1.28 The Chair of the committee recommends that the Commonwealth Director of Public Prosecutions review its procedures to ensure that all age-related evidence in its possession is made available to the court during age determination hearings.

Options for assisting affected individuals

1.29 The inquiry heard evidence that young Indonesians detained in Australia were subjected to arbitrary detention, housed in adult facilities with convicted murderers and paedophiles, and separated from their families for significant lengths of time. The Australian Psychological Society informed the committee that prolonged detention has a serious negative mental health impact on young people and children, such as the Indonesian nationals in these cases.⁷

1.30 The policy changes that have occurred over the last year will assist in reducing the risk of Indonesian minors being inappropriately detained in Australia in the future. However, the Chair of the committee is of the view that appropriate reparations need to be made to assist those individuals who have been wrongly detained or imprisoned in Australia in the past.

1.31 As such, the Chair of the committee considers that the Australian Government should offer an official apology to all Indonesian nationals who have been detained or imprisoned in Australia on people smuggling charges, only to be later released and returned to Indonesia on the grounds that they were probably minors at the time of offending.

1.32 In light of the suffering caused to Indonesian minors who have been wrongfully detained or imprisoned in Australia, appropriate compensation should also be made available to individuals who have been wrongfully detained in Australia, even if they have now returned to Indonesia. The provision of compensation where human rights breaches have occurred is consistent with Australia's international human rights obligations.

⁷ *Submission 13*, pp 3-4.

1.33 The Chair of the committee notes the following evidence from the AGD/AFP submission to this inquiry:

People are free to make claims at any time against any government if they believe that a government has acted wrongly. Claims for reparation are regularly made against all governments. Governments have a duty to properly consider such claims, as well as to properly defend themselves if such claims have no basis.⁸

1.34 Generally speaking, the individuals who have been affected and wrongly imprisoned in these cases are illiterate, poor, non-English speaking Indonesian teenagers, who may have no realistic prospect of finding appropriate legal representation and making a compensation claim in Australia. The Chair of the committee considers that the Australian Government must go beyond simply waiting for possible compensation claims to be brought by affected individuals in the future; rather, the government must take proactive steps to find and compensate Indonesian minors who have been wrongly imprisoned in Australia.

1.35 The Chair of the committee agrees with the Migrant and Refugee Rights Project that the Australian Government should establish an appropriate administrative scheme to investigate and make available compensation to affected individuals who have now returned to Indonesia.⁹ This function could be set up as a stand-alone entity, or could be housed within the Attorney-General's Department. Further, compensation decisions made under this scheme should be subject to judicial review, to ensure that the amount of reparation is appropriate in all the circumstances of each individual case. There should be a clear presumption that in cases where minors were wrongly detained or imprisoned, compensation is payable.

1.36 Finally, the Chair of the committee believes that the Australian Government should investigate options for the provision of culturally appropriate support to help affected individuals recover from any psychological trauma and reintegrate into society upon their return to Indonesia.

Note: options for providing assistance to affected minors, including a formal apology, compensation and other forms of support, are discussed in chapter 4 of the majority report at paragraphs 4.12–4.21.

Recommendation 11

1.37 The Chair of the committee recommends that the Australian Government issue an apology to those Indonesian nationals who were detained, or convicted and imprisoned, in Australia for involvement or suspected involvement in people smuggling offences, only to be later released due to concerns that they were minors at the time of offending or upon the completion of their sentence.

8 *Submission 21*, p. 10.

9 *Submission 11*, p. 4.

Recommendation 12

1.38 The Chair of the committee recommends that the Australian Government:

- **recognise the right of Indonesian minors who were wrongly detained or imprisoned in Australia to be paid appropriate compensation;**
- **initiate a thorough and transparent process to identify individuals who were wrongly detained, or convicted and imprisoned, in Australia on people smuggling charges, only to be released due to concerns that they were minors at the time of offending or upon completion of their sentence;**
- **inform these individuals of their right to seek reparation for any periods of inappropriate detention or imprisonment; and**
- **establish an appropriate administrative mechanism, subject to judicial review, for determining rights violations associated with these cases and enabling compensation payments to be made to these individuals.**

Recommendation 13

1.39 The Chair of the committee recommends that the Australian Government investigate options for providing culturally appropriate psychological support for Indonesian minors who suffered psychological trauma as a result of being wrongfully detained in Australia on suspicion of people smuggling.

Ability of Indonesian prisoners to remit monies earned in prison to family members

1.40 The Chair of the committee condemns in the strongest possible terms the apparent directive of AGD to the states and territories, which would prevent convicted Indonesian people smugglers from remitting their gratuity earnings to their families in Indonesia. The stated policy intent of recovering the detention and removal costs from individuals convicted of people smuggling offences is, in the case of boat crew who come from impoverished, subsistence-based communities and would have little or no ability to pay back such costs, patently illogical and unacceptable.

1.41 If this approach is pursued in the cases of young people in detention, it would clearly breach Australia's obligations to protect and uphold the human rights of such individuals, who themselves are often the subject of exploitation by people smuggling organisers. The Commonwealth should be seeking to compensate such individuals, not disadvantage them further or subject them to additional costs.

1.42 The Chair of the committee notes evidence presented during this inquiry that the inability of convicted Indonesian fisherman to send money home to Indonesia has had serious consequences for the families of those individuals in Indonesia, including

in some cases creating impoverishment and destitution as a direct result of the sole family breadwinner being incarcerated and unable to send any money home.¹⁰

1.43 Moreover, the policy position articulated by AGD is internally inconsistent, as it would still allow Indonesian prisoners to spend gratuities on items such as food or phone credit, thus apparently negating AGD's stated goal of using gratuity earnings to contribute towards the removal and detention costs of these individuals.

1.44 The Chair of the committee is firmly of the view that Indonesian prisoners should have the same rights as any other prisoners in regards to their ability to remit money home to their families, and that the government's stated policy position of seeking to recover costs from impoverished Indonesian fishermen should be reversed immediately.

Note: the issue of Indonesian prisoners in Australia remitting money to Indonesia is discussed in chapter 2 of the majority report at paragraphs 2.59–2.60.

Recommendation 14

1.45 The Chair of the committee recommends that the Attorney-General's Department request that the states and territories afford persons convicted of people smuggling offences the right to remit a portion of any income earned in prison to their relatives in Indonesia.

Recommendation 15

1.46 The Chair of the committee recommends that the Australian Government immediately reverse the policy of seeking to recover the costs of detention and removal from Australia from Indonesian boat crew convicted of people smuggling offences.

Senator Penny Wright
Chair
Australian Greens

Senator Sarah Hanson-Young
Australian Greens

10 Mr Ross Taylor, Indonesia Institute, *Committee Hansard*, 24 August 2012, p. 21.

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Australian Society of Forensic Odontology
2	Confidential
3	Mr Simon Lee
4	Indonesia Institute
5	Commissioner for Children and Young People, Western Australia
6	Royal Australian and New Zealand College of Psychiatrists
7	The International Commission of Jurists (Australian Section)
8	Migration Institute of Australia
9	Law Council of Australia
10	Human Rights Law Centre
11	Migrant and Refugee Rights Project
12	Northern Territory Government
13	Australian Psychological Society
14	Queensland Government
15	Professor Sir Albert Aynsley-Green Kt and others
16	Victorian Equal Opportunity and Human Rights Commission
17	Department of Immigration and Citizenship

- 18 Queensland Law Society
- 19 National Legal Aid
- 20 Australian Lawyers for Human Rights
- 21 Attorney-General's Department and Australian Federal Police
- 22 Ms Edwina Lloyd
- 23 Victoria Legal Aid
- 24 Commonwealth Director of Public Prosecutions
- 25 Immigration Advice and Rights Centre
- 26 Australian Lawyers Alliance
- 27 ACT Government
- 28 Mr Mark Plunkett
- 29 Confidential

ADDITIONAL INFORMATION RECEIVED

- 1 Response to questions on notice provided by Department of Immigration and Citizenship on 31 August 2012
- 2 Response to questions on notice provided by Commissioner for Children and Young People, Western Australia on 31 August 2012
- 3 Response to questions on notice provided by Attorney-General's Department on 5 September 2012
- 4 Response to question on notice provided by Australian Federal Police on 10 September 2012

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 24 August 2012

ANDERSON, Mr Iain, First Assistant Secretary, Criminal Justice Division,
Attorney-General's Department

COLVIN, Mr Andrew, Deputy Commissioner, Australian Federal Police

CONSTANTINOU, Ms Katie, Assistant Secretary, Department of Immigration and
Citizenship

CRAIGIE, Mr Christopher, SC, Director, Commonwealth Director of Public
Prosecutions

FARBENBLUM, Ms Bassina, Director, Migrant and Refugee Rights Project,
Australian Human Rights Centre, Law Faculty, University of New South Wales

JABBOUR, Mr Ramzi, Assistant Commissioner, Australian Federal Police

LLOYD, Miss Edwina

LYNCH, Mr Philip, Executive Director, Human Rights Law Centre

PLUNKETT, Mr Mark

POPE, Ms Kate, PSM, First Assistant Secretary, Department of Immigration and
Citizenship

RICH, Ms Nicole, Director, Research and Communications, Victoria Legal Aid

SCOTT, Ms Michelle, Commissioner for Children and Young People, Western
Australia

SHARP, Mr Allan, Deputy Director, Perth Office, Commonwealth Director of Public
Prosecutions

SHEEHAN, Mr Tony, Deputy Secretary, National Security, Criminal Justice and
Emergency Management, Attorney-General's Department

TAYLOR, Mr Ross, Chairman, Indonesia Institute

WESTWOOD, Ms Sarah, Deputy Managing Lawyer, Victoria Legal Aid