



Australian Government
Department of Immigration and Citizenship

Submission to the
Senate Legal and Constitutional Affairs Committee
Detention of Indonesian Minors in Australia
31 May 2012

Context

Under the Convention on the Rights of the Child (CRC), the best interests of the child must be a primary consideration in every decision that affects minors, including persons in detention. To determine what is in the best interests of the child, the Committee on the Rights of the Child has indicated that authorities must conduct a clear and comprehensive assessment of the child's identity, including nationality, upbringing, ethnic, cultural and linguistic background, particularly vulnerabilities and protection needs.

The CRC contains several requirements for the treatment of children in detention, which complement the 'best interests of the child' principle. In particular, article 37 of the CRC requires authorities to separate children in detention from adults, unless it is considered in the child's best interest not to do so. The International Covenant on Civil and Political Rights (ICCPR) also contains separation requirements in paragraphs 2(b) and 3 of article 10. The Commonwealth, upon ratification of the CRC and ICCPR, made reservations to the effect that Australia accepts the obligation to separate minors from adults, only to the extent that such segregation is considered by the responsible authorities to be feasible and beneficial to the minors or adults concerned.

Immigration detention of crew claiming to be minors

DIAC maintains several different types of immigration detention facilities intended for different types of clients, including:

- immigration detention centres (IDCs);
- immigration residential housing (IRH);
- immigration transit accommodation (ITA); and
- alternative places of detention (APODs).

DIAC seeks to ensure crew who are assessed as minors are housed in facilities appropriate for minors - where a person claims to be a minor but the available evidence indicates the person is an adult, the interests of the person are balanced carefully against the interests of other minors in determining appropriate housing arrangements.

People smuggling crew who claim to be minors are not placed in IDCs, which are the highest security facility in the Australian immigration detention network. Instead they are accommodated in low security APODs within the immigration detention network.

On arrival at Christmas Island, all people smuggling crew are initially held in an APOD.

people our business

Age assessment of alleged minor crew on arrival

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 focussed age interview (see below for detail).

Crew assessed by DIAC to be minors are removed to their country of origin unless exceptional circumstances apply – namely that they have previously been a crew member on a boat that has brought IMA's to Australia or DIAC officers become aware that they have been involved in serious criminal activity such as sexual assault, murder or identified as a people smuggling organiser, during the voyage.

Where a crew member DIAC assesses to be a minor is not referred to the AFP and has not sought protection in Australia, DIAC arranges removal to Indonesia with the assistance of the International Organization for Migration as required.

The Migration Act 1958 requires that all unlawful non-citizens are removed from Australia as soon as practicable when they have signed a request for removal.

Crew assessed to be minors continue to be held in an APOD until they are removed to their country of origin (or charged if there are exceptional circumstances).

In many cases, the process of removal can take some time, as DIAC must arrange appropriate institutional care in their country of origin, and arrange for the person to be accompanied during their travel.

If a crew member is assessed by DIAC to be an adult they are referred to the AFP for consideration of criminal prosecution..

Crew assessed to be adults may be transferred to an IDC while the AFP finalises its investigation.

To allow time for the AFP to conduct its investigations a criminal justice stay certificate is issued by the Attorney-General or her delegate, which prevents removal while the certificate remains in force.

It is open to alleged people smuggling crew to change their personal information at any stage, including their date of birth. As those classified as adults cannot access benefits such as education while in the care of DIAC, and those that are classified as minors cannot purchase or smoke cigarettes, some alleged crew members provide Australian authorities with incorrect details, or change their details on a number of occasions.

The development of DIAC's approach to age assessment

DIAC's age determination process has evolved over time and relies particularly on the UK document *The Health of Refugee Children: Guidelines for Paediatricians*, published by the Royal College of Paediatrics and Child health.

Practice across European countries varies in relation to the use of bone scans and other physical investigations (such as dental examinations) but it is fair to say that those countries

which do sometimes use bone scans do not rely on them exclusively and that social and cultural factors are very important in this assessment.

In 2010 the Department decided to pilot an interview based assessment in addition to any evidence or information the client could provide relating to age. If a client already had a wrist x-ray DIAC would consider it, but would not request one.

DIAC consulted widely on this approach and developed it with advice from the Minister for Immigration and Citizenship's advisory council, the Council for Immigration Services and Status Resolution (CISSR), now known as the Ministerial Advisory Council for Asylum Seekers and Detention (MACASD). Prior to the pilot the Department also discussed the approach with the Commonwealth Ombudsman's office, the Departmental Health Advisory Group (DeHAG) and the Australian Human Rights Commission (AHRC). The approach was endorsed by each of these agencies.

The pilot was undertaken in the second half of 2010 and the approach has since been introduced as business as usual and endorsed by CISSR, DeHAG and the Ombudsman's office.

In practice this means the Department uses document research coupled with a focussed interview to determine whether a client is under or over 18 years of age.

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 an adult or a minor. Where they differ the person is given the benefit of the doubt and continues to be treated as a minor.

All interviews are conducted with the assistance of an interpreter, in the presence of an independent person representing the interests of the client and are digitally recorded with the agreement of the client. Currently independent observers are provided by Life Without Barriers.

A Standard Operating procedure has been developed to support this process.

People are encouraged and supported to provide the Department with verifiable documents at any time. If credible new information is brought to attention it is forwarded to a senior officer in the Age Determination Unit in National Office for review. Where the reviewing officer finds the new material to be persuasive the client's age may be altered accordingly.

Current age assessment process for Indonesian crew arriving in Australia

On 21 November 2011 it was agreed that DIAC would have the responsibility for determining the age of Indonesian crew who claimed to be minors on arrival. DIAC commenced age assessing Indonesian crew on 8 December 2011.

Of the 78 Indonesian crew who have been assessed through this process, from 8 December 2011 to 24 May 2012, 35 were assessed as minors and 43 as adults. As at 26 May 2012, 30 of the 35 minors have since been removed to Indonesia.

The group of 19 convicted Indonesian crew members

On 16 March 2012, the President of the AHRC wrote to the Attorney-General asking that an independent review of the age of 17 convicted Indonesian crew be conducted. In the absence of an independent person being available and following consultations between AGD) and the president of the AHRC, DIAC was asked to conduct the independent review. The number of crew requiring assessment increased to 19 including two whose cases were raised by the Indonesian Government.

On 29 March 2012, AGD confirmed this request asking that DIAC use the focussed interview technique to assess the age status of 19 convicted crew members. On 30 March 2012, AGD advised that no legal representation would be required for the crew at these assessments. Particular parameters set out by AGD included the requirement for an age status both at the time of the assessment and at the time of arrival in Australia. This was to be accompanied by an 'officer confidence rating' in the findings.

DIAC started the assessments on 2 April 2012, with the final assessment concluding on 13 April 2012. DIAC officers concluded that all were adults at the time of assessment with four likely to have been minors at the time of arrival.

DIAC used a focussed interview process similar to that used for other Indonesian crew. The process involved two highly trained officers making an age assessment that is thorough but remains subjective and is based on the balance of probabilities. A rating out of five was used to demonstrate the level of confidence in their assessments. However, the influence of incarceration in a correctional institution for several years impacts the client's physical appearance and behaviour and makes assessing the clients age on arrival complex. Accordingly the views expressed on age at time of arrival are always based on the balance of probabilities. DIAC recommended that decisions on release or continued incarceration should not be based solely on DIAC's advice on age but also consider all other information before action is taken.

Additional age assessments of convicted crew

On 7 May 2012 the AGD Asked DIAC to age assess a further five cases on behalf of the President of the AHRC and four more cases referred by the CDPD where age had been an issue during their prosecution. Currently one of the nine has been age assessed and the remainder, located in Western Australia, will be finalised by mid June.

Guardianship issues

Under the Immigration Guardianship of Children Act 1946 (the IGOC Act), the Minister for Immigration and Citizenship is the guardian of certain unaccompanied non-citizen minors who arrive in Australia with an intention to permanently reside. Alleged people smuggling crew claiming to be minors generally do not fall within the scope of the IGOC Act as they do not intend to permanently reside in Australia when they arrive in Australia. However, as DIAC has a duty of care towards crew claiming to be minors, Life Without Barriers is engaged as an independent observer for them while they undergo any formal process in

immigration facilities, including for criminal justice purposes of interviews and conducting wrist X-rays.

Life Without Barriers is currently the contracted service provider of independent observer services on Christmas Island and mainland Australia. The independent observer provides pastoral or physical support to a minor or a person that claims to be a minor throughout interviews and other formal processes, and ensures the treatment of individuals in immigration detention is fair, appropriate and reasonable. However, the independent observer has no custody, guardianship or advocacy responsibilities.

During a formal process, the independent observer builds rapport with the person claiming to be a minor, with the intention of being able to reassure and assist them while they are in the care of DIAC. The independent observer role is undertaken by staff who are professionals at working with young people and have experience in managing the psychological and emotional issues often encountered. Staff from Life Without Barriers attend interviews for minors conducted by the AFP. In attending the interview, the independent observer is required to:

- observe the interaction between the interpreter and the child or young person, and advise the interviewer of any concerns
- observe the conduct of the interview / examination / assessment and the demeanour and presentation of the person, be attentive to non-verbal cues of the person that indicates a need to take a break, and to draw to the attention of the interviewer any concerns about the person's emotional and physical state
- provide a reassuring and friendly presence for the person
- ensure each process is adequately explained and understood by the person, and
- be attentive to signs that the person may benefit from trauma counselling and provide this advice to DIAC.

Life Without Barriers' independent observers have been asked to consent to a prescribed procedure on behalf of a person claiming to be a minor as an independent person within the scope of the provisions under the Crimes Act.

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