

**INQUIRY INTO THE DETENTION OF INDONESIAN MINORS IN
AUSTRALIA**

**THE AUSTRALIAN SENATE
SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
MAY 2012**

Submission on behalf of:

Simon Lee

Barrister

TERMS OF REFERENCE

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

(a) whether any Indonesian minors are currently being held in Australian prisons, remand centres or detention centres where adults are also held, and the appropriateness of that detention;

It is not possible to respond with any certainty as to whether there are Indonesian minors currently being held in Australian prisons, remand centres or immigration detention centres.

In a recent people smuggling trial in the Supreme Court of the Northern Territory, one of the three Indonesians intercepted by the Royal Australian Navy on 10 May 2010 gave evidence that he (Joni Balu) was as at 11 May 2012 “(This year) maybe 19, maybe 20 – roughly 20.” (page 173 of transcript of *The Queen v Riki Selan* SCC 21035880). Despite the fact that there were significant lies or errors admitted by Mr Balu in his evidence, there is little reason to believe he was not truthful about his age. If he is 19 years of age in 2012 he would have been 17 when apprehended in 2010. Joni Balu pleaded guilty to two offences, one of which was a people smuggling offence, on 4 February 2011 in the Supreme Court of the Northern Territory. Joni Balu had been arrested for illegal fishing in 2006 and spent 8 months in immigration detention in Darwin when he would have been either 14 or 15 years of age. He is due to be released from the Darwin Correctional Centre, Berrimah on or about 10 May 2013.

The difficulty of obtaining material (which is admissible evidence as to age) is that in many cases there is no birth certificate, particularly in poorer areas of eastern Indonesia (Nusa Tenggara Timur and southwestern Maluku). Evidence from parents, next of kin, villagers and Indonesian officials is equally difficult to obtain due to several factors, including the absence of school records (if attended), the veracity or accuracy of official documents (such as the Republic of Indonesia Resident Identity Card or “Kartu Tanda Penduduk”, the KTP) and the minor’s separation from his or her place of birth/childhood.

The accuracy of the existing age determination process as authorised by legislation (*Crimes Act 1914* (Cth) and *Crimes Regulations 1990* (Cth) see: term of reference (d) below) has been criticised.

Mr Andrew Metcalfe, Secretary of the Department of Immigration and Citizenship and Ms Kate Pope, First Assistant Secretary, Community, Detention Implementation at pages 1,2, 93-95 of the Legal and Constitutional Affairs Legislation Committee of the Senate dated 24 May 2011 stated the wrist X-ray technique has a margin of error of up to 5 years.

Professor Sir Albert Aynsley-Green, the Children’s Commissioner for England has warned of the inappropriate use of ‘medical examinations’ to assess the age of children.

Skeletal maturation can be affected by poor diet, illness, nutrition and ethnic variations. Medical practitioners would be in a position to indicate whether commencing manual work at an early age influences the development of wrist and hand bones in children.

Dr Anthony John Hill, President of the Australian Society of Forensic Odontology, in a submission to this Standing Committee, is of the opinion that dental development, as opposed to skeletal development, is able to provide the most reliable indicator for chronological age.

Leaving the age determination method to one side, once a person is determined to be under the age of 18 years it is inappropriate for that person to be held in adult prisons, remand centres or in the adult sections of immigration detention centres.

Article 37(b) of the Convention of the Rights of the Child, a Convention to which Australia is a signatory, provides for the right to be arrested, detained or imprisoned only as a measure of last resort and for the shortest appropriate period of time.

Delays in deciding whether to charge (as adults) or repatriate 11 Indonesian males claiming to be under the age of 18 were the subject of a habeas corpus application made on 13 May 2011 in the Supreme Court of the Northern Territory in *Supriadin v Minister for Immigration & Citizenship* [2011] NTSC 45. Though unsuccessful that application had the effect of either charging or repatriating the 11 plaintiffs.

The writer is aware of several of the plaintiffs being relocated outside of the Northern Territory and that some have already been repatriated. In June 2011 the solicitors for Ako Lani (16), Ose Lani (15) and John Ndollu (17) spent four days in Indonesia (at their own expense) gathering admissible evidence to convince the court of their respective ages. All three minors were eventually repatriated.

Dion Domun was one of the 11 plaintiffs moved out of the Northern Territory jurisdiction. His mother, at the request of his lawyers, provided an affidavit stating her son was 15 years old. He had been in detention for eight months until his release in November 2011. No attempt by the Australian prosecuting authorities was made to contact his parents to confirm his age. It was not until his lawyer travelled to the island of Rote to obtain evidence to confirm his age that Dion Domun was released. Such an exercise should not be the onus of the defence but rather on the prosecution to prove his age of majority by using safe, accurate and reliable methods.

(b) what information the Australian authorities possessed or had knowledge of when it was determined that a suspect or convicted person was a minor;

Australian authorities whether the Australian Customs and Border Protection Service, the Department of Immigration & Citizenship, the Australian Federal Police or the Navy will often not have any documents to establish the suspect's age. In rare circumstances the suspect may still have his KTP in his possession but even the stated ages on those cards can be questionable.

In many cases Indonesians apprehended and suspected of having facilitated or assisted in moving unlawful non citizens to Australia will only know their chronological age by reference to a major event, a volcano's eruption or similar significant historical event.

(c) whether there have been cases where information that a person is a minor was not put before the court;

The writer is unable to comment on this term of reference.

(d) what checks and procedures exist to ensure that evidence given to an Australian authority or department about the age of a defendant/suspect is followed up appropriately;

The writer is not aware of any checks or procedures which exist to ensure that evidence given to an Australian authority is actioned appropriately. It appears that legal practitioners acting for potential (ie yet to be determined) Indonesian minors are required at their own expense to obtain admissible evidence to present, not to government authorities, but to the courts.

Existing legislative requirements for age determination.

Under section 3ZQA of the *Crimes Act 1914* (Cth), “age determination information” means a photograph (including an X-ray photograph) or any other record or information relating to a person that is obtained by carrying out a prescribed procedure.

The procedure specified for determining a person’s age is a radiograph to be taken of a hand and wrist of the person whose age is to be determined: regulation 6C(2) of the *Crimes Regulations 1990* (Cth).

The radiograph must be taken using a medical X-ray unit that is operated by an appropriately qualified person (the radiographer). A medical X-ray unit is a defined term and means “general diagnostic X-ray equipment that is used primarily to take radiographs, but does not include fluoroscopy or CT scan equipment.”

Regulation 6C(4) provides that “in taking the radiograph, the radiographer must ensure that the safeguards set out in the relevant standards are applied to ensure that any risks to the health and safety of the person in respect of whom the radiograph is being taken are minimised.”

Reliability of hand and wrist X-ray age determination.

Not being a medical practitioner the writer is unable, without any authority, to comment on this aspect however the reliability of hand and wrist X-rays connected with the Greulich-Pyle Radiographic Atlas (GPRA) has been widely brought into question. It is worth noting that the GPRA was introduced in the 1930s-1940s, dealt with middle-class American children and was not designed to determine the chronological age of children. It is difficult to see how Indonesian children between the years 2000 and 2012 can have their ages accurately assessed with this process.

Future legislative requirements for age determination.

It is necessary for the existing legislative regime to be amended to reflect less intrusive, more accurate methods of ascertaining chronological ages of suspects which do not violate Australia's international treaty obligations.

(e) the relevant procedures across agencies relating to cases where there is a suggestion that a minor has been imprisoned in an adult facility; and

It is the writer's belief and therefore may not be factually accurate that there is ineffective communication between the relevant agencies entrusted with Australia's border protection regime. Suggestions from Serco staff about intelligence relating to the age of detainees which may be of assistance to Government agencies may not be taken seriously or even ignored.

(f) options for reparation and repatriation for any minor who has been charged (contrary to current government policy) and convicted.

The writer believes that the money spent by the Australian Federal Government on YouTube advertisements discouraging "people smuggling" could be better used to convey the message at the grass roots level in the major areas of Indonesia which source the illicit ventures.

It is difficult to place any child charged and convicted back in the position he or she was in before being charged. It is accepted that certain elements higher up in the criminal enterprise of "people smuggling" are taking advantage of children under the age of 18 years to assist in the delivery of asylum seekers to Australia, sometimes knowingly but often without full explanation of the child's involvement. The lure of large sums (to Indonesian youth) of money is often difficult to reject.

AUSAID investment into the key areas of recruitment could be directed to diverting the attention of Indonesian youths tempted to participate in illegal ventures controlled by unscrupulous adults.