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10 February 2012

Age Assessment Inquiry
Human Rights Policy Team
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2000

Dear Sir/Madam,

SUBMISSION TO THE INQUIRY BY THE AUSTRALIAN HUMAN RIGHTS COMMISSION INTO THE TREATMENT OF INDIVIDUALS SUSPECTED OF PEOPLE SMUGGLING OFFENCES WHO SAY THAT THEY ARE CHILDREN

The International Commission of Jurists (ICJ), founded in 1952, has as its mandate the promotion of the rule of law and the legal protection of human rights throughout the world. As a non-governmental organisation it has many national sections and affiliates in all regions of the world, each of whom adhere to the ICJ mandate. The Australian Section of the International Commission of Jurists (the ICJA) has branches in most States and Territories.

The ICJA wishes to respond to the call by the Australian Human Rights Commission for submissions in relation to the treatment of individuals suspected of people smuggling offences who say that they are children. While the ICJA acknowledges this inquiry's focus is on individuals labeled people smugglers the ICJA believes attention should be drawn to two additional groups of boat people being held in detention; un-lawful non citizens and individuals detained under criminal justice certificates. These groups will be explored in this submission as well.

The ICJA submits that in order to effectively address the issue of detention of suspected young people smugglers, one needs to be mindful of the context in which these detainees are being held. The children being detained

appear to be crew on finishing boats only, it is uncertain if any evidence exists that they were involved in arranging people smuggling. These children are probably not aware of why they are on the boats or where the boats are indeed headed. These children may well have been innocently caught up in a political affray that is seeking scapegoats. These children are being detained without being informed why and on what grounds for lengthy periods of time. Lastly, these children are being subject to unreliable tests in order to assess their age. The ICJA submits that detaining children in this manner is deplorable. This situation must change.

The ICJA submits that the current policies and processes involved in the detention of these children in Australia are contrary to Australia's human rights obligations under the Convention of the Rights of the Child and the International Covenant on Civil and Political Rights to which Australia is a party. The ICJA further submits that the current policies and processes involved in the detention of these children in Australia are contrary to the rule of law. It is unacceptable for children or younger people to remain in detention for indefinite periods while their age remains in dispute. The ICJA recommends that a presumption of minority status and removal from detention needs to be applied as the norm rather than the exception where doubt as to the age of these children exists.

The ICJA is concerned with the lack of clarity regarding the grounds for detention of these children. Greater transparency is required to ensure that each individual's rights and our international obligations are upheld. The grounds for detention need to be clear to all involved; suspects, AFP officers, DIAC officers and prosecutors so that the rule of law can be appropriately applied. The ICJA recommends that greater transparency is required in the age assessment determination process.

In support of this the ICJA submits that greater care needs to be taken to clearly distinguish between policy and legal procedures. The ICJA draws the Commission's attention to the *UNHCR Guidelines on Applicable Criteria and Standards Relating to Detention of Asylum-Seekers*, and in particular Guideline 3 which provides as follows:

"Detention of asylum-seekers which is applied for purposes other than those listed above, for example, as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law."

The ICJA submits that Guideline 3 is applicable to the class of people being detained for the purposes of investigating people smuggling offences who claim they are children. Detaining suspected children as an example or deterrence to others is unacceptable and is contrary to Australia's international human rights obligations.

Question A - The assessment 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)

The ICJA notes that there are a number of methods used to assess the age of detainees in Australia today. These methods include a visual assessment of a detainee's physical appearance, a medical assessment of a detainee and an analysis of a detainee's narrative interview.

(a) Assessment of age by physical appearance

In relation to the assessment of an individual's physical appearance, the ICJA submits that due to the wide spectrum of normal physical development, quick superficial judgments of physical appearance cannot be relied upon to determine age unless it is supported by additional evidence.

The ICJA recommends that an assessment of an individual's physical appearance should not be used to determine age without being coupled with other methods of assessment.

(b) Assessment of age by wrist x-ray

In addition to physical appearance another common method of age assessment utilised in Australia has been the result and analysis of a wrist x-ray.

In this method, an x-ray of a person's left hand and wrist is taken which and then compared to x-rays of children with established ages published in a textbook called 'Radiographic Atlas of Skeletal Development of the Hand and Wrist' by Greulich and Pyle. The data in this textbook was derived from a study of healthy white middle-class children in the Cleveland area in the United States in the years 1931 to 1942. The study consisted of 6,879 hand radiographs from boys and girls. The ages ranged from 3 months to 16 years for girls and to 17 years for boys at the time of the radiographs. In the Greulich and Pyle textbook a table is used to provide means and standard deviations for skeletal age. The data was used to identify possible growth disorders, malformations and bone abnormalities.

At the time of its development Greulich and Pyle did not consider that the data would be used to estimate chronological age. The study is thus not widely supported by the medical profession as a precise means of determining age.

There has been much opposition to the use of wrist x-rays in determining age both in Australia and overseas. In February 2011, for example, the President of the Australian Human Rights Commission wrote to the Commonwealth Attorney-General to express concern about the use of wrist x-rays for age assessment purposes. The Attorney-General responding to such concerns requested that the issue be considered by a working group of Commonwealth agencies, including the Attorney General's Department, the Australian Federal Police, the Commonwealth Director of Public Prosecutions and the Department of Immigration and Citizenship. The ICJA notes that on the 8 July 2011, the Australian Government announced that a range of alternative measures would be used to supplement the standard wrist x-ray process when assessing the ages of people accused of people smuggling.

In the matter in *Applicant Vfy v Minister for Immigration [2003] FMCA 289*, the medical practitioner giving evidence on behalf of the applicant submitted that Greulich and Pyle did not consider the estimation of chronological age as a potential use for their atlas. The medical practitioner argued that the atlas cannot specify an individual's chronological age, it can only assist in determining if skeletal maturity has been reached. The ICJA submits that drawing inferences as to a subject's possible age on the basis of whether skeletal maturity has been reached involves a margin of error the consequence of which can be catastrophic for individuals suspected of people smuggling offences.

The ICJA notes that a number of relevant statutory and professional bodies in the UK have argued that radiology should not be used for the administrative purpose of age determination. Such organisations included;

- The Council of European Society for Paediatric Endocrinology;
- Professional organisations such as the British Medical and Dental Associations; and
- Statutory Regulatory bodies such as the General Medical and Dental Councils.

Despite wide criticism of wrist x-rays the ICJA notes that they continue to be given disproportionate weight in age assessment investigations and decisions in Australia. The ICJA is

aware of an instance in which a male minor was determined by the police and the prosecution to be an adult on the basis of a wrist x-ray and was subsequently detained in an adult detention facility pending court process. This was despite documentary evidence in the form of a birth record, affidavits from Indonesia and a DIAC age assessment concluding that the individual was a minor. This evidence was disregarded by the police and prosecution on the basis of a radiologist's interpretation deeming him to be an adult. The ICJA is informed that there appears to be a culture of belief by Departmental officers and the judiciary that radiology tests are conclusive evidence of age.

The ICJA notes that since 8 July 2011 alternative measures have been used in Australia to supplement wrist x-rays include dental x-rays, focused age interviews conducted under caution by AFP officers and efforts to seek birth certificates and other relevant information.

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

(c) Assessment of age through narrative interviews

The ICJA notes that the assessment of age through narrative interviews is another common method used by the Australian Government. The ICJA submits that whilst this method can be more reliable than assessment of age based on physical appearance and wrist x-rays, this method is not without its own problems.

Information gathered in narrative interviews varies widely. Some narratives may detail how much schooling someone has had, how they spend their time or their level of language sophistication whilst other narratives may only contain information such as family history. As far as we can establish there is no requirement that narratives must contain certain specified information or meet a checklist of requisite information before a determination of age is made. A narrative that is short and concise with little factual content may be relied upon to assess age just as conclusively as a narrative that contains a large amount of information may.

An additional area of concern in relying on narrative interviews relates to language barriers. Many of the alleged children being interviewed may not have a proficient level of English or understanding of what is required of them in telling their stories. This presents difficulties of both the interviewer and the interviewee. Whilst involving an interpreter may ease the situation, there are inherent difficulties with interpreters and critical information can be lost in translation.

The difficulties with relying on narrative interviews has been noted by the courts in Australia. In the recent decision by the Federal Court, *Applicant Vjay v Minister for Immigration [2003] FMCA 289*, for example, evidence was provided about an applicant claiming to be under 18 at the time of arrival in Australia by an expert witness, Dr Kirby. Dr Kirby gave evidence that she had referred to her own children as a point of reference of what children of a similar age may have in common. Dr Kirby indicated that similar to her own children the applicant enjoyed cartoons (rather than adult movies), play station games and the Harry Potter books. Dr Kirby also suggested that side-by-side her 15-year son and the applicant looked to be the same age. Based on Dr Kirby's expert evidence the Federal Magistrate found the applicant to be under 18 at the time he arrived in Australia. In finding so however, the Federal Magistrate drew attention to the uncertainty of such evidence stating that such a determination relied on a high level of subjectivity.

An Effective Alternative

The ICJA submits that the difficulties posed by narratives could easily be overcome by ensuring that where narratives are used they are used in conjunction with another reliable method of age assessment (discussed below) and that narratives be open to greater scrutiny.

The ICJA notes that an emerging method of determining age is reliance on documentary evidence such as birth certificates and affidavits from family members. The ICJA supports this method of age assessment as the most preferable method. The ICJA submits that where such documentary evidence is produced and verified, it should be highly regarded as determinative of age.

The ICJA notes however that it is often very difficult to obtain such documentation. Often children accused of people smuggling offences do not have proof of identity due to it having been lost, destroyed or never having been in existence. While formal documentation of birth is standard for Australian citizens such proof of age or identity is not necessarily shared by other nations. It was estimated in UNICEF's statistical review of *The Progress of Children* that 51 million births went unregistered in 2006.¹

The ICJA notes that whilst Article 7 of the *Convention on the Rights of the Child* provides that all children shall be registered immediately after birth, this clearly does not always happen. Such registration can be particularly challenging for nations with high rates of migration due to war, famine, lack of education and natural disasters. The ICJA however contends that working towards establishing a record of all nationals provides an efficient, practical, economical and reliable basis for determining identity and age.

The ICJA recommends that all efforts be made to obtain documentary evidence such as birth certificates and affidavits from family members for the purposes of assessing age. The ICJA further recommends that where such documentary evidence is obtained, it be used as proof of age over any other method of assessment.

Question B - The assessment of the ages of the individuals of concern during the course of the investigation of people smuggling or related offences of which they were suspected;

Question C - The assessment of the ages of the individuals of concern for the purposes of decisions concerning the prosecution of the people smuggling or related offences of which they were suspected

The ICJA has received anecdotal evidence that a number of individuals have been held in detention for 4-6 months without being charged and without having legal advice. The ICJA submits that this situation is unacceptable. While it is unacceptable in relation to adults being held in detention, it is particularly in relation to minors.

The ICJA submits that every effort should be made as soon as is practically possible to determine a detainee's age after detention. This is because the determination will impact where an individual will be likely detained, their access to parents/guardian, the requirements of informed consent for medical procedures and the potential charges that can be laid against them.

The ICJA submits that whilst efforts are being made to conduct an age assessment, individuals who are detained and subject to an investigation need to be treated with a greater level of respect and care. The ICJA is informed that a culture of disbelief has emerged in interviewing officers regarding claims by detainees that they are under the age of 18. The ICJA is concerned that DIAC and AFP

¹ UNICEF Progress for Children. A World fit for Children a Statistical Review. New York; United Nations Children Fund 2007

officers are not appropriately and adequately responding to statements by suspects that could indicate they are a minor.

The ICJA further submits that such detainees also require a greater level of respect and care because of their particular vulnerability. Individuals arriving by boat often have little education and English may not be a first or second language or at all. These difficulties can only be further magnified in instances where minors are involved. The ICJA is concerned that such vulnerabilities are often not taken into account in the investigation process.

Question D - Decisions concerning whether, and the processes and procedures used, to:

i) Facilitate contact between parents/guardians and the individuals of concern

The ICJA understands the difficulties and cost in attempting to notify parents/guardians of missing children and children in detention. The ICJA however notes that the Australian Government has an obligation to attempt to maintain contact between children and their parents/guardians. That obligation is found in Article 9 of the *Convention on the Rights of the Child* which provides that contact between minors and parents/guardians should be maintained unless it is contrary to the child's interests. The ICJA submits that in order for the Australian Government to fulfil its obligations under Article 9 the Department of Immigration needs to facilitate continuous communication between the Embassy's/Diplomatic Representative's of detainees to help facilitate more timely contact between parents/guardians and individuals of concern.

The ICJA is pleased to note that some effort is being made to ensure greater communication. For example, the ICJA notes that in November 2010 an Indonesia-Australia joint statement was issued from the Australian Prime Ministers office reaffirming the commitment to enhance and strengthen mutual cooperation across legal sectors in areas such as legal assistance, extradition, asset recovery and the development of legislation.

Despite this agreement the ICJA submits that timely communication is not in reality being effected. We are aware of anecdotal evidence suggesting that the Indonesian Embassy in Australia is generally informed about detainees within three days in accordance with the 2010 Australia/Indonesia Consular Agreement. It is often the case however that the Indonesian Embassy is not provided with a complete list of detainees. We are aware that the Embassy often requests further records which cannot be produced due to restrictions as to confidentiality. The flow of information between countries thus continues to be problematic.

The ICJA recommends that the Australian Government continue to encourage countries to enter into Consular Agreements to ensure greater and more effective communication processes for information exchange.

ii) Contact and obtain information relevant to age assessment from parents/guardians of the individuals of concern

As we have stated above, parent/guardians can provide reliable documentary and narrative evidence relevant to age assessment. The ICJA is however aware that the cost of obtaining such information can often be prohibitive. The ICJA however submits that the Australian Government should assist where possible, any attempts to contact and obtain information in relation to the age of detainees.

Question E - The preparation for and the conduct of legal proceedings in which evidence concerning the age of individuals of concern was, or was intended to be, adduced;

The ICJA notes that there are several legal processes that can be followed where a detainee is a suspected minor. These processes include:

- Making an application to the Local Court under s7 of the *Children (Criminal Proceedings) Act (1987)* to have the matter moved to the Children’s Court where appropriate. Legal Aid has cautioned that such applications have in some instances resulted in delays due to the willingness by some Local Courts in NSW to accept expert medical evidence provided by Dr Low for the prosecution even while acknowledging its unreliability.
- Expediting matters by having them committed (where charged) for trial so that the issue of age can be raised and determined promptly by the judiciary. This is consistent with Article 9(3) of the International Convention on Civil and Political Rights which provides that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.”

The ICJA supports each of these processes and encourages their continued use.

Question F - The detention, including the determination of the places of detention and the conditions of detention, of the individuals of concern;

The ICJA emphatically submits that minors should only be detained as a last resort.

Where a minor is detained the ICJA submits that such detention should, as provided in Article 37 of the *Convention on the Rights of the Child*, only be used as a last resort and for the shortest period of time.

The ICJA submits that suspected minors, if detained, should be detained in a facility that is completely separated from adult populations who have been detained. The ICJA draws attention to Australia’s international obligations which insist on separate detention for minors. Section 9 of the *Children (Detention Centres) Act (1987)* provides that “so far as reasonably practicable they shall be detained in a detention centre appropriate to the class of persons.” Similarly, Article 37 of the *Convention on the Rights of the Child* provides that

“c) Every child deprived of liberty shall be separated from adults unless it is considered not in their best interests.”

Furthermore, Article 10 of the *International Covenant on Civil and Political Rights* stipulates that

“Juveniles shall be separated from adults and brought as speedily as possible for adjudication.”

The ICJA submits that the only circumstance in which a minor should be detained in an adult population is if that minor is placed with a relative or another person well known to them.

Question G - The provision of guardians or other responsible adults to ensure that the interests of the individual of concern, including with respect to age assessment, were protected.

The ICJA submits that it is essential that a guardian be appointed as soon as an individual asserts himself or herself to being under the under 18. The ICJA submits that the appointed guardian should have appropriate expertise in the area of childcare and should, where possible, have experience in the area of immigration detention.

The ICJA is very concerned with the present system in which the Minister for Immigration and Citizenship is both the guardian of minors and as the Minister overseeing their detention. The ICJA submits that having a Minister be the guardian of detained minors is unfathomable and is an extreme conflict of interest. Political and policy issues have no place in the role of an appointed guardian. In any event a guardian should be individual and specific to each child.

The ICJA submits that it is of the utmost importance that guardians are completely independent and act at all times in the best interest of the child.

The ICJA submits that there are two other possible alternatives that could be instituted in appointing a guardian. The first alternative is a Commonwealth Children's Commissioner. The Commissioner would be an independent Commonwealth Officer who would have the sole care of guarding minors. Secondly, a guardian could be appointed in the relevant state or territory where the detainee is being held. In New South Wales for example, we have a Public Guardian. The Public Guardian exists to promote the rights and interests of people with disabilities through the practice of guardianship, advocacy and education. The Guardianship Tribunal appoints the NSW Public Guardian as guardian of last resort and the Public Guardian then acts as a substitute decision-maker for people under his guardianship. There are similar bodies in each of the states and territories in Australia.

The ICJA recommends that the current situation in which the Minister for Immigration and Citizenship is both the guardian of minors and as the Minister overseeing their detention be abolished. The ICJA recommends that a Commonwealth Children's Commissioner be appointed or that the relevant state or territory Public Guardian be appointed as responsible for all minors who are detained.

Question H - The provision to the individuals of concern of legal advice, assistance and representation, including with respect to age assessment;

Article 37(d) of the United Nations *Convention on the Rights of the Child* provides that "every child deprived of liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of their deprivation of liberty before a court or other, independent and impartial authority and to a prompt decision on any such action."

As the ICJA has already stated, we are concerned that individuals who arrive by boat may be in detention for between 4 and 6 months without being charged and without receiving legal advice in Australia. The ICJA submits that any person that is arrested should be informed of the reasons of their arrest and be promptly brought before a judge. This is clearly not happening in the detention of suspected people smugglers.

The ICJA recommends that measures need to be implemented as soon as possible to ensure that every detainee who alleges to be a minor is provided with legal representation.

Question I - Any other matters incidental to the above mentioned terms of reference

As we stated in the introduction to this submission we are concerned that individuals suspected of people smuggling are being detained without being told why they are being detained and the basis/type of their detention. We are aware of a number of individuals who have been detained being unaware as to why they have been detained and on what grounds. This situation cannot continue.

Every person has a right to know why s/he is being detained and on what basis. It is inconceivable that in today's legal and political environment that we can allow people to be held without reason. The ICJA submits that measures need to be implemented to ensure that people detained are informed at the first available opportunity the reason for their detention.

The ICJA submits that if such individuals are being detained on criminal grounds under the *Migration Act* (1958), the individuals should be charged and brought before the court. The ICJA submits that if an individual is being detained on the grounds of immigration offences under the *Migration Act* (1958) their embassy should be informed and they should be prepared for deportation.

In addition to this concern the ICJA is also by the use of criminal justice certificates and visas as a ground for on-going detention. It is unclear on what basis other than for the individuals own protection, detention of a witness is permitted.

The ICJA notes that a Criminal Justice Stay Certificate can be issued by an AFP officer for a duration of not more than five days. A Criminal Justice Stay Visa can be issued by the Minister at his absolute discretion under s 159 of the *Migration Act* (1958). The subject of such visas need not be informed of the intention to impose or cancel such a visa. The ICJA submits that this is contrary to the rule of natural justice.

ICJA RECOMMENDATIONS:

1. That a presumption of minority status needs to be applied as the norm rather than the exception where doubt as to the age of a 'suspected people smuggler exists.
2. That greater transparency is required in the age assessment determination process.
3. That an assessment of an individual's physical appearance should not be used to determine age without being coupled with other reliable methods of assessment.
4. That the use of wrist x-rays to determine age should be rejected by the Australian Government.
5. That if narratives are used to determine age they should be used in conjunction with other reliable methods of age assessment and that narratives be open to greater scrutiny.
6. That all efforts be made to obtain documentary evidence such as birth certificates and affidavits from family members for the purposes of assessing age. The ICJA further recommends that where such documentary evidence is obtained, it be used as proof of age over any other method of assessment.
7. That the Australian Government continue to encourage countries to enter into Consular Agreements to ensure greater and more effective communication processes for information exchange on the age of detainees.
8. That the current situation in which the Minister for Immigration and Citizenship is both the guardian of minors and as the Minister overseeing their detention be abolished.

9. That a Commonwealth Children's Commissioner be appointed or that the relevant state or territory Public Guardian or an individual guardian be appointed as responsible for all minors who are detained.
10. That measures need to be implemented as soon as possible to ensure that every detainee who alleges to be a minor is provided with legal representation.

Yours sincerely,
ICJ AUSTRALIA

The Hon John Dowd AO QC
President