



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 • 2012



An age of uncertainty

Inquiry into the treatment of
individuals suspected of people
smuggling offences who say that
they are children

July 2012



**Australian
Human Rights
Commission**

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Title

The Commission acknowledges that *The Age of Uncertainty* is the title of a 1977 book by John Kenneth Galbraith. The Commission also acknowledges that Network Ten journalist Hamish Macdonald's report regarding Ali Jasmin published on 16 April 2012 in *The Global Mail* was entitled 'An age of uncertainty'.

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**Australian
Human Rights
Commission**

President

The Hon Catherine Branson QC

The Hon Nicola Roxon MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I am pleased to present *An age of uncertainty*, the Commission's report of the Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children.

The report is furnished to you under Part II of the *Australian Human Rights Commission Act 1986* (Cth). It is therefore subject to the tabling requirements in section 46 of that Act.

Yours sincerely

Catherine Branson
President

July 2012

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Foreword

This report makes disturbing reading. It documents numerous breaches by Australia of both the *Convention on the Rights of the Child* and the *International Covenant on Civil and Political Rights*. As a nation that is understandably anxious that the rights of our own children should be respected when they come into contact with the authorities of other countries, it is troubling that between late 2008 and late 2011 Australian authorities apparently gave little weight to the rights of this cohort of young Indonesians.

The events outlined in this report reveal that, in the above period, each of the Australian Federal Police, the Office of the Commonwealth Director of Public Prosecutions and the Attorney-General's Department engaged in acts and practices that led to contraventions of fundamental rights; not just rights recognised under international human rights law but in some cases rights also recognised at common law, such as the right to a fair trial. It seems likely that some of those acts and practices are best understood in the context of heavy workloads, difficulties of investigation and limited resources. Others, however, seem best explained by insufficient resilience in the face of political and public pressure to 'take people smuggling seriously'; a pressure which seems to have contributed to a high level of scepticism about statements made by young crew on the boats carrying asylum seekers to Australia that they were under the age of 18 years.

Support for this conclusion is perhaps most obviously found in the authorities' failure for a significant period of time seriously to question practices and procedures that led to young Indonesians who said that they were children being held in detention in Australia for long periods of time.

- The average period of time spent in detention by a young Indonesian crew member whose wrist was x-rayed but who was not charged with any offence was 5.4 months – with the longest period that an individual in this class was held being 9.8 months.
- The average period of time spent in detention by a young Indonesian crew member whose wrist was x-rayed but whose prosecution for people smuggling was eventually discontinued, in most cases because it was doubted that the Commonwealth could prove that he was over the age of 18 years when apprehended, was 14.4 months (of which an average of 6.6 months was spent in an adult correctional facility). The longest period that an individual in this class was held was just over two years, of which over 21 months were spent in an adult correctional facility.

These are periods of detention that Australian authorities would ordinarily consider quite unacceptable for children – or for young people who might be children – who had not been convicted of any offence.

Fifteen young Indonesian crew members were ultimately released on licence because there was doubt about whether they were adults at the time of their apprehension. The average period of their detention was 31.6 months, of which 28.8 months were spent in adult correctional facilities. The longest period that an individual in this class was held was 34 months, of which 32.6 months were spent in an adult correctional facility. Each of these young Indonesians had been sentenced to a mandatory term of imprisonment applicable only to an adult.

It is plain that Australian authorities were until recently reluctant to question whether wrist x-ray analysis provides a sound basis for a determination that a young person is over the age of 18 years – notwithstanding the growing, and eventually compelling, evidence that it does not. It is difficult to judge whether this is further evidence of a high level of scepticism about claims to be under the age of 18 years or evidence simply of a strong desire for a scientific means of establishing chronological age – or perhaps both.

This reluctance to question the usefulness of wrist x-rays for the purpose for which they were being used is most clearly seen in the continued reliance by the AFP and the CDPP on a particular radiologist who used this technique – notwithstanding that each of the Royal Australian and New Zealand College of Radiologists; the Australian and New Zealand Society for Paediatric Radiology; the Australasian Paediatric Endocrine Group; and the Division of Paediatrics, Royal Australasian College of Physicians had expressed the view that the technique was unreliable and untrustworthy.

An unwillingness to question this inherently flawed technique can equally clearly be seen in the failure of the Office of the CDPP to identify that it was under a duty to examine whether it could continue to maintain confidence in the integrity of the evidence being given by the radiologist engaged by the AFP, and under an obligation to disclose to the defence the material in its possession that tended to undermine his evidence.

The same unwillingness is apparent in the failure by AGD to review the contemporary literature which critically examined the technique; to seek independent expert advice to assist its understanding of that literature; and thereafter to provide informed and frank policy advice to the Attorney General – including advice concerning the risk that reliance on the technique had led, and would continue to lead, to children wrongly being identified as adults.

The dogged reliance on wrist x-ray analysis as evidence of maturity appears for a significant period of time to have contributed to inadequate efforts being made to obtain documentary evidence of age from Indonesia and to the giving of limited, if any, weight to such evidence when assessments were made of the ages of the young Indonesians. Furthermore, that reliance appears to provide at least part of the explanation for the results of focused age assessment interviews conducted in late 2010 being disregarded.

The result of reliance on wrist x-ray analysis, together with inadequate reliance on other age assessment processes, was the prolonged detention, including in adult correctional facilities, of young Indonesians who it is now accepted were, or were likely to have been, children at the time of their apprehension.

I recognise that in late 2011 Commonwealth agencies stopped relying on wrist x-ray analysis where there was no other probative evidence of age; made increased efforts to obtain documentary evidence of age from Indonesia and modified their opposition to weight being given to evidence from Indonesia. At the same time, the Department of Immigration and Citizenship commenced to conduct focused age interviews with young Indonesian crew members who said that they were children and now only refers for criminal investigation those who are assessed by this process to be adults. These factors have led to a significantly improved approach to the assessment of whether young Indonesians suspected of people smuggling are older than 18 years of age – one which is less likely to lead to errors and therefore less likely to result in breaches of the rights of children.

Moreover, on 2 May 2012, the Attorney-General announced that a review would be conducted by AGD of the cases of 22 individuals identified by the Commission and the Indonesian Embassy as having been convicted of people smuggling offences in circumstances where substantial reliance had been placed on wrist x-ray evidence, or where age was raised as an issue but ultimately not pursued. The review involved further collaboration between the Commonwealth agencies, as well as the AFP's engaging with the Indonesian National Police to seek verified age documents from Indonesia, and DIAC conducting age assessment interviews in order to assess retrospectively the ages of crew at their time of arrival in Australia. During the course of the review, its ambit was extended to include the re-examination of the cases of a further six individuals. The outcome of the review was announced on 29 June 2012. Of the 28 crew whose cases were re-examined as part of the review, 15 individuals were released early on license on the basis that there was a reasonable doubt that they were over 18 years of age at the time they were apprehended; a further two individuals were released early on parole; three crew completed their non-parole periods prior to the commencement of the review; and eight crew were assessed as likely to have been adults at the time they were apprehended.

The recommendations of this report are intended to assist in creating a lasting environment in which the rights of young Indonesians suspected of people smuggling are respected and protected in every interaction they have with Australian authorities.

It is my hope that this Inquiry will additionally lead to mature reflection on the strengths and weaknesses of our criminal justice system more generally. The Inquiry has revealed that this system may be insufficiently robust to ensure that the human rights of everyone suspected of a criminal offence are respected and protected.

To this end, I urge all of the agencies involved to give consideration to how the human rights of this cohort of young Indonesians came to be breached in the ways outlined in this report. Careful consideration should also be given to the steps that need to be taken to ensure that in the future Australia does respect the human rights of all who comes into contact with our system of criminal justice.

Catherine Branson QC

Glossary of terms

Abbreviation	Term
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AFP	Australian Federal Police
AGD	Attorney-General's Department
ALARA	As Low As Reasonably Achievable
ARPANSA	Australian Radiation Protection and Nuclear Safety Agency
CDPP	Commonwealth Director of Public Prosecutions
CJSC	Criminal Justice Stay Certificate
CJSV	Criminal Justice Stay Visa
CRC	Convention on the Rights of the Child
DFAT	Australian Department of Foreign Affairs and Trade
DIAC	Department of Immigration and Citizenship
DOB	Date of birth
IAEA	International Atomic Energy Agency
ICCPR	International Covenant on Civil and Political Rights
INP	Indonesian National Police
MOB	Ministers' Office Brief
MRI	Magnetic resonance imaging
NTLAC	Northern Territory Legal Aid Commission
OIL	Office of International Law, Attorney-General's Department
OPG	OrthoPantomoGraphic x-ray

QTB	Question Time Brief
RANZCR	Royal Australian and New Zealand College of Radiologists
SIEV	Suspected Irregular Entry Vessel
UAM	Unaccompanied minor
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
VLA	Victoria Legal Aid

Executive summary

This Inquiry is concerned with the human rights of children.

Between late 2008 and late 2011, 180 young Indonesians who said that they were children arrived in Australia having worked as crew on boats bringing asylum seekers to Australia.

In some cases, it was apparent that the young people were children and they were returned to Indonesia.

However, in many cases the young Indonesians were not given the benefit of the doubt and treated as children until it was established that they were in fact adults. Instead, in most cases until mid-2011, Australian authorities assessed whether they were adults by relying on wrist x-ray analysis.

Where wrist x-ray analysis suggested that a young Indonesian was skeletally immature and therefore likely to be a child, he was ordinarily returned to Indonesian (although in some cases only after a prolonged period of immigration detention).

However, in most cases where wrist x-ray analysis suggested that a young Indonesian was skeletally mature, Australian authorities immediately treated him as an adult, even if other age assessment processes suggested that he might be a child. The consequences for young Indonesians assessed to be skeletally mature included prolonged periods of detention.

We know now that many young Indonesians assessed to be adults on the basis of wrist x-ray analysis were in fact children at the time of their apprehension, or are very likely to have been children at that time.

It is now beyond question that wrist x-ray analysis has been discredited as a means of assessing whether an individual is an adult. A mature wrist is not informative of whether a person is over the age of 18 years. Having a mature wrist is quite consistent with a person being under the age of 18 years.

The consequence of reliance on wrist x-ray analysis to assess age, combined with a reluctance to rely on the outcomes of focused age assessment interviews, inadequate efforts to seek documentary evidence of age from Indonesia and, until mid-2011, opposition to the admission of documentary evidence from Indonesia in age determination proceedings, was that errors were made in the age assessment of young Indonesians suspected of people smuggling.

This led to the prolonged detention of some individuals likely to have been children in immigration detention facilities and, in many cases, thereafter in adult correctional facilities. For example, the

48 individuals who were charged as adults after their wrist were x-rayed, but ultimately had the prosecutions against them discontinued, spent an average of 431 days in detention, of which on average 199 days, or well over six months, were spent in adult correctional facilities. Many of these individuals are likely to have been children at the time of their apprehension.

In 15 cases where young Indonesians were convicted, it was eventually established by the Australian authorities that there was doubt about whether the individuals were adults at the time of their apprehension. These young Indonesians were released on licence, having spent on average 948 days in detention, of which on average 864 days, or well over two years, were spent in adult correctional facilities.

The approach to the age assessment of young Indonesians suspected of people smuggling has now changed. Since July 2011, only one individual has had his wrist x-rayed. In late 2011, the Office of the Commonwealth Director of Public Prosecutions (Office of the CDPP) stopped relying on wrist x-ray analysis as evidence of age where there was no other probative evidence of age. In December 2011, a new process commenced whereby the Department of Immigration and Citizenship (DIAC) conducts focused age assessment interviews with all individuals whose age is in doubt and only refers to the Australian Federal Police (AFP) those individuals who it concludes are likely to be adults.

These are welcome developments. However, they came too late for the many young Indonesians who were not given the benefit of the doubt, whose ages were incorrectly assessed, and who consequently experienced significant breaches of their rights. Australia has committed to respect, protect and promote the rights of all children within its jurisdiction. This report demonstrates, that in many cases the rights of young Indonesians suspected of people smuggling who said that they were children were inadequately protected.

1 Major findings

The specific findings with regard to each of the issues considered during this Inquiry are detailed at the end of each chapter. Chapter 8 then draws on each set of specific findings to assess whether the system of treatment of the young Indonesians suspected of people smuggling who said that they were children breached Australia's international human rights obligations.

The key specific findings of this Inquiry about age assessment techniques can be summarised as follows:

- wrist x-ray analysis is not informative of whether an individual is over 18 years of age
- dental x-ray analysis is not sufficiently informative of whether an individual is over 18 years of age for use in criminal proceedings

- any use of radiation for age assessment purposes should first be justified as required by internationally accepted standards
- there is no known biomedical marker which is sufficiently informative of age to be used with confidence in the context of a criminal proceeding
- 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 multidisciplinary approach is used, a wide margin of benefit of the doubt should be afforded to individuals whose age is being assessed
- focused age interviews, if conducted appropriately, and if they afford a wide margin of the benefit of the doubt to individuals who say that they are children, are able to provide valuable information about an individual's age.

The key specific findings of this Inquiry about the conduct of Commonwealth agencies are as follows:

- the Office of the CDPP should not have maintained confidence in the Commonwealth's key expert witness, and should have ceased adducing wrist x-ray analysis as evidence that an individual was over the age of 18 years, at least by mid-2011 and possibly earlier
- the Office of the CDPP should have disclosed to defence counsel material of which it was aware that called into question the evidence of the Commonwealth's key expert witness
- the AFP were aware of material that called into question reliance on wrist x-ray analysis as evidence that an individual was over the age of 18 years yet continued to use the procedure as a means of age assessment
- the AGD was aware of material that called into question reliance on wrist x-ray analysis as evidence that an individual was over the age of 18 years; however it continued to support the use of the procedure and did not provide the Attorney-General with a précis of the literature critical of the use of wrist x-ray analysis for this purpose
- in many cases the benefit of the doubt was not afforded to young Indonesians suspected of people smuggling – uniformly, a person assessed by wrist x-ray analysis to be skeletally mature was charged as an adult even when he said that he was a child
- in many cases, individuals arrested and charged as adults on the basis of wrist x-ray evidence ultimately had their prosecutions discontinued, but only after they had spent very long periods of time in detention
- some individuals were charged as adults despite the report on the analysis of their wrist x-ray being inconclusive as to whether they were an adult

- wrist x-ray analysis was relied upon as evidence of age despite alternative age assessment procedures, for example DIAC focused age assessment interviews, finding it likely that the individual was under 18 years of age
- in many cases it appears that the required consents for a wrist x-ray to be taken were not properly obtained in many cases inadequate efforts were made by the AFP to obtain from Indonesia age related information regarding young Indonesians suspected of people smuggling
- many young Indonesians who it is now accepted were likely to have been children at the time of their apprehension spent prolonged periods of time in immigration detention or in adult correctional facilities
- prolonged detention in adult correctional facilities was partly a consequence of the Commonwealth policy, until mid-June 2011, to oppose applications for bail made by individuals charged with people smuggling offences
- no steps were taken to ensure that young Indonesians suspected of people smuggling had a guardian in Australia.

The Commission recognises that steps were taken to ensure that young Indonesians suspected of people smuggling were generally offered an opportunity to speak with a lawyer prior to providing consent to a wrist x-ray or prior to making a decision to participate in an interview with the AFP.

Based on these findings, the Commission has concluded that the Australian Government failed to respect the rights of children. Specifically, 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
- that the best interests of children were always a primary consideration
- that the detention of children was always a measure of last resort and for the shortest appropriate period of time
- that children deprived of their liberty were separated from adults
- respect for the rights of children alleged to have committed an offence
- respect for the rights of children who were separated from their families.

These findings are explored in detail in Chapter 8.

2 Report overview

The structure of this report is as follows:

Chapter 1 provides a short background to the Inquiry and information about the way in which the Inquiry was conducted.

Chapter 2 considers the use of wrist x-ray analysis as a means of assessing age, and whether it is sufficiently informative of whether a young person has attained 18 years of age to be relied on in a criminal proceeding. It also considers whether it is appropriate to use dental x-ray analysis for that purpose. Finally, it gives brief consideration to the analysis of other biomedical markers for the purpose of assessing age in criminal proceedings.

Chapter 3 considers the Commonwealth's approach to the use of wrist x-ray analysis to assess age. It adopts a chronological approach and examines what each relevant Commonwealth agency knew, or should have known, at particular times about the value of analysis of biomedical markers for the purpose of establishing whether an individual has attained 18 years of age.

Chapter 4 sets out some of the Commonwealth's practices regarding the use of wrist x-ray analysis as a means of assessing chronological age in the context of a criminal prosecution. It highlights where those practices were contrary to stated Australian Government policy and circumstances where the use of wrist x-ray analysis as a means of assessing age resulted in individuals who may have been children spending long periods of time in detention, including in adult correctional facilities.

Whether focused age assessment interviews and requests for documentary evidence from an individual's country of origin are appropriate processes for assessing age are discussed in Chapters 5 and 6 respectively. These chapters also consider the Commonwealth's practices regarding the use of these processes with respect to young Indonesians suspected of people smuggling.

Chapter 7 discusses some further aspects of the treatment of individuals suspected of people smuggling offences who said that they were children, including the length of time for which they were detained, their place of detention, their access to legal advice and assistance and the issue of guardianship.

Finally, Chapter 8 sets out the Inquiry's major findings and recommendations. It considers whether the human rights set out in the *Convention on the Rights of the Child* and the *International Covenant on Civil and Political Rights* have been breached through the treatment of individuals suspected of people smuggling who have said that they were children at the time of their alleged offence.

Recommendations

Recommendation 1: The *Migration Act 1958* (Cth), and if appropriate the *Crimes Act 1914* (Cth), should be amended to make clear that for the purposes of Part 2, Division 12, Subdivision A of the Migration Act, an individual who claims to be under the age of 18 years must be deemed to be a minor unless the relevant decision-maker is positively satisfied, or in the case of a judicial decision-maker, satisfied on the balance of probabilities after taking into account the matters identified in s 140(2) of the *Evidence Act 1995* (Cth), that the individual is over the age of 18 years.

Recommendation 2: 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.

Recommendation 3: No procedure which involves human imaging using radiation should be specified as a prescribed procedure for the purposes of s 3ZQA(2) of the *Crimes Act 1914* (Cth), or remain a prescribed procedure for that purpose, without a justification of the procedure being undertaken in accordance with the requirements of paragraphs 3.18, 3.61–3.64 and 3.66 of the International Atomic Energy Agency Safety Standard: *Radiation Protection and Safety of Radiation Sources: International Basic Safety Standards – Interim Edition* (General Safety Requirements: Part 3) or any later edition of these requirements. Such justification should take into account contemporary understanding of the extent to which the procedure is informative of chronological age.

Recommendation 4: The *Crimes Act 1914* (Cth) and, if appropriate, the *Crimes Regulations 1990* (Cth), or alternatively the *Evidence Act 1995* (Cth), should be amended to ensure that expert evidence which is wholly or substantially based on the analysis of a wrist x-ray is not admissible in a legal proceeding as proof, or as evidence tending to prove, that the subject of the wrist x-ray is over the age of 18 years.

Recommendation 5: Imaging of an individual's dentition using radiation (dental x-ray) should not be specified for the purposes of s 3ZQA(2) of the *Crimes Act 1914* (Cth) as a prescribed procedure for the determination of age

Recommendation 6: Imaging of an individual's clavicle using radiation (clavicle x-ray) should not be specified for the purposes of s 3ZQA(2) of the *Crimes Act 1914* (Cth) as a prescribed procedure for the determination of age.

Recommendation 7: If any forensic procedure is specified as a prescribed procedure for the purpose of age determination within the meaning of s 3ZQA(2) of the *Crimes Act 1914* (Cth), Part IAA Division 4A consideration should be given to amending the Crimes Act to provide that such a

procedure may only be undertaken in the circumstances in which a forensic procedure within the meaning of s 23WA of the Crimes Act may be undertaken with respect to a child.

Recommendation 8: Unless and until recommendation 9 is implemented, the Commissioner of Federal Police should ensure that all Federal Agents are aware of their obligations when acting as an ‘investigating official’ in reliance on s 3ZQC of the *Crimes Act 1914* (Cth) and should further ensure that protocols or guidelines are put in place to ensure that these obligations are met. Specifically, an investigating official should be aware that the role of any independent adult person is to represent the interests of the person in respect of whom the prescribed procedure is to be carried out and that he or she should be so advised.

Recommendation 9: Where it is necessary for an investigating official within the meaning of s 3ZQB(1) of the *Crimes Act 1914* (Cth), who suspects that a person may have committed a Commonwealth offence, to determine whether a person is, or was at the time of the alleged commission of an offence, under the age of 18 years, the investigating official should seek the consent of the person to participate in an age assessment interview.

Where reasonably possible, the interviewer should speak the language ordinarily spoken by the person whose age is to be assessed and should be familiar with the culture of the place from which the person comes. The interviewer, who ideally should be independent of the Commonwealth, should be instructed that he or she should only make an assessment that the person is over the age of 18 years if positively satisfied that this is the case after allowing for the difficulty of assessing age by interview.

All interviewers should be trained, should follow an established procedure and should record their interviews. Their conclusions and the reasons for their conclusions should be documented.

Recommendation 10: Any individual suspected of people smuggling who says that he is a child and who is not manifestly an adult should be offered access to legal advice prior to participating in any age assessment interview intended to be relied on in a legal proceeding.

Recommendation 11: If a decision is made to investigate or prosecute an individual suspected of people smuggling who does not admit that he was over the age of 18 years at the date of the offence of which he is suspected, immediate efforts should be made to obtain documentary evidence of age from his country of origin.

Recommendation 12: 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. The Attorney-General should further consult with the Commonwealth

Director of Public Prosecutions concerning procedures put in place by the Director to ensure the expeditious trial of any young person who does not admit to being over the age of 18 years and who is charged with a Commonwealth offence. Should the Attorney-General not be satisfied that appropriate procedures have been put in place by the Director, the Attorney-General should issue guidelines on this topic under s 8 of the *Director of Public Prosecutions Act 1983* (Cth).

Recommendation 13: The Commonwealth should only in exceptional circumstances, and after bringing those circumstances to the attention of the decision-maker, oppose bail where a person who claims to be a minor, and is not manifestly an adult, has been charged with people smuggling. Where a person who claims to be a minor, and is not manifestly an adult, has been charged with people smuggling and granted bail, he should be held in appropriate community detention in the vicinity of his trial court. The Minister for Immigration and Citizenship's guidelines for the administration of his residence determination powers should be amended so that such cases can be brought to the Minister's immediate attention.

Recommendation 14: The Attorney-General should consult with the Commonwealth Director of Public Prosecutions concerning procedures put in place by the Director to ensure that the Commonwealth does not adduce expert evidence in legal proceedings where the acceptance by the court of that evidence would be inconsistent with the accused person's receiving a fair trial. Should the Attorney-General not be satisfied that appropriate procedures have been put in place by the Director, the Attorney-General should seek advice from an appropriately qualified judicial officer or former judicial officer as to the terms of guidelines on this topic that it would be appropriate for her to furnish to the Director under s 8 of the *Director of Public Prosecutions Act 1983* (Cth).

Recommendation 15: The Attorney-General's Department 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. The Attorney-General's Department should additionally ensure that a Criminal Justice Stay Certificate is cancelled as promptly as compliance with s 162(2) of the *Migration Act 1958* (Cth) allows when it is no longer required for the purpose for which it was given.

Recommendation 16: If, at any time, the Commonwealth becomes aware of information that indicates that an individual suspected of people smuggling whose age is in doubt may have been trafficked, he should be treated as a victim of crime and provided with appropriate support.

Recommendation 17: The Australian Government should remove Australia's reservation to article 37(c) of the *Convention on the Rights of the Child*.

Chapter 1:

Introduction and background

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1 Introduction

Between 1 September 2008 and 22 November 2011, 180 young Indonesians who said that they were children arrived in Australia, having worked as crew on boats bringing asylum seekers to Australia. These young people were often fishermen from impoverished communities in the south and east of Indonesia. Many of them have spent long periods of time in immigration detention without being charged, or prior to being charged, with an offence. Some have spent long periods of time in adult correctional facilities in Australia after being charged, and in some cases after being convicted, as an adult of a people smuggling offence.

This Inquiry is concerned with whether the human rights of these individuals were adequately protected by Australian authorities. It specifically considers whether these young people were afforded the benefit of the doubt; whether their best interests were at all times a primary consideration; whether they were detained only as a last resort and for the shortest appropriate period of time; whether while in detention they were separated from adults; and whether they were provided with the special protection and assistance required by children separated from their families.

The Commission first became aware of the issues considered in this Inquiry in late 2010. In September 2010, the Australian Human Rights Commission visited immigration detention facilities in Darwin. At the time of the Commission's visit there were 151 adult crew detained at the Northern Immigration Detention Centre, and 15 boys detained at Berrimah House, a facility designed to accommodate unaccompanied minors. These boys ranged in age from 11 to 17 years of age. The Commission's visit occurred just days after a number of Indonesian crew rioted at the centre, allegedly protesting the length of time that they had been held in detention without charge. The Commission was concerned that the unaccompanied minor Indonesian crew members had been held in detention without charge for periods of between three to eight months.¹

The Commission soon became aware of concerns that Indonesian boys who had arrived in Australia as crew on boats carrying asylum seekers had been charged and prosecuted as adults and were being held in adult correctional facilities. As far as the Commission is aware, these concerns first became public in an article published in *The Australian* newspaper in November 2010.² The article claimed that there were at least four Indonesian nationals detained in Western Australian jails who claimed to be underage, and that in two of these cases the Indonesian Consulate had provided extracts of official birth certificates supporting their claims to be under 18 years of age. The article also contained criticisms of wrist x-ray analysis – the process by which age has been most commonly assessed in cases where an individual's age is in dispute.

Alert to international concern about the extent to which wrist x-rays are able to provide an accurate estimation of a person's chronological age, Commission President, the Hon Catherine Branson QC, commenced an exchange of correspondence with the then Attorney-General, the Hon Robert McClelland MP. Her first letter was sent on 17 February 2011. It expressed concern about the reliance being placed on wrist x-rays for age assessment purposes; about aspects of the process of obtaining consent from each of the individuals whose wrists were being x-rayed; and about whether all information regarding assessments of the ages of individuals who said that they were minors was being disclosed to the defence in the course of prosecutions.³

The then Attorney-General replied on 31 March 2011 informing the Commission that he had asked his Department to lead a working group comprising the Department of Immigration and Citizenship (DIAC), the Australian Federal Police (AFP) and the Office of the Commonwealth Director of Public Prosecutions (CDPP) to:

examine what steps can be taken to ensure that age determination procedures provide the best evidence for a court to determine the age of people smuggling crew who claim to be minors.⁴

The then Attorney-General wrote to the Commission President again on 30 June 2011 to report that an enhanced age assessment process, including offering voluntary dental x-rays, targeted age assessment interviews by the AFP and increased efforts to obtain relevant documentary evidence of age from Indonesia, had been developed by a working group of Commonwealth agencies.⁵

Although the Commission President cautiously welcomed these initiatives, she expressed concern about the ongoing reliance on radiography for the purposes of determining age. She also continued to express concern that there may have been cases where errors in age assessment had occurred, resulting in juveniles being detained in adult correctional facilities for lengthy periods of time. In July 2011 and again in November 2011, the Commission President wrote to the then Attorney-General to express this concern and to urge that there be an independent review of whether a proper and reliable assessment of age had been conducted in all cases where a person had said that he was a minor but had been convicted as an adult; as well as in all cases before the courts where age was in dispute.⁶ The then Attorney-General declined to conduct such a review, saying that he was satisfied that courts considered all available evidence and were fully aware of the limitations of wrist x-rays, and because crew had independent legal representation.⁷

Meanwhile, during 2011, public discussion of the age assessment of Indonesian crew grew. Numerous media articles canvassed the possibility that individuals who were in fact juveniles had been convicted as adults and were being detained in adult correctional facilities.⁸ In mid-2011, defence lawyers for three crew members who said that they were minors travelled from

Brisbane to Indonesia to seek affidavit and documentary evidence of their clients' ages. Following the presentation of this material to the Office of the CDPP, the prosecution was reportedly discontinued in each of these three cases.⁹ Then in late 2011, individuals who had claimed to be children were found to be under 18 years of age in several age determination hearings conducted in Western Australia. Importantly, in two of these cases, the court criticised the evidence of the Commonwealth's preferred witness.¹⁰

The Commission continued to hold concerns that there may have been some cases in which errors had been made in age assessment and that individuals who had been children at the time of their apprehension remained incarcerated in adult correctional facilities. In the absence of an agreement to conduct a comprehensive review of these cases, on 21 November 2011 the Commission President announced that she would conduct an Inquiry into the treatment of individuals suspected of people smuggling offences who said that they were children.

1.1 The Commission's power to hold an Inquiry

The Commission was established by the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). It is recognised by the United Nations as Australia's independent national human rights institution.

The primary function of the Commission under the AHRC Act that is relied upon for the conduct of this Inquiry is that of:

- inquiring into acts or practices that may be inconsistent with or contrary to any human right (section 11(1)(f)).

Other Commission functions that are relevant to, and relied upon, for the purpose of this Inquiry, include:

- examining enactments for the purpose of ascertaining whether the enactments are inconsistent with or contrary to any human right and reporting to the Minister the results of any such examination (section 11(1)(e))
- promoting an understanding, acceptance and public discussion of human rights in Australia (section 11(1)(g))
- advising on laws that should be made by the Parliament or action that should be taken by the Commonwealth on matters relating to human rights (section 11(1)(j)).

The 'human rights' specified in the above functions are outlined in a number of human rights treaties and instruments identified in the AHRC Act. In conducting this Inquiry, the Commission, by its President, has investigated, in particular, whether the treatment of individuals suspected

of people smuggling offences who said that they were children was consistent with Australia's obligations under the *Convention on the Rights of the Child* (CRC), as well as those set out in the *International Covenant on Civil and Political Rights* (ICCPR). See further section 6 below which discusses the international human rights obligations that are relevant to this Inquiry.

1.2 The Inquiry terms of reference

The terms of reference for this Inquiry were published on 21 November 2011. The Terms of Reference are as follows:

The President will inquire into Australia's treatment of individuals suspected of people smuggling or related offences who claim to have been under the age of 18 years at the date of the offences of which they are suspected (the individuals of concern), including by inquiring into acts and practices of the Commonwealth with respect to:

- a) assessments of the ages of the individuals of concern made by or on behalf of the Commonwealth for immigration purposes, including by any 'officer' as defined by section 5 of the *Migration Act 1958* (Cth);
- b) assessments of the ages of the individuals of concern during the course of the investigations of the people smuggling or related offences of which they were suspected;
- c) assessments of the ages of the individuals of concern for the purpose of decisions concerning the prosecution of the people smuggling or related offences of which they were suspected;
- d) decisions concerning whether, and the processes and procedures used, to:
 - i. facilitate contact between parents/guardians and the individuals of concern;
 - ii. contact and obtain information relevant to age assessment from parents/guardians of the individuals of concern;
- e) the preparation for and the conduct of legal proceedings in which evidence concerning the ages of the individuals of concern was, or was intended to be, adduced;
- f) the detention, including the determinations of the places of detention and the conditions of detention, of the individuals of concern;
- g) the provision of guardians or other responsible adults to ensure that the interests of the individuals of concern, including with respect to age assessment, were protected;
- h) the provision to the individuals of concern of legal advice, assistance and representation, including with respect to age assessment; and
- i) any other matters incidental to the above terms of reference.

NOTE: References in these terms of reference to, or to the doing of, acts include references to refusals or failures to do such acts (see section 3(3) of the *Australian Human Rights Commission Act 1986* (Cth)).

1.3 The Inquiry time period

For the purpose of this Inquiry, the Commission sought information about individuals suspected of people smuggling or a related offence who arrived in Australia by boat between 1 September 2008 and 22 November 2011 who claim or claimed to be under the age of 18 years at the date of the offence of which he was or is suspected. The majority of the material provided to the Commission relates to individuals who were apprehended between 2009 and 2011. Specifically, the statistics in this report have been calculated by reference to 180 individuals suspected of people smuggling who arrived in Australia between 29 September 2008 and 22 November 2011.

This report also contains discussion of some events up until mid-2012.

1.4 Terminology

Where this report makes reference to specific individuals, it ordinarily identifies them by the alphanumeric identifier given to them by DIAC when they first arrived in Australia. The only circumstance where an individual is named is where he has given the Commission express permission to use his name or where his name has appeared in the media. The Commission has taken this approach because many of the individuals of concern are likely to have been under 18 years of age at the time of their apprehension.

In addition, this report only uses male pronouns when referring to young Indonesians. This is because all of the individuals of concern to this Inquiry are male. The same issues and concerns that arise with respect to young Indonesian males would arise in the case of young female Indonesians.¹¹

2 Methodology

The Commission has sought to hear from as many individuals and organisations as possible who have been involved in some way with individuals suspected of people smuggling who said that they were children. This includes the individuals themselves, their defence lawyers, the Commonwealth agencies who have responsibility for their treatment while in Australia, non-government organisations and other individuals.

Individuals who are suspected of people smuggling come into contact with a number of Commonwealth agencies. During this Inquiry, the Commission has considered particularly the conduct of those agencies that have had some input into age assessment processes and also those agencies and departments responsible for law enforcement, including:

- the Department of Immigration and Citizenship (DIAC), which is responsible for the individuals while they are in immigration detention, and which may assess age for the purpose of determining an appropriate place of detention
- the Australian Federal Police (AFP), who are responsible for investigating potential charges of people smuggling and for deciding whether charges are laid
- the Commonwealth Director of Public Prosecutions, who is responsible for prosecuting alleged offences of people smuggling, and his office (Office of the CDPP)
- the Attorney-General's Department (AGD), which has broad responsibility for law enforcement policy.

The Commission is grateful to all of these agencies for their efforts to assist the Commission in the conduct of this Inquiry.

The Commission gathered information through a variety of mechanisms, including:

- notices requiring the production of documents and information
- public submissions
- public hearings
- interviews with individuals who, at the time that they were apprehended or during the process of investigation and prosecution, said that they were children.

Each of these sources of information is discussed in further detail below.

2.1 Evidence produced pursuant to Notices

On 21 November 2011, the Commission issued 'Notices to Produce' to the four Commonwealth agencies involved in the treatment of the individuals of concern to this Inquiry: DIAC, the AFP, the CDPP and AGD. Each agency was required to produce information and documents relevant to the Inquiry.¹² The notices required the agencies to produce:

- Information about individuals of concern, including their claimed date of birth; whether their wrist was x-rayed and, if so, whether the requirements of s 3ZQC(2) of the *Crimes Act 1914* (Cth) were met; whether they were charged and, if so, the date of the charge; where they were detained and the length of their detention; the steps taken to notify their family members and the Indonesian Consulate of their circumstances; and whether and, if so, when they were provided with legal advice.

- Documents in their possession about the assessments of the ages of the individuals of concern and documents concerning decisions made regarding their ages and, as relevant, their investigation, prosecution, conviction and sentencing.
- Documents about whether the agency was aware of the criticisms of the wrist x-ray procedure as a means of assessing age, and what steps the agency took in response to the letter dated 17 February 2011 from the President of the Commission to the then Attorney-General regarding age assessment processes.
- All policy, guideline and instruction documents about assessing a person's age, when and how to conduct a wrist x-ray, and notification of family members and the Indonesian Consulate.

Each agency was required to provide this material to the Commission by 21 December 2011. The Commission permitted an extension of time to DIAC which allowed information to be provided progressively from shortly after the due date until 21 February 2012.

The required information and a significant number of documents were duly provided to the Commission. When agencies became aware of relevant documents that they had not provided the Commission, they notified the Commission and offered to make them available. The Commission acknowledges and expresses its gratitude for the considerable amount of work that was involved in the identification and collation of this material.

2.2 Public submissions

On 21 November 2011, the Commission called for public submissions in relation to the Inquiry. The deadline for submissions was 3 February 2012. The Commission accepted submissions after that date at its discretion.

The Commission invited submissions through the internet and email lists. Submissions were numbered as they were received.

The Commission received 39 submissions in respect of the Inquiry, including four that were confidential. Submissions came from a range of individuals and organisations representing medical bodies, members of the legal profession and legal aid commissions, children's commissioners and guardians, members of Parliament, academics, advocacy and non-government organisations. The Commission also received a joint submission from AGD, the CDPP and the AFP. A separate submission was received from DIAC. In order to ensure that standards for confidentiality and privacy were maintained, submissions were amended where necessary to remove the names and identifying details of any individuals who were named or referred to.

The Commission is grateful to all those who devoted their time, energy and expertise to assisting the Commission on this Inquiry. The submissions received by the Commission have been a useful resource, canvassing a number of key issues in detail. To the extent that the content of the submissions can be summarised, they discuss the ethics and reliability of x-ray technology, including wrist, dental and clavicle x-rays to assess chronological age; alternative processes and methods of age assessment including the obtaining of documentary evidence of age; international practice and international legal obligations related to minors; and observations about the experiences of Indonesian minor crew within the criminal justice system.

2.3 Public hearings

Two public hearings were held as part of the Inquiry; the first for medical experts and the second for Commonwealth agencies. The hearings were conducted by the Commission President who was supported by Commission staff. The oral evidence at the hearing for Commonwealth agencies was given on oath or affirmation.

Transcripts of both public hearings were placed on the Inquiry website. All witnesses were provided with a copy of the draft transcript of their evidence to enable corrections to be made prior to its being made available online.

(a) Public hearing for key medical experts – 9 March 2012

The public hearing for key medical experts was held in Sydney on 9 March 2012. The primary purpose of the hearing was to obtain evidence about the science and ethics of using wrist x-rays, dental x-rays and alternative biological markers to assess chronological age.

Three medical experts were physically present at the hearing and two medical experts participated in the hearing via video link. The participants were experts in the fields of forensic odontology, paediatric radiology, paediatric endocrinology, general radiology and medical statistics.

(b) Public hearing for Commonwealth agencies – 19–20 April 2012

The public hearing for Commonwealth agencies was held in Canberra on 19 and 20 April 2012. The primary purpose of the hearing was to provide an opportunity to:

- explore the policy framework and developments in the policy framework of each agency with respect to processes for assessing the ages of individuals suspected of people smuggling
- examine the actions of the Commonwealth in individual cases

- clarify issues raised in the joint submission of AGD, the CDPD and the AFP

and by these means, obtain a comprehensive picture of the Commonwealth's treatment of individuals convicted or suspected of people smuggling offences who claimed to be children.

This hearing was attended by the Commonwealth Director of Public Prosecutions and senior members of his Office; the Deputy Commissioner Operations of the AFP and one further member of the AFP; the First Assistant Secretary, Criminal Justice Division of AGD and two other AGD officers; and the First Assistant Secretary, Community Programs and Children Division of DIAC and two other DIAC officers. The Commission is grateful to the representatives of the Commonwealth agencies for their time and cooperation during the two days of hearings.

2.4 Interviews with individuals convicted of people smuggling offences who said that they were under 18 at the time they were apprehended

On 26 and 27 April 2012, two members of the staff of the Australian Human Rights Commission visited Albany Regional Prison and Pardelup Prison Farm for the purposes of this Inquiry. The Commission chose to visit these two facilities because of the concentration of individuals of concern to the Inquiry who were held there. Twelve Indonesians who were detained in these facilities had said that they were children at the time of the offence of which they were charged. The purpose of the visits was to speak with as many as possible of these 12 individuals in order to understand their backgrounds and histories, and to hear first-hand accounts of their experiences since arriving in Australia.

Only individuals who chose to speak with the Commission staff were interviewed. Each interview was conducted in private with the assistance of an Indonesian interpreter. Each individual interviewed was asked a number of questions concerning his family background, journey to Australia and experiences during the investigation and prosecution process; and about the time spent by him in detention, his treatment in detention and correctional facilities, his contact with relatives, and the availability of evidence confirming his claimed age.

The Commission staff undertook four interviews at Albany Regional Prison and three interviews at Pardelup Prison Farm. One individual was unable to participate due to illness, and four individuals expressed a desire not to speak with Commission staff.

During their visit to Albany Regional Prison, the Commission staff observed the facilities and services available to all prisoners, and spoke to prison officials about efforts made to accommodate the large number of Indonesian inmates.

The Commission thanks the Western Australian Department of Corrective Services for its

assistance in facilitating the visits. The Commission is particularly grateful to the staff at both prison facilities for their attentiveness and willingness to assist the Commission in the conduct of this Inquiry.

2.5 Confidentiality of material provided to the Commission

The Commission has received a great deal of confidential material from Commonwealth agencies and interested parties during the course of its Inquiry. The Commission recognises the importance of its maintaining the confidentiality of this material. The Commission also notes that there is public interest in ensuring transparency regarding the treatment of the individuals of concern to this Inquiry. Consequently, the Commission has relied heavily on documents provided by each of the Commonwealth agencies, and has referred to, and published extracts from, many non-confidential documents throughout this report.

As noted above, the Commission has sought to avoid publishing the name of any young individual except where he has given us his express permission to do so or where his case has received considerable publicity and his name has been published in the media.

The Commission also offered an opportunity for any person or organisation to make a confidential submission to the Inquiry or to make parts of their submission confidential. The Commission also provided each Commonwealth agency involved with a draft copy of this report and the opportunity to request that particular information remain confidential.

3 People smuggling offences and age assessment

3.1 The crime of people smuggling

The *Migration Act 1958* (Cth) makes it an offence for a person to organise or facilitate the arrival or entry into Australia of an individual who has no lawful right to come to Australia.¹³ This is known as the offence of people smuggling.

A person commits an aggravated offence of people smuggling if he or she organises or facilitates the arrival or entry into Australia of a group of at least five persons who have no lawful right to come to Australia.¹⁴

The maximum penalty for the offence of people smuggling is ten years imprisonment and/or a \$110,000 fine.¹⁵ The maximum penalty for the aggravated offence of people smuggling is 20 years imprisonment and/or a \$220,000 fine.¹⁶

The Migration Act provides for mandatory minimum sentences of imprisonment on conviction

for some people smuggling offences. For example, a mandatory minimum sentence of five years (with a non-parole period of three years) applies on conviction as a first offender for the aggravated offence of people smuggling (at least five people).¹⁷

These mandatory minimum sentences do not apply to minors.¹⁸ Moreover, if a person has been charged with a people smuggling offence, a court may discharge him without conviction if it is found on the balance of probabilities that he was under 18 years of age at the time of the offence.¹⁹

3.2 The significance of the age of a person suspected of a people smuggling offence

As the above paragraphs make clear, a determination that he or she is an adult has significant consequences for an individual who is convicted of people smuggling.

An assessment that an individual is an adult is also important for other reasons. First, current government policy is ordinarily not to proceed with a prosecution if a suspect is found to be less than 18 years of age at the time of his or her alleged offence. The Prosecution Policy of the Commonwealth states that the prosecution of a juvenile should always be regarded as a 'severe step'.²⁰ In light of this policy, juveniles should only be charged with people smuggling in 'exceptional circumstances' on the basis of their 'significant involvement in a people smuggling venture', their 'involvement in multiple ventures' or where there are other 'exceptional circumstances'.²¹

Secondly, individuals regarded as adults are generally detained in adult correctional facilities. Unless they are granted bail, they will be held in adult facilities while on remand awaiting trial and while serving any sentence imposed after conviction.

Accordingly, assessment or determination of a person's age is extremely important in the context of people smuggling. If Australian authorities accept that a person suspected of people smuggling is under the age of 18 years, he is unlikely to face charges. If there are exceptional circumstances and he is charged and convicted, he will not be subject to a mandatory minimum sentence. On the other hand, if Australian authorities do not accept that an individual who allegedly brought asylum seekers to Australia by boat is a minor, he is likely to be charged with people smuggling. If he is convicted of aggravated people smuggling he will be subject to a mandatory minimum sentence of imprisonment and detained in an adult correctional facility.

3.3 The legal framework that governs age assessment in criminal proceedings

Many of the individuals who are suspected of people smuggling arrive in Australia without identity or travel documents. Australian authorities, and indeed, often the individuals themselves, may be uncertain as to whether they were under the age of 18 years at the time of their alleged offence.

In 2001, the Crimes Act was amended to provide for the carrying out by an investigating official of a 'prescribed procedure' where it is necessary to determine whether or not a person who is suspected of a Commonwealth offence is, or was, at the time of the alleged commission of the offence under the age of 18 years.²² These amendments were made in response to a decision of the Northern Territory Supreme Court in 2000 which found that the Migration Act did not provide statutory authority for the taking of a wrist x-ray for the purposes of age assessment.²³

Division 4A of Part IAA of the Crimes Act now authorises and regulates the use of a 'prescribed procedure' for determining age.²⁴ A 'prescribed procedure' is defined by s 3ZQA(1) of the Crimes Act to mean a procedure specified by regulations made for the purpose of subsection (2) of that section to be a prescribed procedure for determining a person's age. Currently, the only procedure so specified is a 'radiograph ... of a hand and wrist of the person whose age is to be determined' (wrist x-ray).²⁵

An age determination procedure must be carried out in a manner consistent with appropriate medical or other relevant professional standards.²⁶

An investigating official may arrange to carry out an age determination procedure either with the consent of the person whose age is to be determined and the consent of a parent or guardian or an independent adult, or by order of a magistrate.²⁷

4 Age assessment processes employed in Australia

In conducting this Inquiry, the Commission has considered the range of age assessment processes that have been employed in Australia.

The primary age assessment process employed in respect of individuals suspected of people smuggling has been wrist x-ray analysis.

This report also considers the other age assessment processes that have been utilised, or offered for use in people smuggling matters where age is in dispute. These include the 'improved age assessment process' that was announced by the Australian Government in July 2011 which comprised:

- dental x-rays
- focused age assessment interviews conducted under caution by AFP officers
- steps taken by the AFP as early as possible to seek information from Indonesia, including birth certificates and other relevant information to help determine age.

This report additionally considers the use of focused age assessment interviews by DIAC. A trial of such interviews was conducted in October 2010. Thereafter, interviews of this kind were not undertaken until December 2011. From this time on, a DIAC focused age assessment interview has been conducted with any individual suspected of people smuggling whose age is in doubt. Crew are treated as adults and referred to the AFP for further investigation only where there are clear indications that they are over 18 years of age. Where there is doubt that a person is over 18 years of age, or if DIAC is satisfied that he is a minor, he will be sent home to Indonesia without charge.

5 The people who are the subject of this Inquiry

5.1 Where individuals suspected of people smuggling come from

The Inquiry has received a large amount of information about the individuals suspected or charged with people smuggling who said that they were children at the time of the offence of which they are or were suspected. Much of the information in this section is drawn from the submission made to the Inquiry by Victoria Legal Aid. This information accords with the documents about individuals that have been provided to the Commission by the Commonwealth agencies.

Generally, people who work as crew on boats that bring asylum seekers to Australia are recruited from remote fishing communities on the Indonesian coast. Crew are often from unsophisticated backgrounds, living in conditions of poverty.²⁸ Many come from single parent families having suffered the death of one parent. As a result, many of the young crew are the sole income earners for their families, carrying a heavy burden of responsibility for younger siblings and other dependent relatives. Children as young as eight years old have worked as crew on boats bringing asylum seekers to Australia.²⁹

The majority of crew have a low level of education, often not above primary school level, having left school at an early age in order to find paid work. Though some of these young individuals have experience working as fishermen, many others have little to no experience at sea. Many of them previously had intermittent employment as labourers, motorbike drivers, and farm workers. Many had experienced frequent periods of unemployment, taking up work as and when an opportunity arose. For these communities in which fishing is the main source of income,

conditions of poverty appear to have been exacerbated by the extension of Australia's exclusive fishing zone, strict rules which prevent Indonesians from fishing at Ashmore Island, and depleting fish stocks.³⁰

From the documents received and from first-hand accounts obtained during the course of the Inquiry, it is clear that many of these individuals are not aware of the purpose of their trip or even that they are coming to Australia. Many crew claim to have been 'tricked' into coming to Australia. Typically, they relate being approached by their current employer or by strangers and given very little, and often false, descriptions of the work they will be expected to perform on the boat. They are promised what amounts to large sums of money in Indonesia – often ranging between 300,000 rupiah (approximately A\$32) to 5 million rupiah (approximately A\$530).³¹ The arrangement would often be that this would be paid to them on their return to Indonesia.³² For these individuals, there is a significant incentive to accept work which promises an income several times higher than they would normally receive, especially in circumstances where there is little paid work available to them and limited opportunities for securing steady employment and a regular income.

The young Indonesians appear to rarely be told that they will be bringing asylum seekers to Australia. Occasionally, crew have been told that the people on board will be picked up by another boat in international waters and they will return to Indonesia before entering Australian waters.

In many cases, the young Indonesians are told that they will be transporting cargo, rice or other goods around the Indonesian islands. Often the asylum seekers are only brought onto the boat via smaller boats a distance from the shore.³³ In situations where the asylum seekers are already on the boat, the crew have been told that they are foreign tourists or foreign military and they will be responsible for taking the foreign tourists or military around the Indonesian islands. In many cases, 'the crew are only transferred onto the boat shortly before Australian waters and the organisers then depart on a second boat'.³⁴

Crew are often responsible for performing odd jobs; they may work as a cook or a deckhand, look after the engine or occasionally steer the vessel as directed. In the vast majority of the cases considered by the Commission as part of this Inquiry, the role of the young crew was no more significant than playing supporting roles on the boats and following the directions of older crew members.

It can be several days into the journey before crew become aware – whether by being told by other crew, or by inferences drawn from the ethnicity of the passengers and their circumstances – that the people they are transporting are to be taken to Australia. At this stage, when the boat is already well into the ocean there is no opportunity for crew to leave the boat.³⁵ In some

circumstances, the crew have only realised they were in Australian waters upon interception by the Australian authorities.

5.2 The number of individuals suspected of people smuggling offences who have said that they are children

The Commission received information from the Commonwealth about 180 individuals suspected of people smuggling offences who, at some point, told the Australian Government that they were under 18 years of age when they were apprehended.³⁶

Of the 180 individuals suspected of people smuggling who arrived in Australia during the relevant time period and said that they were children:

- 51 did not have their wrists x-rayed and were removed from Australia without charge
- 33 had their wrists x-rayed and were removed from Australia without charge
- 29 had their wrists x-rayed and were charged and convicted
- 2 did not have their wrist x-rayed and were charged and convicted
- 6 had their wrists x-rayed and were charged but found not guilty
- 2 had their wrists x-rayed and are currently before the court
- 2 were not x-rayed and are currently before the court
- 48 had their wrists x-rayed, were charged with people smuggling offences and ultimately had the prosecution against them discontinued
- 7 did not have their wrists x-rayed, were charged with people smuggling offences and ultimately had the prosecution against them discontinued.

5.3 An outline of the experience in Australia of individuals suspected of people smuggling offences who say they are children

After arriving in Australia, individuals suspected of people smuggling who claim to be children are usually subject to a process of detention, investigation and possibly prosecution.

(a) Apprehension

The process typically begins when Customs or the Royal Australian Navy intercepts a Suspected Irregular Entry Vessel (SIEV) between Indonesia and Christmas Island or Ashmore Reef. The SIEV

crew and passengers are transferred to Customs or Navy vessels and transported to Christmas Island for processing.³⁷

(b) Immigration detention

After they are processed by Customs and the Australian Quarantine and Inspection Service, all passengers and crew are detained in immigration detention facilities. On arrival at Christmas Island all people smuggling crew are initially held in immigration detention in a low security closed immigration detention facility known as the Construction Camp. Individual crew members who are assessed by DIAC to be minors continue to be held in alternative places of detention until they are removed from Australia or charged and transferred to AFP custody. Crew assessed by DIAC to be adults may be transferred to an immigration detention centre, which is the highest category security facility in the Australian immigration detention network, until they are removed to Indonesia or transferred into AFP custody.³⁸ Individuals suspected of people smuggling are usually issued with a Criminal Justice Stay Certificate which prevents their removal from Australia for the duration of a criminal investigation or prosecution, or until a custodial sentence is complete.

(c) Investigation

The AFP investigation process is generally focused on ascertaining the role played by the crew member in bringing asylum seekers to Australia. Until mid-2011, crew who claimed to be minors would ordinarily be asked by the AFP to give their consent for their wrists to be x-rayed.

The AFP officer will also offer a voluntary interview (which is recorded) with an individual during which the officer asks questions about why the individual undertook the journey to Australia and what he knew about the journey and the role he would play on the boat. Individuals are offered access to legal advice prior to participating in this interview and are informed of their right to decline to participate in the interview. AFP officers often ask individuals whose age is in doubt about their age during this interview. The AFP will often also conduct interviews with asylum seekers to obtain evidence concerning the activities of crew members and to seek 'photo-board' identification.

(d) Charge

After the AFP has completed their investigation concerning a crew member and an AFP officer is satisfied that there is sufficient evidence to charge him with a people smuggling offence and that it is appropriate to charge him, the crew member is arrested and charged.³⁹

(e) Imprisonment

Once a decision is taken by the AFP to charge a person with a people smuggling offence, DIAC arrange for the transfer of the person to the State in which he is to be charged. Upon arrival, the AFP then arrests and charges him. Generally, an accused person is initially held in a police facility, such as a police watch house. Soon thereafter he will be moved to a State or Territory prison where he is held on remand until his case is determined, or until he is released on bail. The State and Territory prison authorities decide what kind of prison facility to house him in by undertaking an assessment of his security classification. They will also consider whether it is desirable to separate an individual whose age is in dispute from adult prisoners because of his claim to be a child.

If an accused person is released on bail, he will be released into an immigration detention facility until bail is terminated or his case finalised.

(f) Prosecution

The prosecution process is commenced by the AFP. Once charged, the court determines the progress of the matter – the fastest matters progress from charge to trial in approximately six months.⁴⁰

An individual who has been charged as an adult may be able to challenge the jurisdiction of the court to hear his matter on the grounds that he is a child. such a circumstance, the challenge can be made at any stage of the prosecution process. Where age is raised as an issue before the court, the court will schedule an age determination hearing. During an age determination hearing, the prosecution and the defence have the opportunity to present evidence to the court about the accused person's age. Evidence may include reports from medical experts based on a wrist x-ray and any documents obtained from Indonesia about the accused person's age. The court will assess all of the evidence and make an age determination on the balance of probabilities. Where the court determines that an accused person is under 18 years of age, the prosecution is usually discontinued. This is in line with the Prosecution Policy of the Commonwealth which provides that the prosecution of a juvenile should always be regarded as a severe step.⁴¹

Alternatively, if the court is satisfied on the balance of probabilities that an accused person is an adult, the prosecution will proceed. Where an accused person is convicted, he may be able to raise the issue of his age again before being sentenced. If he is able to do this, a new age determination hearing will take place. If the sentencing court is not satisfied that the person is over 18 years of age, the prosecution may be discontinued in line with the Prosecution Policy of the Commonwealth.

Where the age of the individual is not challenged, or is unsuccessfully challenged, and he is convicted as an adult, he will be sentenced as required by the Migration Act. This means that if he is convicted, as a first offender, of the aggravated offence of people smuggling (at least five people) he will be sentenced to imprisonment for a period of no less than the mandatory minimum sentence of five years imprisonment with a non-parole period of three years.⁴²

The time a person has spent in immigration detention and on remand will ordinarily be taken into account for sentencing purposes with the result that it will be deducted from the period of imprisonment required to be served. A person convicted and sentenced as an adult will be transferred to an adult prison facility for the duration of his sentence. Once he has served his sentence, he will be returned to Indonesia.

6 Australia's human rights obligations

As noted above, this Inquiry is primarily considering the extent to which acts or practices of the Commonwealth may be inconsistent with or contrary to any human right. This section of the report explains the relevance of international human rights law to the issues of concern to this Inquiry.

Australia has chosen to enter into agreements – conventions, covenants or treaties – with other sovereign States. It has thereby agreed to be bound by the international scheme of rights and responsibilities that governs the way in which sovereign States deal with each other and treat individuals within their jurisdiction.

For the purposes of this Inquiry the most important of the treaties to which Australia is a party is the *Convention on the Rights of the Child* (CRC). The CRC recognises that children, as well as adults, are entitled to protection of their basic human rights, but that children require special protection because of their vulnerability to exploitation and abuse. For the purposes of the CRC, children are defined as individuals who are under 18 years of age.⁴³ Australia's obligations under the CRC apply to all children in Australia, regardless of citizenship or immigration status.

The articles of the CRC that are relevant to this Inquiry include:

- article 2(1) – the general prohibition against discrimination
- article 3 – the protection of the best interests of the child
- article 9(3) – the right of the child to maintain contact with parents on a regular basis
- article 9(4) – the State's duty to provide parents of separated children with information about the children's whereabouts
- article 12(1) – the right of the child to be heard

- article 16 – the protection of the child's privacy, family and home
- article 18(1) – the best interests of the child to be the primary concern of a guardian
- article 19(1) – the physical and mental protection of the child
- article 20(1) – that special protection and assistance is to be provided for a child deprived of his or her family environment
- article 37(b) – that detention is a measure of last resort and for the shortest appropriate period of time
- article 37(c) – that children deprived of their liberty are treated with humanity and respect for the inherent dignity of the human person
- article 37(d) – that children deprived of their liberty to be provided legal assistance and the right to challenge their detention
- article 40(1) – concerning treatment of children alleged to have infringed penal law.

In addition to the CRC, there are other general human rights obligations of relevance to this Inquiry. Obligations under the following articles of the *International Covenant on Civil and Political Rights* (ICCPR) are of particular relevance:

- article 9 – the prohibition on arbitrary detention
- article 10 – the humane treatment of people deprived of their liberty
- article 14 – the right to have a conviction and sentence reviewed.

6.1 The principle of the benefit of the doubt

The CRC requires that an individual who says that he or she is a child should be given the benefit of the doubt and treated as a child unless or until it is conclusively shown that he or she is not a child.

When making an assessment of whether an individual is a child, the UN Committee considers that State parties should apply the principle of the 'benefit of the doubt'. This means that, 'if there is a possibility that the individual is a child, she or he should be treated as such'.⁴⁴ It follows that all of the special rights and protections contained within the CRC must be afforded to an individual who says he or she is a child unless or until it is established that the individual is not a child. The same view has been expressed by the Office of International Law within AGD in an advice to the Criminal Justice Division of AGD.⁴⁵

The UN Committee has made a number of specific comments regarding the principle of the benefit of the doubt. For example, in assessing whether an individual is a child for the purpose of a criminal proceeding carrying the death penalty in the Philippines, the UN Committee made a concluding observation that the State should carry the burden of proof in the determination of age. It stated that:

The State party should also take immediate legislative and other measures to oblige authorities, such as police, prosecutors, defence, judges and social workers, to present evidence in courts regarding the precise age of an accused person, or if failing to do so give a person the benefit of the doubt, in order to ensure that persons under 18 years of age are not sentenced to death or another adult punishment.⁴⁶

The UN Committee has further commented that where age assessment processes are inconclusive, the individual should be given the benefit of the doubt, stating:

If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt.⁴⁷

In the event that there is no proof of age and it cannot be established that the child is at or above the minimum age of criminal responsibility, the child shall not be held criminally responsible.⁴⁸

The principle of the benefit of the doubt requires that an individual who says that he or she is a child be afforded all the special protections and rights contained in the CRC. If the benefit of the doubt is not given to an individual whose age is in doubt, and it is later determined that he or she is, in fact, a child, it is possible that the Commonwealth will not have met its obligation to ensure that the rights set out in the CRC were afforded to the child.

6.2 The best interests of the child as a primary consideration

That the best interests of the child must be a primary consideration in all actions concerning children is one of the key principles of the CRC. It is also the human rights principle that is at the heart of this Inquiry. Article 3(1) provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

As an overriding principle of the CRC, article 3(1) is applicable to every article of the CRC.

While there can be no one definition of what will be in the best interests of each and every child, a child's ability to enjoy all of his or her rights in a given environment is a good indication of whether the child's best interests are being met.⁴⁹

The effect of article 3(1) is that the Commonwealth and all its officers must ensure that the best interests of individuals suspected of people smuggling offences who say that they are children are a primary consideration in all decisions and actions concerning them unless they are manifestly adults. It is not inconsistent with article 3(1) for there to be other primary considerations but they cannot be regarded as of greater significance than the best interests of the child.

The United Nations Committee on the Rights of the Child (UN Committee) emphasises the importance of ensuring that domestic law reflects article 3(1), together with the other identified general principles. It states that the best interests principle:

requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.⁵⁰

There is no direct reference to age assessment processes in the CRC. However, the UN Committee has made plain that article 3 requires State parties such as Australia to take positive steps to ensure that age assessment processes in the case of unaccompanied and separated children are conducted in a child's best interests.⁵¹

6.3 Incorrect age assessment may lead to significant human rights breaches

Where a young person is not afforded the benefit of the doubt and is mistakenly assessed to be an adult, it is likely that there will be significant breaches of his or her human rights. A young person assessed to be an adult is unlikely to have his or her best interests regarded as a primary consideration. If his or her best interests are regarded as a primary consideration, the young person will be treated differently from adults and his or her other rights set out in the CRC respected.

The sections below outline some of the other rights set out in the CRC that may be breached where a person suspected of a people smuggling offence who says that he is a child is mistakenly assessed to be an adult.

(a) The right to liberty and the rights of children deprived of their liberty

Article 37(b) of the CRC provides that children must only be arrested, detained or imprisoned as a measure of last resort and for the shortest appropriate period of time.

Article 37(c) is the key right contained within the CRC that applies to the situation of individuals suspected of people smuggling who said that they were children once they were detained. It

applies to all forms of deprivation of liberty, and so must be considered in light of the holding of young Indonesians suspected of people smuggling in immigration detention as well as their detention in adult correctional facilities after they have been charged.

Article 37(c) requires that a child deprived of his or her liberty be treated in a manner which takes into account the needs of a person of his or her age and that the child be ordinarily separated from adults. It provides:

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. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

While Australia has a reservation to article 37(c) of the CRC, the Australian Government at the time of reservation made it clear that its concerns with the article related to whether children in juvenile detention could maintain contact with their families, given the geography and demography of Australia.⁵²

These rights are also set out in the ICCPR. Article 10(2)(b) provides that '[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication' and article 10(3) provides that '[j]uvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status'.

Article 37(d) further provides that:

Every child deprived of his or her liberty 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.⁵³

The right to challenge the legality of detention is also set out in article 9(4) of the ICCPR which states that 'anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.

The UN Committee has recommended that once a child is arrested and placed in detention, the child is to be brought before a competent authority to examine the legality of his detention as soon as possible.⁵⁴ In relation to extended detention and pre-charge delay, the UN Committee has commented that:

in many countries, children languish in pretrial detention for months or even years, which constitutes a grave violation of article 37(b) of CRC. An effective package of alternatives must be available ... for the

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States parties to realize their obligation under article 37(b) of CRC to use deprivation of liberty only as a measure of last resort.⁵⁵

Accordingly, States should enact legislative and policy measures to reduce the use of pre-trial detention, for example, by granting bail where possible in the individual circumstances and considering the best interests of the child.

Article 9(3) of the ICCPR is also relevant to lengthy pre-charge detention. It states:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

Article 9(3) contains an indirect entitlement to release from pre-trial detention in exchange for bail or some other guarantee.⁵⁶ The Human Rights Committee considers that bail should ordinarily be granted unless circumstances exist which would make it unreasonable to do so. It has commented that:

pre-trial detention should be the exception and ... bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party. The mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial.⁵⁷

Finally, the right to be free from arbitrary detention is also relevant to the issues under consideration in this Inquiry. Article 37(b) of the CRC provides that '[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily'. In addition, article 9(1) of the ICCPR provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Detention may be arbitrary notwithstanding that it is authorised by law. The ICCPR has been interpreted as providing that 'all unlawful detentions are arbitrary; and lawful detentions may also be arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality'.⁵⁸ Further, detention must be necessary in all the circumstances and must not continue beyond the period for which a State party can provide appropriate justification.⁵⁹ For this reason, pre-charge detention for a period of time that is unjust, unreasonable and disproportionate to a State's legitimate aim, may be contrary to the prohibition against arbitrary detention in article 9(1).⁶⁰

(b) The rights of children alleged to have committed an offence

In recognising the right of every child suspected of committing an offence to be treated in a manner consistent with the child's sense of dignity and worth, article 40(2)(b) of the CRC provides minimum procedural guarantees in the criminal process. Of relevance to this Inquiry, every child is entitled:

- to be presumed innocent until proven guilty according to law⁶¹
- to be informed promptly and directly of the charges against him or her, and if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence⁶²
- to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interests of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians⁶³
- if considered to have infringed the penal law, to have this decision and any [other] measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law⁶⁴
- to have the free assistance of an interpreter if the child cannot understand or speak the language used.⁶⁵

In the view of the UN Committee, children who are in conflict with the law should be treated in a manner that is consistent with their sense of dignity and worth throughout the entire criminal justice process. Their treatment should take into account their age and promote their reintegration in society.⁶⁶ Of particular relevance, the UN Committee is concerned about the length of delay in judicial processes, having stated:

Internationally there is a consensus that for children in conflict with the law the time between the commission of the offence and the final response to this act should be as short as possible. The longer this period, the more likely it is that the response loses its desired positive, pedagogical impact, and the more the child will be stigmatized. ...

The Committee recommends that the States parties set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor ... to bring charges against the child, and the final adjudication and decision by the court. ... These time limits should be much shorter than those set for adults. But at the same time, decisions without delay should be the result of a process in which the human rights of the child and legal safeguards are fully respected.⁶⁷

Finally, under article 40(3), States are required to promote measures for children in conflict with the law that do not involve judicial proceedings, provided that human rights and legal safeguards are fully respected.

(c) The rights of children to be protected from all forms of physical or mental violence

If a child is detained or sentenced as an adult due to inadequate age assessment procedures, that child may be at risk of mistreatment. Article 19(1) of the CRC provides that:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 19(1) reaches to the treatment of children within institutions and in the justice system.⁶⁸

Article 19 recognises the particular vulnerability of children to violence, injury or abuse, neglect, maltreatment or exploitation. Children who are mistakenly held in adult facilities face a heightened risk in this regard. An obvious preventive and 'protective measure' as required in article 19(2) would be to ensure children are separated from adults, including where age is in dispute.

(d) The rights of a child separated from his family

The CRC requires Australia to ensure that children lacking the support of their parents receive the extra help that they need to guarantee the enjoyment of all rights set out under the CRC and other international human rights instruments.

Article 20(1) of the CRC recognises the particular vulnerability of unaccompanied children who face language and cultural barriers, and provides that '[a] child temporarily or permanently deprived of his or her family environment ... shall be entitled to special protection and assistance provided by the State'.

Effective guardianship is an important element of the care of unaccompanied children. Article 20(2) of the CRC requires Australia to ensure the 'alternative care for such a child', which may be met through the appointment of a guardian.

Article 18(1) of the CRC specifies that the best interests of the child shall be the basic concern of a legal guardian. General Comment 6 of the UN Committee explains this obligation further:

States are required to create the underlying legal framework and to take necessary measures to secure

proper representation of an unaccompanied or separated child's best interests. Therefore, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State. ... The guardian should be consulted and informed regarding all actions taken in relation to the child. The guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution. The guardian or adviser should have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered by, inter alia, the guardian acting as a link between the child and existing specialist agencies/ individuals who provide the continuum of care required by the child. Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship.⁶⁹

Article 16 of the CRC provides that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family and home. Consequently, a child who is separated from one or both parents has the right to maintain personal relations and direct contact with both parents on a regular basis, except if this would be contrary to the child's best interests (article 9(3)). Where such separation results from any action by a State party (including detention of the child), the State party shall, on request, provide both parents, the child or, if appropriate, another member of the family, with the essential information concerning the whereabouts of the absent members of the family unless it would be detrimental to the well-being of the child (article 9(4)).

(e) The right of the child to be heard

A child has the right to express their views and to have those views taken into account in decisions that affect them.

Article 12(1) of the CRC provides that:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 12 underlines children's status as individuals with fundamental human rights, views and feelings of their own.⁷⁰

Article 12(2) specifically provides the child with the right to be heard in any judicial and administrative proceedings affecting him, which would include proceedings involving the determination of age, and with the right for those views to be given 'due weight'. In this regard, the UN Committee's General Comment 5 highlights that for rights to have meaning, effective remedies must be available to redress violations:

Children's special and dependent status creates real difficulties for them in pursuing remedies for

breaches of their rights. ... So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance.⁷¹

The extent to which all of the rights discussed above were respected and protected during the investigation and prosecution of cases of young Indonesians suspected of people smuggling is discussed in Chapter 8.

¹ Australian Human Rights Commission, *Immigration Detention in Darwin* (2010), p 9. At http://www.humanrights.gov.au/human_rights/immigration/idc2010_darwin.html (viewed 9 July 2012).

² P Maley, 'Children in WA jails on smuggler charges', *The Australian*, 11 November 2010. At <http://www.news.com.au/children-in-wa-jails-on-smuggler-charges/story-e6frg13u-1225951673558> (viewed 9 July 2012).

³ Hon C Branson QC, President, Australian Human Rights Commission, Correspondence to Hon R McClelland MP, Attorney-General, 17 February 2011.

⁴ Hon R McClelland MP, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 31 March 2011, p 3.

⁵ Hon R McClelland MP, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 30 June 2011.

⁶ Hon C Branson QC, President, Australian Human Rights Commission, Correspondence to Hon R McClelland MP, Attorney-General, 14 July 2011; Hon C Branson QC, President, Australian Human Rights Commission, Correspondence to Hon R McClelland MP, Attorney-General, 8 November 2011.

⁷ Hon R McClelland MP, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 22 August 2011.

⁸ See, for example, R Carbonell, 'Alleged people smugglers x-rayed to prove age', *ABC News*, 27 June 2011. At <http://www.abc.net.au/news/2011-06-27/alleged-people-smugglers-x-rayed-to-prove-age/2773398> (viewed 9 July 2012); M Dodd, 'Alarm at abuse of asylum boat boys', *The Australian*, 12 July 2011. At <http://www.theaustralian.com.au/national-affairs/alarm-at-abuse-of-asylum-boat-boys/story-fn59niix-1226092675802> (viewed 9 July 2012); 'Indonesian boys "wallowing" in Australian jails', *ABC News*, 17 October 2011. At <http://www.abc.net.au/news/2011-10-17/indonesian-boys-held-in-aust-jails/3574268> (viewed 9 July 2012); M Carlton, 'The shame we keep locked away', *Sydney Morning Herald*, 22 October 2011. At <http://www.smh.com.au/opinion/politics/the-shame-we-keep-locked-away-20111021-1mc7p.html> (viewed 9 July 2012).

⁹ H Cohen and R Henschke, 'Casualties in the war on people-smuggling', *ABC Radio National*, 30 October 2011. At <http://www.abc.net.au/radionational/programs/backgroundbriefing/casualties-in-the-war-on-people-smuggling/3601454> (viewed 9 July 2012); N O'Brien and C Marriner, 'Plucked from poor villages, boys land in jail', *Sydney Morning Herald*, 6 November 2011. At <http://www.smh.com.au/national/plucked-from-poor-villages-boys-land-in-jail-20111105-1n14h.html> (viewed 9 July 2012); K Marks, 'Australia's shame over its forgotten teenage prisoners', *The Independent*, 14 November 2011. At <http://www.independent.co.uk/news/world/australasia/australias-shame-over-its-forgotten-teenage-prisoners-6261947.html> (viewed 9 July 2012).

¹⁰ *R v Daud* [2011] WADC 175, 255; *R v RMA* [2011] WADC 198, 69. In *R v Daud* the judge noted that the expert witness called by the prosecution (Dr Vincent Low) was not a qualified statistician. His Honour accepted the criticisms made of his evidence by defence witnesses, accepting their evidence where it conflicted with Dr Low's and rejecting the statistical probabilities of the accused being the chronological age reported by Dr Low. In *R v RMA* the judge accepted that the method employed by Dr Low was flawed and expressed the opinion that 'the method employed by Dr Low and the assumptions upon which it is based render his opinion unreliable'.

¹¹ It appears that the tendency of females to achieve skeletal maturity earlier than males means that the use of wrist x-rays to assess whether they were over the age of 18 years would be even more problematic in their case.

¹² *Australian Human Rights Commission Act 1986* (Cth), s 21(1).

¹³ *Migration Act 1958* (Cth), s 233A(1).

¹⁴ *Migration Act 1958* (Cth), s 233C(1).

¹⁵ *Migration Act 1958* (Cth), s 233A; *Crimes Act 1914* (Cth), s 4AA.

¹⁶ *Migration Act 1958* (Cth), s 233C; *Crimes Act 1914* (Cth), s 4AA.

¹⁷ *Migration Act 1958* (Cth), ss 233C, 236B.

¹⁸ *Migration Act 1958* (Cth), s 236B(2).

¹⁹ *Migration Act 1958* (Cth), s 236A.

²⁰ Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process*, November 2008 (Commonwealth Prosecution Policy), p 9. At <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf> (viewed 9 July 2012).

²¹ Australian Government, Joint submission, Submission 30, p 6.

²² *Crimes Amendment (Age Determination) Act 2001* (Cth).

²³ *R v Hatim* [2000] NTSC 53.

²⁴ *Crimes Act 1914* (Cth), s 3ZQB.

²⁵ *Crimes Regulations 1990* (Cth), reg 6C(2).

²⁶ *Crimes Act 1914* (Cth), s 3ZQH.

²⁷ *Crimes Act 1914* (Cth), ss 3ZQB, 3ZQC.

²⁸ Legal Officer, CDPP Sydney Office, Minute to Senior Assistant Director, CDPP Sydney Office, 3 September 2011 (GEO028 – CDPP document 006.0071).

²⁹ Federal Agent, AFP Office, Case Note: Crew identified as a minor, 29 March 2011 (CLA061 – AFP document 1). This child was deported to Indonesia by DIAC within three weeks of interception.

³⁰ Greg Hogan, Submission 24, pp 7–10.

³¹ Figures drawn from documents provided to the Commission.

³² Victoria Legal Aid, Submission 13, p 4. Victoria Legal Aid provided this information based on a visit to Rote Island made by VLA lawyers.

³³ Victoria Legal Aid, Submission 13, p 4.

³⁴ Victoria Legal Aid, Submission 13, p 4.

³⁵ Victoria Legal Aid, Submission 13, p 4.

- ³⁶ The Commission has only considered those individuals who arrived in Australia between 28 September 2009 and 22 November 2011.
- ³⁷ Australian Government, Joint submission, Submission 30, p 22.
- ³⁸ Department of Immigration and Citizenship, Submission 37 – Attachment, p 1.
- ³⁹ Australian Government, Joint submission, Submission 30, p 24.
- ⁴⁰ Australian Government, Joint submission, Submission 30, p 24.
- ⁴¹ Commonwealth Prosecution Policy, note 20.
- ⁴² *Migration Act 1958* (Cth), ss 233C, 236B.
- ⁴³ *Convention on the Rights of the Child*, 1989 (CRC), art 1. At <http://www.austlii.edu.au/au/other/dfat/treaties/1991/4.html> (viewed 9 July 2012).
- ⁴⁴ UN Committee on the Rights of the Child, General Comment No. 6 – *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, UN Doc CRC/GC/2005/6 (2005) (General Comment 6), para 31(i). At <http://www.unhcr.org/refworld/docid/42dd174b4.html> (viewed 9 July 2012).
- ⁴⁵ Senior Legal Officer, Office of International Law, AGD, Letter to Principal Legal Officer, People Smuggling and Border Protection Section, AGD, 2 May 2011 (AGD document PROS-27), p 8.
- ⁴⁶ UN Committee on the Rights of the Child, *Report of the UN Committee on the Rights of the Child, Thirty-Ninth Session*, UN Doc CRC/C/150 (2005), para 130. At <http://www.unhcr.org/refworld/docid/44182d714.html> (viewed 9 July 2012).
- ⁴⁷ UN Committee on the Rights of the Child, General Comment No. 10 – *Children’s Rights in Juvenile Justice*, UN Doc CRC/C/GC/10 (2007) (General Comment 10), para 39. At <http://www.unhcr.org/refworld/docid/4670fca12.html> (viewed 9 July 2012).
- ⁴⁸ General Comment 10, above, para 35.
- ⁴⁹ R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, 2007) (CRC Implementation Handbook), pp 37–38. At http://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_1_of_3.pdf (viewed 9 July 2012).
- ⁵⁰ UN Committee on the Rights of the Child, General Comment No. 5 – *General Measures of Implementation of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/5 (2003) (General Comment 5), para 12. At <http://www.unhcr.org/refworld/docid/4538834f1.html> (viewed 9 July 2012). General Comments are considered to have interpretative value in considering rights under the CRC.
- ⁵¹ General Comment 6, note 44, para 31.
- ⁵² See Australian Government, *Australia’s Combined Second and Third Reports under the Convention on the Rights of the Child*, Attorney-General’s Department (2003), paras 466–467. At http://www.dfat.gov.au/hr/downloads/australia_2nd_3rd_reports_convention_rights_child.pdf (viewed 9 July 2012).
- ⁵³ See also, *International Covenant on Civil and Political Rights*, 1966, art 9(4). At <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html> (viewed 9 July 2012).
- ⁵⁴ General Comment 10, note 47, para 83. The Committee has made a recommendation that children be brought before a competent authority within 24 hours.
- ⁵⁵ General Comment 10, above, para 80.
- ⁵⁶ M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005), p 234.
- ⁵⁷ Human Rights Committee, *Hill v Spain*, Communication No. 526/1993, UN Doc CCPR/C/59/D/526/1993 (1997), para 12.3. At <http://www.ohchr.org/Documents/Publications/SDecisionsVol6en.pdf> (viewed 9 July 2012).

- ⁵⁸ *Manga v Attorney-General* [2000] 2 NZLR 65, [40] (Hammond J). See also Human Rights Committee, *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990). At <http://www.unhchr.ch/tbs/doc.nsf/0/a4269194de1b9228c1256ac700449405?Opendocument> (viewed 9 July 2012); Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997). At <http://www.unhchr.ch/tbs/doc.nsf/0/30c417539ddd944380256713005e80d3?Opendocument> (viewed 9 July 2012); Human Rights Committee, *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1997). At <http://www.unhchr.ch/tbs/doc.nsf/0/237a8e226edb906f8025686b005b511b?Opendocument> (viewed 9 July 2012).
- ⁵⁹ Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002), para 8.2. At <http://www.unhcr.org/refworld/docid/3f588ef00.html> (viewed 9 July 2012); *D and E v Australia*, Communication No 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (2006), para 7.2. At <http://www.unhchr.ch/tbs/doc.nsf/0/9dbcb136a858ebc5c12571cc00532f41?OpenDocument> (viewed 9 July 2012); *Omar Sharif Baban v Australia*, Communication No 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003), para 7.2. At <http://www.unhcr.org/refworld/docid/404887ee3.html> (viewed 9 July 2012); *Bakhtiyari v Australia*, Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2003), para 9.2. At <http://www.unhcr.org/refworld/country,,HRC,,PAK,,404887ed0,0.html> (viewed 9 July 2012).
- ⁶⁰ Human Rights Committee, *General Comment No. 31 – Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) para 6. At <http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument> (viewed 9 July 2012).
- ⁶¹ CRC, note 43, art 40(2)(b)(i).
- ⁶² CRC, above, art 40(2)(b)(ii).
- ⁶³ CRC, above, art 40(2)(b)(iii).
- ⁶⁴ CRC, above, art 40(2)(b)(v).
- ⁶⁵ CRC, above, art 40(2)(b)(vi).
- ⁶⁶ General Comment 10, note 47, para 13.
- ⁶⁷ General Comment 10, above, paras 51–52.
- ⁶⁸ CRC Implementation Handbook, note 49, pp 264–265.
- ⁶⁹ General Comment 6, note 44, para 33.
- ⁷⁰ CRC Implementation Handbook, note 49, p 149.
- ⁷¹ General Comment 5, note 50, para 24.

Chapter 2:

Biomedical markers and the assessment of chronological age

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1 Introduction

Since 2001, the primary method of assessing whether an individual is under the age of 18 years in the context of criminal proceedings in Australia has been through the analysis of an x-ray of the young person's wrist. As this Inquiry is considering the treatment of young Indonesian males suspected of people smuggling who say that they are children, it is important to consider the appropriateness of this and other age assessment processes in this context. Consequently, this chapter considers whether it is appropriate to adduce expert analysis of a wrist x-ray, or any other biomedical marker, as evidence in a criminal proceeding on the issue of whether a young male is under the age of 18 years. As noted in Chapter 1, the Commission is not aware of any female person having been suspected of people smuggling.

This chapter considers the use of wrist x-ray analysis as a means of assessing age, and whether it is sufficiently informative of whether a young male person has attained 18 years of age. The question of how wrist x-ray analysis has been used in practice during investigation and prosecution processes, and the impact of its use in specific cases, is considered in Chapter 4.

Although dental x-ray analysis has not been used as a means of assessing age in the context of criminal proceedings in Australia, the process has been offered to a number of individuals suspected of people smuggling offences whose age was in doubt. Also, as recently as November 2011, the Commonwealth was considering specifying dental x-rays as a prescribed procedure for determining age for the purposes of the *Crimes Act 1914* (Cth). Consequently, consideration is additionally given in this chapter to the question of whether it is appropriate to use dental x-ray analysis as a means of assessing age in criminal proceedings.

This chapter also gives brief consideration to the analysis of other biomedical markers for the purposes of age assessment in criminal proceedings. It specifically considers the following:

- the use of wrist x-rays for the assessment of chronological age
- the use of dental x-rays for the assessment of chronological age
- the ethical implications of the use of x-rays for the assessment of chronological age
- the use of other biomedical markers for the assessment of chronological age
- the use of multifactorial medical approaches for the assessment of chronological age
- the use of a multi-disciplinary approach for the assessment of chronological age.

2 The use of wrist x-ray analysis for the assessment of chronological age

Given the heavy reliance, since 2008, on wrist x-ray analysis as a means of assessing chronological age in people smuggling matters where age is in doubt, one of the most important questions for this Inquiry is: how informative is wrist x-ray analysis for assessing whether a young male person is over 18 years of age?

As discussed in Chapter 1 above, the chronological age of an individual suspected of a people smuggling offence is an important issue for the following reasons.

First, it will ordinarily be inconsistent with the Prosecution Policy of the Commonwealth for a juvenile to be prosecuted unless the seriousness of the alleged offence or the circumstances of the juvenile concerned dictate otherwise.¹ This policy position presumably informed the more particular policy position articulated by the Australian Government that juveniles suspected of people-smuggling offences will only be prosecuted in exceptional circumstances on the basis of their significant involvement in a people smuggling venture or multiple ventures.²

Second, there are mandatory minimum penalties for certain people smuggling offences, including the 'aggravated offence of people smuggling (at least 5 people)', the offence with which most individuals suspected of a people-smuggling offence are charged.³ The minimum penalty for this offence is, for a first offence, a sentence of imprisonment of at least five years with a non-parole period of at least three years.⁴ Importantly, however, this mandatory minimum penalty has no application 'if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed'.⁵

Hence, if wrist x-ray analysis is not adequately informative of whether a young person suspected of a people smuggling offence was over the age of 18 years when the alleged offence was committed, the potential consequences of reliance on such analysis are serious. They include prosecuting a juvenile contrary to the Prosecution Policy of the Commonwealth and a more specific policy position adopted by the Australian Government; prosecuting a juvenile in an adult court; the imposition on a juvenile of a mandatory sentence of imprisonment applicable only to adults; and the detention of a juvenile in an adult facility. Each of the above potential consequences would, if realised, involve a failure to respect rights recognised by the *Convention on the Rights of the Child* (CRC).

There is also an ethical dimension to a decision to subject any person, but particularly a child, to radiation, as radiation is potentially harmful. This ethical dimension will be the more acute when the exposure to radiation is for an administrative, rather than a medical, purpose and where the benefit from the exposure is doubtful. This issue is considered further below.

This section of the report discusses the process for taking and analysing a wrist x-ray in Australia. It then considers the following questions:

- Is wrist x-ray analysis using the Greulich and Pyle Atlas (GP Atlas) informative of whether a person has attained 18 years of age?
- How wide is the normal variation in the age at which young people generally achieve skeletal maturity?
- Does the GP Atlas have limitations when used for assessing the chronological age of a population dissimilar to the study sample on which the GP Atlas is based?
- Can errors of interpretation impact on the accuracy of wrist x-ray analysis of skeletal age?

2.1 The process for taking and analysing a wrist x-ray in Australia

The use of wrist x-ray analysis as evidence of age has relied on opinion evidence, ordinarily given by a radiologist. This evidence concerns the probable chronological age of an individual based upon the expert's assessment of the skeletal maturity of his wrist as shown by the x-ray.

The ordinary process of obtaining this evidence involves the following steps:

- After the required consents are obtained, the Australian Federal Police (AFP) organises for a radiographer to take a wrist x-ray, usually of the individual's left wrist.
- This image is interpreted by a radiologist who, after comparing the x-ray with the plates contained in the GP Atlas, gives an estimation of the individual's likely skeletal age.
- Unless that estimation is under the age of 19 years, the AFP then requests a detailed expert report from a second radiologist which can be relied on in a legal proceeding; this report calculates a statistical probability that the individual is under the age of 18 years.

In Australia, when wrist x-rays are taken for the purposes of age assessment, they are usually interpreted with the aid of the publication *A Radiographic Atlas of Skeletal Development of the Hand and Wrist*, published in 1950 by Stanford University Press and Oxford University Press. The second edition of this Atlas was published in 1959. This Atlas is commonly referred to as the 'Greulich and Pyle Atlas' as it was compiled by Professor William Walter Greulich of Stanford University School of Medicine and Dr Sarah Idell Pyle, Research Associate, Departments of Anatomy, Western Reserve University and Stanford University Schools of Medicine. The second edition of this Atlas, which has been relied on in every case in which a wrist x-ray of an individual suspected of a people smuggling offence has been placed before a court in Australia, will be referred to as the 'GP Atlas'.

The GP Atlas consists of a series of plates of standard hand-wrist x-rays for specified skeletal ages.⁶ The standard plates in the GP Atlas were selected from x-ray films of healthy, white children of North European ancestry in the United States whose families may be assumed to have been somewhat above the average in economic and educational status. Each standard is based on a group of 100 children of that chronological age. The x-rays on which the GP Atlas is based were originally obtained as part of a study by the Brush Foundation which was conducted between 1930 and 1942.⁷

While there are other atlases that have been developed to help assess skeletal age, including the TW3 manual and its TW2 predecessor,⁸ the GP Atlas is most commonly used, and appears to be the only atlas to have been used for age assessment purposes in Australia.

Wrist x-ray analysis is most commonly used by medical practitioners to assess the skeletal development of a child whose chronological age is known. An assessment of this kind is undertaken for the purpose of evaluating other aspects of the child's growth and development. Ordinarily, the medical practitioner wants to know how the child's development compares with that of other children of the same sex and age.⁹ By comparing a child's wrist x-ray with the standard plates contained in the GP Atlas, a medical practitioner can compare the skeletal development of that child with other children of the same sex and age for the purpose of forming a judgment about the child's health and development status.¹⁰

The specialised knowledge which informs reliance on the GP Atlas, and other comparable atlases, for the purpose of assessing skeletal development of a child whose chronological age is known includes the demonstrated close correspondence between the developmental status of the human reproductive system and the human skeletal system as disclosed by an x-ray of the hand and wrist. An x-ray of a young person's wrist affords an objective measure of the amount of progress which the young person has made towards attaining physical (including skeletal) maturity.¹¹

It is important to bear in mind that the authors of the GP Atlas were not seeking to create a method of establishing the chronological age of young people. Rather, their concern was to establish a means of assessing the skeletal development of children whose chronological age is known. The authors of the GP Atlas state, in the text that precedes the standard plates, that in constructing the standards contained in the GP Atlas their first object was to select film which would provide an adequate record of discernible stages of normal development of the bones of the hand and wrist. Their second object was to relate those stages as accurately as possible to the chronological age at which they typically occurred in the children of their study sample. They indicate that '[i]n a sense, the first of these objectives is more important than the second'.¹²

The critical question for this Inquiry, which is addressed below, is: how informative is an assessment of a wrist x-ray undertaken by reference to the GP Atlas for the purpose of determining whether an individual Indonesian male was over the age of 18 years at the time of his alleged offence?

2.2 Wrist x-ray analysis using the GP Atlas is not informative of whether a male has attained 18 years of age

Expert opinion evidence concerning a young person's chronological age which is based on a wrist x-ray is ultimately dependent on statistics. The manner in which wrist x-ray analysis has been undertaken in the cases under consideration has involved the expert radiologist seeking to calculate the statistical probability of a person with the degree of skeletal maturity shown by the x-ray being under the chronological age of 18 years.

Statistics by their nature are concerned with populations, not with individuals. For this reason, great care must be taken when placing reliance on statistics to draw an inference about a particular individual. The extent to which it is appropriate to rely on statistics as evidence concerning an individual is discussed in more detail in the paper written by the President of the Commission which is reproduced in Appendix 5.

Even if this issue is put to one side, a limitation inherent in the use of a wrist x-ray to assess a young person's chronological age is that a wrist x-ray is only informative to the point at which the individual achieves skeletal maturity. Thereafter the skeletal status of the young person's wrist will remain unchanged. For this reason, if a wrist x-ray is to be used for the purpose of assessing whether a young male person has achieved the age of 18 years, it is critical to know the age at which, on average, young males achieve skeletal maturity.

The fact that a male person has a mature wrist will not indicate that he is over the age of 18 years if, on average, males achieve a mature wrist when under the age of 18 years or, alternatively, at an age sufficiently close to 18 years of age to render the GP Atlas, or any other source of comparative data, unhelpful.

(a) The GP Atlas does not consider the chronological age at which skeletal maturity is attained

As noted above, the GP Atlas depicts, by a series of standard x-ray plates, the degree of skeletal development that its authors considered representative of the group of children in its study sample, at successive chronological ages until the achievement of skeletal maturity.

The final standard male x-ray in the GP Atlas shows a mature wrist which is assigned the age of 19 years. It may be deduced from the method of selection used by the authors, which is described below, that among the individuals whose hand films were considered for inclusion in the GP Atlas for this standard, most were skeletally mature. The immediately preceding male standard is assigned the age of 18 years and shows a wrist extremely close to maturity. As the evidence of Professor Tim Cole discussed below indicates, it is appropriate to regard each of these plates as representative of a population of young males from which early maturing individuals (that is, for the plate for 18 years, those who were mature before they reached the age of 17 years and for the plate for 19 years, those who were mature before they reached the age of 18 years) had been removed.

The text which accompanies the plates in the GP Atlas reveals that the standards were selected from x-rays taken on, or relatively close to, the 18th and 19th birthdays of the individuals whose wrists they depict.¹³ The GP Atlas contains no male standard for any age between 18 and 19 years; that is, there is no plate, for example, for 18.5 years.

The method of selection of the standards in the GP Atlas is described in the text as follows:

Each of the standards in this Atlas was selected from one hundred films of children of the same sex and age. The films of each of the series were arrayed in the order of the relative skeletal status, from the least mature to the most mature. In most cases the film chosen as the standard is the one which, in our opinion, was most representative of the central tendency of the particular array. The anatomical mode was frequently, but not always, at or near the midpoint of the distribution of the one hundred films.¹⁴

The GP Atlas does not give the average age at which the children in the study sample achieved skeletal maturity. This was not the purpose of the authors' study. Interestingly, however, Table III of the GP Atlas shows the variability of the skeletal age of boys included in the Brush Foundation Study. The data presented in this table are derived from the x-rays that formed the basis of the GP Atlas, but they are based on an assessment of those x-rays made by reference to an earlier set of standards.¹⁵ The authors of the GP Atlas conclude that 'there is no reason to believe that the variability would be significantly greater than that recorded in the tables if those assessments had been based on the standards presented [in the GP Atlas]'.¹⁶ Some information about the average chronological age at which subjects achieved a specific skeletal age can be inferred from this table.

The following is an extract from Table III of the GP Atlas:

Chronological Age	Number of Hand Films	Skeletal Age (in months)	
		Mean	Standard Deviation
14 yr	163	170.02	10.72
15 yr	124	182.72	11.32
16 yr	99	195.32	12.86
17 yr	68	206.21	13.05

Table III concludes at the chronological age of 17 years.¹⁷

Table V of the GP Atlas provides the mean and standard deviation for skeletal age for boys whose growth and development were studied over a long period of time by researchers at the Harvard School of Public Health in Boston. The data presented in this table are based on an assessment of the x-rays using the standards contained in the GP Atlas.¹⁸

The following is an extract from Table V of the GP Atlas:¹⁹

Chronological Age	Number of Hand Films	Skeletal Age (in months)	
		Mean	Standard Deviation
14 yr	65	168.5	12.0
15 yr	65	180.7	14.2
16 yr	65	193.0	15.1
17 yr	60	206.0	15.4

Table V also concludes at the chronological age of 17 years.²⁰

The failure of these two tables to provide information for the age of 18 years gives rise to an inference that the authors of the GP Atlas did not consider that a mean or standard deviation for skeletal age was meaningful at the chronological age of 18 years.

Support for this inference is found in the written submission and in the oral evidence to this Inquiry by Professor Cole, Professor of Medical Statistics, University College, London. The application of statistics to human growth has been Professor Cole's main research focus for the past 30 years.²¹ Professor Cole argues that the reason each of the above tables concludes at the age of 17 years is that there were too few children with older bone ages to be included; that is, that most children older than 17 years have mature wrist x-rays. He draws additional support for this conclusion from the drop in the number of children in the Brush Foundation Study, particularly after the age of 14 years.²²

He explains that the GP Atlas did not attempt to document the different ages at which a wrist *might* mature, as the purpose of the GP Atlas was to plot all the stages of skeletal development *up until* wrist maturity. At the Inquiry's hearing for medical experts Professor Cole explained:

Well this is the fundamental question. How can we get a handle on the age of attainment of a mature x-ray. That's why I went to TW3 [an alternative database to the GP Atlas], because it had a table which gave ages of attainment. There's nothing about that in Greulich and Pyle because Greulich and Pyle were not remotely interested in mature x-rays as needs emphasising. They really were not interested in them.²³

Thus, Professor Cole argues, the GP Atlas does not help a medical practitioner assess whether a person with a mature x-ray might be under or over the age of 18 years.

(b) The Commonwealth's primary witness relied upon the GP Atlas to calculate the probability of attaining skeletal maturity prior to the age of 18

In contrast to Professor Cole, Dr Vincent Hock Seng Low, the witness most commonly called by the Commonwealth Director of Public Prosecutions in people smuggling matters where age is in dispute, has used the GP Atlas as the basis for developing a probability of a male person who has a mature x-ray being under the age of 18 years. Dr Low is a Consultant Radiologist at the Insight Clinical Imaging Group, Western Australia and former Head of the Radiology Department and Consultant Radiologist at the Sir Charles Gairdner Hospital in Nedlands, Western Australia.

The import of Dr Low's analysis of wrist x-rays in people smuggling matters where age was in dispute can be seen in the Joint Commonwealth submission provided to the Inquiry:

Based on expert advice the Commonwealth has sought, the wrist X-ray procedure can assist in determining whether a person is 19 years or older as male wrist skeletal maturation occurs on average at that age. The CDPP will only rely upon wrist X-rays in circumstances where the wrist X-ray indicates that skeletal maturity has been reached and an expert radiologist states that there is the highest level of probability that the person is an adult. Accordingly, only those cases where there is the highest probability that the defendant was 18 years or older at the time of the offence are brought before the courts.²⁴

Dr Low is of the opinion that:

In males, skeletal maturity at the hand is reached at approximately 19 years of age. This means that at this point in time, all the growth plates have fused.²⁵

To calculate the probability that a male person showing skeletal maturity is of a particular chronological age or younger, Dr Low uses the standard deviation for the age of 17 years identified in Table V of the GP Atlas. Dr Low starts by making an assumption that skeletal maturity is attained on average at 19 years of age. Using the larger of the standard deviations provided in the GP Atlas for the age of 17 years, he then extrapolates to conclude that there is a 21.79% probability that a person with a mature wrist is 18 years or less.²⁶

Dr Low's evidence on this topic did not attract support from any witness at the public hearing for medical witnesses conducted as part of this Inquiry; nor has support for it been found in any submission made to the Inquiry by a medical expert.

For example, Dr James Christie, a Specialist Radiologist at the Children's Hospital at Westmead, New South Wales, explained why the assumptions on which Dr Low bases his calculations are wrong in the following way:

The use of such precise numbers suggests to the reader of the report that there is scientific accuracy to the estimate, where none exists. It is scientifically wrong to suggest that a standard variation curve can be applied to the end point of a population distribution, in this case the 19 year standard. For example both a 17 year old boy or a 60 year old man may both have the same skeletal age of 19. By assessing only the skeletal age, and using Dr Low's assumptions, you could come to the clearly false conclusion that each of them has exactly the same probability of being 18 years old.

The skeletal age value assigned to each standard in the [GP Atlas] is not the average or even median age at which the skeleton reaches this appearance, but merely the x-ray that the authors subjectively felt most closely represented that age. Clearly the 19 year value cannot be an average of the values between 15 years and 60 years. It also is not the median age for maturity, (that is the value where 50% will be above and 50% will be below), but is merely a descriptor that is higher than the 18 year value. [Greulich and Pyle] could have called this 20 or 30 or just Mature. The actual number means very little.²⁷

Professor Cole, who unlike Dr Low is an expert bio-statistician, expressed the opinion that Dr Low's conclusions based on the GP Atlas are wrong and should be dismissed.²⁸ As noted above, Professor Cole stresses that the authors of the GP Atlas were not concerned with identifying the average age at which skeletal maturity is attained.

Professor Cole argues that the real question is: what is the average age at which a person *might* have a mature wrist x-ray? In his written submission, Professor Cole asserted:

This leads to the following questions: what proportion are mature at younger ages than 19, and what is the youngest age that adult x-rays are seen? These questions relate to the age of *attainment* of a subject's mature x-ray, which is quite distinct from their current age. Since most x-rays are mature by age 19, the age of attainment must for most subjects be earlier than 19.²⁹

(c) Alternative analysis demonstrates that wrist x-rays are insufficiently informative of whether someone has reached 18 years of age

Professor Cole suggests that it is possible to calculate the distribution of the age of attainment of skeletal maturity in males by reference to a more recent publication, the TW3 bone age manual published in 2001. This manual addresses directly the question of the age at which skeletal maturity is attained.³⁰ Professor Cole has calculated that the average chronological age at which

a male achieves skeletal maturity is 17.6 years; that is, in Professor Cole’s opinion, on average males achieve skeletal maturity earlier than the age of 18 years.

Professor Cole’s written submission illustrates the basis of his calculation:

The distribution of the age of attainment of skeletal maturity can be estimated from the three centiles in Table 8 of TW3, reproduced here.

Centile	97th	90th	75th
Age (years)	15.1	15.8	16.7

Assuming a normal distribution of the mean is about 17.6 years and SD 16.5 months. From this the probability of attaining maturity before age 18 is about 61%.³¹

On Professor Cole’s analysis, there is a 61% statistical probability that a young male will have a mature wrist on his 18th birthday. In other words a mature wrist x-ray is not informative of whether a young male is over the age of 18 years as more than half of all young men will have achieved skeletal maturity before that age.

Professor Cole further suggests that it is important to look beyond a simple probability figure to the relevant ‘likelihood ratio’. Professor Cole gave evidence that:

One might think that the 61% probability of being mature before age 18 is what should interest the court. In a sense it is, but more generally the court wants to decide which of the two alternative scenarios – the individual being either over 18 or under 18 – is better supported by the evidence. For this the court needs to compare two different probabilities – that of being over 18 with a mature x-ray versus that of being *under* 18 with a mature x-ray. Ideally the probability should be close to 100% over 18 and close to 0% under 18, and the ratio of the two probabilities is a concise summary of the evidential value of the x-ray. This ratio is known as the *likelihood ratio* (LR), and the further it is from 1 then the more informative the x-ray is.³²

Professor Cole calculates the relevant likelihood ratio as 2.64 and explains that:

To put this in context, [a likelihood ratio] of less than 5–10 in medical decision-making is viewed as weak – the degree of misclassification is too high. Here the [likelihood ratio] is well below 5, a cogent argument that the evidential value of the mature x-ray is poor. If relied on it would lead to too many minors being incorrectly assessed as adult.³³

In other words, by this additional calculation, Professor Cole seeks to show that, statistically speaking, a mature wrist x-ray is not informative of whether a person has reached 18 years of age.

(d) *Other expert opinion confirms that wrist x-ray analysis is uninformative of whether a male has reached 18 years of age*

Other material before the Commission provides support for the conclusion that, on average, males attain skeletal maturity either before, or at about the time, that they attain the age of 18 years.

Dr Ella Onikul, Director of Medical Imaging at the Children's Hospital at Westmead, New South Wales, gave oral evidence to the Inquiry on behalf of the Royal Australian and New Zealand College of Radiologists (RANZCR). She expressed her support for the opinion of Professor Cole that the statistical probability of a male attaining a mature x-ray before the age of 18 years is 61%.³⁴ Dr Christie, in a written submission, similarly supported the opinion of Professor Cole.³⁵

Professor Sir Al Aynsley-Green, a paediatric endocrinologist and Professor Emeritus of Child Health, University College, London, has shown that the method devised by Tanner and Whitehouse in 1962 to assess skeletal maturity (the TW2 method) indicates that 50% of boys will have achieved 'adult' appearances by the age of 17 years, 50% having yet to reach that stage; but some 10% of normal boys will have yet to achieve full maturity at the age of 19.5 years whilst 3% will have achieved this at the age of 16 years.³⁶

Additional support for a conclusion that, on average, males achieve skeletal maturity at, or earlier than, 18 years of age is found in a short communication from 2006 published in *Forensic Science International*: '[t]he skeletal development of hand bones is complete at the age of 17 years in girls and at the age of 18 years in boys'.³⁷ This statement is inconsistent with males achieving skeletal maturity on average at 19 years of age, as posited by Dr Low.

As illustrated above, the evidence before this Inquiry strongly favours the conclusion that on average males achieve skeletal maturity at, or slightly before, the 18th anniversary of their birth. This conclusion is of itself sufficient to render medical opinion evidence based on an assessment of skeletal maturity as shown by a wrist x-ray unhelpful for the purpose of determining whether a particular male person is over the chronological age of 18 years.

In other words, on Dr Low's approach, a mature wrist x-ray can be relied upon as evidence that the subject was likely to be *at least* 18 and therefore an adult at the time of the offence. The evidence before the Inquiry, however, strongly suggests that at least 50% of males attain skeletal maturity at or before the age of 18, leading to a very real risk, on Dr Low's approach, of minors being incorrectly assessed to be adults.

There are, however, other problems in relying on a wrist x-ray which shows skeletal maturity as evidence that its subject is over the age of 18 years. The first of these is that there is a wide normal variation in the age at which young people generally achieve skeletal maturity.

The evidence is overwhelming that using skeletal age to assess chronological age is an imprecise technique. Young people develop skeletally at different rates and reach skeletal maturity at varying ages. The mean and standard deviation figures contained in Table III and V of the GP Atlas referred to in section 2.2(a) above are one measure of this variation.

The authors of the GP Atlas themselves observed that '[i]n the study of any aspect of the growth and development of children one is constantly bedevilled by their variability'.³⁸ They state:

The system described in this *Atlas* ... is intended to provide merely useful estimates of skeletal status – and will do so, if it is properly used. Unfortunately, as in many other similar procedures, there is a tendency to attribute to and to expect from it a greater degree of precision than intended by those who designed it or, indeed, than is permitted by the nature of the changes about which it is designed to measure.³⁹

Expert opinion evidence has been given in Australian criminal cases which calculates to two decimal points the probability that a person showing skeletal maturity is a particular chronological age.⁴⁰ This level of precision finds no support in the GP Atlas and tends to suggest (wrongly) that the calculation has a high level of scientific accuracy.

Australia's Chief Scientist, Professor Ian Chubb AC, in a brief enclosed with a letter dated 11 January 2012 addressed to AGD advised:

Radiological based determination of skeletal maturity does not allow for a precise determination of chronological age. Outcomes of radiological assessments of bones vary with ethnicity and socio-economic conditions (nutrition and disease status). There is observed variation in skeletal maturity of 2 years within each gender.⁴¹

The majority of medical experts who gave evidence to the Inquiry confirmed that there is significant variation in the rate at which normal children develop. For example, Professor Cole gave evidence that:

developmental age in general, and bone age in particular, is only weakly linked to an individual's chronological age. The age of puberty based on bone age has a standard deviation (SD) of over 15 months. So the range of chronological ages seen in 95% of the population at this developmental stage extends over 5 years (± 2 SDs), and two boys at this stage could be 5 years apart in chronological age. The same observation applies to other developmental markers such as age at peak height velocity or dental age⁴²

Furthermore, a number of Australasian medical professional associations made a joint submission to the Inquiry in which it is stated:

Variations in the tempo of physical maturation have long been noted. For instance some children enter puberty before 10 years of age while others are not in puberty until late teenage years. ... Pubertal variation has a major impact on bone age estimation. ... Like most biological variables puberty occurs in

a 'bell-shaped' curve. ... The tempo of puberty is usually similar among individuals and takes 3 to 4 years to complete. Thus there is approximately a 4 to 5 year range for normal puberty to start in both genders and, as expected, a similar difference in bone age estimations is also observed during this time.⁴³

It may therefore be concluded that wrist x-rays can never provide the basis for an accurate prediction of chronological age. This is because, as the authors of the GP Atlas themselves observed, there is substantial variability in the growth and development of children.

It is no doubt because of the inability of skeletal development to define age precisely that the Study Group of Forensic Age Estimation of the German Association of Forensic Medicine, in its publication *Guidelines for Age Estimation in Living Individuals in Criminal Proceedings*, specifies that:

The expert report has to quote the reference studies on which the age estimation is based. For each feature assessed, the report *must* state the most probable age including the range of scatter of the reference population. What *must* also be noted is that this range may increase further by an empirical observer's error.

The age-related variations resulting from application of the reference studies in an individual case such as different genetic/geographic origin, different socioeconomic status and their potential effect on the developmental status ... as well as diseases that might affect the development of the individual examined *must* be discussed in the report including their effect on the estimated age. If possible, a quantitative assessment of any such effect should be given.⁴⁴ (citations omitted, emphases added)

The 'improved process for age determination in people smuggling matters' jointly announced by the then Attorney-General and the then Minister for Home Affairs and Justice in July 2011 was purportedly based on this publication from the year 2000.⁴⁵ It may be observed, however, that no expert report relied upon in age determination proceedings regarding an individual suspected of a people smuggling offence complied, or even substantially complied, with the above guidelines.

It can be concluded from the evidence before this Inquiry that the normal variation in the chronological age at which males generally achieve skeletal maturity is not less than two years and is possibly as high as five years.

This conclusion is an important one. This is because, as noted above, any assessment of chronological age which is based on skeletal age as shown by a wrist x-ray ceases to be informative upon the attainment of skeletal maturity; the individual's wrist x-ray will remain unchanged thereafter. Even if it be assumed, contrary to the overwhelming weight of the evidence, that skeletal maturity is achieved by males on average at the age of 19 years, normal variation of two years means that no conclusion can safely be drawn from skeletal maturity that a particular male person is not under the age of 18 years. Normal variation of even two years renders his skeletal maturity entirely consistent with his being between 17 and 18 years of age.

2.3 The GP Atlas is of limited use for assessing the chronological age of populations dissimilar to that of the study sample

Another problem associated with using wrist x-rays as evidence of chronological age is that the population in the study sample used in the GP Atlas differs from the population from which the young Indonesians come.

The standard plates in the GP Atlas were selected from x-ray films of healthy, white children of North European ancestry in the United States whose families were somewhat above the average in economic and educational status.⁴⁶ The authors of the GP Atlas observe that '[t]hese standards can be expected to fit reasonably well with other children of comparable genetic and environmental background'.⁴⁷ They explain, however, that variability is especially marked in a 'country whose people are as heterogeneous in national and even in racial antecedents as those of many parts of the United States'.⁴⁸ They observe that, as a result, one usually cannot apply findings based on studies on children in one section of the country to children of another without some modification.⁴⁹ They note that one should be reluctant to attribute the relative skeletal retardation of children in some other parts of the world to racial differences as illness and deprivation might provide a more likely explanation.⁵⁰ They illustrate this point by reference to a study of American-born Japanese children living in California.⁵¹ The boys in that study were found to be significantly more advanced skeletally than Caucasian children from Cleveland at 13, 14, 15, 16 and 17 years of age.

On this issue, the Joint Commonwealth submission notes that:

The CDPP has been advised that while there is racial difference in skeletal size, there is no change across races in skeletal development. Accordingly, the Greulich and Pyle Atlas can be applied as a standard for making forensic age determinations in ethnic groups that differ from the reference population.⁵²

In late 2010 a senior officer of the Office of the CDPP identified two papers that argued that GP Atlas is valid for use across racial and ethnic groups.⁵³ In addition, Dr Low provided the Office of the CDPP with a report on this issue in May 2011. Dr Low's report referred to the studies comparing Japanese and American children from the 1950s, studies from the 1990s which he suggested indicate that the GP Atlas can be used with confidence for young Thai people, and a meta-analysis conducted by Schmeling which found that socio-economic status rather than ethnicity is likely to affect the rate of skeletal maturation.⁵⁴

However, other studies confirm that certain populations of children may develop at different rates from the study sample upon which the GP Atlas is based. For example, an appraisal of the GP Atlas for skeletal assessment in Pakistan found significant differences between skeletal age assessed by the GP Atlas and chronological age in a subset of Pakistani children. In Pakistani

males, skeletal age was advanced during early childhood, delayed during middle and late childhood, and again, advanced during adolescence.⁵⁵

A study has also been undertaken to determine if variation between bone age and chronological age exists in children of different ethnic groups within the United States population. It concluded that the standards of the GP Atlas to determine bone age must be used with reservation, particularly in Asian and Hispanic boys in late childhood and adolescence, when bone age may exceed chronological age by nine months to 11 months 15 days.⁵⁶ Other studies have revealed racial differences in Middle Eastern, African and African American populations with bone age disparities between six to 12 months depending on when the children were assessed.⁵⁷

Dr Low has drawn to the attention of the Commission a study published in 2008 entitled 'Skeletal Maturation in Indonesian and White Children Assessed with Hand-Wrist and Cervical Vertebrae Methods'.⁵⁸ It does not appear that this study assessed skeletal maturity by reference to the GP Atlas, and it only studied boys between the ages of 10 to 17 years. The Indonesian children the subject of the study were school children from Jakarta and its vicinity, and the radiographs were taken during routine orthodontic examinations. Data for the white children came from pre-existing radiographs taken as part of routine orthodontic examinations at the University of Rochester Medical Centre, Rochester, New York, USA.⁵⁹ It may therefore be assumed that both groups probably came from relatively affluent families. The study showed that during the pubertal growth spurt period there were differences between the Indonesian and white children with the white children reaching each skeletal maturity index stage earlier than the Indonesians. However, at 'about the age of 17 years, the Indonesian children appeared to equalize with the white ones'.⁶⁰ The study thus seems of some, albeit limited, relevance for present purposes. It appears that no other bone studies have been done of an Indonesian population.

Additionally, it may be the case, as Dr Paul Hofman, President of the Australasian Paediatric Endocrinology Group, speculated in his evidence to the Inquiry, that the population of individuals with which this Inquiry is concerned may vary genetically from the Indonesian male population generally. Dr Hofman spoke of the possibility that a person who was seeking to recruit a sailor to crew a boat intended to be used for people smuggling would be more likely to choose a person who appeared mature, even though young, so that the recruiter would have, intellectually and emotionally, a young person who could do more work.⁶¹

While this possibility, as Dr Hofman appropriately acknowledged, is purely speculative, it draws attention to the complexities involved in seeking to determine whether an individual suspected of a people-smuggling offence who says that he is a child comes from a population that is relevantly comparable with the study sample on which the GP Atlas is based.

The differences in opinion outlined above indicate that there is no conclusive evidence about the degree to which any relevant genetic difference between the population on which the GP Atlas is based and the population with which this Inquiry is concerned might impact on the accuracy of age assessments. As Professor Cole put it at the medical hearing:

I think the important point to make is that although ... it is known that socio-economic status, ethnic group and nutritional status may all impact on the bone age, it's very hard to actually come up with a number that one can use to make any sort of adjustment. All one can do really is wave one's hand in the air and say whatever certainty we had based on a European population, that certainty decreased substantially when we moved to talking about an Indonesian fisherman population.⁶²

2.4 Errors of interpretation may impact on the accuracy of wrist x-ray analysis of skeletal age

Another unquantifiable factor which may impact on the reliability of an age assessment based on a wrist x-ray is the subjective nature of the assessment of an x-ray.

The authors of the GP Atlas draw attention to the subjective nature of an assessment of a wrist x-ray. They also point out the need for practice before one becomes efficient in duplicating by subsequent independent assessments one's previous estimates.⁶³

The joint submission to the Inquiry by the Australasian medical professional associations states:

All bone age estimation methods have error involved. In other words if the same X-ray is assessed either by the same or different assessors the assigned bone age may vary. Intra-observer error refers to the variation of one clinician's assessment while inter-observer error refers to the variation between different clinicians. ... A number of studies have investigated these effects and in summary have demonstrated an average intra-observer error of between 2 and 9 months and an average inter-observer error between 1 and 12 months. However, these were average errors and the error range in these studies was 0 to over 2 years. Combining both the intra- and inter-observer, variation differences of over 12 months frequently occur.⁶⁴ (Citation omitted)

The *Guidelines for Age Estimation in Living Individuals in Criminal Proceedings* referred to above include two guidelines explicitly concerned with quality assurance.⁶⁵ The first requires annual ring experiments for continual quality assurance. A 'ring experiment' in this context apparently involves a number of experts undertaking the same assessment for purpose of comparing the results and thereby enhancing their skills. The second guideline is that an expert may request an evaluation of an age estimation before his or her report is written.

The expert reports that are before this Inquiry demonstrate variations of assessment between different radiologists. In at least eight cases, Dr Low assessed a wrist x-ray as showing a mature wrist when another radiologist considered that the wrist was not yet mature.⁶⁶

2.5 Wrist x-ray analysis could be relied upon to conclude that an individual with an immature wrist is under the age of 18 years

As discussed above, wrist x-ray analysis does not assist in determining whether a male young person is over 18 years of age. This is because on average males attain skeletal maturity at or just before the age of 18 years.

However, several submissions to the Inquiry argued that wrist x-ray analysis should be able to be used to show that a person is under 18 years of age. For example, Legal Aid Queensland submitted that:

the use of the technique should not be abandoned completely. Wrist x-rays have in the past been able to facilitate the speedy repatriation of children to Indonesia in cases where their x-ray's showed clear skeletal immaturity. For this reason the wrist x-ray technique may still have a valuable [role] in determining the status of a person as a child. However, they should ... not be relied upon as sufficient by themselves to establish an individual as being an adult.⁶⁷

Victoria Legal Aid made a similar argument:

VLA does not support abandoning the use of x-ray techniques altogether. The problem with prohibiting the use of x-ray analysis is that we know that x-rays are sometimes a quick and effective mechanism to determine the veracity of a child's claim about their youth. Children have been appropriately and quickly returned to Indonesia in such situations. To avoid children being unnecessarily detained, a preferable position to outlawing the use of x-ray analysis completely would be to prohibit the reliance on such evidence in isolation should the analysis point to the claimant being an adult.⁶⁸

Because a male person will attain a mature skeleton, on average, at or just before the age of 18 years, it is statistically probable that a male person who has an immature wrist is a minor. For this reason and applying the principle of the benefit of the doubt, it may be concluded, subject to the ethical considerations discussed below, that the practice generally followed by the Commonwealth of discontinuing the investigation and prosecution of any individual whose x-ray shows an immature wrist should continue.

3 The use of dental x-ray analysis for the assessment of chronological age

In July 2011, the Australian Government announced an 'improved process for age determination in people smuggling matters' which was to include offering voluntary dental x-rays to individuals suspected of people smuggling whose age was in doubt.⁶⁹ In addition, at about this time the working group of Commonwealth agencies recommended to the then Attorney-General that dental x-rays be prescribed in the *Crimes Regulations 1990* (Cth) so as to make both wrist x-rays and dental x-rays prescribed procedures for the purpose of s 3ZQB of the Crimes Act.⁷⁰ The Joint

Commonwealth submission notes that:

The Commonwealth is considering adding dental X-rays as a prescribed procedure in the Crimes Regulations, which would allow investigating officials to seek an order from a court to conduct a dental X-ray.⁷¹

If this were to occur, dental x-ray analysis could be used for age assessment purposes in the same circumstances in which wrist x-ray analysis can now be used. The former Attorney-General has said that, if prescribed, dental x-rays would supplement wrist x-rays in all matters where age is in dispute.⁷²

Several dental forensic experts have given evidence to the Inquiry that, while a dental x-ray analysis cannot provide a fully accurate age assessment, it is more informative than any other method for assessing whether a person has reached the age of 18 years.⁷³ Others making submissions to the Inquiry have suggested that dental x-rays suffer from the same weaknesses as wrist x-rays.⁷⁴

The question is whether dental x-rays are an appropriate substitute for, or supplement to, wrist x-rays or, indeed, any other method of assessing chronological age. It appears that, while dental x-ray analysis may be more informative of chronological age than wrist x-ray analysis, it suffers from many of the same issues that make wrist x-ray analysis insufficiently informative of chronological age to be appropriate for use within the context of a criminal prosecution.

Further, there is no evidence that a dental x-ray together with a wrist x-ray will provide a more accurate assessment of age than either one of these methods alone.

This section of the report will discuss the process of taking and analysing a dental x-ray. It will then consider the following questions:

- Is dental x-ray analysis informative of whether a person has attained 18 years of age?
- How wide is the normal variation in the age at which young people generally achieve dental maturity?
- Does ethnicity, socio-economic status and nutrition impact on the attainment of dental maturity?

3.1 The process for taking and analysing dental x-rays for the purposes of age assessment

There are several different types of dental examination that could be used to assess the age of persons in different age ranges. This Inquiry has focussed only on those methods that might be

useful for the purpose of determining whether an individual is under, or alternatively over, 18 years of age.

There appears to be agreement that the only viable examination method for this purpose is to take an OrthoPantomoGraphic (OPG) x-ray to analyse the development of the third permanent molar (wisdom tooth).⁷⁵ Essentially this means taking an x-ray by a procedure that is wholly external to the mouth (as opposed to placing x-ray films inside the mouth), to determine whether the person has a wisdom tooth that has reached a certain stage of maturity.

Unlike wrist x-rays, there appear to be some dental databases expressly developed for the purposes of assessing chronological age (as opposed to skeletal age). The most widely used of these databases is the Demirjian dental age assessment scale, which was developed in 1973 based on a French-Canadian study sample.⁷⁶ In the context of determining adulthood, a forensic odontologist needs to assess whether the OPG indicates that the wisdom teeth have reached 'Stage H' on the Demirjian scale.⁷⁷

3.2 Experts disagree on how informative dental x-ray analysis is of whether a person has attained 18 years of age

Some submissions to the Inquiry asserted that dental x-rays are sufficiently accurate to be useful to a court making a determination of age on the balance of probabilities. For example, the Australian Society of Forensic Odontology cites recent research on the use of third molar development which finds 'analysis of third molar development to be accurate and sufficiently correlated with chronological age to be of forensic value'.⁷⁸

However, Dr Anthony Hill, the President of this Society, gave evidence that a dental x-ray will only be able to tell whether a person is 18 years old 'plus or minus 1.2 years'. He said:

Despite the incredible amount of robust research that has been done and the investigation and scientific research that has been undertaken over the years, looking at and focusing on the development and the maturation of the wisdom tooth, we are unable to state definitively the age of the individual. In other words we can't say this person's 18, we can't say this person's 18.5, we can't say if this person's 19 at all. We are not able to do that. But what we are able to do with ongoing research and ongoing science is that we are able to reduce the parameters of our confidence intervals and our standard deviations to the point where we are comfortable with stating that a person is 18 years of age plus or minus 1.2 years.⁷⁹

Similarly, forensic odontologist, Dr Stephen Knott, gave evidence that:

It is not possible to give a specific age of 18 years, the age assessment would need to include a confidence interval.⁸⁰

Dr Hill further stated:

I don't use confidence levels because basically what we're saying here is that in 61% of the cases we've got it right, but in 39% of the cases we've got it wrong. I don't want to be sitting in the 39% of cases where I'm wrong and I've offered this opinion. I mean that's not really good odds. What I'm saying is that we should not be talking about these confidence intervals, we should be talking about this person is 18 plus or minus.⁸¹

The Inquiry has received two submissions which attempt to conduct a statistical analysis on the reliability of dental age assessments at the 18 year threshold; one from Professor Cole from University College, London (who also provided an analysis in the context of wrist x-rays), and the other from Professor Graham Roberts from the King's College London Dental Institute.⁸² The two methodologies lead to different results.

Professor Cole uses recently gathered data on over 2600 individuals attending the Eastman Dental Hospital in London. Their teeth were x-rayed and staged using the Demirjian classification and information on their four third molars was extracted. The data was collected by a PhD student being supervised by Professor Roberts. From this dataset, Professor Cole calculates the mean age of attainment of one or more Stage H third molars to be 19.6 years with a standard deviation of 1.3 years. Using these figures he calculates that there is a 24% chance of a person having a Stage H wisdom tooth before age 18.⁸³

Professor Cole acknowledges that this is a better probability result than with the wrist x-rays, but he goes on to calculate a likelihood ratio which suggests that the result is still highly uninformative. He stated:

one should rely on the [likelihood ratio] to make the judgement. In the presence of a mature third molar, comparing the probabilities of being under 18 and over 18 gives [a likelihood ratio] of just 5.2 ... which is only marginally informative. ... Thus dental age suffers from the same lack of precision as bone age for forensic age assessment. Ages older than 16 cannot convincingly be excluded using either method.⁸⁴

In the most recent figures provided by Professor Roberts (using an updated version of the dataset used by Professor Cole), he has calculated the mean age of attainment of Stage H of the Lower Left third molar to be 20.7 years with a standard deviation of 2.3 years. From these figures he calculates that there is a 12% chance of having a Lower Left Stage H wisdom tooth before the age of 18.⁸⁵

Professor Roberts and Professor Cole have engaged in a detailed exchange of views regarding their respective results and statistical methodologies, both in the context of this Inquiry⁸⁶ and, in 2008–09, in the *British Dental Journal*.⁸⁷ Briefly summarised, Professor Roberts suggests that

Professor Cole has neither used the most appropriate dataset nor applied the most appropriate statistical methodology to determine his statistical probabilities.⁸⁸ Professor Cole, in turn, suggests that Professor Roberts has not considered the appropriate data and that his statistical methodology is wrong.⁸⁹

The debate between Professor Cole and Professor Roberts over the statistical accuracy of dental x-rays has not been subjected to the same scrutiny as the debate between Professor Cole and Dr Low in relation to wrist x-rays. Consequently, there is insufficient additional information before the Commission for a conclusion to be reached as to the relative accuracy of the calculations of these two acknowledged experts.

It may, nonetheless, be concluded that neither of the figures advanced by Professor Cole and Professor Roberts is particularly informative as to whether an individual is, or is not, over 18 years of age. Within any population, it appears that either 24%, or alternatively 12%, of the population would be incorrectly assessed as being an adult if reliance were placed solely on whether he had attained dental maturity. The difficulties inherent in relying on statistical evidence as evidence concerning a particular individual is examined in Appendix 5.

3.3 There is a wide normal variation in the age at which young people generally reach dental maturity

As with skeletal maturity, there appears to be a wide normal variation in the age at which young people generally reach dental maturity.

For example, the Australian Society of Forensic Odontology gave evidence that wisdom teeth can start developing 'from mid-teens to early 20s'.⁹⁰ This suggests a wide range of ages over which dental maturity is normally achieved. The Society goes on to state that '[p]recise determination of age is not possible due to human variation; an age range, with confidence intervals is the best expression of age estimation'.⁹¹

The Victorian Institute of Forensic Medicine confirms that:

biological variation in human development means that any assessment of age based on analysis of anatomical growth markers is only an estimate, and thus will contain a degree of error.⁹²

Similarly, The George Institute for Global Health states more generally that:

Caution should be exercised when using methods of biological age assessment (i.e. skeletal age, dental age or bio markers) to determine chronological age in adolescents. The range of biological ages within a chronological age group may exceed 2 years even with the most accurate of these methods.⁹³

3.4 Ethnicity, socio-economic status and nutrition may impact on the attainment of dental maturity

The Demirjian scale is based on a study sample of French-Canadian girls and boys. This raises the question of whether assessing the teeth of Indonesian boys against that age assessment scale might be subject to inherent error based on differing ethnicity, socio-economic status and nutrition.

There appears to be substantial scientific debate about the extent to which the development of wisdom teeth is affected by these factors. Some studies suggest that the variation in age estimates between different groups are quite significant and that population-specific standards would increase accuracy.⁹⁴ Others suggest that there are differences but they are insignificant.⁹⁵ Some studies suggest that third molar mineralisation is standard across population groups.⁹⁶ However, it appears that at least some of these studies focus on age groups younger or older than 18 years of age.⁹⁷ It is therefore not clear how directly applicable this research may be at the age of 18 years.

However, there seems to be a consensus among those experts who gave evidence to the Inquiry that there are differences between different population groups. Any controversy seems to concern the significance of the impact of those differences. For example, the Victorian Institute of Forensic Medicine suggested that ethnicity is not a big concern in the context of wisdom teeth, stating:

To the extent this has been researched, there appears to be some robustness in the development of the third molar between different populations.⁹⁸

Dr Hill stated:

There are subtle differences but they are of very little consequence to what we are doing in our age assessments.⁹⁹

Dr Knott also submitted that there may be variations between ethnic groups but said that there would need to be extreme medical problems for there to be a significant effect. His evidence was that:

Biological development will vary slightly between sexes, ethnic groups and an individual's overall health. ... Variation in chronological age assessment due to medical conditions are minimal. The individual would need to be suffering from a noticeable extreme medical problem to have any significant effect, eg: starvation, syndromal variations, severe Vitamin D deficiency, etc.¹⁰⁰

On the other hand, The George Institute for Global Health believes that variations in development on the basis of ethnicity could be quite substantial. Its submission stated:

A recent systematic review of third molar age estimation in various American population groups reinforced a requirement for the use of population specific studies when estimating age from dental x-rays. Within a number of noted American populations, varying rates of third molar development were seen. The review concluded that undoubtedly, additional and larger population specific studies are needed.¹⁰¹ (Citation omitted)

3.5 There is no evidence that a wrist x-ray plus a dental x-ray improves reliability in the assessment of age

Given the Australian Government's announced intention to specify both wrist and dental x-rays as prescribed procedures for the purposes of s 3ZQB of the Crimes Act, it is appropriate to consider whether there is any evidence that the accuracy of age assessments will be significantly enhanced by the taking of both wrist x-rays and dental x-rays.

The Commission is aware of some expert medical opinion that using a combined method of physical examination as well as wrist x-rays, dental x-rays and clavicle x-rays can increase diagnostic accuracy. However, the authors of the report in which this opinion is expressed state that:

For each examined feature, the report must indicate the most probable age and the range of scatter of the reference population. Furthermore, it should be noted that the range of tolerance may be increased by an empirical observer error. The age-relevant variations resulting from the application of the reference studies in an individual case such as deviating genetic/geographic origin, different socio-economic status, and with that a possible difference degree of acceleration, developmental disorders of the individual, have to be discussed in the report including their effect on the estimated age and, if possible, a quantitative assessment of any such effect should be given.¹⁰² (Citations omitted)

The Commission is not aware of any evidence which demonstrates that combining dental and wrist x-ray analyses leads to a more reliable indication of age than one or other of these analyses alone. Further, the radiation exposure involved in two x-ray procedures raises even greater ethical concerns than a single x-ray procedure.

4 The ethical implications of the use of x-ray analysis for the assessment of chronological age

The radiation exposure associated with x-rays gives rise to important ethical issues.

As noted in a recent publication regarding age assessment of individuals subject to immigration control in the United Kingdom:

In considering the ethics of radiography it is necessary to weigh up the actual or potential benefits of radiography with the potential damage that might be caused to a group of children and young people

who are potentially vulnerable as a consequence not only of their age but also their background and experiences.¹⁰³

There is no doubt that the amount of radiation exposure involved in wrist or dental x-rays is low. The Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) states that the radiation exposure associated with wrist and dental x-rays is minimal and that there is wide acceptance in the scientific community that the radiation dosage from a wrist x-ray poses negligible risks to a person's health. ARPANSA estimates that the radiation dose received from a single x-ray examination of the hand is approximately 0.01 millisievert (mSv), a dosage that the Joint Commonwealth submission notes is comparable to flying from Darwin to Singapore.¹⁰⁴ Further, the Australian Society of Forensic Odontology provides a table in its submission suggesting that a dental OPG exposes a patient to 0.02 mSv, which the submission shows is equivalent to three days background radiation. This exposure level is classed 'negligible' under the category of 'additional lifetime risk of fatal cancer from examination'.¹⁰⁵ Nonetheless, there is wide agreement that all deliberate exposures to radiation should be justified and subject to control.

The International Atomic Energy Agency (IAEA) publication, *Radiation Protection and Safety of Radiation Sources: International Basic Safety Standards – Interim Edition* (General Safety Requirements: Part 3) published in 2011 includes a number of general requirements for protection and safety. Requirement 10 is concerned with 'Justification of Practice'. The opening statement under this requirement is: 'The government or the regulatory body shall ensure that only justified practices are authorized'.¹⁰⁶ Paragraphs 3.16 and 3.18 of this publication, which form part of Requirement 10, state:

3.16 The government or the regulatory body, as appropriate, shall ensure that provision is made for the justification of any type of practice and for review of the justification, as necessary, and shall ensure that only justified practices are authorized. ...

3.18 Human imaging using radiation that is performed for occupational, legal or health insurance purposes, and is undertaken without reference to clinical indication, shall normally be deemed to be not justified. If, in exceptional circumstances, the government or the regulatory body decides that the justification of such human imaging for specific practices is to be considered, the requirements of paras 3.61–3.64 and 3.66 shall apply.

Paragraph 3.61 from this publication sets out the requirements of the justification process when radiation is to be used for a purpose other than for medical diagnosis or medical treatment or as part of a program of biomedical research. The paragraph calls for a justification process that includes the consideration of the benefits and detriments of implementing the type of human imaging procedure and the benefits and detriments of not implementing the type of human imaging procedure.

Further, in Australia, the Code of Practice adopted by ARPANSA requires medical practitioners to apply the As Low As Reasonably Achievable (ALARA) principle in any decision relating to radiographic imaging.¹⁰⁷

It is important to note that the ALARA principle requires that radiation be justified, regardless of the dosage of any radiological procedure. ARPANSA is clear that ‘the use of wrist and dental x-rays for age determination purposes must satisfy internationally accepted principles of radiation protection, in particular the principles of justification and optimisation’.¹⁰⁸

RANZCR gave the following evidence to the Inquiry:

One of the most important principles underpinning medical imaging is the ALARA Principle (As Low As Reasonabl[y] Achievable). This requires three factors to be met in the performance of imaging examinations, with a particular emphasis on those using ionising radiation – justification, optimisation and dose limitation. Justification requires any proposed imaging examination to yield a sufficient benefit to society to justify the risks incurred by the radiation exposure, and is based on the hypothesis that any radiation exposure, no matter how small, carries with it a certain level of risk. ...

Determining the risk of the level of radiation involved with a procedure must involve consideration of not just the amount of radiation involved, but also the clinical benefit of the procedure to the subject. If a procedure is without benefit and its application is not evidence based, any level of radiation exposure is considered unacceptable, no matter how ‘trivial’ the radiation dose may be considered.¹⁰⁹

The majority of medical experts who made submissions to the Inquiry argued that the use of x-ray analysis to assess age cannot be justified and therefore is unethical. For example, the joint submission of Australasian medical professional associations states that:

the accuracy of X-ray methods to determine age is not reliable and the benefit of their use is not proven; therefore such examinations are not consistent with the ALARA principle and cannot be justified.¹¹⁰

In his submission, Dr Christie goes further and submits that he:

deplore[s] the use of a non-validated and unproven x-ray technique that exposes these young people to radiation for administrative purposes, without any clear opportunity to improve their health or lives.¹¹¹

Importantly, ARPANSA advised the Commonwealth that:

Current international best practice would require that any use of ionising radiation for the purpose of dental or wrist X-rays for age determination must be subject to a formal process of justification, to demonstrate that there is a net benefit from the exposure.¹¹²

As discussed in Chapter 3, there is no evidence that such a formal justification process has been undertaken.

5 The use of other biomedical markers for the assessment of chronological age

The Commission is aware of a number of other processes that involve using biomedical markers for the assessment of chronological age, including physical examination, clavicle (collar bone) x-ray, magnetic resonance imaging, and ultrasound of the wrist or elbow. However, the Commission is not persuaded that any of these methods constitutes a more informative means of assessing age than the analysis of wrist x-rays.

5.1 Physical examinations suffer the same weaknesses as x-rays and raise serious ethical issues

Physical examinations require a medical practitioner – ideally a paediatrician – to assess height, weight, skin and visible signs of sexual maturity. The indicators of pubertal development in boys include penile and testicular development, pubic hair, axillary hair, beard growth and laryngeal prominence.¹¹³ These assessments would need to be compared to reference data to allow an approximate age to be calculated.¹¹⁴ Thus, while the examination would be external, it would involve the examination of genitalia.

The main advantage of this method is that it is relatively simple and does not require any radiation exposure. However, these are the only advantages of this method and they are outweighed by the disadvantages.

The disadvantages are, first, that these types of physical examinations suffer from the same inherent unreliability as x-rays and other biomarkers including:

- the wide variation in the rate of pubertal development between individuals within any given group
- the impact of ethnicity, socio-economic and nutritional background as well as illness
- the absence of current and culturally relevant reference sets.¹¹⁵

Dr Knott submitted that visual age assessment is patently unreliable.¹¹⁶ Courts in the United Kingdom have also urged great caution in relying on paediatric reports, particularly where they purport to pinpoint an exact age.¹¹⁷

Second, there has been considerable controversy in the United Kingdom over the appropriateness of including paediatric reports in official age assessment processes. In particular, there are concerns about the absence of rigorous protocols and the subjective nature of paediatric reports.¹¹⁸ One United Kingdom court decision held that a report from a paediatrician cannot

generally 'attract any greater weight than the observations of an experienced social worker'.¹¹⁹

Third, physical assessment of a person's genitalia raises ethical issues.¹²⁰ Ethically, it is questionable whether such intrusiveness is justified for administrative purposes.¹²¹

The Commission notes that the Australian Government has rejected physical assessment of genitalia as an age assessment technique. In June 2011, the then Attorney-General Robert McClelland advised the President of the Commission:

I do not consider paediatric examinations appropriate for the Commonwealth to utilise as part of the age determination process. This is because of the invasive nature of the procedure. The working group has investigated this procedure and reported that it involves examination of a person's genitals and is likely to cause significant distress, fear, embarrassment and discomfort.¹²²

5.2 Assessing age using an x-ray of the clavicle requires further research

Some scientists have recommended an examination of the 'ossification status of the medial epiphysis of the clavicle' to estimate the age of people who are assumed to be older than 18 'because all other developmental systems under examination have completed their growth by this time'.¹²³ Thus, this procedure may have some use for those individuals wishing to challenge an assessment of adulthood. The necessary examination would involve taking an x-ray or CT scan and there is some research suggesting that magnetic resonance imaging (MRI) or an ultrasound could be used in the future.¹²⁴ However, it appears that further research is required before this method can be relied upon for age assessment.¹²⁵

5.3 Assessing age using magnetic resonance imaging requires further research

The Commission understands that assessing age through MRI has potential for future use, but that a significant amount of research needs to be conducted. The George Institute for Global Health's submission to the Inquiry states:

The clinical use of MRI in the assessment of growth plate maturity is currently limited. There are some preliminary studies using MRI for the assessment of the extension of the growth plate; specific closure patterns of the normal physis around joints and physal arrest; however, at present none of these methods is widely used.¹²⁶ (Citations omitted)

The George Institute for Global Health reports that the method has been used in the context of age assessment for the purposes of international sporting competition, but concludes that there is no evidence to support the use of this technology for age determination of young people below 14 years and above 17 years and that more research into the methodology is required.¹²⁷

5.4 Assessing age using an ultrasound of wrist and elbow requires further research

The George Institute for Global Health has also suggested that there is some potential for using ultrasounds of the wrist and elbow as a tool for age determination.

The George Institute for Global Health lists the main advantages of ultrasounds as including: that it is a radiation-free imaging technique; it is relatively inexpensive and widely available; it can be easily applied using portable systems; and that patient compliance is generally good. They note that disadvantages include: there is likely to be higher inter- and intra-rater error; difficulties in standardising documentation and imaging transfer; and very little data is available regarding age determination from the ultrasound of a wrist. They thus conclude that further validation is needed before this technique is preferred over any other method.¹²⁸

Professor Aynsley-Green also highlights that, but for the radiation exposure, the weaknesses of wrist x-rays will carry over to ultrasounds of the wrist.¹²⁹

6 The use of multifactorial medical approaches for the assessment of chronological age

Most submissions to the Inquiry openly acknowledge that there is no single reliable scientific method for determining a person's age. However, some go on to suggest that a 'multifactorial' approach will provide more reliable assessments. A multifactorial approach involves employing a combination of medical age assessment processes.

Submissions from medical and forensic experts that supported a multifactorial approach included those from Associate Professor Daniel Franklin from the Centre for Forensic Science¹³⁰ and the Victorian Institute of Forensic Medicine.¹³¹ Associate Professor Franklin argues that there 'appears to be strong evidence showing that multifactorial techniques increase accuracy and help control for variation that may occur in any one single age indicator'.¹³² He also notes that '[t]here does not yet, however, appear to be any general consensus as to which methods should be combined, if they should be weighted, and how this can be achieved'.¹³³

The Joint Commonwealth submission states that the Commonwealth's July 2011 decision to adopt a combination of different age determination procedures was based on academic literature suggesting that multiple procedures would 'increase diagnostic accuracy'.¹³⁴ However, it is important to note that the studies cited in the Joint Commonwealth submission, and several of the other medical experts, openly acknowledge that they are *assuming* an improvement in the quality of results. They are quite clear that there is no way of quantifying those improvements. For

example, one publication cited in the Joint Commonwealth submission states:

for age diagnoses obtained with a combination of methods there is still no satisfactory way to scientifically determine the margin of error. ... If independent features are examined as part of an age diagnosis that combines several methods it may be assumed that the margin of error for the combined age diagnosis is smaller than that for each individual feature. However it has not yet been possible to quantify this reduction.¹³⁵

Similarly, the most recent study from the international interdisciplinary Study Group on Forensic Age Diagnostics (based in Germany), which has focused on the question of age assessments for criminal prosecutions, found that when age estimations from multiple sources are discussed critically in an individual case 'it can generally be assumed that the range of scatter is reduced. So far, however, this reduction could only be estimated'.¹³⁶

The Commission has heard criticism of a multifactorial approach on ethical grounds. The more procedures that an individual is subject to, the greater their radiation exposure. As Professor Aynsley-Green has observed, there is risk associated with administering any amount of radiation.¹³⁷ Further, there must be consideration of whether it is ethically justified to ask individuals to undertake more procedures when it has not been established that this will make a significant difference to obtaining an accurate assessment of chronological age.

The Commission is also concerned at the practicality and the cost involved in a multifactorial medical approach. For example, the Australian Society of Forensic Odontology has suggested that to achieve a more accurate age assessment from dental x-rays, a 'panel of specialists experienced in the interpretation of both the OPG and dental development' is required.¹³⁸ This recommendation was explored further with Dr Hill at the hearing in the following exchange:

Dr Anthony Hill: I am proposing that the investigation should be headed up by a dentist simply because we are focusing on the dentition, teeth, and that is our field of expertise. I believe we should have radiographers with us on a panel, we should have paediatricians with us on a panel, I believe we should have orthodontists on that panel, I believe we should have other experts within this field, so that you are not going to get a skewed or biased dental opinion. You will get an opinion across the board from various experts within this field.

Catherine Branson: Dr Hill from what you've said I think you're envisaging a panel of six or more expert medical practitioners or dental practitioners of one sort or another, is that right?

Dr Anthony Hill: Yes.

Catherine Branson: Have you turned your mind to what the cost to the public purse might be of using such a panel, with respect to every Indonesian national suspected of people smuggling who asserted that he was a child?

Dr Anthony Hill: We need to have one dentist, who is examining the client. We need one radiographer who will be taking one OPG. That OPG can be digitalised and can be sent around Australia. We do not need to convene a board of people; we do not need to convene anyone. This can all be done digitally and securely and that opinion can be sourced and can be arrived at within a matter of days, very simply. Then a report would be written by the forensic dentist, the forensic odontologist or whoever's heading this panel and can be again sent to a commission, sent to a court, sent electronically.

But the cost to the community – well the cost to the community quite frankly, if we get it wrong, is far outweighed by what it's going to cost us and what it's going to cost us to set up the taking of an X-ray. Every state and every capital and every area in Australia where these people are housed, imprisoned, has radiographic facilities. So it's not as though we are expecting extra funding to do this.¹³⁹

Finally, the Commission has heard robust criticism of this approach, with Professor Cole commenting that it is 'pie in the sky' to suggest that multiple assessment methods will provide better answers. He observed:

There's a belief that if you collect extra information you can come up with a more precise estimate of age. I mean the first thing to say is that this is optimistic because many of the measurements that you will be making will be correlated with each other so they'll all tend to give the same answer anyway, but the much more important point is that if you are going to combine information from lots of different directions then you have to operate to a very tightly developed and validated protocol so that you cut out personal bias in the way that individuals assess whatever particular marker they're going to assess.

So I would argue (a) you're not likely to improve precision by using a multidimensional assessment tool and the difficulty involved in setting it up, developing it and validating it would rule it out in practice in anyway. So I would say very bluntly that the idea that you can take lots of different measurements and come up with a better answer is pie in the sky.¹⁴⁰

It must be noted that if a conclusion is drawn that neither wrist nor dental x-ray analysis is sufficiently informative of chronological age to be of use in the context of criminal proceedings, then it is highly unlikely that in combination they will be appropriate as an age assessment method in this context. The Commission has seen no evidence that combining these procedures would lead to better results.

7 The use of a multi-disciplinary approach for the assessment of chronological age

Several submissions and some of the research papers in this area advocate for a 'multi-disciplinary' or 'holistic' approach to age assessment. While there is no consistent description of what this might mean, it appears that the proponents of this approach are suggesting a mix of medical and non-medical approaches to age assessment.

Chapter 2: Biomedical markers and the assessment of chronological age

As well as medical procedures, a holistic approach might include conducting focused age interviews such as those that are discussed in detail in Chapter 5 below.

A number of submissions to the Inquiry supported a 'holistic' approach, including Professor Aynsley-Green who recommends that:

Multi-professional assessment – a 'holistic' approach – involving a team of social workers, educationists, paediatricians and psychologists working in specialised Age Assessment Referral Units or within the existing structures for child protection would seem to be a pragmatic way forward in order to obtain a consensus decision on age.¹⁴¹

Several medical bodies also suggest a multi-disciplinary approach. RANZCR states that:

Whilst there is no single medical way to accurately determine an individual's age, the government should consider developing a process where age is assessed in a number of ways; this is often referred to as 'holistic' age assessment. This approach incorporates narrative accounts, physical assessment of puberty and growth, and cognitive, behavioural and emotional assessments.¹⁴²

The Royal Australasian College of Physicians submitted that it would be appropriate to investigate:

comprehensive assessments which may include psychological, cognitive, developmental and cultural factors, as well as comprehensive efforts to source accurate documentation of age where it exists.¹⁴³

The Australian Society of Forensic Odontology argued that, even in the context of medical evidence, there should be a multi-disciplinary medical team. It advised:

Current thinking would suggest that age estimation is best practiced as a multi-disciplinary specialty, in that practitioners engaged should be familiar with the theory and practice of forensic anthropology, forensic odontology, medical imaging, human growth and development, and anatomy. To obtain the most accurate age estimates, it is evident that practitioners from different disciplines need to work together and reports should be written following consultation from a panel of experts who have examined all relevant data. This would maximise the accuracy of age estimations.¹⁴⁴

International commentary on age assessment also supports a holistic approach. For example the Separated Children in Europe Programme's *Statement of Good Practice* states that:

The [age assessment] procedure should be multi-disciplinary and undertaken by independent professionals with appropriate expertise and familiarity with the child's ethnic and cultural background. They must balance physical, developmental, psychological, environmental and cultural factors.¹⁴⁵

However, while a broader approach to age assessment appears to be common sense, the Commission is not aware of any evidence that supports the view that a physical and psychosocial assessment will give any better result than either one of those methods alone. Individual

differences in physical and social maturity will remain, and both approaches are vulnerable to the subjective views of the assessor.

Further, it is possible that in a 'holistic' assessment that includes both medical and non-medical age assessment techniques, preference will still be given to the results of medically-based processes due to a perception that they are scientifically based.

For these reasons, if a 'holistic' age assessment process is conducted, it is critical that a wide margin of benefit of the doubt is afforded to the individual whose age is being assessed. The importance of affording the benefit of the doubt when conducting focused age interviews is discussed further in Chapter 5 below.

8 Findings

8.1 Findings regarding wrist x-ray analysis for the assessment of chronological age

The overwhelming weight of the evidence before this Inquiry is that, on average, males achieve skeletal maturity as shown by a wrist x-ray, before they reach the age of 18 years or, alternatively, at about the age of 18 years.

Dr Low's evidence that, on average, males achieve skeletal maturity of the wrist at 19 years of age is inconsistent with all other evidence on this issue before the Commission. It also appears to be inconsistent with the GP Atlas itself; the very tool on which Dr Low places reliance when giving opinion evidence as to age. This conclusion can be drawn from the authors' description of the method by which the standard plates were selected for inclusion in the GP Atlas and from the absence of data for the age of 18 years in Tables III and V of the GP Atlas. Dr Low's evidence in this regard cannot reasonably be accepted.

It may therefore be concluded that an expert assessment, made by reference to the GP Atlas, that a wrist x-ray shows a mature wrist is not informative for the purpose of establishing that the individual is over the age of 18 years. Having a mature wrist is quite consistent with a person being under the age of 18 years.

It does not follow from the above conclusion that an assessment that a wrist x-ray shows an immature wrist is not informative for the purpose of establishing that an individual is *under* the age of 18 years. As the above discussion makes plain, subject to the matters discussed below, an immature wrist is statistically consistent with a person being under the age of 18 years.

Even if the above conclusion concerning the age at which males on average achieve a mature

wrist is put to one side, problems remain in relying on a mature wrist x-ray as evidence that an individual is over the age of 18 years. The most significant of these problems arises from the extent of normal variation in the chronological age at which males generally achieve skeletal maturity. The extent of this normal variation is not less than two years. For this reason, expert opinion that a young man is an adult that is based upon analysis that he is skeletally mature, is of limited, if any, probative value. Even if it were the case, contrary to the strong weight of expert evidence, that on average young men achieve skeletal maturity at the age of 19 years, the range of normal variation would reach to at least the age of 17 years.

Another complexity is that it cannot be known whether the individuals suspected of people smuggling who say that they are children come from a population that has a different mean age of skeletal development than the study sample on which the GP Atlas is based. Should this be the case, the potential margin of error in age assessments based on the GP Atlas could be increased.

Additionally, it may be concluded that the potential for errors in the use of wrist x-rays as evidence of chronological age is real – particularly where the medical practitioner who interprets the wrist x-ray does not regularly involve himself or herself in a quality assurance program.

The above conclusions demonstrate that expert opinion evidence based on wrist x-ray analysis should not be accepted for the purpose of establishing that an individual is over the age of 18 years; evidence of this character is not probative of this issue. Consequently, wrist x-rays should not remain a 'prescribed procedure' for the purposes of s 3ZQB of the Crimes Act unless the purpose for which they, or evidence based on them, may be adduced in evidence is limited to establishing that a young person is under 18 years of age. That is, wrist x-rays should only be able to be relied on, where appropriate, as evidence tending to establish that an individual is under the age of 18 years.

8.2 Findings regarding dental x-ray analysis for the assessment of chronological age

Even if the current statistical analysis suggests that dental x-rays are more statistically reliable than wrist x-rays, it does not follow that dental x-rays should replace or supplement wrist x-rays for age assessment purposes in Australia. Nor, for the following reasons, does it follow that dental x-rays should become a prescribed age assessment procedure under the Crimes Act.

First, dental x-rays are not sufficiently informative of whether an individual is over 18 years of age for them to be relied upon as evidence of age in criminal proceedings.

Second, dental x-rays appear to share many of the inherent weaknesses of wrist x-rays as a means of assessing chronological age. In particular, the inescapable factor of substantial variation

in dental development between individuals means that dental x-rays are unlikely to provide reliable evidence of age in individual cases.

Third, there is no evidence to suggest that a wrist x-ray together with a dental x-ray will allow more reliable age assessment than either of those methods alone.

Finally, as shown in Chapter 3, giving wrist x-rays the status of a prescribed procedure under the Crimes Act for the purpose of age determination has resulted in their being seen as far more informative for this purpose than they really are. There is a real risk that the same result will follow if dental x-rays are given the equivalent status.

8.3 Findings regarding the ethical implications of the use of x-ray analysis for the assessment of chronological age

As the IAEA has made plain, human imaging using ionising radiation when undertaken for occupational, legal or health insurance purposes, and without reference to clinical indication, should normally be deemed to be not justified.

Even where human imaging of this character can otherwise be justified, it will only be ethically acceptable, according to principles accepted both internationally and in Australia, if the particular use is subject to a formal process of justification.

Given the above findings that wrist and dental x-ray analyses can provide limited, if any, reliable information concerning whether an individual has attained the age of 18 years, it is very difficult to see how their use for age assessment purposes could be justified.

8.4 Findings regarding the use of other biomedical markers, multifactorial medical approaches, and multi-disciplinary approaches to the assessment of chronological age

There are inherent problems with the use of all other biomedical markers of age of which the Commission is aware. Physical examinations are not appropriate for use because of the wide variation in pubertal development between individuals within any age group, and because they involve examination of a person's genitalia, an intrusive process that is not justified for administrative purposes.

The processes of assessing age through an x-ray of the clavicle, MRI, or through an ultrasound of the wrist or elbow all require further research before they can be appropriately used for age assessment purposes.

Although some submissions to the Inquiry indicate that a multifactorial medical approach might lead to a more accurate assessment of chronological age, there appears to be no consensus as to which methods should be combined or how they should be weighted.

Finally, while a multi-disciplinary approach to age assessment appears to be a common sense approach, and appears to have some support amongst both medical and non-medical authorities, the Commission is not aware of any evidence that a combined approach will provide a more accurate age assessment than either medical or non-medical approaches alone. Individual differences in physical and social maturity will remain, and both approaches are vulnerable to the subjective views of the assessor. There also remains a possibility that within a multi-disciplinary approach, greater weight will be given to medically-based processes. If a multi-disciplinary age assessment process is conducted, a wide margin of benefit of the doubt should be afforded to individuals whose age is being assessed.

¹ Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process*, para 2.15. At <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf> (viewed 9 July 2012).

² Australian Government, Joint submission, Submission 30, p 6.

³ *Migration Act 1958* (Cth), s 233C.

⁴ *Migration Act 1958* (Cth), s 236B.

⁵ *Migration Act 1958* (Cth), s 236B(2).

⁶ WW Greulich and SI Pyle, *Radiographic Atlas of Skeletal Development of Hand and Wrist* (2nd ed, 1959) (GP Atlas), p 27.

⁷ GP Atlas, above, preface.

⁸ Tanner and Whitehouse introduced a more complex process of wrist x-ray assessment in 1962 (TW2 method) in which every one of the 20 bones of the hand and wrist is scored against pictorial and written criteria from 2700 British lower and middle class children's x-rays. The data for this method were updated in 1995 and 2001 (TW3 method), so as to reflect the secular changes that have occurred in the speed of bone development in adolescence: JM Tanner, RH Whitehouse, WA Marshall, MJR Healy and H Goldstein, *Assessment of Skeletal Maturity and Prediction of Adult Height* (TW2 Method) (1st ed, 1975); JM Tanner, RH Whitehouse and N Cameron, *Assessment of Skeletal Maturity and Prediction of Adult Height* (TW3 Method) (3rd ed, 2001) (TW3 Method).

⁹ GP Atlas, note 6, p 28.

¹⁰ GP Atlas, above.

¹¹ GP Atlas, above, pp 15–18.

¹² GP Atlas, above, p 33.

¹³ GP Atlas, above, pp 31, 51.

¹⁴ GP Atlas, above, p 32.

¹⁵ GP Atlas, above, p 49.

- ¹⁶ GP Atlas, above, p 49.
- ¹⁷ GP Atlas, above, p 51.
- ¹⁸ GP Atlas, above, p 49.
- ¹⁹ GP Atlas, above, p 55.
- ²⁰ GP Atlas, above, p 55.
- ²¹ Tim J Cole PhD ScD FMedSci, Professor of Medical Statistics, MRC Centre of Epidemiology for Child Health, Institute of Child Health, University College London, UK. In 2006 the British Royal College of Paediatricians and Child Health bestowed on him the title of Honorary Fellow for research of growth assessment in paediatrics.
- ²² Professor Tim Cole, Submission 5, p 5.
- ²³ Professor Tim Cole, *Transcript of hearing*, Public hearing for key medical experts (9 March 2012), p 17.
- ²⁴ Australian Government, Joint submission, Submission 30, p 11.
- ²⁵ Dr Vincent Low, Submission 15, p 2.
- ²⁶ Dr Vincent Low, Submission 15, p 2.
- ²⁷ Dr James Christie, Submission 19, pp 4–5.
- ²⁸ Professor Tim Cole, Submission 5, p 1.
- ²⁹ Professor Tim Cole, Submission 5, p 4.
- ³⁰ TW3 Method, note 8.
- ³¹ Professor Tim Cole, Submission 5, p 7.
- ³² Professor Tim Cole, Submission 5, pp 8–9.
- ³³ Professor Tim Cole, Submission 5, p 9.
- ³⁴ Dr Ella Onikul, *Transcript of hearing*, Public hearing for key medical experts (9 March 2012), p 16.
- ³⁵ Dr James Christie, Submission 19.
- ³⁶ Professor Al Aynsley-Green, *Expert commentary on the age assessment of [WIL024] prepared for Fisher Dore Lawyers, Brisbane Australia*, June 2011 (WIL024 – CDPP document 066.0023) p 8.
- ³⁷ A Schmeling, W Reisinger, G Geserick and A Olze, 'Age Estimation of Unaccompanied Minors, Part I. General Considerations' (2006) 159S *Forensic Science International* S61, S62.
- ³⁸ GP Atlas, note 6, p 40.
- ³⁹ GP Atlas, above, p 44.
- ⁴⁰ For example, Dr Vincent Low, *Opinion regarding the use of skeletal age determination technique to estimate chronological age*, CDPP, May 2011 (OFD030 – CDPP document 293.0505) (Dr Low Opinion for CDPP).
- ⁴¹ Chief Scientist, Office of the Chief Scientist, Letter to Deputy Secretary, National Security & Criminal Justice Group, AGD, 11 January 2012.
- ⁴² Professor Tim Cole, Submission 5, p 8.
- ⁴³ Presidents of Australasian Paediatric Endocrinology Group, Paediatrics and Child Health Division – Australasian College of Physicians, Royal Australian and New Zealand Royal College of Radiologists, Australian and New Zealand Society for Paediatric Radiology, Australian Society for Adolescent Medicine, Paediatric Imaging Reference Group – RANZCR, Joint submission, Submission 9, pp 1–2.

- ⁴⁴ A Schmeling, H-J Kaatsch, B Marré, W Reisinger, T Riepert, S Ritz-Timme, FW Rösing, K Röttscher and G Geserick, *Study Group of Forensic Age Estimation of the German Association for Forensic Medicine: Guidelines for Age Estimation in Living Individuals in Criminal Proceedings* (2000) (Guidelines for Age Estimation), p 3.
- ⁴⁵ Hon R McClelland MP, Attorney-General, Correspondence to Dr A Cotterill, President, Australian Paediatric Endocrine Group, 18 October 2011 (AGD document CORRO-5), p 1.
- ⁴⁶ GP Atlas, note 6, preface, p xii.
- ⁴⁷ GP Atlas, above, p 40.
- ⁴⁸ GP Atlas, above, p 40.
- ⁴⁹ GP Atlas, above, p 40.
- ⁵⁰ GP Atlas, above, pp 42–43.
- ⁵¹ WW Greulich, 'A Comparison of the Physical Growth and Development of American-born and Native Japanese Children' (1957) 15(4) *American Journal of Physical Anthropology* 489.
- ⁵² Australian Government, Joint submission, Submission 30, p 12.
- ⁵³ A Schmeling, W Reisinger, D Loreck, K Vendura, W Markus and G Geserick, 'Effects of Ethnicity on Skeletal Maturation: Consequences for Forensic Age Estimations' (2000) 113 *International Journal of Legal Medicine* 253; RR van Rijn, MH Lequin, SG Robben, WC Hop and C van Kujik, 'Is the Greulich & Pyle Atlas Still Valid for Dutch Caucasian Children Today' (2001) 31 *Pediatric Radiology* 748, as cited in Senior Assistant Director, People Smuggling Branch, CDPP, *People Smuggling Prosecutions Age Determination Issues*, 15 December 2010 (CDPP document Attachment D document 4).
- ⁵⁴ Dr Low Opinion for CDPP, note 40.
- ⁵⁵ AM Zafar, N Nadeem, Y Husen and MN Ahmad, 'An Appraisal of Greulich-Pyle Atlas for Skeletal Age Assessment in Pakistan' (2010) 60(7) *Medical Association of Pakistan Journal* 552, 554.
- ⁵⁶ FK Ontell, M Ivanovic, DS Ablin and TW Barlow, 'Bone Age in Children of Diverse Ethnicity' (1996) 167 *American Journal of Roentgenology* 1395, 1398.
- ⁵⁷ K-H Chiang, AS-B Chou, P-S Yen, C-M Ling, C-C Lin, C-C Lee and P-Y Chang, 'The Reliability of Using Greulich-Pyle Method to Determine Children's Bone Age in Taiwan' (2005) 17(6) *Tzu Chi Medical Journal* 417; A Zhang, JW Sayre, L Vachon, BJ Liu and HK Huang, 'Racial Differences in Growth Patterns of Children Assessed on the Basis of Bone Age' (2009) 250(1) *Radiology* 228; B Büken, AA Safak, B Yazici, E Büken and AS Mayda, 'Is the Assessment of Bone Age by the Greulich–Pyle Method Reliable at Forensic Age Estimation for Turkish Children?' (2007) 173 *Forensic Science International* 146, as cited in Presidents of Australasian Paediatric Endocrinology Group, Paediatrics and Child Health Division – Australasian College of Physicians, Royal Australian and New Zealand Royal College of Radiologists, Australian and New Zealand Society for Paediatric Radiology, Australian Society for Adolescent Medicine, Paediatric Imaging Reference Group – RANZCR, Joint submission, Submission 9.
- ⁵⁸ BM Soegiharto, SJ Cunningham and DR Moles, 'Skeletal Maturation in Indonesian and White Children Assessed with Hand-Wrist and Cervical Vertebrae Methods' (2008) 134(2) *American Journal of Orthodontics and Dentofacial Orthopedics* 217.
- ⁵⁹ BM Soegiharto et al, above, 218.
- ⁶⁰ BM Soegiharto et al, above, 221.
- ⁶¹ Associate Professor Hofman, *Transcript of hearing*, Public hearing for key medical experts (9 March 2012), p 23.
- ⁶² Professor Tim Cole, *Transcript of hearing*, Public hearing for key medical experts (9 March 2012), p 24.

- ⁶³ GP Atlas, note 6, p 43.
- ⁶⁴ Presidents of Australasian Paediatric Endocrinology Group, Paediatrics and Child Health Division – Australasian College of Physicians, Royal Australian and New Zealand Royal College of Radiologists, Australian and New Zealand Society for Paediatric Radiology, Australian Society for Adolescent Medicine, Paediatric Imaging Reference Group – RANZCR, Joint submission, Submission 9, p 1.
- ⁶⁵ Guidelines for Age Estimation, note 44, p 4. As noted earlier, this is the publication on which the ‘improved process for age determination in people smuggling matters’ jointly announced by the then Attorney-General and the then Minister for Home Affairs and Justice on 8 July 2011 was purportedly based.
- ⁶⁶ As discussed in Chapter 4, section 5.
- ⁶⁷ Legal Aid Queensland, Submission 6, p 2.
- ⁶⁸ Victoria Legal Aid, Submission 13, p 13.
- ⁶⁹ Attorney-General and Minister for Home Affairs and Justice, ‘Improved process for age determination in people smuggling matters’ (Media release, 8 July 2011). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F906838%22> (viewed 9 July 2012).
- ⁷⁰ Consultation with agencies, Crimes Act Regulations – Prescribing dental and clival x-rays as additional age determination procedures, 15 November 2011 (AGD document IMP-18).
- ⁷¹ Australian Government, Joint submission, Submission 30, p 13.
- ⁷² Hon R McClelland MP, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 30 June 2011.
- ⁷³ See for example, Victorian Institute of Forensic Medicine, Submission 18; Australian Society of Forensic Odontology, Submission 4; Dental Age Assessment Team, King’s College London Dental Institute, Submission 7.
- ⁷⁴ See for example, Professor Tim Cole, Submission 5; Professor Al Aynsley-Green, Submission 38.
- ⁷⁵ Australian Society of Forensic Odontology, Submission 4, pp 3, 7; Dr Anthony Hill, *Transcript of hearing*, Public hearing for key medical experts (9 March 2012), pp 31–32.
- ⁷⁶ One study examining a variety of classification methods found Demirjian to be the most reliable. See A Olze, D Bilang, S Schmidt, K Werneke, G Geserick and A Schmeling, ‘Validation of Common Classification Systems for Assessing the Mineralization of Third Molars’ (2005) 119 *International Journal of Legal Medicine* 22.
- ⁷⁷ Dental Age Assessment Team, King’s College London Dental Institute, Submission 7.
- ⁷⁸ Australian Society of Forensic Odontology, Submission 4, p 7.
- ⁷⁹ Dr Anthony Hill, *Transcript of hearing*, Public hearing for key medical experts (9 March 2012), p 30.
- ⁸⁰ Dr Stephen Knott, Submission 17, p 5.
- ⁸¹ Dr Anthony Hill, *Transcript of hearing*, Public hearing for key medical experts (9 March 2012), p 33.
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- ⁸³ Professor Tim Cole, Submission 5, p 11.
- ⁸⁴ Professor Tim Cole, Submission 5, p 11.
- ⁸⁵ Professor Graham Roberts, Emails to the Australian Human Rights Commission, 5 March 2012 and 16 April 2012.

- ⁸⁶ Professor Graham Roberts, Emails to the Australian Human Rights Commission, 5 March 2012 and 16 April 2012; Professor Tim Cole, Email to the Australian Human Rights Commission, 7 March 2012; Professor Tim Cole, *Transcript of hearing*, Public hearing for key medical experts (9 March 2012), pp 34–37.
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- ⁹⁰ Australian Society of Forensic Odontology, Submission 4, p 7.
- ⁹¹ Australian Society of Forensic Odontology, Submission 4, p 11.
- ⁹² Victorian Institute of Forensic Medicine, Submission 18, p 1.
- ⁹³ The George Institute for Global Health, Submission 22, p 10.
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Chapter 3:

The Commonwealth's understanding of the usefulness of biomedical markers for age assessment purposes

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1 Introduction

This chapter considers the Commonwealth's approach to the use of biomedical markers to assess age since wrist x-rays became a prescribed procedure for the purpose of age determination following the enactment of the Crimes Amendment (Age Determination) Bill 2001 (Cth). It also considers what each relevant Commonwealth agency knew, or should have known, about the value of specific age assessment processes for the purpose of establishing whether an individual is under the age of 18 years.

This chapter takes a largely chronological approach. This is because it is necessary to establish what the Commonwealth knew about the effectiveness of these age assessment processes at particular times in order to draw conclusions about the conduct of investigations and prosecutions. Issues relevant to the use of focussed age assessment interviews and age enquiries in Indonesia are discussed in Chapter 5 and Chapter 6 respectively.

Accordingly, this chapter opens by identifying the age assessment processes that have been employed in Australia since 2001. It then considers:

- what the Commonwealth knew at various times about the extent to which analysis of wrist x-rays was informative for age assessment purposes
- what the Commonwealth knew at various times about the extent to which analysis of dental x-rays was informative for age assessment purposes
- issues related to the disclosure of material to the defence.

2 Age assessment processes that have been employed in Australia since 2001

Various age assessment processes have been used, or offered for use, during the investigation or prosecution of young Indonesians suspected of people smuggling offences whose age was in doubt.

The primary age assessment process that has been used since 2001 is expert analysis of a wrist x-ray. As noted above, in 2001 wrist x-rays were specified as a prescribed procedure for the purposes of s 3ZQA(2) of the *Crimes Act 1914* (Cth).¹ Documents provided to the Commission indicate that from late 2008, when boats carrying asylum seekers again began arriving in Australia, until July 2011, a wrist x-ray was taken in the majority of cases where the age of an individual suspected of people smuggling was in doubt. Thereafter, it appears that only one crew member has had a wrist x-ray taken.

Other age assessment processes that have been used, or offered for use, in Australia include dental x-rays, focused age assessment interviews, and the making of enquiries in the crew member's country of origin; that is, Indonesia.

The first age assessment process, other than wrist x-ray analysis, to be used in the period under consideration was a focused age assessment interview. In October 2010, the Department of Immigration and Citizenship (DIAC) sought for the first time to assess the age of individual members of a group of 27 Indonesian young people whose age was in doubt, by means of focused age assessment interviews. For the reasons discussed in Chapter 5, DIAC did not conduct any further interviews of this kind until late 2011. In November 2010, the Australian Federal Police (AFP) also conducted focused age assessment interviews with 12 individuals. These interviews are also discussed in Chapter 5.

On 8 July 2011, the Australian Government announced an 'improved age assessment process' which included the following measures in addition to wrist x-rays:

- the offer of dental x-rays as a supplementary procedure to wrist x-rays
- the offer of focused age assessment interviews conducted under caution by AFP officers
- the AFP taking steps as early as possible to seek birth certificates and other relevant information from Indonesia where the age of an individual suspected of people smuggling offences was contested.²

The 'improved process' was developed by a working group of Commonwealth agencies, chaired by the Attorney-General's Department (AGD). The working group was formed to consider concerns raised in a letter dated 17 February 2011 from the President of the Australian Human Rights Commission to the then Attorney-General.³ The correspondence between the Commission President and the Attorney-General regarding the Commonwealth's reliance on wrist x-rays is discussed further in section 3.6 below.

At the time of its announcement, the 'improved process' appeared to offer some positive change in processes whereby the ages of individuals suspected of people smuggling offences who said that they were children were assessed. However, the additional age assessment methods have not been widely used. Although dental x-rays were offered to some young Indonesians, none has been conducted.⁴ Following the announcement, the AFP assessed whether focused age assessment interview would provide any evidentiary or probative value, and based upon expert academic opinions, found that it was not possible to conduct these interviews due to the cultural, linguistic, geographical and religious diversity of suspects.⁵ No interviews of this kind have been conducted by the AFP since the July 2011 announcement, with questions about age instead being asked during AFP interviews conducted as part of the investigation process. Finally, there

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appear to have been significant impediments to obtaining documentary evidence of age from Indonesia.

In December 2011, a new process for assessing age was adopted which involves DIAC conducting an age assessment interview with any young person suspected of a people smuggling offence whose age was in doubt. DIAC now only refers those individuals to the AFP for investigation whom it concludes are over 18 years of age or who are suspected of being repeat offenders or of being involved in a serious incident. The young people whom DIAC does not refer to the AFP for investigation are returned to Indonesia.⁶

3 The Commonwealth's understanding of the usefulness of wrist x-ray analysis for age assessment purposes

This section provides a chronological appraisal of the Commonwealth's developing understanding since 2001 of the usefulness of wrist x-ray analysis as a means of age assessment.

As noted in Chapter 1, the Crimes Act was amended in 2001 to allow an investigating official, who suspects on reasonable grounds that a person may have committed a Commonwealth offence, to seek authority to carry out a 'prescribed procedure' where it is necessary to determine whether or not the person is, or was at the time of the alleged commission of the offence, under 18 years of age.⁷ The Crimes Act authorises the investigating official to arrange for the carrying out of a prescribed procedure in respect of the person only if that official obtains the required consents or if a magistrate orders the carrying out of the procedure.⁸ Currently, the *only* procedure prescribed for the purposes of this part of the Crimes Act is a 'radiograph ... of a hand and wrist of the person whose age is to be determined' (wrist x-ray).⁹

The amendments referred to above were enacted in response to a decision of the Northern Territory Supreme Court which found that the *Migration Act 1958* (Cth) did not provide statutory authority for the taking of a wrist x-ray for the purposes of age assessment.¹⁰

So far as the Commission is aware, the resulting provisions have only been relied on in the context of prosecutions for people smuggling offences. Since 2001, expert analysis of wrist x-rays obtained in reliance on these provisions has been the primary, and on occasions the only, evidence of age adduced in such prosecutions.

Concerns about the extent to which it is appropriate to rely on wrist x-ray analysis for age assessment purposes are not new. They were raised during the parliamentary processes surrounding the Crimes Amendment (Age Determination) Bill 2001 (Cth), including by the Senate Legal and Constitutional Legislation Committee during its inquiry into the Bill. They were also considered in a series of court and tribunal cases between 2000 and 2003. However, the

concerns did not resurface thereafter until 2010. This appears to be because between 2002 and late 2008 very few boats arrived in Australian waters carrying asylum seekers.

Boats started arriving again in late 2008, with a large increase in numbers towards the end of 2009 and in early 2010. Documents provided to the Commission indicate that during this period the first wrist x-ray of an individual suspected of a people smuggling offence was taken in September 2008. Wrist x-rays appear to have been routinely taken between September 2009 and July 2011 in cases where age was in doubt. During 2010 and 2011, as the number of investigations and prosecutions of individuals suspected of people smuggling whose age was in doubt rose, the question of the appropriateness of the use of wrist x-rays for age assessment purposes became increasingly important.

3.1 Concerns raised during the 2001 Senate inquiry

The Crimes Amendment (Age Determination) Bill 2001 (Cth) was introduced into the House of Representatives on 7 March 2001. The Bill was referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report. During this inquiry, the Senate Committee heard evidence that questioned the usefulness of wrist x-ray analysis for the purposes of age assessment.¹¹

The Senate Committee accepted this evidence, stating in its report that there is no real correlation between bone age and chronological age.¹² The Senate Committee also noted that reservations about the accuracy of x-rays as a means of assessing age were not reflected in the Bill or its accompanying Explanatory Memorandum.

The Senate inquiry process also revealed some important aspects of the way in which wrist x-ray evidence was intended to be used. The Senate Committee report noted that:

the AFP advised that it was prepared to treat all persons who were not clearly adults as if they were juvenile:

In the absence of any other age identification documentation or other means of doing it, anyone who tested up to 19 would be treated as juvenile, because the x-rays would indicate that they were below that point a juvenile.¹³

It appears, however, that no formal steps were taken to ensure that the AFP, in practice, treated all persons who were not clearly adults as if they were juvenile; that is, to give them the benefit of the doubt. A senior member of the AFP gave evidence to this current Inquiry in which he accepted that it is likely that no written direction or protocol was issued to Federal Agents to ensure that the AFP acted in this manner.¹⁴ The Commission accepts that the Crimes Act as amended did not contain a legal obligation to treat all persons who were not clearly adults as if they were juvenile.¹⁵ Nonetheless the Senate Committee noted the AFP's preparedness to act in

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this manner and it is apparent that the AFP has not done so in all cases. Some of these cases are discussed in Chapter 4.

Notwithstanding its reservations about the use of wrist x-rays for age assessment purposes, the Senate Committee formed the view that the Bill made provisions 'that may assist in clarifying the age of some persons suspected of, or charged with, Commonwealth offences'.¹⁶ It recommended that the Bill be amended to include a statement that 'all other appropriate age determination procedures will be undertaken before any prescribed procedure is undertaken'.¹⁷ It also recommended that the Explanatory Memorandum be changed to include a statement 'that persons whose age cannot be precisely determined will be given the benefit of the doubt and treated as juveniles'.¹⁸ Additionally, the Senate Committee recommended that 'information, including radiological studies, relevant to the age determination of young persons of various racial and cultural backgrounds ... be regularly sought and used in order to ensure that the prescribed procedures are of maximum use'.¹⁹

The Bill was not amended to include a statement to the effect that a prescribed procedure would be used as a measure of last resort. The reason for rejecting this recommendation was provided during debate of the Bill in the House of Representatives:

The first part of recommendation 6 would require investigators to exhaust all other avenues before determining a person's age under the bill. Of course, in practice all reasonable alternatives would be pursued before using the provisions under the bill.²⁰

Further, the Explanatory Memorandum was not changed as the Senate Committee recommended. However, some steps were taken to accommodate the Senate Committee's concerns. Both the Revised Explanatory Memorandum and the Second Reading Speech of the Special Minister of State in support of the Bill state:

In those instances where the age of a suspect or defendant cannot be accurately determined the current legal position will prevail. Unless the prosecution can discharge the burden of establishing on the balance of probabilities that a defendant is an adult, the defendant will be treated as a juvenile. This ensures that no injustice will occur if a defendant's age is still in doubt at the time of trial.²¹

The Revised Explanatory Memorandum further states that:

The Bill does not contain an express requirement to exhaust all other avenues before seeking a person's consent to, or magisterial authorisation for, a prescribed procedure. However, in practice, investigating officials will seek to determine a person's age by all reasonable means before exercising the powers contained in the Bill.²²

The AFP also accepts that no direction or protocol was put in place to ensure that Federal Agents would seek to determine a person's age by all reasonable means before exercising the powers in the Crimes Act. Further, the AFP accepts that in a number of cases, wrist x-rays were the

principal means by which it sought to determine age.²³ Some of these cases are discussed in Chapter 4. They support the conclusion that it was not unusual for the AFP to use wrist x-rays as both the first and the principal means of determining the age of an individual suspected of a people smuggling offence who said that he was a child.

The Senate Committee's recommendation that information relevant to the age determination of young persons of various racial and cultural backgrounds be regularly sought and used has apparently not been implemented.

In its response to the draft of this report, the AFP submitted that:

the provisions of the Crimes Act enacted following the Senate Committee's inquiry and the debate that considered that Committee's findings did not create a legal obligation on the AFP to exhaust all other avenues of enquiry in order to determine a suspect's age or to give a suspect the benefit of the doubt before seeking to rely on a prescribed age determination procedure.²⁴

The Commission accepts the accuracy of the above submission. However, it also notes the statement contained within the Explanatory Memorandum that in practice other enquiries would be undertaken before a wrist x-ray was conducted.

3.2 Concerns raised in cases decided between 2000 and 2003

Four cases decided in Australian courts between 2000 and 2003 can be seen to justify the concerns expressed by the Senate Committee and to foreshadow later debates about the extent to which wrist x-rays are informative of chronological age. One of these cases was decided before the Crimes Act was amended in 2001 and three were decided thereafter. Without underestimating the benefits of hindsight, it is legitimate to query whether the varying expert evidence given in these cases ought to have alerted the AFP and the Commonwealth Director of Public Prosecutions to the need to satisfy themselves that the expert evidence that they were placing before the courts was credible, and that it was apt to assist those courts to do justice according to law.²⁵

(a) *The Queen v Astar Udin and Sania Aman*

R v Udin is the first case of which the Commission is aware in which opinion evidence based on the Greulich and Pyle Atlas (GP Atlas) was given.²⁶ In this case, Dr Sven Thonnell, a radiologist, was called as an expert by the Commonwealth Director of Public Prosecutions, indicating that he, and presumably the AFP, accepted Dr Thonnell as a credible expert witness. After explaining the content of the GP Atlas, Dr Thonnell expressed the opinion with respect to young males generally that the growth plate of the forearm has almost totally fused at age 18 years and by the age of 19 years has certainly totally fused.²⁷

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Dr Thonnell went on to explain to the court why the table calculating the standard deviation for bone age in the GP Atlas only goes up to 17 years, stating:

after [17 years] it's very difficult to judge the age, as I say, because the bones are expected to have fused at the age of 18 so I suppose you could put it another year. They could have done that if they really wanted to, but the difference at that stage – the standard deviation of two-thirds of these patients is about 13 months either way, above and below 17 years, so that above that they would have fused and it really doesn't help at all in determining the chronological age or the skeletal age.²⁸

Dr Thonnell observed that:

It takes about 2 or 3 years for the bones to fuse after the age of 15 at least.²⁹

The Court accepted Dr Thonnell as an expert in the relevant field. The court noted the limitations of x-ray evidence for the purpose of ascertaining chronological age and ultimately found on the balance of probabilities that neither of the two defendants was over the age of 18 years at the time of his offence.³⁰

(b) *The Police v Henry Mazela*

Less than 17 months after Dr Thonnell gave evidence for the Commonwealth Director of Public Prosecutions in *R v Udin*, Dr Low, also a radiologist, was called by the Director to give expert evidence in the Children's Court of Western Australia in *The Police v Mazela*.³¹ O'Brien J noted that Dr Low's evidence was the only evidence that could possibly throw doubt on Mr Mazela's account of his age.

The evidence given by Dr Low in this case is at odds with Dr Thonnell's earlier evidence in a critical respect. Dr Low's report on Mr Mazela's wrist x-ray identified that the bones of his wrist had fused and went on to state:

According to the standard reference, Radiographic Atlas of Skeletal Development of the Hand and Wrist by Greulich and Pyle, second edition, this event occurs in the male at skeletal age 19 years. ... Mr Mazela had an estimated skeletal age of 19 years.³²

From her Honour's reasons for judgment, it appears that in his oral evidence Dr Low clarified that, in his opinion, the probability of a 19 year old male showing a mature wrist on x-ray was 50%.³³ He nonetheless described Mr Mazela as having the hand of a 19 year old.³⁴ O'Brien J noted this inconsistency and also drew attention to the unscientific way in which Dr Low had calculated a standard deviation for skeletal age at the age of 18 years. Her Honour additionally referred to the statement made by the authors of the GP Atlas that the method devised by them was intended merely to provide a useful estimate of skeletal age and that there was a tendency to attribute to it a greater degree of precision than is permitted by the nature of the changes it is intended to measure.³⁵

Ultimately, O'Brien J accepted the unchallenged evidence of the defendant as to his age notwithstanding the evidence given by Dr Low.³⁶

Somewhat surprisingly, this decision was appealed to the Full Court of the Supreme Court of Western Australia. It would seem that the wrist x-ray analysis in this case was seen by the Office of the CDPP to be determinative of Mr Mazela's age; that is, that the Office of the CDPP held an unwarranted belief that chronological age can be determined with some precision by analysis of a wrist x-ray.

The appeal was dismissed.³⁷

(c) The Queen v Herman Safrudin and Lukman Muhamad

In *R v Safrudin and Muhamad*, Riley J of the Supreme Court of the Northern Territory sentenced two individuals who had been convicted of people smuggling offences.³⁸ There was no agreement between the prosecution and the defence as to their ages and evidence on this issue was led from Dr Thonnell.

The sentencing remarks of Riley J record that:

It is not in dispute that, at a skeletal age of 19 years, skeletal growth and fusion are complete.³⁹

It may thus be assumed that Dr Thonnell, consistently with his earlier evidence in *R v Udin*, had given unchallenged evidence to this effect; that is, evidence directly at odds with the evidence given only two months earlier by Dr Low in *The Police v Mazela* that skeletal maturity is achieved on average at 19 years of age and that 50% of 19 year olds do not have hands with the skeletal maturity of a 19 year old (that is, hands in which the bones are totally fused).⁴⁰

After noting that chronological age may vary from skeletal age and that the degree of variation may depend on many factors, His Honour concluded that Herman Safrudin was a juvenile but that Lukman Muhamad was an adult.⁴¹

(d) Applicant VFAY v Minister for Immigration

The 2003 decision in *Applicant VFAY v Minister for Immigration*⁴² concerned the eligibility for a bridging visa of an applicant whose age was in dispute rather than an alleged people smuggling offence. It is therefore a case in which DIAC, but not the AFP or the Commonwealth Director of Public Prosecutions, may be assumed to have been involved. This case is of interest as two experts, described by the court as 'very experienced and highly qualified paediatric radiologists',⁴³ gave evidence about the validity of using bone x-rays as a means of determining age.

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The applicant's wrist x-ray showed a skeletally mature wrist. Dr John Radcliffe, who gave evidence on behalf of the applicant, stressed the variation in the rate of skeletal maturity within normal populations and drew attention to the standard deviations recorded in Tables III and V of the GP Atlas. He pointed out that it is commonly regarded that everything within two standard deviations is normal. He further observed that the authors of the GP Atlas did not consider the estimation of chronological age as a potential use of their data and that in science it is generally understood that to use data for purposes for which it was not collected can be fraught with hazards. Additionally, Dr Radcliffe referred to published studies that showed that certain populations matured earlier than the study sample of Greulich and Pyle. His conclusion was that there are fundamental flaws in trying to assess chronological age from an assessment of skeletal age.

Dr Frederick Jensen gave evidence on behalf of the respondent. He was also at pains to explain that the GP Atlas is not ordinarily used as a means of assessing chronological age. He had never been asked to do so before. However, after having his attention drawn to a paper entitled 'Effects of ethnicity on skeletal maturation: consequences for forensic estimations' by Schmeling et al, he was open to the view that the GP Atlas could be used for this purpose. He expressed agreement with the conclusions set out in the Schmeling paper, which include conclusions tending to minimise problems arising from ethnic difference. A significant feature of this paper, to which Dr Jensen drew attention, is that it suggests that age assessments should involve not only a wrist x-ray but also a physical inspection by a forensic pathologist and a dental assessment by a forensically experienced dentist.

The Federal Magistrate concluded that the applicant was under the age of 18 years.

It is not clear that this decision of the Federal Magistrates Court of Australia came to the immediate attention of the Office of the CDPP, the AFP or, indeed, AGD. Nonetheless, decisions of the Federal Magistrates Court are published electronically and can be readily identified by a researcher.

3.3 Commonwealth agencies' awareness of concerns in 2010

As explained above, the fact that prosecutions for people smuggling offences did not recommence until 2009 means that the appropriateness of the use of wrist x-ray analysis did not receive further consideration for some time. Documents provided to the Commission show that detailed discussion between Commonwealth agencies about these issues began in late 2010. It appears that this discussion was largely precipitated by DIAC's presenting its concerns to other Commonwealth agencies.

(a) *The Department of Immigration and Citizenship's approach to age assessment*

DIAC has not used wrist x-ray analysis for the purpose of assessing age in recent years. The reference to wrist x-rays as a means to assess age was removed from the DIAC Protection Visa Procedures Advice Manual in March 2010.⁴⁴

In early June 2010, DIAC began to consider options for assessing the age of asylum seekers where it held real doubt about the veracity of their claims to be under the age of 18 years. At this time, DIAC was giving the benefit of the doubt to any individual who claimed to be a minor unless there was evidence to contradict the claim. On 11 June 2010, a DIAC submission to the Minister for Immigration and Citizenship proposed a pilot program to assess whether approximately 50 'disputed minors' were over or under 18 years of age.⁴⁵ The submission recommended that DIAC assess age through focused age assessment interviews.

In the submission to the Minister, DIAC officers examined the use of wrist x-ray analysis for the purpose of determining chronological age in the context of refugee status determinations. The submission identified the controversy surrounding wrist x-ray analysis and recommended that DIAC use focused age assessment interviews as a means for assessing age. Specifically, the submission noted that:

- the GP Atlas does not take factors such as climate, ethnicity, health, nutrition and environment into account
- the results of wrist x-rays are not definitive and provide only a mean age estimation and an error range of at least two years either way
- the results of wrist x-rays are subjective and it is possible for two professionals to interpret the same data differently
- the GP Atlas was not designed for the purpose of age determination.⁴⁶

The submission also noted that there had been cases in which age determination on the basis of bone scans had been disputed in Australian courts. It identified that in at least two cases the court had given an individual the benefit of the doubt, finding on the balance of probabilities that he was under 18 years of age at the relevant time, notwithstanding expert evidence of a bone age of at least 18 years of age.

Finally, it observed that, while the policy and practice in relation to the use of bone scans varies across Europe, those jurisdictions that do use bone scans do not rely on them exclusively and take into account social and cultural factors in any assessment of age. It noted that the UK Government relies on *The Health of Refugee Children – Guidelines for Paediatricians*, published

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by the Royal College of Paediatrics and Child Health, to inform its policy on age determination for the purposes of refugee status determination.⁴⁷ The Guidelines state:

In practice, age determination is extremely difficult to do with certainty, and no single approach to this can be relied on. Moreover, for young people aged 15–18 it is even less possible to be certain about age. There may also be difficulties in determining whether a young person who might be as old as 23 could, in fact, be under the age of 18. Age determination is an inexact science and the margin of error can sometimes be as much as five years either side.... The issue of whether chronological age can be determined from the estimate of bone age has been discussed at great length in the literature. The answer is that it cannot.⁴⁸

Among the annexures to the submission was a summary of international practice. This summary noted that:

- In Switzerland, the use of wrist x-ray for age determination purposes was stopped in 2000. The Swiss Asylum Appeal Commission determined that bone age may be up to three years different from chronological age.
- In the UK, the Royal College of Paediatricians advise that wrist x-ray age determination testing can be incorrect by up to five years.
- In Austria, the use of wrist x-rays has been discontinued as it has been deemed unreliable.⁴⁹

(b) Concerns raised by DIAC with other Commonwealth agencies

In late 2010, DIAC officers made concentrated efforts to ensure that information questioning the appropriateness of using wrist x-ray analysis for age assessment purposes was provided to the other Commonwealth agencies with a role in the investigation and prosecution of people smuggling offences. Below is a brief chronology of these efforts.

On 3 September 2010, senior officials from DIAC, the AFP and the Office of the CDPP attended a meeting to discuss approaches to age determination. As a result of this conference, the Senior Assistant Director, People Smuggling Branch, Office of the CDPP was provided with the following documents:

- a summary of the cases *Applicant VFAY v Minister for Immigration* [2003] FMCA 289 and V0504672 [2007] MRTA 385
- an extract relating to puberty and age determination from a publication *Guidelines for Paediatricians* (UK)
- a copy of the publication *The Health of Refugee Children: Guidelines for Paediatricians* published by the Royal College of Paediatrics and Child Health (UK).⁵⁰

The Commonwealth Director of Public Prosecutions gave evidence to this Inquiry that in about September 2010 he was not aware of the publication *The Health of Refugee Children – Guidelines for Paediatricians*.⁵¹ He agreed that he would have been seriously troubled had he been aware at that time that it contained the statement extracted above.⁵²

The Director accepted that a reason why he would have been seriously troubled was that he was aware that the Office of the CDPP had been adducing evidence from Dr Low that suggested to the contrary.⁵³

The AFP accepts that DIAC officers provided its officers with the same documents as the Office of the CDPP following the meeting on 3 September 2010.⁵⁴

As a result of the 3 September 2010 meeting, the AFP became concerned that there were discrepancies in the expert evidence with respect to the process of determining age by reference to skeletal age.⁵⁵ On 5 October 2010, the AFP presented the results of its own research to DIAC. The AFP indicated that its likely preferred option for determining age would be a combination of the DIAC focused age interview and a wrist x-ray.⁵⁶ It is clear from the documents provided to the Commission that by this time the AFP was in possession of a substantial amount of information concerning international approaches to using x-rays to determine age.

On 14 October 2010, DIAC officers replied to the AFP expressing their continued concern about the way wrist x-rays were being used to determine age. DIAC officers drew attention to the strong views expressed by authoritative bodies in other jurisdictions about the margin of error associated with the assessment of wrist x-rays. DIAC officers also observed that ‘it is not clear to us that the margin of error is reflected in the wrist x-ray report presented to the court (where the claimed age and wrist x-ray age differ)’.⁵⁷ At that time, DIAC officers provided the AFP with a number of research reports about the reliability of wrist x-rays for assessing age, including the *UK Guidelines on Assessing Age* and a letter dated 23 May 2007 from the President of the Royal College of Radiologists to the UK Unaccompanied Asylum Seeking Children Reform Programme, that questioned how useful x-rays were to determine the age of unaccompanied asylum seeking children.⁵⁸ This letter states:

we are concerned about both the reliability of x-ray examinations for the accurate assessment of age and the clinical grounds for justification of these x-ray exposures.⁵⁹

On 26 October 2010, a meeting described as a ‘People Smuggling Brief Management Conference’ was held. Representatives of the Office of the CDPP, the AFP, DIAC and AGD attended the meeting, its focus being ‘the evidence which needed to be collected in people smuggling matters generally in order for them to be properly put before the court’.⁶⁰ A file note of the meeting, under the heading ‘Juveniles’, noted increasing levels of difficulties in using x-ray

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machines to determine bone density age readings. It further referred to cases where courts had expressed lack of credibility in analysis of individuals.⁶¹

DIAC officers also shared their concerns about the use of wrist x-rays to assess age directly with AGD officers. On 10 January 2011, a DIAC officer sent an email to an AGD officer attaching a number of academic and scientific journal articles relating to the use of wrist x-rays to determine age. One of those articles was *The Health of Refugee Children – Guidelines for Paediatricians*.⁶²

(c) Concerns held by medical service providers

Commonwealth agencies were aware at least by late 2010 of concerns held by some medical practitioners about the use of wrist x-ray analysis for the assessment of chronological age. This is revealed by the notes of the meeting held on 26 October 2010. By this time, the Commonwealth was also aware that some medical service providers, such as the Indian Ocean Territories Health Service which operated on Christmas Island, were refusing to take wrist x-rays for the purpose of determining age. In late November 2010, AGD, at the request of the AFP, made enquiries about why this was the case. In response to these enquiries, an officer from the Department of Regional Australia, Regional Development and Local Government, advised AGD that one of the three reasons the Indian Ocean Territories Health Service was refusing to carry out the procedure was, 'from a clinical point of view, they have advised that age determination using wrist x-rays is highly unreliable and they would be reluctant to unnecessarily expose individuals to radiation'.⁶³

(d) Analysis by the Office of the CDPP

In late 2010, the Senior Assistant Director of the People Smuggling Branch, Office of the CDPP produced a research paper entitled 'People Smuggling Prosecutions Age Determination Issues'.⁶⁴

On 8 November 2010, the Senior Assistant Director wrote to a DIAC officer requesting information about the methodology used by DIAC to assess age. In the subsequent email exchange, he stated that the position of the Office of the CDPP was to use all available information admissible in proof of the age determination issue and not to rely solely on wrist x-ray evidence. The Senior Assistant Director stated:

Further we are cognisant of the professional medical and scientific views backed by judicial and legal concepts that accept a multi discipline approach is likely to lead to a more accurate and safer result than any single method.⁶⁵

The Office of the CDPP's research paper discusses the age determination process and how the results of the wrist x-ray procedure are used in the criminal justice system. The paper describes

the course of events that ordinarily follows the taking of a wrist x-ray, including the preparation by a radiologist of a short report on the x-ray. The paper states:

Assuming the determination [by the radiologist] is that the suspected person is an adult, that is over the age of 18 years, and assuming that the AFP have sufficient evidence to initiate a prosecution, the AFP will proceed to charge the suspected person in an adult court, and if (as is normally the case) the suspected person is remanded in custody he will be remanded to an adult correctional services facility.⁶⁶

The paper makes no reference to the observation made by the Senate Legal and Constitutional Legislation Committee in 2001 that ‘the AFP advised that it was prepared to treat all persons who were not clearly adults as if they were juvenile’ and specifically that ‘anyone who tested up to 19 would be treated as a juvenile’.⁶⁷ It seems likely that the paper’s author did not know of this observation.

The paper goes on to state that the expert witness usually gives evidence drawing on the GP Atlas to the effect that ‘a standard deviation in development of skeletal maturity is 13.05 months and 15.4 months’.⁶⁸ The paper then sets out the table devised by Dr Low which purportedly shows the probabilities that a person showing skeletal maturity is in fact their stated chronological age. It does not appear that any medical or other experts apart from Dr Low were consulted in the preparation of this paper.

The research paper makes no reference to the fact that the Office of the CDPP had in the past called expert evidence that was inconsistent with the table of probabilities devised by Dr Low. However, a footnote recognises that although:

the most commonly used expert is Dr Vincent H S Low, there are other radiologists who have also given evidence in criminal proceedings including in Australia Dr Jensen, Dr Radcliffe, and Dr Thonnell.⁶⁹

It is clear from this footnote, and from a later express reference to the case, that the decision of the Federal Magistrates Court in *Applicant VFAY v The Minister for Immigration* had by this time come to the attention of the Office of the CDPP.

The research paper includes a discussion of the disclosure obligations of prosecuting authorities. It concludes that any DIAC focused age assessment interview report would need to be disclosed to the defence by the prosecution. The paper does not give consideration to the issue of whether material inconsistent with expert evidence forming part of the prosecution case also ought to be disclosed.

Under the heading ‘Borderline cases’, the Senior Assistant Director demonstrates his acceptance of Dr Low’s opinion that on average the fusion of the bones of the wrist commences at about

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the age of 18 years and concludes at about the age of 19 years. On this basis, he identifies the practice of the Office of the CDPP treating everyone whose wrist has not fused as a juvenile as a useful approach.⁷⁰

(e) *Questions raised in media commentary*

Media commentary suggesting that Indonesian minors were detained in adult correctional facilities in Australia, and questioning the use of wrist x-ray analysis for the purpose of assessing age, commenced in late 2010. On 11 November 2010, an article was published by *The Australian* newspaper which discussed the case of four Indonesian crew members held in adult prisons in Western Australia who had said that they were minors. The article questioned whether wrist x-rays were a reliable method of determining age, stating:

The Australian Federal Police relies on wrist X-rays to determine the skeletal maturity of the captured Indonesians, many of whom lie about their age to escape prosecution. But there is serious doubt about the reliability of the test, with one pediatric radiologist, David Christie, describing it as “amazingly inaccurate”. Dr Christie said wrist X-rays had an error margin of up to 26 months in boys aged 17 years old. “It’s a test, but it’s a relatively poor test,” he said.⁷¹

There has been sustained media interest in these issues throughout 2011 and into 2012.

(f) *Intervention by the Attorney-General's Department*

AGD is the lead policy agency on people smuggling crew issues.⁷² From documents provided to the Inquiry, it appears that AGD began taking an active role in issues related to age assessment of people smuggling crew from late 2010. In mid-November 2010, an officer of the Department of Prime Minister and Cabinet forwarded to an AGD officer a draft Question Time Brief (QTB) on the issue of ‘Child People Smugglers’. The preparation of the QTB was apparently precipitated by the report in *The Australian* mentioned above and a further report in the *Herald Sun* newspaper about adult asylum seekers claiming to be children. The QTB stressed that the ‘Government takes very seriously the prosecution of people smugglers’.⁷³

An AGD officer expressed concern that the QTB ‘appears to conflate in places age determination processes used in the criminal justice context and for immigration purposes’. He expressed particular concern about the following lines in the section of the QTB headed ‘Background’, and suggested that they be removed from the QTB.

DIAC has moved away from the use of wrist x-rays as the sole method to determine a client's likely age, because reliability of wrist x-rays to determine age has been questioned in an international context. The inherent margin of error with this process has caused much debate within the medical profession and more broadly in asylum seeker receiving countries.⁷⁴

The explanation for this suggestion offered at the time by the AGD officer was that:

As there are two age determination processes being used in separate contexts, and ongoing agency dialogue which (over time) will ensure each agency has access to relevant information about the other process result, it would be best to avoid references to individual agency views about the reliability of the test.⁷⁵

In giving evidence to this Inquiry, the officer acknowledged the accuracy of the statement that he suggested be removed from the QTB, but denied that his concern was to minimise potential criticism of reliance on wrist x-rays.⁷⁶ He acknowledged that he was aware that DIAC and the AFP took into account the results of each other's processes. This was, of course, not surprising as they were both concerned to ascertain the same thing; that is, whether a particular individual was under or over the age of 18 years. He said that he wanted to make it clear 'that there were two processes and the immigration processes are better off being referred to the Minister for Immigration and the law enforcement process to the Minister for Home Affairs'.⁷⁷ The suggestion, which continued to be made in documents prepared within AGD, that problems concerning the use of wrist x-rays for age assessments undertaken by DIAC did not affect their use by the AFP for age assessment purposes was disingenuous.

On 22 November 2010, AGD officers convened a meeting with DIAC officers to discuss the different approaches to age determination taken by the Commonwealth agencies and to ensure that public statements by one agency about the different processes 'should not cast doubt on the reliability of the processes undertaken by the other agency'.⁷⁸ DIAC explained the research that had been undertaken internationally into the reliability of wrist x-rays for assessing age in the refugee context. As noted above, DIAC agreed to provide to AGD copies of the scientific papers on age assessment that they had previously given to the Office of the CDPP.

Again an AGD officer sought to draw a distinction between age assessment by DIAC and age assessment for the purposes of the criminal justice system. According to a DIAC officer's report of the meeting, the AGD officer expressed the view that the different approaches to age assessment taken by DIAC and the AFP were justified by the different purpose for which the assessment was made, observing:

DIAC's processes are used to assess whether a person is a minor or an adult for the purposes of identifying appropriate placement in administrative detention (for which a less scientific, more flexible approach giving the benefit of the doubt is appropriate), while the AFP's purpose is to decide whether to prosecute the person for a criminal offence, and if so, whether to incarcerate them in a children's or adult's criminal prison.⁷⁹

Were it the case that an AGD officer implied that the benefit of the doubt is of less importance in the criminal justice context than in the context of administrative detention this would be a cause

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for concern. However, as the above statement is drawn from a report by DIAC, not by AGD itself, it may be that it did not accurately record what was said by the AGD officer.

In early January 2011, a Ministers' Office Brief (MOB) was prepared by AGD for the Office of the Attorney-General / Minister for Home Affairs titled *People smuggling – children in gaols*. The MOB referred to three separate articles that had been published in *The Australian* newspaper which questioned reliance on wrist x-rays as evidence of age. The MOB opens with the following points:

- The Australian Government takes the prosecution of people smuggling matters seriously.
- Law enforcement authorities investigate all persons suspected of being involved in people smuggling, including minors.
- Where there is doubt about whether a person arriving in Australia as an irregular maritime arrival is aged over or under 18 years of age, and the person is suspected of committing a Commonwealth offence, the Australian Federal Police conducts an age determination process in accordance with the *Crimes Act 1914*.
- This involves a wrist X-ray conducted by an independent medical expert who then interprets that X-ray to determine the age of the person.⁸⁰

The MOB inaccurately states that, to that date the Commonwealth had not proceeded with a people smuggling prosecution where the court has determined a defendant to be a minor.⁸¹ It further states that the age determination process used by the AFP 'requires a wrist x-ray to be undertaken on all persons who claim to be a minor'.⁸² The AFP acknowledged at the Inquiry hearing for Commonwealth agencies that 'requires' is too strong a word in this context and that it was made very plain when the Crimes Act was amended in 2001 that a wrist x-ray would not be required, but would rather be an option of last resort.⁸³

The MOB further states that 'Australian courts have accepted the accuracy of the X-ray test in age determination proceedings' and '[a]ny issue about the accuracy of evidence is a matter for assessment by the courts'.⁸⁴ The First Assistant Secretary, Criminal Justice Division of AGD gave evidence at the Inquiry hearing that the first of these statements was intended to convey 'that courts have not uniformly found problems with the X-ray test' and that 'if we meant to convey that it had been uniformly accepted, we would say in every case'.⁸⁵ It is clear that the statement contained in the MOB is likely to convey to a reader that Australian courts generally had found the wrist x-ray test to be accurate. It is concerning that an AGD officer would include in a MOB a statement with such potential to mislead.

The second of the above statements also had a tendency to mislead. It overlooks the reality of the way in which trials are conducted under our common law system. This issue is considered in more detail in section 5.1 below. It may be assumed that an officer in the Criminal Justice Division

of AGD would be aware that a common law court is dependent on the parties, and particularly the prosecutor as the representative of the State, to assist it in determining the extent to which expert evidence is credible and informative. He or she may also be assumed to be aware that a common law court is entitled to assume that the State will not call evidence from a witness who is not credible.

3.4 Commonwealth agencies' awareness of concerns in 2011

As the above discussion reveals, between late 2010 and early 2011, the Commonwealth became aware of an increasing amount of information that raised serious questions about the appropriateness of reliance on wrist x-ray analysis for the purposes of assessing whether an individual was under the age of 18 years. Nonetheless, until late 2011, the Commonwealth continued to rely on wrist x-ray evidence in the prosecution of Indonesian young people whose age was in dispute.

(a) Questions raised within the Office of the CDPP

Documents provided to the Inquiry indicate that serious questions about the reliance on wrist x-ray analysis as evidence of age were raised within the Office of the CDPP in early 2011. For example, a memorandum dated 13 April 2011 from the Senior Assistant Director of the Melbourne Office of the CDPP to the Senior Assistant Director of the Head Office of the CDPP, outlines concerns with the approach to age determination then being adopted and with the evidence being given by Dr Low about age.⁸⁶

The author of the memorandum noted that the Office of the CDPP was operating in 'an environment where the information we have available to us is incomplete, and the science that is available to assist us, is imperfect'.⁸⁷ In a footnote, she recorded that in 'a recent Darwin case the wrist bones were fused, indicating that the accused was an adult, but in that matter, a genuine birth certificate was obtained, thereby proving the accused to be a juvenile'.⁸⁸ She noted that, together with a colleague, she had real concerns over the different way in which conclusions are being expressed by the experts, and the periodic reference to 18.5 years. The memorandum queried whether there is anything that the experts can really say beyond:

- observing that the bones are either fused or not fused as at the time of the x-ray and, where they are fused, noting that the only relevant observation that might be made is that there is a 50% chance that the person is under 19 and a 50% chance that they are over 19
- advising of a probability that the person is under 18 – calculated as a mathematical exercise which commences with a standard figure of 22% and adding 2% per month for any delay between the date of the alleged offence and the date on which the x-ray was taken

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- advising a probability, based on the GP Atlas, that the person is the age they claim to be.⁸⁹

The author of the memorandum concludes that these concerns might give rise to broader implications and questioned:

Does the AFP (together with the DPP) need to meet urgently with Dr Low to clarify with him that there is a 50/50 likelihood of someone with fused wrist bones being over/under 19. If this is the case, then the line that has been drawn with the AFP arresting persons who are over 19, and deporting those who are under 19 may well be illusory, as the likelihood of either is simply the same.⁹⁰ (underlining in original)

(b) Further information requested from Dr Low by the Office of the CDPP

In early 2011, defence lawyers began to present the Commonwealth with expert reports that challenged the use of wrist x-ray analysis for the purpose of assessing age. In one matter, where a defence report was received in February 2011, the response of the Office of the CDPP was to request Dr Low to respond. Dr Low was, as has already been noted, the medical practitioner who ordinarily appeared as an expert witness for the CDPP in age determination hearings. He did so, and is reported to have advised that 'although the wrist x-ray technology is not an exact science, he disagrees with the tenor of the defence report which rubbishes the technology'.⁹¹

In May 2011, the Office of the CDPP sought to satisfy itself that it was appropriate to continue to use wrist x-ray analysis as evidence of age. By this time, Dr Low's opinion had been indirectly questioned by the memorandum prepared by the Senior Assistant Director of the Melbourne Office of the CDPP. Nonetheless, the Office of the CDPP asked Dr Low to prepare a report regarding the reliability of the practice. Not surprisingly, Dr Low confirmed the validity of the approach being adopted by him.⁹²

In light of the controversial nature of the evidence being given by Dr Low, his apparent lack of specialist expertise in statistics⁹³ and the view expressed by some other similarly qualified medical practitioners that chronological age cannot reliably be assessed by reference to a wrist x-ray, it would have been appropriate for the Office of the CDPP to have sought independent verification of the validity of Dr Low's approach.

(c) Expert medical opinion presented to the Commonwealth by defence counsel

In mid-2011, further defence lawyers presented the Commonwealth with expert reports that challenged the use of wrist x-ray analysis for the purpose of assessing age. On 28 June 2011, a barrister made submissions to the Acting Deputy Director of the Brisbane Office of the CDPP to the effect that it was not likely that the court would find his client was over the age of 18 years at the time of the alleged offence and in the absence of aggravating factors the prosecution

should be discontinued.⁹⁴ The barrister noted that the defendant's assertion that he was under 18 years of age at the time of the offence was supported by his statements to DIAC, a focused age interview assessment report completed by DIAC, an extract of his birth certificate and affidavits from his mother and uncle attesting to his age. The Commonwealth's only evidence of age was the wrist x-ray report from Dr Low.

In his letter, the barrister submitted that Dr Low's conclusions on chronological age were unsustainable. He argued that the methods Dr Low used and the figures he relied on to draw statistical conclusions about age were imprecise and unclear. He also noted a number of internal inconsistencies in Dr Low's reports. For example, the barrister wrote:

Firstly the report states that in males, skeletal maturity of the hand is reached "at approximately 19 years of age". Next, the report states that, "on average", skeletal maturity is reached at 19 years of age. Dr Low then states that "it [therefore] is a reasonable interpretation that [the defendant] is 19 years of age *or older*" [my emphasis]. This first 20 April 2011 report does not reconcile the competing assertions that skeletal maturity is reached "at approximately 19 years of age" and "on average" at 19 years of age. Nor does Dr Low explain how either fact might mean that [the defendant] should be considered to be "19 years of age *or older*".⁹⁵

The barrister attached to his letter two expert reports on age assessment; one prepared by Professor Sir Al Aynsley-Green and another by Professor Tim Cole. The substance of these expert reports is discussed in detail in Chapter 2.

On 30 June 2011, the Commonwealth Director of Public Prosecutions personally signed a minute approving a recommendation that the prosecution against three defendants be discontinued on the grounds that, on the balance of probabilities, they were juveniles.⁹⁶ The prosecution was discontinued on 1 July 2011.

At about this time, the Office of the CDPP was also aware that some medical practitioners were unwilling to provide an expert opinion as to chronological age based on the GP Atlas. On 8 July 2011, a senior legal officer of the Perth Office of the CDPP wrote an email to a colleague noting that the doctor who had written the initial x-ray report in the matter was not available to give evidence at that individual's age determination hearing. He was unavailable because of 'patient commitments' and had also:

expressed his reluctance to give evidence as he has reservations about the use of G&P to determine age (he says you can't tell how old someone is from it).⁹⁷

This email, and specifically the observation of the medical practitioner that the GP Atlas could not be used to determine age, was apparently not brought to the attention of the Director prior to the Inquiry hearing for Commonwealth agencies in April 2012.⁹⁸ Nor did a senior officer of the Office of the CDPP who had particular responsibility for people smuggling prosecutions have any

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recollection of that view being expressed by that particular medical practitioner at the time the email was written.⁹⁹

On 11 August 2011, another defence lawyer wrote to the Office of the CDPP arguing that the prosecution of his client should be discontinued. The defence lawyer submitted that Dr Low's analysis of the wrist x-ray should not be admitted as it was incapable of supporting a finding that the accused person was over 18 years of age at the time of the alleged offence.¹⁰⁰ Attached to those submissions were:

- a report by radiologist Dr James Christie concluding that there is no scientific basis for using the GP Atlas as it had been used by Dr Low and that its use in that manner is unreliable
- a paper by Professor Cole, stating that Dr Low's use of the GP Atlas to estimate chronological age was inappropriate and his conclusions wrong
- several scientific journal articles discussing the use of wrist x-rays to determine age.

(d) Impact of the evidence presented to the Commonwealth by defence counsel

Shortly after this time, the submissions made by defence lawyers regarding the use of wrist x-ray analysis for age assessment purposes identified above were discussed by the Commonwealth agencies with an interest in these issues. On 12 August 2011, at a regular meeting of the four relevant Commonwealth agencies involved in people smuggling issues, the Office of the CDPP noted that:

Comprehensive submissions were being prepared by defence lawyers questioning wrist X-rays, and that it is necessary to revisit issues associated with the evidentiary strength of X-rays.¹⁰¹

At the Inquiry hearing, the Senior Assistant Director of the Head Office of the CDPP reported that, in response to this information, prosecutors from the Office of the CDPP, and in one case an independent counsel, held conferences with Dr Low and were satisfied with the explanations that he gave them.¹⁰² Again, no independent advice about whether it was appropriate for the Office of the CDPP to continue to place reliance on Dr Low's evidence was sought. It appears that the Office of the CDPP maintained its confidence that Dr Low was an appropriate expert witness for the CDPP to call in legal proceedings.

Indeed, on 16 August 2011, the Office of the CDPP sent a letter to a defence counsel in which, in response to a question asked by her, it advised that the Office of the CDPP was 'not aware of any matters in which Dr Vincent Low's expert evidence had been discredited'.¹⁰³ While this response

may have been technically true, it was hardly frank; by this time the Office of the CDPP was acutely aware of challenges to the credibility of Dr Low's evidence.

On 18 August 2011, a memorandum from the Senior Assistant Director of the Head Office of the CDPP setting out some of the issues surrounding expert evidence concerning chronological age was sent to the Commonwealth Director of Public Prosecutions. The purpose of the memorandum was to recommend to the Director that the prosecution against a particular individual be discontinued on the basis that he was a juvenile. The memorandum drew to the Director's attention the 'considerable debate about the use of wrist x-rays for the purposes of determining age' and referred to a report by Dr Christie.¹⁰⁴ The memorandum sets out Dr Low's standard evidence and explained that Professor Cole had argued that Dr Low's statistical analysis was wrong. The memorandum stated:

I do note however that Dr Low's evidence has been tested and accepted in a significant number of contested cases. I assume that Dr Low is aware of the matters that have been raised in Dr Christie's report, noting in particular that Dr Christie gave evidence in the matter of *R v [PEN059]* at which Dr Low's evidence was accepted. While we should be aware that the issues on which Dr Low is giving evidence are not without debate, I think that it is appropriate for this Office to continue relying upon Dr Low's evidence as an accepted expert in his field.

I am not aware of the weight to be given to the opinions expressed in the articles that have been provided to this Office. That is something that only an expert in the field would have the training and experience to determine. At present the expert that we have has determined that on the basis of his experience and learning the opinions he holds are correct.

I do think however the Commonwealth should take steps to seek advice from further experts in the relevant fields.¹⁰⁵

The Director approved the recommendation to discontinue the prosecution in the particular case. His handwritten note makes no reference to the expression of opinion that the Commonwealth should take steps to seek advice from further experts; nor is reference made in either the memorandum or the Director's note to the prosecutor's duty of disclosure.

At the meeting of Commonwealth agencies on people smuggling crew issues held on 2 September 2011, the Office of the CDPP reported that concerns relating to the efficacy of wrist x-rays had 'been lessened' after reviewing documents submitted by defence lawyers and after cross examination of Dr Low in age determination hearings. The Office of the CDPP further reported that it was in the process of locating an alternative expert – that is, other than Dr Low – on age determination. It advised that the benefit of the doubt was being applied consistently in age determination cases.¹⁰⁶ The issue of whether the benefit of the doubt was in fact being applied in age determination cases is discussed in Chapter 4.

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On 25 October 2011, the District Court of Western Australia delivered judgment in *R v Daud*, rejecting Dr Low's evidence where it was in conflict with the evidence of other experts.¹⁰⁷ This judgment is considered in more detail below. In response to this decision, the Office of the CDPP started a search for experts, both medical statisticians and radiographers, who could comment on the reports being prepared by Dr Low.¹⁰⁸

Between 16 November 2011 and 6 December 2011, officers from the AFP and the Office of the CDPP discussed the interpretation of wrist x-ray analysis for the purpose of assessing age with a number of statisticians.¹⁰⁹ On 12 December 2011, the Office of the CDPP advised the AFP to postpone making further enquiries with statisticians.¹¹⁰ An email from the AFP to the Office of the CDPP confirmed that enquiries would be suspended. It stated:

My understanding is that in relation to identifying and contacting statisticians, you advised that you needed to assess whether [Professor] was the correct person to approach and there were concerns over the disclosure issue of material provided by statisticians on Dr Lowes (sic) reports. I agreed not to undertake any further enquiries with identified persons until we [have] heard back from your office. ... Appreciated if you could advise when DPP are happy for AFP to progress, then we will move forward with approaching statisticians and providing relevant material if they can assist.¹¹¹

The Office of the CDPP subsequently advised the AFP that further enquiries with experts should be postponed in light of both the Australian Human Rights Commission's Inquiry and the increased role of DIAC in assessing age under the Government's new policy in relation to people smuggling crew members whose ages are in doubt.¹¹²

(e) Correspondence from medical professional associations to the Minister for Immigration and Citizenship

Approximately two months before the Office of the CDPP started to look for experts who could comment on the reports being prepared by Dr Low, representatives of a number of professional medical bodies wrote to the Minister for Immigration and Citizenship requesting urgent reconsideration of the use of wrist x-rays as a means of determining age. The joint letter, dated 19 August 2011, was signed by the Presidents of the Australasian Paediatric Endocrine Group; the Royal Australian and New Zealand College of Radiologists (RANZCR); the Australian and New Zealand Society for Paediatric Radiology; the Division of Paediatrics, Royal Australasian College of Physicians; and the Convenor of the Paediatric Imaging Reference Group, RANZCR.

The letter expressed disappointment that representatives of the signatories' professional organisations were not invited to contribute to the 'recent discussions you organised to determine the appropriate means of assessment of age of refugees attempting to gain entry to Australia and the people who are accused of providing the means of entry for the refugees'.¹¹³ While the

signatories misunderstood the context in which the Attorney-General had established the working group to examine age assessment processes, the letter goes on to describe the use of x-rays as:

unreliable and untrustworthy when used as criminal evidence in a Court of Law and unethical when used by medical practitioners in situations when their use is for administrative purposes.¹¹⁴

The letter also states:

We consider that x-rays of teeth and wrists to assess skeletal maturity should be used only when a therapeutic relationship has been established between the doctor and patient. We consider it is unethical to expose a young person to x-rays for purely administrative reasons. X-rays of teeth and wrists should not be used as evidence in a court of law because the age assessments obtained by these means are very inaccurate.¹¹⁵

The letter drew to the Minister's attention the fact that the GP Atlas method of age assessment was unreliable and not validated for the purpose of assessing the chronological age of an individual by reference to their skeletal age.

Although addressed to the Minister for Immigration and Citizenship, the letter was quickly drawn to the attention of others. It was received by AGD officers on 25 August 2011.¹¹⁶ Officers of the CDPP acknowledged that they received a copy of the letter around August 2011. It is not clear when the AFP first saw the letter.¹¹⁷

The then Attorney-General replied to the letter from the medical experts on 18 October 2011. His response was drafted by officers in the Criminal Justice Division of AGD.¹¹⁸

The then Attorney-General's letter referred to his Department's having recently led a working group comprised of the AFP, the Office of the CDPP and DIAC to examine what steps could be taken to ensure that courts have the best available evidence before them when assessing age. It advised that the working group had considered a number of age determination methods and recommended the approach outlined in the *Guidelines for Age Estimation in Living Individuals in Criminal Proceedings* developed by the Study Group of Forensic Age Estimation of the German Association for Forensic Medicine.¹¹⁹ The letter pointed out that the Guidelines recommend a wrist x-ray, dental x-ray and paediatric examination, but that the working group concluded that paediatric examinations would not be appropriate and that the AFP was examining the use of focused age interviews to supplement the x-ray procedures. The letter did not refer to the fact that the Guidelines were some years old, having been adopted in September 2000; nor did it refer to other critical features of the Guidelines which are discussed in Chapter 2. It is at least possible that the then Attorney-General was not himself advised of these features of the Guidelines, or of later publications which reached different conclusions to the Guidelines.¹²⁰

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The letter went on to state:

Based on expert advice the Commonwealth has sought, the wrist X-ray procedure can only determine whether a person is 19 years or older as male wrist skeletal maturation occurs from that age. The CDPP only relies on the analysis of a wrist X-ray where the expert radiologist has concluded that the defendant is probably 19 years or older. The CDPP provides the defendant's legal representatives with copies of the expert radiologist's reports, which includes the information concerning the accuracy of the procedure.¹²¹

The 'expert advice' referred to must be assumed to have been derived from Dr Low's reports. The continued reliance by the Commonwealth, as late as October 2011, on the content of these reports is difficult to understand – particularly having regard to judicial decisions such as *The Queen v [TRA029]* in which Dr Christie's evidence was accepted and serious problems were identified with the approach adopted by Dr Low.¹²² Moreover, it is surprising that the then Attorney-General should have been provided with a letter for signature which placed reliance on the opinion of Dr Low when faced with an expression of divergent opinion shared by the President of Dr Low's own professional college and senior representatives of other professional associations of medical practitioners with relevant expertise.

The then Attorney-General's letter of response dismissed the ethical concerns raised by the professional medical bodies by referring to his understanding, based on advice, that the risks associated with both wrist and dental x-rays are minimal. The letter closed by advising that the then Attorney-General would be happy to receive advice on 'alternative methods of age determination that should be considered for use in the criminal justice context'.¹²³

(f) *Expert evidence presented in legal proceedings*

In the second half of 2011, expert evidence challenging the use of wrist x-ray analysis as evidence of chronological age began to be presented in legal proceedings.

As noted above, on 8 September 2011, following an age determination hearing, the judgment of the Magistrates Court of Western Australia in *The Queen v [TRA029]* was handed down. The court was not satisfied on the balance of probabilities that TRA029 was 18 years of age or older at the relevant date.¹²⁴

In this case, the Commonwealth had called Dr Low to give expert opinion evidence on the likelihood of TRA029 being over the age of 18 years. The defence had called Dr Christie who challenged Dr Low's statistical calculations. The magistrate preferred Dr Christie's evidence to that of Dr Low. She noted that it was not possible to equate the legal burden of proof on the balance of probabilities with mathematical probabilities of the kind calculated by Dr Low and referred to a standard text on the law of evidence.¹²⁵ This issue is further examined in Appendix 5.

Additionally, the magistrate accepted the essence of Dr Christie's evidence which questioned the appropriateness of using the GP Atlas to assess chronological age.¹²⁶

On 23 September 2011, a Senior Assistant Director at the Brisbane Office of the CDPP sent a minute to the Director. The minute discusses the result of the age determination hearing in *R v [TRA029]*. The minute states:

I am of the opinion that this decision now casts significant doubt on whether Dr Low's evidence will be accepted as reliable on this issue in the absence of any additional evidence to support the prosecution contention that the defendant is 18 or over. This becomes an even greater issue when the defendant adduces evidence such as a birth certificate, baptismal certificate or affidavit from a family member.¹²⁷

R v [TRA029] was promptly followed by two cases in the District Court of Western Australia, *R v Daud* and *R v RMA*. In each of these cases, Dr Low's evidence regarding wrist x-ray analysis was criticised and the judge preferred the evidence of defence expert witnesses who challenged Dr Low's opinion.

On 25 October 2011, Bowden DCJ handed down the decision of *R v Daud*.¹²⁸ His Honour considered in some detail the utility of the GP Atlas for determining chronological age, as well as the evidence given by both Dr Low (and two other radiologists) on the one hand, and Professor Cole and Dr Christie on the other. His Honour ultimately rejected the evidence of age adduced by the prosecution, giving the following reasons:

The more experienced practitioner in the area of paediatric radiology is Dr Christie and where his evidence conflicts with Dr Low's, I prefer Dr Christie[s] evidence based on his experience and expertise.

Professor Cole is a professor of medical statistics at University College with qualifications in statistics from Oxford and Cambridge Universities and on the editorial boards of journals such as the *British Medical Journal and Statistics in Medicine* and has authored many publications. He is clearly an expert paediatrician and statistician. I accept his criticism of Dr Low's analysis of the Atlas and where his evidence conflicts with that of Dr Low I prefer Professor Cole's evidence based on his experience and expertise.¹²⁹

His Honour continued:

I am not prepared to accept the findings of Dr Low's reports relating to the statistical probabilities of the accused being of the chronological age he reports for two reasons.

Firstly, because I accept the evidence of Professor Cole and Dr Christie, that there is an absence of scientific data to validate the use of the standard deviation provided by the Atlas for an immature skeleton to assess the chronological age of a person possessing a mature skeleton.

Secondly because Drs Low, Lee and Chan's basic assumption that skeletal maturity is achieved on average at age 19 is not supported by the Atlas. I accept Professor Cole and Dr Christie's evidence that there is other research which shows that the skeletal maturity is achieved at the age of 18 or before.¹³⁰

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His Honour also accepted:

- that whilst a male aged 19 will on average show skeletal maturity, that does not equate with saying the average age of obtaining skeletal maturity is 19
- the mean age of skeletal maturity for males based on information in TW3 [another atlas] is 17.6 years with a standard deviation of 16 months.¹³¹

In *R v RMA*, the only evidence of chronological age before the court was a wrist x-ray and the expert evidence based on it.¹³² In a decision handed down on 11 November 2011, Eaton DCJ stated:

I accept Dr Christie's criticism that, firstly, the method employed by Dr Low is flawed and, secondly, that any well-founded attempt to estimate chronological age would include a range of investigations not just reference to the atlas. In my view, the method employed by Dr Low and the assumptions upon which it is based render his opinion unreliable.¹³³

On 15 November 2011, a Senior Assistant Director in the Office of the CDPP distributed an internal email discussing the cases of *R v RMA* and *R v Daud*. The email set out a number of steps to be taken in age determination matters in light of 'the developing position' in age determination matters.¹³⁴ The email stated:

Given our current level of information it is apparent that we should not be running any matters [where] the sole probative evidence showing that a defendant was over the age of 18 at the time of the offending is the analysis of the wrist x-ray. Even accepting Dr Low's evidence, which has not been followed in two District Court decision[s], there is a not insignificant probability that the defendant may be below the age of 18. We therefore should only be contesting these matters in circumstances where there is some other probative evidence to support the position that the defendant was an adult at the time of offending. ...

If we have any matters still before the Courts where the person has been found to be an adult or appears to have admitted that they were an adult at the time of the offending, solely on the basis of the analysis of the wrist x-ray, we need to identify and undertake a review of those cases. If it is apparent that the defendant is still contesting their age or there may be a doubt about their age we should consider raising the issue of bail with the defendant's representatives and explore the age issue afresh.¹³⁵

The impact of the decisions in *R v Daud* and *R v RMA* can be seen in the Joint Commonwealth submission provided by AGD, the CDPP and the AFP to the Inquiry which states that:

the use of x-rays for age determination purposes is not conclusive and this is recognised by the AFP, CDPP [and] the court. ... Assessments by courts have informed the CDPP's consideration of these matters and the CDPP will only contest people smuggling matters where age is in issue where there is probative evidence other than the analysis of the wrist x-ray evidence to support the position that the defendant was an adult at the time of the offending.¹³⁶

(g) Potentially misleading material prepared by the Commonwealth throughout 2011

On 30 June 2011, AGD coordinated the drafting of a single set of talking points on age determination to be used by all Commonwealth agencies. As initially drafted by an AGD officer, the talking points included the following two points:

- to date, the Commonwealth has not proceeded with a prosecution where an individual has been found to be a minor
- Australian courts have accepted the accuracy of the wrist X-ray in age determination proceedings.¹³⁷

DIAC requested that these points be deleted but indicated that it could accept the second point if amended as follows:

- Australian courts have accepted the *results* of the wrist x-ray in *some* age determination proceedings.¹³⁸

AGD accepted the amendments proposed by DIAC on the basis that the following talking point would be amended by deleting the words 'to determine the likely age of clients':

- DIAC will continue to use a range of methods to determine the most likely age of clients to assure the most appropriate placement and care arrangements for clients.¹³⁹

Documents before the Commission show that the first of the two points mentioned above remained in similar form and the second in its original form in Question Time Brief talking points as late as 22 November 2011; a time after the decisions in both *R v Daud* and *R v RMA* had been handed down.¹⁴⁰

As noted above, on 8 July 2011, the Government announced a new process for age determination in people smuggling matters.¹⁴¹ At about the same time, a document headed 'Questions and Answers – Age Determination' was prepared within the Criminal Justice Division of AGD – presumably to assist the Attorney-General to respond to questions about the new process.¹⁴² The opening points of the document are listed under the heading 'What is the current process for age determination? What is the sequence of events for someone who is claiming to be a minor?'. They include:

- the current age determination process requires a wrist x-ray to be done on all individuals suspected of people smuggling who claim to be a minor

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- this method of age determination was put in place in 2002 and has been successful before Australian courts.¹⁴³

The accuracy of the assertion that the Crimes Act requires a wrist x-ray to be done on all individuals suspected of people smuggling who claim to be a minor is discussed in Chapter 4. The accuracy of the suggestion that the method of age determination put in place in 2002 following the amendment of the Crimes Act had been successful before Australian courts is discussed in section 3.3(f) above.

Under the heading 'What about people who have found [sic] to be adults under the old age determination procedures? Will their cases be reopened? Will the AFP retrospectively apply the new measures to Indonesians already charged where age was disputed? [What will be happening to people who are currently held in adult jails and claim to be children e.g. case in WA? Will these cases be re-examined under new process?]', the document twice includes the following point:

- While it would not be appropriate for me to comment on individual cases, the Government remains confident that at all times the AFP and CDPP have put all available information before the court to assist in determining a person's age in criminal justice proceedings. In each case, the court has made its own assessment of the person's age.¹⁴⁴

Evidence given to this Inquiry by the First Assistant Secretary of the Criminal Justice Division of AGD made clear that AGD did not make enquiries as to the extent of disclosure of scientific materials by the Office of the CDPP or the AFP to defence counsel. It also revealed that AGD had not ever received more than some 'general assurances that what was being put to the court ... covered both Dr Low's views but also the limitations of the approach that was being pursued'.¹⁴⁵ The First Assistant Secretary, together with another AGD officer from the Criminal Justice Division, additionally gave evidence that the Attorney-General was at no time provided with even a précis of the scientific literature identified by AGD, DIAC, the AFP and the Office of the CDPP which concerned the use of x-rays for age assessment purposes.¹⁴⁶

It is concerning that as late as 22 November 2011, and following the decisions in both *R v Daud* and *R v RMA*, an updated QTB on people smuggling crew and age determination prepared within the Criminal Justice Division of AGD and provided to the Offices of the Attorney-General and the Minister for Home Affairs and Justice, repeated the assertions that 'Australian courts have accepted the accuracy of the wrist X-ray in age determination proceedings' and '[i]n each case, the court has made its own assessment of the person's age'.¹⁴⁷

However, the Commission accepts, as the Acting Secretary of AGD advised by his letter of 6 July 2012, that Question Time Briefs and Ministers' Office Briefs provide points which are 'tailored to provide a concise summary of the issue for the purpose of the Government responding to questions during the Parliament or from the media, and were not intended to constitute

comprehensive advice to ministers on these issues'. The Commission does not question the accuracy of the advice of the Acting Secretary that 'these documents make up only a small part of the full advice provided by the Department to the Government on people smuggling [crew] issues'.¹⁴⁸

(h) Opinion of Australia's Chief Scientist

On 11 January 2012, the Deputy Secretary of the National Security and Criminal Justice Group of AGD received a written brief of advice from Australia's Chief Scientist on scientific methods used for determining chronological age in the absence of relevant documentary evidence.¹⁴⁹ The brief noted that it is estimated that more than 60% of births in South East Asia remain unregistered. It advised that skeletal maturity is currently the most accurate indication of chronological age and that dental maturity is another common method to estimate chronological age. In the context of limitations concerning wrist x-rays, the brief advised:

Radiological based determination of skeletal maturity does not allow for a precise determination of chronological age. Outcomes of radiographic assessments of bones vary with ethnicity and socio-economic conditions (nutritional and disease status). There is observed variation in skeletal maturity of 2 years within each gender. Further, there are ethical concerns on exposing healthy children and adolescents to even a relatively low dose of ionising radiation for the purpose of age determination. (citations omitted)

In the context of limitations concerning dental age assessment, the brief advised:

Several studies based on different populations, including an Australian study, have reported that there are wide variations in chronological age corresponding to the different stages of dental development. The development of teeth depends on multiple factors that include the environment, nutrition, ethnicity and race.¹⁵⁰ (citations omitted)

It is appropriate to note that although the Joint Commonwealth submission provided to the Commission on behalf of AGD, the AFP and the CDPP asserted that the submission had been prepared following consultation with a number of departments and agencies, including the Office of the Chief Scientist, it makes no reference to the above advice.

3.5 The Commonwealth's failure to heed advice concerning ethical considerations

As discussed in Chapter 2, standards issued by both the International Atomic Energy Agency and by the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) require that the use of radiation for any specific purpose is subject to the internationally accepted principles of justification and optimisation. It is clear from the documents provided to the Commission that the

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Commonwealth has been advised of these requirements but it does not appear that action has been taken to ensure that they are met.

Concerns about exposure to radiation for the purposes of age assessment were raised with the Commonwealth in the letter of 19 August 2011 from the Presidents or Convenors of a number of professional medical bodies discussed above in section 3.4(e).¹⁵¹

However, the earliest document seen by the Commission in which the Commonwealth received explicit advice on the ethical considerations of exposing young people to radiation for age assessment purposes is a letter dated 7 September 2011 from the Parliamentary Secretary for Health and Ageing. This letter, which responded to a specific request concerning dental x-rays, advised the Minister for Home Affairs and Justice that:

Typically, the dose from a dental X-ray or an X-ray of the wrist is not likely to cause any adverse health effects. However, internationally accepted principles of radiation protection include the principles of justification and optimisation which require that any exposure must, overall, do more good than harm and be the least dose needed to achieve the necessary goal. These principles would need to be adequately addressed in the proposed regulations.¹⁵²

The only other recent engagement AGD appears to have had with ARPANSA concerned the content of the Joint Commonwealth submission of AGD, the AFP and the Office of the CDPD to this Inquiry.¹⁵³ The Joint Commonwealth submission includes the following paragraph:

ARPANSA has also advised that the use of wrist and dental X-rays for age determination purposes satisfy internationally accepted principles of radiation protection. This includes the principles of justification and optimisation which require that any exposure must do more good than harm overall, and be the least dose of radiation needed to achieve the necessary goal.¹⁵⁴

The above paragraph is wrong to the extent that it suggests that ARPANSA's advice was that the use of wrist and dental x-rays for age assessment purposes met internationally accepted principles of radiation protection. Following the publication of the Joint Commonwealth submission, ARPANSA provided a corrected version of the paragraph that documents their advice. As corrected the paragraph reads:

ARPANSA has also advised that the use of wrist and dental X-rays for age determination purposes must satisfy internationally accepted principles of radiation protection, in particular the principles of justification and optimisation. Current international best practice would require that any use of ionising radiation for the purpose of dental or wrist X-rays for age determination must be subject to a formal process of justification, to demonstrate that there is a net benefit from the exposure. Any such radiation exposure should be optimised to ensure the least dose of radiation needed to achieve the necessary goal is used.¹⁵⁵

To the Commission's knowledge, no formal process of justification or optimisation has been undertaken with respect to the use of either wrist or dental x-rays for age assessment purposes.

3.6 The Commonwealth's response to the concerns raised by the Australian Human Rights Commission

On 17 February 2011, the President of the Australian Human Rights Commission wrote to the then Attorney-General to draw to his attention issues of concern that had come to her attention regarding the processes being used for determining the ages of Indonesian nationals who may face charges of people smuggling. Her letter referred to medical evidence that the wrist x-ray procedure was significantly unreliable as a measure of age. It further drew attention to the 2001 recommendations of the Senate Legal and Constitutional Legislation Committee that wrist x-rays should, in effect, be a procedure of last resort and that the benefit of the doubt should be given to any person whose age cannot be accurately determined. Additionally, after referring to the possibility that DIAC was assessing age by a method other than wrist x-rays, the President stated:

Should the Commonwealth be in possession of evidence, whether obtained by this or any other method, which is inconsistent with any wrist x-ray evidence obtained by it, it seems to me that it would be under an obligation to disclose this evidence to the individual concerned or his legal representative. I have reason to suspect that this may not be occurring.¹⁵⁶

The then Attorney-General replied to the President on 31 March 2011. He expressed satisfaction with the age determination procedures being used by the AFP and the conduct of the Commonwealth in age determination hearings. As noted above, it appears that the Attorney-General was not provided by his department at this time, or indeed at any time, with comprehensive advice about the available scientific literature concerning the use of wrist x-rays for age assessment purposes.¹⁵⁷ It appears that the advice provided to him did not go beyond advising him that there were 'differing views' on the reliability of wrist x-rays for this purpose.¹⁵⁸

The Attorney-General's letter, while expressing respect for the view of those such as the Royal College of Paediatric and Child Health who objected to wrist x-rays on ethical grounds, noted the importance to the integrity of the criminal justice system that the court be presented with the best available evidence of a person's age. The then Attorney-General indicated that he had asked his Department to lead a working group with the AFP, the Office of the CDPP and DIAC to consider what steps could be taken to ensure that age determination procedures provide the best evidence for a court to determine the age of people smuggling crew who claim to be minors.¹⁵⁹

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Additionally, by his letter of 31 March 2011, the then Attorney-General advised that records of DIAC interviews would be included in the prosecution disclosure process and that State and Territory corrective services, and other bodies responsible for detaining alleged people smugglers, would be provided with all relevant material relating to their age.

On 30 June 2011, the then Attorney-General wrote again to the President of the Commission to inform her 'about changes to the age determination process for criminal justice purposes that will ensure the courts are provided the best evidence to determine the age of people smuggling crew who claim to be minors'.¹⁶⁰ The letter advised that the key initiatives recommended by the working group earlier established by him were: offering dental x-rays to supplement wrist x-rays; reforms to AFP's consent forms for wrist x-rays; offering focused age interviews by the AFP; and a commitment to more expeditiously obtain relevant documentary evidence from Indonesia. The then Attorney-General further proposed that 'the benefit of the doubt principle be applied more proactively where a person is claiming to be a minor'.¹⁶¹

Somewhat surprisingly, in this letter the then Attorney-General asserted that 'Parliament has accepted that wrist X-rays are currently the only suitable method of determining age for criminal justice purposes, and Australian courts have not criticised the wrist X-ray procedure in a criminal justice context'.¹⁶² This statement is inconsistent with the Report of the Senate Committee on, and the Explanatory Memorandum for, the Crimes Amendment (Age Determination) Bill 2001 (Cth)¹⁶³ and it also overlooks the decision, upheld on appeal, of the Children's Court of Western Australia in *The Police v Mazela*.¹⁶⁴ Further, it appears carefully crafted to avoid reference to the civil case of *Applicant VFAY v Minister for Immigration*¹⁶⁵ which directly considered the reliability of evidence of age based on a wrist x-ray and found that it was not conclusive.

On 8 July 2011, the then Attorney-General and the then Minister for Home Affairs and Justice issued a media release which announced 'a stronger process to help determine the age of individuals detained in Australia suspected of people smuggling'. The elements of the 'improved process' were said to be that the AFP would:

- offer dental x-rays to alleged people smuggling crew claiming to be minors, in addition to the existing process, commencing as soon as possible
- take steps as early as possible to seek information from the individual's country of origin, including birth certificates, where age is contested
- use additional interview techniques to help determine age.¹⁶⁶

On 14 July 2011, the President responded to the then Attorney-General's letter of 8 July 2011 expressing her continuing concern with aspects of the age determination process. She urged consideration of the involvement of an independent body to eliminate the potential for prejudicial

bias and to demonstrate that the best interest of the child had been a primary consideration. She additionally expressed concern at the reliance on radiographic procedures, drawing attention to the significant body of scientific and medical opinion that questioned their reliability and their ethical basis. Finally, she urged the immediate consideration, by an independent person or body, of whether a proper and reliable assessment of age had been conducted for any Indonesian national claiming to be a minor who had been charged but not yet tried, or who had been convicted as an adult. She sought a response by 5 August 2011.¹⁶⁷

On 22 August 2011, the then Attorney-General replied to the President's letter dated 14 July 2011. The then Attorney-General wrote that he was not convinced of the need for independent review of all age determination matters involving Indonesian nationals, explaining:

I hold this view because the court considers all available evidence, is fully aware of the limitations of X-rays and the crew have independent legal representation. Further, by giving the benefit of the doubt in cases involving age, in particular from verified documentation relating to age, AFP and CDPP only proceed with cases with the highest probability that the person is an adult, and where information gathered consistently indicates that this is the case.¹⁶⁸

At the Inquiry hearing for Commonwealth agencies, the First Assistant Secretary of the Criminal Justice Division of AGD gave evidence that this letter was drafted within his area of the department.¹⁶⁹ He agreed that the above extract from the letter was written on the basis of advice provided by the AFP and the Office of the CDPP, although he said that the advice was probably not provided specifically for the purpose of the response to the President's letter. He indicated that the extract reflected his understanding having chaired the working group and having had regular interactions with the agencies concerned.¹⁷⁰ It is plain that AGD did not seek to ensure that the then Attorney-General received advice that assessed, independently of the AFP and the Office of the CDPP, the extent to which individuals suspected of people smuggling offences whose age was in dispute had received fair hearings.

Notwithstanding the expression of view extracted above, the then Attorney-General in his letter of response asked the President to inform his department of any specific matters about which she held concerns.¹⁷¹ The First Assistant Secretary of the Criminal Justice Division of AGD accepted that this reflected the fact that he was not personally persuaded of the need for a comprehensive review of past cases but accepted that it might be appropriate to look at a particular case identified by the President.¹⁷² He indicated a general awareness at the time that reports challenging Dr Low's evidence were being put into evidence and that there were cases where that evidence was being preferred. The First Assistant Secretary concluded that this was evidence that the judicial process was working, as people were able to dispute wrist x-rays.¹⁷³ He agreed that he did not make any enquiries of the Office of the CDPP or the AFP about the extent of disclosure of scientific materials in earlier cases.¹⁷⁴ He also agreed that, as at the date of this letter, the then Attorney-General had not been provided with even a précis of the scientific

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material which questioned the usefulness of wrist x-rays for age determination purposes.¹⁷⁵ Indeed, his evidence was that neither Attorney-General McClelland nor Attorney-General Roxon has ever been provided with such a précis.¹⁷⁶

The President responded to the invitation to identify specific cases of concern by advising the then Attorney-General, by letter dated 26 September 2011, that she would be forwarding details of 11 individuals to his department. Ten notifications were provided to AGD on 28 September and two further notifications were provided on 11 October 2011 and 8 November 2011 respectively.

By a letter dated 8 November 2011, the President expressed concern about the delay in her receiving a response to the notifications. She drew attention to the then recent Western Australian decision in *R v Daud* which had been highly critical of reliance on wrist x-rays as evidence of age and which had revealed that a minor had been held in an adult facility since June 2010. She also drew attention to the discontinuance of prosecutions in Queensland following the production by defence counsel of documentary evidence of age as well as expert reports criticising the use of wrist x-rays for age determination purposes. The letter reiterated the President's call for the immediate consideration, by an independent person or body, of whether a proper and reliable assessment of age had been conducted for every Indonesian national claiming to be a minor who had been convicted as an adult and for every Indonesian national claiming to be a minor who had been charged but not yet tried on people smuggling charges.¹⁷⁷

Having received no reply to her letter of 8 November 2011, the President spoke to the then Attorney-General by telephone on 17 November 2011, and on 21 November 2011 confirmed by letter her earlier provisional decision to conduct this Inquiry.

4 The Commonwealth's understanding of the usefulness of dental x-ray analysis for age assessment purposes

The Commonwealth has considered the potential use of dental x-ray analysis for age assessment purposes for some time.

Documents provided to the Commission indicate that the AFP first sought information from an expert in the use of dental x-ray analysis in late 2010.¹⁷⁸ Advice was provided by a forensic odontologist in early January 2011 which argued that 'dental radiographs [have been used] to determine chronological age ... widely throughout the world for both living and deceased individuals'.¹⁷⁹ The author of the advice suggested that there were three recently developed databases which could 'cover an individual from Indonesia' and that 'a comparison for an individual from Indonesia would be within 0–12 months variation for most of these databases'.¹⁸⁰ The AFP forwarded this advice to the Office of the CDPP and sought their advice on the use of dental x-rays to assess age.¹⁸¹

The AFP subsequently wrote to AGD to recommend that dental x-rays be prescribed as an age assessment procedure for the purposes of the Crimes Act, attaching the expert advice that they had received.¹⁸²

There was a clear divergence of views amongst Commonwealth agencies about the appropriateness of relying on dental x-ray analysis for age assessment purposes. Minutes from an interagency meeting regarding the '[a]ge determination of people smuggling crew' noted that 'the CDPP's research indicated that the use of dental X-rays may be more contentious [than wrist x-rays] as socioeconomic factors such as diet and malnutrition can impact on tooth development'.¹⁸³ An AGD officer indicated that he would be reluctant to prescribe dental x-rays without further work to understand the arguments for and against.¹⁸⁴

The Office of the CDPP conducted further research regarding dental x-rays which it provided to the AFP and AGD on 30 May 2011.¹⁸⁵ The research of the Office of the CDPP is summarised in a brief paper which quotes the advice provided by the forensic odontologist to the AFP. The paper suggests that the '[d]ental x-ray appears to be more susceptible to change by ethnic or racial group and environmental factors such as diet, malnutrition, and lifestyle may also impact upon development'.¹⁸⁶ The paper also states that 'one must accept that the range of variables in dental x-ray techniques appears to be the same as in the wrist x-ray techniques'.¹⁸⁷ The paper concludes with the view that 'dental x-ray procedures are an alternative or adjunct to wrist x-ray procedures'.¹⁸⁸

This research was circulated by an AGD officer within that department, with the accompanying email stating:

Given the apparent high degree of accuracy, benefit in providing the court with the additional information and targeted application to minimise excess exposure to x-rays, it would appear to be worth considering prescribing them in addition to wrist x-rays in regulation 6C of the *Crimes Regulations 1990* rather than having it [as] a voluntary option.¹⁸⁹

However, while the Office of the CDPP had concluded that dental x-rays provide a useful age assessment tool, it had not concluded that they have a high degree of accuracy, or that they are more accurate than wrist x-rays.¹⁹⁰

Minutes from a meeting of Commonwealth agencies held on 10 June 2011 show that AGD intended to recommend to the then Minister for Home Affairs and Justice that he specify dental x-rays as a prescribed procedure for the purposes of the Crimes Act.¹⁹¹ At this time, the AFP sought to implement a voluntary procedure for dental x-rays for crew members.¹⁹²

As noted above, the July 2011 announcement of an 'improved age assessment process' included the announcement that dental x-rays would be offered in people smuggling matters where age was contested. Talking points for the then Minister for Home Affairs and Justice

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prepared to accompany the announcement assert the usefulness of dental x-rays for age assessment processes. The talking points propose that the Minister say that dental x-rays:

- provide a statistical probability of a person's likely age, which includes a margin of error depending on the circumstances of the individual case
- provide information to estimate if a person is up to 20 years old.¹⁹³

The talking points suggest that if the Minister is pressed he should say: 'I am advised that the margin of error is up to 12 months'.¹⁹⁴

The July 2011 announcement indicated that dental x-rays would be offered 'commencing as soon as possible'. It appears that the necessary arrangements to allow dental x-rays to be taken had not then been put in place. On 15 July 2011, the Office of the CDPP wrote to the AFP to inform them that it had received a number of requests from defence counsel seeking dental x-rays for their clients and to express concern that the 'AFP have had difficulty contacting the relevant expert to make arrangements for the implementation of the dental x-ray process'.¹⁹⁵ The AFP replied on 22 July 2011, stating that they had been liaising with the 'President of the Australian Society of Forensic Odontology, in an endeavour to identify suitable persons to assist with the interpretation of dental x-rays and provide professional opinion as to age'.¹⁹⁶ The reply went on to state that 'relevant experts have now been identified in Darwin and the AFP is continuing to expedite the implementation of dental x-rays'.¹⁹⁷

However, the AFP Assistant Commissioner, Crime Operations, sent an email to the Acting Deputy Director of the Legal and Practice Management and Policy Branch of the Office of the CDPP on 3 August 2011, which included the following:

We have once again encountered an ethical dilemma with respect to the administration of "non essential" x-ray. Dentists consulted by AFP to date have indicated an unwillingness to subject patients to the procedure as it is not required for a dental purpose.

We attempted an alternate source, namely Radiologists, however they require a referral from a dentist to carry out such a procedure and given that dentists do not consider the procedure is required for a dental purpose, they are unwilling to issue a referral.

We think we may have found a solution to this impasse through the odontologists who will assess the x-rays. We are pursuing this avenue further and hope to have a solution by weeks end.¹⁹⁸

On 12 August 2011, the AFP reported that the process for providing dental x-rays had been finalised and that the first offers had been made to individuals to have dental x-rays undertaken.¹⁹⁹

At this time, the Commonwealth continued to give consideration to proceeding with a proposal to amend the Crimes Regulations to specify dental x-rays as a prescribed procedure for age

determination.²⁰⁰ Consideration was also being given at the same time to additionally specifying clavicle x-rays as a prescribed procedure.²⁰¹

5 Disclosure of all relevant material to the defence

5.1 The duty to disclose

At common law, prosecuting counsel have a duty to disclose material in their possession which would tend to assist the defence case.²⁰² The duty has been held to exist even where the existence of the material is not known to prosecuting counsel.²⁰³

This duty is recognised by the Commonwealth Director of Public Prosecution's 'Statement on Prosecution Disclosure' which confirms that the prosecution should, as soon as reasonably practicable after the defendant has entered a plea of not guilty, disclose to the defence all material that has been gathered in the course of the investigation and which:

either runs counter to the prosecution case (i.e. points away from the defendant having committed the offence) or might reasonably be expected to assist the defendant in advancing a defence, including material which is in the possession of a third party (i.e. a person or body other than the investigating agency or the prosecution).²⁰⁴

This would include material which raises, or possibly raises, a new issue, the existence of which is not apparent from the prosecution case; material which holds out a real prospect of providing a lead to evidence relevant to an issue in the case; and material which raises a new issue in a case.²⁰⁵ It is not consistent with the prosecutor's obligation to disclose material relevant to an issue in the case 'to simply say that the information was in the public domain and that the applicant should have made enquiries which would have revealed it'.²⁰⁶

The nature of the prosecutor's obligation to conduct a case with fairness to the accused person and to ensure that justice is done in a particular case was discussed by Deane J in *Whitehorn v The Queen*. His Honour observed:

Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one.²⁰⁷

The prosecutor's obligation to disclose all relevant material also goes some way to ameliorating any inequality in resources between the defendant and the State. This is particularly important in relation to the validity of scientific evidence called by the prosecution.²⁰⁸ In *R v Ward*, the Court of Appeal stated:

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We believe that the surest way of preventing the misuse of forensic evidence is by ensuring that there is a proper understanding of the nature and scope of the prosecution's duty of disclosure ... in respect of scientific evidence. That duty exists irrespective of any request by the defence. It is also not limited to documentation on which the opinion of findings of an expert is based. It extends to anything which may arguably assist the defence. It is therefore wider in scope than the rule. Moreover, it is a positive duty, which in the context of scientific evidence obliges the prosecution to make full and proper inquiries from forensic scientists in order to ascertain whether there is discoverable material. Given the undoubted inequality between prosecution and defence in access to forensic scientists, we regard it as of paramount importance that the common law duty of disclosure, as we have explained it, should be appreciated by those who prosecute and defend in criminal cases.²⁰⁹

The disclosure obligation is of particular importance in our system of justice because it is not the role of a common law court to conduct an investigation or examination of its own.²¹⁰ The role of the judge under the common law system is to ensure a fair trial according to law; it is for the parties to decide the grounds on which they will contest the issue, the evidence which they will call and, subject to the laws of evidence, the questions that they will ask.²¹¹ For this reason, a common law court is dependent on the parties to assist it in determining the extent, if any, to which expert evidence is credible and informative.

The principles outlined above were not disputed by the Commonwealth Director of Public Prosecutions, any of his officers, or by any AGD officer or the AFP at the Inquiry hearing for Commonwealth agencies.²¹²

5.2 The Office of the CDPP failed to meet its disclosure obligations in cases where age was in doubt

As noted above, the Commonwealth has on a number of occasions asserted that the assessment of the accuracy of evidence, including medical evidence of age, is a matter for the courts. Further, the Commonwealth submits that it has assisted the courts to make determinations of age by placing all available information before the court.²¹³

In a paper prepared by a Senior Assistant Director of the People Smuggling Branch of the Office of the CDPP, the disclosure obligation in cases in which age is in doubt is described as extending to 'as a minimum, anything which runs counter to the prosecution case; or anything which might assist the defence or lead to other avenues of investigation leading to something that assists the defence case'.²¹⁴ The officer noted the importance of complying with disclosure obligations to ensure that an accused person receives a fair trial. In his paper, he cited advice about the disclosure obligation given by Senior Counsel. That advice stated:

The bottom line is that all participants in the investigative process share the obligation to ensure that an accused person receives a fair trial. If exculpatory material exists in whatever source, then it should be revealed to the prosecution by those who have custody of it for assessment as to whether it can be

disclosed, whether public interest immunity prevents its disclosure, and if so whether the proceedings should continue.²¹⁵

From the documents before the Commission, it is apparent that prosecuting counsel in cases where the age of an individual suspected of people smuggling was in dispute did not make full disclosure of scientific material which could arguably assist the defence.

The observations made by O'Brien J in the early case of *The Police v Mazela* drew attention to the drawbacks of using wrist x-ray analysis for age assessment purposes.²¹⁶ As discussed in section 3.2 above, the cases of *The Police v Mazela* and *R v Safrudin* were heard only two months apart. In these two cases the Commonwealth Director of Public Prosecutions led expert evidence first from Dr Low (in *The Police v Mazela*) and then from Dr Thonnell (in *R v Safrudin*). It is not clear whether any person within the Office of the CDPP noticed the conflict between the respective expert opinions of Dr Thonnell and Dr Low regarding the age at which the hand and wrist bones of a male person are expected to have achieved maturity, or if they did, that they understood its significance. Dr Thonnell identified that age as about 18 years, while Dr Low expressed the opinion that only 50% of young males would show a mature wrist on x-ray at the age of 19 years. They could not both be correct. As the only issue to which their expert opinions were relevant was whether particular individuals were under, or alternatively over, the age of 18 years, the difference between them was of critical importance. Acceptance of Dr Low's opinion, as opposed to Dr Thonnell's opinion, would significantly expand the number of young people likely to be found to have been an adult as at the date of the offence of which they were suspected.

At the Inquiry hearing for Commonwealth agencies, the Commonwealth Director of Public Prosecutions submitted that the difference in expert opinion between Dr Low and Dr Thonnell was not fundamental and was simply a difference in a matter of detail. The Director said:

I would be assured that [disclosure] was approached on the basis that what we had here was no more or no less than a difference between two experts called by the Crown in two different cases and a difference that was not fundamental to, certainly, Dr Low's standard. And you will remember, of course, that both witnesses did agree upon the applicability of Greulich and Pyle Atlas in these cases. I would have to say I would make the same call in 2000, and I emphasise in 2000, knowing what one knew then; I would have seen it as no more and no less than simply a difference in a matter of detail.²¹⁷

Thereafter, as the above discussion reveals, increasing amounts of material became available to the Office of the CDPP which was capable of alerting the Director and his officers to potential problems with the opinion evidence being adduced from Dr Low. Some of that material was generated within the Office of the CDPP.²¹⁸ Other material was provided to the Office of the CDPP either by DIAC,²¹⁹ or by defence counsel.²²⁰ It appears that none of this material caused the Commonwealth Director of Public Prosecutions or his officers to lose faith in Dr Low or his expertise. More importantly for present purposes, it appears not to have stimulated the Office of the CDPP to give consideration to its disclosure obligations.

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At the Inquiry hearing for Commonwealth agencies, the Commonwealth Director of Public Prosecutions was asked whether he at any time issued instructions to Commonwealth prosecutors about what they should do where scientific evidence was being relied on. The following exchanges, which are considered further in the section on findings below, are recorded in the transcript:

MR CRAIGIE: Certainly no general instruction but counter scientific evidence was required because of the state of our judgement as to where Dr Low's evidence stood at that time. We regard it as a matter for the courts to test.

MS BRANSON: They can't test without the information, can they, Mr Craigie; that's the point I'm trying to make. The courts can't go out and research for themselves. They're dependent on the parties to bring the research to them. And here the Commonwealth DPP had the research; the legal aid lawyers were defending them.

MR CRAIGIE: With respect, it's an adversarial system where both sides have capacity to develop their own arguments and counter-arguments which is quite different to a situation where the credit of a witness has been undermined substantially, undermined to the extent that it raises a disclosure issue. I think that's the point of departure between our two views.²²¹

And after the Director's attention was drawn to the observations of the Court of Appeal in *R v Ward* which are extracted above:

MR CRAIGIE: The fact that that research existed and the fact that it was, in certain contexts, critical of wrist X-rays was not disclosed but, in our submission, [it] was somewhat beside the point as to whether at that stage Dr Low's evidence could properly be relied upon by us as we saw it then.

MS BRANSON: Why would that be, Mr Craigie?

MR CRAIGIE: Well, it goes back to the limited processes from which wrist X-rays should be represented at court, as was indicated back before the Parliamentary Committee in 2001. I certainly was generally aware that it was a process that was not generally accepted. In fact, in a number of contexts, in other countries for certain purposes, it's certainly not accepted. But in the context of Australia where there was an Act of Parliament that provided it and where, in a prosecutorial environment – a court environment – where it was often part of the fairly scant evidence available as to age. We were at that stage comfortable to use it, at that stage.²²²

The issue of proper disclosure by the Office of the CDP of material concerning the use of wrist x-rays for age determination purposes was raised by a defence lawyer in January 2011. During a directions hearing in the District Court of Western Australia, the lawyer for the defendant referred to an article published in *The Australian* newspaper that questioned the reliability of wrist x-rays as a means for determining age. The lawyer was concerned that she might wrongly be assuming that wrist x-rays allowed an authoritative determination of age. Specifically, she was concerned that the Commonwealth might be in possession of material that would throw some doubt on wrist x-rays as a reliable method of assessing age. She submitted to the court:

Well it's, from our perspective, or from my perspective, it's a disclosure issue. If the Crown are in possession of information which suggests that there is some controversy about the reliability of this kind of evidence then that ought to be disclosed to us so that we can make a decision about whether or not to take the point about jurisdiction.²²³

It appears that the prosecutor in this case referred the defence lawyer to Dr Low and, after she spoke with him, the issue of her client's age was no longer disputed and the prosecution of the individual continued.²²⁴

At the Inquiry hearing for Commonwealth agencies, a senior CDPP officer confirmed that in February 2011 issues surrounding age determination were discussed by a large number of very experienced prosecutors and that disclosure requirements were not considered at that time.²²⁵ This is surprising, given the request made in the District Court only a month earlier that documents tending to question the reliability of wrist x-ray evidence be disclosed.

In June 2011, the Brisbane Office of the CDPP received an expert report from Professor Cole. This report was further scientific evidence in the possession of the Office of the CDPP that suggested that the evidence being given by Dr Low about the usefulness of wrist x-rays as a means of determining age was unreliable, and perhaps wrong. At the Inquiry hearing, it was agreed that no general direction was issued by or on behalf of the Commonwealth Director of Public Prosecutions that this paper be disclosed to the defence in all cases in which age was in dispute and, indeed, this report was not disclosed by prosecuting counsel.²²⁶

It is of concern that as late as 16 August 2011, an officer of the CDPP sent a letter to a defence counsel in which, in response to a question asked by her, he advised that the Office of the CDPP 'is not aware of any matters in which Dr Low's expert evidence has been discredited'.²²⁷ As noted above, while this response may have been technically true, it was hardly frank. By this time the Office of the CDPP was acutely aware of serious challenges to Dr Low's evidence. The question asked by defence counsel does not seem to have triggered any consideration by officers of the CDPP of the duty of disclosure of prosecuting counsel.

There is no material before the Inquiry which suggests that the Office of the CDPP ever disclosed to defence counsel any material in its possession which raised questions about the reliability of the expert evidence being adduced from Dr Low on the issue of the ages of young individuals suspected of people smuggling offences.

Legal Aid NSW raised the issue of disclosure in its submission to the Inquiry. The submission suggests that in Legal Aid NSW's experience, the Office of the CDPP has not always adopted a balanced approach to scientific evidence about age. The submission states:

Despite there being well documented and published evidence to the contrary, it is the experience of Legal Aid NSW that the CDPP will present the wrist x-ray evidence of assessment of age as a medical fact.

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It is the experience of Legal Aid NSW that the CDPP rarely presents opposing evidence. Nor does ... it make concessions when presented by the defence with evidence of the unreliability of x-ray from radiologists, paediatric radiologists or medical statisticians.²²⁸

6 Findings

6.1 Findings regarding the Commonwealth Director of Public Prosecution's understanding of the usefulness of wrist x-ray analysis for age assessment purposes

(a) Confidence in the evidence of Dr Low should not have been maintained

Prosecuting counsel ought not to call an expert witness in whose evidence they cannot have confidence. Prosecuting counsel, and other officers in the service of the State, have a duty to act with fairness and always with the objective of establishing the truth and ensuring that the accused person's trial is a fair one.²²⁹

It is not clear when the Commonwealth Director of Public Prosecutions and his officers first became aware that serious questions had been identified about the reliability of the evidence being adduced from Dr Low. There is no doubt that the true picture is easier to see with the benefit of hindsight. However, the possibility that Dr Low's evidence might be flawed was capable of being seen as early as February 2002.²³⁰

By mid-2011 there was significant material available to support the inference that Dr Low's evidence was at best problematic:

- In September 2010, DIAC had shared with the Office of the CDPP the views of authoritative international bodies concerning wrist x-ray evidence generally.²³¹
- By March 2011, evidence of age based on wrist x-rays had become sufficiently controversial for the then Attorney-General to ask his department to lead a working group with the AFP, the Office of the CDPP and DIAC to consider what steps could be taken to ensure that age determination procedures provide the best evidence for a court to determine the age of people smuggling crew who claim to be minors.²³²
- In April 2011, a senior officer of the CDPP had noted the flaws of logic inherent in the evidence being given by Dr Low.²³³
- By approximately the end of June 2011, the attention of the Commonwealth Director of Public Prosecutions and his officers had been drawn to reports by Professor Aynsley-Green

and Professor Cole. These reports, prepared by leading experts in their respective fields, were trenchantly critical of the evidence being adduced from Dr Low. Professor Cole, an internationally recognised expert in bio-statistics and human growth, had characterised Dr Low's statistical approach as 'wrong'.²³⁴

- By approximately August 2011 the Office of the CDPP was in possession of the letter dated 19 August 2011 signed by the Presidents of a number of medical colleges, including the Royal Australian and New Zealand College of Radiologists, which stated that '[x]-rays of teeth and wrists should not be used as evidence in a court of law because the age assessments obtained by these means are very inaccurate'.²³⁵

Even taking into account the benefit of hindsight, it is reasonable to conclude that, by no later than mid-2011, the Commonwealth Director of Public Prosecutions and his senior officers ought to have been aware that, unless independent confirmation could be obtained from an authoritative source that the evidence being adduced from Dr Low was soundly based, they could not maintain confidence in Dr Low as an expert witness. Reassurances offered by Dr Low did not amount to independent confirmation.²³⁶

By late 2011, the Office of the CDPP was aware that other radiologists of apparently high repute did not believe that age could be reliably assessed from wrist x-rays.²³⁷ In view of the duty of the Commonwealth Director of Public Prosecutions to ensure fairness to the accused and to avoid the misuse of forensic evidence, the Office of the CDPP ought to have sought authoritative advice on this issue.

It would also have been appropriate for the Office of the CDPP to give more careful attention than it apparently did to the limits of the specialised knowledge of Dr Low.

Dr Low's evidence concerning the age of individuals suspected of people smuggling was adduced in reliance on the authority of s 79 of the *Evidence Act 1995* (Cth). This section excepts expert opinion evidence from the general rule that a witness may not give evidence of his or her opinion. Section 79(1) provides:

If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

Dr Low is a specialist radiologist. His opinions as to the *skeletal* age of the individuals whose wrist x-rays he examined may be assumed to have been based wholly or substantially on his specialised knowledge of radiology based on his training, study and experience. However, it is strongly arguable that the same cannot be said of his opinion as to the *chronological* age of those individuals.

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Dr Low's opinions as to the *chronological* age of the individuals whose wrist x-rays he examined were dependent on an assumption made by him as to the average age at which males achieve skeletal maturity. Counsel for the Commonwealth Director of Public Prosecutions did not call evidence from anyone other than Dr Low to establish the accuracy of his assumption. Yet, it does not appear that Dr Low has the specialised knowledge based on his training, study or experience necessary to qualify him to express an opinion on this issue. As noted above, his area of specialised knowledge is radiology. His training, study and experience in the area of statistics, and specifically biostatistics, are relatively limited.²³⁸ This, as can now be seen, undermined his capacity to calculate from available research studies the average age at which males attain skeletal maturity. Yet, the opinion of Dr Low which was being adduced in evidence by counsel for the Commonwealth Director of Public Prosecutions was an opinion that was substantially based on his understanding of that age. This indicates that Dr Low's opinion about the *chronological* age of the young individuals whose wrist x-rays he examined was almost certainly not an opinion wholly based on his specialised knowledge of radiology. It is arguable that it was not even an opinion substantially based on his specialised knowledge of radiology. The material before the Commission does not suggest that the Office of the CDPP, or indeed AGD, ever undertook an analysis of this kind.

For the Office of the CDPP to have maintained confidence in Dr Low as a witness beyond June 2011, and thereafter beyond August 2011, seems inexplicable. Any explanation must, it seems, be found, at least in part, in the strong desire of that Office, and of other Commonwealth agencies, for an age assessment technique which would allow them to call evidence to show with a high degree of certainty who, from among those suspected of people smuggling, were adults. The reality is that the natural genetic diversity within the human population means there is no known medical technique which can measure an individual's chronological age with sufficient precision for it to be used to determine age in the context of a criminal proceeding.²³⁹ The explanation may also lie in part in the high level of scepticism which developed concerning the claims of young Indonesians to be minors, which is considered in Chapter 4.

(b) Disclosure of material tending to support the defence case

Most, if not all, of the material identified above as material which should have alerted the Office of the CDPP to the risk that Dr Low's evidence was not reliable was material which would also have tended to assist the defence case in any matter in which evidence was adduced from Dr Low by counsel for the Commonwealth Director of Public Prosecutions. Yet, the Office of the CDPP did not disclose any of that material to defence counsel. Indeed, as noted above, as late as mid-August 2011 an officer of the CDPP deflected a request by a defence counsel for information concerning the reliability of Dr Low's evidence by offering a technically accurate but potentially misleading response.²⁴⁰

The Commonwealth Director of Public Prosecutions defended the failure of his office to make disclosure of material tending to support the defence case on three bases. He identified the first basis in the context of the different views of Dr Low and Dr Thonnell on the average age at which a male will achieve skeletal maturity. As noted above, the Director described this as a 'difference in a matter of detail'.²⁴¹ As Chapter 2 makes clear, this difference did not relate to a matter of detail. An accurate understanding of the average age at which males achieve skeletal maturity is fundamental to the use of a wrist x-ray as the basis for an opinion on whether a particular male is under or over the age of 18 years. Further, the identification of that age is not something about which appropriately qualified experts may legitimately hold widely different opinions. Rather, it is an age capable of being scientifically calculated with relative precision from research studies. Where the opinion of any expert is based on an erroneous assumption about that age, that opinion is open to serious challenge.

In short, differences of view between experts on the issue of the age at which, on average, males attain skeletal maturity is not a matter of detail. The opinion of any expert that a particular male is over the age of 18 years, where based on a wrist x-ray, is underpinned by that expert's assumption of the age at which males, on average, attain skeletal maturity. Evidence tending to show that Dr Low's assumption in this respect was inaccurate was clearly material tending to support the defence case.

The second basis on which the Commonwealth Director of Public Prosecutions defended the failure of his office to make disclosure of material tending to support the defence case was that, under our adversarial system of justice, the reliability of Dr Low's evidence was a matter for the court to test.²⁴² The proper role of a common law court is discussed in section 5.1 above. Under our system of justice, a court may not conduct its own investigation. In fact, it is partly the limited role that a common law judge can appropriately play that makes the duty of disclosure of prosecuting counsel so important. As the Court of Appeal recognised in *R v Ward*, adherence to the prosecutor's duty of disclosure is an important safeguard against the misuse of forensic evidence.²⁴³ Without proper disclosure being made to the defence, the capacity of the court to test the reliability of forensic evidence adduced by the State can be severely compromised. Further, as Roberts-Smith JA noted in *Cooley v Western Australia*, '[t]he defence [is] entitled to assume that a professional expert witness called by the State [is] a witness of integrity and credibility and that if there was any material showing otherwise, the State would disclose it'.²⁴⁴

The third basis on which the Commonwealth Director of Public Prosecutions defended the failure of his office to make disclosure of material tending to support the defence case was that, although the process of assessing age by reference to wrist x-rays was not generally accepted, Parliament had provided for it. While the specification of wrist x-rays as a prescribed process for the determination of a person's age might rule out arguments to the effect that the process ought not be used, it has limited, if any, relevance to prosecuting counsel's duty of disclosure

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concerning forensic evidence called by the State based on a particular wrist x-ray. When counsel for the Commonwealth Director of Public Prosecutions adduced opinion evidence based on a particular wrist x-ray, it was critical to a fair trial that such evidence be open to proper testing. Appropriate disclosure by prosecuting counsel is an important means of ensuring proper testing.

Material of which the Office of the CDPP was aware that presented a countervailing point of view regarding the usefulness of wrist x-ray analysis for the purposes of assessing age should have been disclosed to defence counsel in matters where the prosecution intended to call Dr Low as an expert witness.

In his response to the draft report, the Commonwealth Director of Public Prosecutions continued to reject 'any implication that the CDPP breached its duty of disclosure'. He stated that:

The CDPP considered that the appropriate course was for the differing views of experts in relation to wrist x-rays, which were known and used by defence lawyers and provided to the CDPP by them, to be considered and decided by the courts.²⁴⁵

6.2 Findings regarding the AFP's understanding of the usefulness of wrist x-ray analysis for age assessment purposes

Much of the above discussion concerning the Office of the CDPP applies also to the AFP. They were in possession of virtually the same material concerning wrist x-ray analysis as an age assessment technique and concerning the reliability of Dr Low's evidence as the Office of the CDPP. They also did not seek independent verification of the reliability of the evidence being given by Dr Low.

It seems that the AFP, and indeed the Office of the CDPP, fell into the very trap that had been identified by the authors of the GP Atlas; that is, to attribute to the GP Atlas 'a greater degree of precision than was intended by those who devised it or, indeed, than is permitted by the nature of the changes which it is designed to measure'.²⁴⁶ Dr Low's reports which, as noted in Chapter 2, often calculated the probability of an individual being under the age of 18 years to two decimal points, no doubt fed the belief of the AFP and the Office of the CDPP that, by reference to the GP Atlas, age could be precisely assessed from a wrist x-ray.

It may be that the AFP fell into the further trap of failing to recognise the risk of a frequently used witness losing objectivity and coming to see his role as being to help the police.²⁴⁷

Whatever the explanation may be, it is clear that the AFP and the Office of the CDPP not only came to use Dr Low as their expert of choice, they chose to accept his assessments of age when faced with conflicting expert opinions.²⁴⁸ In its response to the draft report, the AFP rejected this finding pointing out that the AFP uses radiologists at locations where detainees are conveyed

by DIAC for the purpose of having the prescribed wrist x-ray procedure undertaken. The AFP acknowledged, however, that the 'CDPP has continued to request AFP case officers to have secondary opinions of further analysis undertaken on wrist x-rays by Dr Low which the AFP facilitated'.²⁴⁹ The Commonwealth Director of Public Prosecutions also accepted that the second more detailed report obtained for the purpose of providing evidence in an age determination hearing was usually obtained from Dr Low.²⁵⁰

6.3 Findings regarding the Attorney-General's Department's understanding of the usefulness of wrist x-ray analysis for age assessment purposes

The AGD Annual Report explains what the department does in the following way:

The Attorney-General's Department serves the people of Australia by upholding the rule of law and providing expert support to the Australian Government to maintain and improve Australia's system of law and justice²⁵¹

The Attorney-General is the First Law Officer of the Commonwealth. Maintaining the integrity of Australia's criminal justice system is an important aspect of the rule of law and thus an important responsibility of the Attorney-General. As the above statement makes clear, the Attorney-General requires the support of AGD to fulfil this responsibility.

The Attorney-General also has important responsibilities with respect to Australia's human rights obligations. While human rights are not a specific responsibility of the Criminal Justice Division of AGD, the First Assistant Secretary of that Division acknowledged that, when his division provides advice to the Attorney-General on criminal justice issues, it is important that 'holistic advice' be provided to ensure that Australia's human rights obligations are not overlooked.²⁵² During much of the period of time with which this Inquiry is concerned human rights were a high priority for the then Attorney-General. He announced a national consultation on human rights in late 2008 and a human rights framework for Australia in April 2010.

Notwithstanding the responsibilities of the Attorney-General as First Law Officer of the Commonwealth and the function of AGD to support the Attorney-General in this role, the documents before this Inquiry suggest that the principal concerns of the AGD officers who provided advice to the Attorney-General were to ensure that the message was conveyed that the Australian Government takes people smuggling seriously, and to maintain support for wrist x-rays as the primary means of assessing the ages of individuals suspected of people smuggling who said that they were children. Ensuring that such individuals received a fair trial, and that any among them who might be children were identified and their human rights respected, appear to have been, at best, secondary considerations.

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A considerable number of documents prepared by AGD included statements to the effect that the Australian Government takes the prosecution of people smuggling matters very seriously or otherwise demonstrated concern that the Government might be seen to be 'soft' on people smuggling.²⁵³ It seems likely that the perceived need to convey this message influenced AGD to adopt a degree of scepticism towards criticisms of the use of wrist x-rays for age assessment purposes in the context of people smuggling trials. It may also have limited the policy options which they drew to the attention of the then Attorney-General.

It is worrying that AGD officers included in briefing papers and talking points the potentially misleading and disingenuous statements identified earlier in this chapter.

The inclusion in the Joint Commonwealth submission to the Inquiry drafted by AGD of an inaccurate statement as to the content of advice received from ARPANSA is even more worrying. The Acting Secretary of AGD, in his letter of 6 July 2012 in response to the draft of this report, described the inaccurate statement as 'related to a typographical error by the Department to the AHRC' and one which 'has been corrected formally'. In light of this response, it is appropriate to note that a comparison of the statement included in the Joint Commonwealth submission with the corrected statement suggests a substantial 'typographical error'; an error which one might have expected to have been picked-up by an officer reviewing the final document. It is also appropriate to note that the formal correction of the statement followed a request from the Commission that it be provided with a copy of the advice received by AGD from ARPANSA.

It is also worrying that the Joint Commonwealth submission contained the assertion that it had been prepared in consultation with the Chief Scientist when the submission included no reference to his advice and aspects of it were inconsistent with his advice. An important extract from the brief provided by the Chief Scientist is set out in Chapter 2, section 2.2(d). The brief refers both to observed variations in skeletal maturity of two years in both genders and to ethical concerns on exposing children to even relatively low doses of ionising radiation. Even if Dr Low's opinion that on average males achieve skeletal maturity at 19 years of age were accepted, normal variations in skeletal maturity of two years are sufficient seriously to undermine the utility of skeletal maturity as a means of assessing whether a young male person is over the age of 18 years.

As noted above, at no time did AGD provide either Attorney-General McClelland or Attorney-General Roxon with even a précis of the scientific material critical of the use of wrist x-ray analysis for age assessment purposes. A proper understanding of the limitations inherent in the use of wrist x-rays to assess whether a young male is over the age of 18 years was necessary to allow the Attorney-General to make the policy judgments necessary to ensure the integrity of the criminal justice process as it impacted on individuals suspected of people smuggling offences who said that they were children.

It is concerning that the Attorney-General was not advised by AGD of the serious reservations expressed in contemporary scientific literature concerning the use of wrist x-ray analysis for age assessment purposes, and of the failure of prosecutors to disclose that material to defence counsel, following the request by the President of the Australian Human Rights Commission for an independent review of age assessment procedures that had been undertaken.²⁵⁴

It seems likely that no AGD officer sought to gain an understanding of the contemporary scientific literature for the purpose of advising the then Attorney-General as to the appropriate response to the President's letters, or even for the purpose of chairing the working party which ultimately recommended the 'improved age assessment process' discussed in section 2 above. It might be for this reason that the 'improved age assessment process' placed heavy reliance on a publication that was more than a decade old, and additionally did not incorporate important aspects of the process recommended by that publication. Whatever the explanation for the problems which beset the 'improved age assessment process', AGD was seriously handicapped in providing advice to the Attorney-General as to potential policy options by its failure to pay close attention to contemporary literature concerning methods of age assessment.

The evidence of the First Assistant Secretary of the Criminal Justice Division of AGD concerning the failure to provide the Attorney-General with even a précis of the scientific material was as follows:

What the department provided him was advice as to the fact that there are differing views on the reliability on wrist x-rays and we provided him a range of commentary about that aspect in particular. He also, of course, had the option of calling for additional information if he so chose, and that's one of the options that was put to him in the submission.²⁵⁵

This chapter reveals that, as at the date of the President's request, the scientific material available to the Commonwealth did considerably more than suggest that there were differing views on the reliability of wrist x-rays as a technique to determine whether a young male was over the age of 18 years. Rather, the material was sufficient to found a reasonable belief that the technique was insufficiently informative to be used for this purpose. It also raised questions concerning the admissibility of the evidence being adduced from Dr Low.²⁵⁶

It appears that neither the First Assistant Secretary nor any officer of the Criminal Justice Division ever read the text of the GP Atlas, although the volume was in the possession of both the Office of the CDPP and the AFP. The belief of the First Assistant Secretary is that AGD may have had regard to extracts from it or advice about the effect of it and how it should be interpreted.²⁵⁷ The GP Atlas is a critical element in the use of wrist x-rays for age assessment purposes. Its text is readily understood by a non-scientist. As noted elsewhere in this report, it draws attention to the striking variability in the rate of development of different individuals,²⁵⁸ and cautions against the tendency to attribute to assessments made by reference to the atlas 'a greater degree of

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precision than is permitted by the nature of the changes it was designed to measure'.²⁵⁹ Little reflection is necessary for a reader to conclude that no more, and almost certainly less, precision would be permitted when the GP Atlas is used for the reverse purpose from that for which it was designed.

During the Inquiry hearing for Commonwealth agencies, an AGD officer, in response to a question from the President of the Commission concerning the department's awareness of the content of certain scientific publications at the time that it drafted a letter for the Attorney-General to send to a number of medical colleges, responded:

I think it's fair to say, Madam President, the Attorney-General's Department doesn't hold itself out as a scientific body evaluating quality of the studies. We seek advice from other agencies to help us with those sorts of judgments.²⁶⁰

While it was plainly appropriate for AGD to seek information from the Office of the CDPP and the AFP, in the circumstances the provision of sound policy advice to the Attorney-General required independent assessment of whether that information was reliable. This did not call, at least in the first instance, for scientific advice. It called for the bringing of an independent mind to the issues and a 'lawyerly' analysis of relevant materials. The skills required include the capacities to identify relevant publications and then analyse them; to identify critical issues and points of difference concerning them; to ask appropriate questions and to test responses against known rules of law and logic. It would be deeply concerning if AGD does not have officers with these skills.

If scientific advice had then been judged to be necessary, AGD could have sought it from one of a number of sources. The Office of the Chief Scientist was one possible source of independent scientific advice but it appears that no approach was made to his office by AGD until after this Inquiry was called.

The above findings do not involve the suggestion that AGD should have become involved directly in AFP and CDPP operational matters.²⁶¹ Nor do they involve a suggestion that the AGD should conduct, 'as a matter of course, its own investigations into the credibility of expert witnesses and their methodology whenever contested in Commonwealth proceedings'.²⁶² Each of the AFP and the CDPP is an independent agency. The Commission accepts that their independence 'is underpinned by the fundamental principle that criminal investigations and prosecutions should be independent of any actual or perceived interference from policy departments'.²⁶³ However, as the lead policy agency on people smuggling crew issues, it was appropriate for AGD to play a more active role than simply relying on information provided to it by the AFP and the Office of the CDPP when significant issues of policy arose. Such issues clearly arose when AGD, for example, chaired the interdepartmental working group on age determination and led the development of the Government's improved policy framework on age determination for criminal justice purposes.²⁶⁴

6.4 Findings regarding DIAC's understanding of the usefulness of wrist x-rays for the purposes of age assessment

As noted above, DIAC came relatively early to the realisation that wrist x-rays were an unreliable way of assessing whether a young person was over the age of 18 years. Having identified a significant amount of scientific literature which threw doubt on the wrist x-ray technique of age assessment, DIAC shared that literature with other Commonwealth agencies. Materials later identified confirm the appropriateness of the approach adopted by DIAC in this regard.

6.5 Findings regarding the Commonwealth's understanding of the usefulness of other biomedical markers for age assessment purposes

The only biomedical marker other than skeletal development as shown by a wrist x-ray to which the Commonwealth seems to have given serious consideration is the assessment of tooth development as shown by a dental x-ray. Some limited consideration seems to have been given to the use of a clavicle x-ray for age assessment purposes.

The July 2011 announcement of an 'improved age assessment process' included the announcement that dental x-rays would be offered in people smuggling matters where age was contested. The Commonwealth was not in fact in a position to offer dental x-rays until August 2011. On 12 August 2011, the AFP reported that the process for providing dental x-rays had been finalised and that the first offers had been made to individuals to have dental x-rays undertaken.²⁶⁵ The Commission is not aware of any young Indonesian taking up the offer of a dental x-ray.

As discussed in section 4 above, some consideration was given by each of the Office of the CDPP, the AFP and AGD to the possibility of dental x-rays being specified by regulations as a prescribed procedure for determining age for the purposes of the Crimes Act. Differing views were expressed about their usefulness for age assessment purposes. So far as the Commission is aware, no formal steps have been taken towards making dental x-rays a prescribed procedure for the purposes of the Crimes Act.

The extent to which a dental x-ray is informative of whether an individual is over the age of 18 years is considered in Chapter 2. In summary, it appears that dental x-rays suffer from most, if not all, of the same difficulties as wrist x-rays when sought to be used as an age assessment technique. The Chief Scientist has advised that:

Several studies based on different populations, including an Australian study, have reported that there are wide variations in chronological age corresponding to the different stages of dental development. The development of teeth depend on multiple factors that include the environment, nutrition, ethnicity and race.²⁶⁶ (Citations omitted)

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Moreover, before dental x-rays could be made a prescribed procedure for the purposes of the Crimes Act, it would be appropriate for the Commonwealth to ensure that the advice of ARPANSA concerning the use of human imaging for age determination is complied with.²⁶⁷

It may additionally be noted that there is little evidence that the use of both a wrist x-ray and a dental x-ray improves the precision of any age assessment, although it naturally increases the dose of radiation to which the individual is subjected.²⁶⁸

The material before the Commission suggests that further research is required in respect of all other biomedical markers, including clavicle x-rays, before it would be appropriate for the Commonwealth to place reliance on them for age determination purposes.²⁶⁹

¹ *Crimes Amendment Regulations 2001 (No 2)* (Cth).

² Hon R McClelland MP, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 30 June 2011. See also Hon R McClelland MP, Attorney-General, and Hon B O'Connor MP, Minister for Home Affairs and Justice, 'Improved process for age determination in people smuggling matters' (Media release, 8 July 2011) (Improved process for age determination – Media release). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F906838%22> (viewed 9 July 2012).

³ See Hon C Branson QC, President, Australian Human Rights Commission, Correspondence to Hon R McClelland MP, Attorney-General, 17 February 2011.

⁴ As at 9 May 2012, 24 alleged crew members had been offered voluntary dental x-rays by the AFP. None of these 24 individuals accepted the offer: Assistant Commissioner, National Manager Crime Operations, AFP, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 29 May 2012.

⁵ Assistant Commissioner, National Manager Crime Operations, AFP, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 29 May 2012; AFP, Response to draft report, 6 July 2012.

⁶ Assistant Commissioner, National Manager Crime Operations, AFP, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 29 May 2012.

⁷ *Crimes Amendment (Age Determination) Act 2001* (Cth).

⁸ *Crimes Act 1914* (Cth), Division 4A, ss 3ZQA–3ZQK; *Crimes Regulations 1990* (Cth), reg 6C.

⁹ *Crimes Regulations 1990* (Cth), reg 6C(2).

¹⁰ *R v Hatim, Kadir and Others* [2000] NTSC 53.

¹¹ Evidence to the Commonwealth Senate Legal and Constitutional Legislation Committee, 'Inquiry into the Provisions of the Crimes Amendment (Age Determination) Bill 2001', 23 March 2001, p 2.

¹² Commonwealth Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Report of the Inquiry into the Provisions of the Crimes Amendment (Age Determination) Bill 2001* (March 2001) (Report of Senate Committee 2001), para 3.62.

¹³ Report of Senate Committee 2001, above, para 3.18.

- ¹⁴ Assistant Commissioner, AFP, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), pp 36–37.
- ¹⁵ AFP, Response to draft report, 6 July 2012, p 5.
- ¹⁶ Report of Senate Committee 2001, note 12, para 4.1.
- ¹⁷ Report of Senate Committee 2001, above, recommendation 6.
- ¹⁸ Report of Senate Committee 2001, above, recommendation 8.
- ¹⁹ Report of Senate Committee 2001, above, recommendation 10.
- ²⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 April 2001, p 26186 (Hon Mr Williams MP, Attorney-General).
- ²¹ Commonwealth, *Parliamentary Debates*, Senate, 4 April 2001, p 23619 (Senator Abetz, Special Minister of State); Revised Explanatory Memorandum, Crimes Amendment (Age Determination) Bill 2001 (Cth) (Revised Explanatory Memorandum 2001).
- ²² Revised Explanatory Memorandum 2001, above, para 9.
- ²³ Deputy Commissioner, AFP, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 41.
- ²⁴ AFP, Response to draft report, 6 July 2012, pp 3–5.
- ²⁵ *Whitehorn v The Queen* (1983) 152 CLR 657, 663–664 (Deane J).
- ²⁶ Transcript of Proceedings, *The Queen and Astar Udin and Sania Aman* (District Court of Western Australia, H.H. Jackson DCJ, 3 October 2000) (Transcript – *The Queen v Udin and Aman*); WW Greulich and SI Pyle, *Radiographic Atlas of Skeletal Development of Hand and Wrist* (2nd ed, 1959) (GP Atlas). The use of the GP Atlas is discussed in Chapter 2.
- ²⁷ Transcript – *The Queen v Udin and Aman*, above, p 19.
- ²⁸ Transcript – *The Queen v Udin and Aman*, above, p 21.
- ²⁹ Transcript – *The Queen v Udin and Aman*, above, p 29.
- ³⁰ Transcript – *The Queen v Udin and Aman*, above, pp 51–53.
- ³¹ Transcript of Proceedings, *The Police v Henry Mazela* (Children’s Court of Western Australia, O’Brien J, 12 February 2002) (Transcript – *The Police v Mazela*).
- ³² Transcript – *The Police v Mazela*, above, p 5.
- ³³ Transcript – *The Police v Mazela*, above, p 6.
- ³⁴ Transcript – *The Police v Mazela*, above, p 6.
- ³⁵ Transcript – *The Police v Mazela*, above, p 7.
- ³⁶ Transcript – *The Police v Mazela*, above, p 7.
- ³⁷ *Stoykovski v Mazela* [2002] WASCA 193.
- ³⁸ Transcript of Proceedings, *The Queen v Herman Safrudin and Lukman Muhamad* (Supreme Court of the Northern Territory, Riley J, 10 April 2002) (Transcript – *The Queen v Safrudin and Muhamad*).
- ³⁹ Transcript – *The Queen v Safrudin and Muhamad*, above, p 3.
- ⁴⁰ Transcript – *The Police v Mazela*, note 31, p 6.
- ⁴¹ Transcript – *The Queen v Safrudin and Muhamad*, note 38, pp 6–7.
- ⁴² *Applicant VFAY v Minister for Immigration* [2003] FMCA 289.
- ⁴³ *Applicant VFAY v Minister for Immigration* [2003] FMCA 289, [25] (Phipps FM).

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- ⁴⁴ Assistant Secretary, Governance and Audit Branch, DIAC, Email to Inquiry in response to follow-up questions, 18 April 2012.
- ⁴⁵ Principal Advisor, Citizenship, Settlement and Multicultural Affairs, DIAC, Submission on Assessment of Disputed Minor Claims to Minister for Immigration and Citizenship, 11 June 2010 (DIAC document) (DIAC Submission to Minister for Immigration).
- ⁴⁶ DIAC Submission to Minister for Immigration, above, Attachment C.
- ⁴⁷ DIAC Submission to Minister for Immigration, above.
- ⁴⁸ Royal College of Paediatrics and Child Health, *The Health of Refugee Children – Guidelines for Paediatricians*, November 1999, p 13.
- ⁴⁹ DIAC Submission to Minister for Immigration, note 45, Attachment C.
- ⁵⁰ Principal Advisor, Citizenship, Settlement and Multicultural Affairs, DIAC, Email to Senior Assistant Director, People Smuggling Branch, CDPP, 3 September 2010 (AFP document provided 29 May 2012).
- ⁵¹ Commonwealth Director of Public Prosecutions, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 62.
- ⁵² Commonwealth Director of Public Prosecutions, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 62.
- ⁵³ Commonwealth Director of Public Prosecutions, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 62.
- ⁵⁴ Acting Assistant Secretary, Immigration Intelligence Branch, DIAC, Email to National Manager Crime Operations, AFP, 3 September 2010 (AFP document provided 29 May 2012).
- ⁵⁵ Assistant Commissioner, AFP, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 60.
- ⁵⁶ Federal Agent, AFP, Email to Acting Principal Advisor, Citizenship, Settlement and Multicultural Affairs Division, DIAC, 5 October 2010 (DIAC document mail39642129).
- ⁵⁷ Acting Principal Advisor, Citizenship, Settlement and Multicultural Affairs Division, DIAC, Email to Federal Agent, AFP, 14 October 2010 (DIAC document mail39646162).
- ⁵⁸ Acting Principal Advisor, Citizenship, Settlement and Multicultural Affairs Division, DIAC, Email to Federal Agent, AFP, 14 October 2010, (DIAC document mail39642144).
- ⁵⁹ President, Royal College of Radiologists, Correspondence to Unaccompanied Asylum Seeking Children Reform Programme, UK Home Office, 23 May 2007, Attachment – Email from Acting Principal Advisor, Citizenship, Settlement and Multicultural Affairs Division, DIAC, to Federal Agent, AFP, 14 October 2010 (DIAC document mail39642144).
- ⁶⁰ Senior Assistant Director, CDPP, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 74.
- ⁶¹ People Smuggling Meeting Brief Management Meeting, AFP Training College, File Note, 26 October 2010 (AGD document PROS-1).
- ⁶² Acting Director, Principal Advisor's Unit, Citizenship, Settlement and Multicultural Affairs Division, DIAC, Email to Officer, Financial Crime and Border Management Section, AGD, 10 January 2011 (AGD document PROS-4).
- ⁶³ Assistant Director, Strategic Policy and Projects Territories West, Department of Regional Australia, Regional Development and Local Government, Email to Principal Legal Officer, People Smuggling Financial Crime and Border Management Section, Criminal Justice Division, AGD, 29 November 2010 (AGD document PROS-2).

- ⁶⁴ Senior Assistant Director, People Smuggling Branch, CDPP, *People Smuggling Prosecutions Age Determination Issues*, 15 December 2010 (CDPP document Attachment D document 4) (CDPP People Smuggling Prosecutions – Paper).
- ⁶⁵ Senior Assistant Director, CDPP Perth Office, Email to Acting Assistant Secretary, Immigration Intelligence Branch, DIAC, 25 November 2010 (DIAC document mail39646086).
- ⁶⁶ CDPP People Smuggling Prosecutions – Paper, note 64, p 7.
- ⁶⁷ Report of Senate Committee 2001, note 12, para 3.18. See section 3.1 above.
- ⁶⁸ CDPP People Smuggling Prosecutions – Paper, note 64, p 7.
- ⁶⁹ CDPP People Smuggling Prosecutions – Paper, above, footnote 14, p 7.
- ⁷⁰ CDPP People Smuggling Prosecutions – Paper, above, p 18.
- ⁷¹ P Maley, ‘Children in WA jails on smuggler charges’, *The Australian*, 11 November 2010. At <http://www.theaustralian.com.au/news/nation/children-in-jail-on-smuggler-charges/story-e6frg6nf-1225951374315> (viewed 9 July 2012).
- ⁷² AGD, Response to draft report, 6 July 2012, p 2.
- ⁷³ Question time brief, Asylum seekers – child people smugglers (QTB10-470), Attachment – Email from Principal Legal Officer, People Smuggling Financial Crime and Border Management Section, Criminal Justice Division, AGD, to Officer, Department of Prime Minister and Cabinet, 17 November 2010 (DIAC document mail39646062).
- ⁷⁴ Principal Legal Officer, People Smuggling Financial Crime and Border Management Section, Criminal Justice Division, AGD, Email to Officer, Department of Prime Minister and Cabinet, 17 November 2010 (DIAC document mail39646062).
- ⁷⁵ DIAC document mail39646062, above.
- ⁷⁶ Principal Legal Officer, Criminal Justice Division, AGD, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 93.
- ⁷⁷ Principal Legal Officer, Criminal Justice Division, AGD, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 93.
- ⁷⁸ Acting Director, Principal Advisor’s Unit, Citizenship, Settlement and Multicultural Affairs Division, DIAC, Email to Officer, DIAC, 13 December 2010 (DIAC document mail39646113).
- ⁷⁹ DIAC document mail39646113, above.
- ⁸⁰ Ministers’ Office Brief – Attorney-General/Minister for Home Affairs, *People smuggling – children in gaols*, 6 January 2011 (AGD document BRIEF-3).
- ⁸¹ See for example, Transcript – The Queen v Safrudin and Muhamad, note 38; Transcript – The Queen v Udin and Aman, note 26.
- ⁸² Ministers’ Office Brief – Attorney-General/Minister for Home Affairs, *People smuggling – children in gaols*, 6 January 2011 (AGD document BRIEF-3), p 4.
- ⁸³ Deputy Commissioner, AFP, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 114.
- ⁸⁴ Ministers’ Office Brief – Attorney-General/Minister for Home Affairs, *People smuggling – children in gaols*, 6 January 2011 (AGD document BRIEF-3), p 5.
- ⁸⁵ First Assistant Secretary, Criminal Justice Division, AGD, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), pp 115–116.

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- ⁸⁶ Senior Assistant Director, CDPP Melbourne Office, Memo to Senior Assistant Director, CDPP Head Office, 13 April 2011 (BOM062 – CDPP document 115.0029).
- ⁸⁷ BOM062 – CDPP document 115.0029, above, p 1.
- ⁸⁸ BOM062 – CDPP document 115.0029, above, footnote 2, p 1.
- ⁸⁹ BOM062 – CDPP document 115.0029, above.
- ⁹⁰ BOM062 – CDPP document 115.0029, above, p 4.
- ⁹¹ Senior Legal Officer, CDPP Perth Office, Email to Officers, CDPP, 10 March 2011 (PEN059 – CDPP document 238.0194).
- ⁹² Dr Low, *Opinion regarding the use of skeletal age determination technique to estimate chronological age*, May 2011, Attachment – Submission 15.
- ⁹³ Transcript of Proceedings, *The Queen and [TRA029]* (Magistrates Court of Western Australia, Magistrate Hogan, 17 August 2011) (TRA029 – CDPP document 030.0166), pp 39–40. Dr Low acknowledged that he is not a professional statistician or mathematician although he learned basic statistics in high school and had some exposure to statistics in year 1 of his medical studies.
- ⁹⁴ Barrister-at-Law, Counsel for defence, Letter to Acting Deputy Director, CDPP Brisbane Office, 28 June 2011 (WIL024 – CDPP document 125.0016).
- ⁹⁵ WIL024 – CDPP document 125.0016, above, p 4.
- ⁹⁶ Acting Senior Assistant Director, Legal Practice Management and Policy Branch, CDPP, Minute to Director, CDPP, 30 June 2011 (WIL024 – CDPP document 126.0010); Senior Legal Officer, People Smuggling Branch, CDPP, Minute to Director, CDPP, 29 June 2011 (WIL024 – CDPP document 323.0713). See also Acting Senior Assistant Director, Legal Practice Management and Policy Branch, CDPP, Email to Officers, CDPP, 30 June 2011 (WIL0024 – CDPP document 126.0008).
- ⁹⁷ Senior Legal Officer, People Smuggling Branch, CDPP Perth Office, Email to Legal Officer, CDPP, 8 July 2011 (VMT011 – CDPP document 155.0207).
- ⁹⁸ Commonwealth Director of Public Prosecutions, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), pp 164–165.
- ⁹⁹ Deputy Director, CDPP Perth Office, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 165.
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- ¹⁰¹ Commonwealth agencies meeting on people smuggling crew issues supporting the Senior Officials' Committee teleconference, Outcomes, 12 August 2011 (AGD document PROS-62).
- ¹⁰² Senior Assistant Director, CDPP, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), pp 140–141, and (20 April 2012), pp 171–172.
- ¹⁰³ CDPP Officer for Director, CDPP Perth Office, Letter to Counsel for defence, 16 August 2011 (TIW044 – CDPP document 232.0006), p 2.
- ¹⁰⁴ Senior Assistant Director, CDPP Head Office, Minute to the Director, CDPP, 18 August 2011 (OFD030 – CDPP document 293.0049), p 1.
- ¹⁰⁵ OFD030 – CDPP document 293.0049, above, pp 2–3.
- ¹⁰⁶ Commonwealth agencies meeting on people smuggling crew issues supporting the Senior Officials' Committee teleconference, Outcomes, 2 September 2011 (AGD document PROS-64).
- ¹⁰⁷ *R v Daud* [2011] WADC 175.

- ¹⁰⁸ Senior Assistant Director, CDPP, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), pp 136–137.
- ¹⁰⁹ Assistant Commissioner, National Manager Crime Operations, AFP, Email to Federal Agents, AFP, 17 November 2011 (AFP document). See also Principal Consultant Statistician, Managing Director, Data Analysis Australia Pty Ltd, Email to Federal Agents, AFP, 1 December 2011 (AFP document provided 29 May 2012); Senior Legal Officer, People Smuggling Branch, CDPP, Email to AFP and CDPP officers, 6 December 2011 (AFP document provided 29 May 2012); Research – Expert – Statistics – Table of Results, 7 November 2011 (CDPP document provided 3 April 2012).
- ¹¹⁰ Information provided by CDPP to the Commission’s request for further documents, 3 April 2012 (CDPP document). See also Lawyer, Legal, Practice Management and Policy Branch, CDPP, Email to Federal Agent, AFP, 12 December 2011 (AFP document provided 29 May 2012).
- ¹¹¹ Federal Agent, AFP, Email to Lawyer, Legal, Practice Management and Policy Branch, CDPP, 7 December 2011 (AFP document provided 29 May 2012).
- ¹¹² Lawyer, Legal, Practice Management and Policy Branch, CDPP, Email to Federal Agent, AFP, 12 December 2011 (AFP document provided 29 May 2012).
- ¹¹³ President of the Australasian Paediatric Endocrine Group et al, Correspondence to Hon C Bowen MP, Minister for Immigration and Citizenship, 19 August 2011, p 1.
- ¹¹⁴ President of the Australasian Paediatric Endocrine Group et al, Correspondence to Hon C Bowen MP, Minister for Immigration and Citizenship, 19 August 2011, p 1.
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- ¹¹⁶ First Assistant Secretary, Criminal Justice Division, AGD, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 178.
- ¹¹⁷ Senior Assistant Director, CDPP, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 177; Deputy Commissioner, AFP, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 177.
- ¹¹⁸ First Assistant Secretary, Criminal Justice Division, AGD, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 180.
- ¹¹⁹ Hon R McClelland MP, Attorney-General, Correspondence to President, Australian Paediatric Endocrine Group, 18 October 2011 (AGD document CORRO-5).
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- ¹²² Transcript of Proceedings, *The Queen v [TRA029]* (Magistrates Court of Western Australia, Magistrate Hogan, 8 September 2011) (Transcript – The Queen v [TRA029]), p 7.
- ¹²³ Hon R McClelland MP, Attorney-General, Correspondence to President, Australian Paediatric Endocrine Group, 18 October 2011 (AGD document CORRO-5), p 10.
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- ¹²⁵ JD Heydon, LexisNexis Australia, *Cross on Evidence* (at June 2012) [9090]–[9095].
- ¹²⁶ Transcript – The Queen v [TRA029], note 122, p 7.
- ¹²⁷ Senior Assistant Director, CDPP Brisbane Office, Minute to Director, CDPP, 23 September 2011 (OXL002 – CDPP document 267.0035), p 2.

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- ¹²⁹ *R v Daud* [2011] WADC 175, 251–252.
- ¹³⁰ *R v Daud* [2011] WADC 175, 260–262.
- ¹³¹ *R v Daud* [2011] WADC 175, 263–265.
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Chapter 4:

The use of wrist x-ray analysis

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1 Introduction

This chapter considers some of the Commonwealth's practices regarding the use of wrist x-ray analysis as a means of assessing chronological age for the purposes of criminal prosecution. It highlights situations where the reliance on wrist x-rays as evidence of age was contrary to stated Australian Government policy; or where it contributed to individuals who were in fact children, or who are likely to have been children, spending long periods of time in detention, including in adult correctional facilities.

Documents before the Commission indicate that wrist x-ray analysis was widely used as a method of assessing age for young Indonesians suspected of people smuggling who said that they were children. The Joint Commonwealth submission to the Inquiry reports that:

In the period from September 2008 to 27 January 2012, 208 people smuggling crew have claimed to be a minor. Of these, 123 had wrist X-rays undertaken. These wrist X-rays indicated that 86 of these persons were skeletally mature, while there are three awaiting a wrist X-ray or charging decision.¹

The Commission has considered the records of young Indonesians suspected of people smuggling who arrived in Australia between 29 September 2008 and 22 November 2011. The records provided to the Commission for the purposes of the Inquiry indicate that 180 individuals suspected of people smuggling who arrived in Australia during this time said that they were children.²

Of those 180 individuals, 118 had wrist x-rays taken. The outcomes for these 118 were as follows:

- 33 were removed from Australia without charge
- 48 were charged with people smuggling offences and ultimately had the prosecution against them discontinued
- 29 were charged and convicted with people smuggling offences
- 6 were charged and found not guilty
- 2 are currently before the courts.

The outcomes for the 62 who did not have their wrists x-rayed were as follows:

- 51 were removed without charge
- 7 were charged with people smuggling offences and ultimately had the prosecution against them discontinued

- 2 are currently before the courts
- 2 were charged with people smuggling offences and were convicted.

This chapter opens with a consideration of the issue of whether the benefit of the doubt was appropriately afforded to the young Indonesians whose wrists were x-rayed. It then considers issues relating to the practices adopted when obtaining wrist x-rays and to the ways in which wrist x-ray analyses were relied on for the purpose of age assessment. It draws the following conclusions:

- some individuals who were assessed by wrist x-ray analysis as being under 18 years of age nonetheless remained in detention for long periods of time
- wrist x-rays were often used as a first and only means of age assessment
- some individuals were charged and convicted as adults on the basis of wrist x-rays that were analysed as being inconclusive as to their chronological age
- some individuals did not contest their age when presented with an analysis of their wrist x-ray
- consent for a wrist x-ray to be taken was frequently not validly obtained.

Issues relating to individuals whose wrists were not x-rayed and who were removed from Australia are discussed in Chapter 7.

2 Benefit of the doubt

As noted in Chapter 3, the *Crimes Amendment (Age Determination) Act 2001* (Cth) authorised the specification of a procedure as a prescribed procedure for the determination of age for the purposes of the *Crimes Act 1914* (Cth). Wrist x-rays were specified by regulation as a prescribed procedure for the purposes of the Crimes Act in 2001.³

As also noted earlier in this report, the report of the 2001 Senate Legal and Constitutional Legislation Committee Inquiry into the Crimes Amendment (Age Determination) Bill, observed that the Australian Federal Police (AFP) ‘advised that it was prepared to treat all persons who were not clearly adults as if they were juvenile’.⁴

In its report, the Committee recommended that the Explanatory Memorandum for the Bill be amended to include a specific reference to an individual being given the benefit of the doubt in cases where doubt about that individual’s age may exist.⁵ The Revised Explanatory Memorandum incorporates in part the Senate Committee’s recommendation by confirming that the prosecution

bears the onus of establishing on the balance of probabilities that the individual is an adult. The Revised Explanatory Memorandum reads:

In those instances where the age of a suspect or defendant cannot be accurately determined the current legal position will prevail. Unless the prosecution can discharge the burden of establishing on the balance of probabilities that a defendant is an adult, the defendant will be treated as a juvenile. This ensures that no injustice will occur if a defendant's age is still in doubt at the time of trial.⁶

From at least April 2011, the Office of the Commonwealth Director of Public Prosecutions (Office of the CDPP) was aware that the AFP had advised the 2001 Senate Committee that that it was prepared to treat all persons who were not clearly adults as if they were juvenile. In an email dated 12 April 2011, the Deputy Director of the Perth Office of the CDPP expressed his concern that prosecutions were being continued against individuals suspected of people smuggling in circumstances in which the benefit of the doubt should have been applied. The Deputy Director referred specifically to the AFP advice to the 2001 Senate Committee Inquiry saying that '[i]t appears that before the introduction of the Bill, the AFP may have given an undertaking, or at least the equivalent, to give the benefit of the doubt to anybody whose wrist x-ray tested below 19'.⁷

On 2 May 2011, the Criminal Justice Division of the Attorney-General's Department (AGD) received formal legal advice from the department's Office of International Law (OIL) in relation to Australia's obligations under the *Convention on the Rights of the Child* (CRC) towards individuals apprehended, detained, charged and prosecuted for people smuggling offences. The advice made clear that Australia's obligations under the CRC require that the principle of the benefit of the doubt be applied.⁸

Throughout 2011, the Commonwealth asserted that Australian Government policy was to apply the benefit of the doubt to any individual whose age was in doubt. For example, talking points prepared for the Australia-Indonesia Consular Consultations held on 30 June 2011 state that the benefit of the doubt would be applied to individuals suspected of people smuggling whose age was in doubt. Specifically, the talking points state:

Commonwealth agencies have and will continue to take a conservative approach to ensure that only the strongest age determination cases proceed to charge and prosecution. ...

- Where information from [age determination] procedures or verified documentary evidence suggests a person is a minor, the benefit of the doubt would be given to the person and they would be treated as a minor.
- For matters prior to charge, if the AFP investigations reveal that there are conflicting results between the procedures or document verified by the Indonesian Government indicates that individual is a minor, the individual will not be charged and will be removed from Australia.

- Should matters arise during the prosecution process, after somebody has been charged, the CDPP will take into account the AFP approach in considering whether a prosecution will continue in accordance with the *Prosecution Policy of the Commonwealth*.⁹

On 30 June 2011, the then Attorney-General wrote to the President of the Commission with regard to the age determination process for people smuggling crew who say that they are minors. The then Attorney-General proposed that the principle of the benefit of the doubt be applied ‘more proactively’ where a person says that he is a minor. More specifically, the Attorney-General stated:

For matters prior to charge, if the AFP investigations reveal that there are conflicting results between the procedures or document verified by the Indonesian Government indicates that individual is a minor, the individual will not be charged and will be removed from Australia. Should matters arise during the prosecution process, after somebody has been charged, the CDPP will continue in accordance with the *Prosecution Policy of the Commonwealth*. Consideration will continue to be given to charging or continuing a prosecution against a person as a minor in exceptional circumstances on the basis of their significant involvement in a people smuggling venture or multiple ventures.¹⁰

On 22 August 2011, the then Attorney-General wrote to the President again. In response to concerns about age determination procedures raised by the President, the then Attorney-General advised that he was not convinced that there was a need for an independent review of all people smuggling matters in which age was in dispute. One reason he gave for this was that he considered that the principle of the benefit of the doubt had been applied to cases in which there was some doubt about an individual’s age. The letter asserted:

by giving the benefit of the doubt in cases involving age, in particular from verified documentation relating to age, AFP and CDPP only proceed with cases with the highest probability that the person is an adult, and where information gathered consistently indicates that this is the case.¹¹

The Joint Commonwealth submission to the Inquiry maintains that the Commonwealth continues to give individuals the benefit of the doubt and return them to Indonesia where all material available supports the individual’s claim to be a minor.¹² It further asserts that the Commonwealth recognises that, given the limitations of currently available processes for assessing age, ‘the best approach is to adopt a combination of age determination procedures and to give defendants the benefit of the doubt’.¹³

2.1 The benefit of the doubt was not afforded in a significant number of cases

It is clear from the documents before the Commission that, in practice, the benefit of the doubt was not afforded to a significant number of young Indonesians suspected of people smuggling who said that they were children. Sections 3–7 of this chapter discuss some of the cases in which this was not done.

In November 2010, the Department of Immigration and Citizenship (DIAC) questioned whether the principle of the benefit of the doubt was being applied to young Indonesians in the criminal justice system. It did so when responding to a request to comment on 'whole-of-government talking points' that had been prepared by AGD about age determination procedures. DIAC commented that, in their experience, the talking points were not reflective of actual practice at the time. The DIAC officer recorded that:

I've just seen the [question time brief] from AGD and am curious about one of the [talking points], i.e.: Where an individual claims to be a juvenile, they are treated as a juvenile in the criminal justice system unless a court determines the person to be an adult based on the relevant age determination process.

Re the alleged 14 year old on remand in Perth, has a court determined he is an adult? If not, then the [talking point] is not accurate.¹⁴

Shortly after the Criminal Justice Division of AGD received the legal advice from OIL dated 2 May 2011 referred to above, a Ministers' Office Brief was prepared within that division for the Office of the then Attorney-General and the then Minister for Home Affairs and Justice. One of the talking points in the Brief concerns the circumstances in which a criminal charge would be brought against an individual suspected of people smuggling whose age is in doubt. The talking point noted that '[w]here all available information indicates the person is unlikely to be a minor, the person is charged and brought before the court as an adult'.¹⁵

At the Inquiry hearing for Commonwealth agencies, the Commission President observed that this statement reflected a reversal of the usual rule and suggested a failure to give the benefit of the doubt to the young person. An officer from AGD agreed that it was possible to interpret the statement in that way.¹⁶

The AGD officer explained the procedure at that time in the following way:

the procedure as we understood it was that the AFP and DPP would have regard to all available information to decide whether in fact a person was a minor or not. If they believed the person was not a minor then they would proceed with charging them.¹⁷

It is doubtful that this procedure would have resulted in individuals being given the benefit of the doubt. The described procedure assumes that it is appropriate for the AFP and the Office of the CDPP to consider only two options – whether they were satisfied that the person was a minor, or alternatively, not a minor. For the benefit of the doubt to be afforded to a young person, a decision maker must be prepared to recognise three, not two, options; first, that they can be satisfied the person is a minor, second, that they can be satisfied the person is not a minor, and third, that the person is someone about whose age there is reasonable doubt.

It appears that in a number of cases the practice that was followed required an individual about whose age there was reasonable doubt to prove to the prosecuting authorities that he was, in fact, under the age of 18 years.

2.2 Issues of proof

There has been an inconsistent understanding of whether the prosecution or the defence, if either, bears the onus of proof in a proceeding to determine whether an individual suspected of people smuggling is a minor.

As noted above, the 2001 Senate Legal and Constitutional Legislation Committee Report made a recommendation that the Explanatory Memorandum for the Bill be amended to include a statement that persons whose age cannot be precisely determined will be given the benefit of the doubt and treated as juveniles.¹⁸ During his Second Reading Speech in the House of Representatives, the then Attorney-General acknowledged this concern and stated that it would be addressed 'by referring to the current legal position that the prosecution bears the onus of establishing on the balance of probabilities that the defendant is an adult'.¹⁹

As is also noted above, in the Second Reading Speech in the Senate, the Special Minister of State explained that the prosecution would bear the onus of proving that an individual was an adult at the time of the offence.²⁰

The question of which party, if either, bears the onus of proof is important for a number of reasons. The age of an accused person can be critical to a court's jurisdiction. Some state courts have exclusive jurisdiction to hear and determine a charge alleged to have been committed by a child.²¹ This report does not address the issue of onus of proof of age when the age of the accused affects the court's jurisdiction. However, documents before the Commission reveal that, on occasions, the jurisdiction of a court to hear a people smuggling prosecution has been challenged on the basis of the age of the accused person.²²

The issue of onus of proof of age is important for the purposes of provisions of the Crimes Act which attribute significance to age. Section 19B of the Crimes Act contains a general power authorising a court to dismiss a charge of a federal offence without recording a conviction.²³ However, s 236A of the Migration Act limits this power. It provides:

The court may make an order under section 19B of the *Crimes Act 1914* in respect of a charge for an offence against section 233B, 233C or 234A only if it is established on the balance of probabilities that the person charged was aged under 18 years when the offence was alleged to have been committed.

Further, the mandatory sentences provided in respect of some people smuggling and related offences by s 236 of the Migration Act do not apply where the offender was under 18 at the time of the offence. Section 236B(2) of the Migration Act provides that '[t]his section does not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed'.

Neither s 236A nor s 236B(2) of the Migration Act makes clear which party, if either, bears the burden of proof to establish the age of the individual charged or convicted.

Most courts have held that the prosecution must prove that an individual was not under the age of 18 at the relevant time.²⁴ However, in some cases, courts have found that the defendant bears the onus of establishing that he was under the age of 18 at the time of the alleged offence.²⁵ In other decisions, the court has held that no burden rests on either party.²⁶ It is current practice for the Office of the CDPP to accept the onus of proving that an individual is not under the age of 18 years.²⁷

A number of submissions made by State and Territory Legal Aid Commissions to the Inquiry expressed concern about the inconsistent approach of courts to the onus of proof.

Legal Aid Queensland's submission to the Inquiry argues that there has been an 'informal reversal' of the onus of proof where a person's status as a juvenile is in issue. It states:

The prosecuting authority simply charges the individual as an adult and then the defence is forced into a position where they are required to conduct enquiries and gather evidence to prove that the individual is in fact a child.²⁸

This submission argues that a more appropriate approach would be for the 'prosecuting authorities to be in possession of material that is sufficient to determine age to the requisite standard before charges are laid'.²⁹

Similarly, the Northern Territory Legal Aid Commission submitted that:

The use of wrist x-rays as definitive places the onus back on the individual and their representative, which is likely to be legal aid, to establish proof of age.³⁰

The Joint Commonwealth submission to the Inquiry noted the inconsistent approach to the onus of proof in age determination matters and advised that the Commonwealth is considering taking steps to ensure a more uniform approach. It states:

To encourage consistency between the courts in each jurisdiction, the Commonwealth is considering possible amendments to the Migration Act to expressly provide that, where a defendant raises the issue of age during proceedings, the prosecution bears the legal burden to establish the defendant was an adult at the time the offence was committed.³¹

This is not the first time the Commonwealth has considered amending the Migration Act to reflect concern about the inconsistent application of the onus of proof between jurisdictions.

In early 2010, the Commonwealth considered amending the Migration Act to provide explicitly that defendants bear the legal burden of proving that they were under 18 years of age for the purposes of an offence against the Migration Act.³² OIL provided advice that a legislative provision that explicitly requires a person claiming to be a child to prove that they are a child might result in a situation where Australia may be in breach of obligations under the CRC.³³ OIL further advised that the government would be open to criticism were a person who was in fact a child not given the protections provided for under the CRC because they were not able to prove that they were a child.³⁴

In a subsequent email, an officer from OIL states her understanding that, in practice, the defence is required to prove age even though this is not expressly required by law. She notes that any amendment to explicitly provide that the defendant bear the legal burden to prove he was under 18 may draw adverse attention to that practice.³⁵

No steps were taken to amend the Migration Act at that time.

In February 2011, AGD was asked to develop an options paper on possible changes to the domestic legal framework criminalising people smuggling.³⁶ The discussion paper circulated to the Commonwealth agencies in connection with that Ministerial request noted that the requirement in the Migration Act for the defendant to prove his or her age 'may be in breach of Australia's international obligations'.³⁷ The paper recommended that the Migration Act be amended to ensure that Australia meet its international obligations to 'expressly provide that the defendant bears the evidentiary burden and the prosecution bears the legal burden of having to disprove the age of the defendant' during sentencing.³⁸

It was eventually agreed by the Commonwealth agencies that it would be appropriate to redraft the relevant provisions of the Migration Act to ensure that during sentencing the defendant did not bear the burden of proving that he was under 18 years of age. However, the Commission is not aware of any policy position adopted by the government with respect this proposed amendment to the Migration Act.

In November 2011, Senator Hanson-Young introduced the Crimes Amendment (Fairness for Minors) Bill 2011 (Cth) into the Senate. The Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report. The Senate Committee report recommended 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.³⁹

2.3 A high level of scepticism

It appears that one explanation for the benefit of the doubt not always being given to young Indonesians may be the development of a high level of scepticism concerning their claims to be under the age of 18 years.

In 2001, when the Crimes Amendment (Age Determination) Bill (Cth) was introduced, the Special Minister of State, in his second reading speech, stated:

Determining the age of a suspect is particularly important in relation to people smuggling offences, where foreign nationals (such as the crew on a vessel containing suspected unlawful non-citizens) refuse to provide details of their age, or make false claims that they are under 18 years old, and there is no documentation or means to prove otherwise.⁴⁰

This speech further asserted:

The age determination powers contained in the Bill will send a strong message to those engaged in people smuggling that they cannot circumvent or abuse the Australian legal system by deceptively claiming they are under 18 years old. It will also avoid the undesirable situation of placing adult suspects in juvenile detention facilities or vice versa.⁴¹

Documents before the Commission suggest that it was often assumed that any difference between an individual's claimed age and his age as assessed on the basis of a wrist x-ray could be attributed to the individual's lying about his age.

For example, in an email exchange between the AFP and the Office of the CDPP about the preparation of the material facts for sentencing in the case of ULT055, an AFP officer stated:

I think it would be good to make mention of the fact that he misled us by stating he was a juvenile and after a costly and time consuming procedure was found not to be.⁴²

In the case of VMT011, the AFP statement of facts suggested the young Indonesian was deliberately lying about his age. The statement asserted:

Defendant 1 was given every opportunity to admit his guilt and tell the correct version of events but chose to hinder the investigation, beginning with the allegation that he was 15 years old.⁴³

In another case, the AFP wrote an email to the Office of the CDPP concerning the age of INN012 who maintained that he was under 18 although he had been charged as an adult. The email notes that in his interview with the AFP he gave inconsistent evidence about his age and then said that he did not know his date of birth. The AFP officer explained to the Office of the CDPP officer that individuals suspected of people smuggling often falsify their age, noting:

This is again consistent with the majority of SIEV cases whereby at the time of interception both false names and dates of birth are provided to authorities in order to minimise the chance of prosecution.⁴⁴

In the matter of QUE053, the prosecutor's submissions on sentence stated that he had lied about his age. The prosecutor submitted:

The age of Mr [name] and Mr [name] should be taken into account. They were clearly young when the offending took place, as from their appearance when photographed after interception and the evidence of passengers. They lied about their age to the AFP however, in their interviews. This is apparent from the evidence of the reports of Dr Low, but the court does not yet know their true age.⁴⁵

Documents before the Commission indicate that Commonwealth authorities not only linked the issues of age and credibility, they began to consider that individuals only claimed to be minors to avoid prosecution and imprisonment in Australia.

For example, in one email from the AFP to an officer of the Office of the CDPP, the AFP officer describes age as a 'bit of a chestnut that defence are using around the country on crew that 'look' like kids'.⁴⁶

In another matter, that of OFD030, the defence lawyer made submissions to the Office of the CDPP that the prosecution should be discontinued on the grounds that the accused was a juvenile. In an email providing his opinion to the Office of the CDPP on the defence submissions to discontinue, the AFP officer stated:

I have read the submissions from [OFD030]'s lawyer. It is virtually a stock standard thing that we have been getting over here in a lot of age determination challenges.

In the submission it states that [OFD030] has given the consistent dob of 1 April 1993. That is nothing new and contrary to what the lawyer says people smugglers are fully aware of the Australian Government policies and that juvenile crew members will not be prosecuted. ... The letter from [OFD030]'s lawyers is just another attempt to cut the prosecution early jumping on the back of false reporting in the media on this issue.⁴⁷

In another case, an AFP officer told DER024, who he was interviewing and who said that he was a child, that according to the result of the wrist x-ray analysis, he was lying about his age. The transcript of the interview records the following exchange:

Q240 Are you over the age of eighteen?

A240 THE INTERPRETER: No.

Q241 Yesterday afternoon, you were taken to the Royal Darwin Hospital, and had a wrist Xray?

A241 THE INTERPRETER: Yes.

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Q242 That procedure was done, to determine your age?

A242 THE INTERPRETER: Yes.

Q243 Do you understand that two doctors who looked at your Xray, stated that you have attained the age of nineteen years?

A243 THE INTERPRETER: Yeah, because my age is from my mother. My mother told me that my age was that.

Q244 What age is that?

A244 THE INTERPRETER: Nearly, nearly fifteen years old, twenty two December, nineteen ninety four. That's what my mother told me.

Q245 When did she tell you that?

A245 THE INTERPRETER: Since I was little. When I was little, my mum, my mum told me. So I keep using that now, I use that age.

Q246 Do you have any official documentation, that proves you have that date of birth?

A246 THE INTERPRETER: No, I don't bring it with me.

Q247 I will put it to you, [DER024], that you stated you were fifteen years old?

A247 THE INTERPRETER: Yes.

Q248 Because you thought that if you were caught by Australian authorities, they would send you home.

A248 THE INTERPRETER: I don't know, because I never been here. So I don't know, because I never – I never been here before.

Q249 Were you aware that Australian authorities would send children home, who were under eighteen years?

A249 THE INTERPRETER: No.

Q250 When you were on the boat, did you discuss this with any of the crew?

A250 THE INTERPRETER: About the age and all that, yep. Did I? No.

Q251 Pardon?

A251 THE INTERPRETER: No, they didn't talk about – I said about the age, talking about the age. I don't even – I didn't know that I was going to come to, and then get caught here, in Australia. ...

Q252 [DER024], the other members of the crew have told us that they lied about their age, because they know they will get sent home.

A252 THE INTERPRETER: I don't know that.

Q253 I believe that you are lying.

A253 THE INTERPRETER: No.

Q254 The Xrays show that you are lying.

A254 THE INTERPRETER: If the Xrays say that, that means maybe, according to the Xray, that. But I believe that my mother told me that I'm – that my – fifteen years old. So I'm just follow my mum, what my mum said. But this – if it's – they say it's nineteen, well it's up to you.⁴⁸

The reality appears to be that many young Indonesians do not know their age. In May 2012, the AFP received advice from an academic about documents proving identity and age in Indonesia. The advice confirms that many Indonesians do not know their date of birth. In particular, it states that:

many rural poor communities do not place much emphasis on precise knowledge of age according to the Gregorian calendar and that many of the rural poor have only limited literacy and rarely keep formal records of births. As a result many adopt nominal birthdays for convenience, choosing a convenient date and year that may have little or no connection with their true age.⁴⁹

The brief of advice provided to AGD by the Chief Scientist under cover of a letter dated 11 January 2012 also advised:

While birth registration is a standard practice among developed nations, the reality in developing nations is very different. It is estimated that only half of the children under 5 years of age have their births registered. ... it is estimated that more than 60% of births in South East Asia ... remain unregistered'. (citations omitted)⁵⁰

It is not suggested that no young Indonesians lied to Australian authorities about their age; it seems highly likely that some of them did. However, it is apparent from the documents provided to the Commission that often an apparently unfounded assumption was made, particularly by investigating officers, that individuals suspected of people smuggling were lying when they said that they were children. This was particularly likely to happen when a wrist x-ray was interpreted as showing that the individual was an adult.

Of course, the fact that some individuals, as seems likely, falsely claimed to be underage provides no justification for conduct that failed to respect the rights of others who might have been children.

The AFP, in response to this draft report noted that it is 'open to the Inquiry to infer that a number of AFP officers may have held views that people smugglers routinely lied about their age'. However the AFP objected to a conclusion that there was a widespread 'culture of disbelief' amongst AFP officers. The response stated:

Indeed it is the role of AFP investigators to question and to challenge statements in order to illicit the best available evidence as to the age of the person being interviewed. The report notes that interviewees at

times provided inconsistent answers which gives rise to the suspicion about their claimed age. The AFP is also in receipt of confidential intelligence that clearly indicates that organisers and facilitators of people smuggling ventures have instructed SIEV crews to lie about their age.⁵¹

In his response to the draft report, the Commonwealth Director of Public Prosecutions also rejected any conclusion that his Office had a 'culture of disbelief'. He stated:

The CDPP's experience in prosecuting people smuggling offences involving crew from Indonesia is that these matters can involve complex situations and uncertainty as to precise dates of birth and accordingly the age of defendants. There have been instances of multiple dates of birth being provided and cases where different ages have been claimed by the claimant individual at different stages. These aspects, combined with other difficulties that have arisen in relation to potential evidence as to age including issues relating in particular to Indonesian documentary material, has meant that age determination can be extremely difficult, which has been reflected in the CDPP's conduct of these matters.⁵²

3 Some individuals whose wrist x-ray analysis placed them as being under 18 remained in detention for long periods of time

The Commission recognises that almost all individuals whose wrist x-ray analysis resulted in a report that they were under 18 years of age were returned to Indonesia. The Joint Commonwealth submission to the Inquiry reports that of 123 people who were x-rayed between September 2008 and 27 January 2012, 37 were found to be skeletally immature. The submission reports that all of these young people were returned to Indonesia.⁵³

From the information and documents provided to the Commission it appears that, of the 118 people who were x-rayed between 29 September 2008 and 22 November 2011, 29 were found to be skeletally immature and subsequently returned to Indonesia.

However, it appears that in some cases, despite wrist x-ray analysis that indicated skeletal immaturity, individuals remained in detention for a long time before being returned to Indonesia.

For example, HAM046 was apprehended in February 2010 and his wrist was x-rayed in April 2010. It was not until 3 August 2010 that a decision was made not to prosecute him as he was a juvenile.⁵⁴ In view of the Australian Government's policy not to prosecute minors except in exceptional circumstances, this delay was regrettable. It is additionally regrettable that the AFP did not request the withdrawal of his Criminal Justice Stay Certificate (CJSC) until 20 October 2010.⁵⁵ HAM046 spent a total of 261 days in immigration detention. He was held in immigration detention for four months following his wrist x-ray prior to a decision being made not to prosecute him and for an additional two months before his CJSC was cancelled.

Another individual, GEE080, was apprehended in April 2010 and his wrist was x-rayed that month. An AFP case note dated 14 May 2010 records that, as per current AFP policy, he will

not be prosecuted and 'can be deported'.⁵⁶ However, no request was made for his CJSC to be withdrawn until 19 October 2010.⁵⁷ He was not removed from Australia until November 2010. He spent 218 days in immigration detention in Australia. Again, it is concerning that following a decision not to prosecute, it took five months to cancel his CJSC and six months to remove him from Australia.

4 Until July 2011, wrist x-rays were often used as a first and only means of age assessment

Documents before the Commission indicate that the AFP routinely conducted wrist x-rays in situations where young Indonesians contested their age and that this process was often used as the AFP's first and only means of assessing age. As a consequence, counsel for the CDPP adduced expert evidence based on wrist x-rays as the primary, and sometimes the only, evidence to challenge a claim made by an individual suspected of people smuggling that he was a child at the date of the alleged offence.

4.1 Wrist x-rays were used as a first resort because they were a prescribed procedure

It appears that the fact that wrist x-rays were a prescribed procedure had a significant impact on the approach taken by both the AFP and the Office of the CDPP to the use of wrist x-ray analysis as a means of assessing age. It further appears that it influenced the way in which AGD officers understood the provisions of the Crimes Act for which wrist x-rays are a prescribed procedure.

At the hearing for Commonwealth agencies, the Commonwealth Director of Public Prosecutions spoke of the GP Atlas as a:

legacy with which we work as a result of being given by the Parliament access to wrist X-rays; it wouldn't make sense other than an extremely limited and probably useless mechanism otherwise.⁵⁸

The Director saw the concerns of the medical profession about the reliability of wrist x-ray analysis as representing 'a commentary on use – a fundamental difference of view in the Parliament creating this mechanism and, in effect, overriding that concern'.⁵⁹

The Director also spoke of wrist x-ray analysis as having 'limitations ... as seemed to be quite apparent, even back in 2001 when before the Senate' but expressed the view that 'those were ... amongst the limited range of tools that we were given'.⁶⁰

Support for the conclusion that the Office of the CDPP held the view that wrist x-rays should be taken because they had been authorised by Parliament is contained in minutes of a meeting of

Commonwealth agencies regarding 'Age determination of people smuggling crew'. The minutes of the meeting record that a senior CDPP officer stated that 'the current wrist X-ray procedure was considered by Parliament and the AFP and CDPP are obligated to comply with that procedure'.⁶¹

The view that wrist x-rays were routinely taken because they were a prescribed procedure is also contained in talking points prepared for the Prime Minister in November 2010. The talking points included the following assertion:

Where there is doubt about whether a person arriving in Australia as an irregular maritime arrival is aged over or under 18 years of age, and the person is suspected of committing a Commonwealth offence, the Australian Federal Police conducts an age determination process in accordance with the *Crimes Act 1914*.⁶²

In response to questioning at the Inquiry hearing for Commonwealth agencies about whether this statement was consistent with the Second Reading Speech for the Crimes Amendment (Age Determination) Bill 2001, the First Assistant Secretary, Criminal Justice Division, AGD said:

The age determination process that's undertaken has one prescribed procedure; the AFP is required to follow that procedure and that's what the talking points are drawing out. The talking points are not forcibly putting forward every piece of evidence that may be relevant to age; it's a procedure that's required to be followed in the legislation.⁶³

The Deputy Commissioner for Operations of the AFP, when giving evidence to the same Inquiry hearing, agreed that there was evidence that, as a result of wrist x-rays having become a prescribed procedure, the authorities' thinking had begun to shift to see wrist x-rays as a mandated procedure rather than a procedure of last resort.⁶⁴ In its response to the draft report, the AFP stated that it 'gives no greater weight to the fact that wrist x-rays are a prescribed procedure when considering to use the procedure over other methods'.⁶⁵ However, the evidence before the Inquiry does not support this conclusion.

This evidence includes, for example, an email sent by an AFP officer to the Office of the CDPP which discusses the progress of the investigation and prosecution of a number of young Indonesians suspected of people smuggling who said they were under the age of 18 years. The AFP officer expressed disappointment that DIAC intended to remove them straight to Indonesia and said that 'someone didn't do their job correctly and [to] tell DIAC we needed to do wrist x-rays before a decision was being made'.⁶⁶

The NSW Legal Aid submission to this Inquiry observed that because wrist x-rays are the only prescribed procedure for age assessment, prosecutors and magistrates have given x-ray evidence undue weight in assessing age, even in circumstances in which they are aware that it is an unreliable method of assessing age.⁶⁷

Nothing suggests that it was the intention of the legislature that the specifying of wrist x-rays as a prescribed procedure would mean that the AFP was obliged to use them. As mentioned above, the Revised Explanatory Memorandum for the Crimes Amendment (Age Determination) Bill 2001 included the following statement:

The Bill does not contain an express requirement to exhaust all other avenues before seeking a person's consent to, or magisterial authorisation for, a prescribed procedure. However, in practice, investigating officials will seek to determine a person's age by all reasonable means before exercising the powers contained in the Bill. For example, if reliable documentary evidence of a person's age is available then this may suffice.⁶⁸

There is, therefore, no reason to think that it was intended that the x-ray procedure should be the first and only method used by investigating officials for determining age. The preferable view is that a wrist x-ray was intended to be no more than an option available where other means of assessing age were either not practicable or not sufficiently informative. Indeed, any other view of the legislation would be difficult to reconcile with the fact that the AFP, as the material before the Commission indicates, effectively ceased using wrist x-rays to determine the age of individuals suspected of people smuggling offences who said that they were children in about July 2011.

It also appears that it was the intention of the legislature that the results of any wrist x-ray procedure would be considered as part of a range of information collected about a person's age. The Senate Legal and Constitutional Legislation Committee, in its report on the 2001 Bill, stated that '[t]he Committee believes that the Bill may assist in clarifying the age of some persons suspected of, or charged with, Commonwealth offences'.⁶⁹ The qualified nature of its belief may be assumed to be based, at least in part, on its earlier observation that:

Although the wrist x-ray is intended to demonstrate the extent of fusion of two bones, there is no real correlation between bone age and chronological age. Variations can be as much as more than a year higher than chronological age, and up to 18 months younger than chronological age.⁷⁰

However, the documents before the Commission reveal that until July 2011 the wrist x-ray procedure was used by the AFP in many cases as the only means of assessing age.

Moreover, it appears that unwarranted assumptions about the extent to which a wrist x-ray could provide definitive evidence of age were drawn by officers of the Commonwealth. For example, in the talking points for the Prime Minister referred to above, the following point appears in respect of the wrist x-ray age determination process: 'This involves a wrist X-ray conducted by an independent medical expert who then interprets the X-ray to determine the age of the person'.⁷¹

As earlier noted, the practice of the AFP appears to have changed from July 2011. Documents provided to the Commission indicate that only one wrist x-ray was conducted in or after July 2011. As discussed above, the 'improved age assessment process' was announced in July

2011. While the Office of the CDDP continued to rely on wrist x-ray analysis as evidence of age where prosecutions had commenced, it appears that the practice of having wrist x-rays taken had essentially stopped at this time.

Even though it appears that wrist x-rays were no longer being taken at the time, the Commission has received documents from as late as November 2011 that show that the AFP may have considered that evidence of age adduced from the analysis of a wrist x-ray was necessary because it was a prescribed procedure. In an email to the Office of the CDDP, an AFP officer described the material relied on during an age determination hearing and included the following statement:

G&P method was imprecise but that there was no precise method available. The wrist X-ray is the method prescribed by the legislation and should be followed.⁷²

The Commission has been informed that no wrist x-rays have been taken since December 2011, when the new procedure commenced whereby DIAC conducts age assessment interviews and only refers to the AFP young Indonesians that they assess as likely to be adults.⁷³

4.2 In many cases, a person was charged as an adult on the basis of wrist x-ray evidence alone

In a significant number of cases, an individual whose age was in doubt was arrested and charged as an adult where the only evidence of his age was based on his wrist x-ray. From documents provided to the Commission, it appears that every individual who, following a wrist x-ray, was assessed as being skeletally mature was charged as an adult – even if he continued to assert that he was under the age of 18 years and there was no other evidence suggesting that he was an adult.

It is clear from some transcripts of interviews between AFP officers and young Indonesians that many individuals were treated by the AFP as adults as soon as an x-ray report was received suggesting that they were skeletally mature.

For example, NTN032, who maintained he was a child, was interviewed without an adult or guardian present (although the presence of such a person is required under the Crimes Act for juvenile suspects) because the result of an x-ray indicated that he was 19 years old. The transcript of the interview included the following exchange:

Q1F/A [Federal Agent] [name]: ... What's your date of birth, [NTN032]?
A1 THE INTERPRETER: 22nd of September 1994.

Q2 Okay, So [how] old are you?

A2 THE INTERPRETER: Sixteen.

Q3 Do you remember having an X-ray on your wrist?

A3 THE INTERPRETER: I do not remember.

Q4 All right. The X-ray on your wrist says you're 19.

A4 THE INTERPRETER: I don't know. I don't know.

Q5 Are you 19 years old?

A5 THE INTERPRETER: As far as I know, I am 16.

Q6 And why - why is it as far as you know, you're 16?

A6 THE INTERPRETER: From my family.

Q7 F/A [name]: This date of birth makes him 15.

A7 THE INTERPRETER: I only know from my mother.

Q8 F/A [name]: Just-Just tell him.

F/A [name]: No, I won't. Okay. [NTN032], our - our medical records or medical examination of your wrist indicates that you're 19 years old. As a result of that, you will be treated as an adult and you'll be interviewed as an adult. Do you understand that?

A8 THE INTERPRETER: All I know is from my mother. My mother has told me I'm 16.

Q9 So as I said, our records [indicate] you're at least 19. You'll be treated as an adult.

And then later in that same interview:

Q34 Are you over 18?

A34 THE INTERPRETER: As far as I know, I'm 16. And that's what I've been advised from - whilst my mother was alive, she's - she's passed away, but whilst she was alive, she advised me that my age was 16. ...

Q37 F/A[name]: All right. As I've explained earlier, the medical results we've got back indicate that you're over 18 years of age. So as a result, you will be treated and interviewed as an adult and charged as an adult, if appropriate. Do you understand what we're saying?

A37 THE INTERPRETER: All I know is that I'm 16 and I got that from my mother.⁷⁴

A similar conversation took place with MAL011 who said that he was 15 years old:

Q42 Can you tell me your age please?

A42 THE INTERPRETER: Fifteen.

Q43 And your date of birth?

A43 THE INTERPRETER: 26-26,.2.199-1999. One-1995, sorry.

Chapter 4: The use of wrist x-ray analysis

Q44 Previously did you go with people and have an X-ray taken of your wrist?

A44 THE INTERPRETER: Yes.

Q45 So for the purposes of this interview, the wrist X-ray I talk of suggested that [MAL011] was greater than 19 years of age and, as such, will be interviewed as an adult and not as a juvenile.⁷⁵

In another matter, an officer from the Office of the CDPP informed UPW031's defence lawyer that the only evidence of age the Commonwealth intended to call at his age determination hearing was that of Dr Low.⁷⁶ The defence lawyer then informed the CDPP officer that he intended to make submissions that the only investigation of age conducted by the Commonwealth was a wrist x-ray. He advised:

I am intending to make a submission to the effect that there was no other investigation undertaken by the prosecution concerning the age of the accused. There doesn't need to be evidence to confirm that. The fact that no other evidence is offered [by the State] is sufficient to support that submission.⁷⁷

Many of those who were arrested and charged as adults based solely on wrist x-ray analysis ultimately had their prosecutions discontinued. In some of these cases, individuals spent very long periods of time in detention, including in adult correctional facilities.

For example, JDT046 had a wrist x-ray taken in April 2010. He was charged as an adult nine months later based on an analysis of that wrist x-ray alone. The prosecution was discontinued a further nine months later after the Office of the CDPP obtained expert evidence from an anthropologist who provided support for his original claim of being a child.⁷⁸

In another case, NTN031 had a wrist x-ray taken in January 2010. He was charged as an adult nine months later, in October 2010, based on a wrist x-ray analysis which stated he was 'approximately 18.5 years'.⁷⁹ By the time his prosecution was discontinued in November 2011, he had spent 690 days in detention, 412 of which were spent in an adult correctional facility.

In another matter, that of TIW044, there was no evidence other than a wrist x-ray to support the contention that he was an adult at the time he was charged. A DIAC focused age assessment interview found him to be under 18 years old. In an email to the Office of the CDPP, the AFP expressed their view that 'the evidence available exceeds the balance of probabilities' and 'there does not appear to be any logical reason why the CDPP would drop this matter'. They stated:

if this matter was dropped by the CDPP it would create an extremely bad precedence (sic) for all current and future age issue matters and virtually indicate that the Commonwealth has not trust in the prescribed procedure (wrist x-ray) and that it is flawed.⁸⁰

By the time the decision was made to discontinue the prosecution, TIW044 had spent 486 days in detention, 309 of which were spent in an adult correctional facility.

4.3 In some cases, a person was convicted as an adult on the basis of wrist x-ray evidence alone

Some individuals have been convicted as adults in circumstances where the prosecution relied wholly or substantially on wrist x-ray analyses.

It appears that this was the case in respect of at least ten of the 15 individuals who the Attorney-General released on licence.⁸¹ Further, for two of the individuals who were released early on licence it appears that the only evidence of age adduced by the prosecution during their age determination hearings was wrist x-ray analyses.⁸²

One of these individuals, who was sentenced to five years imprisonment (with a three year non-parole period), maintained in April 2012 when speaking with Commission staff that he was under the age of 18 when he was apprehended.⁸³ From the documents before the Commission it appears that the only evidence available to the Commonwealth to support the assessment that he and his co-accused were adults was based on their wrist x-rays. After the issue of their respective ages had been raised by defence counsel, a senior CDPP officer instructed the responsible Office of the CDPP lawyer to 'rely on x-rays to prove age' and not on information given by the individuals to the AFP during interviews.⁸⁴ In these cases, which are discussed in Chapter 3, section 5.2, the question of age, having been raised by defence counsel, was not thereafter pursued. The Attorney-General released both of these individuals early on licence in June 2012.⁸⁵

Another example is DRU001 who was convicted as an adult of a people smuggling offence and sentenced to five years imprisonment. It is not clear that the Commonwealth had any evidence of his age other than evidence based on his wrist x-ray. The AFP noted that the individual's date of birth was unknown and that they relied on the evidence of Dr Low with respect to his age.⁸⁶

4.4 Wrist x-ray procedures were used even where documentary evidence of age existed

In other cases, even where documentary evidence of the individual's age was available, the AFP arranged for a wrist x-ray to be taken.

For example, BOM064, who was apprehended in June 2010, had in his possession a photograph identification document from Indonesia. This document gave his date of birth as 12 March 1995, indicating that he was 15 years old at the time of his apprehension.⁸⁷ In September 2010, the AFP recorded a 'critical decision' not to prosecute him.⁸⁸ However, in October 2010 a Federal Agent asked for a wrist x-ray to be performed as 'juveniles undergo wrist x-rays as a matter of course'.⁸⁹ An AFP case note recorded that they are waiting on the outcome of the wrist x-ray

before a decision is made whether to withdraw BOM064's CJSC and remove him to Indonesia.⁹⁰ He was removed to Indonesia only after the wrist x-ray results were received. He spent 185 days in immigration detention in Australia.

It appears that in some cases, the Commonwealth preferred evidence of age based on wrist x-rays to documentary evidence of age. For example, a senior officer of Office of the CDPP requested all evidence of age in one particular matter. The case officer said that there was documentary evidence of age, but that it was a forged birth certificate. The senior officer of the CDPP replied to the effect that wrist x-ray evidence is ordinarily more reliable than documentary evidence of age, advising:

We do not rely upon Indonesian birth certificate[s], even if they are genuine, the provenance of the data and time of providing it is so late as to be unreliable. I am more interested in what our x-ray material and expert witnesses say as to age.⁹¹

These issues are discussed further in Chapter 6.

4.5 Wrist x-ray evidence was preferred to the results of age assessment interviews

As discussed in detail in Chapter 5, in October 2010, DIAC conducted focused age assessment interviews with 27 individuals suspected of people smuggling whose ages were in doubt and concluded that 23 of them were likely to have been under the age of 18 at the time of their alleged offence.

An internal DIAC communication from September 2010 records that the AFP had indicated that they would not charge an individual whom DIAC assessed to be under 18 years of age but would rather request his removal to Indonesia.⁹² The documents provided to the Inquiry indicate that this is not what happened in practice.

Of the 23 individuals assessed by DIAC as likely to have been under the age of 18 at the time of their alleged offences, 11 had already had wrist x-rays taken prior to participating in the DIAC interview. In two of these cases the wrist x-ray analysis showed that the individual was not skeletally mature. They were both removed from Australia without charge after the DIAC interview. However, in the other nine cases the wrist x-ray analysis suggested that the individual was either over 19 years of age, or between 18 and 19 years of age. Every one of these nine individuals was charged as an adult despite DIAC's finding that they were likely to have been under 18 years of age at the time of their alleged offences. In each case, the prosecution was ultimately discontinued.

The remaining 12 individuals each had a wrist x-ray taken, notwithstanding that DIAC's age

assessment interview had resulted in a conclusion that he was likely to have been under the age of 18 at the time of his alleged offence. Of these 12 individuals, five were found to be skeletally immature and removed from Australia without charge. Wrist x-ray analyses suggested that the remaining seven were either over 19 years of age, or between 18 and 19 years of age. Each of these seven individuals was charged as an adult despite DIAC's finding that he was likely to have been under 18 years of age at the time of his alleged offence. In each case the prosecution was ultimately discontinued.

Clearly, despite the undertaking to remove from Australia those individuals assessed by DIAC as likely to be under the age of 18 years, the AFP was not, in practice, prepared to rely on DIAC's assessment of an individual's age, preferring wrist x-ray analysis as evidence of age. As a consequence, when the Commonwealth was faced with conflicting opinions on the age of an individual, he was not given the benefit of the doubt.

Some of these young Indonesians spent long periods of time in detention in Australia, as is shown in the following cases.

When JDT046 was apprehended in February 2010, he told authorities that he was born in August 1995. In April 2010, he underwent a wrist x-ray. When an expert report was prepared a year later, it stated that he was 'probably 19 years or older at 8 April 2010 when the x-ray was taken'.⁹³ A DIAC age assessment was conducted in October 2010 (with a formal report completed in February 2011) which concluded that he was under 18 years of age at that time.⁹⁴ He was charged as an adult in December 2010 and was remanded in custody from that date. The prosecution was discontinued in August 2011 when the Office of the CDPP came to the view that there was some doubt about whether he was over the age of 18 years at the date of the offence.⁹⁵ He spent 537 days in detention in Australia, 239 of them in an adult correctional facility.

Another individual, BOM062, was assessed by DIAC to be under 18 years of age in October 2010 (with a formal report completed in February 2011).⁹⁶ He had a wrist x-ray taken in December 2010, six months after he arrived in Australia. The wrist x-ray analysis showed that he was skeletally mature.⁹⁷ He was charged as an adult in March 2011.⁹⁸ The prosecution was discontinued about six weeks later when the Office of the CDPP came to the view that the information available suggested that he was younger than 18 years when apprehended.⁹⁹ He spent 332 days in detention in Australia, 43 of them in an adult correctional facility.

In another case, DIAC assessed TOW043 to be under 18 years of age in October 2010 (with a formal report completed in February 2011).¹⁰⁰ His wrist was x-rayed in December 2010. The wrist x-ray analysis showed him to be skeletally mature. In March 2011, the AFP requested a copy of the DIAC Age Assessment Report before laying charges.¹⁰¹ In April 2011, after receiving the DIAC report, the AFP charged and arrested him as an adult.¹⁰² A second opinion on the wrist x-ray was

then sought from Dr Low who stated that it was 'a reasonable interpretation that [TOW043] is 19 years of age or older'.¹⁰³ An age determination hearing was conducted in the Victorian Magistrate's Court in December 2011. The magistrate was not satisfied on the balance of the probabilities that he was over 18 at the time of the offence and the prosecution was discontinued.¹⁰⁴ He spent 510 days in detention in Australia, 64 of them in an adult correctional facility.

In the case of JAM074, in October 2010 an email from a DIAC investigator seconded to the AFP stated that 'the AFP are keen to seek an age determination on [JAM074], so a decision can be made whether or not to proceed with a prosecution against him'.¹⁰⁵ He was assessed by DIAC in October 2010 to be under 18 years of age (with a formal report completed in January 2011).¹⁰⁶ Despite this assessment, his wrist was x-rayed in December 2010, with analysis finding that he was at least 19 years of age.¹⁰⁷ The AFP charged him as an adult in March 2011.¹⁰⁸ In April 2011, both the Office of the CDPP and the AFP were under the impression that no DIAC age determination assessment had been completed for him.¹⁰⁹ This was despite the fact that in October 2010, a DIAC officer had confirmed with the AFP that an age determination interview took place but they were still awaiting the outcome of the report.¹¹⁰ The prosecution was discontinued in November 2011 as the Office of the CDPP had come to the view that they could not be confident that he was an adult at the time of committing the offence.¹¹¹ He spent 516 days in detention in Australia.

4.6 Many cases were ultimately discontinued as there was no probative evidence other than wrist x-ray analysis

Documents before the Commission indicate that ultimately the Office of the CDPP came to the view that in cases where there was no probative evidence of age other than the wrist x-ray analysis, prosecutions should be discontinued.

The Commonwealth Director of Public Prosecutions has informed the Commission that this change in position was a response to the decisions in *R v Daud* and *R v RMA*. He reported that:

The CDPP's changed position was that no people smuggling matter in which age was contested should be prosecuted where the sole probative evidence that the defendant was over 18 years at the time of the offending was the analysis of the wrist x-ray.¹¹²

During an Inquiry hearing, a Senior Assistant Director of the Office of the CDPP said:

I think prior to October [2011], we had discontinued 14 matters where we had made assessments on the evidence available. After October, we discontinued a further 21 matters and they were matters which we identified where the wrist X-ray was evidence and that there wasn't probative evidence otherwise. So we did react in that way of reviewing all the matters and making certain that we discontinued any matter which we had before the court.¹¹³

From the information that the Commission has received regarding individual cases, it is evident that at least nine cases were discontinued in November 2011 and another 11 in December 2011. The CDPP has informed the Commission that 55 of the matters considered by this Inquiry were discontinued, including 22 matters that were discontinued prior to October 2011 without an age determination hearing having been conducted and a further 20 matters which were discontinued between October and December 2011 without an age determination hearing having been conducted.¹¹⁴

However, it must be noted that by the time their prosecution was discontinued, some of these individuals had spent a very long period of time in detention, including in adult correctional facilities, when the only evidence of their age held by the Commonwealth was based on a wrist x-ray. In addition, it should be noted that the use of wrist x-ray analysis as evidence of age had been questioned by a court as early as 2002.¹¹⁵

5 Individuals were charged and convicted as adults on the basis of wrist x-rays that were inconclusive

It appears from the documents before the Commission that individuals were charged as adults, and some were later convicted, in circumstances where the wrist x-ray analysis was inconclusive. In many of those cases, a second analysis of the wrist x-ray was sought and the Commonwealth relied on the second opinion to continue the prosecution against the individual.

As discussed in section 2 above, the report of the 2001 Senate Legal and Constitutional Legislation Committee inquiry into the Crimes Amendment (Age Determination) Bill (Cth), observed that the Australian Federal Police (AFP) 'advised that it was prepared to treat all persons who were not clearly adults as if they were juvenile'.¹¹⁶ The Joint Commonwealth submission to this current Inquiry maintained that the Commonwealth continues to give individuals the benefit of the doubt.¹¹⁷

This would require the Commonwealth to treat as a minor any individual about whom conflicting credible evidence of age exists. The principle of the benefit of the doubt means that wherever an initial x-ray report was inconclusive on the issue of whether the individual had reached skeletal maturity, unless there was good reason to question that report, the Commonwealth should have treated that individual as a minor. A second opinion should not have been sought.

However, the documents before the Commission suggest that, in some cases, officers of the AFP or the Office of the CDPP questioned the reliability of wrist x-ray analysis that did not conclusively report that an individual was 19 years of age or over and sought a second opinion from another radiologist, most often Dr Low.¹¹⁸

As the cases described below demonstrate, the Commonwealth has charged as adults individuals whose wrist x-ray analyses were inconclusive as to whether they had attained skeletal maturity. This practice is directly contrary to the 2001 assurance given by the AFP, which is referred to above, that the benefit of the doubt would be given to individuals where wrist x-ray analysis did not show skeletal maturity.

5.1 Some individuals were charged as adults on the basis of wrist x-rays that did not show skeletal maturity

The Commission is aware of a number of cases in which individuals were charged as adults on the basis of wrist x-rays that did not show skeletal maturity. In many of these cases second opinions were sought, usually after an individual had been charged.

For example, TRA029 was apprehended in January 2010. He told authorities that he was born in 1995, making him almost 15 years old at the time of the alleged offence.¹¹⁹ His wrist x-ray was taken a short time later and the medical practitioner expressed the opinion that, on the basis of the wrist x-ray, he 'is thought [to be] in the order of 18 to 19 years'.¹²⁰ The Office of the CDPP officer requested that the AFP seek a second opinion stating:

I have encountered this situation a number of times before where Doctors have incorrectly (on my assessment, but also on the second opinion of Dr Low) applied the Pyle and Greulich test, in the sense that their opinion has not been open at all (typically because the radial epiphysis still shows a line that has not completely faded and this incorrectly leads to a conclusion the person is at least 18 – 19, rather than at least 19, as prescribed in the text).

Could you please obtain the x-ray and a second opinion, ideally from Dr Low.

My view is that we would not have sufficient evidence to proceed against [TRA029] as an adult (on the balance of probabilities) based on the opinion of [medical practitioner] irrespective of the question of public interest. As [medical practitioner] has apparently expressed an opinion that is entirely consistent with the possibility the accused was underage at the time of offending, could you please attend to this as soon as reasonably practicable.¹²¹

A second radiologist report was provided (by a doctor other than Dr Low) and that report stated that it was a reasonable interpretation that he was above the age of 19 years.¹²² Some months later, when preparing for an age determination hearing, the Office of the CDPP sought an expert opinion from Dr Low. Dr Low provided a report expressing the opinion that he was probably 19 years or older when the x-ray was taken.¹²³ The matter proceeded to an age determination hearing in the Magistrate's Court of Western Australia. The magistrate found that it was 'more probable than not that TRA029 was not aged 18 years or older' at the time of the alleged offence.¹²⁴ The prosecution was subsequently discontinued.¹²⁵ He spent 621 days in detention in Australia, 341 of them in an adult correctional facility.

In another example, UPW031 was charged as an adult on the basis of a wrist x-ray report which expressed the opinion that his skeletal age was between 18 and 19 years.¹²⁶ When the Office of the CDPP received the brief from the AFP, they questioned how they could prove he was 18 at the time of the offence on the basis of a wrist x-ray taken two months after the offence that stated that he was between 18 and 19 years old.¹²⁷ The Office of the CDPP sought a second opinion from Dr Low, who stated that he showed a skeletal age of 19 years or greater.¹²⁸ On receipt of the second report, the CDPP officer noted the conflicting opinions and favoured that given by Dr Low. In an email to an AFP officer he made the comment: 'I knew my interpretation was better than [medical practitioner]'s',¹²⁹ and then in an email to a colleague from the Office of the CDPP:

On the face of the report of [medical practitioner], his opinion is inconsistent with Greulich and Pyle, and should be disregarded in favour of Dr Low's opinion.¹³⁰

The matter proceeded to an age determination hearing, following which the Judge was not satisfied that UPW031 was over 18 at the time of the alleged offence.¹³¹ The prosecution was discontinued and he was removed to Indonesia. He spent 731 days in detention in Australia, 641 of them in an adult correctional facility.

In another case, NTN031 challenged the reliability of wrist x-ray analysis. The manner in which he was questioned suggests not only that the interviewer was willing to be less than frank with him, but also that the interviewer held a degree of confidence in the precision of the technique that was inconsistent with any need to apply the benefit of the doubt. The transcript of the interview includes the following exchange:

F/A [Federal Agent] ...: Do you remember having [an] X-ray on your wrist?

THE INTERPRETER: Yes, I was X-rayed.

F/A ...: Yeah. They tell us you're 19, over 19.

THE INTERPRETER: No, I was not told that. At the time I had my X-ray, I was told that my age was between 18 and 19, but I'm not over 19.

F/A ...: So – okay. So you were told between 18 and 19?

THE INTERPRETER: Yes

F/A ...: And you still say you're 16, even though medical proof shows you're over?

INTERPRETER: As soon as I found that out, I asked to be moved here.

F/A: So you asked to be moved to where?

INTERPRETER: Moved to the place with the adults.

F/A ...: All right. So it's possible that you're over 18?

THE INTERPRETER: No. My date of birth is correct.

F/A ...: Can you explain why there's a difference between what you say your age is and what medical evidence says your age is?

THE INTERPRETER: If that equipment that you're talking about, how can that know my date of birth? If it's going to know my date of birth, tell me then, does it also know my date of death?

F/A ...: It works on bone development. So it can tell how old a person is based on the development of bones.

THE INTERPRETER: Therefore that equipment or that item that you're talking about should tell me when I'm going to die.

F/A ...: No. Different things affect how you live: how much you eat, what you eat, whether you exercise, don't exercise. So that will tell – those will influence when you die, not a machine. The machine ...

THE INTERPRETER: Yeah, but how can it know that I'm between 18 and 19?

F/A ...: A doctor examines the X-ray and with his specialist knowledge of bone development in the wrist, the doctor determines how old you are as a result of reviewing your X-rays. It is the doctor who has said that you are over 19 years of age.

THE INTERPRETER: Can that doctor tell me my date of birth? My year of birth? Can he do that?

F/A ...: The doctor only looks at the X-ray. He examines the X-ray and determines your age according to that X-ray.

THE INTERPRETER: The problem is if this so-called doctor, he can determine, but he doesn't know for sure. Now, he's saying for example, that I'm between 18 and 19. He still doesn't know for sure.¹³²

Following this interview, NTN031 was charged as an adult. In April 2011 an internal email of the Office of the CDPP records that the initial x-ray analysis showed that he was 18.5 years old and considered that the benefit of the doubt may need to be given and that consideration should be given to discontinuing the prosecution.¹³³ Instead, a second medical expert opinion was sought that reported that the x-ray showed skeletal maturity.¹³⁴ The prosecution was finally discontinued in November 2011 when the Office of the CDPP came to the view that they would not be able to prove that he was over the age of 18 years at the time of the alleged offence, largely because the two radiologists who had interpreted his wrist x-ray came to different conclusions.¹³⁵ He spent 690 days in detention in Australia, 412 of them in an adult correctional facility.

In a further matter, VMT011 was charged as an adult on the basis of a wrist x-ray report that was inconclusive about whether he had achieved skeletal maturity. The initial x-ray report, obtained on 15 January 2010, expressed the opinion that he was at least between 18 and 19 years old.¹³⁶ A legal officer from the Office of the CDPP noted that the benefit of the doubt would need to be given based on that report alone and asked the AFP to seek a second report from Dr Low. The legal officer stated that 'it seems possible that [the initial doctor] is being conservative, and a

finding that [VMT011] is 19 or over is more applicable'.¹³⁷ However, before the second report was received, he was charged as an adult.

In April 2011, over a year after VMT011 had been charged as an adult, a second report was received from Dr Low. The report states that the x-ray reveals skeletal maturity and that it is a reasonable interpretation that he is 19 years of age or older.¹³⁸ He then conceded age and was charged and convicted as an adult.¹³⁹ He was sentenced to a mandatory minimum sentence of five years imprisonment, with a non-parole period of three years. The Attorney-General released him early on licence in June 2012.

In a final example, PEN060 told DIAC and AFP officers, when he was apprehended on 31 December 2009, that he was born in 1997 and was 12 years old.¹⁴⁰ He later told police that he was born in 1992 and was actually 17 years old at the time of his alleged offence.¹⁴¹ He subsequently underwent a wrist x-ray, the report of which concluded that his skeletal age was 18.5 years.¹⁴² He was then charged as an adult. He maintained that he was a juvenile. The Office of the CDPP sought a second opinion about his age from Dr Low in March 2011. Dr Low's report stated:

Examination of the bones of the hand of [name] as derived from the radiograph taken reveals a status close to maturity. A segment of growth plate remains unfused along one margin of the radius. The process of fusion at this site occurs during the age of 18 years. Since the process is quite well advanced, but not yet complete, it is [a] reasonable interpretation that [name] is about 18½ years of age.¹⁴³

The prosecution of PEN060 was discontinued about three weeks after the Office of the CDPP received the report from Dr Low and over a year after the initial x-ray report had been obtained. In an internal email discussing the reasons for discontinuing the prosecution, the Office of the CDPP notes that the AFP policy is not to charge an individual whose skeletal age is not at least 19 years and, accordingly, the benefit of the doubt should be given to the individual. The email states:

The reasons for discontinuance are that the accused has raised the issue of his age and claims to be a juvenile, that is a person under the age of 18 years of age. The Australian Federal police aware of the claim had undertaken a prescribed procedure as to age, being a wrist x-ray procedure in accordance with the Crimes Act 1914 (Cwth) and the Crimes Regulations (Cwith). The expert evidence on the issue placed the age of the person at 18.5 years. The AFP policy is that they will not refer for prosecutions persons under the age of 19 years of age, where the age is determined by wrist x-ray procedure alone. The AFP has previously assured Parliament (The Senate Constitutional and Legal Committee) that where the age was an issue that anyone under 19 years of age would be given the benefit of the doubt. I have considered the evidence in this particular matter and the Prosecution Policy of the Commonwealth. Whilst I cannot determine on the evidence that the accused is a person under the age of 18 years and cannot therefore consider him to be a juvenile, I am satisfied that in this case the accused is entitled to the benefit of the doubt as to his being between 18 years and 19 years of age, and accordingly the prosecution ought to be discontinued.¹⁴⁴

Since AFP policy was not to proceed to charge where a wrist x-ray did not show skeletal maturity, then it is of concern that PEN060 was ever charged and that a second opinion as to his age was sought 15 months after his apprehension. He spent 479 days in detention in Australia, 201 of them in an adult correctional facility.

5.2 Some individuals were convicted as adults on the basis of wrist x-ray evidence that was inconclusive

The Commission is aware of at least two cases where the wrist x-ray of a young Indonesian did not show skeletal maturity but he was nonetheless charged and ultimately convicted as an adult.

The first example is WAK089 who, when apprehended in September 2009, told authorities he was 17 years old.¹⁴⁵ He subsequently underwent a wrist x-ray for the purpose of determining his age. The wrist x-ray report stated that:

Examination of the bones of the hand of [WAK089] as derived from the radiograph taken reveals a status close to maturity. A very short segment of growth plate remains unfused along the outside margin of the radius. The process of fusion at this site occurs during the age of 18 years. Since the process is quite well advanced, but not yet complete, it is a reasonable interpretation that [WAK089] is about 18½ years of age.¹⁴⁶

He was arrested and charged on the same day that the report was written and remanded in adult custody.¹⁴⁷ In a brief to counsel, the CDPP officer notes:

X-rays performed prior to their arrest indicate that ... [WAK089] ... is 18½. I note that neither accused has raised issue of age to date in the proceedings. Therefore, for the purposes of criminal proceedings against them, [WAK089] and [WAK087] are to be treated as adults.¹⁴⁸

No other evidence of age was obtained by the Commonwealth. He was convicted as an adult and sentenced to a mandatory minimum sentence of five years imprisonment, with a non-parole period of three years. The Attorney-General released him early on licence in June 2012.

The second example is EAS054 who told the AFP that he was born in 1996; this would have made him 13 years old at the time of his alleged offence.¹⁴⁹ He underwent a wrist x-ray and the x-ray report expressed the opinion that he was at least between 18 and 19 years of age at the time of the x-ray being taken.¹⁵⁰ The CDPP officer wrote to the AFP and asked that the AFP seek a second opinion saying:

I also note that the wrist x-ray for [name] states that he is at least between 18 to 19. ie 40 days earlier at the time of the offence he could be 17. [Medical practitioner] seems to consistently observe bone formation that should correspond to a finding of at least 19 years old. Could you please obtain the x-rays and get a second opinion from Dr Low here in Perth.¹⁵¹

The documents before the Commission do not make clear whether Dr Low provided a formal second opinion. The AFP emailed the Office of the CDPP to say:

[Dr Low] states clearly that the report is what it is: meaning that the Dr in Darwin is reporting that (quote) 'at the time of the x ray, the person is at least 18 years old'. He further explained that that is all an x-ray can provide for. That is, they cannot then say how much older than 18 anyone actually is. ... In any case, the x-ray states that he's over 18. AFP thoughts are that this prosecution should go ahead.¹⁵²

He entered a plea of guilty and was sentenced as an adult to a mandatory minimum term of imprisonment of five years. EAS054 was one of those whose conviction was reviewed by the Attorney-General in May 2012. On 18 May 2012, he was released early on licence and he was returned to Indonesia shortly thereafter.¹⁵³ He spent 891 days in detention in Australia, 806 of them in an adult correctional facility.

6 Some individuals conceded age when presented with wrist x-ray evidence

From the documents before the Commission, it appears that in some cases individuals may have conceded the issue of their age when presented with wrist x-ray analysis by the Commonwealth. As discussed in section 2 above, and in Chapter 6, in many cases young Indonesians do not know their actual age.

Documents before the Commission indicate that AFP officers frequently told individuals suspected of people smuggling that wrist x-ray analysis is an accurate means of assessing age and that their stated age was incorrect. In some cases, an individual who had previously said that he was a child accepted the result of the wrist x-ray analysis. For example, in one interview with the AFP, EAS056, who had previously told the AFP that he was 16 years old, was asked whether he was over 18 years of age. He replied 'Yeah, it is according to the x-ray'.¹⁵⁴ The issue of age was raised again later in that same interview. The transcript of the interview reads:

Q121 Okay. Were you told to say that you were under the age of eighteen by anyone?

A121 THE INTERPRETER: No.

[EAS056]: No

THE INTERPRETER: (*Speaking on behalf of the interviewee*) Oh, can I ask a question? I said my age but according to you, what is my age?

Q122 All the x-ray can tell us is that you over the age of nineteen.

A122 [EAS056]: Yeah.

He later pleaded guilty. During sentencing submissions his defence lawyer said that the individual was 'not in a position to tell ... his exact age, but we estimate roughly between early 20s and mid-20s'.¹⁵⁵

It appears that in some cases a young Indonesian continued to believe that he was aged under 18, but may have been confused by the difference between his stated age and the age provided in the wrist x-ray report. For example, one transcript of interview records the following exchange:

Q57 All right. Are you over the age of eighteen?

A57 Sorry, if that is the situation I accept that, but my real age is given to me by my parents.

Q58 Mm, and what age —

A58 My parents told me I am such and such an age, so I will go along with that age.

Q59 And how old did your parents say?

A59 I don't know what age I am, whatever, but my parents gave me the age I have.

Q60 And what age do you think you are?

A60 I don't know. So, I don't know what age I am because my parents told me my age, my parents gave birth to me so I followed through with the age that they told me.

Q61 Mm, and what age did your parents say that you are?

A61 Fifteen.

Q62 Fifteen, okay. And do you agree that yesterday you went and had some X-rays done of your wrist?

A62 Yes.

Q63 Okay, and that as a result of those X-rays, we have now informed you, the doctor has looked at the X-rays?

A63 (No audible reply)

Q64 Okay, and those X-rays indicate that you are over the age of eighteen.

A64 I understand that. So, that's - I don't know what age I am but that is the age that was given to me by my parents.

Q65 Yes, that's fine. That's okay.

A65 But now I feel as though I have sinned because my parents gave me — so, you know, they have said to me that my age is — and I followed with that.

Q66 Yes, you are only doing what you believe, it is not a sin.¹⁵⁶

In the transcript of an interview between another young Indonesian and the AFP, again with no independent adult present, DRL038 is apparently surprised that he has been charged as an adult. The transcript records the following exchange:

Q3. You previously stated to me that you are the age of sixteen. Is that correct?

A. That's right.

Q4. And I explained to you that since you underwent the [wrist] x-ray, we have reason to believe that you are over the age of eighteen. ... I am now placing you under arrest for this offence. ...

Q8. Can you tell me in your own words your understanding of this caution?

A. THE INTERPRETER (Answering on behalf of interviewee): My understanding – I'm still surprised about my, my age. ...

Q21. Are you over the age of eighteen?

A. No.¹⁵⁷

In another matter, DER026 continued to assert that his correct date of birth was that given by his parents and not the wrist x-ray analysis. The transcript of his interview includes the following exchange:

Q98 Are you over the age of eighteen?

A98 THE INTERPRETER: Because yesterday I was in the hospital and then they checked my age. So it's up to them. According to my parents I was aged that time, that age I was told.

Q99 Are you over eighteen years old?

A99 THE INTERPRETER: It's up to you, if you want to say I am over eighteen, yes. So it's up to you.

Q100 How old do you think you are?

A100 THE INTERPRETER: I don't think of anything because my parents give me I was sixteen years old.

Q101 Okay. Do you agree that yesterday you were taken to the hospital in Darwin for a wrist x-ray?

A101 THE INTERPRETER: Yes.

Q102 The results of that wrist x-ray indicate that you have attained the age of nineteen years.

A102 THE INTERPRETER: That's okay, whatever.

Q103 You understand that, what happened yesterday?

A103 THE INTERPRETER: Yes, I do understand.

Q113 What is your date of birth?

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A113 THE INTERPRETER: I don't know.

Q114 Yesterday you stated your date of birth was the third of March, nineteen ninety-three. Is that true?

A114 THE INTERPRETER: That's correct.

Q115 Is that your true date of birth?

A115 THE INTERPRETER: That's my true date of birth.

Q116 Do you have any documentation which can prove that's your date of birth?

A116 THE INTERPRETER: Yeah, I have my birth certificate, but that's not here, it's in Indonesia.

Q117 Do you understand that the date of birth you have given me, makes you sixteen years old?

A117 THE INTERPRETER: Yes.

Q118 Do you also understand that two doctors yesterday stated that you were at least nineteen years old?

A118 THE INTERPRETER: Yeah, I do understand.

Q119 Can you explain the discrepancy between your stated date of birth, and your apparent real age?

A119 THE INTERPRETER: I know that's my, my date of birth. But yesterday they test me, so if they think I'm eighteen, it's up to them, what they want to say.

Q120 What do you say, [name]?

A120 THE INTERPRETER: It's up to you.¹⁵⁸

In yet another case, that of INN012, a psychological assessment reports his describing what it was like to be told that the wrist x-ray had determined he was over 19 years of age when he did not believe that to be true. The report of the assessment records:

[INN012] stated that he was afraid during the interview with the Police. When asked why he initially said he was 15 years old and later said he was 19 years old, [INN012] reported that "they asked me so many questions ... I was confused ... they told me according to a wrist X-Ray my age should be 19 and I'm afraid to go against that ... but the lady who raised me said my age was 15 and how could I not believe her ... I am confused about the X-Ray". He added that "in that interview I said the wrong thing in my heart". It seems that [INN012] agreed with the suggestion that he was 19 years old, because he did not want to contradict the Police Officer and get himself in more trouble. He repeated several times that he was told that he was 15 last year, by his aunt, and seemed confused as to why she would tell him incorrect information.¹⁵⁹

The Commission is also aware of cases where individuals were advised to plead guilty by defence lawyers following their consideration of the results of wrist x-ray analysis.

For example, a person named Syam was convicted and sentenced for people smuggling on 9 June 2011 in the Queensland District Court.¹⁶⁰ He continues to maintain that he was under 18 years of age at the time of the offence.¹⁶¹ Syam says that he was advised by his lawyer to plead guilty to the offence with which he was charged. He has signed an affidavit which includes the following paragraphs:

28. On 12 April 2010 at Darwin Australia, a person unknown to me took an x-ray of my wrist without me understanding what was going on or why.

29. On 1 July 2010 at Darwin Detention Centre, I was questioned by the Australian Federal Police. In answer to their questions, I told them that I was not over the age of 18 years. I repeated my date of birth as 1 March 1995.

30. On 1 October 2010 I was charged and transported to a maximum security prison at the Arthur Gorrie Correctional Centre Brisbane, Queensland, Australia and held with adult prisoners. ...

35. I told [my] lawyer that I was under 18 years of age. I gave the lawyer the telephone number of my older brother, [name redacted] who has a cell telephone, and asked the lawyer to call [name redacted] to confirm my age as being under 18 years. The lawyer wrote down the telephone number in the file.

36. After I was sentenced I was able to speak to [name redacted] on the telephone, who said he had not received any telephone call from [my lawyer] or any one else concerning my age or this matter. There is nothing in [my lawyer's] file to show that they had tried to contact [name redacted] as instructed.

37. No one from the Australian Government, Customs, the Department of Immigration and Citizenship, the Australian Federal Police, the Commonwealth Director of Public Prosecutions, or [my lawyer]:

- a) contacted my mother or any other member of my family to tell them I was under detention, had been charged, or detained in Australia on a very serious criminal offence facing mandatory imprisonment;
- b) tried to obtain independent evidence of my birth from Indonesia or a birth certificate. ...

39. [My lawyer] advised me that:

- a) medical evidence from a wrist x-ray showed that I was 19 years of age;
- b) I was lying about my age and knowledge of the offence;
- c) the wrist x-ray showed I was 19 years and that if it showed that I lied in Court, I would be sentenced to 7 years actual imprisonment;
- d) if I pleaded guilty, I would only receive 3 years imprisonment and would avoid the risk of a 5 year sentence. ...

44. On 9 June 2011, I pleaded guilty, and my age was given to the judge as "approximately 19 years of age", because ...

- (h) I knew I was under 18 year of age but was being told that I was 19 years of age;

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- (i) I did not understand the meaning of the x-ray, or how it could prove I was lying about my age;
- (j) the legal issues were very complex and beyond my understanding;
- (k) I did not want to go to a juvenile gaol, where I would not be with my fellow Indonesian prisoners who were my friends and where I am unable to smoke cigarettes;
- (l) I was advised by [my lawyer] to plead guilty.¹⁶²

The Attorney-General released Syam early on licence in June 2012.

In another example, that of QUE051, the defence lawyer raised age during his submissions on sentencing in the District Court of Western Australia. He said that the defendant had conceded age once presented with the wrist x-ray evidence and stated:

We know from the medical report prepared by Dr Low, I think it was, that this man is of an age of somewhere a little bit more than 19 years. The Crown submits in their submission that I've quickly looked at that [he] lied in his video about this matter, but the position is and I've discussed this with him, he has a fervent belief that that was his date of birth, the 14th of April 1994.

It's not surprising, he comes from a very small village and that is the date of birth that he believed it to be and that is what he said. However, having put the medical report to him during the course of this trial [he] has conceded that the medical report is the medical report and does not challenge it. But it's not so much that he lied. It's a situation, from the instruction that I have from him, that he had a fervent belief that was his date of birth.

WISBEY DCJ: It's unusual isn't it? You can get people such as Indigenous people in the North of this State who don't know how old they are.

[DEFENCE LAWYER]: You do.

WISBEY DCJ: But it is unusual to have someone who stipulates a precise date of birth that happens to be wrong.

[DEFENCE LAWYER]: Look, I accept, I do accept that, but I merely put it that I did discuss that matter with him and that's what he instructed me.¹⁶³

These examples suggest that in some circumstances the Commonwealth presented wrist x-ray analysis as determinative of the issue of age to young Indonesians whose age was in doubt; and in some cases individuals' legal representatives accepted the medical evidence as determinative and accordingly advised their clients to plead guilty. It appears likely that in some cases the individual did not raise the issue of their age again, or pleaded guilty, thereby conceding their age, after receiving the results of the wrist x-ray because they were under the mistaken belief that those results were accurate and conclusive.

7 Consent for a wrist x-ray to be taken was frequently not validly obtained

The requirement that consent be given prior to a medical procedure being carried out is underpinned by the principle of bodily integrity.¹⁶⁴ An individual has a right to choose what happens to his or her own body.¹⁶⁵ It is a fundamental rule of domestic law, an international human rights principle and a requirement for those working in the medical profession that informed consent must be obtained before there is any interference with a person's bodily integrity.

Where a child is unable to consent to medical treatment, for example because of immaturity or illness, a parent or guardian is generally able to consent on behalf of the child.¹⁶⁶ When a parent does provide consent to a medical procedure for their child, they must do so in the best interests of their child. The High Court of Australia has observed:

Ordinarily a parent of a child who is not capable of giving informed consent is in the best position to act in the best interests of the child. Implicit in parental consent is understood to be the determination of what is best for the welfare of the child.¹⁶⁷

Informed consent was an important element of the 2001 amendments to the Crimes Act which introduced the requirements governing the conduct of prescribed procedures for age assessment purposes. The Second Reading Speech for the Crimes Amendment (Age Determination) Bill 2001 states:

The Bill is predicated on informed consent – use of the prescribed equipment for investigation and related purposes will only be permitted where the informed written consent of both the detained person and an appropriate independent adult has been obtained; or by order of a magistrate.¹⁶⁸

In this section consideration is given, first, to the law and to accepted practice concerning the obtaining of consent where a medical procedure, whether conducted for forensic or therapeutic purposes, is to be carried out on a child. It considers:

- consent requirements for the conduct of medical procedures generally
- consent requirements for prescribed procedures conducted under the Crimes Act
- consent requirements for other forensic procedures conducted under the Crimes Act
- how consent was obtained in reliance on the Crimes Act to conduct wrist x-rays of young Indonesians.

Second, this section considers the extent to which the requirements for informed consent under the Crimes Act were complied with in relation to age determination procedures for young Indonesians. In particular, it examines:

- whether the independent adult understood that they were required to act in the best interests of the young Indonesian
- whether the independent adult was provided with the information required by the Crimes Act
- whether the consent of an independent adult was obtained in all cases
- whether a recording of the consent was made in all cases as required by the Crimes Act.

This section concludes that in many cases, consent for a wrist x-ray to be taken was not validly obtained.

7.1 Consent requirements for the conduct of medical procedures generally

Informed consent is a fundamental principle of sound medical practice. The National Health and Medical Research Council (NHMRC) *General Guidelines for Medical Practitioners on Providing Information to Patients* contain guidelines to ensure good medical practice concerning doctor-patient communication and to reflect the principle that patients are able to make their own decisions about medical treatment, including whether to grant or withhold consent to treatment.¹⁶⁹ Furthermore, consent is required in order to avoid a medical procedure constituting an assault.¹⁷⁰

The NHMRC guidelines emphasise the importance of consent to medical treatment being fully informed, stating:

patients are entitled to make their own decisions about medical treatments or procedures and should be given adequate information on which to base those decisions. Information should be provided in a form and manner which helps patients understand the problem and treatment options available, and which are appropriate to the patient's circumstances, personality, expectations, fears, beliefs, values and cultural background.¹⁷¹

The guidelines also set out the kinds of information and advice a doctor should normally give to a patient who is asked to consent to treatment. They indicate that the topics doctors should normally discuss with their patients include:

- whether the proposed approach is conventional or experimental
- the degree of uncertainty about any diagnosis arrived at
- the expected benefits of the proposed treatment.¹⁷²

They further indicate that interventions where the patient has no illness require a doctor to provide more information.¹⁷³

The medical experts who participated in the Inquiry hearing agreed that if a medical procedure were being carried out for research purposes or in a clinical situation, it would be important to explain to the patient the degree of uncertainty of any diagnosis reached and the differences in medical opinion about how useful the information obtained is.¹⁷⁴

Two of the Australian medical experts who participated in the Inquiry hearing were of the opinion that sound medical practice requires there to be an engaged adult of some kind who can bring a judgment to bear independently of the child with respect to the reasons for, and the risks and benefits of, a particular medical procedure.¹⁷⁵ It was suggested that consent to medical treatment could only validly be given by a child's parent or legal guardian and could not be given by 'anybody who happens to be with the child on that day'.¹⁷⁶

7.2 Consent requirements for prescribed procedures conducted under the Crimes Act

The Crimes Act provides that an investigating official may only arrange to carry out a prescribed age determination procedure if the appropriate consents have been obtained or, alternatively, by order of a magistrate.¹⁷⁷

Section 3ZQC of the Crimes Act requires the written consent of two individuals; the person whose age needs to be determined and either their parent or guardian or an acceptable independent adult person who is capable of representing their interests.¹⁷⁸ The Explanatory Memorandum to the Bill introducing the requirements governing the conduct of prescribed procedures makes clear that it was envisaged that the independent adult could be a senior government official who is not connected with the investigation.¹⁷⁹

The Crimes Act sets out a number of other requirements that must be met for consent to be validly obtained under the Act.

First, the consent of both the person whose age needs to be determined and the independent adult must be informed consent.¹⁸⁰ The Crimes Act requires that an investigating officer must inform them both of a number of things, including:

- the purpose of, and reasons for, the procedure
- the nature of the procedure and the equipment involved
- known health risks associated with the procedure

- that the information obtained from carrying out the procedure could affect the manner of dealing with the person
- that the person undergoing the procedure may have, so far as is reasonably practicable, a person of their choice present while it is carried out.¹⁸¹

This information must be provided in a language in which the person whose age needs to be determined is able to communicate with reasonable fluency.

The investigating official must, if practicable, ensure that the giving of the information about the prescribed procedure and the responses (if any) of the persons to whom the information is given are recorded by audio tape, video tape or other electronic means. A copy of that record must be given to the person on whom the procedure is to be carried out.¹⁸² If it is not practicable to make an electronic record, the investigating official must make a written record of the giving of information and of the responses, and a copy of that record must be given to the person.¹⁸³

7.3 Consent requirements for forensic procedures conducted under the Crimes Act

The consent requirements for age determination procedures are less stringent than those for other forensic procedures under the Crimes Act. This was drawn to the attention of the Senate Committee in 2001. The Senate Committee report observed that there was no obvious reason for the protections afforded in relation to other forensic procedures not to be afforded when age determination procedures are undertaken.¹⁸⁴

For example, a child cannot consent to any other forensic procedure under the Crimes Act.¹⁸⁵ Generally, a forensic procedure may only be carried out on a child by order of a magistrate.¹⁸⁶ The exception to that rule is that a parent or guardian may volunteer on the child's behalf that the child undergoes a forensic procedure.¹⁸⁷ Where a parent or guardian does volunteer that their child undergoes a forensic procedure, the parent or guardian must be informed:

- of the details of the procedure¹⁸⁸
- that they are not obliged to consent to the procedure¹⁸⁹
- that the procedure may produce evidence to be used in a court of law¹⁹⁰
- of their right to contact a legal practitioner¹⁹¹
- of their right to withdraw consent at any time.¹⁹²

Additionally, the child must be informed that the procedure will not be carried out over their objection.¹⁹³

The consent of a parent or guardian to a forensic procedure under the Crimes Act may be withdrawn at any time, including after the procedure has been carried out.¹⁹⁴ If a parent or guardian withdraws consent after the procedure has been completed, the forensic material obtained from the procedure must be destroyed as soon as practicable.¹⁹⁵

Where the consent of a parent or guardian cannot reasonably be obtained, a magistrate may order the carrying out of a forensic procedure on a child.¹⁹⁶ A magistrate must consider a range of factors in deciding whether to order a forensic procedure be carried out on a child, including:

- the seriousness of the circumstances surrounding the commission of the offence
- the best interests of the child
- any wishes expressed by the parent or guardian of the child
- whether the procedure is justified
- the wishes of the child.¹⁹⁷

The differences between the consent requirements for age determination procedures and those required for forensic procedures under the Crimes Act may be summarised as follows:

- The provisions relating to forensic procedures place a greater emphasis on fully informing child suspects and their parents or guardians of their rights before obtaining consent than the provisions relating to age determination procedures.
- Only a parent or guardian, and not any other independent adult, may consent to the carrying out of another forensic procedure. Where the parent or guardian is not reasonably available, an application must be made to a magistrate to order the carrying out of the forensic procedure.
- A magistrate must have regard to a more extensive list of enumerated matters when making an order to carry out another forensic procedure on a child suspect than when making an order to carry out an age determination procedure.
- The parent or guardian of a child suspect may withdraw their consent to another forensic procedure at any time, including after the procedure is completed, at which time the forensic material must be destroyed. There is no such provision for age determination materials.

7.4 How consent was obtained from people smuggling suspects whose age in doubt

(a) The consent of the individual

Documents provided to the Commission show that consent for the conduct of a wrist x-ray has generally been obtained from young Indonesians at an interview conducted by AFP officers. This interview is generally attended by two AFP officers, an independent adult and an interpreter.

People smuggling suspects who have been asked to consent to a wrist x-ray being taken have generally been offered access to legal assistance prior to a formal request for consent being made. Documents provided to the Commission indicate that this assistance is usually obtained, if at all, by telephone from the local legal aid office. In most cases a young Indonesian who has spoken to a lawyer agrees to give consent to the procedure being undertaken.

The AFP has provided the Commission with a standard statement of information provided to individuals prior to consent for the wrist x-ray procedure being obtained. As discussed below, this statement of information was altered in mid-2011.

Documents provided to the Commission indicate that it was common for the young Indonesian to be provided with a copy of the standard statement of information translated into Bahasa Indonesia and asked whether they understood it.

When a young Indonesian agreed to give consent, he signed a form which was witnessed and retained by the AFP.

(b) The consent of an independent adult

As discussed in Chapter 7, the individuals whose treatment is the subject of this Inquiry ordinarily do not have a legal guardian in Australia.

Consent of an independent adult for the conduct of a wrist x-ray, as required by the Crimes Act, has generally been given by an independent observer engaged by DIAC. It is DIAC policy that an independent observer be present whenever DIAC, or another Australian Government agency, interviews an unaccompanied minor in immigration detention.¹⁹⁸

The non-government organisation, Life Without Barriers,¹⁹⁹ is contracted by DIAC to provide independent observer services for unaccompanied minors in immigration detention. In most cases, a representative from this organisation acts as the independent adult for the purposes of providing 'consent' to a prescribed procedure conducted under the Crimes Act.²⁰⁰ The limited

responsibilities of an individual engaged by Life Without Barriers under its contract with DIAC are discussed in section 7.5(b) below.

(c) Recording consent

As mentioned above, the Crimes Act requires that, where practicable, an electronic record of the giving of consent must be made. From the material provided to the Inquiry it appears that electronic recordings of the interviews in which consent was given were made in a significant number of cases but not in all cases.

7.5 Consent for a wrist x-ray to be taken was frequently not validly obtained

The Commission has concerns about the extent to which the requirements for informed consent under the Crimes Act were complied with in relation to age determination procedures for young Indonesians.

(a) Information provided to individuals from whom consent was sought was misleading

Until mid-2011, misleading information was provided to individuals from whom consent was sought.

As noted above, the AFP provided the Inquiry with a copy of a standard statement of information provided to individuals prior to consent for the wrist x-ray procedure. Until mid-2011, that statement included the following information:

The purpose and reasons for carrying out this procedure is to accurately determine your age based on the expert examination of an x-ray of your wrist.²⁰¹

In February 2011, the Commission President wrote to the then Attorney-General advising that, in her opinion, consent to carry out a wrist x-ray cannot be characterised as informed consent unless the person is aware of the unreliability of the wrist x-ray procedure for the purpose for which it is used.²⁰²

Subsequently, a Senior Assistant Director of the Office of the CDPP wrote to the AFP advising that the standard statement of information should be revised to make clear that the wrist x-ray can only provide a probable estimation of a person's age. The Senior Assistant Director expressed concern that the consent statement also appeared to indicate that the wrist x-ray would be determinative of age, when the official policy was to take a number of factors, including the result of the wrist x-ray, into account when determining age.²⁰³

On 19 August 2011 the AFP issued an Aide Memoire with an updated version of the statement of information to be provided to individuals before obtaining consent for the wrist x-ray procedure. The updated statement includes the following information:

The purpose and reason for carrying out this procedure is to assist in determining your age based on the expert examination of an x-ray of your wrist. ... The wrist x-ray may only provide a probable estimation of a person's age. Multiple factors may be considered in seeking to determine your age.²⁰⁴

At the Inquiry hearing for Commonwealth agencies, the AFP gave evidence that while the process to change the form had begun earlier, the changes were not formalised in writing until 19 August 2011.²⁰⁵

(b) The independent adult did not act in the interests of individuals whose age was uncertain

Section 3ZQC of the Crimes Act requires that the independent person who provides consent is a person who is capable of representing the interests of the person in respect of whom it is sought to carry out the procedure. This would ordinarily be understood to mean that the independent person should be a person who understands that they should turn their mind to whether the procedure is in the interests of the person on whom it is proposed to be carried out. This would require the provision of adequate information to them to enable them to make that assessment.

Such a reading of s 3ZQC would be consistent with the requirement that legislative provisions be interpreted in a manner that ensures, as far as possible, that they are consistent with Australia's international human rights obligations.²⁰⁶ It would also be consistent with the language of the Senate Second Reading Speech for the Crimes Amendment (Age Determination) Bill 2001 during which the Special Minister of State said:

This Bill is predicated on informed consent – use of the prescribed equipment ... will only be permitted where the informed written consent of both the detained person and an appropriate independent adult has been obtained; or by order of a magistrate.²⁰⁷

The role assigned by DIAC to an independent observer retained by Life Without Barriers is:

to act in the best interests of unaccompanied minors and ensure that the Department's and other agencies' treatment of unaccompanied minors during certain immigration detention processes is fair, appropriate and reasonable.²⁰⁸

DIAC materials show that the independent observer provides a service 'to ensure [the minor's] physical and emotional wellbeing'.²⁰⁹ The independent observer has no casework, legal advocacy or investigative responsibilities.²¹⁰ During processes such as interviews with the AFP, an independent observer is required to provide pastoral or physical care of the child throughout

the interview process. More specifically, the contractual role of the independent observer during interviews is:

- To observe the interaction between the interpreter and the child or young person, and advise the interviewer of any concerns.
- To observe the conduct of the interview/examination/assessment and the demeanour and presentation of the child or young person; and to draw to the attention of the interviewer any concerns about the emotional and physical state of the child or young person.
- To provide a reassuring and friendly presence for the child or young person.
- To ensure each process is adequately explained and understood by the child or young person.
- To be attentive to non-verbal cues of the young person that indicates a need to take a break.
- To be attentive to signs that the young person may benefit from trauma counselling and provide this advice to DIAC.²¹¹

On 11 March 2011, DIAC provided clear advice to AGD about the limited role persons engaged by Life Without Barriers were obliged to perform. The DIAC officer stated in an email:

The policy documents also make clear that independent observers are not required to actively engage in immigration and other processes, and that they are instead passive observers within the process.²¹²

The email goes on to advise that there is no contractual obligation for the Life Without Barriers independent observer to take an active role in AFP processes and notes that the identification of an appropriate independent adult in the context of age determination is a matter that should be discussed and considered further.

One week later, AGD received advice from the AFP that the Crimes Act requires Life Without Barriers to play an active role in either signing the consent form or in refusing to give consent. The AFP officer informed an AGD officer that she understood that the Life Without Barriers representatives took their role seriously.²¹³ The critical issue of course, is what they understood their role to be, not whether they took their role seriously.

The documents before the Commission suggest that individual AFP officers may not have had a clear understanding of the real role the legislation required the independent adult to play. During interviews in which the independent adult was asked to consent to the x-ray, AFP officers variously stated that the independent person 'is there to make sure everything's conducted fairly and that we treat you well' and 'is there to ensure that we treat you okay during the interview and for your support'.²¹⁴

In one interview where an Indonesian consular officer was acting as the independent adult, the consular officer expressed reluctance about signing the consent form. The AFP officer replied, 'O'kay, all I am trying to do is acknowledge the fact that you were here'.²¹⁵

It is not clear from the material before the Commission what the individuals engaged by Life Without Barriers understood their role to be. A number of transcripts of interviews between young Indonesians and the AFP record the independent adult giving their consent for the young Indonesian to undergo the x-ray procedure. In many cases, the independent adult asks the individual whose age is in doubt to explain, in his own words, what he understands he is being asked to consent to and the purpose of the procedure. In general, the independent adult then explains why he or she is agreeing to consent to the x-ray procedure, ordinarily in the following terms:

Since you have indicated that you are under the age of 18 and you don't have an adult guardian present, I'm going to sign this consent form as an independent observer on your behalf.²¹⁶

The Commission has not been provided with any material which suggests that those engaged by Life Without Barriers ever received an explanation of the role of the independent adult under the Crimes Act. As noted above, their contractual obligation was to act as an observer and to provide pastoral support to ensure the physical and emotional wellbeing of the child. By contrast, the role of the independent adult under the Crimes Act is to represent the young person's interests and to provide informed consent to the x-ray procedure.

(c) Independent adults may not have been provided with the information required by the Crimes Act

From the documents before the Commission, it appears that, even where the independent adult signed the consent form (and in some cases no such signature was obtained), they may not have been given the information that the Crimes Act requires an independent adult to be given.

Section 3ZQC(2) of the Crimes Act requires that the specified information about the x-ray procedure be provided to 'each of the persons from whom ... consent is being sought'. Clearly, this requires the relevant information to be provided to both the person whose age is in dispute and his parent, guardian or the independent adult.

It was not uncommon for the standard statement of information concerning wrist x-rays to have been provided by way of a written statement in Bahasa Indonesia which the interpreter read to the young Indonesian. Where the young person was able to read Bahasa Indonesia, the AFP sometimes provided the statement directly to the young person and invited him to read it to himself. The young Indonesian was then asked to consent to the x-ray procedure. In some cases, the independent adult was then immediately asked to consent to the procedure without being

provided with the standard statement of information in English.²¹⁷ There is nothing to suggest that the independent adults spoke or read Bahasa Indonesia.

(d) In some cases, the consent of an independent adult was not obtained

In *[ULT055] v the Queen*,²¹⁸ the Commonwealth accepted that the consent of a parent, guardian or independent adult had not been obtained.²¹⁹

The Judge observed:

The federal agent agreed that when a person is transported from Christmas Island to Perth as a juvenile as a matter 'of course' the Australian Federal Police (AFP) arrange for a wrist x-ray to be taken to ascertain that person's age. There was no evidence establishing whether written consents or magistrate orders were obtained on those other occasions and I am not able to say whether the procedure adopted on this occasion is the routine procedure adopted by the AFP. If it is there must be a change of procedure.

One would have expected the AFP would have procedures in place to check that they had obtained the written consent of the person and his parent and guardian before they took the person from the Immigration Department's Custody. If those procedures were in place they failed on this occasion.²²⁰

There are a number of cases where the documents provided to the Commission do not include a form signed by an independent adult.²²¹ In its response to the draft report, the AFP stated that 'it was established that the Interpreter was utilised as the independent person under the provisions of the Crimes Act 1914 at this time'. The AFP also states that the practice was discontinued some time ago.²²² It is important to note that representing the interests of a person for whom he or she is providing interpretation services is not part of the conventional role of a professional interpreter. A professional interpreter is ordinarily required to be independent of their client.

The decision in *[ULT055]* raises the possibility that at about that time, the Commonwealth was treating DIAC's written acknowledgement that an individual was being taken into AFP custody for the purpose of the x-ray as written consent by a guardian to that procedure being performed.

Documents provided to the Commission support such a conclusion.

In the week before the age determination hearing in *[ULT055]*, the AFP contacted DIAC seeking urgent advice as to whether 'there was an informed consent of an appropriate adult in relation to ULT055 and whether any such adult was not connected with the investigation'.²²³ DIAC responded to the effect that the Minister was not ULT055's guardian and that it would not be accurate to advise the court that any DIAC officer was the delegated guardian of ULT055 or signed any forms in that capacity.²²⁴ Subsequent internal DIAC emails discuss the issue of consent and variously state:

- [AFP] appear to be looking to hinge substantiation of consent to wrist examination issues on [DIAC officer's] testimony, when her involvement related to transfer of immigration custody. My understanding of processes at the time is that AFP came and collected such clients under an immigration transfer of custody arrangement to interview and that wrist X rays or scans sometimes took place but generally with no advice to DIAC as to their intentions in each instance.²²⁵
- [AFP officer] also indicated that the CDPP may try to argue that consent was given as an 'independent person' rather than as a guardian. I am certainly no expert on the Crimes Act but there is a real problem here – the requirement is that there is written consent for the procedure from a parent/guardian/independent person as well as the individual concerned (or a court order) – the fact is they do not have the written consent in this case. In my discussions with both [AFP officers], they are very concerned about the impact of this case on the broader case load.²²⁶
- The view of the CDPP is that without evidence of consent the case would fail. ... He was led to believe we provided consent by signing a transfer of custody document, however when I explained that is simply an internal document so we can prove continuity of immigration detention, he acknowledged it did not meet what he was seeking. As [DIAC officer] has acknowledged, proof of written consent is required and it seems AFP hold neither written or evidenced consent from any party, which in my view is an issue for them to address as they were the ones seeking to exercise a power under the Crimes Act. This case may have significant impact if the AFP have been x-raying alleged minors without consent from either the person or someone who is an independent responsible adult, as people smuggling prosecutions may fall over.²²⁷

In December 2010, the Senior Assistant Director, People Smuggling Branch of the Office of the CDPP wrote a paper entitled 'People Smuggling Prosecutions Age Determination Issues'. In his paper, the Senior Assistant Director discusses the requirement under the Crimes Act for informed consent to the x-ray procedure. He notes:

I am advised by the AFP that in the past officers of DIAC have acted as the independent persons and consented to the prescribed procedure where an accused people smuggler has claimed to be a juvenile. ... It may be that in these cases DIAC did not give informed consent but merely made available a suspect to the AFP. That is the position DIAC take, and the AFP at least at an operational level appear to accept this was the case.²²⁸

(e) In some cases, consent was invalidly obtained because inaccurate information about the possibility of obtaining a court order was provided

The documents before the Commission show that in some cases the AFP officer conveyed to the individual that if he did not consent to the x-ray procedure an order would automatically be

granted by a court authorising the x-ray to be taken.

This issue also arose in the case of *[ULT055] v The Queen* discussed above. The decision concerned whether consent to the carrying out of a wrist x-ray procedure had been properly obtained under the Crimes Act. Bowden DCJ found that it had not, stating:

The evidence establishes [ULT055] initially refused to give his consent and after he enquired what would happen if he did not consent was told he would be taken to court and consent would be 'granted' by a judge or 'given' by the Court.²²⁹

The Judge found that it had been conveyed to ULT055 that he had no choice but to consent. For this reason, his Honour held that the consent given by ULT055 was not consent as required under s 3ZQC and the x-ray was therefore improperly obtained.

The Commission is concerned that in other cases, while the young person was not told that consent would be given by a judge, the possibility of a court authorising the wrist x-ray was put to them in a way likely to put pressure on them to give their consent. For example, the Inquiry has been provided with a transcript of a record of interview in which the AFP asked QUE053 for his consent to the x-ray procedure. The interview proceeded as follows:

Just one more thing. Would you be prepared to give us your consent to carry out an age determination procedure?

THE INTERPRETER: He's thinking.

Okay. I'll just explain for the purpose of the tape, that the procedure to determine your age is not painful, all it is, is a doctor will take an x-ray, which is a photograph of the bones in your wrist. It takes, it takes about twenty seconds, and you just put your wrist down and they take a picture of it and what that will tell us is whether you are nineteen or older or younger than nineteen. And that allows us to treat you correctly and fairly, as either a juvenile person or an adult person.

THE INTERPRETER: Oh, yes, I will not give this consent.

Okay. Just to advise that the way you've said you're not willing to give your consent, we can actually apply to a magistrate and get a court order for them to let us take your wrist x-ray without your consent. I'm just advising you that that might be a possibility that we might apply to the magistrate to obtain your wrist x-ray without your consent.

THE INTERPRETER: Yes

Can you tell me is there any reason why you don't want us to do this procedure?

THE INTERPRETER: I just don't feel like to have it.

That's fine, that's your choice but I'm just advising you that we may, in the future, be applying for a magistrate to take your wrist x-ray without your wanting us to do it.²³⁰

A subsequent email between AFP officers, and copied to an officer of the Office of the CDPP, states that consent was ultimately given by the individual:

[QUE053] DID NOT consent on tape but afterwards when we further explained we were not cutting his arm off to undertake this procedure he said he'd changed his mind.²³¹

In another case, that of FLE048, the interview proceeded as follows:

[FLE048]: If I don't want to be x-rayed it doesn't matter?

Well I am asking you for your consent and you can give me your consent and I can get the x-ray done. If I ask you for consent and you don't give me your consent I can't get the x-ray done by consent. I can't get it done if you don't give me your permission. However if you don't give me your permission I will go to a Judge and hopefully get an order to have your wrist x-rayed.

[FLE048]: It's best to give you consent.²³²

He then gave his consent to an x-ray of his wrist.

(f) In some cases a recording of consent does not appear to have been made

The Commission received some electronic recordings of interviews in which consent was given to the taking of a wrist x-ray, some transcripts apparently taken from recordings of this character, and some notes apparently made during interviews that were not electronically recorded. However, it was not provided with a recording or transcript for each individual who had a wrist x-ray taken.²³³

In view of the breadth of the Commission's request for documents, it seems reasonable to infer that not all interviews were recorded as required by the Crimes Act.

8 The Commonwealth's approach to review of cases

As noted in Chapter 3, on 14 July 2011, the President of the Australian Human Rights Commission wrote to the then Attorney-General and expressed concern that there may have been cases where reliance on wrist x-ray analysis for the purposes of assessing age had resulted in erroneous conclusions about a person's age. This was the first occasion on which the President explicitly requested that an independent review be conducted of cases involving people smuggling crew who said that they were children. In particular, the President urged that an independent body or person review whether a proper and reliable assessment of age has been conducted for any Indonesian national claiming to be a minor:

- who had been charged but not yet tried on people smuggling charges
- who had been convicted as an adult, including where a wrist x-ray was relied upon for the purposes of age determination.²³⁴

The President asked that the then Attorney-General inform her by 5 August 2011 whether he would arrange such an independent review.

The then Attorney-General replied on 22 August 2011. He advised the President that he was not convinced of the need for an independent review of all age determination matters involving Indonesian nationals. He stated:

I hold this view because the court considers all available evidence, is fully aware of the limitations of x-rays, and the crew have independent legal representation. Further, by giving the benefit of the doubt in cases involving age, in particular from verified documentation relating to age, AFP and CDPP only proceed with cases with the highest probability that the person is an adult, and where information gathered consistently indicates that this is the case.²³⁵

Nonetheless, the then Attorney-General invited the President to forward to his Department any concerns about the age determination process undertaken in any specific matters. On 28 September 2011, the Commission sent the then Attorney-General 10 notifications the Commission had received from Indonesian crew convicted of people smuggling offences who maintained that they were minors, with notifications regarding two further individuals being sent on 11 October and 8 November 2011.²³⁶

On 8 November 2011, the President again wrote to the then Attorney-General expressing her concern about the delay it had taken for his Department to respond to the notifications regarding these individuals. The President reiterated her call for a review by an independent person or body of whether 'a proper and reliable assessment of age has been conducted for every Indonesian national claiming to be a minor who has been convicted as an adult'.²³⁷ On 21 November 2011, this Inquiry was called. On 30 November 2011, the then Attorney-General wrote to the President to provide 'factual evaluation' of the 12 cases.²³⁸ It appears that no further evaluation of these cases was undertaken at this time. The AGD and AFP submission to the 2012 Senate Legal and Constitutional Affairs References Committee inquiry into detention of Indonesian minors in Australia, notes that AGD 'did not make any formal recommendations about their management as the AHRC subsequently announced its inquiry on 21 November 2011'.²³⁹ The Commission does not view the calling of this Inquiry as an adequate reason to stop the review of these cases.

On 16 March 2012, after the Inquiry hearing for medical experts, the President wrote to the present Attorney-General urging her to conduct an independent assessment of age in all cases where convictions were obtained for people smuggling offences and there was substantial reliance on the use of wrist x-ray analysis to determine age. The President included the names of 17 individuals who had been convicted of people smuggling offences where:

- an age determination had been made wholly or substantially on the basis of wrist x-ray evidence

- after initially saying he was a child, the accused either admitted to being over the age of 18, or did not contest age, once presented with wrist x-ray evidence.²⁴⁰

On 1 May 2012, the President wrote to the Attorney-General about an additional five similar cases that had been brought to her attention after officers of the Commission visited individuals in Albany Regional Prison and Pardelup Prison Farm. The President urged that a review of these cases be undertaken to enable the Attorney-General to satisfy herself that a child had not been prosecuted as an adult in any case.²⁴¹

In her letter, the President emphasised that the Commission is not the most appropriate agency to identify cases in which errors of age assessment may have been made. For this reason, the President urged the Attorney-General to ensure that the agencies involved in investigating and prosecuting people smuggling offences conducted a review of all cases where individuals who remained in adult custodial facilities and had at any time disputed their age.²⁴²

On 2 May 2012, the Attorney-General communicated to the President that she would conduct an assessment of the cases of individuals convicted of people smuggling offences where substantial reliance had been placed on wrist x-ray analysis as evidence of age. Her review was to include the cases of the 22 individuals identified by the Commission as well as a further two crew who had said that they were minors and who had been identified by the Indonesian Embassy. The Attorney-General noted that, while efforts would be made to obtain documentary evidence of age from Indonesia, it may not be possible to do so in all cases. The Attorney-General stated that the benefit of the doubt would be given where evidence suggested an individual may have been a child at the relevant time. The letter advised:

If verified documentation from Indonesia or DIAC age assessments suggests that the benefit of the doubt should be given to these crew on the basis that they may have been minors at the time of the offence, I will consider whether early release on licence is an appropriate outcome for these crew.²⁴³

On 3 May 2012, the President replied to the Attorney-General. She urged the Attorney-General to act as quickly as possible on cases where material was available to suggest that the crew should be given the benefit of the doubt. The President drew to the attention of the Attorney-General three particular cases in which the relevant agencies had, during the Inquiry hearing for Commonwealth agencies,²⁴⁴ been made aware of the existence of material establishing some doubt about the age of individuals who had been convicted of people smuggling offences. During the hearing, certain admissions were made by the agencies about the conduct of those three matters. In particular:

- In one matter,²⁴⁵ the Office of the CDPP had acknowledged that they had disputed the admission of a birth certificate that suggested an individual was 14 years old at the time of the offence.

- In one matter,²⁴⁶ the AFP acknowledged that the prosecution had continued even though the medical expert report observed that the bones of the wrist were not fully fused.
- In one matter,²⁴⁷ the Office of the CDDP acknowledged that the initial medical expert report regarding the wrist x-ray was not definitive and a second opinion was sought and the prosecution continued.²⁴⁸

The President also noted that at the Inquiry hearing for Commonwealth agencies, officers from DIAC had advised that they had completed focused age assessment interviews with the individuals identified in the Commission's letter of 16 March 2012 and on 18 April 2012 had provided a report to AGD on the results of those interviews.

On 17 May 2012, the Attorney-General wrote to the President to advise her of the initial outcome of the review of the cases of individuals convicted of people smuggling. She advised that DIAC had finalised its age assessment of the first 19 crew subject to review. Of the four individuals DIAC had assessed as likely to have been minors at the date of the offence, the Attorney-General had decided to release three on licence. The Attorney-General explained that the Indonesian National Police had provided documentary evidence about the fourth individual which indicated that he was an adult at the time of the offence and that further inquiries concerning him were being pursued in Indonesia. The Attorney-General subsequently advised on 7 June 2012 that she would release this individual on licence.

The Attorney-General further stated that the Office of the CDDP had advised that there were an additional four crew who had been convicted of a people smuggling offence and who had raised age at some point during investigation or prosecution and that these individuals would be included in the review. Another three individuals had completed their sentences and been returned to Indonesia.

The President replied on 18 May 2012 urging that the review be completed as soon as practicable given that it was possible that individuals who had been convicted of people smuggling offences and detained in adult correctional facilities were minors at the time of their apprehension.²⁴⁹

On 28 May 2012, the Attorney-General wrote to the President to assure her that the review of the cases of individuals suspected of people smuggling was proceeding as quickly as possible. She further advised that AGD had asked the AFP to offer voluntary dental x-rays to those individuals whose cases remained under review.²⁵⁰

On 6 June 2012, the President replied and expressed her concern that dental x-rays would be offered to the remaining individuals:

First, it is unclear to me how a dental x-ray conducted now, in many cases over two years from the date of apprehension, will give an indication of the individual's age at that time.

Second, evidence and research before the Inquiry indicate that dental x-ray analysis is not sufficiently informative of whether an individual has attained the age of 18 years to be used with confidence for determining age in a criminal justice proceeding. I will draw this conclusion in the Inquiry report.

Third, internationally accepted principles regarding the use of radiography require that a process of justification be undertaken before radiation is used for a purpose other than for medical diagnosis or medical treatment. The Australian Radiation Protection and Nuclear Safety Agency has provided this advice to your Department. I am not aware of any such process of justification having been undertaken with regard to the use of either wrist x-ray analysis or dental x-ray analysis for the purpose of age assessment.²⁵¹

The next day, the Attorney-General wrote to the President to update her on the progress of the review of individuals convicted of people smuggling offences. She advised that she had granted early release on licence to a further two individuals in whose cases there was doubt about whether they were adults at the time of the offence. She had also decided to release two individuals on parole, 30 days before their non-parole periods were due to expire, although she did not hold any doubt that they were over the age of 18 when they were apprehended in Australian waters.²⁵²

The Attorney-General provided progressive updates of the review. On 12 June 2012, she advised that three individuals would be granted early release on licence;²⁵³ and on 26 June 2012, she advised that three further individuals would be granted early release on licence.²⁵⁴

The Attorney-General wrote to the President on 29 June 2012 to advise that the review was complete and that the final four individuals would be released early on licence. She confirmed that, of the 28 crew examined as part of the review:

- 15 were released early on licence on the basis that they may have been minors on arrival in Australia
- two crew were released early on parole
- three completed their non-parole periods prior to the commencement of the review, and
- eight were assessed as likely to be adults on arrival.²⁵⁵

The Commission is troubled by the Commonwealth's delay in calling the review of the cases of individuals convicted of people smuggling who had at some point in time said that they were less than 18 years of age at the time of their apprehension. The Commission first raised concerns about reliance on wrist x-ray analysis for age assessment purposes in February 2011 and

explicitly called on the then Attorney-General to review cases where age was in doubt in July 2011. It was not until May 2012 that it was announced that a review would be conducted.

A delay of this length is disturbing when the rights of individuals who might be children are involved, especially when they are in detention. The review has concluded that there is some doubt as to whether 15 individuals were aged over 18 years of age at the time of their apprehension. All of these 15 individuals spent long periods of time in adult correctional facilities prior to their release.

9 Findings

9.1 Findings regarding the application of the principle of the benefit of the doubt

Despite undertakings given by the Australian Government in 2001 that the benefit of the doubt would be applied in cases where individuals suspected of people smuggling were not clearly adults,²⁵⁶ and despite the repeated assertions by the Australian Government throughout 2011 that the benefit of the doubt was being afforded to individuals in this circumstance, it is clear that in many cases this did not occur.

The procedure adopted by the AFP for deciding whether to charge a person as an adult, notwithstanding his claim to be a child, demonstrates that the benefit of the doubt was not afforded. In many cases, the only available information which threw doubt on the person's claim to be a minor was wrist x-ray analysis that showed skeletal maturity. Uniformly, a person assessed to be skeletally mature would be charged as an adult even when he said that he was a child. This was not a practice that afforded the benefit of the doubt to the individual. It would only have done so had wrist x-ray analysis been capable of determining age with some precision. It is plain that it could not and that this had been widely recognised since at least 2001.

It is clear that charging a person as an adult on the basis that he has achieved skeletal maturity, as shown by a wrist x-ray, has led to an informal reversal of the onus of proof concerning age. The relevant provisions in the Migration Act do not make it clear which party bears the onus of proving that the defendant is under, or alternatively over, the age of 18 years and courts have come to differing conclusions about whether the defendant or the prosecution bears that onus. Placing the onus on the defendant undermines the application of the principle of the benefit of the doubt. Consequently, although it is current practice for counsel for the CDPP to accept the onus of proving that an individual is an adult, this should be formalised by amendment of the relevant provisions of the Migration Act.

9.2 Findings regarding the reliance on wrist x-ray analysis as a basis for charging and prosecuting individuals as adults

It appears that the specifying of a wrist x-ray as a prescribed procedure for the purposes of age determination in criminal proceedings has influenced attitudes towards the evidentiary value of assessments of age based on wrist x-rays and to the need for wrist x-rays to be taken. The Commonwealth Director of Public Prosecutions gave evidence that, but for the fact that the wrist x-ray procedure was prescribed, it was an 'extremely limited and probably useless mechanism'.²⁵⁷ In his response to the draft report, the Commonwealth Director of Public Prosecutions stressed that:

the unique circumstances leading to the creation of the GP Atlas left a legacy with which we were able to work. This is solely as a result of being given recourse to it by Parliament's providing access through legislation to wrist x-rays as the one prescribed aid to age determination. This reflected that without being prescribed the procedure would not be able to be the subject of an order facilitating its use in aid of age related determinations.²⁵⁸

The AFP developed the practice of nearly always having a wrist x-ray taken where an individual disputed his age, and a senior officer from AGD described the procedure as one that 'the AFP is required to follow'.²⁵⁹ However, as the Explanatory Memorandum in respect of the 2001 amending legislation makes clear, wrist x-rays were intended by the Parliament to be a procedure available for use when investigating officials had used all other reasonable means to make an assessment of an individual's age.

Where analysis of an individual's wrist x-ray resulted in a finding that the individual was skeletally mature, he was immediately treated by the AFP as an adult, including for the purpose of the laying of charges against him – even if there was no other evidence of his age and even if he continued to assert that he was under the age of 18 years. Many of those who were arrested and charged as adults, based solely on wrist x-ray evidence, ultimately had their prosecutions discontinued. In some of these cases, the individual spent a very long period of time in detention, including in an adult correctional facility. Some individuals were ultimately convicted as adults in circumstances where the only evidence of age provided to the court was wrist x-ray evidence. In some cases wrist x-rays were taken even where documentary evidence of age existed. Finally, in late 2011, the Office of the CDPP decided that in cases where there was no probative evidence of age other than the wrist x-ray analysis, the prosecutions should be discontinued. The length of time that some of the individuals affected by this decision had spent in detention prior to their cases being discontinued is disturbing.

Particular disregard for the rights of children is demonstrated by the ongoing detention of some individuals whose wrist x-ray analyses indicated that they were not skeletally mature. There appear to have been significant delays both between the obtaining of a wrist x-ray analysis that found an individual to be skeletally immature and the making of a decision not to prosecute;

and between the making of a decision not to prosecute and the making of a request to cancel a CJSC and ultimate removal from Australia. These delays have resulted in the unjustified and prolonged detention of minors.

Also, in direct contravention of Australian Government policy, some individuals were charged as adults despite the analysis of their wrist x-ray being inconclusive as to whether they were an adult. In several of these cases, the AFP, either of their own initiative, or at the request of the Office of the CDPP, sought a second opinion on whether the wrist x-ray showed skeletal maturity. When they sought a second opinion, it appears that they nearly always did so from Dr Low, the Commonwealth's expert witness of choice. It is of concern that, rather than these individuals being given the benefit of the doubt and their prosecutions discontinued because the wrist x-ray analysis was inconclusive, they were charged as adults and then a second opinion was sought in order to justify continuing the prosecution. The Commission is aware of at least two cases where individuals whose wrist x-ray analyses were inconclusive were convicted and sentenced to terms of five years imprisonment (with non-parole periods of three years). Both were released on licence, one in May 2012 and one in June 2012, after the Commonwealth conceded that there was doubt about his age at the time of his apprehension.

It appears that wrist x-ray analysis was relied upon as evidence of age despite alternative age assessment procedures, for example DIAC focused age assessment interviews, which found it likely that the individual was under the age of 18. The AFP gave a commitment that they would not charge any individual assessed by DIAC to be under the age of 18 following the focussed age assessment interviews conducted in October 2010. Despite this commitment, in at least 12 cases where DIAC's assessment was that the individual was likely to be a minor, the AFP subsequently arranged for wrist x-rays to be obtained. In seven of these cases the x-ray showed skeletal maturity. All of these individuals were charged, with the prosecution ultimately being discontinued in every case – but not until the individual had spent a prolonged period of time in detention.

It also appears that in some circumstances the Commonwealth led young Indonesians to believe that wrist x-ray evidence was determinative of age. In some cases, individuals' legal representatives accepted the medical evidence based on wrist x-rays as determinative and accordingly advised their clients to plead guilty. It appears likely that in some cases the individual did not raise the issue of their age again, or pleaded guilty thereby conceding their age, after receiving the results of the wrist x-ray because they were under the mistaken belief that those results were accurate and conclusive.

It can only be concluded that the practice of relying on wrist x-ray analysis for age assessment purposes has resulted in the investigation, prosecution and prolonged detention of a significant number of young Indonesians who are likely to have been children at the time of the people smuggling offence of which they were suspected.

9.3 Findings regarding the obtaining of consent for wrist x-ray procedures to be conducted

In many, indeed possibly all, cases it appears that the required consents for a wrist x-ray to be taken were not properly obtained.

First, until July 2011, the information that was provided to the young Indonesians from whom consent was sought was misleading as it implied that the wrist x-ray procedure would accurately determine his age. In March 2011, the Office of the CDPP advised the AFP that the standard statement of information should be amended to make it clear that a wrist x-ray can only give a probable estimation of a person's age. The formal amendment of the information was only made in August 2011, although the AFP has advised that the information was in practice changed earlier. There seems, nonetheless, to have been a considerable delay in rectifying this problem.

Secondly, it may be that no second informed consent was ever obtained. It seems that in early cases the requirement for a second consent was often overlooked. Thereafter reliance was ordinarily placed on a consent provided by an 'independent observer' whose responsibilities did not involve representing the best interests of the child. The responsibilities of the independent observer were significantly more limited and focused on monitoring the minor's physical and emotional wellbeing. Additionally, it does not appear that the independent observers were always provided the information required by the Crimes Act to be given to the independent adult.

Thirdly, in at least one case, the young person's consent was not validly obtained as the AFP officer conveyed to the individual that, if he did not consent to the x-ray procedure, an order would automatically be granted by a court authorising the x-ray to be taken.

Fourthly, it appears that in some cases a recording of the obtaining of consent, as required by the Crimes Act, was probably not made.

The AFP is the Commonwealth's principal law enforcement agency; its own compliance with the law is critical to its integrity. It is therefore particularly regrettable that the AFP should have failed to comply with the requirements of the Crimes Act in the above ways. It is the more regrettable that it did so in its dealings with a group of young people who were especially vulnerable by reason of being away from their families and outside their country of nationality.

9.4 Findings regarding the review of cases in which substantial reliance had been placed on wrist x-ray analysis

It is concerning that in mid-2011, the then Attorney-General was advised to decline the request made by the President of the Australian Human Rights Commission for a review of cases in which

substantial reliance had been placed on wrist x-ray analysis. There was at that time substantial evidence available to the Commonwealth that called into question the utility of wrist x-ray analysis as evidence that a person was over the age of 18 years. The need for this review is demonstrated in the fact that ultimately in 15 cases it was found that there was a doubt about whether individuals had been adults at the time of their offence. These individuals all spent long periods of time detained in adult correctional facilities.

¹ Australian Government, Joint submission, Submission 30, p 8.

² The difference between these figures and those provided in the Joint Commonwealth submission may be explained in part by the differences in time periods. However, the Commission believes that some of the 208 people identified by the Joint Commonwealth submission as having claimed to be a minor at the time of their apprehension may not in fact have made this claim.

³ *Crimes Amendment Regulations 2001* (No 2) (Cth).

⁴ Commonwealth Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Report of the Inquiry into the Provisions of the Crimes Amendment (Age Determination) Bill 2001* (March 2001) (Report of Senate Committee 2001), para 3.18.

⁵ Report of Senate Committee 2001, above, para 4.9, recommendation 8.

⁶ Revised Explanatory Memorandum, Crimes Amendment (Age Determination) Bill 2001 (Cth) (Revised Explanatory Memorandum 2001), p 2.

⁷ Deputy Director, CDPP Perth Office, Email to Assistant Commissioner, National Manager Crime Operations, AFP, 12 April 2011 (AGD document PROS-17).

⁸ Senior Legal Officer, Office of International Law, AGD, Letter to Principal Legal Officer, People Smuggling and Border Protection Section, AGD, 2 May 2011, Attachment – Email from AGD Officer, Border Management and Crime Prevention Branch, Criminal Justice Division, AGD, 4 May 2011 (AGD document PROS-27), p 8.

⁹ Talking points on the working group on age determination to be discussed at the Australia-Indonesia Consular Consultations – Perth, 30 June 2011 (AGD document BRIEF-19), p 2.

¹⁰ Hon R McClelland MP, Attorney General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 30 June 2011, pp 1–2.

¹¹ Hon R McClelland MP, Attorney General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 22 August 2011, p 4.

¹² Australian Government, Joint submission, Submission 30, p 16.

¹³ Australian Government, Joint submission, Submission 30, p 29.

¹⁴ Acting Assistant Secretary, Immigration Intelligence Branch, DIAC, Email to Deputy Project Leader, Community Detention and Implementation, DIAC, 11 November 2010 (DIAC document mail39646006).

¹⁵ Ministers' Office Brief – Attorney-General/Minister for Home Affairs, *People smuggling – children in gaols*, 27 May 2011, Attachment – Email from AGD Officer, Border Management and Crime Prevention Branch, Criminal Justice Division, AGD, 2 June 2011 (AGD document BRIEF-12), p 2.

¹⁶ First Assistant Secretary, Criminal Justice Division, AGD, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 138.

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- ¹⁷ First Assistant Secretary, Criminal Justice Division, AGD, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 138.
- ¹⁸ Report of Senate Committee 2001, note 4, recommendation 8.
- ¹⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 April 2001, p 26186 (The Hon Darryl Williams MP, Attorney-General).
- ²⁰ Commonwealth, *Parliamentary Debates*, Senate, 4 April 2001, p 23619 (The Hon Senator Abetz, Special Minister of State).
- ²¹ See for example, *Children's Court of Western Australia Act 1988* (WA).
- ²² See for example, Transcript of Proceedings, *The Police v Henry Mazela* (Children's Court of Western Australia, O'Brien J, 12 February 2002) (Transcript – The Police v Mazela).
- ²³ *Crimes Act 1914* (Cth), s 19B.
- ²⁴ Transcript of Proceedings, *Australian Federal Police v [TOW043]* (Magistrates Court of Victoria, Magistrate Collins, 1 December 2011) (TOW043 – CDPP document 179.0857), p 2.
- ²⁵ *R v [OSB051]* [2011] WADC 95.
- ²⁶ *R v Udin and Aman* (unreported, District Court of Western Australia, 8 November 2000); *R v Kaspoo* [2002] WACC, para 7 (O'Brien J); *R v Junus* [2002] WACC 2.
- ²⁷ Commonwealth Director of Public Prosecutions, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 44.
- ²⁸ Legal Aid Queensland, Submission 6, p 2.
- ²⁹ Legal Aid Queensland, Submission 6, p 3.
- ³⁰ Northern Territory Legal Aid Commission, Submission 32, p 5.
- ³¹ Australian Government, Joint submission, Submission 30, pp 6–7.
- ³² Senior Legal Officer, Financial Crime & Border Management Section, AGD, Email to Officer, AGD, 2 February 2010 (AGD document LEG-1).
- ³³ Senior Legal Officer, Office of International Law, AGD, Email to Senior Legal Officer, Financial Crime & Border Management Section, AGD, 3 February 2010 (AGD document LEG-1).
- ³⁴ AGD document LEG-1, above.
- ³⁵ Senior Legal Officer, Office of International Law, AGD, Email to Senior Legal Officer, Financial Crime & Border Management Section, AGD, 4 February 2010 (AGD document LEG-1).
- ³⁶ Officer, Financial Crime & Border Management Section, AGD, Email to DIAC, CDPP and AFP Officers, 22 February 2011 (AGD document LEG-6).
- ³⁷ Options for dealing with minors in relation to people smuggling offences, Attachment A – Email from Officer, Legal Policy Section, DIAC, to Officer, Financial Crime and Border Management, Criminal Justice Division, AGD, 24 February 2011 (AGD document LEG-5).
- ³⁸ AGD document LEG-5, above.
- ³⁹ Report of Senate Committee 2001, note 4, recommendation 2, para 2.76.
- ⁴⁰ Commonwealth, *Parliamentary debates*, Senate, 4 April 2001 p 23619 (Hon Senator Abetz, Special Minister of State).
- ⁴¹ Commonwealth, *Parliamentary debates*, Senate, 4 April 2001 p 23619 (Hon Senator Abetz, Special Minister of State).

- ⁴² Investigator, Border & International, AFP, Email to Legal Officer, CDPP, 30 November 2009 (ULT055 – CDPP document 047.0316). Note that in November 2010, a document was received from Indonesia by the AFP that suggested that ULT055 was over 18 years of age. The prosecution against this individual was ultimately discontinued.
- ⁴³ Statement of material facts, AFP, undated (VMT011 – CDPP document 153.0048). The AFP received documentary evidence after VMT011 that may have indicated that he was an adult, however, it was for a person with a different name who may have used an alias that corresponded with VMT011's name. In June 2012, this individual was released early on licence as it was accepted that there was doubt about whether he was an adult at the time of his apprehension.
- ⁴⁴ Federal Agent, People Smuggling Strike Team, Crime Operations, AFP, Email to Officers, CDPP, 29 March 2011 (INN012 – CDPP document 240.0301).
- ⁴⁵ Crown's submissions on sentence, District Court of Western Australia, undated (QUE053 – AFP document 21), para 54.
- ⁴⁶ Federal Agent Crime Operations, AFP Adelaide Office, Email to Principal Legal Officer, CDPP Adelaide Office, 4 October 2011 (LAW085 – CDPP document 367.0037).
- ⁴⁷ Federal Agent, Team Leader People Smuggling Team, Crime Operations, AFP, Email to Team Leader, People Smuggling Strike Team, AFP Brisbane Office, 12 August 2011 (OFD030 – CDPP document 293.0651).
- ⁴⁸ Transcript of taped record of interview, AFP, 10 December 2009 (DER024 – AFP document 9), p 24.
- ⁴⁹ Statement of [academic expert] re: Indonesian identity and proof of age, Federation Fellow, Director, Asian Law Centre, Faculty of Law, The University of Melbourne, 24 May 2012, p 6 (AFP document provided 29 May 2012).
- ⁵⁰ Chief Scientist, Office of the Chief Scientist, Letter to Deputy Secretary, National Security & Criminal Justice Group, AGD, 11 January 2012, p 2.
- ⁵¹ AFP, Response to draft report, 6 July 2012, p 21.
- ⁵² Commonwealth Director of Public Prosecutions, Response to draft report, 6 July 2012, p 3.
- ⁵³ Australian Government, Joint submission, Submission 30, p 8.
- ⁵⁴ Federal Agent, AFP Brisbane Office, Case Note, 3 August 2010 (HAM046 – AFP document 8).
- ⁵⁵ Federal Agent, People Smuggling Operations Support Crime Operations, AFP, Email to AGD Officer, 20 October 2010 (HAM046 – AFP document 10).
- ⁵⁶ Federal Agent, AFP, Case Note 14 May 2010 (GEE080 – AFP document 9).
- ⁵⁷ Federal Agent, People Smuggling Operations Support, Crime Operations, AFP, Email to AGD Officer, 19 October 2010 (GEE080 – AFP document 10).
- ⁵⁸ Commonwealth Director of Public Prosecutions, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 179.
- ⁵⁹ Commonwealth Director of Public Prosecutions, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 179.
- ⁶⁰ Commonwealth Director of Public Prosecutions, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 64.
- ⁶¹ Minutes, Age determination of people smuggling crew, 1 March 2011, Attachment – Email from Principal Legal Officer, AGD, to Commonwealth agencies, 3 March 2011 (AGD document ENG-AHRC-2).

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- ⁶² Question time brief, Asylum seekers – child people smugglers (QTB10-470), Attachment – Email from Principal Legal Officer, People Smuggling Financial Crime and Border Management Section, Criminal Justice Division, to Officer, Department of Prime Minister and Cabinet, 17 November 2010 (DIAC document mail39646062).
- ⁶³ First Assistant Secretary, Criminal Justice Division, AGD, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 90.
- ⁶⁴ Deputy Commissioner, AFP, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 114.
- ⁶⁵ AFP, Response to draft report, 6 July 2102, p 12.
- ⁶⁶ Federal Agent, Border and International, AFP, Email to Principal Legal Officer, CDPP, 10 August 2009 (QUE053 – CDPP document 211.0133).
- ⁶⁷ NSW Legal Aid, Submission 35, pp 8–9.
- ⁶⁸ Revised Explanatory Memorandum 2001, note 6, pp 4–5, para 9.
- ⁶⁹ Report of Senate Committee 2001, note 4, Chapter 4, para 4.1.
- ⁷⁰ Report of Senate Committee 2001, above, para 3.62.
- ⁷¹ Question time brief, Asylum seekers – child people smugglers (QTB10-470), Attachment – Email from Principal Legal Officer, People Smuggling Financial Crime and Border Management Section, Criminal Justice Division, to Officer, Department of Prime Minister and Cabinet, 17 November 2010 (DIAC document mail39646062).
- ⁷² Federal Agent, AFP, Email to Acting Principal Legal Officer, Counter Terrorism and People Smuggling, CDPP Sydney Office, 29 November 2011 (TYE059 – CDPP document 053.0004).
- ⁷³ Deputy Commissioner, AFP, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 198.
- ⁷⁴ Transcript of taped record of interview, AFP, 7 July 2010 (NTN032 – CDPP document 173.0297), pp 17–20.
- ⁷⁵ Transcript of taped record of interview, AFP, 5 May 2010 (MAL011 – CDPP document 150.0398), p 5.
- ⁷⁶ Principal Legal Officer, CDPP Perth Office, Email to Counsel for defence, 12 November 2010 (UPW031 – CDPP document 004.0415).
- ⁷⁷ Defence Barrister & Solicitor, Email to Principal Legal Officer, CDPP Perth Office, 12 November 2010 (UPW031 – CDPP document 004.0415).
- ⁷⁸ Acting Senior Assistant Director, CDPP Perth Office, Email to Deputy Director, CDPP Perth Office, 5 August 2011 (JDT046 – CDPP document 111.0084).
- ⁷⁹ Brief to counsel, Age determination hearing, 26 August 2011 (NTN031 – CDPP document 316.0246).
- ⁸⁰ Federal Agent, Team Leader, People Smuggling Team, Crime Operations, AFP, Email to Officers, CDPP, 3 October 2011 (TIW044 – AFP document 24).
- ⁸¹ OSB051; YRE052; WAK090; PEN061; KAD059; ALE058; WAK089; OFD029; EAS054; WAK087.
- ⁸² OSB051; KAD059.
- ⁸³ Interview with WAK087, Australian Human Rights Commission, 27 April 2012.
- ⁸⁴ Officer, CDPP Perth Office, File Note, 21 June 2010 (WAK087 – CDPP document 079.0148). This document also refers to WAK089.
- ⁸⁵ WAK087; WAK089.

- ⁸⁶ Investigator, Border & International, AFP, Email to Legal Officer, CDPP, 30 April 2009 (DRU001 – CDPP document 341.0324).
- ⁸⁷ Transcript of taped record of interview, AFP, 29 November 2010 (BOM064 – AFP document 8).
- ⁸⁸ Federal Agent, AFP Melbourne Office, Case Note, 20 September 2010 (BOM064 – AFP document 1).
- ⁸⁹ Federal Agent, AFP, Task Result Details, 20 October 2010 (BOM064 – AFP document 2).
- ⁹⁰ Federal Agent, AFP Melbourne Office, Case Note, 12 November 2010 (BOM064 – AFP document 3).
- ⁹¹ Deputy Director, CDPP Perth Office, Email to Senior Legal Officer, CDPP Perth Office, 11 April 2011 (TIW043 – CDPP document 249.0354).
- ⁹² Principal Advisor, Citizenship, Settlement and Multicultural Affairs, DIAC, Email to Secretary, DIAC, 3 September 2010 (DIAC document mail39642123).
- ⁹³ Dr Low, Medical opinion, 2 April 2011 (JDT046 – DIAC document mail39645747_att1).
- ⁹⁴ Age assessment interview report, DIAC, 27 February 2011 (JDT046 – CDPP document 110.0521).
- ⁹⁵ Deputy Director, CDPP Perth Office, Email to Acting Senior Assistant Director, CDPP Perth Office, 8 August 2011 (JDT046 – CDPP document 111.0084); Prosecution Report, CDPP Perth Office, 18 August 2011 (JDT046 – CDPP document 111.0009).
- ⁹⁶ Age assessment interview report, DIAC, 21 February 2011 (BOM062 – CDPP document 115.0136).
- ⁹⁷ Medical opinion, 21 December 2010 (BOM062 – CDPP document 115.0236).
- ⁹⁸ Federal Agent, AFP Melbourne Office, Case Note, 9 March 2011 (BOM062 – AFP document 16).
- ⁹⁹ CDPP Officer, Minute to Senior Assistant Director, CDPP, 12 April 2011 (BOM062 – CDPP document 115.0033).
- ¹⁰⁰ Age assessment interview report, DIAC, 21 February 2011 (TOW043 – CDPP document 179.0729).
- ¹⁰¹ Federal Agent, Operations Team, AFP Adelaide Office, Email to IMA Operations, Community and Detention Services Division, DIAC, 18 March 2011 (TOW043 – DIAC document mail39642183).
- ¹⁰² Team Leader, AFP Adelaide Office, Case Note, 20 April 2011 (TOW043 – AFP document 13).
- ¹⁰³ Dr Low, Medical opinion, 27 April 2011 (TOW043 – CDPP document 179.0802).
- ¹⁰⁴ Transcript of Proceedings, *Australian Federal Police v [TOW043]* (Magistrates Court of Victoria, Magistrate Collins, 1 December 2011) (TOW043 – CDPP document 179.0857).
- ¹⁰⁵ Team Leader, People Smuggling Strike Team & International Investigations Capacity Training, Risk Fraud and Integrity Division, DIAC, Email to Christmas Island Detention Operations Team Leader, DIAC, 20 October 2010 (JAM074 – DIAC document mail39646050).
- ¹⁰⁶ Age assessment interview report, DIAC, 28 January 2011 (JAM074 – AFP document 11).
- ¹⁰⁷ Legal Officer, CDPP Darwin Office, Memo to Director, CDPP, 26 October 2011 (JAM074 – CDPP document 287.0007).
- ¹⁰⁸ 'Arrest/Summons/Caution (National) Details (Summary View)', AFP, 24 March 2011 (JAM074 – AFP document 13).
- ¹⁰⁹ Federal Agent, AFP Darwin Office, Email to Legal Officer, CDPP Darwin Office, 13 April 2011 (JAM074 – CDPP document 304.0056).
- ¹¹⁰ Christmas Island Detention Operations Team Leader, DIAC, Email to Team Leader, People Smuggling Strike Team & International Investigations Capacity Training, Risk Fraud and Integrity Division, DIAC, 20 October 2010 (JAM074 – AFP document 2).
- ¹¹¹ Legal Officer, CDPP, Minute to Director, CDPP, 28 October 2011 (JAM074 – CDPP document 288.0622).

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- ¹¹² Commonwealth Director of Public Prosecutions, Response to draft report, 6 July 2012.
- ¹¹³ Senior Assistant Director, CDPP, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 199.
- ¹¹⁴ Commonwealth Director of Public Prosecutions, Response to draft report, 6 July 2012.
- ¹¹⁵ Transcript – *The Police v Mazela*, note 22, p 7.
- ¹¹⁶ Report of Senate Committee 2001, note 4, para 3.18.
- ¹¹⁷ Australian Government, Joint submission, Submission 30, p 16.
- ¹¹⁸ In his response to the draft report, the Commonwealth Director of Public Prosecutions reported that the Office of the CDPP has been provided with expert evidence from 22 medical practitioners other than Dr Low. He acknowledged, however, that the CDPP was usually provided with two expert reports, an initial report and a second more detailed report, and that the more detailed report was ‘usually by Dr Low’. See Commonwealth Director of Public Prosecutions, Response to draft report, 6 July 2012, p 2.
- ¹¹⁹ Biodata form, DIAC, 11 January 2010 (TRA029 – DIAC document).
- ¹²⁰ Legal Officer, CDPP Perth Office, Letter to Counsel for defence, 17 November 2010 (TRA029 CDPP document 063.0536).
- ¹²¹ Legal Officer, CDPP Perth Office, Email to Federal Agent, AFP Perth Office, 17 November 2010 (TRA029 – CDPP document 063.0497).
- ¹²² Medical opinion, 20 January 2011 (TRA029 – CDPP document 065.0206).
- ¹²³ Dr Low, Medical opinion, CDPP, 3 May 2011 (TRA029 – CDPP document 063.0401).
- ¹²⁴ Officer, CDPP, File Note, 8 September 2011 (TRA029 – CDPP document 267.0159);
- ¹²⁵ Prosecution Report, CDPP Perth Office, 20 September 2011 (TRA029 – CDPP document 064.0004).
- ¹²⁶ Medical opinion, AFP, 15 January 2010 (UPW031 – AFP document 1).
- ¹²⁷ Legal Officer, CDPP Perth Office, Email to Federal Agent, AFP, 12 February 2010 (CDPP document 038.0454).
- ¹²⁸ Dr Low, Medical opinion, 4 March 2010 (UPW031 – CDPP document 031.0121).
- ¹²⁹ Legal Officer, CDPP, Email to Federal Agent Border & International, AFP, 3 March 2010 (UPW031 – CDPP document 038.0408).
- ¹³⁰ Legal Officer, CDPP Perth Office, Email to Officer, CDPP, 5 March 2010 (UPW031 – CDPP document 038.0396).
- ¹³¹ Transcript of Proceedings, *The Queen v RMA* (District Court of Western Australia, Eaton DCJ, 11 November 2011) (UPW031 – CDPP document 037.0003).
- ¹³² Transcript of taped record of interview, AFP, 7 July 2010 (NTN031 – AFP document 7), pp 5–6.
- ¹³³ Deputy Director, CDPP Perth Office, Email to Officers, CDPP, 12 April 2011 (NTN031 – CDPP document 315.0275).
- ¹³⁴ Dr Low, Medical opinion, 6 August 2011 (NTN031 – CDPP document 031.0008).
- ¹³⁵ Senior Assistant Director, CDPP Perth Office, Memo to Director, CDPP Head Office, 18 November 2011 (NTN031 – CDPP document 323.0943).
- ¹³⁶ Medical opinion, 15 January 2010 (VMT011 – CDPP document 153.0088). See also, Senior Legal Officer, CDPP Perth Office, Email to CDPP Officer, 4 July 2011 (VMT011 – CDPP document 154.0036).
- ¹³⁷ Legal Officer, CDPP Perth Office, Email to Federal Agent, AFP, 26 February 2010 (VMT011 – CDPP document 153.0342).

- ¹³⁸ Dr Low, Medical opinion, 26 April 2011 (VMT011 – CDPP document 154.0273).
- ¹³⁹ Senior Legal Officer, People Smuggling Branch, CDPP Perth Office, Email to Deputy Director, CDPP Perth Office, 28 April 2011 (VMT011 – CDPP document 154.0269).
- ¹⁴⁰ Entry interview, DIAC, 21 January 2010 (PEN060 – CDPP document 134.1642).
- ¹⁴¹ Transcript of taped record of interview, AFP, 9 July 2010 (PEN060 – CDPP document 134.0191).
- ¹⁴² Counsel for defence, Email to Legal Officer, CDPP, 12 March 2011 (PEN060 – CDPP document).
- ¹⁴³ Dr Low, Medical opinion, 20 March 2011 (PEN060 – CDPP document 135.0125).
- ¹⁴⁴ Deputy Director, CDPP Perth Office, Email to Legal Officer, CDPP, 14 April 2011 (PEN060 – CDPP document 186.0002).
- ¹⁴⁵ Entry interview, DIAC, 29 September 2009 (WAK089 – CDPP document 076.0214), p 3; Transcript of taped record of interview, AFP, 12 October 2009 (WAK089 – CDPP document 070.0086).
- ¹⁴⁶ Dr Low, Medical opinion, AFP, 15 October 2009 (WAK089 – CDPP document 070.0040).
- ¹⁴⁷ Prosecution notice, Magistrates Court of Western Australia, AFP, 15 October 2009 (WAK089 – AFP document 5).
- ¹⁴⁸ Senior Legal Officer, CDPP Perth Office, Brief to counsel, 18 October 2010 (WAK089 – CDPP document 046.0178).
- ¹⁴⁹ Transcript of taped record of interview, AFP, 4 March 2010 (EAS054 – AFP document 5).
- ¹⁵⁰ Legal Officer, CDPP, Email to Legal Aid Officer, Legal Aid WA, 11 May 2010 (EAS054 – CDPP document 050.0179).
- ¹⁵¹ Legal Officer, CDPP Perth Office, Email to Federal Agent, AFP, 11 May 2010 (EAS054 – CDPP document 051.0208).
- ¹⁵² Federal Agent, AFP, Email to Legal Officer, CDPP, 14 May 2010 (EAS054 – CDPP document 051.0173). It is interesting to note that Dr Low’s observation, as reported in this email, is inconsistent with his usual observation that for a young male skeletal maturity is achieved, on average at age 19 years.
- ¹⁵³ Hon N Roxon MP, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 17 May 2012.
- ¹⁵⁴ Transcript of taped record of interview, AFP, 4 March 2010 (EAS056 – AFP document 6), p 4.
- ¹⁵⁵ Transcript of Proceedings, *The Queen and [EAS054] and Madina Marwan and [EAS056]* (District Court of Western Australia, Staude DCJ, 17 September 2010) (EAS056 – CDPP document 050.0109).
- ¹⁵⁶ Transcript of taped record of interview, AFP, 22 December 2009 (LAL041 – AFP document 3), p 7.
- ¹⁵⁷ Transcript of taped record of interview, AFP, 1 June 2011 (DRL038 – AFP document 12), pp 2–3.
- ¹⁵⁸ Transcript of taped record of interview, AFP, 9 December 2009 (DER026 – AFP document 8), pp 13–14.
- ¹⁵⁹ Psychological Assessment Report, Defence, 28 June 2011 (INN012 – CDPP document 240.0238), p 6.
- ¹⁶⁰ Syam’s legal representative gave the Commission permission to quote from his statement.
- ¹⁶¹ Statutory Declaration, Syam, 16 May 2012 (Document provided to Commission 20 May 2012).
- ¹⁶² Statutory Declaration, Syam, 16 May 2012 (Document provided to Commission 20 May 2012).
- ¹⁶³ Transcript of Proceedings, *The Queen v Lorens Lapikana and [QUE053] and Anwar Abdullah and [QUE051]* (District Court of Western Australia, Wisbey DCJ, 23 September 2010) (QUE051 – CDPP document 208.0315), p 670.
- ¹⁶⁴ *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (Marion’s Case) (1992) 175 CLR 218.

- ¹⁶⁵ B Matthews, 'Children's Consent to Medical Treatment' in B White, F McDonald and L Willmott (eds), *Health Law in Australia* (2010) 113, 116.
- ¹⁶⁶ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.
- ¹⁶⁷ *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (Marion's Case) (1992) 175 CLR 218, 239–240 (Mason CJ, Dawson, Toohey and Gaudron JJ).
- ¹⁶⁸ Commonwealth, *Parliamentary Debates*, Senate, 4 April 2001, p 23619 (The Hon Senator Abetz, Special Minister of State).
- ¹⁶⁹ National Health and Medical Research Council, *General Guidelines for Medical Practitioners on Providing Information to Patients* (2004) (General Guidelines for Medical Practitioners 2004), p 7. At http://www.nhmrc.gov.au/_files_nhmrc/publications/attachments/e57.pdf (viewed 9 July 2012).
- ¹⁷⁰ See *Schloendorff v Society of New York Hospital* (1914) 105 NE 92, 93 (Cardozo J) cited in *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (Marion's Case) (1992) 175 CLR 218, 234 (Mason CJ, Dawson, Toohey and Gaudron JJ).
- ¹⁷¹ General Guidelines for Medical Practitioners 2004, note 169, p 9.
- ¹⁷² General Guidelines for Medical Practitioners 2004, above, p 11.
- ¹⁷³ General Guidelines for Medical Practitioners 2004, above, p 11.
- ¹⁷⁴ *Transcript of hearing*, Public hearing for key medical experts (9 March 2012), pp 56–57.
- ¹⁷⁵ Dr Ella Onikul, Dr Paul Hofman, *Transcript of hearing*, Public hearing for key medical experts (9 March 2012), pp 59–60.
- ¹⁷⁶ Dr Ella Onikul, *Transcript of hearing*, Public hearing for key medical experts (9 March 2012), p 59.
- ¹⁷⁷ *Crimes Act 1914* (Cth), s 3ZQB.
- ¹⁷⁸ *Crimes Act 1914* (Cth), s 3ZQC(1).
- ¹⁷⁹ Explanatory Memorandum, Crimes Amendment (Age Determination) Bill 2001 (Cth) (Explanatory Memorandum 2001), para 12.
- ¹⁸⁰ Explanatory Memorandum 2001, above, para 13.
- ¹⁸¹ *Crimes Act 1914* (Cth), s 3ZQC(2).
- ¹⁸² *Crimes Act 1914* (Cth), s 3ZQE.
- ¹⁸³ *Crimes Act 1914* (Cth), s 3ZQE(2).
- ¹⁸⁴ Report of Senate Committee 2001, note 4, para 4.10.
- ¹⁸⁵ *Crimes Act 1914* (Cth), s 23WE(1).
- ¹⁸⁶ *Crimes Act 1914* (Cth), s 23WR.
- ¹⁸⁷ *Crimes Act 1914* (Cth), s 23XWQ.
- ¹⁸⁸ *Crimes Act 1914* (Cth), s 23XWR(1)(a).
- ¹⁸⁹ *Crimes Act 1914* (Cth), s 23XWR(1)(b).
- ¹⁹⁰ *Crimes Act 1914* (Cth), s 23XWR(1)(c).
- ¹⁹¹ *Crimes Act 1914* (Cth), s 23XWR(1)(e).
- ¹⁹² *Crimes Act 1914* (Cth), s 23XWR(1)(f).
- ¹⁹³ *Crimes Act 1914* (Cth), s 23XWQ(2)(b)(ia).
- ¹⁹⁴ Consent may be withdrawn expressly, or it may be inferred from the conduct of the parent or guardian. See *Crimes Act 1914* (Cth), s 23XWT(1).

- ¹⁹⁵ *Crimes Act 1914* (Cth), s 23XWT(2). This requires consent to be expressly withdrawn and is subject to an order made under s 23XWV of the Crimes Act.
- ¹⁹⁶ *Crimes Act 1914* (Cth), s 23XWU(1)(a).
- ¹⁹⁷ *Crimes Act 1914* (Cth), ss 23XWU(2)(a)–(e).
- ¹⁹⁸ ‘DSM: Chapter 2 – Client placement – Minors in Detention’, DIAC (DIAC document PAM3), para 22.1.
- ¹⁹⁹ Life Without Barriers. At <http://www.lwb.org.au/About-Us/Pages/default.aspx> (viewed 9 July 2012).
- ²⁰⁰ Australian Government, Joint submission, Submission 30, p 28.
- ²⁰¹ ‘Information to be provided to persons prior to consent for wrist x-ray being obtained’, AFP, undated (TYE059 – CDPP document 053.0224).
- ²⁰² Hon C Branson QC, President, Australian Human Rights Commission, Correspondence to Hon R McClelland MP, Attorney-General, 17 February 2011.
- ²⁰³ Senior Assistant Director, Legal Policy and Practice Management, CDPP, Letter to National Manager Crime Operations, AFP, 3 March 2011 (CDPP document Attachment D Document 5).
- ²⁰⁴ ‘Section 3ZQC(2) Part IAA Division 4A Crimes Act 1914’, AFP, Aide Memoire, 19 August 2011 (Document provided in hard copy 21 December 2011). See also, Assistant Commissioner, National Manager Crime Operations, AFP, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 3 September 2011 (AFP document 20110903).
- ²⁰⁵ Assistant Commissioner, AFP, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 124.
- ²⁰⁶ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.
- ²⁰⁷ Commonwealth, *Parliamentary Debates*, Senate, 4 April 2001, p 23619 (The Hon Senator Abetz, Special Minister of State).
- ²⁰⁸ ‘DSM: Chapter 2 – Client placement – Minors in Detention’, DIAC (DIAC document PAM3), para 22.3.
- ²⁰⁹ DIAC document PAM3, above, para 22.2.
- ²¹⁰ ‘Contract of Services, Schedule 2C, Item B. Services’, DIAC (DIAC document provided to Commission 19 January 2012).
- ²¹¹ ‘Contract of Services, Schedule 2C, Item B. Services’, DIAC (DIAC document provided to Commission 19 January 2012).
- ²¹² Deputy Project Leader – Community Detention Implementation, Principal Advisor’s Unit, DIAC, Email to Principal Legal Officer, AGD, 11 March 2011 (DIAC document mail39642174).
- ²¹³ Coordinator Legislation Program, Policy and Governance, AFP, Email to Officer, AGD, 18 March 2011 (AGD document DAA-2).
- ²¹⁴ Transcript of taped record of interview, AFP, 30 July 2009 (QUE053 – CDPP document 198.0596), p 4; Transcript of taped record of interview, AFP, 1 July 2010 (OFD030 – AFP document 14), p 6.
- ²¹⁵ Transcript of taped record of interview, AFP, 15 June 2009 (FLE048 – CDPP document 091.0040), p 3.
- ²¹⁶ Transcript of taped record of interview, AFP, 21 January 2010 (PEN060 – CDPP document 135.0098). See also, Transcript of taped record of interview, AFP, 21 January 2010 (NTN031 – CDPP document 173.0458); Transcript of taped record of interview, AFP, 20 January 2010 (Ali Jasmin – CDPP document 026.0300).
- ²¹⁷ See Ali Jasmin; NTN031; MAL011.
- ²¹⁸ *[ULT055] v The Queen [No 2]* [2010] WADC 169.
- ²¹⁹ *[ULT055] v The Queen [No 2]* [2010] WADC 169, [66].

- ²²⁰ [ULT055] v *The Queen* [No 2] [2010] WADC 169, [69]–[70].
- ²²¹ See for example, WAK087; WAK089; DRU011; WAK090; QUE051; DRU003; DRU002.
- ²²² AFP, Response to draft report, 6 July 2012, p 18.
- ²²³ Federal Agent, Border and International, AFP, Email to Director Detention Operations West, Community and Detention Services Division, DIAC, 2 November 2010 (ULT055 – DIAC document mail39645970).
- ²²⁴ Director, Principal Advisor's Unit, DIAC, Email to Federal Agent, Border and International, AFP, 4 November 2010 (ULT055 – DIAC document mail39645970).
- ²²⁵ Regional Manager Detention, DIAC Perth Office, Email to Director Principal Advisor's Unit, DIAC, 5 November 2010 (ULT055 – DIAC document mail39645970).
- ²²⁶ Director, Principal Advisor's Unit, DIAC, Email to Regional Manager Detention, DIAC Perth Office, 5 November 2010 (ULT055 – DIAC document mail39646024).
- ²²⁷ Regional Manager Curtin Operations, DIAC, Email to Director Principal Advisor's Unit, DIAC, 5 November 2010 (ULT055 – DIAC document mail39646024).
- ²²⁸ Senior Assistant Director, People Smuggling Branch, CDPP, People Smuggling Prosecutions Age Determination Issues, 15 December 2010 (CDPP document 4 – Attachment D), p 6.
- ²²⁹ [ULT055] v *The Queen* [No 2] [2010] WADC 169, [36].
- ²³⁰ Taped record of interview, AFP, 30 July 2009 (QUE053 – AFP document 1), pp 19–20.
- ²³¹ Federal Agent, AFP, Email to Federal Agent, AFP, 30 July 2009 (QUE053 – CDPP document 211.0133).
- ²³² Transcript of taped record of interview, AFP, 15 June 2009 (FLE048 – CDPP document 091.0040).
- ²³³ See for example, LAL041; PRK056. In some cases where a recording was not provided to the Commission, the AFP has informed the Commission that a recording was made: QUE051; QUE053. It appears that in at least one case, consent was not recorded because a signed consent form was received from the accused's solicitor: HWD059.
- ²³⁴ Hon C Branson QC, President, Australian Human Rights Commission, Correspondence to Hon R McClelland MP, Attorney-General, 14 July 2011, p 4.
- ²³⁵ Hon R McClelland MP, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 22 August 2011.
- ²³⁶ Hon C Branson QC, President, Australian Human Rights Commission, Correspondence to Hon R McClelland MP, Attorney-General, 26 September 2011.
- ²³⁷ Hon C Branson QC, President, Australian Human Rights Commission, Correspondence to Hon R McClelland MP, Attorney-General, 8 November 2011, p 2.
- ²³⁸ Hon R McClelland MP, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 30 November 2011.
- ²³⁹ Submission by the Attorney-General's Department and Australian Federal Police to the Commonwealth Senate Legal and Constitutional Affairs References Committee, 'Inquiry into detention of Indonesian minors in Australia', June 2012, pp 26–27.
- ²⁴⁰ Hon C Branson QC, President, Australian Human Rights Commission, Correspondence to Hon N Roxon MP, Attorney-General, 16 March 2012.
- ²⁴¹ Hon C Branson QC, President, Australian Human Rights Commission, Correspondence to Hon N Roxon MP, Attorney-General, 1 May 2012.
- ²⁴² Hon C Branson QC, President, Australian Human Rights Commission, Correspondence to Hon N Roxon MP, Attorney-General, 1 May 2012.

- ²⁴³ Hon N Roxon MP, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 2 May 2012.
- ²⁴⁴ Held on 19 and 20 April 2012.
- ²⁴⁵ KAD059. See *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 194.
- ²⁴⁶ WAK089. See *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), pp 202–209.
- ²⁴⁷ VMT011. See *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), pp 215–221.
- ²⁴⁸ Hon C Branson QC, President, Australian Human Rights Commission, Correspondence to Hon N Roxon MP, Attorney-General, 3 May 2012.
- ²⁴⁹ Hon C Branson QC, President, Australian Human Rights Commission, Correspondence to Hon N Roxon MP, Attorney-General, 18 May 2012.
- ²⁵⁰ Hon N Roxon MP, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 28 May 2012.
- ²⁵¹ Hon C Branson QC, President, Australian Human Rights Commission, Correspondence to Hon N Roxon MP, Attorney-General, 6 June 2012, p 1.
- ²⁵² Hon N Roxon MP, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 7 June 2012.
- ²⁵³ Hon N Roxon MP, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 12 June 2012.
- ²⁵⁴ Hon N Roxon MP, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 26 June 2012.
- ²⁵⁵ Hon N Roxon MP, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 29 June 2012.
- ²⁵⁶ Revised Explanatory Memorandum 2001, note 6, p 2. See discussion in section 2 above.
- ²⁵⁷ Commonwealth Director of Public Prosecutions, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 179.
- ²⁵⁸ Commonwealth Director of Public Prosecutions, Response to draft report, 6 July 2012, pp 5–6.
- ²⁵⁹ First Assistant Secretary, Criminal Justice Division, AGD, *Transcript of hearing*, Public hearing for Commonwealth agencies (19 April 2012), p 90.

Chapter 5:

Focused age assessment interviews

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1 Introduction

Focused age assessment interviews can be a useful technique for assessing age. Interviews of this kind have been used in Australia in a range of different ways since late 2010.

In late 2010, both the Department of Immigration and Citizenship (DIAC) and the Australian Federal Police (AFP) conducted focused age interviews for the purposes of assessing the ages of young Indonesians suspected of people smuggling. It appears that no further interviews of this kind were conducted until late in 2011, although, in mid-2011, the Government announced that the AFP would again offer voluntary focused age interviews, this time to be conducted under caution. For a number of reasons, the AFP did not offer these interviews.

In late 2011, a new age assessment procedure was introduced whereby DIAC conducted focused age interviews with individuals suspected of people smuggling whose age was in doubt, and only referred to the AFP those who they believed likely to be adults.

The Commission recognises that focused age interviews have some limitations that may affect their reliability and credibility as evidence of age. For that reason, focused age interviews must be conducted with care and must afford a wide margin of benefit of the doubt to any individual interviewed whose age is in doubt. It appears that the DIAC focused age assessment interview process generally meets these criteria.

From the material before the Commission it appears that the results of focused age interviews conducted with young Indonesians by DIAC in 2010 were largely disregarded by the AFP, with the consequence that many individuals assessed to be minors by DIAC were charged as adults and spent long periods of time in immigration detention and adult correctional facilities. In the vast majority of these cases, the prosecutions were ultimately discontinued.

This chapter of the report discusses:

- the benefits and limitations of conducting focused age assessment interviews
- the Commonwealth's approach to conducting focused age assessment interviews
- concerns about the Commonwealth's approach to focused age assessment interviews
- disclosure of DIAC age assessment interviews to the defence
- outcomes of DIAC age assessment interviews conducted since December 2011.

2 The benefits and limitations of conducting focused age assessment interviews

A focused age assessment interview can be a useful source of information about the interviewee's age, especially in circumstances where documentary evidence of age is unavailable. Such an interview involves trained interviewers asking a person whose age is in doubt a series of questions about his or her life in order to establish a chronology so as to make an assessment of the likelihood of the person being a child.

Interviews of this kind offer an important opportunity to hear directly from individuals who say that they are children. The Victoria Legal Aid submission to the Inquiry notes the importance of listening to the experience of people who say that they are children in the context of child asylum-seekers. The submission states:

Given the importance of age in determining whether young refugees can reunite with their families, and the difficulties in relying on either written records or x-ray data, it will often be appropriate to treat the evidence of a young refugee as the primary source of evidence about their age. Where there is other credible evidence as to age, this will also need to be taken into account. In the absence of such evidence, the young person's testimony should be treated as sufficient evidence of age, so that such vulnerable child refugees can seek to be reunited with their family in Australia.¹

Focused age assessment interviews are widely used in other countries as one of a variety of techniques for determining age. However, they are generally used in the context of unaccompanied minors in the immigration system as distinct from in a criminal justice context.² In his submission to the Inquiry, Professor Sir Al Aynsley-Green, former Children's Commissioner for England, notes that focused age assessment interviews are used universally.³ However, he observes some challenges to achieving reliable results from focused age assessment interviews. According to Professor Aynsley-Green, research demonstrates that interview results can be affected by the 'often intimidating' environment in which they occur and that the quality of interpreters who are present is key.⁴ He also noted that there can be challenges in the analysis of the material provided during the interview. He observed:

Analysis of the narrative given by the subject is fundamentally important. To be performed properly, however, this demands time, often involving several separate interviews, and expertise in the interviewers in understanding the lives, education and culture of children in the countries from which they have come.⁵

It is apparent that focused age interviews have limitations which may affect their reliability and credibility as evidence of age. These include potential problems with interpretation, and the risk that the interviewer has an inadequate understanding of the social and cultural circumstances of the interviewee.

The submission to the Inquiry from the Australian Children's Commissioners and Guardians notes the importance of those conducting or relying on focused age assessment interviews being aware that the experience of childhood varies across cultures. They said:

It is crucial that any interviews (such as the focused age interviews conducted by the AFP) to assess the age of an individual are undertaken with regard to the cultural context of childhood in the individual's country of origin so that any differences in typical experiences compared to an Australian child can be taken into consideration.⁶

Other submissions to the Inquiry raise questions about the reliability of age assessment interviews. For example, the Northern Territory Legal Aid Commission argues that:

They are very subjective, both in requiring the interviewee to be able to provide an accurate history and in the opinion forming by the interviewer. There is significant scope for incorrect results where individuals with limited education fail to provide an accurate history. There is also the risk of misunderstandings due to language and cultural barriers, as despite the provision of interpreters, many people speak dialect and have limited education.⁷

Legal Aid NSW emphasises the impact of the use of inappropriate interpreters in interview processes especially as many of the individuals being interviewed speak regional dialects and may not be fluent in Bahasa Indonesia, the official language of Indonesia.⁸

Importantly, the UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum conclude that age focused interviews must be age-appropriate and culturally sensitive.⁹

In order to mitigate the limitations of focused age interviews, Professor Aynsley-Green recommends that in documenting an individual's narrative there should be a written protocol and checklists of the data needed for the record and that effective and consistent training must be given to those performing interviews.¹⁰ In addition, he argues, an impartial approach by the interviewer needs to be adopted, so as to avoid the influence of any culture of disbelief.

Although there may be a degree of imprecision associated with eliciting narrative evidence through interview, international experience suggests that, if such interviews are conducted in a consciously age-appropriate and culturally sensitive manner, issues concerning reliability can be mitigated. Nonetheless, conclusions drawn from focused age interviews should factor in a wide margin of error to account for the inevitable imprecision.

3 The Commonwealth's approach to conducting focused age assessment interviews

As noted above, age assessment interviews with young Indonesians suspected of people smuggling offences have been conducted periodically in Australia since late 2010.

Prior to December 2011, focused age interviews were only conducted during two periods of time, both in late 2010, when:

- DIAC conducted a trial of age assessment interviews with 27 individuals suspected of people smuggling offences
- the AFP conducted age assessment interviews with 12 individuals suspected of people smuggling offences.

Although the Australian Government announced on 8 July 2011 that the 'improved age assessment process' would include focused age assessment interviews conducted under caution by the AFP, no such interviews have been conducted by the AFP since that date.¹¹

The current approach to age assessment interviews by DIAC commenced in December 2011. The current practice where the age of a young Indonesian suspected of people smuggling is in doubt is for DIAC officers to conduct an age assessment interview and only refer the individual to the AFP for investigation where they have found that he was likely to have been an adult at the time of his alleged offence.

The different approaches to age assessment interviews of DIAC and the AFP will be discussed below.

3.1 DIAC conduct a trial of focused age interviews in 2010

DIAC's approach to focused age assessment interviews with individuals whose ages were in doubt was developed in the context of asylum seekers who said that they were minors. In mid-2010 DIAC found that an increasing number of irregular maritime arrivals were saying that they were minors when DIAC officers believed that they may have been adults.

In response, DIAC developed a focused age assessment interview process where clients were interviewed by two experienced and trained DIAC officers in the presence of an independent observer engaged by DIAC.

The primary purpose of the DIAC age assessment interviews is to make an appropriate detention placement and to comply with Australian Government policy that minors will not be detained

in immigration detention centres but rather in alternative places of detention or in community detention.¹² DIAC has made clear to the Commission that it 'did not develop its age assessment process for the purpose of criminal justice administration and has not ever purported to carry it out to the standard that might be required in that context'.¹³

In correspondence with the Inquiry, DIAC describes the process as follows:

The approach [used] ... is through interviewing, asking a series of questions, not necessarily one after the other but interspersed, which go to chronology around schooling, ages of siblings, birth dates, when certain events occurred and so on. Any chronological inconsistencies which emerge are put to the client. Interviewers have access to, and considered, other documentation before conducting these interviews e.g. records of entry interview, any identity documents and/or records of discussions with DIAC staff in relation to their change of date of birth claims.¹⁴

DIAC also informed the Commission that officers take a 'low-key, commonsense approach to the interview recognising that the client may in fact be a minor', and that 'the interviewer ensures that information taken into account in forming that view is put to the client for comment' and this occurs 'before coming to a view about whether the client is a minor or adult'.¹⁵

The areas of inquiry covered during a DIAC focused age assessment interview include: physical appearance and demeanour; behaviour; family history; education and employment; and social history and independence.¹⁶

If the two interviewers come to different conclusions about an individual's age following an interview, the principle of the benefit of the doubt applies. DIAC has advised:

The interview assessment is conducted by two experienced officers who each separately form their own view and only share that view towards the end of the process. When their views concur on the basis of relevant, available information, this forms the official DIAC view of whether the person is a minor or an adult. Where they differ the person is given the benefit of the doubt and continues to be treated as a minor.¹⁷

3.2 DIAC age assessment interviews were conducted with 27 individuals in October 2010

Documents provided to the Commission indicate that, at a meeting on 3 September 2010, DIAC and the AFP agreed that 'DIAC would assist the AFP in age determination of a group of minors [suspected of people smuggling] whose age had been determined to be over 18 on the basis of a wrist x-ray alone'.¹⁸ This group consisted of 32 young Indonesians who were in immigration detention and four who were at that time before the courts.¹⁹ It appears that the AFP agreed that, if DIAC determined that any member of this group was a minor, the AFP would drop charges and DIAC would arrange for the individual to return to Indonesia.²⁰

Ultimately, DIAC age assessment interviews were conducted with 27 crew members either on Christmas Island or in Darwin. Documents provided to the Commission show that the result of these age assessment interviews were that one individual was found to be likely to be over 18, three individuals were considered to be borderline, and the remaining 23 individuals were found to be likely to be under 18.²¹ The outcome of the assessment is described by a senior DIAC officer in an email to the AFP:

Of this group, we have assessed one client as being over 18 (and are currently giving him the opportunity to comment on that finding). The others were either borderline (but for our purposes we will continue to treat them as minors) or we are satisfied they are minors.²²

From the documents before the Commission, it appears that most of the individuals who were assessed by DIAC as likely to be under the age of 18 were nevertheless charged as adults and spent long periods of time in detention before having the prosecution against them discontinued and being removed to Indonesia. The outcomes of these interviews are discussed further in section 4.1 below.

3.3 AFP age assessment interviews were conducted with 12 individuals in November 2010

Focussed age interviews have never been adopted by the AFP as standard operating practice.²³ However, in November 2010 the AFP conducted a number of focused age interviews. In correspondence with the Commission the AFP described the genesis of these interviews in the following way:

In November 2010, due to a large number of crew in detention on Christmas Island, the AFP decided to approach crew outside the formal interview process in an endeavour to ascertain their approximate age. These discussions were voluntary in nature and not conducted under Part 1C of the Crimes Act 1914. Following the initial conversations with the crew, the AFP made decisions on whether to proceed further with the investigational process or refer individuals back to DIAC for deportation.²⁴

It appears that 12 individuals suspected of people smuggling offences participated in these interviews. The AFP reported at the time that: '[t]hese conversations were not recorded and the clients were advised that they were for intelligence purposes only'.²⁵ An AFP officer describes how the interviews were conducted:

General questions were asked and more specific ones targeted ... [at] gaining a greater understanding of their true age, level of intelligence and role on the boat. They included:

- Where were you when President Suharto stepped down?
- What were you doing at this time?
- How old were you then?

- Do you remember the Ambon riots and did this affect your family?²⁶

In its response to the draft report, the AFP reported that the ‘purpose of the interviews was to provide assessments on the likelihood of the interviewee being a juvenile and to reduce the time in detention of suspected people smuggling crew’. The response also noted that ‘the development of the interview questions was informed through discussions with a qualified Indonesian interpreter with knowledge of Indonesia’.²⁷

Although these questions are focused on events in Indonesia, they may not have been appropriate for this group of individuals. First, Ambon is some distance from the area from which many crew members originate. Second, many of these individuals have limited education and are from impoverished areas with poor infrastructure and limited telecommunications. It cannot be assumed that they would know when President Suharto stepped down.

Documents provided to the Commission contain information about the outcome of these interviews. Of the 12 individuals interviewed, the AFP came to the conclusion that two were definitely minors and that they should be returned to Indonesia, and that ten others ‘will need wrist x-rays’.²⁸

The AFP has informed the Inquiry that no further interviews of this type were conducted by the AFP after November 2010. They explained:

Given that age is a significant proof of the offence, the AFP considers that age determination questions should be conducted in accordance with Part 1C [of the Crimes Act 1914] to form part of the admissible brief of evidence available to the court.²⁹

The development of a focused age interview process that met the requirements of the Crimes Act was considered further in the development of the ‘improved age assessment process’ that was announced in July 2011.

3.4 In January 2011, DIAC was asked to stop conducting age assessment interviews with individuals suspected of people smuggling

It is clear from documents provided to the Commission that there was concern within the AFP and the Office of the CDPP about the impact on the prosecution of people smuggling offences where a DIAC focused age assessment interview came to a different conclusion about an individual’s age from that expressed in a wrist x-ray report.

This concern is evident in email correspondence between the AFP and Office of the CDPP in November 2010 in which it is stated:

Now that we have a DIAC report that from my perspective the reliability of it is questionable as to its conclusions, it appears this is now jeopardising prosecutions. ... The outcomes now potentially mean that any test of 19 (any adult) through the x-ray process the prosecution can be crippled by the DIAC pilot assessment that has little academic rigour or foundation for the conclusions made.³⁰

In December 2010, the Office of the CDPP conducted an analysis of the DIAC age assessment interview process and concluded that the current DIAC age assessment process and report presents significant problems for prosecuting authorities. These include that:

- interviews are not conducted under caution
- DIAC officers are not investigating officials for the purposes of the Crimes Act 1914
- DIAC age assessment reports would need to be disclosed to defence counsel;
- CDPP would likely challenge the qualifications and expertise of the age assessment officer, the methodology used, the criteria of age determination, the statements of the accused person, and the scientific basis of the questions if relied upon by defence counsel.³¹

In late January 2011, the Attorney-General's Department (AGD) and the Office of the Commonwealth Director of Public Prosecutions (Office of the CDPP) asked DIAC to stop conducting age determination interviews with crew. On 27 January 2011, the Office of the CDPP hosted a meeting with AGD and DIAC to discuss age determination of crew in people smuggling prosecutions. At that meeting, DIAC was requested not to undertake any age assessments of crew, as a 'highly undesirable situation of DIAC being called by the defence to counter the prosecution's wrist x-ray based evidence' was foreseen.³²

An internal DIAC email discussing a specific case (in which, in fact, a DIAC focused age assessment interview had not been conducted), outlines an understanding of the reasons for DIAC being requested to stop conducting age focused interviews in the following way:

The CDPP and AGD are very concerned to avoid this situation, where an age determination is undertaken by the AFP using one method and a separate and different process is used by DIAC, with different conclusions reached. Two specific issues arose ... they expect the DIAC age assessment report (which they believe signals he is a minor) will be disclosable to the defence, conscious that it does not support the AFP's (wrist xray method) evidence that he is aged 19. ... [T]hey want DIAC to not undertake any age assessments of crew, foreseeing a highly undesirable situation of DIAC being called by the defence to counter the prosecution's wrist x-ray based evidence, particularly after the disclosure of the contradictory DIAC report.³³

It is important to note that DIAC age assessment processes have continued at all times for unaccompanied asylum seekers who say that they are children, irrespective of whether they were being done for Indonesian crew.³⁴

3.5 The July 2011 improved age assessment process is to include focused age interviews

As described in Chapter 3, on 8 July 2011, the then Attorney-General and the then Minister for Home Affairs and Justice announced an 'improved process for age determination in people smuggling matters'³⁵ that was to include focused age interviews conducted by the AFP under caution.³⁶

At the time of the announcement, the then Attorney-General informed the Commission that:

The AFP will commence offering focused age interviews where age is in dispute as part of the ordinary interview of irregular maritime arrivals suspected of committing people smuggling offences. Focused interviews will occur under caution and will be conducted by AFP officers.³⁷

The then Attorney-General went on to note:

The AFP is seeking to engage an external consultant with appropriate anthropological, cultural and linguistic expertise to develop guidance material for investigators conducting focussed age interviews. It is anticipated that this guidance material would set out relevant lines of questioning for interviewers to put to Indonesian nationals.³⁸

However, within a month of the announcement, it became clear that it would not be possible to develop a set of generic questions that could be asked of a young person from Indonesia whose age was in doubt. On 3 August 2011, the AFP met an anthropologist with expertise in Indonesian culture to discuss the viability of developing focused age assessment interviews that could be used for criminal justice purposes.³⁹ The AFP reported on this discussion at a meeting of Commonwealth agencies held on 12 August 2011. A note of the meeting records that:

it has met with anthropologist [name redacted] to discuss the development of questions for interviewing people smuggling crew on age issues. [Name redacted] highlighted that it would not be possible to develop a set of generic questions for age determination.⁴⁰

The AFP explained to the Commission its understanding of the reasons why the expert came to this view in the following way:

Firstly, the sheer diversity of Indonesian language and culture due to the geography of the nation (a situation exacerbated by the inherent difficulty in establishing the identity and therefore origin of the interviewee in question). This diversity means that questions would need to be tailored specifically to ports or villages of origin to have any chance of being useful to the investigator in determining the age of the interviewee. This diversity raises additional difficulties, not least being the fact that the maritime workforce in Indonesia has a high degree of mobility between regions of Indonesia as a result of the seasonal nature of maritime work.

Secondly, the significant lack of participation in formal schooling amongst a large proportion of Indonesian males, particularly those from families involved in maritime life, such as fishing and coastal shipping. This fact results in problems such as eliminating a key source of material which could be used to help determine an interviewee's age (ie. How long were you at school for?) in addition to the obvious difficulties associated with interviewing an uneducated person.⁴¹

Based on this advice, and the opinion of the Office of the CDPP, the AFP has not relied on age assessment interviews for evidentiary purposes.⁴²

According to the Joint Commonwealth submission to the Inquiry, rather than conduct specific age assessment interviews, the AFP includes questions that go to age in interviews conducted for investigative purposes. The submission states:

The AFP offers anyone suspected of committing a Commonwealth offence an opportunity to participate in an interview as part of the normal course of an investigation. The AFP asks questions about age as an ordinary part of this interview in cases where age is in dispute, including about the person's background, education, family and work experience among other things. Interviews with the AFP are conducted in accordance with Part 1C of the Crimes Act, which imposes obligations on investigating officials that protect the rights of people under arrest.⁴³

The Joint Commonwealth submission also notes that:

To comply with the requirements of Part 1C, participation in an interview with the AFP is voluntary and people smuggling crew cannot be compelled. Accordingly, the use of interviews with the AFP for age determination purposes is limited to circumstances where the crew member consents. Typically, crew decline to be interviewed as it is voluntary under Part 1C.⁴⁴

The Commission understands that it is for the reasons noted above that the AFP has not conducted any focused age interviews under caution notwithstanding that they constituted an element of the 'improved age assessment process' announced in July 2011.

3.6 DIAC commenced conducting focused age interviews with all crew whose age is in doubt from December 2011

In late 2011, the Commonwealth agencies involved in issues of age assessment in the context of people smuggling agreed that a new process would commence whereby DIAC would conduct focused age assessment interviews with all individuals whose age is in doubt, and it would only refer to the AFP those individuals who it found were likely to be adults. It is important to again note that DIAC has at all times since 2010 conducted age assessment interviews for unaccompanied asylum seekers who say that they are children.⁴⁵

The Joint Commonwealth submission describes this new process as follows:

Shortly after arrival at Christmas Island, DIAC conducts an age assessment of all crew claiming to be minors. DIAC assesses the age of the person based on any documents available at the time of the assessment and a focused age interview. If a crew member is assessed by DIAC to be an adult they are referred to the AFP for consideration of criminal investigation and for age determination processes to be conducted. ... Crew assessed by DIAC to be minors are removed to their country of origin unless exceptional circumstances apply.⁴⁶

The Commission has been informed that this process commenced on 21 December 2011.⁴⁷ The outcomes of DIAC focused age assessment interviews conducted since December 2011 are discussed further in section 4.1 below.

4 Concerns about the Commonwealth's approach to focused age assessment interviews

The documents before the Commission suggest that there are a number of issues of concern with the way the Commonwealth has approached focused interviews as a method of assessing the age of young Indonesians whose age is in doubt. These include that:

- the results of DIAC focused age assessment interviews conducted in October 2010 were largely disregarded by the AFP
- the AFP age assessment interviews conducted in November 2010 did not produce reliable information about age
- legal advice is not provided prior to the conduct of DIAC age assessment interviews.

4.1 The results of the DIAC age assessment interviews conducted in October 2010 were largely disregarded by the AFP

It appears that the results of the October 2010 DIAC age assessment interviews were largely disregarded by the AFP.

As noted above, the results of these age assessment interviews were that one individual was found to be likely to be over 18 years of age, three individuals were considered to be borderline, and the remaining 23 individuals were found to be likely to be less than 18 years of age.

The Commission acknowledges that eight individuals who participated in this trial were ultimately found to be less than 18 years of age and removed from Australia without being charged. However, the AFP had given an undertaking that they would not charge any individual assessed by DIAC to be less than 18 years of age and would rather request his removal to Indonesia.⁴⁸ It appears that the AFP did not remove those individuals to Indonesia until a wrist x-ray had also been conducted.

All of the 27 young Indonesians who participated in focused age assessment interviews ultimately had wrist x-rays conducted. Documents provided to the Commission indicate that 15 of these x-rays were taken after the DIAC focused age assessment interviews had been completed. In 12 of these 15 cases a wrist x-ray was taken even though the DIAC focused age assessment interview had already concluded that the individual was likely to be a minor.

Concern about the practice of conducting a wrist x-ray for an individual who was interviewed by DIAC and found likely to be a minor is expressed by the solicitor Mr Anthony Sheldon in his submission to the Inquiry:

A client "L" was interviewed when he was processed after his arrest. A Department of Immigration and Citizenship (DIAC) officer conducted this interview. The officer's title was "Age Assessment Interview Officer". This officer reported that L was in his assessment, a minor. Following this assessment a wrist x-ray was ordered which, when examined by a Radiologist suggested that statistically, L was over 18. ...

The assessment of the Age Assessment Interview Officer was not, in L's case sufficient to show L was a minor. The view of the Commonwealth Department of Public Prosecutions (CDPP) in that case was that the x-ray was evidence indicating that L was an adult. No attempt to verify L's age from Indonesian records, or relatives was made in over 12 months. During this period of detention D was held with adult offenders on remand.⁴⁹

The outcomes of the 27 cases in which DIAC focused age assessment interviews were conducted in October 2010 can be summarised as follows:

- Assessed by DIAC to be likely to be over 18 (one individual):
 - o Charged as an adult and ultimately found likely to be a minor following an age determination decision delivered on 25 October 2011 in the District Court of Western Australia.⁵⁰
- Assessed by DIAC to be borderline (three individuals):
 - o Two individuals were charged as adults and ultimately had their prosecutions discontinued in October 2011.
 - o One individual was charged as an adult and found likely to be an adult in an age determination decision delivered on 25 October 2011 in the District Court of Western Australia in *R v Daud*.⁵¹
- Assessed by DIAC to be likely to be under 18 (23 individuals):
 - o Eight individuals were assessed by the AFP to be under 18 following wrist x-ray analysis and were not charged and removed from Australia.
 - o Twelve were assessed by the AFP to be 19 years or older following wrist x-ray analysis and were charged as adults, with all of these prosecutions ultimately discontinued (in most of these cases, prosecutions were not discontinued until the second half of 2011).

- o Three individuals had a wrist x-ray that was not conclusive, with reports saying that the individuals had either ‘just reached skeletal maturity’;⁵² that they were over 18 but that their bones had ‘not yet fully fused’;⁵³ or that they were ‘between 18-19’.⁵⁴ In each of these cases the individual was charged as an adult and the prosecution was ultimately discontinued.

It appears that, in cases where the wrist x-ray analysis found skeletal maturity, the AFP relied on the wrist x-ray to charge the individual as an adult notwithstanding the earlier DIAC age assessment had concluded that the individual was a minor. While all of these prosecutions were ultimately discontinued, these individuals spent a considerable length of time in detention. Issues relating to the length of time young Indonesians spent in detention are discussed further in Chapter 7.

It is of concern that in at least three cases, an individual was charged as an adult even where the wrist x-ray analysis was inconclusive and a DIAC age assessment interview had found that the individual was likely to be less than 18 years of age. In one of these cases, DIAC urgently communicated their concerns to the AFP that DUR041, who was going to be charged as an adult, had recently been assessed as a minor in a DIAC focused age assessment interview. A DIAC officer advised the AFP:

The view of my team is that, whilst the client is unlikely to be 11 years old as he claims, they do not consider he is over 18 (but more likely around 14 or 15 years of age).⁵⁵

DUR041 was charged by the AFP the day after his DIAC focused age assessment interview found that he was likely to be less than 18 years of age. He was charged as an adult on the basis of the wrist x-ray even though the analysis of his wrist x-ray was not conclusive.⁵⁶ Ultimately the CDPP discontinued his prosecution over a month later. DUR041 spent 245 days in detention in Australia, 57 of them in an adult correctional facility.⁵⁷

Of the eight individuals who were assessed by the AFP to be less than 18 years of age, two were also assessed as likely to be less than 18 years of age by both DIAC focused age assessment interviews and following wrist x-ray analysis. In both cases, an AFP file note records a decision not to prosecute based on the wrist x-ray analysis approximately five and six months respectively before the DIAC focused age assessment interviews for these individuals were even held.⁵⁸ It is of concern that the AFP had information that these two individuals were likely to be minors, and had recorded a decision not to prosecute, many months before taking action to return them to Indonesia.⁵⁹

4.2 The AFP age assessment interviews conducted in November 2010 did not produce reliable information about age

As discussed above, the AFP focused age assessment interviews conducted in November 2010 were premised on questions that may not have provided reliable information about a person's age.

As noted above, ten of the 12 individuals who participated in these interviews were assessed by the AFP as likely to be adults.

The Commission only has documentary records for ten of the individuals who participated in the AFP interviews (two of these ten were assessed as likely to be minors, eight of the ten were assessed as likely to be adults).

It appears that the two individuals who were assessed to be minors were not x-rayed and were returned to Indonesia. However, it is concerning that they were not returned until approximately two and three months respectively after the AFP interviews were conducted. In one of these cases, it appears that the AFP did not act on the decision not to pursue prosecution. It was discovered during a review of CJSCs conducted in early 2011 that he remained in detention more than two months after this decision was made.⁶⁰

A third individual was assessed as being less than 18 years of age following a wrist x-ray, despite the assessment of the AFP interviewer that the answers given to questions 'would make him about 27 years [old] – definitely over 18'.⁶¹

Another four of the ten individuals, who were all assessed by the AFP to be adults, also participated in the October 2010 DIAC focused age assessment interviews described above. DIAC assessed all four to be minors. All four were arrested and charged, and all four ultimately had their prosecutions discontinued.⁶²

Of the three remaining cases for which the Commission has records, two prosecutions were ultimately discontinued, while one remains before the courts at the time of writing.⁶³

It is clear from the results of these interviews that they did not provide reliable information about age. This is evident from the different outcomes of the AFP focused age interviews when compared with the results of the DIAC interviews. It is also apparent from the fact that, of the eight matters for which the Commission has records where individuals were found likely to be adults by the AFP, seven prosecutions were later discontinued. In most cases it appears that the prosecution was discontinued because the Commonwealth was not satisfied that the individual would be found by a court on the balance of probabilities to be over the age of 18 and the prosecution of a minor was not justified in the circumstances. While a matter being discontinued

is not of itself an indication that the individual is definitely a minor, it is clear that there is a significant inconsistency between the assessments of age made by the AFP and the eventual outcome of the cases.

4.3 Legal advice is not provided prior to the conduct of DIAC age assessment interviews

Submissions to the Inquiry have expressed concern that legal advice is not provided to individuals prior to their participating in a DIAC focused age assessment interview. For example, Legal Aid Queensland observes that ‘there is no obligation for the [migration] officer to caution the individual of concern about answering questions’. The submission goes on to say:

The answers that are provided in the course of these interviews may have a direct impact on whether the individual is later charged with a criminal offence. To ensure that the rights of an individual of concern are protected, it is essential that they receive full advice in relation to the legal consequences of answering age related questions.⁶⁴

Other submissions to the Inquiry raised similar concerns, including those of the Northern Territory Legal Aid Commission and Legal Aid NSW.⁶⁵

5 Disclosure of DIAC age assessment interviews to the defence

Issues also arose between agencies regarding the disclosure of the DIAC focused age assessment interviews. It is important to note that, although the age assessment interviews were conducted in October 2010, and a spreadsheet summary of results was provided to the AFP soon after this time, the actual reports on the interviews were not completed by DIAC until February 2011.

At a meeting on 4 November 2010 attended by officers of AGD, the Office of the CDPP, DIAC and the AFP, the Office of the CDPP advised that, notwithstanding the difficulties they had with DIAC age assessment documents and the methods used by DIAC to assess age, the Commonwealth had an obligation to disclose any such documents.⁶⁶

In December 2010, the Office of the CDPP again acknowledged that the record of a DIAC age assessment interview should be provided by DIAC to the prosecution so that consideration could be given as to whether they should be disclosed to the defence.⁶⁷ However, the Office of the CDPP also considered that, if the defence were to tender a DIAC focused age assessment interview as evidence, the Office of the CDPP would challenge the contents of that report. In particular, the CDPP would challenge:

- the qualifications and expertise of the Age Assessment Officer;
- the methodology used by the Age Assessment Officer;
- the criteria of age determination in each category;
- the self-serving statements of the accused person in answering the questions put;
- the scientific, including social science, basis of the questions; and
- the appropriateness of the methodology when compared with other known and provable scientific methodology (including the prescribed wrist x-ray procedure).⁶⁸

Material before the Commission indicates that, following the letter from the President of the Commission to the then Attorney-General dated 14 February 2011 which raised the issue of disclosure, the agencies involved agreed that DIAC focused age assessment interviews should be disclosed to the defence and that they were in fact disclosed in some cases.⁶⁹

On 3 March 2011, the Office of the CDPP wrote to the AFP requesting that the AFP ensure that DIAC focused age assessment interviews were disclosed to the defence in all cases. The letter reports that, at that time, only one of the cases in which a DIAC focused age assessment interview had been conducted had reached the prosecution stage and that this case had been discontinued prior to the DIAC report being disclosed.⁷⁰

Submissions to the Inquiry have raised concerns about whether DIAC focused age assessment interviews have been disclosed to the defence in a timely manner in every case. For example, the Northern Territory Legal Aid Commission reported that:

In one case the interview was disclosed to NTLAC very late, after the individual had been in custody for a long period of time and the matter had been listed for trial. The interview indicated that the defendant may well be younger than 18.

Ultimately in this case the prosecution filed a *nolle prosequi*, however this did not occur until 16 months after apprehension and a few weeks before the trial was listed to commence. No explanation was given as to the change in prosecution view, nor are we aware of any new evidence being received or provided to the prosecution to explain the decision. Early disclosure of this material may have assisted in submissions to have the charge withdrawn at an earlier stage.⁷¹

While the Office of the CDPP agreed that the DIAC age assessment interviews should be disclosed to the defence in age determination matters, the Office of the CDPP proposed, for the following reasons, that the prosecution should lead them in evidence:

The reasons are that the test is on the balance of probabilities and the courts in such matters do tend to allow hearsay evidence; for example evidence from the accused as to what he was told by his parents as to his date of birth. Also this approach would allow the proceedings to be dealt with at one time rather

than being adjourned for the defence to summons DIAC. As the evidence is DIAC evidence and thus part of the Commonwealth it may be worthwhile from the point of view of the model litigant to put before the court all the information the Commonwealth has. Doing this would also allow the prosecution to control the proceedings rather than have defence call, proof and lead evidence in the defence case leaving the prosecution to attack the evidence in cross examination. The fact that we say the court should not rely on the evidence may come out in a more positive and compelling way rather than having a defensive witness under cross examination.⁷²

6 Outcomes of DIAC age assessment interviews conducted since December 2011

Since the Commonwealth agencies agreed in December 2011 that DIAC would recommence focused age assessment interviews, the majority of individuals suspected of people smuggling who have said that they were minors have been assessed by DIAC as likely to be minors and have been returned to Indonesia.

DIAC has told the Commission that, between December 2011 and 20 April 2012, 56 individuals were interviewed by DIAC, assessed as likely to be minors, and subsequently not referred to the AFP.⁷³

The AFP has also provided statistics about the number of individuals suspected of people smuggling who have been assessed to be minors through this process. Records of the AFP indicate that between 21 December 2011 and 23 May 2012, there were 98 crew arrivals. The Commission has not been provided with information about how many of these individuals participated in DIAC age assessment interviews. The AFP has provided the following information to the Inquiry concerning the 98 crew:

- 50 [were] not ... referred to the AFP by DIAC; and
- 48 were referred to the AFP [by DIAC] with the following outcomes:
 - 4 are currently before the courts charged as adults and age is not in dispute;
 - 15 are currently under investigation, of which 2 are suspected juvenile recidivists;
 - 29 were not charged;
 - 9 were assessed as adults but there was insufficient evidence; and
 - 20 were given benefit of doubt as possible juveniles.⁷⁴

This information indicates that a large proportion of the crew who have arrived since December 2011 have been given the benefit of the doubt that they may in fact be minors and have been returned to Indonesia.

7 Findings

It is clear from international research that where interviewers have the appropriate knowledge and experience, are well-trained, follow a clear procedure, and carefully document their results, focused age interviews are able to provide valuable information about an individual's age. Some indirect support for this conclusion can be found in the Australian context; Bowen DCJ noted in *R v Daud* that he could attach relatively little weight to the evidence of an interviewer who had not had any formal training whatsoever in assessing age and whose past assessments had not been shown to be correct.⁷⁵

However, focused age interviews have some inherent limitations, including potential problems with interpretation and the risk that an interviewer has an inadequate understanding of the social and cultural circumstances of the interviewee. Consequently, in line with human rights principles, a wide margin of benefit of the doubt should be afforded to someone who says that he is a child.

It is disappointing that the findings of the DIAC focused age assessment interviews conducted in October 2010 were largely disregarded by the AFP; they instead relied upon wrist x-ray analysis as evidence of age. This led to prolonged periods of ongoing detention, including in adult correctional facilities, for individuals who DIAC had found were likely to be minors. In the vast majority of these cases the prosecutions were ultimately discontinued.

It appears that the focused age assessment interviews conducted by the AFP in November 2010 were based on inappropriate questions and that they produced unreliable results.

The Commission is not critical of the practice, which has been in place since December 2011, of DIAC conducting focused age interviews with young Indonesians suspected of people smuggling offences whose age is in doubt and only referring to the AFP those individuals it concludes are likely to be adults. This process appears to afford a wide benefit of the doubt to individuals who say that they are children.

However, a preferable practice, particularly if a focused age assessment interview is to be relied on in a legal proceeding, would be for it to be conducted by appropriately trained, Indonesian speaking interviewers who are familiar with the culture of the places from which the young Indonesians suspected of people smuggling come. The integrity of the interview process would also be enhanced were the interviewers to be independent from the government departments and agencies responsible for making decisions about the young Indonesians.

Additionally, individuals who are invited to participate in a focused age assessment interview which may be relied on in legal proceedings should be given an opportunity to speak with a lawyer prior to doing so. Legal aid agencies to which individuals invited to participate in a focused

age assessment interview are referred should be informed of the nature and purpose of the interviews in order for them to be able to provide such advice.

¹ Victoria Legal Aid, Submission 13, pp 18–19.

² European Migration Network, *Policies on Reception, Return and Integration Arrangements for, and Numbers of, Unaccompanied Minors – an EU Comparative Study* (May 2010), p 76. At <http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do?directoryID=115> (viewed 9 July 2012).

³ Professor Al Aynsley-Green, Submission 38, p 14.

⁴ Professor Al Aynsley-Green, Submission 38, p 14.

⁵ Professor Al Aynsley-Green, Submission 38, p 14.

⁶ Children’s Commissioners and Guardians, Submission 31, pp 3–4.

⁷ Northern Territory Legal Aid Commission, Submission 32, p 4.

⁸ Legal Aid NSW, Submission 35, p 2.

⁹ United Nations High Commissioner for Refugees, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, p 2. At <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae6b3360> (viewed 9 July 2012).

¹⁰ Professor Al Aynsley-Green, Submission 38, p 14.

¹¹ Deputy Commissioner, AFP, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 172.

¹² DIAC, Response to draft report, 6 July 2012.

¹³ DIAC, Response to draft report, 6 July 2012.

¹⁴ Secretary, DIAC, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 22 December 2011, Attachment B.

¹⁵ Secretary, DIAC, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 22 December 2011, Attachment B.

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¹⁷ Department of Immigration and Citizenship, Submission 37.

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- ³⁰ Federal Agent, AFP, Email to Legal Officer, CDPP, 2 November 2010 (DUR041 – CDPP document 003.0104).
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Chapter 6:

Age enquiries in Indonesia

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1 Introduction

When it can be obtained, verified documentary evidence from a person's country of origin can be reliable evidence of that person's age. Consequently, the making of enquiries in Indonesia about whether such documentary evidence exists is an important means of age assessment. When they are made, such enquiries are ordinarily part of the investigation process conducted by the Australian Federal Police (AFP).

The importance of making age enquiries in Indonesia is recognised by the Commonwealth. The July 2011 announcement of an 'improved age assessment process' included a commitment that steps would be taken 'as early as possible to seek information from the individual's country of origin, including birth certificates, where age is contested'.¹

The Commission acknowledges that there are significant logistical difficulties which impact on the AFP's ability to make enquiries about age in Indonesia. It is also clear that the lack of comprehensive processes for officially documenting age in Indonesia increases the challenge of obtaining verified documentation of age.

From the material before the Commission it appears that age enquiries in Indonesia were not routinely conducted prior to mid-2011 and were not commenced immediately in all cases even after the July 2011 announcement. Further, in many cases, the AFP enquiries did not produce results although in some situations defence lawyers were able to source documentation themselves.

This chapter discusses:

- the process of making age enquiries in Indonesia
- the benefits and limitations of making age enquiries in Indonesia
- the Commonwealth's approach to age enquiries in Indonesia
- concerns about the AFP efforts to locate documentary evidence of age from Indonesia
- the Commonwealth's approach to the authenticity of documentary evidence from Indonesia.

2 The process of making age enquiries in Indonesia

The process by which the Commonwealth makes age enquiries in Indonesia involves the AFP working with the Indonesian National Police. The Joint Commonwealth submission to the Inquiry indicates that the AFP makes a request for documentation as soon as it becomes aware that an individual's age is in doubt. It states:

To manage the risk of delays, the AFP seeks documentation [from Indonesia] as soon as it becomes aware that a people smuggling crew member claims to be a minor, and cooperates closely with the Indonesian National Police (INP) to prioritise requests for assistance.²

Ordinarily this involves the AFP seeking documentary evidence of age, such as a birth certificate, through police-to-police cooperation with the Indonesian National Police.³ The Commonwealth has advised the Commission that police-to-police cooperation is often faster than formal requests for legal assistance.⁴ Despite this, the Commonwealth states that police-to-police cooperation can still take some time due to factors such as ‘other law enforcement priorities, road and telecommunications infrastructure, record-keeping practices and geography’.⁵

In November 2011, due to a number of requests for evidence of age being outstanding, the AFP and the Indonesian National Police agreed that the AFP would send an officer to Indonesia to assist the Indonesian National Police with enquiries about the age of individuals suspected of people smuggling offences. The AFP officer travelled to Indonesia between 21 November and 15 December 2011.⁶ The Commission is not aware of an AFP officer travelling to Indonesia since this time.

3 The benefits and limitations of making age enquiries in Indonesia

As shown in Chapter 2, medical methods of assessing age are inexact and unreliable. Documentary evidence of age, if it can be verified, is extremely important as it is likely to be seen by a court as determinative of age. A range of documents can be used as evidence of age, including records that might be obtained from local government, schools, police or religious organisations. Affidavit evidence can also be obtained from relatives or community leaders.

From the documents before the Commission, it appears that in a significant number of cases, prosecutions of individuals charged with people smuggling offences have been discontinued following the production of affidavit evidence (and in some cases other documentary evidence) regarding age from family members and community leaders in Indonesia. In a number of cases, this evidence has been obtained by lawyers representing young Indonesians who have travelled to Indonesia to gather evidence of age from family and community leaders.⁷

However, while documentary evidence should be a critical component of any assessment of age, it is not always easy, or indeed possible, to obtain verifiable documents to establish an individual's age. Many young Indonesians will not have any formal documentation of their age. In some circumstances, it may be possible to obtain affidavit evidence from family, community leaders or local government officials. However, obtaining evidence of this kind will usually require travel to Indonesia.

The AFP have recently informed the Commission that official Indonesian documentation does not provide reliable evidence of a person's age.⁸ On 24 May 2012, the AFP received advice from an academic expert about Indonesian documents concerning identity and age, including advice about:

- the processes Indonesian nationals follow to obtain identity documents, including processes for registering personal information for official purposes
- the reliability of Indonesian identity documents, particularly birth certificates
- Indonesian attitudes regarding the significance of a person's date of birth
- the range of calendars that are used in Indonesia.⁹

In summary, the advice was that:

official Indonesian identity documentation systems are subject to such significant systemic problems as to render the documents produced by this system extremely unreliable in formally determining identity or age.¹⁰

The Joint Commonwealth submission to the Inquiry also notes that Australian agencies face particular challenges in establishing the identity and assessing the age of persons from developing countries who arrive in Australia without documentary evidence.¹¹ The Joint Commonwealth submission sets out some of the specific challenges the AFP has faced in establishing the age of young Indonesians suspected of people smuggling. These include:

- the limited availability of legal documents establishing age in Indonesia
- difficulties making contact with families and officials in remote locations with limited infrastructure
- technical and legal barriers that impede cooperation with the Indonesian National Police.¹²

3.1 Limited availability of legal documents establishing age in Indonesia

It is clear that in many cases it is difficult to obtain legal documents that establish age in Indonesia. This difficulty was outlined by the former Attorney-General in correspondence with the President of the Commission,¹³ and by the AFP in their response to a request for information for the purposes of this Inquiry.¹⁴ In their response to the draft report, the AFP state that they 'do not believe that initiating inquiries in Indonesia will necessarily provide evidence of any probative value'.¹⁵

In 2010, UNICEF reported that 60% of children under five in Indonesia do not have their births officially registered; this puts Indonesia in the bottom 20 countries in the world for levels of birth registration.¹⁶ The AFP has recently received advice that there are significant documentary and cost hurdles, combined with problems of corruption, that make the system for obtaining a birth certificate complex and sometimes impossible.¹⁷ The advice states that:

official Indonesian identity documentation systems are subject to such significant systemic problems as to render the documents produced by this system extremely unreliable in formally determining identity or age Date of birth is generally understood in Western cultures as [a] linear indicator of a person's age with a single point of origin that is fixed on the Gregorian calendar. Traditionally this idea was much less important in Indonesia[n] cultures than age as calculated according to a range of cyclical (and often overlapping) indigenous calendars, or by general reference to important historical markers, such as a major natural or political event.¹⁸

Further the advice states:

Even where a formal birth certificate is issued (and this can be rare in remote and poor villages), it is commonly the case that the data in it is unreliable. ... Birth certificate information provided by parents may be intentionally provided in an inaccurate form to gain advantage for dishonest reasons but it may also be inaccurate even if provided in good faith, as a result of the Indonesian cultural patterns relation to age and date of birth.¹⁹

In some cases, the births of Indonesian nationals suspected of people smuggling have only been registered after the individuals have been arrested in Australia. Where a birth is registered in these circumstances, the AFP has considered that it must verify the information provided to the Indonesian authorities at the time of registering the birth.²⁰

The AFP has reported challenges in confirming the authenticity of information provided to Indonesian authorities when a birth is registered. In November 2010, AFP officers prepared a Ministerial Brief on age determination processes and issues surrounding court proceedings for the then Minister for Home Affairs and Justice. The Brief discusses the difficulties associated with obtaining documentary evidence of age from Indonesia. The Brief notes that the AFP does not doubt the authenticity of birth certificates provided to the AFP through the Indonesian Consulate but has questions about the process for registering a birth in Indonesia.²¹

The Brief also discusses in some detail the cases of three individuals, focusing particularly on the availability of documentary evidence about their age. The Brief identifies the documents obtained about their age but questions the validity of the process of registering their birth. The Brief notes a particular concern about whether supporting documentation was provided to the Civil Registry Authority in Indonesia to validate the date of birth on the young Indonesians' birth certificates.²²

It is apparent that these concerns are ongoing. For example, in a February 2012 brief for the Minister for Home Affairs and Justice, the AFP report that Indonesian authorities do not:

sight documentation evidencing date of birth but rather [accept] oral advice from parents or other close associates and this can occur many years after the birth.²³

Advice received by the AFP on 24 May 2012 about Indonesian identity documents stated that it is easy for an individual in Indonesia to obtain false or inaccurate identity documents as these are issued 'with little or no evidence of identity and often without citizens having to attend government offices or be sighted at all by an official'.²⁴ The academic also advised that it is not unusual for Indonesians to possess multiple and inaccurate identity cards or to possess different cards with different dates of birth 'in order to gain access to different age-determined government services'.²⁵

In its response to the draft report, the AFP made the following observation about age enquiries in Indonesia:

The AFP on occasions has conducted enquiries with the Indonesian National Police in relation to identity documents. In many instances, documentation provided is intended to assert that a person is under the age of 18 years old. Many of these forms of documentary evidence have been discredited by inquiries conducted by Indonesian authorities. In addition, Australian courts have also found that identity documentation presented during age determination hearings to be false.²⁶

The AFP provided details of a number of cases where they had received unreliable or conflicting documents regarding age. These included some cases where it appeared that documents had been altered or were fraudulent, a case where a birth certificate that was otherwise identical had been issued in two different names, a case where a birth certificate conflicted with school records, and a case where a birth certificate extract conflicted with a baptismal certificate.²⁷ The Commission recognises that there probably have been some cases where fraudulent documents were produced and that in some cases inconsistencies in documentation have arisen from poor systems of record keeping. However, this does not mean that documentary evidence of age should not be sought from Indonesia.

3.2 Difficulties in making contact with families and officials in remote locations

In circumstances where it is not possible to obtain legal documentation establishing age, it may be possible to obtain affidavit evidence from family members, community leaders or local government officials attesting to an individual's age. The Joint Commonwealth submission to the Inquiry states that on occasion, the Indonesian National Police has provided statements from friends or relatives as to the age of an individual suspected of people smuggling.²⁸

However, it is evident that there are difficulties associated with obtaining evidence of this kind. Most relevantly, it usually requires travel to Indonesia. Moreover, many of the young Indonesians

come from remote and isolated locations within Indonesia. Poor infrastructure and limited transport lead to difficulties in reaching the communities from which affidavit evidence might be obtained.

3.3 Cooperation with the Indonesian National Police

In correspondence to the Commission, the AFP has explained that they work closely with the Indonesian National Police to verify the age given by Indonesian people smuggling crew.²⁹ The Joint Commonwealth submission lists some specific challenges in obtaining formal verification of age of this kind from Indonesia, including that:

- a response to a formal mutual assistance request can take several months or years
- police-to-police cooperation can take a significant period of time due to factors such as other law enforcement priorities, road and telecommunications infrastructure, record-keeping practices and geography
- there is no lawful basis for the AFP to exercise police powers, such as investigation, in Indonesia without agreement from Indonesian authorities.³⁰

4 The Commonwealth's approach to age enquiries in Indonesia

The revised Explanatory Memorandum to the Crimes Amendment (Age Determination) Bill 2001 addressed the issue of age enquiries in the crew's country of origin. Specifically, it explained that while such enquiries could be helpful, they were not explicitly required by the Bill. It explained:

The Bill does not contain an express requirement to exhaust all other avenues before seeking a person's consent to, or magisterial authorisation for, a prescribed procedure. However, in practice, investigating officials will seek to determine a person's age by all reasonable means before exercising the powers contained in the Bill. For example, if reliable documentary evidence of a person's age is available then this may suffice.³¹

It is not clear from the documents before the Commission precisely when the AFP first made efforts to obtain documentary evidence of age from Indonesia. However, the importance of young Indonesians being able to provide documentary evidence of their age has been recognised for some time. For example, in October 2010, a Department of Immigration and Citizenship (DIAC) officer responsible for conducting focused age assessment interviews requested assistance from DIAC case managers to locate documents to provide more information about the age of individuals whose age was in doubt. He noted the importance and urgency of locating documents to 'lend weight or otherwise to their claims in relation to their age' given that these individuals were subject to ongoing AFP action.³²

The documents before the Commission do not make clear what further action, if any, was taken at that time by either DIAC or any other government agency to locate documents to support those individuals' statements about their age.

The importance of locating relevant documentary evidence in Indonesia was also recognised by the Office of the Commonwealth Director of Public Prosecutions (Office of the CDPP) in early 2011. On 3 March 2011, a Senior Assistant Director of the Office of the CDPP wrote to the AFP setting out a number of issues in relation to determining the age of people smuggling crew who say that they are children. At that time, the Office of the CDPP urged the AFP to consider whether more enquiries should be made in Indonesia, stating:

it may be worthwhile considering if anything more can be done to obtain any relevant documentation from Indonesian authorities.³³

It appears that there was a general AFP direction issued in mid-2011 that AFP officers should seek documents regarding age from Indonesia. On 16 June 2011, the AFP sent an email to all team leaders asking that, in all matters subject to age determination, the case officer request Jakarta to seek age related documents and to verify the authenticity of those documents. The task was to 'back capture' all matters before the court and was to be carried out even though it may return no results or take extensive time to complete.³⁴

At the Australia-Indonesia Consular Consultations held in late June 2011, the AFP undertook to discuss steps to improve cooperation on obtaining age identification documentation with their Indonesian counterparts and to agree to an improved process going forward.³⁵ Talking points prepared for the meeting state that the AFP:

is taking steps to as early as possible seek birth certificates and other relevant information for crew from Indonesia where age is contested. The working group recognised that it is important that AFP engage as early as possible with Indonesian authorities to seek birth certificates and other documentation as it is currently sometimes being provided too late.³⁶

As noted above, on 8 July 2011, the Government announced an 'improved process' for determining age in people smuggling matters, which included taking early steps to seek information from the individual's country of origin. It does not appear that these steps were in fact taken immediately. In the weeks following the Government's announcement of the 'improved age assessment process', the Office of the CDPP wrote to the AFP asking them to make greater efforts in making enquiries to locate evidence of age in Indonesia. On 15 July 2011, the Deputy Director of the Office of the CDPP sent a letter to the National Manager of Crime Operations at the AFP advising that:

The AFP should in all cases where there is some doubt as to an individual's age make proactive inquiries, at the earliest stage possible, to seek any relevant information from Indonesia. This includes cases where age may not yet have been formally raised as an issue in the proceedings.³⁷

On 22 July 2011, the AFP replied:

AFP case officers have been reminded of the requirement to conduct enquiries with an individual's country of origin and seek relevant documentation, as soon as it is suspected that the person may be a juvenile, or where age becomes an issue.³⁸

However, the Office of the CDPP continued to hold concerns that enquiries were not being made in all cases. On 2 August 2011, the Office of the CDPP again wrote to the AFP urging it to make efforts to conduct enquiries in Indonesia of the type that had been announced on 8 July 2011.³⁹ The email notes that it appeared that neither enquiries in Indonesia nor a dental x-ray had been undertaken by the AFP in the individual matter of OFD030 and that the Office of the CDPP:

is extremely concerned that given the Government's announcement, the failure to have commenced implementing the improved processes for age determination prior to these matters coming before the courts may attract very significant criticism and could cause embarrassment to the Commonwealth.⁴⁰

Documents before the Commission indicate that making age enquiries through formal channels could be a lengthy process. In October 2011, the Attorney-General's Department (AGD) received an email from an officer at the Australian Embassy in Indonesia requesting information on the length of time taken to determine age and repatriate minors to Indonesia. The email suggests that the age determination process was a subject of discussion at meetings between senior Indonesian and Australian officials. The AGD officer advised the Department of Foreign Affairs and Trade officer that one of the processes creating delays in the time taken to process individual crew was the length of time taken for a response to be received from the Indonesian National Police to requests for documents from the AFP. The AGD officer stated:

Current advice is that it is taking [Indonesian National Police] 2–3 months to either provide AFP with verified documents or confirm that they have not been able to locate any documents. We understand from AFP that the [Indonesian National Police] has been reluctant at times to prioritise the AFP's requests.⁴¹

Following the decisions in *R v Daud* and *R v RMA*, discussed in Chapter 3, in which the Court had preferred other evidence of age to that given by Dr Low, the Office of the CDPP decided that it would not continue to prosecute cases where the only probative evidence of age was a wrist x-ray.⁴² The Office of the CDPP also considered the length of time that it would be reasonable to wait for a result from an enquiry made in Indonesia. A Senior Assistant Director of the Office of the CDPP sent an internal email discussing the approach to be taken. The email, dated 15 November 2011, states:

If the issue of age determination depends almost exclusively on the receipt of [information from Indonesia], I suggest that we ask the AFP to provide its results within a period of six weeks. If the material is not received in that time and it is apparent that it is not likely to be forthcoming in the near future, and there is no other material which raises a strong reason to be kept on foot, then I suggest we carefully consider stopping the prosecution.⁴³

The Commission has not been able to make an assessment of whether these time frames have been observed in the period of time since November 2011.

5 Concerns about AFP efforts to locate documentary evidence of age from Indonesia

At the Inquiry hearing for Commonwealth agencies, the AFP gave evidence that they had been working closely with the Indonesian National Police through AFP liaison officers based in Jakarta for some time.⁴⁴ However, as the discussion above indicates, there was not a systemic approach to making age enquiries in Indonesia until at least mid-2011.

According to the AFP, while the Indonesian National Police indicated a willingness to assist to locate more documentary evidence about age, the AFP continued to confront a number of challenges in obtaining the kind of evidence that they sought. Challenges included the limited availability of Indonesian National Police officers to conduct the enquiries required, particularly in remote locations, the time taken to respond to requests for evidence and also the difficulties with obtaining evidence that complies with the requirements of Australian laws of evidence.⁴⁵

It is clear to the Commission that these are genuine challenges. However, documents before the Commission suggest that, in many cases, inadequate efforts were made to conduct enquiries regarding age related information in Indonesia. For example:

- in many cases, no enquiries about age were made in Indonesia at all
- in many cases there was a long delay before the AFP made enquiries in Indonesia
- in some cases the defence obtained evidence from Indonesia when the AFP was not able to do so
- in some cases the AFP was reluctant to undertake enquiries in Indonesia
- an AFP officer was not deployed to Indonesia to make specific enquiries about age until November 2011.

5.1 In many cases no enquiries about age were made in Indonesia at all

The Commission has received documents regarding a significant number of cases in which it appears that no request was ever made by the AFP to the Indonesian National Police for documents relating to an individual's age.

This includes the matter of WAK087, who was convicted of a people smuggling offence as an adult in February 2011. There was no evidence of his age other than evidence based on his wrist

x-ray. During his entry interview WAK087 had provided DIAC with the phone number of a friend in Indonesia and stated that he had an identity card at his home in Indonesia.⁴⁶ However, it appears that no request was ever made by the AFP to the Indonesian National Police for documents relating to the age of this young Indonesian. WAK087 maintains that he was a child when he arrived in Australia.⁴⁷

In another case, FLE048 claimed to be 15 years old when he arrived in Australia in April 2009.⁴⁸ He was convicted as an adult in October 2009. The only evidence of his age was based on his wrist x-ray. During his entry interview FLE048 had provided authorities with the telephone number for his aunt in Indonesia.⁴⁹ However, it appears that no attempt was made by the AFP to speak with his aunt or to seek documents relating to his age from Indonesia.

In a further matter, OXL003 claimed to be 14 years old when apprehended in April 2010 and was charged as an adult by the AFP in November 2010. It appears from the documents provided to the Inquiry that no request was made by the AFP to the Indonesian National Police for documents relating to the age of this young Indonesian. During his entry interview OXL003 had told DIAC that they would be able to contact his family by using the mobile phone owned by the captain of the vessel who was also in DIAC custody at that time. In September 2010, a DIAC case manager was satisfied that OXL003 was under 15 years old.⁵⁰ A DIAC focused age assessment report completed in February 2011 assessed that he was under 18 years old based on his appearance, behaviour and family history.⁵¹ In October 2011, the AFP agreed with a recommendation of the Office of the CDPP to discontinue the case as there was no evidence of his age other than an analysis of his wrist x-ray.⁵² The case was discontinued in November 2011, 19 months after OXL003 first claimed to be a child.⁵³

5.2 In many cases there was a long delay before the AFP made enquiries in Indonesia

From the documents before the Commission, it appears that the AFP has not always sought information about age from Indonesia in a timely manner.

As set out above, the talking points prepared for the Australia-Indonesia Consular Consultations on 30 June 2011 indicated that the AFP was taking steps to make age enquiries in Indonesia 'as early as possible'. Further, as noted above, an element of the 'improved process' of assessing age announced on 8 July 2011 was that the AFP would be taking 'steps as early as possible' to seek information about age from Indonesia.

Material before the Commission shows that until mid-2011, in a significant number of cases, a substantial amount of time passed between the time a young Indonesian was apprehended and the AFP making its first request to Indonesia for evidence about his age. For example:

- No enquiries were directed to Indonesia about an individual apprehended in December 2009 until April 2011; that is, 17 months later.⁵⁴
- No enquiries were directed to Indonesia about an individual apprehended in June 2010 until March 2011; that is, 9 months later.⁵⁵

It appears that in many cases, the AFP's first request to Indonesia for documents relating to an individual's age was only made after all case officers were requested to make such requests on 16 June 2011. For example:

- No enquiries were directed to Indonesia about an individual apprehended in December 2009 until June 2011; that is, 18 months later.⁵⁶
- No enquiries were directed to Indonesia about an individual apprehended in March 2010 until July 2011; that is, 16 months later.⁵⁷
- No enquiries were directed to Indonesia about an individual apprehended in June 2010 until July 2011; that is, 13 months later.⁵⁸

It appears that there were significant delays in making enquiries even in cases where an individual provided the authorities with contact details such as a phone number for family members in Indonesia. This was often done in a DIAC entry interview shortly after apprehension. For example:

- During his DIAC entry interview in January 2010, NTN032 informed DIAC that his father's contact telephone number was in the telephone in his possession when he arrived.⁵⁹ However, attempts to obtain information from Indonesia were not made until August 2011; that is, 19 months later.⁶⁰ In August 2011, NTN032 agreed that he was 18 years of age at the time of his alleged offence; however he raised the question of his age again in September 2011.⁶¹ He ultimately admitted that he was over 18 and advised that he wished to plead guilty in September 2011.⁶²
- JDT046 who arrived in February 2010 provided information to DIAC in his entry interview that could have been used to assist in an assessment of his age.⁶³ No enquiries in Indonesia were made before he was arrested and charged. In May 2011, almost six months after JDT046 was charged, the AFP and the Office of the CDPP considered whether there might be some way to verify the information he gave about his age in his DIAC entry interview. They decided to request an expert report from an expert in Indonesian studies on the information.⁶⁴ In June 2011, the AFP received a statement from a village government body stating that JDT046 was approximately under the age of 18 years.⁶⁵ In July 2011, the AFP received the expert report that indicated that it was likely JDT046 was under 18 years of age.⁶⁶ The prosecution was discontinued in August 2011; that is, 18 months after he had arrived in Australia.⁶⁷ JDT046 spent 537 days in detention in Australia, 239 of those in an adult correctional facility.

In an internal AFP email discussing the deployment of an AFP officer to Indonesia to obtain documentary evidence of age, it was noted that there was a backlog of outstanding requests made to the Indonesian National Police to obtain documentary evidence of age and that many of those requests related to individuals who had already been returned to Indonesia. It appears that there was no system in place for notification to be made to the Indonesian National Police when an individual had been returned to Indonesia and no further enquiries were required.⁶⁸

The lack of any such system may have contributed to long delays in the return of information from Indonesia about the age of individuals suspected of people smuggling in Australia.

5.3 In some cases the defence obtained evidence from Indonesia

In some cases, defence lawyers obtained documentary evidence of age from Indonesia in situations where the AFP had either not made enquiries at all or where their enquiries had not produced any evidence of age.

In August 2011, an email from a CDPP legal officer raised the point that:

Defence lawyers here have realised they can obtain Birth Certificates very quickly if they request them through the Indonesian Consulate. We don't have an understanding of the process of how the Consulate obtain or verify birth certificates; and AFP are not keen to make those sort of politically sensitive enquiries.

In one of my matters, defence obtained a birth certificate from the Consulate and AFP had sent a separate tasking over to Jakarta for birth certificate etc. The [Indonesian National Police] have advised AFP they cannot find any documentary evidence in Kupang and surrounding areas (which is the alleged place of birth) for the defendant. ... [An] AFP agent who was posted in Jakarta for 3 yrs and recently returned to Brisbane, has advised that it could be due to incompetent staff at the civil registry or it could be that the birth certificate defence gave is a forgery. There is no way of knowing which.⁶⁹

Some submissions to the Inquiry questioned why it took so long for information about age to be gathered by the AFP when representatives and advocates of some young Indonesians were able to locate either documentary evidence or testimony of family and friends very quickly. For example, Mr Anthony Sheldon's submission to the Inquiry notes that a privately funded trip to gather documentary and affidavit evidence to support the evidence of age given by three individuals whose ages were in doubt:

took four days to complete, where evidence was verified and gathered for three clients. Upon presentation to the CDPP charges were withdrawn and the three clients repatriated. It remains difficult to accept that the AFP had adequately expended all resources of the Commonwealth over 12 months to investigate the age of these children when lawyers achieved this in just four days at their own expense.⁷⁰

The following example also demonstrates the comparative ease with which defence lawyers were able to obtain evidence of age from Indonesia. OFD030, who was apprehended in March

2010, told authorities that he was under 18 years of age. In July 2011, 16 months later, an official request for information about age was made by the AFP to the Indonesian National Police. The AFP informed the Office of the CDPP that requests for information about age take a minimum of three months to complete. In early August, a CDPP officer sent an email to the AFP expressing concern about the length of time it had taken for evidence other than wrist x-ray evidence to be sought. The email stated:

From March 2010 [OFD030] has consistently claimed to have been 16 years old at the time of the alleged offending. Mr [OFD030]'s representatives wrote to our Office on 11 July 2011 referring to the recent announcement on new age determination procedures and specifically requesting that the AFP make inquiries in Indonesia regarding their client's age. On 14 July 2011 our Brisbane Office wrote to the Manger of the AFP in Brisbane, attaching a copy of the letter from Mr [OFD030]'s representatives and requesting that the information in that letter be passed to the AFP in Jakarta to assist in making inquiries in Indonesia and that efforts be made for a dental x-ray to be obtained prior to the hearing on 22 August 2011. To date we understand that no progress has been made on either of these fronts. I have also attached copies of these letters for your reference.⁷¹

About one week after that email was sent, [OFD030]'s defence lawyer travelled to Indonesia and produced a sworn statement from the individual's brother attesting to his date of birth. Ten days later the prosecution was discontinued.⁷²

In the matter of GEO027, a request for age verification information from Indonesia was made by the AFP in November 2011.⁷³ In December 2011, the AFP provided the Office of the CDPP with extracts of government documents obtained from Indonesia. Although the CDPP requested further verification in the form of statements from the Indonesian Registry officials who produced the documents, the AFP was unable to obtain evidence to support the admissibility of the Indonesian Registry documents. However, in January 2012, the defence was able to take affidavits from the same registry officials from whom the CDPP had sought statements through the AFP. In addition, the defence obtained affidavit and declaration evidence from Indonesian relatives (including the individual's father) about his age. Based on the strength of the evidence obtained by the defence, the CDPP made the decision to discontinue the prosecution.⁷⁴

There are also the cases of three individuals apprehended in April 2010. All three individuals immediately identified themselves to Australian authorities as children. During their DIAC entry interviews in May 2010, one individual provided his brother's mobile number, and another provided the telephone number of a friend in Indonesia.⁷⁵ In each of these cases, it appears from documents before the Inquiry that the AFP made no attempt to contact authorities in Indonesia or family members to obtain documentary evidence about the ages of these individuals. In January 2011 they were each charged as an adult on the basis of wrist x-ray evidence alone.

Over May to June 2011, defence representatives for all three individuals obtained baptism certificates, birth certificates and affidavit evidence from family members in Indonesia indicating

that they were all children.⁷⁶ The Office of the CDPP requested the AFP to make enquiries to verify the authenticity of these documents.⁷⁷ In June 2011, the AFP provided verification on the baptism certificate for one individual, but had no indication on the progress for enquiries on the other two individuals.⁷⁸ Approximately one week later, the CDPP withdrew charges against all three individuals.⁷⁹

It appears that in many cases where the defence have been able to obtain information about an individual's age from Indonesia, the Office of the CDPP has been willing to withdraw the prosecution.⁸⁰ However, it is important to note that in some of those cases it took many months after the documents were received for the prosecution to be discontinued. In addition, prior to mid-2011, the AFP and the Office of the CDPP were reluctant in some cases to accept the authenticity of documents obtained from Indonesia.

5.4 In some cases the AFP was reluctant to undertake enquiries in Indonesia

Documents before the Commission indicate that in some cases the AFP appeared reluctant to make enquiries in Indonesia, even when defence lawyers had discovered that it was likely that documents existed in Indonesia. For example, ULT055 was apprehended in August 2009 and at that time he told authorities he was 16 years old. It appears that the AFP made no enquiries in Indonesia about his age and he was charged as an adult on the basis of wrist x-ray evidence alone. In August 2010, ULT055's defence lawyer advised that he had spoken to the individual's mother and she said that she had his birth certificate with her in his village in Indonesia. The AFP advised that that village was too remote for them to be able to contact anyone or to verify documents, stating:

To travel to [the island] you must source a vessel (through private hire) in Wanci to take you there. This area of Indonesia is very remote and generally people who live there are in a low socio economic class.

After discussion with AFP OSO in Jakarta the risk associated with travel to this remote area by private vessel is considered too high risk to achieve the outcome required. There are no reliable search and rescue service in Indonesia and no accredited airlines or transport companies that travel to this area.

Travel into this area of Indonesia requires a lot of time as airline schedules are not reliable and flights are often cancelled resulting in long stays in areas until alternative transport can be organised. ...

Contacting Polri [police] in these remote areas is very difficult due to communications issues and it is highly unlikely that we will receive any response before the 9 November 2010.⁸¹

The prosecution against ULT055 continued in the absence of any evidence of age other than wrist x-ray analysis. The prosecution was eventually discontinued but only after a court found that it was not satisfied on the balance of probabilities that ULT055 was over 18 years of age at the

time of the offence.⁸² ULT055 spent 454 days in detention in Australia, 424 of them in an adult correctional facility.

5.5 An AFP officer was not deployed to Indonesia to make specific enquiries about age until November 2011

At the Inquiry hearing for Commonwealth agencies, the AFP explained that, while it has officers permanently stationed in Jakarta, there were some difficulties in deploying an additional AFP officer to Indonesia to work with the Indonesian National Police to locate documentary evidence of age for young Indonesians suspected of people smuggling in Australia. The witness stated that Indonesia is:

a sovereign jurisdiction. We can't just attend Indonesia and make our own enquiries. We have to do it with the authorisation of the Commissioner of the Indonesian National Police and there are protocols that one must follow. We needed to collect – we needed to collate all the information required, transmit that to the Indonesian National Police, give them an indication of the evidence that we required and then seek their authorisation for a member of the AFP to travel in company with them throughout the archipelago to collect the information required.⁸³

Eventually agreement was reached between the AFP and the Indonesian National Police and on 21 November 2011, the AFP sent an additional officer to Indonesia to make enquiries about the age of individuals suspected of people smuggling offences.⁸⁴ Together with the Office of the CDPP, the AFP compiled a list of 14 cases in which obtaining documentary evidence of age was considered a priority.⁸⁵ These were generally matters that were listed for age determination hearings in December 2011.

On 9 January 2012, the AFP officer reported the outcome of his enquiries in Indonesia. The AFP officer stated that he had worked together with the Indonesian National Police to conduct investigations regarding the age of ten individuals suspected of people smuggling. Only two of the ten individuals investigated were on the original list of 14 priority cases that had been compiled by the agencies. The AFP officer obtained identity documents for four of the ten individuals he had investigated.⁸⁶

Documentary evidence of age was not obtained in the majority of the 14 priority cases initially identified by the agencies. Following deployment of the AFP officer to Indonesia, the prosecutions in 11 of the 14 priority cases were ultimately discontinued.

The Commission recognises that the AFP does not have the authority or jurisdiction to conduct investigations or enquiries outside Australia without the appropriate approval and authorisation from the host country. However, it is of concern that it took until November 2011 for the AFP to make arrangements to deploy an officer to Indonesia to conduct investigations about age when

there was such a well-documented history of difficulty in obtaining documents through police-to-police cooperation.

6 The Commonwealth's approach to the authenticity of documentary evidence from Indonesia

Even when documents from Indonesia were obtained, in some cases prior to mid-2011, they were not considered by the Commonwealth to be material on which a decision to discontinue a prosecution could be based, or which they should consent to defence counsel adducing in evidence during an age determination hearing. This was because the Office of the CDPP considered that the documents did not comply with the requirements of the laws of evidence.

The Commonwealth policy of returning minors to Indonesia without charge, combined with the substantial mandatory penalties that apply to adults convicted of people smuggling offences, create an incentive for individuals to say that they are under 18 years of age. It is therefore not unreasonable for the AFP and the Office of the CDPP to require some credible evidence of age. However, in accordance with the application of the principle of the benefit of the doubt, when an individual says that he is under 18 years of age and his physical appearance does not render his claim implausible, Commonwealth agencies should treat that individual as a child until they are reasonably able to satisfy themselves that he is over the age of 18 years. This should be the primary purpose of enquiries in Indonesia.

The Commission recognises that there are real difficulties in obtaining from Indonesia documents that will be admissible as evidence in legal proceedings in Australia. It appears that the Office of the CDPP advised the AFP that records from Indonesia relating to age should be introduced in a statement by an official in charge of maintaining those records in accordance with the requirements of the *Foreign Evidence Act 1994* (Cth).⁸⁷ To obtain such a statement from an Indonesian Government official would require a formal request to be made under the *Mutual Assistance in Criminal Matters Act 1987* (Cth).⁸⁸

However, it is important that formal requirements do not lead to a situation where a person who is in fact a minor is treated as an adult merely because the documentary evidence that supports his claim is viewed as inadmissible in legal proceedings.

In her submission to the Inquiry, Ms Edwina Lloyd, a solicitor noted her concerns with the expectation of Australian courts that documents from Indonesia relating to the age of an individual whose age is in dispute be in admissible form. She notes from her experience that the Local Court:

will not accept documentary evidence unless it is accredited by Australian legal practitioners and in a Western style format. This places an unreasonable burden on legal practitioners and the young

Indonesian clients and their families to produce documentary evidence that is viewed as credible before a western court.⁸⁹

It appears that, prior to mid-2011, as a consequence of the preoccupation with documents about age being admissible in Australian legal proceedings, in some cases documents produced by defence lawyers and other representatives to support an individual's statement about their age were not relied upon by the Commonwealth as evidence of age. Further, the Office of the CDPP indicated that their admissibility would be challenged if it they were sought to be adduced in evidence in an age determination hearing.

The position of the Office of the CDPP changed in mid-2011.⁹⁰ The new position is outlined in a Minute to the Director dated 18 August 2011, regarding a specific case. It states:

This Office has stated that it would provide all material to the [courts] to assist the [courts] in making a determination about age. Given the circumstances of these matters, where both the prosecution and the defence are faced with very great difficulties in obtaining evidence in relation to a person's age, I do not think that we should object to the admissibility of the material that the defence seeks to put before the [courts] in these matters unless there are very cogent reasons. At the same time however comment can be made about the weight that the Court should give to any evidence in circumstances where it is hearsay or is unable to be tested.⁹¹

The Commonwealth Director of Public Prosecutions has described this approach to documentary material from Indonesia that the defendant wishes to tender as 'a very unusual and permissive stance to be taken by a prosecuting entity'.⁹²

The Commonwealth Director of Public Prosecutions has provided the Commission with details of a number of cases that were discontinued, in which material from Indonesia which was not admissible was considered by the Office of the CDPP in determining whether a court was likely to be satisfied on the balance of probabilities that the defendant was an adult.⁹³ In these cases the prosecution was discontinued in July 2011 or later. The Commission is aware of a number of earlier cases where documentary material from Indonesia was either not considered as evidence of age or where the Office of the CDPP indicated to defence counsel that it would challenge its admissibility.

For example, in the case of Ali Jasmin, the Commonwealth received a copy of a birth certificate in August 2010 and, in October 2010, a copy of that certificate verified by the Indonesian National Police. Despite this, the Office of the CDPP advised Ali Jasmin's defence lawyer that the Commonwealth would dispute the admissibility of the birth certificate unless the defence obtained 'proper evidence establishing what it is and the circumstances as to how it came into being'.⁹⁴ In November 2010, the AFP said that they would not be asking the officers in Jakarta for further documentary evidence, stating:

The home of JASMIN's family is fairly remote, as is usual in these matters, they are extremely busy and only have a very limited staffing capacity to undertake operational matters. ... I cannot see what this will prove, as there is simply no authority that can accurately stipulate that his date of birth is correct.⁹⁵

As a result, Ali Jasmin's birth certificate was not placed before the court. He was convicted as an adult and sentenced to the mandatory minimum sentence of five years imprisonment with a three year non-parole period. On 17 May 2012, following a review by AGD of cases where age had been in dispute and a conviction had been obtained, an announcement was made that three individuals would be released from prison and returned to Indonesia.⁹⁶ Media reports confirmed that Ali Jasmin was one of those released. He spent 878 days in detention in Australia, 781 of them in an adult correctional facility.

In the case of another individual, UPW031, who was apprehended in 2009, the defence lawyer told an officer from the Office of the CDPP in August 2010 that he had statements from community leaders in Indonesia and a birth certificate showing that his client was 15 years old. The AFP responded that the AFP position is that any documents coming out of Indonesia cannot be confirmed as genuine.⁹⁷ In October 2010, the Office of the CDPP sent an email to his lawyer challenging the relevance of the documents provided:

In respect of the birth certificate ... [w]e also dispute that it is admissible in its present form or without calling proper evidence as to what it is and the circumstances as to how it came into being.

In relation to the letters of [the community leaders in Indonesia], it is disputed that these documents provide any relevant evidence whatsoever. In any event to the extent you deem that such evidence has any relevance we would require the parties to give evidence in person.⁹⁸

UPW031's defence lawyer then informed the Office of the CDPP that he intended to make a submission to the Court to the effect that there was no investigation of age undertaken by the prosecution other than the wrist x-ray. It was not until June 2011 that the AFP first made a request for information from Indonesia.

In September 2011, the defence lawyer sent the Office of the CDPP a document from the an Indonesian official certifying the birth certificate that had previously been provided to the CDPP. The CDPP responded in a disparaging manner saying:

Thank you for your letter enclosing a note from the Regent of [name redacted]. Am I to assume that this person whose name is [name] on the official document you have emailed is in fact supposed to be [name] your client? Is there any reason why after you have clearly gone to considerable trouble you have provided from apparently an official source a completely different name on the document?

I also note the date of birth differs from the DIAC entry interview date where your client described himself as born on 29 January 1995? I note at the recent mention your client told the court via the interpreter that he was 15 at the time of the offence (after you had advised the court he had been sixteen) and this latest

document would make him 14 at the relevant time. Is there any reason for these discrepancies?

No provenance of his age has been provided by you, and this latest document has no forensic value.

I also advise that the AFP has not received any response from the Indonesian authorities as to any inquiries they may be able to make.⁹⁹

Despite being in possession of a legalised birth certificate and two statements from community leaders attesting to the fact that UPW031 was under 18 years of age, the Office of the CDPP continued to prosecute this young Indonesian as an adult on the basis of an analysis of his wrist x-ray. The prosecution was discontinued in November 2011 after a judge of the District Court of Western Australia concluded that he was not satisfied on the balance of probabilities that UPW031 was over the age of 18 years at the time of the offence.¹⁰⁰ UPW031 was in Australia for 18 months before a request for documents was made to Indonesia by the AFP, and spent 641 days in an adult correctional facility.

A further example is OXL002 who arrived in Australia in April 2010 and provided to DIAC contact details for his family in Indonesia soon after his apprehension. It appears from the documents before the Commission that the AFP made enquiries in Indonesia about his age. In August 2011, with the assistance of the Indonesian Consulate, Legal Aid provided to the Office of the CDPP a copy of his baptism certificate as evidence of his age. The Office of the CDPP forwarded the baptism certificate to the AFP and asked them to make enquiries about the document.

Legal Aid then sought an adjournment to allow the Office of the CDPP time to verify the baptism certificate. While the magistrate granted the adjournment, he commented that “for the Crown to verify a document which had been provided by the Indonesian Consulate was “embarrassing””.¹⁰¹

The AFP then advised the Office of the CDPP that there was no photograph or fingerprint on the baptism certificate and as such it was questionable whether the certificate was proof of age. They stated:

In relation to the Baptism certificate provided by the defence team for [OXL002] ... whilst we do not contest that the document is a Baptism certificate obtained through the Consulate General of the Republic of Indonesia, we do not believe that there is any feasible way of confirming the details contained therein. We doubt that we would have any success in trying to ascertain any evidence from Timor which may date from before the separation from Indonesia or that Rev. [name redacted] could be expected to recall the Baptism some seventeen years later if he is still alive and could, indeed, be located following the recent upheavals in Timor. Further, I would note that the Consulate General also declines to accept any responsibility for the contents of the document.

Our main issues with the document are: we contend the date of birth expressed in the document would have been provided by the subject’s family and may not be reliable, the document does not contain any secondary confirmation, like fingerprint identification, to show that the person referred to is the same

as our defendant or even that the defendant is, in fact, the [individual] referred to in the document. We also note that there are no witnesses to the Baptism detailed on the document and that the document appears to have been prepared on 20 July 2011, possibly from some other record which is not attested to in any way.¹⁰²

In September 2011, the defence made submissions to the Office of the CDPP that the prosecution should be discontinued. An internal Office of the CDPP email discussing whether to discontinue the prosecution referred to the practice of the Office of the CDPP saying:

We have accepted that matters where the defence submit that their client is under 18 should go to the court to be determined in an “age determination hearing”. There is no legislative basis for such a proceeding. We have justified this approach on the basis that it is Commonwealth government policy that persons under the age of 18 are not prosecuted and that a determination by a court before a trial is conducted [in] an appropriate way to have a defendant’s age determined so that this policy may be applied.¹⁰³

The email then notes that there is no evidence to suggest that the document from Indonesia is fabricated, nor evidence that documents in Indonesia are ‘unreliable in this case or generally’. The officer then recommended that the prosecution be discontinued. The prosecution was discontinued on 30 September 2011. OXL002 spent 550 days detained in Australia, 289 of them in adult correctional facilities.

In a final example, LAL040, who was apprehended in October 2009, was charged as an adult in December 2009 based on wrist x-ray analysis. In July 2010, the defence adduced a birth certificate during court proceedings which indicated that he was a child. Following this, the Office of the CDPP sent the defence a letter stating that the prosecution would continue to maintain that he was an adult unless the defence could obtain more information to prove otherwise. The Office of the CDPP advised that its ‘particular concern about the document is that on its face the record of the birth appears to have been created in 2009 and would therefore be completely unreliable’.¹⁰⁴ The AFP was then requested by the Office of the CDPP to verify the authenticity of the birth certificate.

In September 2010, the Indonesian National Police faxed the AFP Jakarta office an original extract from documents used to register LAL040’s birth. The date of birth matched the date of birth on the birth certificate provided by the defence. The AFP officer then asked her Jakarta-based counterpart:

if she was able to tell if the document had been forged in anyway and she was unable to tell me given it was a faxed copy. I have requested the Indonesia Police obtain a certified copy or undertake some form of inquiries to authenticate the document if possible.¹⁰⁵

The liaison officer in Jakarta reported that there were a number of anomalies in the documents and that it appeared that the ages of LAL040’s parents were inconsistent with his claimed date of birth.¹⁰⁶

In November 2010, the AFP was still seeking to verify the birth certificate that had been provided by defence five months earlier. Later that month, the Office of the CDPP contacted the defence stating:

you may be seeking to tender evidence in the nature of a birth certificate. ... We do not agree to this being tendered by consent as the documents you have shown to us lack provenance and on their face show recent creation.¹⁰⁷

At an age determination hearing in January 2011, the Magistrate found on the balance of probabilities that LAL040 was under 18 at the time of the offence.¹⁰⁸ After an appearance in the Children's Court, his prosecution was discontinued in February 2011. The Office of the CDPP noted that he 'has now served a greater period in custody than would be imposed by a sentencing judge for a juvenile convicted of a ... people smuggling offence'.¹⁰⁹ LAL040 spent 485 days in detention in Australia, 416 of which were spent in an adult correctional facility.

7 Findings

The Commission recognises that it is not always possible to obtain credible documents that establish an individual's age, particularly in Indonesia, the country of origin of all of the individuals with whom this Inquiry is concerned. However, attempting to locate documentary evidence should be a critical component of any process of assessing age.

It appears that in many cases inadequate efforts were made by the AFP to obtain from Indonesia age related information regarding young Indonesians suspected of people smuggling.

The Commission has identified many cases in which no request was ever made to obtain documentary evidence of age from Indonesia. The Commission has also identified a number of cases in which it appears that there were long delays before the AFP contacted the Indonesian National Police to request assistance in locating documents to establish age. In a significant number of these cases, the individual had given Australian authorities contact details for relatives or friends in Indonesia who would probably have been able to give information about his age had they been contacted by Australian authorities.

It appears that in a number of cases, defence representatives were able to obtain documentary evidence of age reasonably easily, even when AFP enquiries had not produced any results. The Commission is aware that defence representatives are not constrained by the requirements of working through the agreed processes of police-to-police cooperation with the Indonesian National Police.

Nonetheless, it is of concern that an AFP officer was not deployed to Indonesia to work with the Indonesian National Police for the purpose of investigating the age of individual crew until

November 2011. It appears to the Commission that it had been clear for some time that the AFP was experiencing considerable difficulties in obtaining documents through police-to-police cooperation. It is not clear why it took until November 2011 for arrangements to be made to send a dedicated AFP officer to Indonesia for the specific purpose of assisting with enquiries about age.

As the individual cases considered above show, prior to mid-2011, the Office of the CDDP was reluctant to consent to defence counsel adducing in evidence documentary material from Indonesia. As a result, in some cases where documents about age did exist, they were not considered by the Commonwealth because they could not be adduced in evidence. Nor were the courts advised of their existence. The Commission is aware of cases in which the prosecution against an individual continued even where documentary evidence suggested that he was a child. There appears to have been considerable doubt within the AFP and the Office of the CDDP about the authenticity of the information contained within documents from Indonesia, even those documents provided to the Australian authorities by the Indonesian National Police or Embassy.

The Commission notes that since mid-2011, the AFP and the Office of the CDDP have taken a more flexible approach to consideration of documents that may be inadmissible in a court proceeding. This is a welcome development, given the difficulties in obtaining documents from Indonesia that can be adduced in evidence under the formal requirements of Australian law.

¹ Hon R McClelland MP, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 30 June 2011; Hon R McClelland MP, Attorney-General, and Hon B O'Connor MP, Minister for Home Affairs and Justice, 'Improved process for age determination in people smuggling matters' (Media release, 8 July 2011). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22media%2Fpressrel%2F906838%22> (viewed 9 July 2012).

² Australian Government, Joint submission, Submission 30, p 15.

³ Australian Government, Joint submission, Submission 30, p 15.

⁴ A formal mutual assistance request is governed by the *Mutual Assistance in Criminal Matters Act 1987* (Cth).

⁵ Australian Government, Joint submission, Submission 30, p 15.

⁶ Acting Deputy Commissioner Operations, AFP, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 5 April 2012, p 3.

⁷ For example, charges against three Indonesian boys were dropped on 1 July 2011 after the Brisbane Magistrates Court found that there was lack of evidence that they were over 18 years of age. Lawyers had travelled to the remote island of Rote in June to obtain affidavit evidence from relatives and village officials (WIL024; WIL025; WIL042).

⁸ Assistant Commissioner, National Manager Crime Operations, AFP, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 29 May 2012, p 4.

- ⁹ Statement of [academic expert] re: Indonesian identity and proof of age, Federation Fellow, Director, Asian Law Centre, Faculty of Law, The University of Melbourne, 24 May 2012 (AFP document provided 29 May 2012) (Statement of [academic expert]).
- ¹⁰ Statement of [academic expert], above, p 1.
- ¹¹ Australian Government, Joint submission, Submission 30, p 4.
- ¹² Australian Government, Joint submission, Submission 30, pp 15–16.
- ¹³ Hon R McClelland, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 22 August 2011, p 3.
- ¹⁴ Commissioner, AFP, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 21 December 2011.
- ¹⁵ AFP, Response to draft report, 6 July 2012, p 22.
- ¹⁶ UNICEF, *Children in Indonesia: Birth Registration* (June 2010). At http://www.unicef.org/indonesia/UNICEF_Indonesia_Birth_Registration_Fact_Sheet_-_June_2010.pdf (viewed 9 July 2012).
- ¹⁷ Statement of [academic expert], note 9, p 4.
- ¹⁸ Statement of [academic expert], above, p 5.
- ¹⁹ Statement of [academic expert], above, p 5.
- ²⁰ Hon R McClelland, Attorney-General, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 22 August 2011, p 4.
- ²¹ Ministerial Brief – Minister for Home Affairs, *Age determination process and issues surrounding court proceedings*, National Manager Crime Operations, AFP, November 2010 (AFP document provided 5 April 2012) (Age determination process – Ministerial Brief).
- ²² Age determination process – Ministerial Brief, above.
- ²³ Ministerial Brief – Minister for Home Affairs and Justice, *People smuggling crew investigations – AFP practices and procedures, Acting Deputy Commissioner*, AFP, 27 February 2012 (AFP document provided 5 April 2012).
- ²⁴ Statement of [academic expert], note 9, p 2.
- ²⁵ Statement of [academic expert], above, p 2.
- ²⁶ AFP, Response to draft report, 6 July 2012, p7.
- ²⁷ AFP, Response to draft report, 6 July 2012; LAL040; INN012; ALB057; SAN055; YND049; JUK070; JUK069; KEL055.
- ²⁸ Australian Government, Joint submission, Submission 30, p 16.
- ²⁹ Commissioner, AFP, Correspondence to Hon C Branson QC, President, Australian Human Rights Commission, 21 December 2011, p 2.
- ³⁰ Australian Government, Joint submission, Submission 30, pp 15–16.
- ³¹ Revised Explanatory Memorandum, Crimes Amendment (Age Determination) Bill 2001 (Cth), para 9. At http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr1246_ems_d3e6e08b-3169-4600-9186-4c53e07f9d02%22 (viewed 9 July 2012).
- ³² Deputy State Director, DIAC Tasmania Office, Email to Officers, DIAC, 8 October 2010 (DIAC document mail39642131).
- ³³ Senior Assistant Director, CDPP, Letter to Assistant Commissioner, National Manager Crime Operations, AFP, 3 March 2011, p 3 (CDPP Document Attachment D document 5), p 3.

- ³⁴ Team Leader Crime Operations, AFP, Email to Officers, AFP, 16 June 2011 (AFP document AFP_05 provided in hard copy).
- ³⁵ Officer, Office of the Minister for Foreign Affairs, Email to Officers, AGD and Office of the Minister for Foreign Affairs, 29 June 2011 (AGD document ENG-IG-48).
- ³⁶ Talking points on the working group on age determination to be discussed at the Australia-Indonesia Consular Consultations – Perth, AGD, 30 June 2011 (AGD document BRIEF19).
- ³⁷ Deputy Director, CDPP Canberra Office, Letter to Assistant Commissioner, National Manager Crime Operations, AFP, 15 July 2011 (CDPP document Attachment D document 12), p 2.
- ³⁸ Assistant Commissioner, National Manager Crime Operations, AFP, Canberra Office, Letter to Deputy Director, CDPP, 22 July 2011 (CDPP document IMP-10), p 1.
- ³⁹ Acting Deputy Director, Legal and Practice Management and Policy Branch, CDPP, Email to Assistant Commissioner, National Manager Crime Operations, AFP, 2 August 2011 (AGD document PROS-60).
- ⁴⁰ AGD document PROS-60, above.
- ⁴¹ Acting Assistant Secretary, Border Management and Crime Prevention Branch, Criminal Justice Division, AGD, Email to Third Secretary (Political), Australian Embassy Jakarta, 26 October 2011 (AGD document ENG-IG-34).
- ⁴² As discussed in Chapter 3.
- ⁴³ Senior Assistant Director, Legal and Practice Management and Policy Branch, CDPP, Email to Legal Officers, CDPP, 15 November 2011 (CDPP document Attachment D Document 14).
- ⁴⁴ Assistant Commissioner, AFP, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 168.
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- ⁵³ Prosecution Report, CDPP Brisbane Office, 7 November 2011 (OXL003 – CDPP document 268.0003).
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- ⁸² *ULT055 v The Queen [No 2]* [2010] WADC 169.
- ⁸³ Assistant Commissioner, AFP, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 169.
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- ⁸⁹ Edwina Lloyd, Submission 29, p 7.
- ⁹⁰ Commonwealth Director of Public Prosecutions, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 266.
- ⁹¹ CDPP Officer, Minute to Director, 18 August 2011, (CDPP document Attachment D document 5), p 5.
- ⁹² Commonwealth Director of Public Prosecutions, Response to draft report, 6 July 2012, p 4.
- ⁹³ Commonwealth Director of Public Prosecutions, Response to draft report, 6 July 2012, p 4. WIL024; WIL025; WIL042; OXL002.
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- ¹⁰⁰ *R v RMA* [2011] WADC 198.
- ¹⁰¹ Adjournment Report, Brisbane Magistrates Court, 12 August 2011 (OXL002 – AFP document 13).
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Chapter 7:

Some further
aspects of the
treatment of the
young Indonesians

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1 Introduction

This chapter discusses some further aspects of the treatment of young Indonesians suspected of people smuggling who said that they were children.

As discussed in Chapter 1, Australia's international human rights obligations require that individuals who say that they are children be given the benefit of the doubt and treated as minors unless there is proof to the contrary. In the case of unaccompanied children, this should lead to consideration by the State of what steps need to be taken to ensure their special protection and care.

As is clear from the preceding chapters of this report, in many cases the benefit of the doubt was not afforded to young Indonesians who said that they were children. Instead, on the basis of the analysis of a wrist x-ray, they were charged and prosecuted as adults. This has had further consequences, including in many cases, their detention in adult correctional facilities. This chapter considers issues related to the detention of individuals suspected of people smuggling offences who said that they were children. It also considers issues related to their guardianship and to the provision of legal advice and assistance to them. It closes with a brief discussion of whether some of the individuals whose experience this Inquiry is considering might in fact have been victims of trafficking.

2 The detention of individuals suspected of people smuggling offences

2.1 The legal basis for detention

The *Migration Act 1958* (Cth) permits, but does not require, the detention of an 'unlawful non-citizen' who first arrives in Australia at an 'excised offshore place'.¹ It does not appear that any young Indonesian suspected of people smuggling has held an Australian visa. Therefore they have all been 'unlawful non-citizen[s]'. Nor does it appear that any young Indonesian suspected of people smuggling first landed on the Australian mainland; they nearly all first landed on Christmas Island which is an excised offshore place. Their detention was therefore not mandatory.² However, in practice, almost all non-citizens who arrive by boat without a valid visa are currently taken into detention on Christmas Island. A person who is so detained must be kept in immigration detention until they are either removed from Australia, deported or granted a visa.³

Authority for the detention of individuals suspected of people smuggling is also found in the provisions of the Migration Act relating to the detention of suspected offenders. A person who has travelled to Australia and is believed to have been on board a boat when it was used in connection with the commission of an offence may be detained until a decision is made whether to prosecute the person and, if the decision is to prosecute, for the further period of time that is

required for the purposes of the prosecution.⁴

If an unlawful non-citizen makes a written request to the Minister for Immigration and Citizenship to be removed from Australia, he must ordinarily be removed as soon as reasonably practicable.⁵ In order to stay the removal of a suspect, law enforcement or prosecuting agencies may request that the Attorney-General issue a Criminal Justice Stay Certificate (CJSC).⁶ The Attorney-General may issue a CJSC if he or she (or his or her delegate) 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 a law of the Commonwealth'.⁷ If a CJSC is in force, the non-citizen to whom it applies is not to be removed or deported from Australia even where they have made a written request to the Minister to be removed.⁸

A Criminal Justice Stay Visa (CJSV) is a temporary visa that may be granted to persons who are subject to a CJSC.⁹ A CJSV is granted at the personal discretion of the Minister for Immigration and Citizenship, having regard to the matters set out in s 158 of the Migration Act. A person who has been issued a CJSV and who is being held in immigration detention is entitled to be released from that detention.¹⁰

(a) Criminal Justice Stay Certificates

Individuals suspected of people smuggling are usually issued with a CJSC which prevents their removal from Australia for the duration of a criminal investigation or prosecution, or until a custodial sentence is complete. The Attorney-General's Department (AGD) informed the Commission that, when an agency requests a CJSC, it provides AGD with 'a costs undertaking and a completed questionnaire setting out the information required' in order for a CJSC to be issued.¹¹ During the Inquiry hearing, the Attorney-General's delegate agreed that, before granting a CJSC she needed to be satisfied that the stay of a person's removal 'was required for the administration of criminal justice' and that she required the provision of sufficient information for her to be so satisfied.¹²

An AGD officer also informed the Commission that CJSCs are only sought by the AFP after the Department of Immigration and Citizenship (DIAC) has assessed the person to be an adult and referred the case to the AFP for investigation.¹³ This may be the process since age assessment procedures changed in December 2011. However, the Commission believes that prior to this date, in many cases, CJSCs were issued to suspects before age assessment processes were completed. For example:

- In one case, a CJSC was issued in August 2010 – one month after the individual concerned was apprehended.¹⁴ A DIAC age assessment interview was not conducted until October 2010,¹⁵ and a wrist x-ray was not requested by the AFP until December 2010¹⁶ – four months after the CJSC was granted.

- In another case, a CJSC was issued in February 2010 – one month before the AFP requested a wrist x-ray.¹⁷

The Attorney-General's delegate has a duty to cancel a CJSC which is no longer required for the purposes for which it was given.¹⁸ An AGD officer informed the Commission that the relevant agency requests cancellation of a CJSC where an investigation has been completed without proceeding to a prosecution; where a prosecution has been discontinued; or where a person has been acquitted of an offence.¹⁹

In September 2010, the AFP National Manager of Crime Operations wrote to a senior AGD officer about his concerns regarding the length of detention of people smuggling crew being held in detention on CJSCs:

Whilst the AFP is taking all reasonable steps to progress investigations in a timely manner, these factors alone mean that a thorough investigation of the suspected offence will be prolonged. The result is the prolonged detention of suspects, far in excess of periods originally anticipated, and for this reason the AFP has concerns regarding these current arrangements.

I believe it is appropriate to reconsider the application of CJSCs in circumstances where prolonged periods of detention are anticipated. ... In cases where prolonged CJSCs are in place, appropriate review mechanisms should also be considered.²⁰

AGD responded by letter to the AFP's concerns about the prolonged detention of individuals on CJSCs. The letter expressed the view that, while the AFP had in place a clear process for investigation and prosecution of individuals suspected of people smuggling offences, the grant of CJSCs remained appropriate. The letter also noted that it would be appropriate to continue to monitor the time taken to carry out investigations.²¹

AGD has informed the Commission that there are no formal timeframes for reviewing CJSCs under the Migration Act, but that AGD and relevant agencies have informally implemented practices to review the status of CJSCs as required.²² These practices, AGD advised, were as follows:

- In December 2010, the AGD delegate asked the AFP to audit all CJSCs in effect for people smuggling cases, and advise which cases had been referred for prosecution and which were still under investigation. Following this, AGD began to manually record in its database a 'follow-up date' three months after the date of the CJSC issue.
- In March 2011, the AFP initiated a new process of sending a weekly report to AGD on all the individuals charged in that week with people smuggling offences, as well as a monthly report of all those who were still under investigation and yet to be charged.
- In late 2011, when the number of cases at the investigation stage decreased, the AFP ceased providing weekly and monthly updates to AGD. Instead it commenced to conduct

its own internal review of cases at the investigation stage and advised AGD when to cancel CJSCs.

The Inquiry hearing explored issues relating to the review of CJSCs. It appears that individual CJSCs were reviewed periodically where circumstances, such as the period of time the CJSC had been in operation, prompted the Attorney-General's delegate to make enquiries with the requesting agency.²³ However, at the hearing, the Attorney-General's delegate agreed that the first time that she had proactively sought information from the AFP about current CJSCs and conducted a systematic review of whether each individual CJSC should remain in operation was in December 2010.²⁴

The Commission is aware of some cases where it appears that there was a significant delay between a decision not to prosecute a young Indonesian and the consequent request to cancel his CJSC. For example, in one case a decision was made in late November 2010 not to prosecute an individual who had arrived in Australia in early October 2010.²⁵ In mid-February 2011, during a review of CJSCs that had been in place for three months or longer, the AFP realised that he was still in immigration detention.²⁶ He was removed from Australia a week later, after spending 134 days in immigration detention. The wrist of this individual was not x-rayed. From the date of birth that he provided to the authorities, it appears that he may have been 12 or 13 years old.

It appears that there have also been some delays in applications for the cancellation of CJSCs in the cases of young Indonesians who were x-rayed and found likely to be under the age of 18 years. Two cases where such delays are evident are discussed in Chapter 4, section 3.

It appears that there were some processes in place to review whether there was an ongoing need for particular CJSCs. However, it is of concern that the first time a systematic review process was instituted was in late 2010. Subsequent review processes appear to have been conducted on an *ad hoc* basis and, for a significant part of 2011, it does not appear that there was any review of individual cases. It is not clear that the reviews which took place considered questions such as the appropriateness of the length of detention prior to charge. Rather, it appears that decisions to issue or cancel a CJSC were made largely on the basis of the view of the investigating or prosecuting agency as to whether a CJSC was required.

(b) *Judicial review of the legal basis for detention*

Individuals who have been issued with CJSCs are effectively denied access to judicial review of their detention. This became clear with the decision in *[BAI031] v Minister for Immigration & Citizenship*; a case in which a number of individuals held in immigration detention facilities in the Northern Territory sought to challenge their detention by applying for writs of *habeus corpus*.²⁷

The Human Rights Law Centre summarises the plaintiffs' arguments in the case as follows:

the powers contained in sections 189, 147 and 250 of the Migration Act are open ended and, as the plaintiffs were all minors, decisions must be made promptly as to whether to prosecute them or not.²⁸

The court confirmed the Commonwealth's power to detain the plaintiffs while the CJSCs were in force. Mildren J said that 'whilst the Attorney-General's certificate is in force, the provisions of s 250(5) cannot operate'.²⁹

(c) Criminal Justice Stay Visas

As noted above, a person in respect of whom a CJSC has been issued may be granted a CJSV. If granted a CJSV, the person will be released from immigration detention to live in the community.

Information provided to the Inquiry shows that there have been some differences in opinion between Commonwealth agencies about the desirability of granting CJSVs to individuals charged with people smuggling. However, these differences have largely been resolved and the current practice is not to issue CJSVs to individuals charged with people smuggling.

In December 2009, a DIAC document clarifying the immigration status of alleged people smugglers in immigration detention observed that, where a person is charged and taken into criminal custody, consideration will be given to the grant of a CJSV.³⁰ This document noted that it is desirable for suspects to be held in immigration detention to enable investigations to take place, and noted the AFP's concerns that, if a suspect were released from immigration detention on a CJSV, he may abscond into the community or leave Australia of his own volition before investigations into his alleged offence were complete.³¹

However, the document also noted concerns about the ongoing detention of individuals for whom a CJSC is in force. The document stated:

Where there appears to be unreasonable delay in respect of a particular case, ... DIAC will discuss options with the AFP and other agencies as appropriate for the management and progress of the case, such as consideration of the grant of a CJSV. ... A delay in deciding whether to charge a person beyond a period of three months from the initial police interview will trigger formal consideration by DIAC of the grant of a CJSV.³²

The Commission is aware of cases where individuals were granted CJSVs but remained in immigration detention. For example, in one case in late November 2010, an individual is reported by the Office of the Commonwealth Director of Public Prosecutions (Office of the CDPP) to have been issued with a CJSV 'prior to ... discussions with DIAC which caused DIAC to cease this

practice in relation to people smuggling crew'. The Office of the CDPP expressed concern that if the individual is 'found to be a juvenile and the prosecution continues, there is a strong likelihood he may be granted bail by the Children's Court at which point this office may be responsible for his care which will be a complex and expensive undertaking'.³⁴

The issue of whether CJSVs should be granted to suspects who say that they are children was discussed extensively between Commonwealth agencies in mid-2011. These discussions first arose in the context of the *[BA1031]* case discussed above, with DIAC raising the possibility of granting the plaintiffs in that case CJSVs. In response, the Office of the CDPP observed that it 'has not been funded nor does it have the resources or capabilities to support these defendants during the course of the criminal proceedings'.³⁵

Similar concerns were raised in June 2011 when it appeared that three defendants in Brisbane would apply for bail and might apply for CJSVs. The Office of the CDPP made it clear that it was not in a position to support any people smuggling defendants should they be released on bail into the community.³⁶ These issues are discussed further in section 2.4 below.

The Commission is concerned that no consideration appears to have been given to placing young Indonesians in the least restrictive form of detention available. For these individuals this would have been community-based detention.

2.2 Length of detention

As noted in Chapter 1, under the *Convention on the Rights of the Child* (CRC), children should only be detained as a last resort and for the shortest appropriate period of time.³⁷ The principle of the benefit of the doubt means that a person who says that he or she is a child should be treated as a minor until it is established that he or she is an adult. Consequently, it is of concern that many individuals suspected of people smuggling whose ages were in doubt spent prolonged periods of time detained in either immigration detention facilities or adult correctional facilities or both.

The Commonwealth was advised in May 2011 of the content of the obligations under the CRC with respect to the detention of young Indonesians who said that they were children. This legal advice noted:

- even where an individual is transferred to a State-based facility, the Australian Government retains ultimate responsibility in respect of the action of that State or Territory.
- the best interests of the child should be a primary consideration in every decision taken in relation to a child accused, including non-citizen children accused of people smuggling offences. ...

- the obligation to detain children only as a last resort and for the shortest appropriate period of time applies to both immigration detention and criminal detention.³⁸

The prolonged detention of young Indonesians suspected of people smuggling is demonstrated by the following figures showing the average length of detention for different categories of individuals suspected of people smuggling whose age was in doubt:

- Individuals who were removed from Australia without charge and without having their wrists x-rayed – average length of detention 66 days.
- Individuals who were found to be a minor after their wrists were x-rayed and then removed from Australia without charge – average length of detention 161 days.
- Individuals whose wrists were x-rayed, were charged as adults and ultimately had the prosecutions against them discontinued – average length of detention 431 days (of these an average of 199 days were spent in adult correctional facilities).
- Individuals who were charged but ultimately found not guilty (six people) – average length of detention 570 days (of these an average of 418 days were spent in adult correctional facilities).
- Individuals who were charged and convicted and ultimately granted early release on licence (15 people) – average length of detention 948 days (of these an average of 864 days were spent in adult correctional facilities).
- Individuals who were charged and convicted and have served the entirety of their sentences (three people) – average length of detention 1088 days (of these an average of 1054 days were spent in adult correctional facilities).

(a) Prolonged detention in immigration detention facilities prior to charge

Many young Indonesians suspected of people smuggling spent prolonged periods of time in immigration detention facilities – either prior to a decision not to prosecute them, resulting in their being removed from Australia; or prior to their being charged with people smuggling.

The above figures show that those individuals who were either immediately accepted by the AFP to be minors, or who were accepted by the AFP to be minors after their wrists were x-rayed, spent an average of 66 or 161 days in immigration detention, depending on whether their wrists were x-rayed.

It appears that a number of individuals, who were ultimately not charged with people smuggling, experienced delays between apprehension and being subject to a wrist x-ray of between five and seven months. For example:

- The AFP did not arrange a wrist x-ray for an individual apprehended in July 2010 until December 2010 – 5 months later.³⁹
- The AFP did not arrange a wrist x-ray for an individual apprehended in August 2010 until February 2011 – 6 months later.⁴⁰
- The AFP did not arrange a wrist x-ray for an individual apprehended in December 2010 until May 2011 – 5 months later.⁴¹
- The AFP did not arrange a wrist x-ray for an individual apprehended in June 2010 until November 2010 – 5 months later.⁴²

In each of these cases, following receipt of the wrist x-ray analysis, the AFP made a decision not to prosecute the individual. It appears that in most cases the decision not to prosecute was made because the wrist x-ray analysis showed that the individual was likely to be under 18 years of age. However, it is not clear from the documents before the Commission whether in some cases the decision not to prosecute was made because the time that had passed between the alleged offence and the date of the x-ray increased the probability that the individual, although skeletally mature at the time of x-ray, was under 18 years of age at the time of the alleged offence.

The Commission is aware that in some cases, delay may be explained by the lack of appropriate x-ray facilities on Christmas Island. In some cases, young Indonesians had to wait for a considerable period of time on Christmas Island before they were transferred to Darwin where appropriate x-ray facilities existed.⁴³ Sometimes this delay was attributable to the limited number of places of detention in Darwin suitable for young Indonesians who DIAC assessed to be under 18 years of age.⁴⁴ DIAC appropriately considered that minors should be detained in alternative places of detention which were less restrictive than immigration detention centres.

The young Indonesians who were ultimately charged with people smuggling and who had their prosecutions discontinued spent an average of 186 days (over six months) in immigration detention prior to being charged. This can only be described as prolonged detention. Some submissions to the Inquiry raised the issue of whether the lengthy detention of an unlawful non-citizen for the purposes of making a decision about whether he should be charged with an offence amounts to arbitrary detention within the meaning of the *International Covenant on Civil and Political Rights*.⁴⁵

Victoria Legal Aid's submission to the Inquiry reports a prolonged period of pre-charge detention for the eight accused whom they represented (whose charges were ultimately withdrawn after they were accepted as being children by the Commonwealth). These eight individuals spent an average of 6.9 months in immigration detention before being charged.⁴⁶

Submissions to the Inquiry argued that this period of pre-charge detention was unreasonable as

the investigating authorities should have had sufficient information to make an earlier decision about whether they should be charged. For example, the solicitor Ms Edwina Lloyd noted:

8 months is an unreasonable amount of time to wait to be charged and there has been no reasonable explanation as to why it took so long. It is unreasonable because Luco [name an alias] was identified as a crew-member of a vessel bringing asylum seekers into Australian territorial waters. There existed enough physical evidence for the AFP to lay charges upon apprehension.⁴⁷

Victoria Legal Aid observed that, for nearly every other offence prosecuted in Australia that results in the immediate detention of an accused, a charging decision is made within hours.⁴⁸ Victoria Legal Aid recommend:

that the initial investigation and charging process be expedited for all relevant suspects such that no suspected people smuggler can be detained for more than 14 days before being charged. Two weeks is sufficient time for an accused to be interviewed by the AFP on Christmas Island before being conveyed to another State or Territory for a charge to be laid and prosecution commenced. The prosecuting authorities would then be given adequate time to compile a brief of evidence. In Victoria, this is typically three months.⁴⁹

Legal Aid NSW contrasted the potential for indefinite detention prior to charge for a person suspected of people smuggling with the regime underpinning other criminal offences. The submission stated that:

NSW and Commonwealth legislation enables police to hold individuals arrested on suspicion of committing an offence for 4 hours, further detention requires a warrant issued through a court. Even in relation to terrorism offences there are time limits on detention and court involvement in extending detention for investigation.⁵⁰

The AFP has argued that the length of the investigation process is affected by a number of difficulties that it faces in preparing a brief of evidence for the prosecution of people smuggling crew. This includes the length of time it takes to obtain statements from Navy and Customs officers and the challenges in securing witness statements from passengers on boats. These challenges include that most passengers require the assistance of an interpreter.⁵¹ The AFP assert that these difficulties contribute to the length of time a young Indonesian suspected of people smuggling spends in immigration detention waiting for a decision to be made about whether he should be charged. The AFP reiterated these issues in its response to the draft report.⁵² In its response, the AFP also outlined the delays caused by the significant increase in AFP investigations caused by the high number of boats carrying asylum seekers that arrived in the first four months of 2010, and the whole-of-government negotiations that took place to enable prosecutions to be conducted in jurisdictions other than Western Australia. The change in jurisdiction for prosecutions required the AFP to re-format evidence in a significant number of cases.⁵³

Legal Aid NSW argues that this period of time for investigation is not required in other criminal proceedings. The submission states that:

If a person arrives at Sydney Airport with drugs in their suitcase, they are interviewed, then immediately charged. If subsequent evidence establishes their innocence charges are then dropped. The law allows police to charge a person they reasonably suspect of committing an offence. Once identified as a crew member on a boat suspected of people smuggling there is generally sufficient suspicion to charge individuals and immediately bring them before a court. Witness statements can be obtained later, similar to other criminal matters.⁵⁴

Furthermore, the argument that a significant period of time is required for investigation does not explain the length of time spent in immigration detention by individuals who were either removed from Australia without undergoing a wrist x-ray (presumably because from their physical appearance it was apparent that they were under 18 years of age) or those who were x-rayed and removed without charge (presumably because the x-ray did not show skeletal maturity or because the length of time between the date of the alleged offence and the wrist x-ray being taken was so long as to make the wrist x-ray analysis uninformative). In these cases, the AFP faced no requirement to prepare a brief of evidence.

The AFP has informed the Commission that the average time taken by the AFP to complete an investigation is currently 104.5 days, from the time of arrival on Christmas Island to the date of the charge.⁵⁵

(b) Prolonged detention in adult correctional facilities

From the above figures it can be seen that, in those cases where young Indonesians were charged but their prosecutions ultimately discontinued, the individuals spent on average 228 days in adult correctional facilities. From documents provided to the Commission, it appears that the most common reasons for a prosecution being discontinued were either that a decision was made that a court would be unlikely to find that, on the balance of probabilities, the individual was over 18 at the time of the offence and there were no exceptional circumstances to justify the prosecution of a minor; or from late 2011 onwards, because there was no probative evidence of age other than wrist x-ray analysis. This means that a significant proportion of the 55 young Indonesians whose prosecutions were ultimately discontinued may well have been under 18 years of age at the time of their apprehension – and perhaps for some period of time during their detention.

The detention of these young Indonesians in adult correctional facilities appears to have been a consequence of their not being afforded the benefit of the doubt when they said that they were minors. It was also a consequence of the fact that, earlier than mid-2011, bail was opposed in all cases where individuals were charged with people smuggling. Issues related to bail are discussed in section 2.4 below.

Submissions to the Inquiry describe the damage that young Indonesians suffered as a result of being detained in an adult correctional facility. For example, the Victorian Legal Aid submission reported that:

It is our experience that children detained on people smuggling charges are harmed by their time in detention, particularly when they are detained in adult facilities. We know this because we have seen first hand their distress and isolation. The children suffer by virtue of being imprisoned in a foreign country where cultural differences are huge and their native language is not spoken. The effect of having little or no contact with family, particularly at a young age, is immeasurable.⁵⁶

2.3 Place of detention

As described in section 2.1 above, individuals suspected of people smuggling who say that they are children are taken into immigration detention when they are apprehended. For nearly all of them, their first place of detention is on Christmas Island.

Information provided to the Commission indicates that DIAC practice is to give individuals who say that they are children the benefit of the doubt, and consequently to treat them as if they are children for the period of time that they are in immigration detention. This means that individuals who say that they are children are detained in low security 'alternative places of detention' rather than in high security immigration detention centres.⁵⁷ Nonetheless, people detained in such facilities remain under supervision and are not free to come and go.⁵⁸

Once the AFP makes a decision to charge a person with people smuggling, arrangements are made to transport him to the State or Territory in which he is to be charged and arrested. At the time of being charged, the AFP completes a Prosecution Notice, which sets out the details of the alleged offence and other details relevant to the charge, including the accused person's date of birth. The individual is remanded into the custody of State or Territory correctional authorities unless he applies for, and is granted, bail.

(a) The AFP assigned an individual a date of birth based on wrist x-ray analysis even where the date of birth was in dispute

The Commonwealth Joint submission states that an individual is generally held in a correctional facility on the basis of the date of birth listed on the Prosecution Notice prepared by the AFP.⁵⁹ Therefore, the date of birth given to an individual on the Prosecution Notice is, in most cases, determinative of his place of detention.

From the documents provided to the Commission, it appears that, where a person's date of birth is unknown, the AFP, when completing the Prosecution Notice, ordinarily assigned a date of birth to the individual that was consistent with the age given in the wrist x-ray report. That date of birth

was usually included on the AFP Statement of Material Facts that was provided to the Office of the CDPP as part of the brief of evidence.

An email from the Office of the CDPP to AGD describing the age determination provisions in the Crimes Act stated:

AFP ask if the crewman will consent to a wrist x-ray. They usually consent. If the report indicates the person is an adult they will be charged as an adult with a DOB consistent with the [x-ray] report.⁶⁰

From the documents before the Commission regarding individual cases, it appears that the practice of allocating a date of birth consistent with the medical practitioner's report on the x-ray occurred in most cases where an individual's exact date of birth was unknown or in dispute. For example, in one case a defence lawyer wrote to the CDPP to ask why his client's date of birth had been listed as 1 January 1991. The individual had previously told authorities he was born in 1995. The CDPP officer replied, 'I understand he was allocated that date as it was consistent with the Doctor's wrist x-ray report'.⁶¹

Some staff in the Office of the CDPP instructed the AFP that it was not consistent with CDPP policy to allocate a date of birth to an alleged offender where his exact date of birth was not known. For example, on 20 January 2011, an officer of the Brisbane Office of the CDPP advised the AFP that, under the Office of the CDPP guidelines, the 'DOB' on the bench charge sheet should be left blank where the date of birth is unknown.⁶² Again in March 2011, the Office of the CDPP advised AFP to leave the date of birth on the charge sheet for a particular individual blank because his exact date of birth was uncertain.⁶³ The Office of the CDPP advised the AFP that it appeared a nominal date of birth had been ascribed to the individual on the basis of the wrist x-ray report and that:

If it's just a nominal date of birth, this is inappropriate and we should properly concede that his exact date of birth is unknown to Australian authorities.⁶⁴

However, it appears that the date of birth on the Prosecution Notice was left blank in very few cases.

In its response to the draft report, the AFP explained that the State Police charging system requires a date of birth to be entered when charges are laid. The AFP then states that 'allocating their claimed date of birth would incorrectly allocate the charge to a children's court which was not consistent with the CDPP approach'.⁶⁵ While this is true, it is also true that allocating a date of birth consistent with the x-ray report is likely to have resulted in children being detained in adult correctional facilities. The preferable approach in the circumstances is clearly that advised by the Office of the CDPP; that is, to make clear that the exact date of birth is unknown.

(b) Individuals whose age is in dispute were ordinarily remanded to adult correctional facilities

As noted above, individuals who were charged as adults were in most cases detained from that time in adult correctional facilities. Applications for bail were generally opposed until mid-2011. This issue is discussed in section 2.4 below.

It appears that DIAC was concerned about the practice of detaining individuals in adult correctional facilities on the basis of wrist x-ray analysis alone. In an internal DIAC email from October 2010 concerning arrangements for transferring people between detention facilities, the following passage appears:

we would be most grateful if you do not move any of the UAM crew off the island until we have met with the AFP to discuss the age determination process. The AFP have been rigid in their interpretation of wrist x-rays. As a result, it is possible that a minor will be placed in prison and we strongly want to avoid this.⁶⁶

As the discussion above demonstrates, young Indonesians were detained in adult correctional facilities because they were not afforded the benefit of the doubt when they said that they were minors.

On 8 April 2011, the Commonwealth received preliminary legal advice from the Office of International Law (OIL) within AGD about the content of the obligations of the CRC as they applied to young Indonesians suspected of people smuggling. In summary, OIL advised that the Commonwealth has an obligation to give individuals who say they are a minor the benefit of the doubt and consequently an obligation to detain them separately from adults. The advice goes on to say that an individual should be detained separately from adults until it is proven that he is not a child.⁶⁷

The holding of an individual who claims to be a child in an adult correctional facility before his age has been determined by a court is directly inconsistent with this advice. No individual who disputed that he was an adult, other than one who was manifestly an adult, should have been held on remand in an adult correctional facility unless and until a court ruled that he was an adult.

It appears that in at least one case from 2010, the Office of the CDPP supported the holding of a young Indonesian whose age was in doubt in an adult correctional facility. In the case of Ali Jasmin (see further Case Study 1 in Appendix 1), the Indonesian Consulate presented a birth certificate to the DIAC office in Western Australia in August 2010 that showed his age as 14 years. DIAC immediately contacted the Office of the CDPP. The Office of the CDPP responded to DIAC to say:

Mr Jasmin should not be released from prison until such time as his age is determined by the Court. ... If the Court determines that he is under the age of 18, then the matter may be remitted to the Children's Court⁶⁸

On 15 September 2010, a DIAC officer contacted the Western Australian Office of the CDPP to express her concern about the risk of continuing to detain a person who may be a minor in an adult facility. The Office of the CDPP responded to her concerns by saying the case would take its normal course and that he would continue to be held in Hakea Prison until the court determined otherwise.⁶⁹

From the documents before the Inquiry, it further appears that even after a court had determined that an individual was not an adult, he may have continued to be held for a period of time in an adult facility. For example, a Judge of the District Court was not satisfied on the balance of probabilities that UPW031 was over 18 at the time of the offence and remitted the matter to Children's Court. UPW031 was remanded in custody.⁷⁰ There is a signed warrant releasing him from Hakea Prison three days later.⁷¹

(c) State and Territory correctional authorities did not receive sufficient information regarding individuals' claims about their age

Individuals charged with Commonwealth crimes who are remanded in custody, and individuals convicted of Commonwealth crimes and sentenced to imprisonment, are detained in State and Territory correctional facilities.

The Joint Commonwealth submission to the Inquiry states that it is the responsibility of State and Territory correctional facilities to ensure that federal prisoners are managed appropriately.⁷² Throughout 2011, this point was repeatedly made in talking points for various Ministers. For example, the Minister's Office Brief for the Minister for Home Affairs and Justice from August 2011 stated that:

The States and Territories are responsible for the management and operation of prisons, including the assessment of each prisoner's security classification and whether it is desirable to physically separate certain classes of prisoners, such as minors.⁷³

The Joint Commonwealth submission also claims that the AFP provides to State and Territory correctional authorities all available information concerning the age claims of an individual who has been charged as an adult but maintains that he is a minor.⁷⁴

This claim was also repeatedly made in 'ministerial talking points' throughout 2011. For example, one talking point stated:

Chapter 7: Some further aspects of the treatment of the young Indonesians

The Australian Federal Police provides State and Territory corrections agencies with information about the age of a person claiming to be a minor to assist those agencies to manage that person appropriately.⁷⁵

Under international law, obligations of the Commonwealth cannot be transferred to the States and Territories. It is the Commonwealth's responsibility to ensure that individuals who say that they were children are afforded the benefit of the doubt and treated consistently with Australia's human rights obligations, including with respect to their place of detention.

Documents provided to the Inquiry demonstrate that the Commonwealth appears in many cases not to have provided information to State and Territory correctional authorities regarding a young Indonesian's claims about his age. Where information was provided, it was often insufficient to enable the correctional authorities to determine the appropriate place of detention for the individual whose age was in dispute.

In one case, for example, an AFP officer recommended that OFD030 be treated as a minor and removed to Indonesia based on the result of an x-ray report (a skeletal age of approximately 18 years) and the policy not to prosecute juveniles unless exceptional circumstances exist.⁷⁶ Four months after the recommendation was made, the AFP sought authority to charge OFD030 and his co-accused as juveniles on the basis that it was not clear who was the captain of the boat and 'if one was to be repatriated the other may then claim the repatriated member was the master'.⁷⁷

Approval to charge the 'alleged juveniles' was given.⁷⁸ In subsequent instructions given to the Officer in Charge of the Brisbane City Watch House, a Federal Agent advised that OFD030 would be charged as an adult.⁷⁹ He was subsequently arrested and charged as an adult and detained in an adult correctional facility. The prosecution against OFD030 was eventually discontinued. He spent 576 days in detention in Australia, 326 of them in an adult correctional facility.

It appears that in some cases the relevant department of corrective services only became aware that a person's age was in dispute after they had been held in adult facilities for some time. For example, on 9 September 2010, the Western Australian Department of Corrective Services contacted DIAC saying that '[a] question has been raised with regard to the actual age of two Indonesians currently in prison custody in Western Australia'. The Department of Corrective Services asked whether the two individuals had been subject to any 'bone density age verification' testing and whether they could be provided the result of those tests.⁸⁰ DIAC forwarded the request to the AFP for action.

Similarly, on 22 October 2010, an internal Office of the CDPP email noted the concerns of New South Wales Corrections that all information relevant to the detention of individuals was not being shared between the various agencies. The email notes that:

advance notice was not given that one individual claimed to be a juvenile. This also caused a degree of angst for LAC, who are obviously concerned about the prospect of a juvenile being housed in an adult facility.⁸¹

In another example, on 26 July 2011, the Queensland Commissioner of Corrective Services wrote to the Secretary of the Commonwealth AGD to convey a request from the General Manager of Arthur Gorrie Correctional Centre for additional verification of age for ten Indonesian prisoners on remand for people smuggling charges. Queensland Corrective Services were seeking an assurance that it was appropriate for those ten individuals to be incarcerated with the adult prison population.⁸²

From these examples it appears that, in some cases, State and Territory correctional authorities were not provided with information about an individual's claims regarding his age.

This issue was recognised by a Senior Assistant Director of the Office of the CDPP who, on 3 March 2011, wrote to the AFP to raise the issue of the provision of information about age to corrective services. The letter noted the importance of providing information concerning a person's age to State and Territory corrective services to assist in the proper management of young Indonesians. The officer stated:

As we have discussed the AFP may consider providing all relevant information that it is able to provide concerning a person's age to DIAC and the relevant corrective services organisations to assist them with the proper management of the crew.

I note that section 3ZQJ(2)(a)(i) allows the disclosure of age determination information obtained under Division 4A of Part 1AA of the *Crimes Act 1914* for a purpose related to the establishing and complying with the rules governing the detention of the person to whom the age determination information relates. It would be important to ensure that the agencies are informed of the limitations of the analysis of wrist x-ray material.⁸³

In some cases it appears that the AFP did inform State and Territory correctional authorities that an individual's age was in dispute, or provided the x-ray report on which they were relying to show that an individual was an adult. However, it appears that the information provided included information about the results of wrist x-rays without explanation of the limitations of this procedure as a means of age assessment.⁸⁴

2.4 Bail

The Joint Commonwealth submission to the Inquiry states that the Office of the CDPP does not generally oppose bail applications by people smuggling defendants who say that they were a minor at the time of the alleged offence.⁸⁵ However, while this seems to be current practice, it appears that this practice was only adopted in July 2011 and not formally communicated to defence lawyers before November 2011.

(a) Bail applications were generally opposed prior to July 2011

The anomaly inherent in the Commonwealth's opposing bail applications made on behalf of young Indonesians charged with people smuggling is highlighted in the submission made by Victoria Legal Aid. This submission notes that defendants in the circumstances of the young Indonesians would ordinarily have a prima facie entitlement to bail in Victoria:

[accused people] in a like situation of no prior convictions, no history of bail breaches, low risk of re-offending and a likely delay to trial of one to two years, would easily achieve bail.⁸⁶

However, until July 2011, the Commonwealth position was generally to oppose bail in all people smuggling matters.

The question of whether bail should be opposed was a contentious issue between Commonwealth agencies during mid-2011. On 6 April 2011, the AFP wrote to the Office of the CDPP to ensure that alleged offenders were housed in the most appropriate detention facility for their age. Accordingly, the AFP proposed that in circumstances where a person had been charged as an adult but maintained that they were a minor, the Office of the CDPP should make an application to have him bailed into immigration detention until his age was determined by the court. DIAC supported this proposal.⁸⁷

The Office of the CDPP identified a number of potential risks that could arise from the granting of bail to defendants who said that they are children.⁸⁸ Despite their concerns, the Office of the CDPP agreed to individuals whose age was in dispute being bailed into immigration detention pending the outcome of an age determination hearing. The CDPP officer noted that the obligation to apply for bail rests with the defendant and proposed:

It would seem the most appropriate course would be for this Office in each of the matters where there is an age determination dispute, to contact the relevant defendant's legal representative and inform them that should an application for bail be made it would not be opposed on the basis that the person would be bailed to immigration detention and noting that the position in relation to the person being an adult is still maintained.⁸⁹

However, at this time AGD did not support the proposal to facilitate the granting of bail to defendants whose age was in dispute. AGD was concerned that granting bail in a particular matter in which the defendant maintained he was a minor in the face of a 'strong set of facts (the wrist x-ray)' would weaken arguments against bail in people smuggling matters more generally.⁹⁰

AGD maintained this stance despite having received on 8 April 2011 preliminary advice from OIL on Australia's obligations under the CRC, which included the conclusion that an person claims to be a child then they should be given the benefit of the doubt that they are in fact a child and that detention should be used as a measure of last resort and for the shortest appropriate period of time.⁹¹

On 14 April 2011, the AFP wrote directly to AGD to question whether it is appropriate to hold a defendant who says that he is a child on remand in an adult correctional facility before a court has determined his age. The AFP informed AGD that, in their opinion, an immigration detention facility would 'provide more appropriate interim accommodation'.⁹² The AFP contacted the Office of the CDPP at the same time to request that they contact each relevant defendant's legal representative to inform them that if a bail application was made, it would not be opposed on the basis that the individual would be bailed into immigration detention.⁹³

On 18 April 2011, the Deputy Director of the Perth Office of the CDPP stated that:

The current practice of opposing bail remains the CDPP position until the current consultations with all other stakeholders in particular the AGD, DIAC and AFP is completed.⁹⁴

At this time, the Senior Assistant Director of the Office of the CDPP noted that one potential concern with bailing young Indonesians into immigration detention was that they may have to be moved interstate in order to be housed in an appropriate detention facility and that this may interfere with an individual's contact with his legal representative.⁹⁵

This concern was shared by Legal Aid NSW in its submission to the Inquiry. Legal Aid NSW noted that:

DIAC has advised Legal Aid NSW practitioners that it could not guarantee where the young people would be held if granted bail. They have alternatively advised Legal Aid NSW practitioners that the young person would be moved to Darwin. Legal Aid NSW understands that DIAC have nowhere in Sydney to house unaccompanied young people. ... For these reasons, so far as Legal Aid NSW is aware, no bail applications have been made for individuals charged with people smuggling who claim to be under 18. DIAC should ensure that it is able to house young people who are charged and claim to be under 18 in appropriate community detention in the capital city where they are being tried.⁹⁶

On 2 May 2011, the Criminal Justice Division of AGD received formal advice from OIL about Australia's obligations under the CRC in relation to the apprehension, detention, charge, bail and prosecution of individuals whose age is in dispute. The advice confirmed the preliminary advice given on 8 April 2011 and, in relation to bail, advised that if alternative measures to detention have not been considered there will be a conflict with Australia's obligation to detain children only as a measure of last resort.⁹⁷

In May 2011, a DIAC officer advised an AGD officer that it was DIAC's view that immigration detention should not be used to provide ongoing accommodation for defendants who have been bailed by the court. DIAC would nevertheless facilitate the appropriate accommodation of individuals who were bailed into immigration detention.⁹⁸

(b) Bail applications were generally not opposed from July 2011 onwards

It appears that bail was first granted without opposition from the Commonwealth in mid-June 2011. In one matter heard in Melbourne, bail was granted unopposed on 16 June 2011.⁹⁹ In another three matters heard together in Brisbane, bail was granted unopposed on 17 June 2011.¹⁰⁰ In a further matter heard in Brisbane, bail was granted unopposed on 12 July 2011.¹⁰¹

On 28 June 2011, a minute was sent to the Commonwealth Director of Public Prosecutions discussing the issue of bail in people smuggling matters. The memo set out the position of the Office of the CDPP on bail in people smuggling matters and noted that the Office of the CDPP could continue to justify opposing bail in people smuggling matters generally, notwithstanding that the basis for opposing bail is tenuous, particularly given that defendants will be bailed into immigration detention. However, given the increasing number of crew who were challenging their age and seeking bail, the memo suggests that the Office of the CDPP adopt a different position for people smuggling crew who say that they are children. The minute recommended:

In matters where a defendant disputes that they are an adult and provides material to support this or there is otherwise some concern that the person may not be an adult, then if the defendant seeks bail this Office should not oppose bail until such time as a Court finds that the person is an adult.¹⁰²

On 4 July 2011, the position proposed in the minute was approved by the Director.

On 5 July 2011, the Office of the CDPP informed AGD that the Director had approved a new position in relation to bail for individuals suspected of people smuggling whose age is in doubt and that bail would not be opposed for those individuals until such time as a court finds them to be an adult.¹⁰³

Documents before the Commission suggest that the Office of the CDPP did not immediately make its position on bail for young Indonesians public.¹⁰⁴ Certainly, in its submission to the Inquiry, the Northern Territory Legal Aid Commission stated that it was not aware of the policy of the Office of the CDPP not to oppose bail where age is in dispute.¹⁰⁵

It further appears that in some cases bail continued to be opposed after the Office of the CDPP adopted the position not to oppose bail where age was in dispute. For example, in the matter of ENO029, the Office of the CDPP received submissions from a defence lawyer on 22 July 2011 stating that his client was 16 years old, that the prosecution against him should be discontinued and that they would be making a bail application. An internal email suggests that the Office of the CDPP response was to indicate that the prosecution would not be discontinued and that bail would be opposed.¹⁰⁶ On 15 August 2011, the defence lawyer sent a birth certificate to the Office of the CDPP indicating that ENO029 was under 18 years of age.¹⁰⁷ On receipt of the birth certificate, the CDPP indicated to the defendant's solicitors that bail would not be opposed.¹⁰⁸

On 19 August a Minute was provided to the Commonwealth Director of Public Prosecutions recommending that the prosecution be discontinued. The Director approved the Minute on that same day.¹⁰⁹ The same CDPP officer who had earlier suggested that bail be opposed recommended that the prosecution against ENO029 be discontinued as it was not in the public interest to proceed. He reported:

I have also seen [ENO029] and my immediate reaction was that he could not possibly be over 18. The photo attached to the submission, if anything, possibly makes him look a little older than seeing him in the flesh.¹¹⁰

ENO029 spent 546 days in detention in Australia – 383 of them in an adult correctional facility.

The issue of bail for individuals whose age was in dispute was discussed on 3 November 2011 at a meeting between the Department of Foreign Affairs and Trade and Indonesian Embassy officials. At that meeting, the Indonesian officials requested that individuals be bailed into immigration detention in all cases where age is in dispute.¹¹¹ In a subsequent discussion, AGD advised that, while the Commonwealth does not generally oppose bail where crew say they are minors, this is not a policy setting that has been announced.¹¹²

Following the decision in *R v RMA*, in which a District Court Judge preferred the evidence of Professor Cole over Dr Low, the Office of the CDPP decided to write to the representatives of all defendants in people smuggling matters where age was in dispute to advise them that bail applications would not be opposed. All legal officers at the Office of the CDPP responsible for people smuggling matters where age was in dispute were instructed to write to defendants' legal representatives in the following terms:

We note that your client is in the process of claiming that he was a juvenile at the time the alleged offence occurred and that no bail application has been made on his behalf. As a result your client has remained on remand rather than in immigration detention.

You would be aware that this Office has as a matter of practice normally not opposed bail in circumstances where defendants in people smuggling matters are claiming that they were juveniles at the time of the offence.

We suggest that your client considers making an application for bail in light of the above practice. As you are aware a bail application can be brought on at any time.¹¹³

From the documents before the Commission, it appears that the defendant's legal representatives were informed of the change in position in relation to bail soon after this instruction was sent to officers at the Office of the CDPP.

3 Guardianship

Individuals suspected of people smuggling offences who are under the age of 18 (other than those accompanied by an immediate family member) do not have a legal guardian while they are detained in Australia. This is because the *Immigration (Guardianship of Children) Act 1946* (Cth), which provides that the Minister for Immigration and Citizenship is the guardian of unaccompanied non-citizen children, applies only to children who intend to become permanent residents of Australia.¹¹⁴ This means that for minor crew, who do not intend to stay in Australia permanently, no-one has legal responsibility for ensuring that their best interests are considered at all times. The Commission President raised this issue with the then Attorney-General in correspondence of 17 February 2011. At the Inquiry hearing, a senior AGD officer admitted that AGD did not act immediately on this concern, but subsequently had discussions with OIL and with DIAC.¹¹⁵ Advice was also sought from OIL regarding the *Vienna Convention on Consular Relations* after the Indonesian Embassy raised the possibility of Consular officials acting as guardians of young Indonesians in Australia.¹¹⁶ However, it does not appear that any steps have been taken to provide individuals suspected of people smuggling who say that they are minors with guardians.

As discussed in Chapter 1, the principle of the benefit of the doubt means that if there is a possibility that an individual is a child, then he or she should be treated as such. Further, if there is a possibility that a person is a child, he or she has the right to receive special care and protection, including through the appointment of a guardian.¹¹⁷

The role of a guardian is to ensure that the best interests of the child are considered at all times. For the guardian of a child suspected of people smuggling, this includes ensuring the child's best interests are considered in decisions about how he is treated while in detention as well as how he is treated during the investigation and prosecution processes.

The Australian Children's Commissioners and Guardians in their submission to the Inquiry argued that it is important that young people suspected of people smuggling offences have access to an independent guardian to ensure that their best interests are considered in all decisions that affect them. They stated:

To protect the best interests of young people suspected of people smuggling, access to an independent guardian appointed with statutory responsibilities for ensuring the protection of their rights and to monitor their treatment and wellbeing is important. Any appointment of a guardian however should not be considered a substitute for the provision of early access to legal advice, assistance and representation, particularly as the age assessment process has significant ramifications in a criminal law context.¹¹⁸

In principle, the Commission believes that all children in Australia who are separated from their parents should be provided with an independent guardian to ensure the protection of their

best interests. This is especially the case where individuals who say that they are children face investigation and potential prosecution for criminal offences.

In most, but not all, cases, a young Indonesian suspected of people smuggling who said that he was a child was provided with the support of an independent adult during his interviews with the AFP. As set out in Chapter 4, the independent adult was ordinarily a representative from the NGO Life Without Barriers. Life Without Barriers representatives have no legal advocacy responsibilities under the contract between Life Without Barriers and DIAC; they are essentially passive observers in the interview process.¹¹⁹

As set out in Chapter 4, the Commission does not view the support provided by the independent adult to young Indonesians during the process of providing consent to have been of the standard that a guardian would be expected to provide.

Moreover, it appears that the support provided by the independent adult during an individual's interview with the AFP for the purpose of the investigation of a people smuggling offence was also not of the standard that a guardian would be expected to provide.

Although the interviewees were offered the opportunity to contact a lawyer, it appears from the documents before the Commission that a large proportion of them elected not to speak to a lawyer before continuing with the AFP investigation interview. The Commission is not aware of any case in which the Life Without Barriers representative advised the child to speak to a lawyer before participating in the AFP investigation interview. As a result, many of these individuals did not speak to any adult who could represent their best interests, or advise them about criminal procedures in Australia, until after they were charged by the AFP as an adult and became entitled to a grant of legal aid. It is reasonable to expect that a legal guardian would be more proactive in encouraging a young person who was being detained for the purpose of a criminal investigation to obtain legal advice at the earliest possible stage. In situations where young people are being investigated and prosecuted for serious criminal offences, it is important that they are provided with a legal guardian who can advocate for the protection of their best interests.

4 Legal advice and assistance

The Joint Commonwealth submission to the Inquiry observes that legal aid funded lawyers are responsible for providing legal advice and representing people smuggling crew in court. The submission states that:

This includes providing advice, both prior to charging and while before the court, on whether to raise age as an issue and the most appropriate way to do so.¹²⁰

Records provided to the Commission indicate that young Indonesians suspected of people smuggling are initially offered access to legal assistance when first interviewed by the AFP. This interview is usually for the purposes of obtaining consent for a wrist x-ray to be taken. At the beginning of each interview of this kind the individual is ordinarily advised of his right to communicate with a legal practitioner. In many cases, individuals said that they did not wish to speak to a lawyer at that time.¹²¹ It appears that where individuals did speak to a lawyer, they generally still consented to the wrist x-ray procedure.

If the investigation continues, individuals are ordinarily offered an opportunity to participate in an interview with the AFP as part of the investigation process. The documents provided to the Commission indicate that crew are also routinely offered access to legal assistance at the commencement of interviews of this kind. In many cases, individuals have said that they did not wish to speak to a lawyer at that time. Documents provided to the Inquiry indicate that the crew who ask to speak with a lawyer normally refuse to participate in the AFP interview.

In both of the situations described above, access to legal assistance appears to be obtained through a telephone call to the local legal aid office.

The submission by the Northern Territory Legal Aid Commission discussed the legal aid grant process. It reported that individuals who are being held in immigration detention pending investigation of criminal charges are able to contact a legal aid lawyer for preliminary and simple legal advice, including advice about:

- participating in AFP interviews
- the process of consenting to using a wrist x-ray to determine age
- the status of the AFP investigation into their alleged offence.¹²²

Legal aid agencies expressed concern to the Commission about the point in time at which legal assistance is provided. While it is open for an individual to seek one-off legal advice from a legal aid agency at any time, a grant of legal aid (which means a lawyer is allocated to represent an individual) is generally not made until criminal charges have been laid.

Legal Aid NSW and Legal Aid Queensland both submitted that suspects should be provided with legal advice prior to participating in DIAC entry interviews or DIAC age assessment interviews.¹²³ Legal Aid Queensland submitted that this is because such interviews have been relied upon by the Office of the CDPP in age determination hearings.¹²⁴

The Northern Territory Legal Aid Commission also expressed concern that DIAC interviews may have a significant impact on the way in which an individual is treated, yet:

there is no obligation to caution a person or provide access to legal advice prior to participating in these interviews. This is significant as the interview may form the basis of the type of detention in which the person is held, whether or not charges are laid and ultimately there is the potential for them to be used in court in age determination proceedings.¹²⁵

Similarly, Legal Aid Queensland submitted that legal assistance should be provided prior to any interview by a DIAC officer which raises questions about a person's age.¹²⁶

Legal Aid NSW also identified a need for individuals suspected of people smuggling whose age is in issue to receive legal advice very early in the investigation process. It submitted:

Immediate advice for all people suspected of people smuggling is essential so that lawyers can obtain instructions about their age. If they are under 18, lawyers need to be able to advise them on the risks and benefits of wrist x-rays and assist in obtaining age documentation, like Family Cards and affidavits from parents as early as possible.¹²⁷

Commission staff members assisting the Inquiry met a number of individuals who have been convicted of people smuggling who say that they were children when they were apprehended. Many of those individuals told them that they remembered a long time passing between the time they arrived and the time they first spoke to a lawyer. Most said that the first time they remembered speaking to a lawyer was after they had been charged and detained in prison; usually about one year after arriving in Australia.¹²⁸

The Commission is concerned that, in some cases, there were significant delays in young Indonesians being provided with a grant of legal aid after being charged with people smuggling. For example, four young Indonesians who had been remanded to an adult correctional facility on 17 October 2009 had still not been granted legal aid on 2 November 2009.¹²⁹

5 Crew may be victims of trafficking

The circumstances of many of the young Indonesians suspected, or convicted, of people smuggling offences suggest that they may have been deceptively or forcibly recruited to work as crew on boats bringing asylum seekers to Australia.

5.1 What is people trafficking?

Trafficking in persons involves the physical movement of people across and within borders through deception, coercion or force for the purpose of exploitation.¹³⁰ Deceptive or coercive means includes the threat or use of force, fraud and abuse of power or a position of vulnerability.¹³¹ Exploitation means conduct serious enough to be described as sexual exploitation, forced labour, slavery or equivalent practices.¹³²

5.2 The legal framework around trafficking in Australia

The Australian Government has made a commitment to combat trafficking in persons and to provide victims with appropriate support.¹³³

Australia has international obligations to prevent trafficking in persons. Australia ratified the international protocol to prevent trafficking in 2005.¹³⁴ Additionally, the CRC, to which Australia is a party, calls on State parties to take all appropriate measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.¹³⁵

Australia has passed legislation to create a range of people trafficking offences, including a specific offence of trafficking in children. These offences are found in Division 271 of the Commonwealth *Criminal Code*.

In a November 2010 statement to Parliament, the then Minister for Home Affairs and Justice, who led the whole-of-government anti-people trafficking strategy, described trafficking in persons as a 'heinous crime which involves serious contraventions of human rights'.¹³⁶

5.3 The experiences of young Indonesians suspected of people smuggling offences

As discussed in Chapter 1, many of the young Indonesians who work on boats that bring asylum seekers to Australia are recruited from conditions of poverty, have low levels of education and have experienced frequent periods of unemployment, taking up work as an opportunity arises.

It appears from the documents before the Commission, and from the interviews between members of Commission staff and individuals convicted of people smuggling, that many of the young Indonesians the subject of this Inquiry were recruited to work on boats bringing asylum seekers to Australia without knowing the purpose of their journey or that their final destination was to be Australia.

Many individuals who have been investigated and prosecuted for people smuggling offences in Australia appear to have been told that they would be transporting cargo, such as rice or fruit, around Indonesian islands or that they would be taking tourists on a tour of the Indonesian archipelago.¹³⁷ Some individuals report asylum seekers being brought onto the boat some distance from the shore in the middle of the night.¹³⁸ Many of the young Indonesians said that at that point in time there was no alternative but to stay on the boat that eventually came to Australia.¹³⁹ In his interview with the AFP, OSB051 said:

I was looking for a boat in order to get a job to bring timber, to transport timber, but I couldn't find a job. ... He said, Do you want to work with me? He said, If you want to work with me four days, I'll give you a million. ... So I, I said to him, One million for four days. What am I going to do? And he said, We'll be transporting rice. Then he told me to get down on the boat and so I waited from the early evening to late night and the rice did not arrive. So, because I was watching over on that boat then, from early, then I went to sleep. So when we left they did not wake me up. And then, in the middle of the night, I woke up and I went aft and there were a lot of people there. I asked the captain, Where are we going? And the captain was silent, did not answer and I said, You know, they said they would take rice and suddenly there are all those people. So I was scared because there were a lot of people. So I started to cry. So they wanted me to be the cook. So for four days, so, so from, until two o'clock in the morning. ... I thought that we arrived in Sumba – that's another island – because that journey had taken four, four days and I thought we had arrived from Sumba. Then they, they ordered me to put the anchor down. I put the anchor down and there were lights there and I thought we were in Sumba. Then about seven o'clock in the morning suddenly there was the navy and I was scared and I was crying. Then we took us up on the big boat and they, or, or Roger(?) did brought the people here and I said, Yes, I was wrong and I was also cheated by those people. So that was my experience.¹⁴⁰

Some individuals report having been threatened by the captain of the boat, or being left on the boat to travel to Australia when other crew members got off before reaching Australian waters.¹⁴¹ In a memo recommending a prosecution be discontinued, the Office of the CDPP described what one passenger said had happened to the youngest crew member on the boat that had brought him to Australia. He reported:

In the statement of [a passenger] dated 7 January 2011, he noted that there were originally 5 crew members, but that the 'Captain' and 'Mechanic' got off the vessel near Roti Island. He stated that his son was able to speak Indonesian and that the youngest crew member [name] was 'crying and asking the Captain to let him get off as well but the Captain wouldn't let him'. ... He advised that when the two crew got off the vessel at Rote, the youngest crew member started crying. He said the two crew members were speaking softly to the young crew member and that the young crew member was crying softly. ... He said his son told him that the boy was saying he wanted to get off, but the Captain and Mechanic who were leaving the vessel wouldn't let him. ... [T]he boy said he wanted to get off the vessel, but he was told he had to keep travelling with the passengers.¹⁴²

Although most are promised significant sums of money in return for their labour, many individuals report that they were not paid a wage for their work. Alternatively, they report being promised that any payment would be made on their return to Indonesia.¹⁴³

These circumstances suggest the possibility that at least some young Indonesians who have crewed boats bringing asylum seekers to Australia are victims of trafficking. While some individuals may not have told the truth about the extent of their knowledge of the purpose of their trip, or about their experiences on the journey, it seems unlikely that they have all been untruthful.

6 Findings

6.1 Findings regarding Criminal Justice Stay Certificates

A decision to issue or grant a CJSC is made by a delegate of the Attorney-General. However, it appears that in the cases under consideration by this Inquiry, the decision to issue or cancel a CJSC was made largely on the basis of the opinion of the investigating or prosecuting agency as to whether a CJSC was required.

For most of the period of time under consideration by this Inquiry, it appears that there was no formal system in place for conducting a systematic review of all CJSCs that were in force. In particular, it appears that there was no systematic review of whether each individual subject to a CJSC continued to be required in Australia for the purpose for which the certificate had been issued. Some individuals remained in detention in Australia for significant periods of time after a decision had been made that they were no longer required for the purpose of investigating or prosecuting a criminal offence. A system of regular and frequent review of CJSCs that are in force should reduce the likelihood of errors of this kind occurring.

6.2 Findings regarding the place and length of detention

Many young Indonesians suspected of people smuggling spent prolonged periods of time in immigration detention facilities, either prior to the making of a decision that they should not be prosecuted, or prior to their being charged with an offence. In some cases this was because it took a significant amount of time for an x-ray of their wrist to be taken. In others, the length of the AFP investigation process affected the time an individual spent in immigration detention prior to charge.

Many young Indonesians suspected of people smuggling spent a significant amount of time in adult correctional facilities after being charged and before ultimately having the prosecution against them discontinued. Many of them were remanded in adult correctional facilities before their age had been determined by a court. Often this was as a result of the AFP assigning an individual a date of birth based on wrist x-ray analysis, even where the exact date of birth was unknown or in dispute. Once a date of birth had been assigned, it does not appear that State and Territory correctional authorities were provided sufficient information about the dispute regarding an individual's age, including specific information about the limitations of wrist x-ray analysis for determining age, to ensure that individuals were placed in correctional facilities appropriate for their age.

In a large number of cases in which age was in doubt, ultimately a decision was made to discontinue the prosecution because the Commonwealth considered it unlikely that the court would find, on the balance of probabilities, that the individual was over 18 years of age at the time of the offence. It is a reasonable conclusion that a significant proportion of these individuals were in fact under 18 years of age at the time of their apprehension. Many young Indonesians in this situation spent prolonged periods of time in adult correctional facilities.

6.3 Findings regarding bail

It appears that many young Indonesians suspected of people smuggling whose age was in doubt spent a significant amount of time in adult correctional facilities partly because, until July 2011, Commonwealth policy was to oppose applications for bail made in these circumstances. Although, from July 2011, the Commonwealth no longer opposed bail in people smuggling matters where age was in dispute, this change in policy was not announced or communicated to legal representatives until November 2011. As a result of this, many individuals remained in detention in adult correctional facilities for a prolonged period of time before their age had been determined by a court or their case brought to trial.

6.4 Findings regarding guardianship

Young Indonesians suspected of people smuggling, and unaccompanied by any adult who is able to act as their guardian, do not have a guardian in Australia. Consequently, no independent adult is charged with ensuring that their best interests are considered and protected in all decisions and actions concerning them.

6.5 Findings regarding legal advice and assistance

Although young Indonesians suspected of people smuggling whose ages were in doubt were routinely offered an opportunity to speak with a lawyer prior to providing their consent to a wrist x-ray procedure, it appears that in a significant number of cases they did not do so.

Many advocates have argued that access to legal advice should be provided prior to participation in a DIAC age assessment interview. However, the Commission has accepted the submission of DIAC that there will be cases where this is not necessary, for example in the case of an obviously young child who is to be promptly removed to Indonesia.¹⁴⁴ A requirement that legal advice be provided before a DIAC age assessment interview in these circumstances may prolong the individuals detention. However, legal advice should be provided prior to any age assessment interview intended to be relied on in a legal proceeding.

In some cases, there were substantial delays between the time an individual was charged with a people smuggling offence and the time that he was provided with a grant of legal aid.

As discussed in section 3 above, young Indonesians suspected of people smuggling do not have a legal guardian in Australia. The effect of this has been that until they have been charged and receive a grant of legal aid, they have no independent adult representing their best interests during the investigation or prosecution processes.

6.6 Findings regarding trafficking

It appears to the Inquiry that some young Indonesians who arrive as crew on boats bringing asylum seekers to Australia may be victims of trafficking. As such, they should be treated as victims of crime and supported appropriately.

¹ *Migration Act 1958* (Cth), s 189(3).

² *Migration Act 1958* (Cth), s 189(3).

³ *Migration Act 1958* (Cth), s 196(1).

⁴ *Migration Act 1958* (Cth), ss 250(1)–(3). But see Human Rights Council of Australia, Submission 39, p 4.

The Human Rights Council of Australia argues that there is doubt as to whether s 189 of the *Migration Act* can permit a person to be detained in immigration detention for the purpose specified in s 250(3). The Commission has not sought to evaluate this argument.

⁵ *Migration Act 1958* (Cth), s 198(1).

⁶ *Migration Act 1958* (Cth), s 147.

⁷ *Migration Act 1958* (Cth), ss 143, 147(1)(b)(iii).

⁸ *Migration Act 1958* (Cth), ss 147, 150.

⁹ *Migration Act 1958* (Cth), ss 155(2), 157(a), 158.

¹⁰ *Migration Act 1958* (Cth), s 161(2)(b).

¹¹ Principal Legal Officer, AGD, Email to Director, Human Rights Unit, Australian Human Rights Commission, 2 April 2012.

¹² Assistant Secretary, International Crime Cooperation Division, AGD, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 147. See also *Migration Act 1958* (Cth), s 147(1)(b)(iii).

¹³ Principal Legal Officer, AGD, Email to Director, Human Rights Unit, Australian Human Rights Commission, 2 April 2012.

¹⁴ Criminal Justice Stay Certificate, AGD, 13 August 2010 (JAM074 – AFP document 1); Biodata form, DIAC, 2 July 2010 (JAM074 – DIAC document).

¹⁵ Team Leader, Christmas Island Detention Operations, DIAC, Email to Team Leader, People Smuggling Strike Team, DIAC, 20 October 2010 (JAM074 – DIAC document mail39646050).

¹⁶ Consent to carry out a prescribed procedure (wrist x-ray) – individual, AFP, 21 December 2010 (JAM074 – AFP document 7).

- ¹⁷ Criminal Justice Stay Certificate, AGD, 16 February 2010 (TRA029 – AFP document 2); Consent to carry out a prescribed procedure (wrist x-ray) – individual, AFP, 2 March 2010 (TRA029 – AFP document 4).
- ¹⁸ *Migration Act 1958* (Cth), s 162(1). See also Assistant Secretary, International Crime Cooperation Division, AGD, Transcript of hearing, Public hearing for Commonwealth agencies (20 April 2012), p 147.
- ¹⁹ Principal Legal Officer, AGD, Email to Director, Human Rights Unit, Australian Human Rights Commission, 2 April 2012.
- ²⁰ National Manager Crime Operations, AFP, Letter to First Assistant Secretary, Criminal Justice Division, AGD, 7 September 2010 (AFP document provided 5 April 2012).
- ²¹ First Assistant Secretary, Criminal Justice Division, AGD, Letter to National Manager Crime Operations, AFP, 20 September 2010 (AFP document provided 5 April 2012).
- ²² Principal Legal Officer, AGD, Email to Director, Human Rights Unit, Australian Human Rights Commission, 2 April 2012.
- ²³ Assistant Secretary, International Crime Cooperation Division, AGD, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 152.
- ²⁴ Assistant Secretary, International Crime Cooperation Division, AGD, *Transcript of hearing*, Public hearing for Commonwealth agencies (20 April 2012), p 152.
- ²⁵ Federal Agent, AFP, Case Note – Decision not to prosecute, 26 November 2010 (NOK040 – AFP document 1).
- ²⁶ Federal Agent, AFP, Case Note, 10 February 2011 (NOK040 – AFP document 2).
- ²⁷ *[BAI031] v Minister for Immigration & Citizenship* [2011] NTSC 45, [23].
- ²⁸ Human Rights Law Centre, Submission 34, p 4.
- ²⁹ *[BAI031] v Minister for Immigration & Citizenship* [2011] NTSC 45, [22].
- ³⁰ Director, Enforcement & Citizenship Litigation Section, DIAC, ‘CJSC for SIEV Crew – Process Paper’, 15 December 2009, Attachment – Email from Director, Enforcement & Citizenship Section, DIAC, to Federal Agent, AFP, 10 May 2011 (DIAC document mail39645896).
- ³¹ DIAC document mail39645896, above.
- ³² DIAC document mail39645896, above.
- ³³ Senior Assistant Director, Legal and Practice Management and Policy Branch, CDPP, Email to Director, CDPP, 18 November 2010 (CDPP document 3 – Attachment D).
- ³⁴ CDPP document 3 – Attachment D, above.
- ³⁵ Senior Assistant Director, Legal and Practice Management and Policy Branch, CDPP, Email to the AFP, DIAC and AGD, 11 May 2011 (DIAC document mail39645896).
- ³⁶ Senior Assistant Director, Legal and Practice Management and Policy Branch, CDPP, Email to the AFP, AGD and DIAC, 15 June 2011 (AGD document PROS-42).
- ³⁷ *Convention on the Rights of the Child* (CRC), art 37(b). At <http://www2.ohchr.org/english/law/crc.htm> (viewed 9 July 2012).
- ³⁸ Senior Legal Officer, Office of International Law, AGD, Letter to Principal Legal Officer, People Smuggling and Border Protection Section, AGD, 2 May 2011, Attachment – Email from Officer, Border Management and Crime Prevention Branch, Criminal Justice Division, AGD, 4 May 2011 (AGD document PROS-27), pp 1–2, 4.
- ³⁹ Consent to carry out a prescribed procedure (wrist x-ray) – individual, AFP, 21 December 2010 (OTF049 – AFP document 4); Federal Agent, AFP, Case Note, 22 December 2010 (OTF049 – AFP document 6).

Chapter 7: Some further aspects of the treatment of the young Indonesians

- ⁴⁰ Federal Agent, AFP Brisbane Office, Case Note, 14 February 2011 (YAL048 – AFP document 10); Federal Agent, AFP Brisbane Office, Case Note, 18 February 2011 (YAL048 – AFP document 11).
- ⁴¹ Consent to carry out a prescribed procedure (wrist x-ray) – individual, AFP, 18 May 2011 (GRD044 – AFP document 4); Federal Agent, AFP Canberra Office, Case Note, 25 May 2011 (GRD044 – AFP document 8).
- ⁴² Consent to carry out a prescribed procedure (wrist x-ray) – individual, AFP, 12 November 2010 (CRO033 – AFP document 6); Federal Agent, AFP, Case Note, 1 December 2010 (CRO033 – AFP document 9).
- ⁴³ See for example, Acting Assistant Secretary, Immigration Intelligence Branch, DIAC, Email to DIAC Officers, 28 November 2010 (DIAC document mail39646078); Commonwealth agencies meeting on people smuggling crew issues supporting the Senior Officials’ Committee teleconference, Minutes and Outcomes, 20 May 2011 (AGD document PROS-39).
- ⁴⁴ See for example, Acting Assistant Secretary, Immigration Intelligence Branch, DIAC, Email to Deputy Project Leader, Community Detention Implementation, DIAC, 21 November 2010 (DIAC document mail39646098); AGD document PROS-39, above.
- ⁴⁵ Human Rights Council of Australia, Submission 39, p 4; Human Rights Law Centre, Submission 34, p 5.
- ⁴⁶ Victoria Legal Aid, Submission 13, p 15.
- ⁴⁷ Edwina Lloyd, Submission 29, p 5. The real name of this individual was changed in the submission provided to the Inquiry.
- ⁴⁸ Victoria Legal Aid, Submission 13, p 16.
- ⁴⁹ Victoria Legal Aid, Submission 13, p 16.
- ⁵⁰ Legal Aid NSW, Submission 35, p 11.
- ⁵¹ Australian Government, Joint submission, Submission 30, pp 22–23.
- ⁵² AFP, Response to draft report, 6 July 2012, pp 14–15.
- ⁵³ AFP, Response to draft report, 6 July 2012, pp 16–17.
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Chapter 8:

Findings and recommendations

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1 Introduction

The major finding of this Inquiry is that Australia's treatment of individuals suspected of people smuggling offences who said that they were children has led to numerous breaches of both the *Convention on the Rights of the Child* (CRC) and the *International Covenant on Civil and Political Rights* (ICCPR).

The specific findings with regard to each of the issues considered during this Inquiry are detailed at the end of each chapter. This final chapter draws on each set of specific findings to assess whether the system of treatment of the young Indonesians suspected of people smuggling who said that they were children breached Australia's international human rights obligations.

In conducting this Inquiry the Commission has inquired into the acts and practices of the Commonwealth. This is because it is Australia that is the State party to the CRC and the ICCPR. For this reason, the findings make broad reference to the Commonwealth. However the Commission recognises that each of the Commonwealth agencies whose acts and practices have been considered by this Inquiry have a specific role. In general terms those roles are as follows:

- the Department of Immigration and Citizenship (DIAC), is responsible for the individuals while they are in immigration detention, and may assess age for the purpose of determining an appropriate place of detention
- the Australian Federal Police (AFP), is responsible for investigating potential charges of people smuggling and for deciding whether charges are laid
- the Office of the Commonwealth Director of Public Prosecutions (Office of the CDPP), is responsible for prosecuting alleged offences of people smuggling
- the Attorney-General's Department (AGD), has broad responsibility for law enforcement policy.

The Commission notes in particular that DIAC has no role in the investigation or prosecution of people smuggling matters and has little control over the amount of time an individual suspected of people smuggling spends in immigration detention.

2 Failure 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

A major finding of this Inquiry is that the principle of the benefit of the doubt was not afforded to individuals who said that they were children. For Australia to meet its obligations under the CRC,

an individual who says that he or she is a child ought to be given the benefit of the doubt and treated as a child unless or until it is conclusively shown that he or she is not a child.

It is a finding of this Inquiry that the Commonwealth ordinarily assumed that an individual was either an adult or a child. However, the principle of the benefit of the doubt requires the authorities to recognise that there will be three categories of individuals: those who they can be satisfied are adults; those who they can be satisfied are minors; and those about whose age there is reasonable doubt. It is that last category of individuals who must be given the benefit of the doubt – individuals whose age is in doubt should be treated as children.

The individuals whose experience was considered by this Inquiry, young Indonesians who said that they were children, were not afforded the benefit of the doubt. Instead:

- They were routinely subjected to a wrist x-ray (in some and possibly all cases without the required consents having been obtained), a biomedical age assessment procedure that was called into question in 2001 and has now been shown to be uninformative of whether an individual has reached 18 years of age.
- If the wrist x-ray analysis showed that they were skeletally mature, they were charged as an adult and in the vast majority of cases then detained in an adult correctional facility regardless of whether they continued to maintain that they were under 18 years of age.
- Individuals were charged as adults even when wrist x-ray analysis was inconclusive, directly in contravention of stated Australian Government policy.
- Individuals were charged and prosecutions continued even when there was other material available that indicated that an individual might be a child, including documentary evidence and the results of DIAC age assessment interviews.

There is a clear understanding that the principle of the benefit of the doubt requires that, if there is a doubt about whether a person who is subject to a criminal proceeding is a child, he or she must be treated as a child. In the context of the young Indonesians suspected of people smuggling this did not occur.

The failure to give individuals who said that they were children the benefit of the doubt was compounded by the fact that wrist x-ray analysis is uninformative of whether an individual has reached 18 years of age.

Until very recently, Commonwealth agencies placed reliance on wrist x-ray analysis as evidence that a person was over the age of 18 years – despite significant material being available to support the conclusion that they should not do so. This reliance meant that:

- The AFP continued to use wrist x-ray analysis to inform decisions about whether to charge young Indonesians who said that they were children beyond the point in time at which they became aware that serious questions had been raised regarding this method of age assessment.
- The Office of the CDPP continued to adduce wrist x-ray analysis as evidence of age in legal proceedings beyond the point in time at which they were, or should have been, aware that serious questions had been identified about the reliability of the evidence being adduced from their preferred expert witness.
- The Office of the CDPP failed to disclose to defence counsel material of which it was aware that undermined the credibility of expert evidence proposed to be adduced by it.
- Together, the Commonwealth agencies failed to undertake adequate consultation with appropriately qualified experts, including medical experts, regarding the use of wrist x-ray analysis for age assessment purposes. They continued to rely on the opinions of an individual radiologist when faced with expressions of concern by the President of the Royal Australian and New Zealand College of Radiologists and the leadership of a number of other medical colleges whose membership had relevant expertise.
- AGD did not provide either Attorney-General McClelland or Attorney-General Roxon with even a précis of the scientific material critical of the use of wrist x-rays. While the 'improved age assessment process' introduced in July 2011 did provide some alternative methods of age assessment, these were either insufficiently informative of age, or not implemented. At no time does it appear that AGD provided either the former or the current Attorney-General with advice that wrist x-ray analysis was not fit for the purpose of assessing whether an individual is over the age of 18 years.

These failures resulted in the ongoing use of an age assessment procedure that is not informative of whether a person has reached 18 years of age, well past the time that each of these agencies was, or should have been, aware of its limitations. Reliance on skeletal maturity as evidence that a person is over the age of 18 years is likely to result in an incorrect assessment. Each of these agencies was, or ought to have been, aware of this fact from mid-2011 onwards, yet the prosecutions of individuals who had been charged as adults solely or substantially on the basis of wrist x-ray analysis continued.

The consequence of reliance on wrist x-ray analysis for the purposes of age assessment was that a significant number of children were mistakenly assessed to be adults. This error led to further breaches of their human rights.

3 Failure to ensure that the best interests of the child are a primary consideration

The first of these further breaches was the failure to ensure that in all actions concerning them, their best interests were a primary consideration. This human right is central to the CRC and is the human rights principle that is at the heart of this Inquiry. Article 3 of the CRC provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Where the young Indonesians were not afforded the benefit of the doubt and mistakenly assessed to be adults, the Commonwealth did not have regard to their best interests as a primary consideration. If their best interests had been regarded as a primary consideration, they would have been treated differently from adults and their other rights as set out in the CRC would have been respected.

Yet, the material before the Commission shows that children, and young Indonesians about whose age there was doubt, were detained for prolonged periods of time in both adult immigration detention facilities and in adult correctional facilities. They were not afforded the special protection and assistance to which a child separated from his parents is entitled. They were not provided with a guardian. All of these subsequent breaches of children's rights flow from the failure to afford the young Indonesians who said that they were children the benefit of the doubt, and the failure to treat their best interests as a primary consideration in all actions concerning them.

4 Failure to ensure that detention of children is a measure of last resort and for the shortest appropriate period of time

Articles 37(b) and (d) of the CRC state that the detention of children should be a measure of last resort, for the shortest appropriate period of time and promptly reviewable in the courts.

The Commission is satisfied that there have been numerous and repeated breaches of the requirement that children should be detained as a measure of last resort and for the shortest appropriate period of time.

First, there have been many cases where individuals who were clearly children were detained for prolonged periods of time. Individuals who were x-rayed but not charged spent an average of 161 days in immigration detention. This lengthy detention was a result of a significant delay both between the obtaining of a wrist x-ray analysis that found an individual to be skeletally immature

and the making of a decision not to prosecute; as well as between the making of a decision not to prosecute and the making of a request to cancel a Criminal Justice Stay Certificate (CJSC). These delays have resulted in the unjustified and prolonged detention of minors.

Second, many young Indonesians suspected of people smuggling spent prolonged periods of pre-charge detention in immigration detention facilities. Individuals who were x-rayed and eventually charged spent an average of 157 days in immigration detention before they were charged. These are unacceptably long periods of pre-charge detention under any circumstance, but particularly in the case of children.

Third, many young Indonesians who ultimately had their prosecutions discontinued spent long periods of time in adult correctional facilities, spending an average of 215 days in such facilities. While the Commission cannot be certain that all of these individuals were in fact children at the time of their apprehension, or during the period of their detention, it appears likely that a significant number of them were. It further appears that, most commonly, prosecutions were discontinued because the prosecution did not believe that it could prove that the person charged was, on the balance of probabilities, over the age of 18 years. Alternatively, the prosecutions were discontinued, from November 2011 onwards, because there was no probative evidence of the age of the person charged other than wrist x-ray analysis.

Fourth, until mid-June 2011 (although the policy change was not announced until November 2011), Commonwealth policy was to oppose bail in all cases in which an individual was charged with people smuggling. A grant of bail does not automatically result in the individual's release into the community – the few individuals who were granted bail were returned to immigration detention. However, the Commission believes that the principle that children should be detained for the shortest appropriate period of time should ordinarily lead to the placement in community-based accommodation of any accused person whose status as an adult is in doubt and who is granted bail. The prolonged periods of pre-charge detention, in combination with the lack of access to bail for the majority of cases under consideration, also amounts to a breach of article 9(3) of the ICCPR.

The Commission also finds that the detention of many of the young Indonesians has been arbitrary, in breach of article 37(b) of the CRC, and also in breach of article 9(1) of the ICCPR. Detention that is lawful is nonetheless considered arbitrary if it exhibits elements of inappropriateness, injustice or lack of predictability or proportionality. Detention also becomes arbitrary if it is unreasonable or disproportionate to a legitimate aim of the Commonwealth.

The Commission is aware of some cases where individuals were found to be skeletally immature, and thus accepted by the Commonwealth as likely to be children, but were not removed from Australia for some months due to an apparent oversight in requesting the cancellation of a CJSC.

In other cases, individuals spent months in immigration detention before a wrist x-ray was taken which, when analysed, suggested that they were under 18 years of age. Only then were they removed from Australia. In the Commission's view, this amounts to arbitrary detention in breach of article 37(b) of the CRC.

The lengthy periods of pre-charge detention to which the young Indonesians were subject could also constitute arbitrary detention, particularly where consideration was not given to their being held in the least restrictive form of detention; arguably, community detention. Further, the lengthy periods of detention in adult correctional facilities of individuals who said that they were children (as bail was opposed in all cases until mid-June 2011) could also amount to arbitrary detention, in breach of article 37(b) of the CRC.

In addition, individuals suspected of people smuggling who said that they were children at the time of their offence are effectively denied access to judicial review of their detention. A judicial ruling has confirmed the power of the Commonwealth to detain individuals in this circumstance while a CJSC is in place.¹ This amounts to a breach of article 37(d) of the CRC.

5 Failure to ensure that children deprived of their liberty are separated from adults

The combination of the practice of charging as adults individuals who were assessed to be skeletally mature, and the fact that individuals charged as adults were overwhelmingly detained in adult correctional facilities, led to numerous breaches of article 37(c) of the CRC which requires that a child deprived of his or her liberty shall be separated from adults.

As noted above, at least 48 individuals who had wrist x-rays taken and whose prosecutions were ultimately discontinued were detained in adult correctional facilities. However, the Commission believes that there may be a significantly higher number of individuals who were, at some time, detained in adult correctional facilities while there was at least a strong possibility that they were children. This is because the Commission is aware of cases where individuals, who either maintained that they were less than 18 years of age, or appeared not to have known their age, accepted that they were over 18 years of age once presented with what they understood to be conclusive evidence in the form of a wrist x-ray analysis. The Commission is also aware of cases where individuals' legal representatives accepted wrist x-ray analysis as determinative and accordingly advised their clients to concede age or to plead guilty. The willingness of defence representatives to accept wrist x-ray analysis as reliable evidence of age may have been attributable, at least in part, to the failure of the Commonwealth to disclose the information it had in its possession that tended to question the accuracy of wrist x-ray analysis as a method of determining age.

Furthermore, in mid-2011, the then Attorney-General was advised to decline a request made by the President of the Commission for a review of cases where substantial reliance had been placed on wrist x-ray analysis. Such a review was not announced until May 2012. The resulting review found that there was doubt about whether some 15 individuals who had been convicted of people smuggling offences were adults at the time they were apprehended. The delay in the calling of this review has contributed to an ongoing breach of article 37(c), as well as a breach of article 37(b) in these specific cases.

6 Failure to ensure respect for the rights of children alleged to have committed an offence

Article 40(2) of the CRC outlines minimum procedural guarantees for children charged with criminal offences, including the right to be presumed innocent until proven guilty, the right to be informed promptly of the charge, the right to legal or other appropriate assistance and the right to have the matter determined without delay.

As noted above, the Commission has found that there have been significant periods of time between apprehension and charge for individuals suspected of people smuggling offences who said that they were children. An average period of time of approximately five and a half months prior to charge almost certainly violates the principle that a matter must be determined without delay, particularly where the individuals were detained during this period. Consequently, the Commission finds that there has been a breach of article 40(2)(b)(iii) of the CRC.

The Commission has not considered in detail the reasons for delays in the prosecution of individuals once they were charged. However, there were significant delays and consequently some people spent long periods of time in adult detention facilities before a decision was ultimately made to discontinue their prosecution.

Young Indonesians suspected of people smuggling were routinely offered access to a lawyer either prior to providing their consent to a wrist x-ray procedure or prior to participating in an AFP investigative interview. For this reason, the Commission does not find that there has been a breach of the requirement to provide legal assistance. However, a large proportion of young Indonesians elected not to speak to a lawyer before speaking to the AFP. This may have been because they were not provided with a guardian and, as a result, did not have an independent adult who could act in their best interests and encourage them to obtain legal advice at the earliest possible stage.

Although many advocates have argued that access to legal advice should be provided prior to participation in a DIAC age assessment interview, the Commission has concluded there will be cases where this is not necessary, for example in the case of an obviously young child who

is to be promptly removed to Indonesia. Legal advice, however, should be provided prior to participation in any age assessment interview intended to be relied on in a legal proceeding.

7 Failure to ensure respect for the rights of a child separated from his or her family

The CRC requires Australia to ensure that children lacking the support of their parents receive the extra help that they need to guarantee the enjoyment of the rights set out under the CRC and other international instruments. Separated children should be provided with special protection and assistance, an important element of which is effective guardianship.

The Commission finds a breach of article 20(1) of the CRC. It is clear that many of the individuals of concern to this Inquiry were either children or entitled to the benefit of the doubt and should have been treated as children. However, they were not provided with special protection and assistance as they were not provided with guardians. In addition, the independent adults who attended these interviews while they were in immigration detention were not informed of the requirement that they act in the interviewee's best interests and it does not appear that they sought to do so. No independent adult was given the responsibility to ensure that the best interests of these young Indonesians were considered and protected in all decisions concerning them.

The Commission did not receive substantial evidence about, and did not make further inquiry into, issues relating to whether the individuals of concern to this Inquiry were mistreated while they were in adult correctional facilities.

8 Recommendations

Recommendation 1: The *Migration Act 1958* (Cth), and if appropriate the *Crimes Act 1914* (Cth), should be amended to make clear that for the purposes of Part 2, Division 12, Subdivision A of the Migration Act, an individual who claims to be under the age of 18 years must be deemed to be a minor unless the relevant decision-maker is positively satisfied, or in the case of a judicial decision-maker, satisfied on the balance of probabilities after taking into account the matters identified in s 140(2) of the *Evidence Act 1995* (Cth), that the individual is over the age of 18 years.

Recommendation 2: 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.

Recommendation 3: No procedure which involves human imaging using radiation should be specified as a prescribed procedure for the purposes of s 3ZQA(2) of the *Crimes Act 1914* (Cth), or remain a prescribed procedure for that purpose, without a justification of the procedure being undertaken in accordance with the requirements of paragraphs 3.18, 3.61–3.64 and 3.66 of the International Atomic Energy Agency Safety Standard: *Radiation Protection and Safety of Radiation Sources: International Basic Safety Standards – Interim Edition* (General Safety Requirements: Part 3) or any later edition of these requirements. Such justification should take into account contemporary understanding of the extent to which the procedure is informative of chronological age.

Recommendation 4: The *Crimes Act 1914* (Cth) and, if appropriate, the *Crimes Regulations 1990* (Cth), or alternatively the *Evidence Act 1995* (Cth), should be amended to ensure that expert evidence which is wholly or substantially based on the analysis of a wrist x-ray is not admissible in a legal proceeding as proof, or as evidence tending to prove, that the subject of the wrist x-ray is over the age of 18 years.

Recommendation 5: Imaging of an individual's dentition using radiation (dental x-ray) should not be specified for the purposes of s 3ZQA(2) of the *Crimes Act 1914* (Cth) as a prescribed procedure for the determination of age.

Recommendation 6: Imaging of an individual's clavicle using radiation (clavicle x-ray) should not be specified for the purposes of s 3ZQA(2) of the *Crimes Act 1914* (Cth) as a prescribed procedure for the determination of age.

Recommendation 7: If any forensic procedure is specified as a prescribed procedure for the purpose of age determination within the meaning of s 3ZQA(2) of the *Crimes Act 1914* (Cth), Part IAA Division 4A consideration should be given to amending the *Crimes Act* to provide that such a procedure may only be undertaken in the circumstances in which a forensic procedure within the meaning of s 23WA of the *Crimes Act* may be undertaken with respect to a child.

Recommendation 8: Unless and until recommendation 9 is implemented, the Commissioner of Federal Police should ensure that all Federal Agents are aware of their obligations when acting as an 'investigating official' in reliance on s 3ZQC of the *Crimes Act 1914* (Cth) and should further ensure that protocols or guidelines are put in place to ensure that these obligations are met. Specifically, an investigating official should be aware that the role of any independent adult person is to represent the interests of the person in respect of whom the prescribed procedure is to be carried out and that he or she should be so advised.

Recommendation 9: Where it is necessary for an investigating official within the meaning of s 3ZQB(1) of the *Crimes Act 1914* (Cth), who suspects that a person may have committed a Commonwealth offence, to determine whether a person is, or was at the time of the alleged commission of an offence, under the age of 18 years, the investigating official should seek the consent of the person to participate in an age assessment interview.

Where reasonably possible, the interviewer should speak the language ordinarily spoken by the person whose age is to be assessed and should be familiar with the culture of the place from which the person comes. The interviewer, who ideally should be independent of the Commonwealth, should be instructed that he or she should only make an assessment that the person is over the age of 18 years if positively satisfied that this is the case after allowing for the difficulty of assessing age by interview.

All interviewers should be trained, should follow an established procedure and should record their interviews. Their conclusions and the reasons for their conclusions should be documented.

Recommendation 10: Any individual suspected of people smuggling who says that he is a child and who is not manifestly an adult should be offered access to legal advice prior to participating in any age assessment interview intended to be relied on in a legal proceeding.

Recommendation 11: If a decision is made to investigate or prosecute an individual suspected of people smuggling who does not admit that he was over the age of 18 years at the date of the offence of which he is suspected, immediate efforts should be made to obtain documentary evidence of age from his country of origin.

Recommendation 12: 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. The Attorney-General should further consult with the Commonwealth Director of Public Prosecutions concerning procedures put in place by the Director to ensure the expeditious trial of any young person who does not admit to being over the age of 18 years and who is charged with a Commonwealth offence. Should the Attorney-General not be satisfied that appropriate procedures have been put in place by the Director, the Attorney-General should issue guidelines on this topic under s 8 of the *Director of Public Prosecutions Act 1983* (Cth).

Recommendation 13: The Commonwealth should only in exceptional circumstances, and after bringing those circumstances to the attention of the decision-maker, oppose bail where a person who claims to be a minor, and is not manifestly an adult, has been charged with people smuggling. Where a person who claims to be a minor, and is not manifestly an adult, has been charged with people smuggling and granted bail, he should be held in appropriate community

detention in in the vicinity of his trial court. The Minister for Immigration and Citizenship's guidelines for the administration of his residence determination powers should be amended so that such cases can be brought to the Minister's immediate attention.

Recommendation 14: The Attorney-General should consult with the Commonwealth Director of Public Prosecutions concerning procedures put in place by the Director to ensure that the Commonwealth does not adduce expert evidence in legal proceedings where the acceptance by the court of that evidence would be inconsistent with the accused person's receiving a fair trial. Should the Attorney-General not be satisfied that appropriate procedures have been put in place by the Director, the Attorney-General should seek advice from an appropriately qualified judicial officer or former judicial officer as to the terms of guidelines on this topic that it would be appropriate for her to furnish to the Director under s 8 of the *Director of Public Prosecutions Act 1983* (Cth).

Recommendation 15: The Attorney-General's Department 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. The Attorney-General's Department should additionally ensure that a Criminal Justice Stay Certificate is cancelled as promptly as compliance with s 162(2) of the *Migration Act 1958* (Cth) allows when it is no longer required for the purpose for which it was given.

Recommendation 16: If, at any time, the Commonwealth becomes aware of information that indicates that an individual suspected of people smuggling whose age is in doubt may have been trafficked, he should be treated as a victim of crime and provided with appropriate support.

Recommendation 17: The Australian Government should remove Australia's reservation to article 37(c) of the *Convention on the Rights of the Child*.

¹ [BAI031] v *Minister for Immigration & Citizenship* [2011] NTSC 45.

Appendix 1:

Case studies

Case study 1: Ali Jasmin

- Apprehended: 18 December 2009
- Charged: 29 March 2010
- Removed from Australia: 18 May 2012
- Number of days in detention: 878 days

Until December 2009, Ali Jasmin lived with his family in Bala Uring, a small village on the island of Flores, Indonesia. His family bought fish from the local fishermen and sold them at the market. Ali had completed seven years of schooling and worked as a fisherman in a little town not far from his home.

Ali says that he was approached by a middle-man and offered a job on a boat. He says that he was promised an amount of money to help with shipping goods between the Indonesian islands.¹ The boat was already at sea when the passengers came on board via smaller vessels. He says that he had never heard of people smuggling before and it did not occur to him that these people were seeking asylum in Australia.²

Ali described the boat as not very sea-worthy, with leaks in the hull. The motor often tripped out and had to be repaired. At one point during their journey the sail broke. Initially, there were six or seven crew members, but only four were on the boat when it reached Australian waters.³

Ali worked as a cook on the boat.⁴ The boat had fuel, water, rice and eggs, but the supply of food and water ran out before it reached Australia. There were no lifejackets or other safety equipment on board, and there was smoke coming from the engine.⁵ On the last night at sea, the engine broke down and the crew could not fix it. The passengers feared they would sink and they formed a chain to pass buckets of water to empty the boat as water was filling the lower deck. Flood water was up to a metre high,⁶ and the passengers were up to their knees in water while bailing it out.⁷ Ali says that he felt half-dead during the journey because he was so afraid.⁸

18 December 2009

Ali Jasmin is apprehended in Australian waters by Australian authorities. He is one of four Indonesian crew members on board a SIEV carrying 55 Afghani asylum seekers to Australia. Ali tells Australian officials that he was born in 1993 (making him 16 years old). He has a total of 3 185 500 rupiah [A\$343 equivalent] in his possession.⁹

He is taken to Christmas Island for processing and transferred into DIAC custody.

*Ali says that he did not understand what was happening and thought the Australian customs boat was the Australian military.*¹⁰

January 2010

Ali spends several weeks on Christmas Island before being taken to Northern Immigration Detention Centre (Berrimah accommodation) in Darwin.

On 20 January 2010, AFP officers seek Ali's consent to perform a wrist x-ray based on his earlier claim that he is not yet an adult. When asked his date of birth, Ali says that he is 14 years old and was born on 12 October 1996.

Ali is cautioned and given a copy of his rights in Bahasa Indonesia. Both Ali and an independent adult from Life Without Barriers give consent for the procedure, and an x-ray of his right wrist is taken at Royal Darwin Hospital.¹¹ Ali chooses to not speak to a lawyer before a wrist x-ray is taken.¹²

On 25 January 2010, a Criminal Justice Stay Certificate is issued which states that Ali's date of birth is 12 October 1996.¹³

On 28 January 2010, an initial x-ray report says that 'the skeleton is mature' as the bones of the wrist have fused and that '[a]ccording to the male standards of Greulich and Pyle skeletal age is 19 years or greater'.¹⁴ It states that 'the skeletal age and stated chronological age are incongruous'.¹⁵

In his interview with the AFP on 20 January 2010, Ali is advised that the question of whether he was under 18 years of age is relevant to 'the rules governing regular detention, the investigation of the offence or the institution of criminal proceedings'.¹⁶

*Ali says that he didn't understand what he was waiting for as no one had explained the criminal justice and investigative process to him. He says that when he was being put on a plane to be transferred to Darwin, he thought he was being sent home to Indonesia.*¹⁷

*He says that he was told by the AFP that the wrist x-ray would specify his age. He says that he didn't understand the importance of the issue of his age and that he thought that the AFP simply wanted to check his age because they didn't believe him.*¹⁸

3 February 2010

Ali is interviewed by DIAC and again states that he is 14 years old.¹⁹

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30 March 2010

Ali declines to participate in a taped record of interview with the AFP after receiving legal advice over the phone. He says that he would like to communicate with his girlfriend to tell her where he is. The AFP officer replies: 'We'll try and organise that for you but it might have to wait until you're in Hakea on Thursday.'²⁰

On the same day, Ali is formally charged as an adult. A Prosecution Notice is prepared for the Magistrates Court of Western Australia which states that Ali's date of birth is 12 October 1990 (making him 19 years old).²¹

7 May 2010

Ali is transferred to Hakea Prison.

*Ali says that he was frightened and shocked and did not understand why he was being locked up. Ali says that he was told by the Indonesian prisoners in Hakea that some of the younger crew suspected of people smuggling offences were sent home to Indonesia. He says this was the first time he began to understand how important the issue of his age was.*²²

July 2010

On 2 July 2010, an indictment is signed by the Senior Assistant Director of the Office of the CDPP which lists Ali's date of birth as 12 October 1990.²³

On 30 July 2010, Ali's legal representative raises the issue of Ali's age for the first time during a sentencing mention in the District Court of Western Australia. There is no interpreter present as his lawyer did not book one. Ali's lawyer says the issue of his age has 'only just arisen. ... It's come to my attention now that he may not be 18 ... and apparently a birth certificate is coming from Indonesia.' The Commissioner of the District Court says: 'Well, then if he is under 18, presumably we just remand him into the Children's Court or something?'²⁴ While they wait for the birth certificate to arrive, Ali continues to be remanded in an adult prison.

On the same day, the Office of the CDPP confirms that Dr Vincent Low will appear as an expert witness in Ali's age determination hearing. He is asked to prepare an expert report based on Ali's wrist x-ray.²⁵

August 2010

On 2 August 2010, a Senior Officer of the Office of the CDPP sends a letter to the AFP saying that they 'will attempt to list the [age determination] hearing some months away, but it is likely the court will be anxious to determine age as soon as possible'.²⁶

By this stage, the Indonesian Consulate has received a copy of Ali's birth certificate but it has not yet been received by the defence.²⁷ During a directions hearing, the Commissioner of the District Court accepts that once they have clarity on Ali's age, they can remit the matter to the Children's Court. When he asks if there is any reason why he shouldn't continue to have Ali remanded in custody, Ali's lawyer says 'No'. Ali's case is adjourned and he continues to be held on remand in an adult prison while his legal representative waits to be provided with his birth certificate.

On 24 August 2010, DIAC receives a copy of Ali's birth certificate from the Indonesian Consulate in Western Australia. The birth certificate indicates that Ali is 13 years old. DIAC raises the issue of Ali's age with the Office of the CDPP and queries his place of detention.²⁸ The Office of the CDPP indicate that they will ask the AFP to investigate the provenance of the birth certificate, and that they will not release Ali from custody until an age determination hearing is held and a court determines that he is under 18 years of age.²⁹

The same day, DIAC emails a copy of the birth certificate which it had received from the Indonesian Consulate to the Office of the CDPP.³⁰

September 2010

On 9 September 2010, the Department of Corrective Services in Western Australia contact DIAC querying Ali's age and ask whether he has been subject to a wrist x-ray.³¹

On 22 September 2010, the AFP receive an expert report from Dr Low and tell the Office of the CDPP: '[Dr Low] claims that he can only state 19 years or older in line with the determination guidelines but that Jasmin is an adult and has been for some time'.³²

On 27 September 2010, the AFP commenced enquiries in Indonesia in an attempt to ascertain the authenticity of the birth certificate.³³

October 2010

On 12 October 2010, the Indonesian National Police fax a legalised copy of Ali Jasmin's birth certificate to an AFP Liaison Officer in Denpasar.³⁴

The Office of the CDPP continues to deny the admissibility of the birth certificate, saying that it was created after the offence was committed. They tell defence that, even though it was provided by the Indonesian Consulate, they will dispute its admissibility unless the defence obtains 'proper evidence establishing what it is and the circumstances as to how it came into being'.³⁵

On 20 October 2010, the AFP send electronic documents relating to Ali's age from the AFP Liaison Officer in Jakarta to the Office of the CDPP and state that they think the document

Appendix 1: Case studies

'doesn't really accurately clarify his true year of birth'.³⁶ The Office of the CDPP request the AFP provide a full translation of the birth certificate.

24 November 2010

The AFP officer responsible for Ali's case tells the Office of the CDPP that they will not be asking their officers in Jakarta for further documentary evidence:

The home of Jasmin's family is fairly remote, as is usual in these matters, they are extremely busy and only have a very limited staffing capacity to undertake operational matters. ... I cannot see what this will prove, as there is simply no authority that can accurately stipulate that his date of birth is correct'.³⁷

December 2010

Ali's age determination hearing takes place in the District Court on 8 December 2010. The hearing commences without an interpreter. When Ali is asked his date of birth, he says in English that he was born on 12 October 1990. When an interpreter arrives, he clarifies in Bahasa Indonesia that he was born on 12 October 1996. He explains that after the x-ray was taken, the AFP told him that he was born in 1990.³⁸ Ali's birth certificate is not placed into evidence by either the defence or the prosecution.

On 22 December 2010, the judge determines that Ali is over 18 years of age.³⁹

Ali is convicted of the offence of people smuggling and sentenced to the mandatory minimum sentence of five years imprisonment with three years non-parole.⁴⁰

June 2011

In June 2011 Ali Jasmin lodges an appeal against his sentence, based on the standard and burden of proof contained in s 233C of the Migration Act. His appeal is dismissed.⁴¹

16 March 2012

The Commission writes to the Attorney-General requesting an independent review of a number of cases where convictions were obtained for people smuggling offences and there was substantial reliance on the use of wrist x-rays to determine age.⁴² Ali Jasmin's case is one of the cases identified.

April 2012

A journalist travels to Indonesia and meets Ali's family. He obtains copies of documents corroborating Ali's claim that he is a child.⁴³ Ali's case receives a significant amount of media attention.⁴⁴

May 2012

On 17 May 2012, the Attorney-General announces that three Indonesian nationals convicted of people smuggling will be released from prison and returned to Indonesia.⁴⁵ Media reports confirm that Ali Jasmin is one of these three individuals.⁴⁶

On 18 May 2012, Ali returns home to Indonesia. Since first claiming to be a child, Ali has spent 97 days in immigration detention and 781 days in a maximum security adult prison.

Case study 2: OSB051

- Apprehended: 30 December 2009
- Charged: 17 March 2010
- Removed from Australia : 18 May 2012
- Total days in detention: 864 days

Until December 2009, OSB051 lived with his mother, brother and three sisters in Oelaba, a small village on Rote Island in Indonesia. His father passed away some years ago. His family worked as fishermen or helped with selling fish at the local market where they could earn up to 20 000 rupiah per week [A\$2 equivalent].⁴⁷ OSB051 had attended primary school for some years and had worked as a fisherman for two months.⁴⁸

OSB051 was looking for work on a nearby island when he was approached by a man and offered 1 000 000 rupiah [A\$105 equivalent] to transport rice.⁴⁹ OSB051 says that this was a lot more money than he would normally be paid, but he believed that all four people on the boat would share the money they earned by selling the bags of rice. OSB051 was not told that they would be coming to Australia. He did not receive the money he was promised.⁵⁰

OSB051 boarded the boat at Makassar and fell asleep while waiting for the rice to arrive. The boat was already at sea when the asylum seekers came on board via smaller boats. OSB051 woke up in the middle of the night to see a lot of people on the boat and he became scared and started to cry.⁵¹ He says that he had never seen people like the asylum seekers and he did not know where they had come from.⁵² He asked the captain where they were going but the captain would not answer.⁵³

During the journey, OSB051 worked as a cook on the boat.⁵⁴ He says that he was initially told that they would be at sea for two days. After four days had passed, he started to worry and realised that something was wrong, but no one would tell him where they were going or what they were doing. He says that there was no opportunity for him to get off the boat as it never anchored anywhere.⁵⁵

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30 December 2009

OSB051 is apprehended in Australian waters by Australian authorities. He is one of four crew members on board SIEV 90, carrying 48 Afghani asylum seekers to Australia. He does not understand what is happening when the Australian customs officials board the boat. He is scared and crying.⁵⁶

January 2010

On 5 January 2010, OSB051 is taken into an alternative place of detention on Christmas Island (Construction Camp). The nominal roll compiled after interception lists OSB051's date of birth as 17 April 1997 (making him 12 years old).⁵⁷

On 12 January 2010, OSB051 tells immigration officers that his date of birth is 7 April 1997.⁵⁸

On 21 January 2010, AFP officers seek OSB051's consent to perform a wrist x-ray. OSB051 is cautioned and given a copy of his rights in Bahasa Indonesia.⁵⁹ He is offered an opportunity to speak with a lawyer, but declines.⁶⁰ Both OSB051 and an independent adult from Life Without Barriers give consent for the procedure, and an x-ray of his left wrist is taken at Royal Darwin Hospital.⁶¹

On 25 January 2010, a Criminal Justice Stay Certificate is issued which states that OSB051's date of birth is 17 April 1997.⁶²

On 28 January 2010, an initial x-ray report says that OSB051 is 19 years or older.⁶³

*OSB051 says that it was only after he arrived on Christmas Island that he was told that the passengers were asylum seekers and that they needed permission to come to Australia.*⁶⁴

*He says that he did not understand what was happening when the AFP asked him if he wanted to have a wrist x-ray taken.*⁶⁵ *He says that the AFP officers told him a wrist x-ray would prove that he was under 18 years old when he arrived in Australia, and that he agreed to the procedure because the AFP officers did not believe him when told them his age.*⁶⁶

March 2010

On 17 March 2010, OSB051 participates in a record of interview with the AFP. This is the first time he speaks to a lawyer over the phone. During the interview, AFP officers tell OSB051 that: 'We have deemed you to be nineteen years or older based on an x-ray that was taken in a hospital that you consented to.'

OSB051 clarifies that his date of birth is 7 April 1997 and he knows this is his correct age as this is what he was told when his father died. He tells the AFP that he started school in 2001 and attended primary school until completing sixth grade in 2008.⁶⁷

Later that day, OSB051 is arrested and formally charged as an adult. A Prosecution Notice is issued which states that his date of birth is 17 April 1990 (making him 20 years old).⁶⁸

On 18 March 2010, OSB051 first appears in Perth Magistrates Court. He is placed on remand in an adult correctional facility.

*OSB051 says that when he first entered prison, he was sad and afraid as Australians are very tall people.*⁶⁹

From March 2010 to July 2010, OSB051 is unrepresented in court on a number of occasions as there is no appearance by his defence representatives.⁷⁰

May 2010

On 31 May 2010, an officer of the Office of the CDPP emails Legal Aid to query why OSB051 has been unrepresented in court for his last two appearances.⁷¹

July 2010

On 1 July 2010, OSB051's lawyer appears in court and says he has been unable to locate OSB051 and has been unable to take instructions from him. The case is adjourned.⁷²

*OSB051 says that the first time he met his lawyer was when he was on remand at Albany Regional Prison.*⁷³

On 29 July 2010, OSB051's lawyer raises the issue of OSB051's age for the first time. He enters a plea of no jurisdiction before the Perth Magistrates Court on the basis that OSB051 claims to have been under 18 years old at the time of the offence. His matter is listed for an age determination hearing on 16 November 2010.⁷⁴

September 2010

On 3 September 2010, the defence tell the Office of the CDPP that they may challenge the x-ray on the basis that OSB051 consented to x-rays but was not told that he was consenting to x-rays being taken for an age determination purpose.⁷⁵

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On 9 September 2010, the Department of Corrective Services in Western Australia contacts DIAC querying OSB051's age and ask whether he has been subject to a wrist x-ray.⁷⁶

October 2010

On 19 October 2010, the Office of the CDPP receives an expert report from Dr Vincent Low after requesting a 'second opinion' on the initial x-ray result.⁷⁷ It states that the probability of OSB051 having his stated date of birth is zero.⁷⁸ The report is disclosed to the defence.

On 21 October 2010, OSB051's lawyer contacts Dr Low to ask him for more information on OSB051's x-ray and the interpretation of x-rays in order to decide whether to obtain a report from their own expert.⁷⁹

An Office of the CDPP brief to counsel about several defendants including OSB051 says that 'the AFP arranged for wrist x-rays which confirmed that that they were in fact adults'. It goes on to say that:

The defence in each case has been remarkably lax in failing to pursue any of these matters given that the xrays in each case were performed many months ago. It has been entirely as a result of the prosecutors for each matter reminding them of the issue [of age].⁸⁰

16 November 2010

OSB051's lawyer contacts the Office of the CDPP to say that the defence no longer challenges the lawfulness of the x-ray and they agree to the x-ray being admitted as evidence.⁸¹

On the same day, an age determination hearing is held in Perth Magistrates Court. No evidence of age other than wrist x-ray analysis is considered.⁸²

3 December 2010

A magistrate finds on the balance of probabilities that OSB051 was over 18 years old at the time of offence and that the Magistrates Court has jurisdiction to hear his case.⁸³

*OSB051 says that this was the second occasion where there was no interpreter present in court and that he did not understand what was happening. He says that on both occasions, his lawyer told him that no interpreter was available, but he continued with the hearings anyway. He told OSB051 that he would meet him at the prison and explain what happened during the hearings afterwards, but this never occurred.*⁸⁴

28 January 2011

OSB051 enters a guilty plea and is committed to the District Court of Western Australia for sentencing.⁸⁵

March 2011

On 8 March 2011, the Deputy Director of the Office of the CDPP agrees that there is a public interest in proceeding on indictment in this matter.⁸⁶

On 14 March 2011, the defence obtains an expert report on OSB051's x-ray from Dr James Christie. It states that:

the stated chronological age and the skeletal age are incongruous. However it is not possible from this examination to draw a conclusion as to whether Mr [OSB051] is greater than 18 years or less than 18 years at the time of the study.

It also states that 'Dr Low's use of apparently precise percentage estimates of skeletal age is not supported by scientific use of the data'.⁸⁷

On 17 March 2011, the defence sends Dr Christie's report to the Office of the CDPP and informs them that they will be contending at sentencing that OSB051 was under 18 years of age at the time of the offence.⁸⁸

On 25 March 2011, the defence raises the issue of OSB051's age as a matter relevant to sentencing during a listing hearing in the District Court.⁸⁹

21 June 2011

A judge of the District Court determines that the District Court is not bound by the Magistrates Court's finding on age. He holds that it is open for an accused to raise the issue of their age at sentencing stage in the District Court, and if it is established on the balance of probabilities that an accused was under 18 at the time of the offence, the matter will be remitted to the Children's Court for sentencing.⁹⁰

OSB051's case is listed for an age determination hearing in the District Court on 10 November 2011.

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August 2011

The AFP receives documentary evidence of age from the Indonesian Consulate. According to the date of birth recorded on the document, OSB051 would have been 17 years and six months at the time of the offence.⁹¹

September 2011

*OSB051 says that someone from Australia tried to call his older sister in Indonesia, but she did not understand as they were speaking in English. OSB051 is not aware of any other attempts made to contact his family in Indonesia to obtain information about his age.*⁹²

14 October 2011

The defence obtains an expert report from Professor Tim Cole, a professor of medical statistics. It states that the conclusion drawn by Dr Low that 'it is a reasonable interpretation that Mr [OSB051] is 19 years of age or older' based on the wrist x-ray is 'wrong and should be dismissed'. It states that 'the chance of [OSB051] having become skeletally mature before age 18 is 61%'.⁹³

November 2011

On 2 November 2011, an internal memorandum discussing the issue of age in OSB051'S case was produced within the Office of the CDPP. The memorandum notes that the CDPP had consistently been informed that AFP enquiries in Indonesia had not resulted in the production of any documents. However, it had become apparent to the Office of the CDPP that an age related document had in fact been obtained by the AFP some months earlier.⁹⁴ A separate internal Office of the CDPP memo prepared by the Principal Legal Officer states that the age related document from Indonesia has 'no forensic value' and recommends continuing the prosecution against OSB051.⁹⁵

On the same day, a separate memo is prepared by the Senior Assistant Director of the Office of the CDPP which recommends that the prosecution against OSB051 be discontinued on public interest grounds, and as consistent with the conservative policy approach to be taken to the issue of age by the Office of the CDPP. It states that 'it cannot be completely ruled out that Mr [OSB051] was under 18'. The memo is marked 'draft' and 'not sent'.⁹⁶

On 2 November 2011, the Office of the CDPP also discloses the documentary evidence obtained from Indonesia to the defence.⁹⁷ The next day, the defence contacts the Office of the CDPP to inform them that a plea of guilty will be entered to the charge on the indictment and the matter can proceed to sentencing.⁹⁸

On 10 November 2011, the age determination hearing is vacated as the defence does not have any positive evidence to adduce in favour of OSB051's age claim. The defence enters a guilty plea and withdraws their previous objection raised to jurisdiction. During the hearing, the District Court Judge says: 'it just strikes me as odd that in this day and age ... reliable evidence of age can't be obtained by one side or the other'.⁹⁹ The matter proceeds to sentence and OSB051 is sentenced to five years imprisonment with three years non-parole.¹⁰⁰

*OSB051 says that he felt he had been waiting too long already – he had already spent two years in prison, and he just wanted it to be over. He felt that there was nothing he could do about it as he does not have any documents to prove his age – his family are poor people and they do not have enough money to buy a birth certificate. He says that he has asked his mother whether there is any proof of his age, but she has told him that they have nothing in writing.*¹⁰¹

March 2012

The Commission writes to the Attorney-General requesting an independent review of a number of cases where convictions were obtained for people smuggling offences and there was substantial reliance on the use of wrist x-rays to determine age.¹⁰² OSB051's case is one of the cases identified.

April 2012

*DIAC officials visit Albany Regional Prison and speak to some of the Indonesian prisoners. OSB051 says that he did not understand why they were asking questions about age for the Indonesians who have already been sentenced – he says that he feels it is too late for them to ask questions about age now. He says he did not receive a reply when he asked them if he would be sent home if he was under 18 years old.*¹⁰³

On 26 April 2012, Commission staff members visit OSB051 at Albany Regional Prison.

*He says that though he was initially scared in prison, he has been here so long that he feels being in prison is almost normal. He says that he used to be able to contact his family fairly regularly, but he thinks the number may have been recently disconnected. He is very worried about them as he has no other way of getting in touch with them and he does not know how they are. He expresses a desire to go home. He plans to continue to work as a fisherman, but that he certainly does not want to come back to Australia.*¹⁰⁴

May 2012

On 17 May 2012, the Attorney-General announces that three Indonesian nationals convicted of people smuggling will be released from prison and returned to Indonesia.¹⁰⁵ OSB051 is one of these three individuals.

On 18 May 2012, OSB051 returns home to Indonesia. Since first claiming to be a child, OSB051 has spent 71 days in immigration detention and 793 days in a maximum security adult prison.

Case study 3: NTN031

- Apprehended: 29 December 2009
- Charged: 6 October 2010
- Removed from Australia: 26 November 2011
- Number of days in detention: 690 days

Until December 2009, NTN031 worked as a fisherman in Indonesia. He had been working as a fisherman since leaving school mid-way through junior high school. When the weather was poor and not suitable for fishing, NTN031 worked as a farmer on his friend's farm.¹⁰⁶

NTN031 says that he had no intention of coming to Australia, and that he was not told he was coming to Australia. NTN031 was told that he was to take the passengers on the boat from Timika to Merauke Island.¹⁰⁷ The boat departed at night from a remote location,¹⁰⁸ and the normal captain got off the boat before it left the shore.¹⁰⁹

During the six to seven day journey, NTN031 assisted with refuelling the engine and he also assisted with steering.¹¹⁰ After a few days, they ran out of drinking water and there was very little food on the trip. The boat sailed for several days under its own power before the engine broke down. The vessel began to take on water, causing the passengers to fear for their lives. A manual pump and buckets were used to draw out the water.¹¹¹ NTN031 says the boat drifted for two days before ending up in Australian waters because two of the passengers on the boat would not let the crew drop anchor.¹¹²

29 December 2010

NTN031 is apprehended outside of Australian waters but within Australia's Exclusive Economic Zone by Australian authorities.¹¹³ He is one of three Indonesian crew members on board a SIEV carrying 30 Afghani asylum seekers to Australia. He has a total of 864 000 Indonesian rupiah [A\$91 equivalent] in his possession.¹¹⁴

January 2010

On 5 January 2010, NTN031 is transferred from the Navy vessel to an alternative place of detention on Christmas Island.

On 10 January 2010, during a DIAC entry interview, NTN031 states that his date of birth is 27 November 1993. This would make him 16 years old. He also says that his brother's contact phone number for Indonesia is saved in his mobile phone which has been confiscated.¹¹⁵

On 13 January 2010, NTN031 is transferred to Northern Immigration Detention Centre in Darwin.

On 21 January 2010, AFP officers seek NTN031's consent to perform a wrist x-ray. While obtaining consent, NTN031 is told by an AFP officer that the purpose of the wrist x-ray is 'to determine whether or not you are under the age of eighteen'. When he is asked 'Do you understand why that x-ray is needed?', NTN031 says '[t]o check my true age'. He confirms that he believes that his date of birth is 27 November 1993.¹¹⁶

NTN031 is cautioned and given a copy of his rights in Bahasa Indonesia.¹¹⁷ Both NTN031 and an independent adult from Life Without Barriers give consent for the procedure,¹¹⁸ and an x-ray of his left wrist is taken at Royal Darwin Hospital.

On 22 January 2010, an initial x-ray report by [radiologist] states that the bones in NTN031's wrist are 'almost completely fused' and his 'skeletal age is estimated at approximately 18.5 years'.¹¹⁹

3 February 2010

An informal meeting takes place between NTN031 and DIAC staff, as well as a representative from Life Without Barriers. According to a summary of the meeting:

[NTN031] stated that he was 18 and as such would like to be moved to the [adult] NIDC. ... Client confirmed he was 18 and would like to be moved. ... [DIAC staff] advised of the results of the wrist x-ray and explained that these confirm that client is 18. Client was advised that a move to the NIDC would be arranged.¹²⁰

7 July 2010

During a taped record of interview with the AFP, the following interaction takes place concerning NTN031's wrist x-ray result:

FEDERAL AGENT: Do you remember having x-ray on your wrist?

THE INTERPRETER: Yes, I was x-rayed.

FEDERAL AGENT: Yeah. They tell us you're 19, over 19.

THE INTERPRETER: No, I was not told that. At the time I had my x-ray, I was told that my age was between 18 and 19, but I'm not over 19.

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FEDERAL AGENT: So – okay. So you were told between 18 and 19?

[NTN031]: Yeah.

FEDERAL AGENT: And you still say you're 16, even though medical proof shows you're over?

THE INTERPRETER: As soon as I found that out, I asked that I be moved ... to the place with the adults.
...

FEDERAL AGENT: Okay. Is it possible that you are over 18? That you are not sure of your year of birth?

THE INTERPRETER: No. My date of birth is correct. ...

FEDERAL AGENT: [I]f you believe you are 16, why did you ask to be moved into the adult detention centre?

THE INTERPRETER: Because I'm the sort of person, I was a bit afraid to go into debate with them over it.¹²¹

It is later suggested by the AFP that 'the main reason some accused persons in detention, claiming to be juveniles, ask to be moved to the adult centre is because they cannot gain access to cigarettes while being treated as a juvenile'.¹²²

6 October 2010

NTN031 is arrested and charged as an adult.¹²³ A prosecution notice is signed which states that NTN031's date of birth is 27 November 1991.¹²⁴

1 November 2010

NTN031 is transferred to Albany Regional Prison, an adult maximum security correctional facility.

18 January 2011

An email from the Office of the CDPP to Legal Aid raises the issue that NTN031 does not have legal representation.¹²⁵ By this time, he has been in detention for over 12 months and it is over three months since he was charged.

April 2011

On 12 April 2011, an internal email from the Deputy Director of the Office of the CDPP draws attention to the initial x-ray report which found that NTN031 was 18.5 years old. It states that the benefit of the doubt should be given and the Office of the CDPP should consider discontinuing the prosecution.¹²⁶

On 26 April 2011, a second medical opinion is obtained for the AFP from Dr Vincent Low. He says that NTN031's wrist has reached skeletal maturity, and 'it is a reasonable interpretation that [NTN031] is 19 years of age or older'.¹²⁷ He states that the probability of NTN031 having a date of birth of 27 November 1993 'is less than 1%'.¹²⁸

20 May 2011

NTN031's legal representatives raise the issue of age for the first time. The defence indicates that NTN031 is disputing age and challenges the jurisdiction of the Perth Magistrates Court to hear his case. The defence asks for an age determination hearing to be listed.¹²⁹

July 2011

On 17 July 2011, a Statement of Material Facts is prepared by the Office of the CDPP which states that a wrist x-ray conducted on NTN031 identifies that he is 'over the age of 18 years of age, believed to be at least 19 years of age'.¹³⁰

On 25 July 2011, the Office of the CDPP contacts the defence to offer NTN031 a dental x-ray to help determine his age.¹³¹

August 2011

On 10 August 2011, an AFP officer tells the Office of the CDPP that she has requested enquiries to be conducted in Indonesia to locate documentation confirming NTN031's age.¹³²

On 26 August 2011, the age determination hearing is vacated due to the unavailability of defence counsel.¹³³

September 2011

On 1 September 2011, almost two years after NTN031 was apprehended in Australia, an AFP officer tells the Office of the CDPP that enquiries are underway in Indonesia to locate documentation confirming NTN031's age, and that it can take between two to eight weeks for results to become available.¹³⁴

On 22 September 2011, the Magistrate in the Perth Magistrates Court decides that it would be a waste of the court's time to have an age determination hearing, as the District Court is able to reconsider an age determination issue and the question of jurisdiction that has previously been determined in the Magistrates Court.¹³⁵

NTN031 is committed for trial on 16 December 2011, with the expectation that an age determination hearing will take place in the District Court.

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On 28 September 2011, the Office of the CDPP recommends signing an indictment to proceed against NTN031. It states:

[NTN031] claims to be a juvenile and is disputing the jurisdiction of the court. ... This minute is prepared based on the assumption that the Crown will successfully argue that [NTN031] was over 18 years at the time of the alleged offence.¹³⁶

November 2011

On 16 November 2011, an AFP officer is assigned to travel to Indonesia for three weeks to personally work with the Indonesian National Police in several investigations regarding the ages of Indonesians charged with people smuggling. NTN031 is one of these individuals.¹³⁷

On the same day, an internal minute is sent to the Commonwealth Director of Public Prosecutions recommending the prosecution against NTN031 be discontinued. It notes that he has consistently maintained that his date of birth is 27 November 1993, and that the AFP enquiries have not resulted in the production of any documents from Indonesia relevant to determining age. In particular, it expresses concerns that 'the fact that those two doctors cannot agree, casts serious doubt on the reliability of the method of age assessment and interpretation of the x-ray'.¹³⁸

On 22 November 2011, a decision is made to discontinue the prosecution.¹³⁹

On 26 November 2011, NTN031 returns home to Indonesia. Since first claiming to be a child, NTN031 has spent 278 days in immigration detention and 412 days in a maximum security adult prison.

Case study 4: INN012

- Apprehended: 20 February 2010
- Charged: 14 October 2010
- Removed from Australia: 16 November 2011
- Number of days in detention: 631 days

Until February 2010, INN012 lived with his aunt, his sister, and his aunt's four children in Alor Pantar Bakalang, Indonesia.¹⁴⁰ Both his parents have passed away. INN012 began working after he completed primary school. He worked a number of casual jobs which have not provided him with much money – as a deckhand carrying bags of rice or cement, working on his cousin's boat and also helping his aunt clean the house while the family farmed.¹⁴¹ He also worked as a machine boy on small wooden power boats, where he could earn up to 700 000 rupiah [A\$74

equivalent] per month. In addition to this, his aunt required him to go fishing.¹⁴² He had been fishing since he left school, using his own canoe. He could earn up to 30 000 rupiah [A\$3.20 equivalent] per day selling fish, or up to 150 000 rupiah [A\$16 equivalent] per week.¹⁴³ He would give half of his earnings to his aunt to use for daily needs.¹⁴⁴

INN012 was sitting near the entrance of his house when he was approached by a man named 'Herman' who he had never met before. Herman offered him 10 million rupiah [A\$1060 equivalent] to take some people around the small islands in Indonesia. INN012 was told that he would be paid once he returned home.¹⁴⁵

INN012 says that he went by boat to Makassar with Herman where they met the other crew members. They then drove to Surabaya to find another vessel as the original boat was too narrow and too shallow to be of use. Herman did not accompany the crew when the boat left Surabaya. The passengers came onto the boat from another vessel while out at sea.¹⁴⁶ During the journey, INN012's duties on the boat included looking after the engine, steering the boat at times and raising and lowering the sail.¹⁴⁷

February 2010

On 20 February 2010, INN012 is apprehended in Australian waters near Ashmore Reef by Australian authorities. He is one of three Indonesian crew members on board a SIEV carrying 10 Afghani asylum seekers to Australia. He has 9 000 rupiah [\$1 equivalent] in his possession.¹⁴⁸ INN012 tells members of the Royal Australian Navy that he is 15 years old.¹⁴⁹ The DIAC nominal roll records INN012's date of birth as 1 January 1995.¹⁵⁰

On 24 February 2010, INN012 is taken to Christmas Island for processing and transferred into DIAC custody. SERCO records his date of birth as 1 January 1995.¹⁵¹

On 25 February 2010, during a DIAC entry interview, INN012 again asserts that he is 15 years old.¹⁵² DIAC proceeds to treat INN012 as a juvenile.¹⁵³

10 March 2010

INN012 is transferred to Northern Immigration Detention Centre (Berrimah accommodation) in Darwin.

April 2010

On 1 April 2010, AFP officers seek INN012's consent to perform a wrist x-ray based on his earlier claim that he is not yet an adult. INN012 is cautioned and given a copy of his rights in Bahasa Indonesia.¹⁵⁴ Both INN012 and an independent adult give consent for the procedure, and an x-ray

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of his left wrist is taken in Darwin.¹⁵⁵ An initial medical opinion assesses INN012 to be about 19 years old.¹⁵⁶

On 6 April 2010, a Criminal Justice Stay Certificate is issued which states that INN012's date of birth is 1 January 1995.¹⁵⁷

June 2010

On 16 June 2010, INN012 participates in a taped record of interview with the AFP. He declines to make contact with a lawyer.¹⁵⁸ An independent adult is present during the interview but appears to stay silent and offers no advice to INN012.¹⁵⁹ During the interview, INN012 is told by the AFP that the wrist x-ray determined his age to be 19 years old.¹⁶⁰ He is then asked the question 'Are you under the age of eighteen?', and he says 'Yes. I'm nineteen'.¹⁶¹

This is then referred to as an 'admission' by INN012 of being born on 1 January 1991.¹⁶²

A psychologist report obtained by INN012's defence lawyer during preparation for his trial describes INN012's experience of his interview with the AFP. The report reads:

[INN012] stated that he was afraid during the interview with the Police. When asked why he initially said he was 15 years old and later said he was 19 years old, [INN012] reported that "they asked me so many questions ... I was confused ... they told me according to a wrist x-ray my age should be 19 and I'm afraid to go against that ... but the lady who raised me said my age was 15 and how could I not believe her ... I am confused about the x-ray". He added that "in that interview, I said the wrong thing in my heart".¹⁶³

October 2010

On 14 October 2010, INN012 is formally arrested and charged. According to a description in the psychologist's report, INN012 found the experience of being arrested frightening:

[H]e was "terrified" when he was arrested and stated that his heart was racing. He added that he thought it was better to stay quiet so as not to "say anything against the police".¹⁶⁴

The same day, the AFP contacts the Indonesian Consulate and the Deputy Consular General agrees to contact INN012's uncle in Indonesia to inform him of INN012's arrest.¹⁶⁵ INN012 appears before Central Local Court.¹⁶⁶ Bail is not applied for and is formally refused. INN012 is transferred from immigration detention to the Metropolitan Remand and Reception Centre at Silverwater Correctional Centre. Again, the psychologist report obtained by INN012's defence lawyer describes INN012's experience of being in prison:

Of his situation in prison... he described that he feels “the others are more grown up than me” and further stated that he feels “sad” about being in prison. Specifically, he stated that he missed the sky and wishes he could go home. He commented that he tries to “live each day as it goes by” and tries to keep busy by working in the prison folding clothes.¹⁶⁷

26 November 2010

The full brief of evidence on INN012’s case is served on the defence.¹⁶⁸ This is the first time INN012 receives legal representation.¹⁶⁹

December 2010

On 20 December 2010, INN012’s lawyer withdraws from the case due to a potential conflict of interest. The matter is returned to the Legal Aid Commission for reallocation.¹⁷⁰

On 24 December 2010, INN012 obtains new legal representation. It is noted that there will be a delay until 17 January 2011 until the previous lawyer returns from holiday so that he can transfer the brief of evidence across to INN012’s new defence representatives.¹⁷¹

January 2011

On 10 January 2011, an Office of the CDPP file note from a conversation with INN012’s defence representatives notes that ‘he does look young’.¹⁷² The defence raise the issue of his age for the first time and ask for a copy of the wrist x-ray and report.¹⁷³

February 2011

On 2 February 2011, the AFP obtain another report on the initial wrist x-ray from a consultant radiologist. He says that ‘it is a reasonable interpretation that [INN012] is above the age of 19 years’.¹⁷⁴

On 7 February 2011, a magistrate in the Local Court expresses his unhappiness with the progression of the matter and apologises to INN012 for the delay.¹⁷⁵

March 2011

On 7 March 2011, INN012’s defence representatives make an application for an adjournment of four weeks to allow time to obtain an expert report, having only received the original x-ray one week earlier.¹⁷⁶

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On 29 March 2011, an email from the AFP to the Office of the CDPP refers to the taped record of interview where INN012 is asked:

how old he is and [INN012] answers 19. This question is followed by [INN012] claiming that he does not know his date of birth. This is again consistent with the majority of SIEV cases whereby at the time of interception both false names and dates of birth are provided to authorities in order to minimise the chance of prosecution.¹⁷⁷

30 May 2011

Dr Vincent Low provides the AFP with an expert report which states that the probability of INN012 being less than 18 years old at the date of the offence is approximately 24%.¹⁷⁸

June 2011

On 6 June 2011, a magistrate from the Bankstown Local Court says that INN012's matter has been dragging on since October 2010 and it is not fair to the accused.¹⁷⁹

On 16 June 2011, the AFP makes its first request to Indonesia for age related documentation, 16 months after INN012 was apprehended. They state that INN012's date of birth is 1 January 1991.¹⁸⁰

July 2011

On 7 July 2011, the AFP receive documentary evidence from Indonesia. They obtain two 'Citation of Birth Certificates'; one for a '[INN012]' and the other under a different name. The two citations are identical in all aspects except for name and year of birth. The AFP 'suggests that the document in the name of [INN012] where no original was available could be a fraudulent document'.¹⁸¹

On 8 July 2011, INN012's lawyers ask the Office of the CDPP to discontinue the prosecution on the grounds that INN012 was 15 years old at the time of the offence and based on his special vulnerability.¹⁸² They provide a radiologist report which states that the GP Atlas 'was not intended as an estimator of chronological age. Extrapolating data in a reverse fashion is not scientifically valid'. The report goes on to say that 'no test for chronological age is conclusive'. The radiologist states that INN012 has a skeletal age of 19 years, but 'it is incorrect to interpret this finding as stating he is 19 years or older. ... [He] could be under 18 years of age and still have a skeletal age as described'.¹⁸³

The defence also provide the Office of the CDPP with a statement from an Indonesian cultural expert who interviewed INN012 and reviewed the AFP taped record of interview. She states that

it is likely INN012 accepted what the AFP officer said when he was told that he was 19 after the wrist x-ray, as '[w]hen someone in authority tells a villager something, he or she would simply accept it, out of deference or fear of people in authority'.¹⁸⁴

The defence also provides a report of a clinical psychologist who reports that INN012 has a significant mental impairment with an intellectual functioning in the lowest 5% of his aged peers,¹⁸⁵ and that he meets the criteria for a mild to moderate intellectual disability.¹⁸⁶ She also says there are several indicia of INN012's youth, which include 'a lack of any intimate relationships, or even holding hands with a girl, lack of licence to drive a moped or car, and lack of identity card known as KTP'.¹⁸⁷

On 8 July 2011, an internal Office of the CDPP email indicates that they will object to the tender of both reports produced by the defence, the cultural report 'on the basis that its content is irrelevant to an age determination activity' and the report of the clinical psychologist on the grounds that it 'does not relate to any chronological age but to [INN012's] perceived ability to "handle imprisonment in an adult prison"'.¹⁸⁸

On 18 July 2011, an Office of the CDPP minute is prepared by the Legal Officer responsible for INN012's case and recommends that the prosecution be discontinued based on the clinical psychologist's report that INN012 has an intellectual disability.¹⁸⁹

The same day, an officer of the AFP communicates to the Office of the CDPP that he cannot see any facts that indicate the prosecution should be discontinued, '[n]otwithstanding the compassion one may feel for [INN012] and his circumstances'.¹⁹⁰

On 20 July 2011, a Principal Legal Officer and Senior Legal Officer of the Office of the CDPP both decide to continue with the prosecution, stating '[i]n regards to intellectual deficit, the level of poverty and lack of education is typical in these offence [sic] and require general deterrence. ... [T]he accused knew what he was doing and expected to be paid'.¹⁹¹

August 2011

On 15 August 2011, an age determination hearing is held in Bankstown Local Court. The Magistrate 'accepts that x-rays cannot give a chronological age'. However, based on the wrist x-ray evidence he believes it is more probable than not that INN012 was over 18 years old at the time of the offence.¹⁹²

On 29 August 2011, INN012 is committed for trial in Campbelltown District Court on 12 June 2012.¹⁹³

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October 2011

On 21 October 2011, INN012's lawyers once again ask the Office of the CDPP to discontinue the prosecution on the grounds that INN012 is a child. They produce an expert report from Professor Tim Cole asserting that there is a 61% probability of INN012 reaching skeletal maturity before 18 years of age.¹⁹⁴

On 23 October 2011, INN012's defence lawyer travels to Indonesia and gathers affidavit evidence of INN012's age from his sister, aunt and uncle attesting to his claim that he was less than 18 years old.¹⁹⁵

November 2011

On 1 November 2011, INN012's lawyers send the Office of the CDPP the affidavits obtained from INN012's sister, aunt and uncle which state that he is less than 18 years old.

On 2 November 2011, an Office of the CDPP minute recommends that the prosecution against INN012 be discontinued following receipt of the defence evidence.¹⁹⁶ A file note written by an Acting Principal Legal Officer from the Office of the CDPP agrees with the recommendation to discontinue. Nonetheless, it states that: 'The report of Professor Cole does no more than attempt to undermine the credibility of the methodology which has been proscribed by the Australian Parliament.'¹⁹⁷

On 7 November 2011, the Commonwealth Director of Public Prosecutions agrees to discontinue the case against INN012.¹⁹⁸

On 8 November 2011, charges are formally withdrawn at Sydney District Court. INN012 is subsequently released to Villawood Immigration Detention Centre.¹⁹⁹

On 16 November 2011, INN012 returns home to Indonesia. Since first claiming to be a child, INN012 has spent 241 days in immigration detention prior to formal arrest, and 390 days in an adult prison.

Case study 5: DUR041

- Apprehended: 28 March 2010
- Charged: 7 October 2010
- Removed from Australia: 3 December 2010
- Number of days in detention: 245 days

Until March 2010, DUR041 lived with his mother in Rote, Indonesia. DUR041 only completed up to Grade 3 of school in his village as his family could no longer afford to pay the school fees. After leaving school, DUR041 worked as a fisherman and could earn up to 50 000 rupiah per day [A\$5.30 equivalent].²⁰⁰ DUR041 had worked as a cook and crew member on fishing boats for one year.²⁰¹

DUR041 was at home with his mother when a friend came to his house and told him that the captain wanted to see him. He had worked with the captain one time before. The captain offered him 5 million rupiah [A\$530 equivalent] to be a crew member on a boat that would be going to Australia. He was paid the money that night and gave it to his mother. He accompanied the captain to the harbour the following night and they got into a small boat to travel out to a larger boat. One hour after getting on the larger boat, the passengers came on board via smaller vessels out at sea.²⁰²

During the journey, DUR041 was responsible for preparing the food for the crew and passengers.²⁰³ He did not know that he would be the cook before he got on the boat.²⁰⁴ There were initially seven crew on board the boat, but three of the crew members departed via a smaller vessel the night before the boat was intercepted.²⁰⁵

*DUR041 was not aware of the difference between Indonesian and Australian waters but he knew that boats monitor the border. He did not know that it is illegal to travel from Indonesia to Australia without travel documents.*²⁰⁶

March 2010

On 28 March 2010, DUR041 is apprehended in Australian waters by Australian authorities. He is one of four Indonesian crew members on board a SIEV carrying 36 asylum seekers to Australia.²⁰⁷

DUR041 remains on the Australian Navy ship for three days before he is taken to Christmas Island for processing and transferred into DIAC custody.²⁰⁸

April 2010

On 2 April 2010, DUR041 states during an interview with DIAC²⁰⁹ that his date of birth is 24 August 1999, as this is what he was told by his parents.²¹⁰ This would make him 11 years old.

On 5 April 2010, DUR041 is transferred from Christmas Island to Northern Immigration Detention Centre (Berrimah Accommodation) in Darwin.²¹¹

On 15 April 2010, AFP officers seek DUR041's consent to perform a wrist x-ray based on his earlier claim that he is not yet an adult. He is cautioned and given a copy of his rights in Bahasa

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Indonesia.²¹² Both DUR041 and an independent adult from Life Without Barriers give consent for the procedure,²¹³ and an x-ray of his left wrist is taken at Northern Territory Medical Imaging.²¹⁴

*DUR041 says that he was aware the x-ray was to determine his age.*²¹⁵

6 May 2010

A Criminal Justice Stay Certificate is issued which states that DUR041's date of birth is 24 August 1999.²¹⁶

September 2010

On 8 September 2010, an internal DIAC email attaching a list of minor crew in detention states that a DIAC case manager is satisfied that DUR041 is under 15 years old and should be removed.²¹⁷

On 11 September 2010, Corrective Services NSW contact the AFP Darwin Office and request DUR041's x-ray information as he has informed them that he is only 11 years old. The AFP provided Corrective Services NSW with the x-ray report for DUR041.²¹⁸

On 29 September 2010, a Statement of Material Facts is prepared by the AFP which states that DUR041 told the AFP that he was aware that the wrist x-ray results indicated that he was 19 years old. It states that DUR041 did not believe that he was this old as his mother and father told him he was born in 1999.²¹⁹

On 30 September 2010, an internal DIAC email expresses concern about DUR041's age and his transfer into AFP custody to face charges as an adult. It states 'I know that the AFP's wrist x-ray indicates this client "approximates 19" but our information is that he is likely to be under 15'.²²⁰

October 2010

On 4 October 2010, an internal DIAC email notes that 'the AFP are insistent that [DUR041] is over 18 and intend to charge him as an adult. ... [T]he indications from the AFP are that they won't discuss options for this client.'²²¹

On 6 October 2010, DIAC informs the AFP that DIAC age assessment officers do not consider DUR041] to be over 18 years old, and consider it likely that he is between 14 to 15 years old. They also tell the AFP that DUR041 says his mother has a birth certificate and that he will try to obtain a copy.²²²

On 7 October 2010, DUR041 is formally charged as an adult.²²³ He is transferred to Silverwater Correctional facility.²²⁴

On 8 October 2010, DUR041 appears before Central Local Court. Bail is not applied for and is formally refused. The Magistrate orders that DUR041 is to be kept with at least one other crew member for company, and the matter is adjourned for an age determination hearing on 1 November 2010.²²⁵

The same day, the defence emails the Office of the CDPP querying whether the AFP have any way of confirming DUR041's date of birth. The defence draws attention to the brief medical report which refers to an '*estimate of an approximate age*' and says that this 'is less than satisfactory when the result is the possible detention of a child in an adult gaol'. The defence also says that DUR041 did not look 18 years old.²²⁶

Later that day, an internal Office of the CDPP email notes, 'I am concerned about this one. The solicitors here say that he would pass for 15. Where we have a borderline case of "approximately 19", I'm wondering whether we should press on or send him back.'²²⁷ This is followed by an email which states that in matters where there has been some doubt about the age, the Office of the CDPP has 'ensured that Corrective Services were aware of the issue'.²²⁸

On 11 October 2010, an internal Office of the CDPP email notes the concerns raised by Legal Aid and recommends following up with the AFP. It says '[a]lso ask (though we know the answer) whether records may be available from Indonesia. The tone to take is that this is of genuine concern (because it is), and that we are not being dismissive of the concerns of [Legal Aid]'.²²⁹

On 14 October 2010, Corrective Services NSW again contact the AFP enquiring about DUR041's age as he is continuing to claim that he is a child. The AFP advise that 'it was the opinion of the AFP that the earlier x-ray analyses was [accurate] and that [DUR041] was born no later than 1991 and that the only reason than a expert witness statement was being obtained was to satisfy NSW Courts'.²³⁰

On 22 October 2010, an expert report from Dr Vincent Low states that DUR041 is 'over 18 years of age, and close to reaching skeletal maturity age of 19 years'. It notes that the bones in his wrist have not fully fused.²³¹

On 29 October 2010, an Office of the CDPP file note from a conversation with the defence records real concern about the applicability of the GP Atlas to people from different ethnic backgrounds. The defence say that they do not accept the expert report from Dr Low and are seeking funding from Legal Aid to obtain their own expert report.²³²

The same day, DIAC sends the formal report from DIAC's age assessment interview of DUR041 to the AFP and the Office of the CDPP.²³³ It states that based on his physical appearance, demeanour, behaviour, education and family history, DIAC believes that DUR041 is probably older

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than 11 years but he is not over the age of 18.²³⁴ Both the CDPP and AFP take issue with the relevance of the report.²³⁵

November 2010

On 1 November 2010, an officer from the Office of the CDPP tells the AFP that he feels the expert witness report and DIAC age assessment report are likely to create enough doubt for the court to have it err on the side of caution and consider DUR041 as under 18 years of age.²³⁶

On 2 November 2010, the Office of the CDPP ask the AFP for their view of DUR041's matter. An AFP officer states that the AFP would:

seek to return all people that test to 18 years, as part of the initial testing process, unless there is exceptional circumstances. In this case [DUR041] tested at 19, the expert report details him as over 18. There are no exceptional circumstances with this individual.²³⁷

He also states that the DIAC age assessment report is 'questionable as to its conclusions', and:

the outcomes now potentially mean that any test of 19 (any adult) through the x-ray process the prosecution can be crippled by the DIAC pilot assessment that has little academic rigour or foundation for the conclusions made. ... This current DIAC pilot process potentially raises risks for the government particularly to their claim at being tough on people smugglers.²³⁸

On 21 November 2010, an internal Office of the CDPP email recommends taking a cautious approach in cases where a wrist x-ray shows a person's wrist plates are not completely fused and that these individuals should be treated as juveniles.²³⁹

On 23 November 2010, an Office of the CDPP minute is sent to the Commonwealth Director of Public Prosecutions recommending withdrawal of the charges against DUR041. It states that there is a possibility that DUR041 is under 18 years of age due to the standard deviations available when comparing chronological and skeletal age.²⁴⁰

On 30 November 2010, charges against DUR041 are withdrawn and he is placed in DIAC custody.²⁴¹

3 December 2010

DUR041 returns home to Indonesia. Since first claiming to be a child, DUR041 has spent 188 days in immigration detention and 57 days in an adult prison.

¹ Interview with Ali Jasmin, Australian Human Rights Commission, Albany Regional Prison, 26 April 2012.

- ² Interview with Ali Jasmin, Australian Human Rights Commission, Albany Regional Prison, 26 April 2012.
- ³ Statement of material facts, AFP, 31 March 2010 (CDPP document 026.0031).
- ⁴ Statement of material facts, CDPP, 30 June 2010 (CDPP document 026.0190).
- ⁵ Interview with Ali Jasmin, Australian Human Rights Commission, Albany Regional Prison, 26 April 2012.
- ⁶ Interview with Ali Jasmin, Australian Human Rights Commission, Albany Regional Prison, 26 April 2012.
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- ²¹⁰ Acting Legal Officer, CDPP Sydney Office, Minute to Director, CDPP Sydney Office, 23 November 2010 (CDPP document 003.0045).
- ²¹¹ Information provided by DIAC to the Commission, 17 February 2012.
- ²¹² Part 1C Caution and rights – Bahasa (Indonesia), AFP, 15 April 2010 (AFP document 3).
- ²¹³ Consent to carry out a prescribed procedure (wrist x-ray) – individual, 15 April 2010 (AFP document 5);
Consent to carry out a prescribed procedure (wrist x-ray) – independent adult, 15 April 2010 (AFP document 5).
- ²¹⁴ Statement of [Federal Agent], AFP Darwin Office, 28 September 2010 (AFP document 8).
- ²¹⁵ Statement of material facts, AFP, 29 September 2010 (CDPP document 003.0175), p 10.
- ²¹⁶ Criminal Justice Stay Certificate, AGD, 6 May 2010 (AFP document 7).
- ²¹⁷ Immigration Officer, DIAC Canberra Office, Email to Immigration Officer, DIAC Canberra Office, 9 September 2010 (DIAC document mail39646801).
- ²¹⁸ Federal Agent, AFP Perth Office, Case Note, 12 October 2010 (AFP document 12).
- ²¹⁹ Statement of material facts, AFP, 29 September 2010 (CDPP document 003.0175), p 10.
- ²²⁰ Acting Principal Advisor, DIAC, Email to Immigration Officer, DIAC, 30 September 2010 (DIAC document mail39646739).
- ²²¹ Acting Principal Advisor, DIAC, Email to Acting Assistant Secretary, Immigration Intelligence Branch, DIAC, 4 October 2010 (DIAC document mail39646176).
- ²²² Acting Principal Advisor, DIAC, Email to Federal Agent, AFP, 6 October 2010 (DIAC document mail39642130).
- ²²³ Federal Agent, AFP, File Note, 8 October 2010 (AFP document 9).
- ²²⁴ Acting Director, Irregular Maritime Arrivals Operations Section, DIAC, Email to Immigration Officer, DIAC, 29 November 2010 (DIAC document mail39646085).
- ²²⁵ Federal Agent, AFP, File Note, 8 October 2010 (AFP document 9).
- ²²⁶ Counsel for Defence, Email to Legal Officer, Counter Terrorism & People Smuggling Branch, CDPP, 8 October 2010 (CDPP document 003.0138).
- ²²⁷ Senior Assistant Director, CDPP, Email to Deputy Director, CDPP, 8 October 2010 (CDPP document 003.0143).
- ²²⁸ Senior Assistant Director, CDPP, Email to Deputy Director, CDPP, 8 October 2010 (CDPP document.003.0143).

Appendix 1: Case studies

- ²²⁹ Senior Assistant Director, Counter Terrorism and People Smuggling Branch, CDPP, Email to Legal Officer, CDPP, 11 October 2010 (CDPP document 003.0137).
- ²³⁰ Federal Agent, AFP Perth Office, Case Note, 14 October 2010 (AFP document 13).
- ²³¹ Dr Vincent Low, Expert medical report, AFP, 22 October 2010 (CDPP document 003.0124).
- ²³² Legal Officer, CDPP Sydney Office, File Note, 29 October 2010 (CDPP document 003.0117).
- ²³³ Acting Principal Advisor, DIAC, Email to Federal Agent, AFP, 29 October 2010 (DIAC document mail 39645997).
- ²³⁴ Age assessment interview report, DIAC, 6 October 2010 (CDPP document 003.0064).
- ²³⁵ Acting Assistant Secretary, Immigration Intelligence Branch, DIAC, Email to Acting Principal Advisor, DIAC, 31 October 2010 (DIAC document mail 39645997).
- ²³⁶ Federal Agent, AFP Perth Office, Case Note, 01 November 2010 (AFP document 19).
- ²³⁷ Federal Agent, AFP, Email to Deputy Director, CDPP, 2 November 2010 (CDPP document 003.0104).
- ²³⁸ Federal Agent, AFP, Email to Deputy Director, CDPP, 2 November 2010 (CDPP document 003.0104).
- ²³⁹ Senior Assistant Director, CDPP, Email to Deputy Director, CDPP, 22 November 2010 (CDPP document 003.0074).
- ²⁴⁰ Acting Legal Officer, CDPP, Minute to Director, CDPP, 23 November 2010 (CDPP document 003.0045).
- ²⁴¹ Officer for the Director, CDPP Sydney Office, Fax to Court Coordinator, Bankstown Local Court, 29 November 2010 (CDPP document 003.0021).

Appendix 2:

Individuals of concern to the Inquiry

Appendix 2: Individuals of concern to the Inquiry

The table below contains information about each of the individuals of concern to the Inquiry. The data contained in this table was provided by the Department of Immigration and Citizenship and the Australian Federal Police.

The Commission has endeavoured to ensure that the information contained in this table is accurate. However, largely due to some inconsistencies in the original data provided, we are unable to guarantee its accuracy in every case.

Name	Status	Date apprehended	Date detained	Date x-rayed	Date moved to correctional facility	Date returned to immigration detention	Date removed	Days in immigration detention	Days in correctional facilities	Total days detained – until 6 July 2012
UNA001	Before the court	10/08/10	10/08/10	25/01/11	8/04/11		CJSC in place	241	455	696
NOK041	Before the court	1/10/10	6/10/10	31/03/11	20/04/11		CJSC in place	196	443	639
TAR041	Before the court	16/11/10	16/11/10	–	10/02/11	–	Still in detention	86	512	598
LAW085	Before the court	7/05/11	7/05/11	–	15/09/11	–	Still in detention	131	295	426
ART020	Convicted	17/01/09	19/01/09	5/02/09	8/02/09	16/01/12	16/01/12	20	1072	1092
ART019	Convicted	17/01/09	19/01/09	5/02/09	6/02/09	16/01/12	16/01/12	18	1074	1092
ART018	Convicted	17/01/09	19/01/09	5/02/09	7/02/09	16/01/12	16/01/12	19	1073	1092
DRU001	Convicted	2/04/09	9/04/09	28/04/09	29/04/09	2/04/12	2/04/12	20	1069	1089
FLE049	Convicted	16/04/09	21/04/09	20/05/09	5/06/09	14/04/12	20/04/12	51	1044	1095
FLE048	Convicted	16/04/09	5/05/09	22/05/09	29/05/09	14/04/12	20/04/12	30	1051	1081
QUE053	Convicted	23/06/09	28/06/09	20/08/09	20/08/09	12/06/12	12/06/12	53	1027	1080
QUE051	Convicted	23/06/09	28/06/09	20/08/09	20/08/09	12/06/12	12/06/12	53	1027	1080
YAG065	Convicted	11/09/09	16/09/09	15/10/09	29/10/09	3/07/12	3/07/12	43	978	1021
WAK090	Convicted	12/09/09	17/09/09	15/10/09	15/10/09	19/06/12	19/06/12	28	978	1006
WAK089	Convicted	12/09/09	17/09/09	15/10/09	16/10/09	19/06/12	19/06/12	29	977	1006
WAK087	Convicted	12/09/09	17/09/09	15/10/09	15/10/09	19/06/12	19/06/12	28	978	1006
FAI030	Convicted	28/09/09	28/09/09	20/11/09	7/12/09	3/07/12	3/07/12	70	939	1009
FAI031	Convicted	1/10/09	2/10/09	20/11/09	7/12/09	3/07/12	3/07/12	66	939	1005
INW054	Convicted	9/10/09	13/10/09	26/11/09	26/11/09	–	Still in detention	44	953	997
OAK031	Convicted	23/10/09	25/10/09	–	15/12/09	3/07/12	3/07/12	51	931	982
UPW029	Convicted	15/11/09	19/11/09	14/01/10	11/02/10	–	Still in detention	84	876	960

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Name	Status	Date apprehended	Date detained	Date x-rayed	Date moved to correctional facility	Date returned to immigration detention	Date removed	Days in immigration detention	Days in correctional facilities	Total days detained – until 6 July 2012
VMT011	Convicted	16/11/09	20/11/09	14/01/10	3/02/10	12/06/12	12/06/12	75	860	935
YRE052	Convicted	19/11/09	20/11/09	14/01/10	2/02/10	26/06/12	26/06/12	74	875	949
ALE058	Convicted	23/11/09	27/11/09	13/01/10	8/02/10	26/06/12	26/06/12	73	869	942
DER026	Convicted	27/11/09	2/12/09	9/12/09	11/12/09	–	Still in detention	9	938	947
DER024	Convicted	27/11/09	2/12/09	9/12/09	11/12/09	–	Still in detention	9	938	947
EAS056	Convicted	3/12/09	9/12/09	14/01/10	4/03/10	–	Still in detention	85	855	940
EAS054	Convicted	3/12/09	9/12/09	14/01/10	4/03/10	18/05/12	18/05/12	85	806	891
KAD059	Convicted	18/12/09	22/12/09	20/01/10	29/03/10	18/05/12	18/05/12	97	781	878
NTN032	Convicted	29/12/09	5/01/10	20/01/10	6/10/10	–	Still in detention	274	639	913
OSB051	Convicted	30/12/09	5/01/10	21/01/10	17/03/10	18/05/12	18/05/12	71	793	864
PEN061	Convicted	31/12/09	5/01/10	20/01/10	29/09/10	26/06/12	26/06/12	267	636	903
OFD029	Convicted	7/03/10	9/03/10	12/04/10	30/09/10	8/06/12	8/06/12	205	617	822
SAN055	Convicted	7/06/10	7/06/10	21/12/10	10/02/11	–	Still in detention	248	512	760
JET090	Convicted	13/09/10	14/09/10	–	28/06/11	–	Still in detention	287	374	661
FAI029	Acquitted	1/10/09	2/10/09	20/11/09	7/12/09	30/03/11	11/04/11	78	478	556
LAL041	Acquitted	18/10/09	23/10/09	21/12/09	22/12/09	5/08/11	20/08/11	75	591	666
KAD058	Acquitted	18/12/09	24/12/09	22/01/10	29/03/10	20/05/11	29/05/11	104	417	521
TEN051	Acquitted	25/04/10	1/05/10	24/09/10	10/03/11	7/12/11	13/01/12	350	272	622
TIW043	Acquitted	5/06/10	14/06/10	17/11/10	1/12/10	25/11/11	3/12/11	178	359	537
WIC116	Acquitted	17/11/10	17/11/10	17/06/11	10/03/11	3/04/12	20/04/12	130	390	520
TUC016	Discontinued	7/10/08	10/10/08	24/10/08	17/10/08	13/11/08	21/11/08	15	27	42

Name	Status	Date apprehended	Date detained	Date x-rayed	Date moved to correctional facility	Date returned to immigration detention	Date removed	Days in immigration detention	Days in correctional facilities	Total days detained – until 6 July 2012
ULT055	Discontinued	29/08/09	2/09/09	24/09/09	24/09/09	22/11/10	30/11/10	30	424	454
LAL040	Discontinued	18/10/09	23/10/09	21/12/09	22/12/09	11/02/11	20/02/11	69	416	485
UPW031	Discontinued	15/11/09	18/11/09	13/01/11	11/02/10	14/11/11	19/11/11	90	641	731
MAL011	Discontinued	28/12/09	4/01/10	20/01/10	29/09/10	2/12/11	2/01/12	299	429	728
NTN031	Discontinued	29/12/09	5/01/10	21/01/10	6/10/10	22/11/11	26/11/11	278	412	690
PEN060	Discontinued	31/12/09	5/01/10	21/01/10	29/09/10	18/04/11	29/04/11	278	201	479
PEN059	Discontinued	31/12/09	5/01/10	21/01/10	30/09/10	7/12/11	18/12/11	279	433	712
TRA029	Discontinued	8/01/10	11/01/10	2/03/10	14/10/10	20/09/11	24/09/11	280	341	621
INN012	Discontinued	20/02/10	23/02/10	1/04/10	14/10/10	8/11/11	16/11/11	241	390	631
JDT046	Discontinued	24/02/10	28/02/10	8/04/10	16/12/10	12/08/11	19/08/11	298	239	537
OFD030	Discontinued	7/03/10	10/03/10	12/04/10	30/09/10	22/08/11	7/10/11	250	326	576
ALB057	Discontinued	23/03/10	26/03/10	15/04/10	11/11/10	26/10/11	4/11/11	239	349	588
DUR041	Discontinued	28/03/10	2/04/10	15/04/10	7/10/10	–	3/12/10	188	57	245
EN0028	Discontinued	29/03/10	29/03/10	–	5/08/10	28/10/11	30/11/11	162	449	611
EN0029	Discontinued	29/03/10	29/03/10	–	4/08/10	22/08/11	26/09/11	163	383	546
HER053	Discontinued	4/04/10	9/04/10	21/11/11	14/10/10	11/11/10	20/01/12	623	28	651
OXL003	Discontinued	11/04/10	19/04/10	21/05/10	4/11/10	3/11/11	5/12/11	231	364	595
OXL002	Discontinued	11/04/10	19/04/10	21/05/10	3/11/10	19/08/11	21/10/11	261	289	550
SHE003	Discontinued	22/04/10	24/04/10	–	2/12/10	14/07/11	8/08/11	247	224	471
SHE002	Discontinued	22/04/10	24/04/10	–	2/12/10	19/07/11	8/08/11	242	229	471
WIL025	Discontinued	26/04/10	1/05/10	21/05/10	20/01/11	17/06/11	13/07/11	290	148	438

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Name	Status	Date apprehended	Date detained	Date x-rayed	Date moved to correctional facility	Date returned to immigration detention	Date removed	Days in immigration detention	Days in correctional facilities	Total days detained – until 6 July 2012
WIL042	Discontinued	26/04/10	1/05/10	21/05/10	20/01/11	17/06/11	13/07/11	290	148	438
WIL024	Discontinued	26/04/10	1/05/10	21/05/10	20/01/11	17/06/11	13/07/11	290	148	438
KRM054	Discontinued	13/05/10	13/05/10	21/12/10	–	–	18/05/11	370	NIL	370
LEN060	Discontinued	15/05/10	20/05/10	24/09/10	9/12/10	12/05/11	2/06/11	224	154	378
TIW041	Discontinued	5/06/10	14/06/10	1/12/10	1/12/10	26/10/11	2/11/11	177	329	506
TIW044	Discontinued	5/06/10	14/06/10	21/12/10	1/12/10	6/10/11	13/10/11	177	309	486
BOM062	Discontinued	12/06/10	18/06/10	21/03/11	9/03/11	21/04/11	17/05/11	290	43	333
JAM074	Discontinued	2/07/10	2/07/10	21/12/10	–	–	30/11/11	516	NIL	516
TOW043	Discontinued	28/07/10	29/07/10	14/12/10	13/04/11	16/06/11	21/12/11	446	64	510
WID021	Discontinued	13/08/10	14/08/10	19/04/11	–	–	5/01/12	509	NIL	509
IRI056	Discontinued	6/09/10	11/09/10	17/03/11	7/04/11	1/08/11	23/08/11	230	116	346
KIN050	Discontinued	20/09/10	20/09/10	17/03/11	6/04/11	21/04/11	15/05/11	222	15	237
MOA025	Discontinued	1/10/10	5/10/10	–	14/04/11	–	24/03/12	191	345	536
QUN077	Discontinued	8/10/10	8/10/10	10/02/11	9/03/11	9/09/11	15/09/11	158	184	342
RUN068	Discontinued	9/10/10	9/10/10	17/03/11	24/03/11	22/06/11	26/06/11	170	90	260
TYE059	Discontinued	13/10/10	13/10/10	25/01/11	29/03/11	8/12/11	21/12/11	180	254	434
GEO027	Discontinued	27/10/10	31/10/10	23/05/11	6/05/11	15/02/12	22/02/12	194	285	479
GEO028	Discontinued	27/10/10	31/10/10	25/01/11	6/05/11	20/12/11	29/12/11	196	228	424
BAI031	Discontinued	25/11/10	2/12/10	20/04/11	19/05/11	21/12/11	10/01/12	188	216	404
BAI032	Discontinued	25/11/10	2/12/10	20/04/11	19/05/11	21/12/11	10/01/12	188	216	404
DRL038	Discontinued	27/11/10	2/12/10	19/04/11	1/06/11	5/05/12	5/05/12	181	339	520

Name	Status	Date apprehended	Date detained	Date x-rayed	Date moved to correctional facility	Date returned to immigration detention	Date removed	Days in immigration detention	Days in correctional facilities	Total days detained – until 6 July 2012
HWD059	Discontinued	10/12/10	16/12/10	31/10/11	23/06/11	28/11/11	7/12/11	198	158	356
IGL009	Discontinued	14/12/10	14/12/10	11/02/11	19/05/11	12/12/11	21/12/11	165	207	372
LMN005	Discontinued	19/12/10	26/12/10	8/04/11	5/05/11	21/05/11	2/06/11	142	16	158
NEP059	Discontinued	25/12/10	4/01/11	18/05/11	–	–	19/07/11	196	NIL	196
PAL080	Discontinued	7/01/11	18/01/11	10/02/11	20/04/11	28/05/11	19/06/11	114	38	152
UNI098	Discontinued	26/02/11	6/03/11	7/06/11	30/06/11	8/12/11	21/12/11	129	161	290
BAZ139	Discontinued	17/03/11	21/03/11	31/03/11	23/06/11	2/11/11	5/12/11	127	132	259
BAZ138	Discontinued	17/03/11	21/03/11	31/03/11	23/06/11	12/07/11	2/12/11	237	19	256
CLA059	Discontinued	21/03/11	25/03/11	31/03/11	–	–	6/12/11	256	NIL	256
DEA039	Discontinued	30/03/11	7/04/11	–	8/06/11	11/11/11	19/01/12	131	156	287
NAK032	Discontinued	18/05/10	22/05/10	–	10/02/11	25/05/12	25/05/12	264	470	734
UNI099	Discontinued	26/02/11	6/03/11	7/06/11	30/06/11	13/12/11	21/12/11	124	166	290
IGL011	X-rayed & removed without charge	14/12/10	14/12/10	11/02/11	–	–	22/03/11	98	NIL	98
DRU003	X-rayed & removed without charge	2/04/09	9/04/09	28/04/09	–	–	15/05/09	36	NIL	36
DRU002	X-rayed & removed without charge	2/04/09	9/04/09	28/04/09	–	–	15/05/09	36	NIL	36
CAN050	X-rayed & removed without charge	31/01/10	31/01/10	11/03/10	–	–	7/05/10	96	NIL	96
GIR041	X-rayed & removed without charge	16/02/10	16/02/10	1/04/10	–	–	24/08/10	189	NIL	189

Appendix 2: Individuals of concern to the Inquiry

Name	Status	Date apprehended	Date detained	Date x-rayed	Date moved to correctional facility	Date returned to immigration detention	Date removed	Days in immigration detention	Days in correctional facilities	Total days detained – until 6 July 2012
HAM046	X-rayed & removed without charge	18/02/10	23/02/10	1/04/10	–	–	11/11/10	261	NIL	261
INN013	X-rayed & removed without charge	20/02/10	23/02/10	8/04/10	–	–	16/08/10	174	NIL	174
JDT047	X-rayed & removed without charge	24/02/10	28/02/10	8/04/10	–	–	12/08/10	165	NIL	165
MAN048	X-rayed & removed without charge	3/03/10	7/03/10	8/04/10	–	–	16/08/10	162	NIL	162
NED054	X-rayed & removed without charge	6/03/10	6/03/10	12/04/10	–	–	24/08/10	171	NIL	171
GEE080	X-rayed & removed without charge	2/04/10	7/04/10	6/05/10	–	–	11/11/10	218	NIL	218
KRM055	X-rayed & removed without charge	13/05/10	13/05/10	11/11/10	–	–	20/12/10	221	NIL	221
MOI046	X-rayed & removed without charge	16/05/10	23/05/10	12/11/10	–	–	20/12/10	211	NIL	211
BOM061	X-rayed & removed without charge	12/06/10	18/06/10	7/09/10	–	–	9/04/11	295	NIL	295
BOM064	X-rayed & removed without charge	12/06/10	18/06/10	12/11/10	–	–	20/12/10	185	NIL	185
CR0033	X-rayed & removed without charge	14/06/10	18/06/10	12/11/10	–	–	20/12/10	185	NIL	185
CR0036	X-rayed & removed without charge	14/06/10	18/06/10	12/11/10	–	–	20/12/10	185	NIL	185

Name	Status	Date apprehended	Date detained	Date x-rayed	Date moved to correctional facility	Date returned to immigration detention	Date removed	Days in immigration detention	Days in correctional facilities	Total days detained – until 6 July 2012
JAM075	X-rayed & removed without charge	2/07/10	2/07/10	25/01/11	–	–	16/03/11	257	NIL	257
OTF049	X-rayed & removed without charge	13/07/10	17/07/10	21/12/10	–	–	13/01/11	180	NIL	180
EAS055	X-rayed & removed without charge	3/12/09	9/12/09	14/01/10	–	–	12/03/10	93	NIL	93
BAI033	X-rayed & removed without charge	25/11/10	2/12/10	20/04/11	–	–	30/06/11	210	NIL	210
GRD044	X-rayed & removed without charge	13/12/10	16/12/10	18/05/11	–	–	9/06/11	175	NIL	175
LMN006	X-rayed & removed without charge	19/12/10	26/12/10	19/04/11	–	–	30/06/11	186	NIL	186
PAL078	X-rayed & removed without charge	7/01/11	18/01/11	10/02/11	–	–	7/04/11	79	NIL	79
ASH049	X-rayed & removed without charge	16/03/11	21/03/11	10/05/11	–	–	9/06/11	80	NIL	80
BAZ137	X-rayed & removed without charge	17/03/11	21/03/11	31/03/11	–	–	5/05/11	45	NIL	45
CLA060	X-rayed & removed without charge	21/03/11	25/03/11	8/04/11	–	–	18/05/11	54	NIL	54
JSS023	X-rayed & removed without charge	28/04/11	1/05/11	15/06/11	–	–	18/11/11	201	NIL	201
JSS024	X-rayed & removed without charge	28/04/11	1/05/11	16/06/11	–	–	6/01/12	250	NIL	250

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Name	Status	Date apprehended	Date detained	Date x-rayed	Date moved to correctional facility	Date returned to immigration detention	Date removed	Days in immigration detention	Days in correctional facilities	Total days detained – until 6 July 2012
PRK056	X-rayed & removed without charge	30/05/11	3/06/11	26/09/11	–	–	18/11/11	168	NIL	168
YND048	X-rayed & removed without charge	26/07/11	30/07/11	26/09/11	–	–	28/10/11	90	NIL	90
LEA009	X-rayed & removed without charge	25/12/2009	4/1/2010	1/04/10	–	–	12/08/10	220	NIL	220
YAL048	X-rayed & removed without charge	17/08/2010	18/08/2010	9/02/11	–	–	16/03/11	210	NIL	210
SNUG002	Not x-rayed & removed	29/09/08	2/10/08	–	–	–	16/10/08	14	NIL	14
TUC017	Not x-rayed & removed	7/10/08	10/10/08	–	–	–	27/10/08	17	NIL	17
VEL010	Not x-rayed & removed	19/11/08	24/11/08	–	–	–	30/12/08	36	NIL	36
ALT002	Not x-rayed & removed	15/09/09	19/09/09	–	–	–	2/10/09	13	NIL	13
PRE038	Not x-rayed & removed	30/10/09	3/11/09	–	–	–	7/01/10	65	NIL	65
TRK051	Not x-rayed & removed	14/11/09	17/11/09	–	–	–	5/12/09	18	NIL	18
TRK050	Not x-rayed & removed	14/11/09	17/11/09	–	–	–	5/12/09	18	NIL	18
DAL036	Not x-rayed & removed	1/02/10	1/02/10	–	–	–	18/03/10	45	NIL	45
MOA026	Not x-rayed & removed	1/10/10	5/10/10	–	–	–	28/01/11	115	NIL	115
NOK039	Not x-rayed & removed	1/10/10	6/10/10	–	–	–	7/04/11	183	NIL	183
NOK040	Not x-rayed & removed	1/10/10	6/10/10	–	–	–	17/02/11	134	NIL	134
TAR042	Not x-rayed & removed	16/11/10	16/11/10	–	–	–	29/01/11	74	NIL	74
ALI057	Not x-rayed & removed	18/11/10	23/11/10	–	–	–	24/02/11	93	NIL	93
ALI056	Not x-rayed & removed	18/11/10	23/11/10	–	–	–	18/02/11	87	NIL	87

Name	Status	Date apprehended	Date detained	Date x-rayed	Date moved to correctional facility	Date returned to immigration detention	Date removed	Days in immigration detention	Days in correctional facilities	Total days detained – until 6 July 2012
ALI054	Not x-rayed & removed	18/11/10	23/11/10	–	–	–	18/02/11	87	NIL	87
RAS046	Not x-rayed & removed	6/02/11	12/02/11	–	–	–	10/06/11	118	NIL	118
RAS045	Not x-rayed & removed	6/02/11	12/02/11	–	–	–	10/06/11	118	NIL	118
RAS047	Not x-rayed & removed	6/02/11	12/02/11	–	–	–	10/06/11	118	NIL	118
CLA061	Not x-rayed & removed	21/03/11	25/03/11	–	–	–	20/04/11	26	NIL	26
NON056	Not x-rayed & removed	16/05/11	16/05/11	–	–	–	26/09/11	133	NIL	133
PRK054	Not x-rayed & removed	30/05/11	3/06/11	–	–	–	15/02/12	257	NIL	257
PRK055	Not x-rayed & removed	30/05/11	3/06/11	–	–	–	18/11/11	168	NIL	168
ULI062	Not x-rayed & removed	8/07/11	8/07/11	–	–	–	15/08/11	38	NIL	38
ULI064	Not x-rayed & removed	8/07/11	8/07/11	–	–	–	15/08/11	38	NIL	38
BIL051	Not x-rayed & removed	7/08/11	7/08/11	–	–	–	23/09/11	47	NIL	47
CRB104	Not x-rayed & removed	11/08/11	11/08/11	–	–	–	10/09/11	30	NIL	30
CRB106	Not x-rayed & removed	11/08/11	11/08/11	–	–	–	10/09/11	30	NIL	30
DOY060	Not x-rayed & removed	12/08/11	12/08/11	–	–	–	7/10/11	56	NIL	56
EMY069	Not x-rayed & removed	19/08/11	19/08/11	–	–	–	6/01/12	140	NIL	140
HPR111	Not x-rayed & removed	23/09/11	23/09/11	–	–	–	16/12/11	84	NIL	84
GDE001	Not x-rayed & removed	23/09/11	24/09/11	–	–	–	14/10/11	20	NIL	20
HPR112	Not x-rayed & removed	23/09/11	23/09/11	–	–	–	21/12/11	89	NIL	89
GDE002	Not x-rayed & removed	23/09/11	24/09/11	–	–	–	14/10/11	20	NIL	20
IML076	Not x-rayed & removed	28/09/11	28/09/11	–	–	–	21/10/11	23	NIL	23
IML075	Not x-rayed & removed	28/09/11	28/09/11	–	–	–	2/12/11	65	NIL	65

Appendix 2: Individuals of concern to the Inquiry

Name	Status	Date apprehended	Date detained	Date x-rayed	Date moved to correctional facility	Date returned to immigration detention	Date removed	Days in immigration detention	Days in correctional facilities	Total days detained – until 6 July 2012
KEL053	Not x-rayed & removed	18/10/11	22/10/11	–	–	–	12/01/12	82	NIL	82
MUN081	Not x-rayed & removed	22/10/11	23/10/11	–	–	–	16/12/11	54	NIL	54
MUN080	Not x-rayed & removed	22/10/11	23/10/11	–	–	–	18/11/11	26	NIL	26
NIC045	Not x-rayed & removed	23/10/11	23/10/11	–	–	–	18/11/11	26	NIL	26
NIC047	Not x-rayed & removed	23/10/11	23/10/11	–	–	–	18/11/11	26	NIL	26
OLD050	Not x-rayed & removed	30/10/11	7/11/11	–	–	–	9/02/12	94	NIL	94
ROB050	Not x-rayed & removed	2/11/11	7/11/11	–	–	–	13/01/12	67	NIL	67
SIR059	Not x-rayed & removed	6/11/11	15/11/11	–	–	–	9/12/11	24	NIL	24
SIR057	Not x-rayed & removed	6/11/11	15/11/11	–	–	–	9/12/11	24	NIL	24
SIR058	Not x-rayed & removed	6/11/11	15/11/11	–	–	–	21/12/11	36	NIL	36
TOB056	Not x-rayed & removed	8/11/11	8/11/11	–	–	–	16/12/11	38	NIL	38
VDR079	Not x-rayed & removed	20/11/11	21/11/11	–	–	–	14/01/12	54	NIL	54
WEE083	Not x-rayed & removed	22/11/11	22/11/11	–	–	–	8/01/12	47	NIL	47
WEE062	Not x-rayed & removed	22/11/11	22/11/11	–	–	–	8/01/12	47	NIL	47
WEE084	Not x-rayed & removed	22/11/11	22/11/11	–	–	–	8/01/12	47	NIL	47
WEE069	Not x-rayed & removed	22/11/11	22/11/11	–	–	–	8/01/12	47	NIL	47

Appendix 3:

Submissions

Appendix 3: Submissions

The Inquiry received a total of 39 submissions, four of which remain confidential.

Submission name	Submission No.
Amnesty International Australia	23
Australian Government	30
Australian Lawyers Alliance	21
Australian Society of Forensic Odontology	4
Aynsley-Green, Al (Professor Sir)	38
Children's Commissioners and Guardians	31
Christie, James (Dr)	19
Cole, Tim (Professor)	5
Dental Age Assessment Team, Kings College London Dental Institute	7
Department of Immigration and Citizenship	37
Franklin, Daniel (Associate Professor)	16
Henson, Graeme (Chief Magistrate, Local Court of NSW)	27
Hofman, Paul (Dr) and others	9
Hogan, Greg	24
Human Rights Council of Australia Inc	39
Human Rights Law Centre	34
Hyde, John (MLA)	1
Indonesia Institute	3

International Commission of Jurists Australia	33
Knott, Stephen (Dr)	17
Lee, Simon	10
Legal Aid NSW	35
Legal Aid Queensland	6
Lloyd, Edwina	29
Low, Vincent (Dr)	15
Northern Territory Legal Aid Commission	32
Refugee Action Network Newcastle	20
Sheldon, Anthony	26
The George Institute for Global Health	22
The Royal Australasian College of Physicians	11
The Royal Australian and New Zealand College of Radiologists	14
Victoria Legal Aid	13
Victorian Equal Opportunity and Human Rights Commission	25
Victorian Institute of Forensic Medicine	18
Xamon, Alison (MLC)	28
CONFIDENTIAL	4 Submissions

Appendix 4:

Hearings and visits

1 Hearings

The Inquiry held two public hearings; the first for medical experts and the second for Commonwealth agencies.

The following is a list of witnesses who appeared at each of the hearings.

Public hearing for key medical experts – Sydney, 9 March 2012

- Professor Tim Cole (Professor of Medical Statistics)
- Dr Anthony Hill (President of the Australian Society of Forensic Odontology)
- Dr Paul Hofman (President of the Australasian Paediatric Endocrine Group)
- Dr Vincent Low (Consultant Radiologist)
- Dr Ella Onikul (Paediatric Radiologist)

Public hearing for Commonwealth agencies – Canberra, 19-20 April 2012

- Commonwealth Director of Public Prosecutions and senior staff from his office
- Deputy Commissioner Operations of the Australian Federal Police and one other AFP officer
- First Assistant Secretary, Criminal Justice Division of the Attorney-General's Department and two other AGD officers
- First Assistant Secretary, Department of Immigration and Citizenship and two other DIAC officers

2 Visits

On 26 and 27 April 2012, two members of the staff of the Australian Human Rights Commission visited Albany Regional Prison and Pardelup Prison Farm for the purposes of this Inquiry.

The Commission staff undertook four interviews at Albany Regional Prison and three interviews at Pardelup Prison Farm with individuals who had said that they were children at the time of the offence of which they were charged.

Appendix 5:

The use of
statistical
evidence in
the context of
section 236B of
the Migration Act

1 Introduction

This short paper is concerned, first, to examine the significance in a particular case of statistical evidence; secondly, to examine what it means to prove a fact on ‘the balance of probabilities’; and finally to examine the significance of relying on statistical evidence to establish an accused person’s age in the context of s 236B of the *Migration Act 1958* (Cth).

Section 236B of the Migration Act fixes mandatory minimum penalties for certain people smuggling offences. In particular, the section fixes a mandatory minimum penalty of five years imprisonment for the offence created by s 233C of the Migration Act – the aggravated offence of people smuggling. The aggravated offence of people smuggling involves organising or facilitating the bringing or coming to Australia of a group of at least five unlawful citizens. It is the offence with which most Indonesian crew of people smuggling vessels are charged.

The legislature has made it plain that it does not intend the mandatory minimum penalties for people smuggling offences to apply to children. Subsection 236B(2) provides:

This section does not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.

This paper is not concerned with the issue of which party bears the onus of establishing that an individual charged is under the age of 18 years. This latter issue is complicated by, among other things, the related issue which arises when a particular court has exclusive jurisdiction to hear and determine a charge for an offence alleged to have been committed by a child (see for example, the *Children’s Court of Western Australia Act 1988* (WA)).

Nor is this paper concerned with the debate about the applicability of available statistical information to a population of young Indonesian males who have arrived in Australia after travelling to Australia on a vessel carrying asylum seekers and who say that they are children.

The issue of how informative skeletal maturity, as revealed by a wrist x-ray, is on the issue of whether an individual is over the age of 18 years is considered in Chapter 2 of this report. That issue is not further considered in this paper.

2 Statistics are concerned with populations – not with individuals

It is universally acknowledged that a person’s precise chronological age cannot be determined from a wrist x-ray or from any other biomedical marker. However, statistical information is available as to the approximate age at which young people generally will show a mature x-ray.

Where an individual suspected of people smuggling has been shown by x-ray to have a mature wrist, it has been common in Australian courts for opinion evidence to be given in terms such as:

The probability of the subject of the x-ray being less than 18 years old at 17 November 2010 is approximately 22%.

Chapter 2 of this report reveals the inaccuracy of this suggested probability. However, since it may prove possible to calculate a more accurate statistical probability of a person's being a particular age, it is useful to understand the import of evidence of this kind. For convenience this issue is here examined on the (false) assumption that the above probability is accurate.

Taken at face value, a statistical probability of this kind has a tendency to mislead. The author of the above statement, in referring to the probability of the individual being less than 18 years of age, sought to identify the statistical probability of the individual being less than 18 years of age; he was not saying anything directly concerning the individual the subject of the x-ray.

This is because statistics are concerned, not with individuals, but with populations. The expert opinion quoted above intended to identify the mathematical probability within a given population of an individual who is less than 18 years of age showing a mature wrist on x-ray. Mathematical probabilities rely on the principle of indifference which is discussed by Ligertwood and Edmond in *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts*.¹

The true import of the above statement is that, assuming that the subject of the x-ray comes from a population comparable to that from which the relevant statistics have been derived, if the individual the subject of the wrist x-ray, and a sufficiently large number of other individuals from the same population who have x-rays showing the identical degree of skeletal development, are all found to be adults, this finding will be correct in 78 out of every 100 cases – but inevitably incorrect in 22 out of every 100 cases. Put another way, the statistic accepts that approximately 22% of individuals with an x-ray identical to the subject's x-ray will be less than 18 years of age and says nothing about whether the subject might be one of them. To assess the subject's age on the basis of this statistical probability alone will be to act to his serious prejudice should he be one of the 22% who matures early.

The above reference to a 'sufficiently large population' is intended to reflect the difference between a theoretical and an empirical probability. This difference can be illustrated by reference to the toss of a coin. We take it as a given that, with a sufficiently large population, the toss of a coin will come down heads: tails 50:50. This result, however, may not be achieved in 100 tosses or even 1,000; it is a theoretical probability which might only be replicated empirically in a much larger number of tosses. In a limited sample the empirical outcome might be heads: tails 75:25 or 25:75 or some other ratio. The smaller the sample, the less likely it is that the theoretical ratio will be achieved.

The significance of the failure of statistical evidence to address any particular case was examined by Dant in '*Gambling on the Truth: The Use of Purely Statistical Evidence as a Basis for Civil Liability*'.² In this article the learned author usefully discusses the difference between rational decision-making for gambling purposes and rational decision-making for judicial purposes. She makes the point that, on the basis of the statistic '60% of the marbles in the sack are red', it is rational to bet that a particular marble withdrawn from the sack is red even though the statistic does not assert anything about the particular marble selected.³ Long term winnings will be maximised by betting red on every occasion on which a marble is drawn from the sack. By contrast, the rational basis required for fact finding for judicial purposes is logical or evidentiary support in the context of the individual case.⁴ While it might be rational to *bet* that the marble is red as this will maximise long term winnings, it would not be rational on the basis of the statistic alone to form a *belief* that the marble is red; any belief that the particular marble is red will be no more than a guess.

The learned authors of *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (5th edition) analyse the nature of mathematical probabilities in a similar way. They state:

mathematical probabilities describe the nature of entire classes and say nothing about the individual members of that class. To say that an individual hypothesis is proved where its probability exceeds 0.5 is to say that, although there can be no certainty about the occurrence of this individual hypothesis, nevertheless, to act on it as if it had occurred will in the long run produce more correct decisions than incorrect decision. But incorrect decisions there will be.⁵

Legal writers who have considered this issue not infrequently refer to two theoretical cases to illustrate the unsatisfactory nature of mathematical probabilities as proof of a particular issue – even where the issue in question is only required to be proved on the balance of probabilities. While these theoretical cases tend to be unrealistic, as few cases will arise in which mathematical probabilities constitute the only evidence available and joinder rules would probably obviate some of the difficulties envisaged, the cases usefully illuminate the deficiencies of evidence based on statistics alone.

The first case, found in Cohen's *The Probable and the Provable*, postulates that 499 people have paid for admission to a rodeo and 1,000 people are found to be at the event, with 'A' being one of those present.⁶ No other testimony is available as to whether A paid for his seat. Plainly enough there is a 0.501 probability that A, and indeed all others present, did not pay, but it would be manifestly unjust to hold A liable. Apart from anything else, there is a 0.499 probability that he did pay. Professor Glanville Williams has suggested that it would remain wrong to give judgment against A even if only 50 of the 1,000 people present had paid, raising the mathematical probability to 0.95.⁷

The second theoretical case is one initially raised by Professor Glanville Williams himself.⁸ He hypothesises that the Blue Bus Company has far more buses on the road than the Red Bus Company and points out that this constitutes no reason in law to assume that the plaintiff was knocked down by a blue bus rather than a red bus – otherwise the Blue Bus Company would have to pay damages in all cases in which the sole issue is the ownership of the offending bus and it cannot be shown whether the bus was blue or red.

There is judicial support for the above concerns with respect to statistical evidence. In *State Government Insurance Commission v Laube*⁹ an insurer sued an insured to obtain reimbursement of an amount paid in damages to a pedestrian who had been struck by a car driven by the insured. The insurer claimed that the insured had failed to comply with a term of his policy by driving while so much under the influence of alcohol as to be incapable of exercising effective control of the vehicle. It was proved that the collision occurred at 1:20am and that at 2:35am the insured's blood alcohol reading was 0.155. Expert evidence was given that, with such an alcohol content, most but not all persons would have their faculties impaired to a degree that would significantly impair their ability to exercise effective control of a vehicle. All three judges held that the insurer had failed to prove its case. King CJ, after referring to the evidence, said:

The most that can be said is that it is statistically more probable than not that any individual with such a blood alcohol level would be incapable of exercising effective control. ... I am clearly of the opinion that the statistical fact that a particular proposition is true of the majority of persons cannot of itself amount to legal proof on the balance of probabilities that the proposition is true of any given individual.¹⁰

The fact that most people with a blood alcohol level of 0.15 are incapable of exercising effective control of a motor vehicle does not establish against any individual with that blood alcohol level that the individual is so incapable.¹¹

Criticisms have been made of the above decision, for example by the Hon Mr Justice D H Hodgson in '*The Scales of Justice: Probability and Proof in Legal Fact-Finding*'.¹² Hodgson J takes the view that:

subject to the requirement of adequate material concerning the particular case, and, in particular, the calling of appropriate evidence by the party bearing the onus of proof, evidence of the kind given in *Laube* should be enough to enable an inference to be drawn, on the balance of probabilities, if the defendant chooses not to give evidence.¹³

His Honour's criticism therefore has limited application to a case in which statistical evidence is the only relevant evidence available to be adduced. Indeed, Hodgson J accepts that 'mere mathematical probability' constitutes 'inadequate material' on which to base a judicial finding.¹⁴

Sir Richard Eggleston has also criticised the decision in *State Government Insurance Commission v Laube* but it is significant to note that the authorities to which he points were concerned either

to estimate a future event (e.g. to predict the life expectancy of a particular person) or involved high probabilities. He additionally points to some statements in the United States which reject mathematical probability as a basis for fact-finding.¹⁵

It may be doubted that the approach adopted by King CJ would now attract judicial support where the relevant statistical probabilities are extremely high. It is no longer doubted that statistical evidence based on DNA analysis can be probative in a particular case.¹⁶ Ordinarily, however, the probabilities generated from DNA evidence are extremely high and other evidence making the defendant a person of interest is available. In *R v Galli*, for example, where the paternity of a foetus was in issue, it was accepted that the defendant was one of only a very small group of men who had access to the mother of the foetus and one test indicated that he was 172 times more likely to be the father of the foetus than a person taken at random from the population and a second test put that probability at 14 330 times more likely.¹⁷

Nonetheless, it has been recognised that, even where statistical evidence of high probabilities is received by a court, it is inappropriate for the decision-maker, whether judge or jury, to approach the issue of chance on a strictly mathematical basis.¹⁸ In *R v Galli*, Spigelman CJ referred to the danger that a statistical computation by 'its very precision and concreteness suggests an exactness which a statistical distribution does not have'.¹⁹ The Chief Justice recognised the desirability of counterbalancing these features of statistical calculations, observing:

Findings of fact in both civil and criminal cases require common sense judgment and the tribunal of fact is required to reach a level of actual persuasion on the whole of the evidence. This does not involve a mechanical application of probabilities.²⁰ (citations omitted)

3 What does it mean to prove a matter of fact on the balance of probabilities?

It is common to identify two broad judicial approaches to what is required in a judicial proceeding to establish a fact on the balance of probabilities. The first approach is that which calls for the decision-maker to 'feel an actual persuasion of its occurrence or existence before it can be found'.²¹ The second approach is that which looks, not for actual belief, but rather for 'a more probable inference in favour of what is alleged'.²²

The well-known observation of Dixon J in *Briginshaw v Briginshaw*²³ is commonly regarded as an example of the 'actual belief' approach:

Fortunately ... at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved.

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

The statement of Lord Simon in *Davies v Taylor* that 'the concept of proof on the balance of probabilities ... can be restated as the burden of showing odds of at least 51 to 49 that such-and-such has taken place or will do so' is an example of the 'more probable inference' approach.²⁴ Another example of this approach is found in *Malec v J C Hutton Pty Ltd* where Deane, Gaudron and McHugh JJ stated:

A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain.²⁵

The different approaches suggested to exist in judicial authority to finding a fact proved on the balance of probabilities are probably more apparent than real in their practical application. This is because in every civil case the court will be required to assess the totality of the evidence before it for the purpose of assessing which of (ordinarily two) competing potential factual findings appears the more likely to be true. For present purposes, however, it is important to note that neither approach would appear to sanction decision-making on the basis of pure statistical evidence. As the discussion above concerning the nature of statistical evidence illustrates, properly understood, a mere statistic cannot of itself amount to proof on the balance of probabilities in a particular case. This is because it does not speak to the individual case but rather to a population. The only exception to this may be where the statistic conveys a very high probability as in the case of most DNA evidence.

In the words of Ligertwood and Edmond:

To rely on a mathematical probability in a general class by ready (and unwarranted) reliance upon the principle of indifference may produce more right decisions in the long run, but to do so flies in the face of a system of justice which seeks truth in individual cases.²⁶

Assuming that there is a real difference between the two approaches identified above, it may be observed that in enacting the *Evidence Act 1995* (Cth) the legislature appears to have expressed a clear preference for at least some elements of the *Briginshaw* approach.²⁷ Section 140 of the Evidence Act provides:

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

- (a) the nature of the cause of action or defence; and
- (b) the nature of the subject-matter of the proceeding; and
- (c) the gravity of the matters alleged.

Because of its reference to a ‘civil proceeding’, s 140 must be assumed to have no direct application to a criminal proceeding in which an issue must be proved ‘on the balance of probabilities’. However, it seems reasonable to assume that the reference to ‘on the balance of probabilities’ in s 236B(2) of the Migration Act, which was enacted later than the Evidence Act, was intended to reflect the content of s 140(2) of the Evidence Act.

4 Reliance on statistics concerning age in the context of section 236B of the Migration Act.

As noted above, s 236B of the Migration Act fixes mandatory terms of imprisonment for people smuggling offences provided that the person convicted was over the age of 18 years at the date of the offence. The exclusion of children from the reach of the provision reflects not only a natural reluctance to subject children to mandatory imprisonment in adult facilities but also Australia’s obligations as a party to the *Convention on the Rights of the Child*.

While the legislature has decided that age need only be established on the balance of probabilities for the purposes of s 236B, the consequences of an inaccurate determination that the individual charged is an adult will be extremely serious. It will almost certainly lead, on conviction, to a child being sentenced to a sentence not intended by the legislature to apply to a child and to a child being imprisoned in an adult facility where he or she will face the dangers necessarily inherent in being so held.

As a consequence, any determination that an individual suspected of aggravated people smuggling is an adult ought not to be based on a mere statistical probability – except perhaps where that probability is exceptionally high. Any other approach runs the risk of disadvantaging in a systematic way individuals who mature early – as the statistics plainly reflect that a significant proportion of individuals will. Moreover, in reaching such a determination, a court would need to give careful consideration to the fact that the determination was being made for the purposes of a criminal proceeding concerning a serious offence in which the liberty of the accused, for a significant period of time, was at stake – and where error could result in a child being convicted as an adult, subjected to a mandatory sentence of imprisonment only intended to apply to adults, and thereafter held in an adult jail.

Catherine Branson

June 2012

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- ¹ A Ligertwood and G Edmond, *Australian Evidence Act: A Principled Approach to the Common Law and the Uniform Acts* (5th ed, 2010), paras [1.45]–[1.46].
- ² M Dant, ‘Gambling on the Truth: The Use of Purely Statistical Evidence as a Basis for Civil Liability’ (1988–1989) 22 *Columbia Journal of Law and Social Problems* 31.
- ³ M Dant, above, p 38.
- ⁴ M Dant, above, p 44.
- ⁵ A Ligertwood and G Edmond, note 1, para [1.35].
- ⁶ LJ Cohen, *The Probable and the Provable* (1977), p 75, as cited in Hon Sir R Eggleston, ‘Focussing on the Defendant’ (1987) 61 *Alternative Law Journal* 58.
- ⁷ G Williams, ‘The Mathematics of Proof’ (1979) *Criminal Law Revue* 297, 304, as cited in Hon Sir R Eggleston, ‘Focussing on the Defendant’ (1987) 61 *Alternative Law Journal* 58.
- ⁸ G Williams, above.
- ⁹ *State Government Insurance Commission v Laube* (1984) 37 SASR 31.
- ¹⁰ *State Government Insurance Commission v Laube* (1984) 37 SASR 31, 33.
- ¹¹ Above, see also *TNT Management v Brooks* (1979) 23 ALR 345.
- ¹² See, for example, Hon Justice D Hodgson ‘The Scales of Justice: Probability and Proof in Legal Fact-Finding’ (1995) 69 *Alternative Law Journal* 731. See also Hon Sir R Eggleston ‘Focusing on the Defendant’ (1987) 61 *Alternative Law Journal* 58.
- ¹³ D Hodgson, above, p 742.
- ¹⁴ D Hodgson, above, p 736.
- ¹⁵ G Williams, note 7.
- ¹⁶ *R v Galli* [2001] NSWCCA 504. See also *Yusuf Aytugrul v The Queen* [2012] HCA 15, where the High Court recently dismissed an appeal by the appellant against his conviction of murder based on DNA opinion evidence (and other circumstantial evidence) expressed as an exclusion percentage and accompanied by a frequency ratio and explanation of the two. The Court unanimously held found that the DNA evidence was not expressed to the jury in a prejudicial way that would enliven s 135 of the *Evidence Act 1995* (NSW). While the DNA evidence states as an exclusion percentage was high, 99.9 per cent, the evidence given was not said to establish that the DNA profile found in the hair came from the appellant.
- ¹⁷ *R v Galli* [2001] NSWCCA, [30]–[31].
- ¹⁸ *R v Milat* (1996) 87 A Crim R 446, 452 (Hunt CJ).
- ¹⁹ *R v Galli* [2001] NSWCCA 504, [50].
- ²⁰ *R v Galli* [2001] NSWCCA 504, [55]. See also, *Seltsam Pty Ltd v McGuinness* [2000] NSWCA 29.
- ²¹ See for example, *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition & Consumer Commission* (2007) 162 FCR 466, 31.
- ²² See for example, *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1, 5.
- ²³ *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, 361–362.
- ²⁴ *Davies v Taylor* [1974] AC 207, 219; [1972] 3 All ER 836, 844.
- ²⁵ *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638, 642–643 (Deane, Gaudron and McHugh JJ).
- ²⁶ A Ligertwood and G Edmond, note 1, para [1.45].

²⁷ In *Qantas Airways Ltd v Gama* [2008] FCAFC 69, Branson J stated (at 139): ‘The correct approach to the standard of proof in a civil proceeding in a federal court is that for which s 140 of the Evidence Act provides. It is an approach which recognises, adopting the language of the High Court in *Neat Holdings*, that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved – and, I would add, the circumstances in which it is sought to be proved.’ French and Jacobsen JJ agreed with Branson J on this point.

Appendix 6:

Responses to
Inquiry report –
Attorney-General's
Department,
Australian Federal
Police and
Commonwealth
Director of Public
Prosecutions



Australian Government
Attorney-General's Department
Acting Secretary

11/28717

12 July 2012

The Hon Catherine Branson QC
President
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

Dear President

Thank you for your letters of 9 and 10 July 2012 in which you provided a revised draft of your Report on the Australian Human Rights Commission (AHRC) inquiry into the treatment of persons suspected of people smuggling offences who say they are children.

As you requested, I have outlined the actions the Department has taken in working with other Commonwealth agencies to address many of the issues raised in your Report. I have also included the Department's comments on your specific recommendations where they relate to this Department (**Attachment A**). I note your advice that this letter will be published in the Report.

Overview of actions by the Department on age determination

Following your initial concerns about age determination issues expressed on 17 February 2011 and in subsequent correspondence, the Department has engaged stakeholders across the Commonwealth to discuss, formulate and implement measures for operational agencies to expand and improve the procedures to assess the age of persons suspected of people smuggling offences who say they are minors. These measures include:

- establishing an interdepartmental working group on age determination issues
- changing the Government's policy framework on age determination for criminal justice purposes
- leading whole-of-government development of the Government's current policy to remove persons suspected of people smuggling offences assessed by the Department of Immigration and Citizenship (DIAC) as minors
- working with the AFP, CDPP and DIAC to conduct a factual evaluation of the cases of 12 persons, referred by the AHRC, who were charged with or convicted of people smuggling offences and who said they were minors

- conducting a review of 28 persons convicted of people smuggling offences who had raised age at some stage resulting in the Attorney-General granting 15 of these persons early release on licence as they may have been minors on arrival in Australia
- engaging the Office of the Chief Scientist to obtain independent advice on the scientific and statistical approaches to age determination
- working with the Indonesian Embassy and Consulates to more effectively identify persons who say they are minors and more quickly obtain age documentation for relevant Commonwealth agencies, and
- engaging with senior representatives of the States and Territories on the appropriate management of persons charged with or convicted of people smuggling offences, including for those who say they are minors.

The role of the Attorney-General's Department in developing age determination policy

The Department is the lead policy agency on Commonwealth criminal justice issues, including for persons suspected of people smuggling offences. The role of the Department includes coordinating a whole-of-government approach to these issues, including age determination policy, and providing advice to the Attorney-General and Minister for Home Affairs and Justice. The Department also administers the relevant part of the *Crimes Act 1914* dealing with age determination in the criminal justice context. While DIAC has administrative responsibility for offences under the *Migration Act 1958*, in practice the Department has taken the lead on legislative amendments as a result of similar offences in place in the Criminal Code, which the Department administers.

The Australian Federal Police (AFP) is the primary agency responsible for investigating breaches of Commonwealth criminal law, including offences under the Migration Act, and the Office of the Commonwealth Director of Public Prosecutions (CDPP) is responsible for prosecuting these offences. While the AFP and CDPP are agencies within the Attorney-General's portfolio, each agency makes decisions about the conduct of investigations and prosecutions independently of government.

Consistent with its role, the Department has taken the lead in progressing whole-of-government efforts to develop and implement improved techniques for the age determination of persons suspected of people smuggling offences who say they are minors. Media reports first raised the issue of the prosecution of such persons in around November 2010, and from this time the Department and other agencies were engaged in considering the issue of age determination.

On 1 March 2011, the Department led a senior interdepartmental working group with representatives from the AFP, CDPP and DIAC to examine options for providing additional information to the courts to assist them in making decisions about whether a person accused of a people smuggling offence is an adult or a minor. The working group concluded on 10 June 2011.

For the remainder of June 2011, the Department worked with the AFP, CDPP and DIAC to develop a submission to the former Attorney-General, the Hon Robert McClelland MP, and the former Minister for Home Affairs and Justice, the Hon Brendan O'Connor MP, on the next steps on age determination policy. The submission sought agreement to the outcomes of the interdepartmental working group. It also recommended a new age determination policy

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framework to supplement existing wrist X-ray procedures, based on a more holistic approach to age determination which better reflects international practice.

The policy framework involved the AFP seeking documents and information from Indonesia as early as possible, and offering voluntary dental X-rays and voluntary interviews under caution using enhanced interview techniques. Importantly, if any one procedure or verified documents raised a doubt that a person may be a minor, the submission stated that AFP and CDPP would give the benefit of the doubt to the individual, which involved the investigation or prosecution being discontinued and the person being removed from Australia. This required agencies to give the benefit of the doubt about age where the available evidence did not clearly establish a person was a minor. In addition, the submission set out what became the CDPP's approach, implemented in early July 2011, of not opposing bail in court proceedings where age was an issue. The submission was agreed on 28 June 2011 and the Government announced the new age determination policy framework on 8 July 2011.

The Department also subsequently led the development of the Government's current policy to remove persons suspected of people smuggling offences assessed by DIAC as minors, where there are no exceptional circumstances to warrant their prosecution. Since 8 December 2011, any person suspected of people smuggling offences assessed to be minors by DIAC on the basis of an age assessment interview have been removed to their country of origin unless exceptional circumstances apply (for example, the person was a crew member on more than one venture, or a serious incident occurred on the vessel). If persons suspected of people smuggling offences are assessed to be adults they are referred to the AFP to consider investigation.

The Department also developed protocols that applied this policy, and DIAC and the AFP worked with the Department to implement revised standard operating procedures on referring and investigating persons suspected of people smuggling offences who say they are minors. The Department continues to play a coordinating role to ensure that the revised procedures are implemented in accordance with government policy.

The Department understands that since 1 December 2011, 101 persons suspected of people smuggling offences have said they are minors on arrival, of a total 155 persons suspected of people smuggling offences arriving in Australia (65 per cent of all persons suspected of people smuggling offences say they are minors on arrival). Of these, DIAC has assessed 44 persons suspected of people smuggling offences as minors and 57 as adults (as at 30 June 2012), demonstrating that less than half of persons who say they are minors on arrival are subsequently assessed by DIAC as minors. Since 8 December 2011, 84 persons suspected of people smuggling offences have been removed as minors to their country of origin on the basis of being assessed as minors by Australian Government agencies or determined to be a minor by a court.

The Department's approach to wrist X-rays as an age determination procedure

When wrist X-rays were introduced as a prescribed procedure in 2001, the Department was aware of concerns about the procedure and the limitations of the Greulich and Pyle Atlas. At the time, these concerns focused on the possibility of racial or ethnic variations between populations, the effect of malnutrition on skeletal maturity, and ethical objections to the use of a medical procedure for a non-medical purpose.

These issues were the subject of robust discussion by the Senate Legal and Constitutional Affairs Committee and by the Parliament in 2001. The Committee heard evidence about the

limitations of the Greulich and Pyle Atlas to assess chronological age from wrist X-rays. It also heard evidence that, notwithstanding the fact that the Atlas was developed to assess skeletal and not chronological age, the Atlas was 'still valid today' and was the 'simplest and most practical' method available that ensures 'radiation is kept to a minimum'.¹ After considering all of the available information, the Committee weighed the risks associated with the procedure against the reality that there are very few other age determination techniques, and recommended that the Government adopt wrist X-rays as a prescribed age determination procedure. This approach was subsequently endorsed by the Parliament.

Criticisms of the statistical methodology used by Dr Vincent Low as the expert witness for the Commonwealth arose in 2011. The Department was advised of the nature of these criticisms by the CDPP at a meeting of Commonwealth agencies on 12 August 2011. At that time, the CDPP advised the Department that Dr Low's approach had been contested by Professor Tim Cole in an age determination hearing. The CDPP advised that it was consulting further with Dr Low on the issues raised by Professor Cole. The CDPP subsequently advised the Department on 2 September 2011 that after these discussions it was satisfied with the appropriateness of Dr Low's approach and how wrist X-ray evidence was being presented. The Department did not receive documentation containing the substance of those criticisms until it received material for the evaluation of the 12 cases, which were referred to the Department by the AHRC between September and November 2011.

Engagement with the Office of the Chief Scientist on age determination issues

The Department has consulted the Office of the Chief Scientist on a range of scientific issues relating to age determination. In late November 2011 the Department requested advice from the Office of the Chief Scientist on the methods available for age determination in the absence of documentary evidence. On 11 January 2012 the Chief Scientist, Professor Ian Chubb AC, advised the Department on the available scientific methods for determining chronological age. The advice confirmed what the Department was aware of in 2001, that wrist X-rays did not allow for precise estimation of chronological age, that results vary with ethnic and socio-economic conditions, and that there were ethical considerations. The 'observed variation' of two years for wrist X-rays, identified by the Chief Scientist, further indicated to the Department that the science of wrist X-rays and statistical extrapolation from that science was a contested issue that required further expert consideration.

Between January and June 2012, the Department consulted further with the Office of the Chief Scientist on a number of age determination issues. This included seeking assistance on identifying available experts to assist the Commonwealth with the science of age determination, in particular to critically analyse the scientific and statistical basis for using wrist X-rays as an age determination procedure. On 29 June 2012, the Office of the Chief Scientist provided the Department with advice relating to statistics and wrist X-rays from Professor Patty Solomon, Professor of Statistical Bioinformatics of the University of Adelaide.

Professor Solomon reviewed the approaches of each of the experts who contributed to your inquiry. In her report, Professor Solomon concluded that there is not enough scientific data in either the Greulich and Pyle Atlas or the TW3 Manual for those experts to draw sufficiently precise inferences of chronological age for young Indonesian males. To address the issue, Professor Solomon suggested that '[w]ell designed, population-based studies are needed to

¹ Evidence of Dr Kevin Osborn, Secretary, ACT Branch, Royal Australian and New Zealand College of Radiologists from transcript of the Senate Legal and Constitutional Legislation Committee hearing on 23 March 2001 (pp.3 and 7).

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properly evaluate the potential impacts of poverty, malnutrition and disease on patterns of skeletal development’.

Professor Solomon also indicated that, in her opinion, each of the experts who gave evidence to your inquiry applied oversimplified statistical methods or made statistical errors in their analyses. For example, Professor Solomon noted that Dr Low’s model is ‘simplistic at best and probably misleading’. She also concluded that she:

[does] not have confidence in Professor Cole’s probability model, including the often quoted 61% probability of attaining skeletal maturity before age 18.

In considering Professor Cole’s discussion of ‘likelihood ratios’, Professor Solomon further noted that she:

[does not] believe Professor Coles’ [sic] normal model assumptions to be true necessarily, and all subsequent calculations ensue from those assumptions.

As a result of Professor Solomon’s advice, the Department considers that it is premature to make specific findings about drawing inferences of chronological age from wrist X-rays given the contested nature of the science, the insufficient data sets that experts have been working from, and the errors and limitations in applying statistical analysis to the limited datasets by each of the experts.

A summary of Professor Solomon’s advice was provided to the AHRC on 6 July 2012, but her conclusions have not been reflected in the Report. The Department is concerned that the Report does not include any reference to Professor Solomon’s critique of the experts who gave evidence during the inquiry, including those upon whose opinion the AHRC’s findings are substantially based.

The Department’s review of persons convicted of people smuggling offences who raised age as an issue

The Department has taken seriously and been responsive to concerns about minors being imprisoned in adult gaols. On 14 July 2011, you requested an independent review of all age determination matters. In response to your request, the Department took steps to examine 12 cases following notifications from the AHRC after details of those cases were provided to the Department on 28 September 2011. The former Attorney-General provided you with details of the Department’s factual evaluation of these cases on 30 November 2011, as an input to your inquiry.

Following your letter of 16 March 2012, in which you again requested an independent assessment of age, the Department engaged with the AFP, CDDP and DIAC to review those cases of persons convicted of people smuggling offences who raised age as an issue at some stage between arrival in Australia and conviction as quickly as possible. On 29 March 2012, the Department requested additional information on each of the cases from the AFP, CDDP and DIAC for the purposes of conducting a review. The Department also separately sought documentation containing information about age from the Indonesian Embassy. The review was formally approved by the Attorney-General, the Hon Nicola Roxon MP, on 24 April 2012 and the Minister for Home Affairs and Justice, the Hon Jason Clare MP, on 2 May 2012. The review was announced publicly on 2 May 2012.

The Department finalised its review of 28 cases of persons convicted of people smuggling offences who said they were minors at some stage on 25 June 2012. The persons whose cases

were examined as part of the review were all legally represented at the time of trial, and were convicted as adults. Of these, 17 of them pleaded guilty. Only three contested age and they were determined by the court to be adults.

As part of the review, the Department considered information from age determination processes which was not available when the persons convicted of people smuggling offences originally advised Commonwealth they were minors. In particular, the Indonesian Embassy provided age documentation for 15 persons as part of the review (provided on 6, 8 and 20 June 2012), DIAC conducted age assessment interviews for all persons as part of the review (provided on 18 April and 12 June 2012), and the AFP and CDPP provided relevant case information for all persons as part of the review. Recommendations were made to the Attorney-General by the Department after it considered this additional material, as well as the material previously available in each case.

The review applied the benefit of the doubt in matters where information from the case file or further information raised a doubt that the person may have been minors at the time of arrival in Australia. For all persons assessed by DIAC as likely to be minors at the time of arrival, recommendations were put to the Attorney-General either within one week of receiving ministerial approval to conduct the review, or within six days of receiving that advice from DIAC. For all persons where documentation was provided by the Indonesian Embassy indicating they were a minor at the time of arrival, recommendations were put to the Attorney-General within five days of receiving those documents, except for one case where recommendations were put to the Attorney-General after 10 days.

On 29 June 2012, the Attorney-General announced the outcomes of the review. This involved:

- 15 persons being granted early release from prison on licence as there was a doubt they may have been minors on arrival in Australia
- two persons being released early on parole
- three persons completing their non-parole periods prior to the commencement of the review, and
- eight persons being assessed to be adults as there was no evidence supporting their claims to have been minors at the time of their arrival.

The Department has actively sought additional information on age from the Indonesian Embassy for persons subject to the review, and will continue to engage closely with the Embassy to obtain any further identity documentation where it becomes available. Any further information will be considered by the Department in accordance with the usual processes governing applications from federal offenders for early release from prison on licence.

The Department's outstanding concerns with the Report

The Acting Secretary of the Department, Tony Sheehan, wrote to you on 6 July 2012 responding to a draft of the Report and raised a number of concerns about the AHRC's proposed findings and recommendations. Some of these issues have been resolved in the final Report. However, a number of the Department's substantive concerns have not been addressed.

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One of the Department’s key concerns is that the findings and recommendations in the Report are underpinned by an over-reliance on age assessment interviews, without adequately recognising the difficulties in relying on that process for age determination in a criminal justice context. The Report also rejects X-rays as an age determination method, on the primary basis of expert opinion formed using an inadequate dataset.

I am also concerned that you have concluded that officers in the Department’s Criminal Justice Division, in the course of their work on people smuggling issues, produced work that was deliberately ‘misleading’ and ‘disingenuous’. The Department categorically rejects these assertions and any implications that officers of the Department did not strive diligently and professionally to advise on improving policy on age determination for persons suspected or convicted of people smuggling offences since November 2010. The Department believes that the enhanced age determination policies announced by the Government in July 2011 and those implemented in December 2011, as well as the review of individual cases in 2012, are a reflection of this.

The Department does not accept the emphasis you have selectively placed upon individual documents or statements with respect to this period and emphatically denies any suggestion that errors in briefings, talking points and submissions were deliberately made by officers of the Department with a view to misleading the public and relevant ministers. Where errors have been identified, they have been formally corrected as quickly as possible.

The Department thanks the AHRC for the opportunity to comment on the Report. If you have any questions about the information above, please do not hesitate to contact me.

Yours sincerely



Elizabeth Kelly
Acting Secretary

ATTACHMENT A

Attorney-General's Departments comments on the Australian Human Rights Commission's recommendations from its inquiry into the treatment of persons suspected of people smuggling offences who say they are children

Recommendation 1: *The Migration Act 1958 (Cth), and if appropriate the Crimes Act 1914 (Cth), should be amended to make clear that for the purposes of Part 2, Division 12, Subdivision A of the Migration Act, an individual who claims to be under the age of 18 years will be deemed to be a minor unless the relevant decision-maker is positively satisfied, or in the case of a judicial decision-maker, satisfied on the balance of probabilities after taking into account the matters identified in s 140(2) of the Evidence Act 1995 (Cth), that the individual is over the age of 18 years.*

This recommendation is a matter for the Government as it proposes a legislatively prescribed presumption of age in all cases where an individual says they are a minor. The recommendation limits the proposed presumption to persons charged with offences under Part 2, Division 12, Subdivision A of the Migration Act. However, as the recommendation delineates between a 'relevant decision-maker' and a 'judicial decision-maker', the presumption appears to apply to such persons in both the immigration and criminal justice contexts.

The Department considers the recommendation already broadly reflects existing practices of agencies for the treatment of persons who say they are minors in immigration detention and criminal custody. For example, DIAC does not detain a person who says they are a minor as an adult unless they assess that person to be an adult. The AFP also does not proceed to charge a person if it considers the person is a minor, unless exceptional circumstances exist, such as if the person is substantially involved in the venture, involved in multiple ventures, or involved in a serious incident on the venture. Further, while the burden of proof in establishing a person's age is not legislatively prescribed in the Migration Act, the prosecution assumes this burden in practice.

A legislatively prescribed presumption of age was recently proposed as part of the Crimes Amendment (Fairness for Minors) Bill 2011, and rejected by the Senate Legal and Constitutional Affairs Committee in its report dated 4 April 2012. As set out in the Department's submission to the Senate Committee, there are a number of risks involved in legislating a presumption of age that would need to be carefully considered by the Government. These include the risk to other minors detained with the person, where the person's physical and emotional maturity suggests that they are in fact an adult. It is apparent from the Department's review of persons convicted of people smuggling offences who said they were minors that organisers in a number of cases told persons to claim to be minors in order to be quickly returned to Indonesia. The Report accepts that persons suspected of people smuggling offences do not necessarily tell the truth about their age, and the Department notes that at least one person the AHRC notified the Department about in September 2011 changed the date of birth claimed to the AHRC, indicating he was an adult rather than a minor. As such, applying a presumption of age on the basis of the person's claim alone presents a number of practical difficulties.

Further, the recommended 'relevant decision-maker' would need to be defined. It is not clear whether this is referring to the independent assessor in recommendation 9 below, or the AFP and DIAC. It is also not clear how the 'relevant decision-maker' should be 'positively satisfied' that a person is under the age of 18 years.

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For background, the Commonwealth Evidence Act does not generally apply to Commonwealth criminal proceedings held in State and Territory courts, as the relevant States and Territory Evidence Acts apply. However, NSW, ACT, Victoria and Tasmania are all Uniform Evidence Act jurisdictions (like the Commonwealth) and have largely adopted the model Evidence Act that the Commonwealth Evidence Act is based on.

Recommendation 2: *An individual suspected of people smuggling who says that he is a minor, 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.*

This recommendation is a matter for the Government, as implementation could involve funding decisions and potentially legislative amendments.

It is not clear what the status of the guardian being proposed would be. The Government would need to consider whether an independent guardian would be appropriate in the circumstances of a particular person suspected of a people smuggling offence who says they are a minor, and if so, who would perform that role. For example, there are a number of difficulties with consular officials acting in this capacity, where consular assistance is not accepted by the individual.

It is also not clear what makes a person ‘manifestly’ an adult, and if an assessment of whether a person is ‘manifestly’ an adult is separate to the age assessment processes by agencies. Given the recommendation proposes that a ‘guardian’ is provided to any person who says they are a minor who is not ‘manifestly’ an adult, it would be important to clearly define the meaning of ‘manifestly’.

Recommendation 3: *No procedure which involves human imaging using radiation should be specified as a prescribed procedure for the purposes of s 3ZQA(2) of the Crimes Act, or remain a prescribed procedure for that purpose, without a justification of the procedure being undertaken in accordance with the requirements of paragraphs 3.18, 3.61–3.64 and 3.66 of the International Atomic Energy Agency Safety Standard: Radiation Protection and Safety of Radiation Sources: International Basic Safety Standards – Interim Edition (General Safety Requirements: Part 3) or any later edition of these requirements. Such justification should take into account contemporary understanding of the extent to which the procedure is informative of chronological age.*

This recommendation is a matter for the Government.

Under the IAEA Safety Standard, performing human imaging using radiation for legal reasons is not normally justified unless the government or regulatory body considers it appropriate, with regard to the factors set out in paragraph 3.61 of the Standard. The Department agrees that any X-ray procedure to be prescribed for age determination purposes under the Crimes Act must meet the requisite justification processes set out in that Standard.

The framework for this justification process is contained in subsection 3ZQA(4) of the Crimes Act, which requires consultation with the minister responsible for the administration of the *Therapeutic Goods Act 1989*, prior to prescribing any new age determination procedure. The Therapeutic Goods Administration (TGA) advises the relevant minister for this purpose, currently the Minister for Health and Ageing.

Prior to introducing the framework for prescribing age determination procedures under the Crimes Act in 2001, a comprehensive process of parliamentary scrutiny took into account the views of all stakeholders. The Government and the Parliament decided that age was of

considerable significance for both individuals and investigating agencies, and wrist X-rays were assessed as delivering potential value in this context with minimal exposure to radiation.

Subsequently, prior to prescribing wrist X-rays as an age determination procedure in the Crimes Regulations, the TGA and the Minister for Health and Aged Care were consulted and agreed to the proposed regulations. Similarly, in late 2011, the Parliamentary Secretary for Health and Ageing, the Hon Catherine King MP, was consulted about the proposal to prescribe dental X-rays as an age determination procedure.

By way of additional ongoing safeguards for age determination procedures already prescribed, a procedure may only be undertaken with the person's consent, or by court order. If the court does not consider the procedure is justified in a given case, the authorities may not undertake the procedure.

Recommendation 4: *The Crimes Act 1914 (Cth) and, if appropriate, the Crimes Regulations 1990 (Cth), or alternatively the Evidence Act 1995 (Cth), should be amended to ensure that expert evidence which is wholly or substantially based on the analysis of a wrist x-ray is not admissible in a legal proceeding as proof, or as evidence tending to prove, that the subject of the wrist x-ray is over the age of 18 years.*

This recommendation is a matter for the Government as implementation would involve legislation.

The Department understands that wrist X-rays are not routinely being offered or used by the AFP and CDPP at present. However, they remain available for Commonwealth agencies to assist in investigations and prosecutions where appropriate. While the Department recognises that further research on their scientific interpretation is required, it would be premature to limit the admissibility of wrist X-ray evidence, as recommended, particularly as it is the role of the court to weigh this evidence and rule on its relevance and probity.

Recommendation 5: *Imaging of an individual's dentition using radiation (dental x-ray) should not be specified for the purposes of s 3ZQA(2) of the Crimes Act as a prescribed procedure for the determination of age*

Recommendation 6: *Imaging of an individual's clavicle using radiation (clavicle x-ray) should not be specified for the purposes of s 3ZQA(2) of the Crimes Act as a prescribed procedure for the determination of age.*

Recommendations 5 and 6 are matters for the Government.

The Department accepts that there is not sufficient scientific evidence to support the introduction of dental or clavicle X-rays as prescribed procedures for age determination at this time. However, the Department may seek further expert scientific opinion on the use of dental and clavicle X-rays for age determination purposes. As such, it does not rule out the possibility of providing advice on prescribing dental or clavicle X-rays age determination procedures to the Attorney-General and Minister for Home Affairs and Justice at some stage in the future.

Recommendation 7: *If any forensic procedure is specified as a prescribed procedure for the purpose of age determination within the meaning of s 3ZQA(2) of the Crimes Act 1914 (Cth), Part IAA Division 4A consideration should be given to amending the Crimes Act to provide that such a procedure may only be undertaken in the circumstances in which a forensic procedure within the meaning of s 23WA of the Crimes Act may be undertaken with respect to a minor.*

This recommendation is a matter for the Government.

Part ID of the Crimes Act sets out the requirements for undertaking certain forensic procedures on suspects, offenders and volunteers largely for the purposes of producing evidence that confirms or disproves the commission of an offence. The procedures authorised under Part ID mostly relate to obtaining a forensic sample from which a DNA profile can be derived and placed on the Commonwealth’s DNA database. The authorisation requirements, including those relating to consent, contained in Part ID for carrying out a forensic procedure are specific to this purpose and are therefore not applicable to the circumstances in which age determination is required. However, the Department will give further consideration as to whether the authorisation requirements in Part IAA could be further aligned with those requirements in Part ID.

Recommendation 8: *Unless and until recommendation 9 is implemented, the Commissioner of Federal Police should ensure that all Federal Agents are aware of their obligations when acting as an ‘investigating official’ in reliance on s 3ZQC of the Crimes Act and should further ensure that protocols or guidelines are put in place to ensure that these obligations are met. Specifically, an investigating official should be aware that the role of any independent adult person is to represent the interests of the person in respect to whom the prescribed procedure is to be carried out and that he or she should be so advised.*

This recommendation is a matter for the AFP.

Recommendation 9: *Where it is necessary for an investigating official within the meaning of s 3ZQB(1) of the Crimes Act 1914 (Cth), who suspects that a person may have committed a Commonwealth offence, to determine whether a person is, or was at the time of the alleged commission of an offence, under the age of 18 years, the investigating official should seek the consent of the person to participate in an age assessment interview.*

Where reasonably possible, the interviewer should speak the language ordinarily spoken by the person whose age is to be assessed and should be familiar with the culture of the place from which the person comes. The interviewer, who ideally should be independent of the Commonwealth, should be instructed that he or she should only make an assessment that the person is over the age of 18 years if positively satisfied that this is the case after allowing for the difficulty of assessing age by interview.

All interviewers should be trained, should follow an established procedure and should record their interviews. Their conclusions and the reasons for their conclusions should be documented.

This recommendation is a matter for the AFP or, if legislative amendments are being proposed, the Government.

The recommendation reflects the AFP’s current processes in terms of seeking the person’s consent prior to participating in an interview under caution with investigating officials. The

AFP undertakes voluntary interviews for investigative purposes and those interviews include questions concerning the age of individual participating in the interview. The AFP's current process is not to undertake specific age assessment interviews. The AFP conducts interviews using an appropriately qualified interpreter.

The recommendation proposes that an independent assessor conduct the interview with the person. However, the recommendation does not address the issue of whether such interviews would be conducted under criminal caution. Further, there may be difficulties in locating sufficient numbers of qualified interviewers who are fluent in Indonesian and familiar with Indonesian culture, who could conduct an interview in this context.

Recommendation 10: *Any individual suspected of people smuggling who says that he is a child and who is not manifestly an adult should be offered access to legal advice prior to participating in any age assessment interview intended to be relied on in a legal proceeding.*

This recommendation reflects existing practice, whereby the AFP offers access to legal advice to all persons, regardless of age, prior to participating in a voluntary interview under caution conducted by the AFP for investigative purposes. It appears this recommendation does not propose that legal advice is provided to individuals prior to DIAC age assessment interviews, as these interviews are not conducted with the intention that they will be relied on in legal proceedings.

Recommendation 11: *If a decision is made to investigate or prosecute an individual suspected of people smuggling who does not admit that he was over the age of 18 years at the date of the offence of which he is suspected, immediate efforts should be made to obtain documentary evidence of age from his country of origin.*

This recommendation is a matter for the AFP. Under the policy framework announced on 8 July 2011, the AFP is to request documents containing information about the age of persons who say they are minors from their country of origin as soon as possible.

Recommendation 12: *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. The Attorney-General should further consult with the Commonwealth Director of Public Prosecutions concerning procedures put in place by the Director to ensure the expeditious trial of any young person who does not admit to being over the age of 18 years and who is charged with a Commonwealth offence. Should the Attorney-General not be satisfied that appropriate procedures have been put in place by the Director, the Attorney-General should issue guidelines on this topic under s 8 of the Director of Public Prosecutions Act 1983 (Cth).*

This recommendation is a matter for the Attorney-General.

The Department supports measures to reduce delays in investigations for persons suspected of people smuggling offences who say they are minors. The AFP currently has a benchmark timeframe of 90 days from interception to laying charges. The Department understands the current average timeframe for laying charges is 112.9 days.

It is important that the AFP and CDPP have adequate time to consider all relevant factors when making a decision to charge or prosecute a person. The CDPP makes decisions relating to the prosecution process in accordance with the guidelines established by the *Prosecution Policy of*

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the Commonwealth. The Prosecution Policy outlines relevant factors to be considered when exercising prosecutorial discretion, including specific factors relating to decisions about the prosecution of minors.

The CDPP makes decisions independently of the Government. However, the Attorney-General has the power to issue directions or guidelines to the CDPP under section 8 of the Director of Public Prosecutions Act. It is a matter for the Attorney-General to determine whether it is appropriate to issue directions or guidelines, in consultation with the CDPP.

Recommendation 13: *The Commonwealth should only in exceptional circumstances, and after bringing those circumstances to the attention of the decision-maker, oppose bail where a person who claims to be a minor, and is not manifestly an adult, has been charged with people smuggling. Where a person who claims to be a minor, and is not manifestly an adult, has been charged with people smuggling and granted bail, he should be held in appropriate community detention in the vicinity of his trial court. The Minister for Immigration and Citizenship’s guidelines for the administration of his residence determination powers should be amended so that such cases can be brought to the Minister’s immediate attention.*

This recommendation in part reflects existing practices. The CDPP generally does not oppose applications for bail made by persons charged with people smuggling offences who say they were minors at the time of the offence. This policy has been in place since mid-2011. Provided the defendant’s legal representative makes an application for bail, and this is granted by the court, the defendant will be released into immigration detention as an unlawful non-citizen until the court either reconsiders the issue of bail or the outcome of the prosecution is known.

The detention arrangements for individuals who have been bailed into immigration detention are a matter for DIAC, which ensures that minors are held in appropriate facilities. Where appropriate, DIAC holds these individuals in alternative places of detention, which may include rented accommodation in the community (such as hotel rooms or apartments). Community detention placement decisions are made by the Minister for Immigration and Citizenship using a non-delegable non-compellable power. Any guidelines on the use of this power are matters for DIAC and the Minister for Immigration and Citizenship.

Recommendation 14: *The Attorney-General should consult with the Commonwealth Director of Public Prosecutions concerning procedures put in place by the Director to ensure that the Commonwealth does not adduce expert evidence in legal proceedings where the acceptance by the court of that evidence would be inconsistent with the accused person’s receiving a fair trial. Should the Attorney-General not be satisfied that appropriate procedures have been put in place by the Director, the Attorney-General should seek advice from an appropriately qualified judicial officer or former judicial officer as to the terms of guidelines on this topic that it would be appropriate for her to furnish to the Director under s 8 of the Director of Public Prosecutions Act 1983 (Cth).*

This recommendation is a matter for the Attorney-General.

The CDPP conducts prosecutions in accordance with the *Prosecution Policy of the Commonwealth*. The court also has the power to refuse to admit evidence if its probative value is outweighed by the danger of unfair prejudice to the defendant, and has the power to manage its processes in a way that ensures a defendant’s right to a fair trial is protected. It is a matter for the Attorney-General to determine whether it is appropriate to issue directions or guidelines under section 8 of the Director of Public Prosecutions Act, in consultation with the CDPP.

Recommendation 15: *The Attorney-General's Department 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. The Attorney-General's Department should additionally ensure that a Criminal Justice Stay Certificate is cancelled as promptly as compliance with s 162(2) of the Migration Act 1958 (Cth) allows when it is no longer required for the purpose for which it was given.*

The Department accepts the recommendation that the Department establish and maintain a process for regular and frequent review of criminal justice stay certificates (CJSCs). The Department currently has procedures in place for the review of CJSCs, and will continue to refine and document those procedures consistent with the Commission's findings and recommendations.

As indicated by the Department at the AHRC hearings, the AFP and CDPP are the competent authorities in relation to investigations and prosecutions, and the Attorney-General's delegate necessarily relies on advice from these agencies as to whether a person's presence in Australia is required for the purposes of the administration of justice. The Department's refinements to its procedures for review of CJSCs will however include guidance on appropriate follow up with AFP or CDPP, as relevant, for confirmation of the continuing need or otherwise for the CJSC to ensure cancellation of certificates promptly once a person is no longer required.

Recommendation 16: *If, at any time, the Commonwealth becomes aware of information that indicates that an individual suspected of people smuggling whose age is in doubt may have been trafficked, he should be treated as a victim of crime and provided with appropriate support.*

The Department accepts this recommendation in principle. However, in cases where Commonwealth authorities become aware that someone may be a victim of trafficking, the age of the suspected victim (whether in doubt or otherwise) is irrelevant. All arrivals on a suspected irregular entry vessel are referred first to DIAC to establish their reasons for travel. DIAC officers are provided with specific training to identify possible indicators of trafficking in persons. All suspected victims of trafficking identified by Australian authorities are referred to the AFP for assessment and possible referral to the Australian Government Support for Trafficked People Program.

Recommendation 17: *The Australian Government should remove Australia's reservation to article 37(c) of the Convention on the Rights of the Child.*

This recommendation is a matter for the Government.

As part of Australia's National Human Rights Action Plan, the Australian Government is reviewing its reservations to all United Nations human rights treaties, including article 37(c) of the *Convention on the Rights of the Child*.



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12 July 2012

The Hon Catherine Branson QC
President
Australian Human Rights Commission
Level 3, 175 Pitt Street
SYDNEY NSW 2000

Dear President

Australian Human Rights Commission (AHRC) Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children (the Inquiry)

I refer to your letters to Commissioner Negus dated 9 and 10 July 2012 inviting the Australian Federal Police (AFP) to respond to the draft Inquiry report; in particular, to any of the findings or recommendations contained within the final draft. The AFP acknowledges that any such response would be published as an Appendix in the published report.

As I stated at your public hearing, I believe the AFP has acted at all times in good faith in relation to investigations of people smuggling crew. The AFP expects the highest integrity and ethics of its officers, individually and as an organisation, and shares your objective to ensure that the human rights of all individuals, particularly minors, are respected.

In terms of action the AFP has taken in response to the Inquiry, I can advise that the AFP will ensure that aide memoires relevant to the investigation of suspected people smuggling crew incorporate additional advice to address Recommendation 8. The AFP will consider its response to the report in full, once the final report is provided to the Attorney-General.

The AFP's role is to enforce Commonwealth criminal law and to protect Commonwealth and national interests from crime in Australia and overseas. Through the AFP Ministerial Direction, pursuant to subsection 37(2) of the *Australian Federal Police Act 1979*, the AFP is required to effectively contribute to Australia's border management and security, particularly protecting Australia from people smuggling. In achieving this priority, the AFP participates in whole-of-government approaches towards people smuggling.

In recognition of the seriousness of people smuggling offences and the associated penalties, it is incumbent upon the AFP to gather sufficient admissible evidence before charges are laid.

Over the period subject to the Inquiry, the AFP has investigated people smuggling ventures associated with the arrival of 255 Suspect Irregular Entry Vessels (SIEV). The SIEV arrivals resulted in the interception of over 12,800 Potential Irregular Immigrants and 634 suspected people smuggling crew, 180 of whom claimed to be minors.

I would like to acknowledge that following a review of the final draft, it is evident that the AHRC has taken into account major elements of the AFP's response. While I do not propose to re-state the material we provided in our comprehensive response to you of 6 July 2012, I also remain concerned that the report does not give adequate consideration of, or balance to, some aspects of that response.

Overall, the AFP assesses that Chapters 5 and 6 of the report, dealing with age assessment interviews and documentary evidence of age from Indonesia, have not appropriately reflected information made available to the Commission by the AFP. Specifically, the Chapters place an over-emphasis on the reliability of both age assessment interviews and Indonesian documentary evidence, despite evidence questioning their probative value. In this regard, the AFP believes that the Chapters do not present a balanced reflection of the material available to the Inquiry.

Specifically, the Inquiry's report pays particular attention to bio-medical age assessment methodologies; age determination processes and the investigative practices of the AFP. It is within these areas of the report that the AFP finds the Inquiry has given insufficient consideration to material submitted by the AFP to the Inquiry. Particular areas of concern for the AFP include findings regarding:

- AFP efforts to obtain documentary evidence;
- AFP approach to the use of age assessment interviews;
- Appropriate consent for wrist x-rays; and
- The use of wrist x-ray analysis as evidence a person was over the age of 18 years, despite concerns about its credibility.

Documentary evidence

The report finds that the AFP made inadequate efforts to obtain documentary evidence of age from Indonesia however, recognises it is not always possible to obtain credible documents that establish an individual's age. In submissions to the Inquiry, the AFP presented evidence of its long standing difficulty in obtaining credible documentary evidence of age; case examples of fraudulent identity documents and expert opinions from a Professor of Anthropology of the Australian National University and a Professor (Director of Asian Law Centre) of the University of Melbourne.

The expert opinions of the Professors demonstrate that identity documentation cannot be relied upon. The AFP does not believe that sufficient consideration is given to the impact these factors should have in forming an adequate conclusion for this report.

Age assessment interviews

The report finds that it is disappointing that the value of the Department of Immigration and Citizenship (DIAC) focused age assessment interviews (in 2010) were largely disregarded by the AFP. In mid-2011 following AFP participation in a whole-of-government working group on age assessment, the AFP sought expert opinions on the reliability and feasibility of conducting focused age assessment interviews. The expert reports of the Professors (above) were provided to the Commission in the AFP's response to the draft report on 6 July 2012. These reports question the value and credibility of age assessment interviews. The AFP is concerned that the report does not include any reference to the Professors' critique of the usefulness of DIAC's age assessment interviews, including in sections where

the Inquiry’s findings support the DIAC process and the Inquiry’s findings are substantially based.

The AFP believes that these expert opinions support the view that there remains no categorical way of establishing age, in the absence of reliable official documentation. The AFP believes that no greater weight can be placed on the utility of age assessment interviews, than on any other available technique to assist in determining age. Adequate consideration in the findings of the report must be given to the advice provided by the Professor of Anthropology of the Australian National University and the Professor (Director of Asian Law Centre) of the University of Melbourne in this regard.

Consent

The report finds that the AFP in some, and possibly all, cases involving the use of wrist x-rays, proceeded without the required consents having been obtained. The report also argues that independent persons present during consent procedures did not act in the interests of the individual, therefore rendering consent invalid. The AFP believes that this finding is not supported by evidence before the Inquiry, or the report. Indeed, evidence before the Inquiry established only one case where judicial proceedings found that consent was not properly obtained¹, and accepts that in one other case consent may not have been appropriately obtained². The AFP does not believe that this evidence supports such a broad finding.

Wrist x-rays

The report finds that the AFP continued to use wrist x-ray analysis despite questions being raised regarding its usefulness as an indicator of age. The AFP does not believe that this finding gives adequate consideration to the material submitted to the Inquiry.

Views about the utility of wrist x-rays in the investigation of people smuggling cases has changed over time, and continue to be contested. As there is no categorical way of establishing age, in the absence of reliable official documentation proving date of birth, this provides significant challenges for the AFP. The AFP continued to utilise wrist x-rays as an indicator of age on the information and advice provided to the AFP, that they remained the most reliable means of age determination available.

The AFP has, at all times, endeavoured to cooperate with the Commission, and this Inquiry. As I have stated earlier, we share your concerns to ensure that the human rights of all individuals, but particularly minors, are respected. To this end I trust that the material provided above, coupled with the earlier submission and evidence of the AFP, has assisted you in this Inquiry. We look forward to the final report being made available.

Yours sincerely



Andrew Colvin
Deputy Commissioner Operations

¹ ULT055
² FLE048



DPP

Commonwealth Director of Public Prosecutions

Chris Craigie SC

Your reference:

Our reference:

12 July 2012

The Hon Catherine Branson QC
President and Human Rights Commissioner
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2011

Dear President

Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children

Thank you for your letter of 10 July 2012 and for providing this Office with a confidential copy of the final draft report of the Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children and for the opportunity to respond to this final draft and to address subsection 29(2)(e) of the *Australian Human Rights Commission Act 1986*.

Accordingly I would be grateful if this letter responding to your request was published as an Appendix to the Report. I note that this letter draws upon our earlier comments on the draft findings and recommendations.

Prosecution Policy of the Commonwealth

The period of the last surge of people smuggling prosecutions in the late 1990's to the early 2000's pre-dates the CDPP's present policy of not prosecuting minors for people smuggling offences except where there are exceptional circumstances. Previously, given the seriousness of the alleged offences, it had been considered appropriate to prosecute minors for people smuggling offences.

The CDPP had cause to reconsider its position in relation to the prosecution of minors for people smuggling offences in late 2010. This arose from the fact that the AFP had decided not to charge any persons considered to be minors. The CDPP's position also changed to one under which minors should not be prosecuted for people smuggling offences unless there were exceptional circumstances on the basis of the minor's significant involvement in a people smuggling venture or involvement in multiple ventures.

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Where the CDPP is conducting a people smuggling prosecution and the defendant claims to be a minor, the CDPP assesses all material provided on the referral of a matter. This includes any additional material on age provided by the AFP or the defence in considering whether a court is likely to be satisfied on the balance of probabilities that the defendant was an adult in assessing whether there is a reasonable prospect of conviction in accordance with the *Prosecution Policy of the Commonwealth*. 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. The CDPP has discontinued a significant number of people smuggling prosecutions at various stages of the prosecution process after coming to the view that we were not satisfied on all the evidence available that a court would not likely be satisfied on the balance of probabilities that the defendant was an adult. As previously indicated, the CDPP has discontinued 55 of the matters considered by the Commission in this inquiry where a claim has been made by the defendant to be a minor. This includes 22 matters which were discontinued prior to October 2011 without an age determination hearing having been conducted and a further 20 matters which were discontinued between October and December 2011 without an age determination hearing having been conducted.

The above approach has been and continues to be the CDPP’s practice. Over the course of the latest surge of people smuggling prosecutions, that is, since September 2008, the CDPP has also implemented further policies in relation to the prosecution of people smuggling offences where the defendant claims to be a minor, as the assessment of these matters before the courts has evolved or issues have become apparent to the CDPP.

Expert evidence in relation to wrist x-rays

The draft report contains extensive discussion of the use of wrist x-ray evidence in relation to the investigation and prosecution of people smuggling offences. Evidentiary material provided to the CDPP in briefs of evidence relating to people smuggling offences has included wrist x-ray evidence taken in accordance with Division 4A of Part 1AA of the *Crimes Act 1914*. The CDPP has presented expert evidence in relation to wrist x-rays, including evidence by Dr Low, to courts in age determination hearings when age had been raised as an issue. Expert evidence on wrist x-rays provided to the CDPP was not limited to Dr Low. As provided in our email of 3 April 2012, the CDPP had been provided with expert evidence by 22 experts.

In most cases which went to an age determination hearing, the CDPP was provided with 2 expert reports in relation to wrist x-rays. The first was the initial report usually made in Darwin, after the x-ray was conducted. The second was a more detailed report, usually by Dr Low, for the purposes of providing evidence in an age determination hearing. In all matters where the CDPP relied on the evidence of Dr Low at an age determination hearing, the initial report was disclosed to the defence as well.

The CDPP did not consider that it was continuing to adduce wrist x-ray analysis as evidence of age in legal proceedings beyond a point in time at which the Office was or should have been aware that serious questions had been identified about the reliability of the evidence being adduced from their preferred expert witness. The CDPP had been provided with an expert who had been accepted by courts. The CDPP was aware that challenges were being made to the wrist x-ray evidence being relied on and considered that these constituted differences of opinion that should be assessed by the Courts.

In late 2011, there were matters in which the courts made critical assessments of the use of statistical probabilities by Dr Low in relation to wrist x-ray evidence. The CDPP responded

quickly to the critical assessments that have been made as to Dr Low's formulation of statistical probabilities in relation to wrist x-ray evidence. These assessments were made by the Court in the cases of *R v Daud* [2011] WADC 175 and *R v RMA* [2011] WADC 198 and, in response, the CDPP reviewed its position in relation to the use of wrist x-ray evidence. The CDPP's position was that no people smuggling matter in which age was contested should be prosecuted where the sole probative evidence that the defendant was over 18 years at the time of the offending was the analysis of the wrist x-ray.

The CDPP does not agree that this Office had a 'culture of disbelief' in relation to the age claimed or indicated by defendants. In relation to references to the CDPP having a high level of scepticism concerning the claims of young Indonesians to be minors, the CDPP's experience in prosecuting people smuggling offences involving crew from Indonesia is that these matters can involve complex situations and uncertainty as to precise dates of birth and accordingly the age of defendants. There have been instances of multiple dates of birth being provided and cases where different ages have been claimed by the claimant individual at different stages. These aspects, combined with other difficulties that have arisen in relation to potential evidence as to age including issues relating in particular to Indonesian documentary material, has meant that age determination can be extremely difficult, which has been reflected in the CDPP's conduct of these matters.

Disclosure

The draft report contains discussion of disclosure obligations in prosecuting and of the CDPP not disclosing scientific material. The draft report finds that the CDPP failed to disclose to defence counsel material of which it was aware that undermined the credibility of expert evidence proposed to be adduced by it.

The CDPP regards the Crown's obligations of disclosure as a core duty. The CDPP rejects any implication that the CDPP breached its duty of disclosure. The CDPP considered that the appropriate course was for the differing views of experts in relation to wrist x-rays, which were known and used by defence lawyers and provided to the CDPP by them, to be considered and decided by the courts. Accordingly, in 2011, contrary views on wrist x-rays were before the courts and were assessed through a number of age determination hearings and in this way were public knowledge, leading to the decisions of *R v Daud* [2011] WADC 175 and *R v RMA* [2011] WADC 198, as discussed above.

Documentary material from Indonesia

The draft report suggests that the CDPP has focused on admissibility when considering material from Indonesia. In prosecuting, the CDPP must scrutinise material to determine whether it is authentic, reliable and accurate. To do otherwise would constitute a grave derogation in our duty to the Court.

In people smuggling matters where the issue of age has arisen, the CDPP has had to consider whether the document or material provided does indeed go to establish an age for the person. This requires consideration of the provenance of the document and the underlying information which has been used to create the document, including the date of registration and the date of extract of the information.

The CDPP has also had a responsibility to consider whether the material is admissible in order to determine whether it could properly be tendered in evidence by the prosecution and whether objections could be taken to the material by the defence. The admissibility of

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material from Indonesia has been a matter which the CDPP has been required to consider in detail.

Material from Indonesia which was not admissible was considered by the CDPP in determining whether a court was likely to be satisfied on the balance of probabilities that the defendant was an adult. In a number of matters the CDPP has discontinued the prosecution after considering documentary material, notwithstanding that it was not in admissible form.

Given the issues that the CDPP has encountered with documentary material from Indonesia, including admissibility issues and in some cases conflicting documentation, the CDPP’s position evolved. This position only relates to the material that the defendant wishes to tender. The CDPP cannot require or expect that defence representatives will allow the CDPP to tender documentary material which is not admissible.

The approach that the CDPP has adopted in relation to documentary material from Indonesia that the defendant wishes to tender is a very unusual and permissive stance to be taken by a prosecuting entity. The approach has been taken as a result of practical issues confronting the CDPP in relation to documentary material from Indonesia. The CDPP does not have a similar approach in any other area of its practice. This approach has facilitated the CDPP’s decisions in these matters and highlights the often unusual difficulties and issues which confronted the CDPP in people smuggling prosecutions.

Bail

The draft report’s findings regarding bail suggest that the CDPP’s change in policy regarding bail was not announced or communicated to legal representatives until November 2011. Prior to this, bail was raised by defence solicitors with CDPP prosecutors in individual matters as is normal practice. Bail was granted unopposed in a number of matters. In November 2011 the CDPP formally implemented a national practice of writing to all legal representatives of defendants claiming to be minors but who had not applied for bail. They were informed of the CDPP’s position not to normally oppose bail for persons claiming to be minors.

Chapter 7

Whilst I appreciate that the statements in section 5.3 are expressions of opinion, I note that it is an element of the people smuggling offences that the defendant intentionally facilitated the bringing or coming to Australia or entry or proposed entry to Australia of another person and that a large number of defendants have been convicted by courts of these offences.

In summary:

- The CDPP notes the findings and recommendations made in the draft report;
- The CDPP has made detailed comments on a number of the findings in this letter;
- The CDPP’s policies and practices in relation to people smuggling prosecutions have evolved, including in relation to issues arising from the use of wrist x-ray evidence;
- The CDPP’s policies in relation to bail and documentary material from Indonesia address areas covered by the recommendations made in the draft report;
- The CDPP notes the recommendations relating to consultation between the Attorney-General and the CDPP;
- The CDPP will, subject to practical limitations as to matters within our control, continue to consider ways in which this Office can facilitate trials for people smuggling

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offences involving defendants who do not admit to being over 18 years of age to proceed expeditiously through the court system; and

- The CDPP prosecutes in accordance with the Prosecution Policy of the Commonwealth, which is based on the principles of fairness, openness, consistency, accountability and efficiency and affirms the importance of an accused person receiving a fair trial.

Thank you again for the opportunity to comment.

Yours sincerely

A handwritten signature in cursive script that reads "Chris Craigie". The signature is written in black ink and is positioned above the typed name.

Chris Craigie SC

