

Dear Ms Dennett,

Thank you for your invitation to make a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Detention of Indonesian Minors in Australia.

I would like to refer the Committee to Victoria Legal Aid's previous submissions to the Committee's inquiries into the Deterring People Smuggling Bill and the Crimes Amendment (Fairness to Minors) Bill 2011. These submission are available for viewing and download on the Australian Parliament website and on our website at: <http://www.legalaid.vic.gov.au/3909.htm>

Kind regards,
Bevan Warner

RESPONSE TO

DETECTING PEOPLE SMUGGLING BILL 2011

1. INTRODUCTION

The following report informs our response to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Deterring People Smuggling Bill 2011* (the Bill).

VLA's interest stems from the fact that, by virtue of our obligations under clauses 28 and 29 of the National Partnership Agreement on Legal Assistance Services¹ (NPA), we are arranging legal representation for the accused charged in all but two of the 55 cases of alleged people smuggling currently before the courts in Victoria². VLA's staff practice also acts for the majority of the Indonesian men charged with those offences. More specifically we act for Mr Jeky Payara, whose case was due to be heard in the Victorian Court of Appeal last Thursday. Given the purported effect and the timing of the Bill it appears to be in response to Mr Payara's case.

This submission is primarily directed to the questions of retrospectivity and the effectiveness of mandatory sentencing as a deterrent, as these questions fit with our role remit. We have not addressed other matters that are the subject of this inquiry, such as the policy underlying the declaration that those who seek asylum from persecution have no lawful right come to Australia, or whether the Bill breaches international obligations.

2. THE ROLE OF VICTORIA LEGAL AID

Background

VLA is an independent statutory authority established under the Victorian *Legal Aid Act 1978* to provide legal aid and improved community access to justice and legal remedies³, and empowered to provide legal assistance notwithstanding that the interests of the assisted person are or may be adverse to the State or Commonwealth⁴. This includes legal assistance to accused defending criminal prosecutions, to applicants in some judicial review proceedings and in various actions designed to quality assure the actions of government agencies, in their exercise of power over citizens' lives.

The provision of legal aid makes possible access to justice, which is central to the rule of law and a critical element of a well-functioning democracy. Our democratic society is based on the premise that all Australians are equal before the law. Legal aid commissions play a defining role in achieving that equality. They strive to ensure that all persons, including those who cannot afford to pay, have access to legal services and to the law. This includes taking actions against government, contemplated in section 5 of the *Legal Aid Act* which states that VLA does not represent the Crown.

As with all state and territory legal aid commissions, we are funded by both State and Federal Governments. In the 2011 – 2012 Budget, the Commonwealth Government allocated \$194.8 million in funding for legal aid commissions under the NPA⁵. In addition, the Commonwealth

¹ http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/other.aspx.

² Victoria Legal Aid has arranged legal representation in a total of 61 alleged people smuggling cases.

³ *Legal Aid Act 1978* (Vic) s4.

⁴ *Legal Aid Act 1978* (Vic) s25.

⁵ Australian Government, *Australia's Federal Financial Measures: Budget Paper No. 3: 2011–12*, Commonwealth of Australia, 2011, p 96.

Government provides additional funding to reimburse costs incurred by state and territory legal aid commissions in providing legal assistance in expensive Commonwealth criminal matters, including people smuggling cases, through the Expensive Commonwealth Criminal Cases Fund (ECCCF). Funding allocated through a specific fund ensures that legal aid commissions are not impacted in their ability to provide assistance for other Commonwealth legal aid priorities⁶. The 2011–12 Budget papers show that the Government has allocated \$28.9 million over three years to the ECCCF⁷.

In the context of the cases to which the Bill relates we have a dual role. First, we are an arranger of legal representation for the accused in these cases and, secondly, through our staff practice, we act as the lawyers for a large number of the men who have been prosecuted.

People smuggling prosecutions arrive in Victoria

In February 2011 we received advice from the Commonwealth Director of Public Prosecutions (CDPP) that Victoria could expect to receive a significant number of people smuggling prosecutions as a result of the Northern Territory courts being unable to deal with the numbers of cases. The next day eight accused were brought to Victoria. Over the following months many more followed. In total 61 people charged with people smuggling offences have been legally aided in Victoria. The majority are being represented by lawyers from VLA's staff practice with the rest represented on grants of legal aid by private law firms.

These accused men are all eligible for legal aid because they face serious charges and have no assets or income. Under Clause 28(b) of the NPA the Commonwealth maintains separate funding for legal aid commissions for expensive Commonwealth criminal cases accessible on a reimbursement basis (the ECCCF noted above). By agreement, the people smuggling cases are funded on that basis and the Commonwealth bears all the costs, without detriment to other worthy cases that might be funded.

The cases are at various stages. Some have been through committal in the Magistrates' Court of Victoria and are awaiting trial in the County Court of Victoria. Others will follow. We have worked closely with the CDPP and the County Court to schedule the trials in as efficient way as possible and they will be heard in blocks of three over the course of 2012.

There are two kinds of people smuggling offences. The simple version of the offence carries no mandatory term of imprisonment. On the other hand, Aggravated People Smuggling carries a mandatory term of five years with a minimum non-parole period of three years. The offence is aggravated if five or more people are brought to Australia. The practical reality is that all boats intercepted have significantly more than five people. Everyone we fund and act for is therefore charged with Aggravated People Smuggling and faces, on conviction, mandatory imprisonment.

Once a staff lawyer is assigned to a client they have, under section 16 of the *Legal Aid Act*, the same professional obligations and duties as any other legal practitioner acting for a client, including

⁶ H Spinks, J Phillips, E Karlsen and N Brew, *Budget Review 2011 – 2012: Responding to boat arrivals*, Parliament of Australia, 2001. Retrieved from <http://www.aph.gov.au/library/pubs/RP/BudgetReview2011-12/Boat.htm>.

⁷ Australian Government, *Budget Measures: Budget Paper No. 2: 2011–12*, Commonwealth of Australia, 2011, p 103.

the obligation to properly represent the interests of the accused person. As noted above, this means that, uniquely to legal aid commissions, staff employed by a public sector agency must at times act against the interests of the State. It is one of the hallmarks of a civilised society that the state helps people who the state itself charges with criminal offences.

Jeky Payara's case

In people smuggling cases one of the things that the prosecution has to prove is that the people brought to Australia had 'no lawful right to come'⁸. It became clear to our legal staff relatively early that there was a real question over the interpretation of this phrase. In particular, there was a question as to whether a person who seeks asylum from persecution in Australia can truly be said to have 'no lawful right to come' given Australia's obligations under the Refugees Convention and the extent to which those obligations have been incorporated into Australian domestic law and practice. Having identified the question, our professional obligation was to raise it on behalf of our clients and have it determined.

In order to ensure that the large number of pending trials proceeded efficiently and on a clear legal footing, we gave notice to the CDPP of this issue and chose a test case to take to the Victorian Court of Appeal before any of the trials started. The case chosen was Mr Payara's and, on 12 September 2011, the Chief Judge of the County Court reserved questions of law to the Court of Appeal. The hearing was set down for 3 November 2011 in the Court of Appeal. The Bill was introduced in the House of Representatives on 1 November 2011 and passed the same day. The hearing was adjourned until 30 November 2011 to allow the Senate process to take its course. The President of the Court of Appeal commented that this was an entirely appropriate issue to have brought to the Court given the fact that it impacts on a large number of cases and resolving it early would provide legal certainty, which the efficient administration of justice requires.

The Bill's effect

The Bill does three things. It:

- defines the phrase 'no lawful right to come' as being satisfied if a person does not hold a visa that is in effect or does not fall within the visa exceptions in section 42 of the *Migration Act 1958*,
- declares that an asylum seeker is not a person who has a 'lawful right to come to Australia', and
- provides for the Bill to come into effect 12 years ago in 1999.

The hearing in the Court of Appeal in Mr Payara's case will be rendered moot if the Bill passes into law. That is presumably why it was introduced.

As is discussed in more detail below, retrospective criminal legislation has only been passed on four previous occasions in the Australian Parliament. It has never previously been passed to prevent a case from being argued, although was recently passed after a case had been argued in the High Court of Australia but before judgment was delivered.

⁸ *Migration Act 1958* (Cth) s233C(c).

3. RETROSPECTIVE CRIMINAL LAWS

Introduction

In many countries retrospective criminal law is unconstitutional or otherwise prohibited⁹. This includes many jurisdictions that operate very differently from our own, including, for example, Iran and Indonesia. Concern about retrospective criminal laws thus crosses cultural and political boundaries as is reflected by its enshrinement as an absolute right, from which derogation is not permitted¹⁰, in Article 15 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party.

In Australia, retrospective criminal legislation is considered to be constitutionally valid but highly undesirable. In 1991 the High Court held that the Parliament could constitutionally pass retrospective criminal legislation¹¹. It did so by majority against two dissenting judgments by Justice Deane and Justice Gaudron which held that retrospective criminal legislation is beyond the power of the Parliament to make because it interferes, in a way barred by Chapter III of the Constitution, with the functioning of the judiciary. Even though retrospective criminal legislation is permitted in domestic law, it nonetheless represents a breach of Australia's international obligations under the ICCPR.

Policy

The policy reason why retrospective criminal legislation is treated in this way can be put simply: people should only be charged with criminal offences that existed at the time that the act constituting the offence took place – it is unfair to make people criminally liable for acts that were not offences at the time they were done. The principle applies equally in a situation like this. If Mr Payara's argument about the interpretation of the phrase 'no lawful right to come' was held to be correct then he did not commit an offence. The effect of the Bill will be to nonetheless deem him to have committed an offence. It does so by declaring the amendment to have come into force 12 years before being passed by the Parliament.

This sort of legislation offends two bedrocks of our parliamentary system of government - the rule of law and the separation of powers between the elected parliament and the independent judiciary. The rule of law ensures that laws apply equally and openly to all Australians, including the Government, while our independent courts ensure that the law is applied without political interference. Retrospective legislation undermines these fundamental protections because it allows a government to change the law in their favour during the course of a case, turning government by rule of law into government by decree.

⁹ For example, Brazil, Canada, Finland, France, Indonesia, Iran, Ireland, Italy, Japan, Norway, New Zealand, Pakistan, the Philippines, Russia, Spain, South Africa, Sweden, Turkey and the United States.

¹⁰ Article 4 of the ICCPR allows for derogation from some obligations under the Covenant, but the prohibition on retrospective criminal laws is specifically excluded, see 'Prohibition on Retrospective Criminal Laws', Attorney-General's Department: www.ag.gov.au (accessed November 2011).

¹¹ *Polyukhovic v Commonwealth* ("War Crimes Case") [1991] HCA 32.

The Australian experience

The Attorney General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* says that¹²:

[a]n offence should be given retrospective effect only in rare circumstances and with strong justification.

It goes on to note that¹³:

The Federal Parliament and successive governments have only endorsed retrospective criminal offences in very limited circumstances. People are entitled to regulate their affairs on the assumption that something which is not currently a crime will not be made a crime retrospectively through backdating criminal offences.

Exceptions have normally been made only where there has been a strong need to address a gap in existing offences, and moral culpability of those involved means there is no substantive injustice in retrospectivity.

This caution has meant that, prior to the term of the current Parliament, retrospective criminal legislation had only been enacted in Australia on three occasions:

- The 'bottom of the harbour' tax evasion offences (*Crimes (Taxation Offences) Act 1980*),
- The war crimes offences inserted in the *War Crimes Act 1945* by the *War Crimes (Amendment) Act 1988*, and
- The anti-hoax offence inserted in the *Criminal Code Act 1995* by the *Criminal Code Amendment (Anti-Hoax and other Measures) Act 2002*.

In the term of the current Parliament legislation was passed to retrospectively impose disclosure obligations on Centrelink recipients when the courts had held that the particular obligations did not exist in law and could not found criminal liability¹⁴. Previously, people receiving government pensions or benefits were required to provide updated information on any matter requested by Centrelink in regular notices sent to recipients. As a result of the legislation, people can now be prosecuted for failing to comply with an additional, general obligation to notify Centrelink of any event or change, when that obligation did not exist at the time that they are said not to have complied with it.

Notwithstanding strong concerns expressed by the Senate Scrutiny of Bills Committee¹⁵, that legislation passed and passed quickly. In that case, the Scrutiny of Bills Committee said that retrospective laws "*show a basic disrespect for citizens insofar as they undermine the idea that law is a system of rules designed to guide human conduct*". As breaching criminal laws may lead to the deprivation of liberty, "*retrospective laws carry added opprobrium*"¹⁶. In addition, at the time

¹² *Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, Attorney-General's Department, September 2011, p 15.

¹³ *Ibid.*

¹⁴ *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011*.

¹⁵ Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 7 of 2011, 6 July 2011, p 26.

¹⁶ *Ibid* at p 24.

the legislation was passed, the existing law affected by the retrospective amendments was the subject of a case taken on appeal by the Commonwealth to the High Court, in which arguments had been heard and judgment was pending but not yet delivered.¹⁷

Why retrospective legislation in this case?

The current position as a matter of law and policy in Australia is therefore that retrospective criminal legislation is permitted but should only be used in rare circumstances, in particular where the moral culpability of the people involved means that there is no injustice. The Scrutiny of Bills Committee has previously said that even where laws are enacted to pursue worthy policy objectives, there is a moral cost when those laws apply retrospectively¹⁸.

In relation to this Bill the question of moral culpability requires careful consideration. While there are people who organise and substantially profit from the trade, the overwhelming majority of the people charged with people smuggling in Australia are impoverished Indonesian fisherman, the totality of whose involvement is to be recruited on to the boats to steer, crew or cook. They are as dispensable to the organisers of people smuggling as the boats that get burnt off the coast of Christmas Island and Ashmore Reef. The second reason said to justify retrospective legislation is to ensure that people smugglers are deterred, or as it is sometimes put, to 'break the people smugglers' business model'.

The remainder of this submission addresses both the extent of criminality by describing who the people being prosecuted in Australia actually are and the deterrent effect of the current strategy of prosecuting boat recruits.

4. THE PEOPLE

Boat recruits, not organisers, are being prosecuted

As of 15 March 2011 of 353 people arrested and charged for people smuggling offences 347 were crew. Only six were organisers.¹⁹ This makes sense because the organisers would never allow themselves to be present on a boat in Australian Territorial waters.²⁰ They know what the consequences of that are and they are measured by years in detention. By contrast, the men arrested on the boats are those who are considered by the people smugglers to be expendable.

¹⁷ *Commonwealth Director of Public Prosecutions v Poniatowska* [2011] HCA 43.

¹⁸ Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 7 of 2011, 6 July 2011, p 24.

¹⁹ Attachment A, Senate Question on Notice 25, Senate Standing Committee on Legal and Constitutional Affairs, Australian Federal Police, 22 February 2011.

²⁰ Commonwealth, *Estimates*, Senate Legal and Constitutional Affairs Legislation Committee, 18 October 2011, p 68 [evidence of Australian Federal Police]: In 2009, the AFP made 82 arrests for people-smuggling related matters, of which 76 were crew. In 2010, 203 arrests for people-smuggling related matters were made, of which 202 were crew. For 2011 to date, 208 arrests for people-smuggling related matters were made, of which 205 were crew. 'Most of those would have been arrested in Australia because they would have been the crews...All of those arrests have been made here in Australia. The remainder are for what we term as people-smuggling organisers, and there would be a mix with a majority of the arrests made overseas where we have then sought extradition.'

Our experience

By virtue of acting for the majority of people charged with these offences in Victoria we have come to learn a lot about the way in which people smuggling operates, the roles played by the Indonesian fisherman and how they are recruited. This knowledge comes both from reviewing multiple briefs from the CDPP and from obtaining instructions from a large number of clients. There are a small number of repeating scenarios that have emerged from that experience:

- The crew are told that they will be transporting cargo and the asylum seekers are only brought onboard once at sea.
- The crew are only transferred onto the boat shortly before Australian waters and the organisers then depart on a second boat.
- The crew are only told that that the people they are transporting are to be taken to Australia once they are on the High Seas and cannot return.
- The crew are told that once they transport people to Christmas Island, Ashmore Reef or Cartier Island that they will be paid and allowed to return home.

We demonstrate each of these scenarios with case studies based on real but de-identified clients below. However, it is important to understand something of how the process of people smuggling works.

The process of people smuggling through Indonesia

Most of the asylum seekers who come to Australia by boat are from Iraq, Afghanistan and other parts of the Middle East. They are usually fleeing persecution. The asylum seekers are guided through a sophisticated network of ‘true’ people smugglers operating between the Middle East and Indonesia before being placed on a boat that ultimately brings them to within Australian territory.

Asylum seekers typically pay an agent in the Middle East a first instalment of up to \$5000 to be issued a false passport and fly to Malaysia. They then pass through immigration officials in other countries by illegal means. A network of people smugglers then facilitates their transport by land and sea through a series of safe houses to Java or other islands further east along the Indonesian archipelago. Dozens of people will assist in managing the secret movement of asylum seekers to the point at which they board the boat to Australia. None of the 55 accused currently being assisted by VLA are alleged to have been involved in the movement of asylum seekers through Indonesia. Their involvement is limited to the final leg of the journey to Australia on the boats themselves.

Crew are recruited by organisers from the islands of the Indonesian archipelago. In the ways set out in the case studies below, the crew are often misled into going onto the boats. They have an expectation of returning; an expectation not shared by the organisers.

Arrival and treatment in Australia

Inevitably, the boats are apprehended in off-shore waters by Australian authorities and the crew and passengers are detained because they are “*reasonably suspected of being unlawful citizens*”²¹. They must then be kept in immigration detention until removed from Australia or

²¹ *Migration Act 1958* s189.

provided with a visa²². In the case of suspected people smugglers, the Attorney General usually stays their removal or deportation for the purposes of 'the administration of criminal justice'²³.

Of the almost 60 people in Victoria currently charged with people smuggling, many were kept in immigration detention for ten months before being charged. Even since the people smuggling prosecutions have been distributed across various Australian jurisdictions to alleviate a backlog, the delay between apprehension and charge remains at about six months²⁴.

People smuggling accused in Victoria have a prima facie entitlement to bail²⁵. Ordinary accused people in a like situation of no prior convictions, no history of bail breaches, low risk of re-offending and likely delay to trial of one to two years, would easily achieve bail. However, for people smuggling accused, there is no practical right to freedom from incarceration pre-trial. Bail would mean a return to immigration detention and in Victoria this means housing in the Maribyrnong Immigration Detention Centre, currently the most secure and prison-like immigration detention facility in Australia. When delays to trial are added in, there will be people ultimately acquitted at trial who will have spent close to three years in custody.

Mandatory Sentencing

On conviction, the mandatory minimum sentence of imprisonment is eight years for a repeat offence and five years in any other case. A non-parole period must be set at a minimum five years for a repeat offence and three years in any other case²⁶.

Sentencing judges around the country have been reluctant to date to impose any more than the mandatory minimum even after trial. Trial Judges have consistently spoken out against of the injustice of the mandatory sentencing regime and, in a number of cases, called for the Federal Attorney General to release prisoners after the expiration of 12 months²⁷.

5. RECURRING SCENARIOS

CASE STUDY 1 – told they are transporting cargo

Asis²⁸ is fairly typical of the type of person charged with aggravated people smuggling. He is 19 and comes from a small island near Rote in the far eastern end of the Indonesian archipelago. He finished his education at primary school, speaks fluently in his local dialect, has a working knowledge of Bahasa Indonesian, but can barely read or write and cannot speak English. He has never used a computer or read a newspaper. He lives in a small one roomed wooden house with an outside toilet and no running water. His wife, infant child and aging mother are entirely dependant on his income because his father has passed away. Asis mainly catches fish in nets

²² *Migration Act 1958* s196.

²³ *Migration Act 1958* s147.

²⁴ The ICCPR entitles all accused to be 'tried without undue delay'. The *Universal Declaration of Human Rights* decrees that 'no one shall be subjected to arbitrary arrest, detention or exile'.

²⁵ *Bail Act 1977* (Vic), s4.

²⁶ *Migration Act 1958* s236B.

²⁷ See, eg, *The Queen v Tahir and Beny*, unreported, Supreme Court of the Northern Territory, Mildren J, as reported in *The Australian* newspaper 19 May 2011.

²⁸ Not his real name.

cast from the beach for a living, but occasionally works for a few days at a time on other people's fishing boats. He takes whatever work comes to him to survive.

One day Asis is visited in his home by a Javanese man who says he will pay him three million rupiah (about \$330) for a week's work as crew man on a cargo boat. The payment is much better than the few dollars a day that he usually earns and Asis needs to pay for an operation on his mother's stomach. He doesn't ask why the pay is better than usual because he is desperate for the money, besides, employees at this strata of society know not to question their superiors. So Asis does what he is asked and travels by plane to Surabaya in Java along with three other similarly uneducated and naïve men from Rote recruited for the same purpose. Two of these other men are aged 15 and 16 respectively. The third suffers a cognitive disability.

Once in Surabaya they are quickly taken to a Javanese port where they meet Mahmad²⁹, the captain of a fishing boat. Mahmad briefly shows the four crew a small map and explains that they will take cargo to Palau Pasir, or 'Sand Island', about 80 nautical miles south of Rote. This trip will involve a voyage back along the archipelago to Rote before turning south and travelling for another day and a half through open waters to Palau Pasir. What Asis does not realise is that Palau Pasir is also known as Ashmore Reef and is within Australia's contiguous zone.

The captain and crew then motor offshore and wait at sea. Meanwhile, the other organisers of the smuggling operation have assembled fifty asylum seekers in two safe houses in Surabaya. They are brought in two mini-buses then two small boats to board the fishing boat waiting offshore. Asis and the other crew are surprised to see passengers instead of cargo but again, don't ask questions.

Commonly the voyages are taken in two stages to enable the organisers to avoid the operation of Australia's anti-people smuggling laws. It is no different for Asis. Mahmad, the captain, uses his map to steer the boat along the Indonesian archipelago to near Rote. He makes a phone call and another boat sails to meet them at sea. The captain disembarks near the edge of the contiguous zone, takes the map and instructs Asis and the crew to sail south. Without a map, on the high seas and subject to insistence from an agitated group of passengers that they get to 'Ashmore', Asis assumes control of the boat and charts a course south using the boat's compass.

They miss Ashmore Island entirely and come to rest on a nearby island within the contiguous zone called Cartier Island. The passengers ask Asis if this is Ashmore and, not knowing either way, he says it is to quell any further trouble.

CASE STUDY 2 – crew and organisers swap boats shortly before Australian waters

Murdin³⁰ was born and raised in a village of approximately 500 people on the island of Lombok. Before coming to Australia, he was living with his wife and child in a nearby village of only 15 to 20 people. Murdin's wife is of the Sasak people, an indigenous tribe from the island of Lombok, and their baby is now 8 months old.

Since Murdin's departure, his wife has no support and his father has died. He speaks no English and worked as a fisherman.

²⁹ Not his real name.

³⁰ Not his real name.

Murdin was approached by an Indonesian man in the village market who offered him work on a fishing boat leaving that day. He was told that it was a fishing trip and that it would take a few weeks. A normal fishing trip would usually take about three weeks. Murdin was offered about \$120 but was never paid. He met the other crew when he arrived on the boat. The asylum seeker passengers got on board offshore.

There were two boats involved in this operation: the main boat ('the A team') with passengers and a support boat ('the B team') following behind. About one day prior to interception by Australian authorities, Murdin was told to swap from the support boat to the main boat. The people smuggling organisers ('the A team'), who had been managing the asylum seekers and navigating, then moved to the support boat which then departed.

Murdin was not given any instructions when he boarded the larger boat other than to keep travelling straight. He did not use a compass or map because he didn't know how. After three or four hours, an aircraft passed overhead and then later that evening the boat was caught in a violent storm. At some point, the engine stopped and could not be restarted. From the outset, the boat was continuously taking on water. The day after the storm the boat was intercepted by the Australian navy.

While on the main boat Murdin helped steer the boat from time to time, though he did not know where they were headed, and assisted to bail water out of the boat using a pump. He instructs he has no knowledge of engines and did not perform any repairs on the engine. He denies knowing the boat was destined for Australia and did not have any conversations with any passengers given the language barrier.

CASE STUDY 3 – not told they were travelling to Australia

Ramir³¹ is 26 years old and was born in Sulawesi. He was educated to half way through secondary school but remains illiterate. Ramir moved to Java for work in his late teens and worked as a fisherman on other people's boats. He is married with two young children.

Ramir was approached by a person he had never met before and offered five million rupiah (about \$500) to take a group people from Java to Kupang on West Timor. Ramir was taken to a boat where he met the captain and two other crewmen and they anchored slightly offshore. At night time the group of passengers got on board and they started travelling east. It was only after being away for three days that he asked where he was going and was told Australia. At this point there was no land in sight and he was powerless to turn the boat around. Ramir remains in custody awaiting trial and is angry at the people smugglers who tricked him into undertaking the journey.

CASE STUDY 4 – told they will be able to return home

Jodan³² is from Ambon Indonesia. He was 19 years old when recruited by people smugglers to come to Australia. He finished three years of high school education, is single, has no children, and cannot read or write English. He had been a fisherman for about 2 years.

³¹ Not his real name.

³² Not his real name.

On a trip to visit family, he was sitting at a bus stop when approached by a man who started talking to him about work opportunities. The same man also involved another young Indonesian who was at the bus terminal into the conversation.

The man asked if Jodan would be interested in bringing a group of people to an island, pointing to the island on a map. He said the boat was ready to go, and that all Jodan would need to do would be to steer a boat to this island, drop the people off and then come back. He stated that each passenger would pay them about twenty million rupiah (over \$200) once they arrived at the island. This was an incredibly attractive offer, compared to Jodan's usual monthly wage of between 700,000 to 1 million rupiah (\$75-110).

Jodan and the other recruited crew member then caught a bus with this man to Surabaya. They were kept in a hotel for three days while the man made final arrangements for the pair, like organising SIM cards for their phones. They were told not to leave the hotel as their different appearance might frighten the locals. At about 8pm on the third night, the pair were driven by taxi to the beach. They then took a small boat to a larger boat. The passengers then boarded this larger boat and they left for the island, using a map and compass to navigate. It was not until daylight that they realised the poor condition the boat was in. They decided to continue with the journey rather than turn back, as they feared the passengers would harm them. Jodan did not know that their destination, Christmas Island, was in fact part of Australia.

The journey to the island took about five days. The boat frequently broke down requiring hours of work by both crew men to have it start again.

After five days at sea, they arrived at the island and pulled into a port with assistance from Australian officials. The crew expected the passengers to pay them, leave the boat and for them to be able to begin their journey back to Indonesia. The crew were, however, detained and Jodan has now been in custody for over 12 months.

CASE STUDY 5 – 'Here's a compass – head South'

Wawan³³ is about 35 years old and lived in a small village of around 50 families on the island of Sumbawa. He lived with his mother and was the sole provider for the home as his father had died when he was a small child.

He had survived a very impoverished upbringing, in which he had worked from a young age to support his mother. As a result his formal education finished before the end of primary school.

The home he shared with his mother was a small, one room, bamboo hut with a dirt floor. There was no electricity and the only access to running water was outside in the village.

Wawan was a fisherman who often travelled for work. His mother suggested that he go to Sumba to fish for Octopus. In Sumba on this occasion he was sitting in a coffee shop, when he was approached by a man called Mohammed³⁴ who asked if he would be interested in taking a boat load of passengers to go diving in Kupang. Wawan agreed, thinking that this was a way to make more money than fishing for octopus would bring.

³³ Not his real name.

³⁴ Not his real name.

When the passengers arrived Wawan was surprised to see that none of them were Indonesian. However, he did not ask any questions, as Mohammed was his boss and he was now to do as he was told.

When they set off there were 40 passengers on board Wawan's boat as well as another Indonesian man who had been recruited in the same way as Wawan. Mohammed followed in a larger boat and after two days he came aboard Wawan's boat and handed him a compass telling him to continue to sail at 180 degrees. Mohammed then turned his boat around and headed back towards Indonesia. Wawan had never used a compass before, however still believed he was heading to Kupang, so continued to follow Mohammed's instructions.

Wawan and the other Indonesian man followed Mohammed's directions for another two days until they were intercepted by the Royal Australian Navy off the coast of Western Australia.

Those who are left behind

One way of understanding how these men end up on the boats, and the true circumstances from which they come, is to speak with those that they have left behind. VLA staff have recently travelled to Rote Island to fulfil their professional obligations in acting for accused, including to establish the age of a number of our clients who claim to be under 18. The Commonwealth rely in age determination hearings on wrist X-ray analysis that has been internationally discredited. Obtaining direct evidence of age is almost impossible from a distance and the Commonwealth do not themselves travel to these communities to obtain first hand evidence. The relative cost of an investigative trip to Indonesia is much less than the cost of a committal hearing and trial which are avoided if a person is demonstrated to be under 18.

A number of claims were investigated on the most recent trip in order to maximise the benefit. The trip was supported and facilitated by the Indonesian government. What we confirmed was the extreme poverty from which these men come and why the villagers of Rote are such easy targets for people smuggling organisers. The experience also illustrated the generational poverty that is being created by the removal of 'bread winners' from the villages for three years or more. This is particularly so given that about 45% of these men are under 30 years old.

For example, in one village our staff spoke to twelve women who had male family members (husbands, brothers and sons) ranging in age from 14 to over 75 years old in detention in Australia on people smuggling charges. A number of the men had already been working in other provinces when they were recruited by 'organisers', while others were recruited from the village itself by outsiders who came to the village in search of fishing crews.

These families reported having received sums of around of 1-3 million rupiah (\$100-330) from the 'organisers'. However, there was no evidence of enrichment to the families. Most of the women indicated that the money received had been used to pay off debts or to purchase food. These families were clearly suffering financially when compared to families who did not have relatives in Australian detention. Many of the women were in the practice of incurring debt at the local store to buy cooking ingredients, which they would then bake into cakes to be sold at the local market, so as to buy other foodstuffs and repay the store. All of the affected families with school aged children reported having been forced to remove one or more children from primary or junior secondary school so that the children could begin to work to support the family.

6. DETERRENCE

Once one understands who the accused men are and how they are recruited, it is very hard to continue to sustain a deterrence argument either in principle or on a cost benefit analysis. It is our view, therefore, that in this instance the rare step of retrospective legislation is not justified by any deterrence effect.

This follows from the conclusion that these accused men are treated in the same way as the boats that they sail. They are expendable. The people smugglers are well aware that these men will be detained for years in Australia. That is why they themselves do not travel to Australia but arrange for others, often by deception, to take the trip.

Indonesia has a population of 245 million people, many of whom live a coastal subsistence lifestyle without access to television or internet. Once there is sufficient knowledge of the tactics of the organisers in a particular location they can simply move to the next village or island. The people smugglers themselves are not deterred at all. In the case of the people who sail the boats the likelihood of apprehension and punishment is certain, indeed, it is the object of the exercise to be apprehended in Australian waters.

7. MANDATORY IMPRISONMENT

The current regime provides for mandatory imprisonment for five years if the offence is committed in relation to five or more people. This aggravated form of the offence in reality captures all of these accused because each boat always has more than five people. This test does not fairly address the culpability upon which penalties should fairly be based. A sounder and fairer model would differentiate between the criminality of those who crew these boats and the organisers of people smuggling. If mandatory imprisonment was linked to whether or not the person was an organiser rather than a boat recruit, many of the harsh effects of the regime would be removed and the concerns for the treatment of this population ameliorated.

8. CONCLUSION

The awfulness of the people smuggling trade cannot be doubted. In its worst form it creates victims of some of the most vulnerable people on earth. Almost all of the men who are currently being prosecuted in Australia for Aggravated People Smuggling are themselves victims of the trade. They are put on the same boats and exposed to the same risk as the asylum seekers. They are either misled into working on the boats, or offered what seems to them to be a small fortune. The organisers have no interest in seeing these men return to Indonesia and they do not return – at least for many years.

The public interest in securing the conviction and mandatory detention of these men is not sufficient to justify the rare step of imposing retrospective criminal liability – still less so before the Victorian Court of Appeal has decided whether the law as it currently stands creates the problems that the retrospective legislation is intended to solve.

**Senate Legal and Constitutional Affairs Committee Inquiry
into the *Crimes Amendment (Fairness for Minors) Bill 2011***

Introduction

VLA is grateful for the opportunity to respond to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Crimes Amendment (Fairness for Minors) Bill 2011* (the Bill).

VLA's interest in this Bill stems from the fact that, by virtue of our obligations under clauses 28 and 29 of the National Partnership Agreement on Legal Assistance Services¹ (NPA), we are arranging legal representation for the accused charged in all but two of the 54 cases of alleged people smuggling currently before the courts in Victoria². VLA's staff practice acts for the majority of the Indonesian men charged with those offences. More specifically we have assisted eight children who were charged as adults, but whose charges were subsequently withdrawn after the Commonwealth accepted that they were in fact children at the time of the alleged offence.

Of the 63 prosecutions of crew initiated in Victoria to date, eight have been discontinued because the accused were found to be children³. This equates to 12.7%, or more than one in ten, accused having been found to be minors.

This submission is directed to the unreliable methods of determining the age of accused people smugglers and the unclear standards and burdens of proof for the determination of age in these cases. We will also address the unacceptable delays in charging accused people smugglers that lead to lengthy periods of arbitrary detention. The first part of the submission focuses on understanding the way in which people smuggling from Indonesia comes to involve children both generally and using the experiences of two of our clients who have been recently returned home.

Summary of recommendations

- I. Where x-ray analysis indicates a likelihood that a suspect or accused is an adult, this evidence should not be relied on in isolation and must be supported by other evidence. Assessments should include gathering information from families and relevant Indonesian authorities, and interviews by appropriate experts (such as psychologists) to internationally accepted standards;
- II. Suspects must have access to legal advice prior to being asked to consent to x-ray or other age determination assessments;
- III. The Crown should bear the onus of proving that an accused was 18 years or older when the offence was alleged to have been committed;
- IV. The Crown should prove the age of the accused *beyond reasonable doubt*;
- V. A time limit of 14 days should apply for the charging of an accused people smuggler who claims to be a child;

¹ http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/other.aspx

² Victoria Legal Aid has arranged legal representation in a total of 61 alleged people smuggling cases

³ One other prosecution was withdrawn after it was accepted that the accused was so cognitively impaired that he was incapable of forming the requisite intent to commit the offence.

- VI. A time limit of 30 days should apply for the Commonwealth to make application to a Magistrate for an age determination order; and
- VII. Initial investigation and charging of all people suspected of people smuggling by bringing asylum seeker to Australia by boat must be expedited so that no suspected people smuggler can be detained for more than 14 days before being charged.

The role of Victoria Legal Aid

People smuggling prosecutions arrive in Victoria

In February 2011 we received advice from the Commonwealth Director of Public Prosecutions (CDPP) that Victoria could expect to receive a significant number of people smuggling prosecutions as a result of the Northern Territory courts being unable to deal with the numbers of cases. The next day eight accused were brought to Victoria. Over the following months many more followed. In total 63 crew charged with people smuggling offences have been legally aided in Victoria. The majority are being represented by lawyers from VLA's staff practice with the rest represented on grants of legal aid by private law firms.

These accused men are all eligible for legal aid because they face serious charges and have no assets or income. Under Clause 28(b) of the NPA the Commonwealth maintains separate funding for legal aid commissions for expensive Commonwealth criminal cases accessible on a reimbursement basis (the ECCCCF noted above). The Commonwealth therefore bears all the costs for people smuggling cases.

The cases are at various stages. Some have been through committal in the Magistrates' Court of Victoria and are awaiting trial in the County Court of Victoria. Others will follow. We have worked closely with the CDPP and the County Court to schedule the trials in as efficient way as possible and they will be heard in blocks of three over the course of 2012/13.

There are two kinds of people smuggling offences. The simple version of the offence carries no mandatory term of imprisonment. On the other hand, Aggravated People Smuggling carries a mandatory term of five years with a minimum non-parole period of three years. The offence is aggravated if five or more people are brought to Australia. The practical reality is that all boats intercepted have significantly more than five people. Everyone we fund and act for is therefore charged with Aggravated People Smuggling and faces, on conviction, mandatory imprisonment⁴.

Once a staff lawyer is assigned to a client they have, under section 16 of the *Victorian Legal Aid Act 1978*, the same professional obligations and duties as any other legal practitioner acting for a client, including the obligation to properly represent the interests of the accused person. As noted above, this means that, uniquely to legal aid commissions, staff employed by a public sector agency must at times act against the interests of the State. It is one of the hallmarks of a civilised society that the state helps people who the state itself charges with criminal offences.

⁴ *Migration Act 1958* (Cth) s233C(c).

People smuggling generally

Our experience

By virtue of acting for the majority of people charged with these offences in Victoria we have come to learn a lot about the way in which people smuggling operates, the roles played by the Indonesian fisherman and how they are recruited. This knowledge comes both from reviewing multiple briefs from the CDPP and from obtaining instructions from a large number of clients. There are a small number of repeating scenarios that have emerged from that experience:

- The crew are told that they will be transporting cargo and the asylum seekers are only brought onboard once at sea.
- The crew are only transferred onto the boat shortly before Australian waters and the organisers then depart on a second boat.
- The crew are only told that that the people they are transporting are to be taken to Australia once they are on the High Seas and cannot return.
- The crew are told that once they transport people to Christmas Island, Ashmore Reef or Cartier Island that they will be paid and allowed to return home.

It is also our experience that the organisers usually recruit crew members who are vulnerable to exploitation by virtue of their poverty, age or, sometimes, cognitive impairment.

The process of people smuggling through Indonesia

Most of the asylum seekers who come to Australia by boat are from Iraq, Afghanistan and other parts of the Middle East. They are usually fleeing persecution. The asylum seekers are guided through a sophisticated network of 'true' people smugglers operating between the Middle East and Indonesia before being placed on a boat that ultimately brings them to within Australian territory.

Asylum seekers typically pay an agent in the Middle East a first instalment of up to \$5000 to be issued a false passport and fly to Malaysia. They then pass through immigration officials in other countries by illegal means. A network of people smugglers then facilitates their transport by land and sea through a series of safe houses to Java or other islands further east along the Indonesian archipelago. Dozens of people will assist in managing the secret movement of asylum seekers to the point at which they board the boat to Australia. None of the 54 accused currently being assisted by VLA are alleged to have been involved in the movement of asylum seekers through Indonesia. Their involvement is limited to the final leg of the journey to Australia on the boats themselves.

Crew are recruited by organisers from the islands of the Indonesian archipelago. The crew are often misled into going onto the boats. They have an expectation of returning; an expectation not shared by the organisers.

Arrival and treatment in Australia

Inevitably, the boats are apprehended in off-shore waters by Australian authorities and the crew and passengers are detained because they are “*reasonably suspected of being unlawful citizens*”⁵. They must then be kept in immigration detention until removed from Australia or provided with a visa⁶. In the case of suspected people smugglers, the Attorney General usually stays their removal or deportation for the purposes of “*the administration of criminal justice*”⁷.

People smuggling accused in Victoria have a prima facie entitlement to bail⁸. Ordinary accused people in a like situation of no prior convictions, no history of bail breaches, low risk of re-offending and likely delay to trial of one to two years, would easily achieve bail. However, for people smuggling accused, there is no practical right to freedom from incarceration pre-trial. Bail would mean a return to immigration detention and in Victoria this means housing in the Maribyrnong Immigration Detention Centre, currently the most secure and prison-like immigration detention facility in Australia. When delays to trial are added in, there will be people ultimately acquitted at trial who will have spent close to three years in custody.

Children who sail to Australia

The families

One way of understanding how children end up on the boats, and the true circumstances from which they come, is to speak with those that they have left behind. VLA lawyers have recently travelled to Rote Island to fulfil their professional obligations in acting for accused, including to establish the age of a number of our clients who claim to be under 18. As discussed below, the Commonwealth rely in age determination hearings on wrist X-ray analysis that has been internationally discredited. Obtaining direct evidence of age is almost impossible from a distance and neither the AFP, nor the Commonwealth, themselves travel to these communities to obtain first hand evidence. The relative cost of an investigative trip to Indonesia is much less than the cost of a committal hearing and trial which are avoided when a person is demonstrated to be under 18.

VLA investigated the claims of a number of clients on the most recent trip in order to maximise the benefit. The trip was supported and facilitated by the Indonesian government. What we confirmed was the extreme poverty from which these men come and why the villagers of Rote are such easy targets for people smuggling organisers. The experience also illustrated the generational poverty that is being created by the removal of ‘bread winners’ from the villages for three years or more. This is particularly so given that about 45% of these men are under 30 years old.

For example, in one village our staff spoke to twelve women who had male family members (husbands, brothers and sons) ranging in age from 14 to over 75 years old in detention in Australia on people smuggling charges. A number of the men had already been working in other provinces when they were recruited by ‘organisers’, while others were recruited from the village itself by outsiders who came to the village in search of fishing crews.

⁵ *Migration Act 1958* s189.

⁶ *Migration Act 1958* s196.

⁷ *Migration Act 1958* s147.

⁸ *Bail Act 1977* (Vic), s4.

These families reported having received sums of around of 1-3 million rupiah (\$100-330) from the 'organisers'. However, there was no evidence of enrichment to the families. Most of the women indicated that the money received had been used to pay off debts or to purchase food. These families were clearly suffering financially when compared to families who did not have relatives in Australian detention. Many of the women were in the practice of incurring debt at the local store to buy cooking ingredients, which they would then bake into cakes to be sold at the local market, so as to buy other foodstuffs and repay the store. All of the affected families with school aged children reported having been forced to remove one or more children from primary or junior secondary school so that the children could begin to work to support the family.

The children

It is instructive to learn from the stories of two of our clients who were both ultimately accepted as being children after spending significant periods in custody. Both children have provided express permission for their names and stories to be made public.

Case study one - Syarifudin (Ari) Min

Background

Syarifudin (Ari) Min's family have worked as fishermen for as long as he knows. He was born and raised in the village of Oelaba on Rote Island in the remote south east of the Indonesian archipelago. Oelaba Desa has a population of about 1000 people and is predominantly Muslim. There is no arable land to grow food and no sanitation or running water. Water is fetched by hand from a nearby well. There is no hospital or medical clinic. Electricity is shared between the houses. Some houses have television but Ari's family could not afford this. The only electricity in Ari's house comes from a cable strung from a neighbour's house.

According to Ari, its hard to live in his village. He was often hungry. If the family didn't have money they can't afford to buy rice or vegetables and must subsist on the fish they catch.

Ari is one of four children born to his mother and father, of which three remain alive. His elder sister Saleha helped to raise him when his parents went away to sea on extended fishing trips to feed the family. She married shortly before Ari came in Australia and she lives on another island with her husband and baby.

Ari's elder brother drowned at sea during a fishing trip between Rote and Sulawesi when he was about 13 years old. He was one of two young boys who disappeared overboard in a storm. Their bodies were never found.

Ari has a much younger brother who is still going to school. His mother adopted her sister's baby when her sister died during childbirth. Ari considers this boy to also be a brother.

No one in his family has a birth certificate. Ari had heard of the KTP (Indonesian Identity Card) but he does not have one. Ari went to primary school in the neighbouring village of Oelua and started the first year of junior high school. He had to leave school because there wasn't enough money.

His mother and father asked him to leave school and start working as a fisherman about the time the tsunami hit Indonesia (26 December 2004). He thinks he was about 12 or 13 when he left school to become a fisherman. He is barely literate and says he has “problems with counting and numbers”. He is fluent in Rotinese dialect and speaks basic Bahasa Indonesian.

After he left school Ari learned to work as a fisherman until he got his first job as a cook on a cargo boat taking palm sugar from Rote Island to Sulawesi. The round trip took about one month and he was paid 200,000 rupiah (AUD\$22.35) to cook for the crew of five or six and help unload the boat in Sulawesi. He injured his foot badly in an accident while unloading the boat and was taken to hospital on Sulawesi.

The palm sugar boat makes the trip from Rote to Sulawesi twice a year and Ari got a regular job as cook on the boat. Everything else he did to support the family was based on subsistence fishing. He mostly fishes from a small canoe or sampan within a kilometre of the shore. He takes the boat out each night about 8.00pm and fishes all night, coming back the next morning. Any fish left over after feeding the family, he takes by motorbike to the port town of Ba’a to sell at the market.

For 3 to 4 months each year during the wet season it’s too dangerous to go to sea and it’s difficult for fishermen to find any work. Ari had one job in 2007 when he worked as a building labourer on a house in his village during the wet season. He was paid 300,000 rupiah (AUD \$33.48) for a month’s work which was the best paid job he’d had.

More recently, his mother’s health began to deteriorate and his father remained absent from the family for long periods. There was little money coming in and Ari became the main breadwinner for the family.

About two months after returning from the palm sugar trip in May 2010, an Indonesian man came to the village and offered Ari 5 million IDR (\$540 AUD) to work on a boat out of Java. Ari accepted because he wanted to earn money for his family. He was paid half the money which he gave to his mother, and promised the balance when he returned. He was told he’d be away for a few weeks fishing. The man organised for Ari to catch the ferry from Rote Island to Kupang and then fly to Java. It was the first time he had been on the ferry to Kupang or on a plane. He was terrified the plane would fall out of the sky.

When he arrived in Java he was taken by bus to the boat with other crew and told he was going fishing. The boat sailed to another location and anchored. Small boats approached at night carrying passengers who got on board. Ari didn’t know he would be working on a boat with passengers and was shocked at the size of the men who got on board. They were big and he felt intimidated.

The boat began sailing out to sea and within a day or so began leaking badly and the engine kept stopping. Ari was asked by the passengers to go overboard and swim to some nearby Indonesian fishing boats to ask for help. He agreed to do this because he felt he had no choice. The fishermen were unable to help and despite his fear Ari returned to the disabled boat. Later that day the steering on the boat broke and the engine stopped completely. Then the boat drifted for up to 7 days and the weather deteriorated. Ari thought that he was going to die.

The passengers told Ari and another crew member to go overboard and try to fix the broken rudder. The waves were big and Ari hit his head on the underside of the boat. It was impossible to fix the boat and it continued to drift until they were rescued.

Entry into Australia and detention

The boat was intercepted by the Royal Australian Navy (RAN) on 28 July 2010 in the Indian Ocean. When located it was sinking approximately 60 nautical miles outside the Australian Contiguous Zone surrounding Christmas Island. The boat was designated Suspected Illegal Entry Vessel (SIEV) 173.

On board there were 82 Afghan male asylum seekers in addition to Ari and three other Indonesian crew. The boat was too unsafe to be towed and all the people on board were transferred to navy vessels and taken to Christmas Island where they were put into immigration detention.

On 29 July 2010 Ari was recorded by an officer of Department of Immigration (DIAC) on Christmas Island as having a date of birth of 1 January 1993 (17 years old). He was searched and his wallet was taken away. His wallet contained a piece of paper with his brother's phone number on it. The wallet was later returned but the piece of paper was missing. He didn't know how to contact his family to tell them where he was.

On 3 August 2010 he was processed as a minor by a SERCO client services officer on Christmas Island. An independent person was present and Ari was photographed. His image was uploaded onto the DIAC biometrics data base. Ari gave signed consent to DIAC for his identification information to be used. The Australian Federal Police asked for and received the photograph on 6 August 2010⁹.

On 8 August 2010 Ari was interviewed by a DIAC officer in the presence of a responsible adult. The interview took the form of prescribed questioning for an "Unauthorised Arrival" (DIAC Entry Interview). Ari was told that he was "expected to give true and correct answers to the questions" asked of him. He was told that the answers he gave would be used to carry out checks with international humanitarian agencies and disclosed to Australian government agencies including in relation to foreign affairs, border control, health, security and law enforcement¹⁰.

During this interview, Ari stated his full name, his date of birth as 1 January 1993, his age as being 17 years old. He provided the name and address of his village on the Island of Rote and the names and approximate ages of his mother and father. He provided the names of his brothers and sister. The officer noted that he asked for help to contact his family. He didn't receive any help and was unable to speak to his family while he remained on Christmas Island. When he was finally able to contact his brother from detention in Darwin his family hadn't heard from him for about four months and they thought he was dead.

On 14 October 2010 Ari was interviewed on Christmas Island by a senior DIAC officer, with the designation Age Determination Interviewing Officer. The purpose of the interview was to decide

⁹ Statement of Helen KAVANAGH, page 156 brief of evidence

¹⁰ Unauthorised Arrival interview form – Introductory remarks page 1

where to detain Ari, based on a determination of his age as under or over 18¹¹. This officer later produced a report in which he found that it was likely that Ari was under the age of 18¹².

On 14 December 2010 Ari was interviewed by Australian Federal Police at the Northern Immigration Detention Centre in Darwin. He told police that he was 17 years old and gave the same date of birth he had earlier given to DIAC. His left wrist was x-rayed and the radiologist reported that his skeletal age was ‘thought to be 19 years’ based on the Greulich and Pyle radiographic atlas (the Atlas)¹³.

Prosecution for aggravated people smuggling

Ari remained in immigration detention without charge for about nine months until 13 April 2011 when he was transferred to Melbourne and charged by the Australian Federal Police. He was by then 18 years old. He was remanded in adult custody.

Ari’s date of birth was recorded on the charge sheet as 1 January 1993 which meant he was 17 years old at the time he crewed on SIEV 173. The Commonwealth DPP claimed this was not his correct date of birth. On 27 April 2011 the Commonwealth obtained wrist x-ray evidence from Dr Vincent LOW that claimed Ari had a skeletally mature wrist therefore he must be older than 18 years of age. On 30 May 2011 the Australian Federal Police obtained a copy of a document called a Family Card which purported to record a person called Sarifudin Hasan MIN with birth date of 12 April 1987. The Commonwealth DPP relied on this document to say that Ari’s true age was 23 years old, although no one could explain how the document had been made or if it was correct.

On 16 June 2011 Ari was bailed on condition that he be held in an immigration detention facility for young people in Melbourne. He was able to make contact with his sister and heard that his mother had become sick and had left Rote to go hospital. He knew his family could not afford to pay for his mother’s medical treatment and he feared she would die while he was in Australia.

On 31 August 2011 an age determination hearing commenced in the Melbourne Magistrates Court. The hearing ran over 3 separate days ending on 24 November 2011. His lawyers travelled to Rote Island on 23 October 2011 and located Ari’s mother who provided an affidavit confirming Ari’s date of birth.

On 1 December 2011 Magistrate Ann Collins ruled that she was not satisfied on the balance of probabilities based on the evidence before the court that Ari had been 18 years old at the time he crewed SIEV 173 and the prosecution was withdrawn. Ari was returned to his home on Rote Island on 21 December 2011.

Please find attached an affidavit from Ari that explains his experience whilst in Australia. Ari has provided his consent for this to be made public.

¹¹ Transcript of evidence of Todd JACOBS to Melbourne Magistrates Court on 13 October 2011

¹² Assessment Report TOW 043 MIN, Syarifudin Ari Hasan dated 21 February 2011

¹³ Medical Imaging Report of Dr Adam KOUKOUROU dated 14 December 2010, page 590 brief of evidence

Case study two - Dion Domun

Background

Dion Domun's family come from the Solor archipelago in the north east of Indonesia. They were traditional whalers, who migrated south from Solor and settled in Papela Village on Rote Island in the West Timor. From Papela they fish for shark and other fish from sailing boats in the Timor Sea. Since the negotiation of sea boundaries between Indonesia and Australia in 1974, the traditional fishing grounds of the fishermen in Dion's village have been restricted and their fishing methods are tightly regulated by Australian law. The law prohibits fishermen from using technology such as GPS to navigate or engines to power their boats. This has made the work of fishing much more dangerous and the income derived from fishing in Papela Village has decreased and the families become increasingly impoverished. The fishing seasons have lengthened and men now routinely work in the open ocean during the monsoon season. It is dangerous work and many men from Dion's village have been lost at sea.

Dion was born at home, like his younger sisters, and has lived all his life in Papela Desa. He went to primary school in his village and spent 2 years at junior high school completing the equivalent of Year 8. He passed his exams to proceed to Year 9 but his parents asked him to leave to start working as a fisherman. His first job was as 1 of 6 crew on a traditional sailing boat fishing for shark in traditional fishing grounds near Pulau Pasea (Ashmore Island) in the restricted Australian Fishing Zone. Because he was the smallest on the boat, his job was to cook and look after the other crew during the 2 week trip. That time, he was not paid anything because they didn't catch any shark. He crewed on other fishing boats a further 2 times before arriving in Australia. The 2nd time he was paid IDR250,000 (AUD \$26.55) and the 3rd time, there was a successful catch and he was paid IDR1,000,000 (AUD \$106.00).

Dion was recruited as crew on the asylum seeker boat when a man came to his village. The smuggler offered to pay his mother money if he accepted the job. He didn't know how much money his mother would be paid. He had never left Rote Island before. He had to travel to Kendari in South East Sulawesi with other crew members to get onto the boat. He didn't know that the boat would be taking passengers and he had no idea the destination was Australia. He was told that he was expected to cook and help look after the engine on the boat.

Entry into Australia

The boat was intercepted by RAN on 21 March 2011 about 13 nautical miles off Ashmore Island in the Australian Territorial Sea and designated Suspected Illegal Entry Vessel (SIEV) 237.

On board there were 57 asylum seekers from Iran, Iraq and Afghanistan in addition to Dion and three other Indonesian fisherman. Everyone was taken to Darwin and placed into detention. Two of the Indonesian crew were sent home immediately because it was decided they were minors.

On 31 March 2011 Dion was processed as a minor in the Northern Detention Centre, Darwin. In the presence of an independent guardian, he signed a consent to undergo a wrist x-ray procedure for the Australian Federal Police.

On 5 April 2011 Dion was interviewed by an officer of Department of Immigration (DIAC) in Darwin. The interview took the form of prescribed questioning for an “Unauthorised Arrival” (DIAC Entry Interview). Dion was told that he was “expected to give true and correct answers to the questions” asked of him. He was told that the answers he gave would be used to carry out checks with international humanitarian agencies and disclosed to Australian government agencies including in relation to foreign affairs, border control, health, security and law enforcement.

Dion told DIAC that he was 15 years old and his date of birth was 9/03/1996. He provided the name and address of his village and the names and ages of his mother and father. He provided the names of his two younger sisters and their ages. He told DIAC that he had been able to telephone his mother. He said that he had had to become the breadwinner for his family because his father was unable to work as a fisherman any longer and he needed to look after his sisters and mother.

On 12 April the AFP gave the x-ray of Dion’s wrist to Consultant Radiologist Dr Vincent LOW. Dr LOW stated that “examination of the bones of the hand of Mr Dion DAUZEN (sic) as derived from the radiograph taken reveals th(e) appearance of skeletal maturity. On average this is reached at 19 years. Therefore it is a reasonable interpretation that Mr Dion DAUZEN (sic) is 19 years of age or older¹⁴”.

On 4 May 2011 Dion was interviewed by Australian Federal Police at the Northern Immigration Detention Centre in Darwin. He told police that he was 15 years old and gave the same date of birth he had earlier given to DIAC.

The wrist x-ray was the only evidence that the Commonwealth DPP relied upon to claim that Dion’s age was other than as he reported. The opinion of Dr LOW was not supported by medical evidence and was not statistically accurate. There was no contact made by the AFP with his family on Rote Island even though Dion was able to regularly speak to his mother by phone while he was in detention. DIAC did not conduct an age determination interview with Dion although he was processed and detained as a minor and was able to attend school while in immigration detention in Darwin.

Prosecution for aggravated people smuggling

Dion remained in immigration detention without charge for about six months until 15 August 2011 when he was transferred to Melbourne and charged by the Australian Federal Police. He was immediately bailed to be held in an immigration detention centre in Melbourne.

While in the detention centre in Melbourne he spoke to his mother Ase Domun by phone. She told him that about three months earlier she had been visited by local Indonesian police who had asked her about Dion’s date of birth and whether she had a birth certificate for him. Although she was scared of the police, she told Dion that she had gone to the local police station and given a written statement attesting to his true date of birth. She told police that she had never had anything more than an informal written record of Dion’s age and that this document had been lost when the family had moved house. The statement that she gave to Indonesian police has never been produced by the Australian Federal Police.

¹⁴ Unauthorised Arrival interview form – Introductory remarks page 1

Dion's lawyer travelled to Rote Island on 23 October 2011 and located Dion's mother who provided an affidavit confirming Dion's date of birth. On 16 November 2011 the Commonwealth DPP withdrew the Dion's charge and he returned to Indonesia on 6 December 2011.

People smuggling and fairness for minors

Young people are frequently targeted by people smuggling organisers as candidates to sail boats of asylum seekers to Australia. As indicted above, more than one in ten of the accused brought to Victoria were subsequently accepted by the Commonwealth to be children.

The Bill's effect

The Bill does a number of things as follows:

- Removes the ability of the Commonwealth to obtain or rely on x-rays as a lawful means to determine the age of an accused person;
- Presumes that people who claim to be children at the time of the alleged offence are in fact children unless a Magistrate otherwise orders;
- Sets a 30 day time limit for the Commonwealth to make application to a Magistrate for age determination orders;
- Requires that the prosecution bear the burden of proving, on the balance of probabilities, that relevant accused people were adults at the time of the alleged offence;
- Requires that accused people smugglers who claim to be children must be remanded in a youth justice facility, not an adult prison;
- Sets a 14 day time limit for charging accused people smugglers who claim to be children.

Use of x-rays to determine age

X-ray techniques have been widely discredited as being accurate predictors of age¹⁵. The criticism of these techniques has come from a variety of sources, including a recent UNICEF report on age assessment practices¹⁶, Sir Al Aynsley-Green, Britain's Children's Commissioner, the Royal Australian and New Zealand College of Radiologists, Professor of Medical Statistics Tim Cole, and a raft of radiologists who have given evidence in relevant matters around Australia.

A range of expert bodies have also criticised the use of x-rays to determine age as being unethical because it unnecessarily expose children to ionizing radiation when their use is for "administrative purposes"¹⁷.

¹⁵ See for example the reasoning of Bowen DCJ in *R v Daud* [2011] WADC 175

¹⁶ UNICEF Age Assessment practices: a literature review & annotated bibliography, Terry Smith and Laura Brownlees, 2011.

¹⁷ Royal Australian College of Physicians, the Royal Australian and New Zealand College of Radiologists, the Australian and New Zealand Society for Paediatric Radiology and the Australian Paediatric Endocrine Group in a letter to the Immigration Minister, Chris Bowen, dated 19 August 2011.

The bill proposes to outlaw 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-rays analysis completely would be to prohibit the reliance on such evidence in isolation should the analysis point to the claimant being an adult. Any legislation should make clear that a range of evidence can be relied on by government officials, Commonwealth prosecutors and the Courts to determine age.

Age determination mechanisms should be expanded beyond reliance entirely on wrist or other x-rays to include proactive gathering by the Commonwealth of information from families and relevant authorities in Indonesia, and the conduct of age determination assessments by appropriate experts (such as psychologists) to internationally accepted standards¹⁸.

Protections should also be put in place to ensure that suspects have ready access to legal advice prior to being asked to consent to x-ray or other age determination assessments.

The burden and standard of proof

Determination of age in a people smuggling prosecutions is a threshold question that determines whether an adult or juvenile court in a given State or Territory has jurisdiction to hear the matter. It has a direct bearing on whether the mandatory minimum penalties prescribed by the *Migration Act 1958* (the Act) apply and also whether the Commonwealth Director of Public Prosecutions implements his policy of not proceeding with people smuggling charges against children.

Age determination and specifically the standard of proof applicable to this determination is of significance in the context of the overall prosecution of people smuggling cases. This is particularly acute given the lengthy mandatory minimum sentences of imprisonment that apply to adults.

The Act allows a court to sentence an accused to a bond without conviction for the offence of aggravated people smuggling "*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*"¹⁹.

The Act does not make explicit who bears the onus of proof in establishing age and the law in other States and Territories appears unclear on this point²⁰. In Victoria to date, only one age determination hearing in a people smuggling prosecution has been finalised and in that case the prosecution conceded that the Crown bore the onus of proof for the purpose of the hearing.²¹

Given the significant penal consequences of at least three years jail that can flow from the determination of age, we suggest that it would promote the interests of justice and fairness if the

¹⁸ See for example the Review of current laws, policies and practices relating to age assessment in sixteen European Countries 2011, International Save the Children Alliance in collaboration with the United Nations High Commissioner for Refugees (UNHCR)

¹⁹ Section 236A.

²⁰ See *R v Kasopa* [2002] WACC: per O'Brien J at par 7: The issue of the defendant's age is to be determined on the balance of probabilities. No burden of proof rests on either side. Also cites *Queen v Janus* [2002] WACC.

²¹ *Commonwealth v Syarifudin Ari Hasan MIN* – Ruling of Magistrate Ann Collins 1 December 2011

Act were amended to require that the Crown bear the onus of proving an accused was 18 or older when the offence was alleged to have been committed beyond reasonable doubt.

The law currently appears settled on the question of the standard of proof which is the civil standard of the balance of probabilities. There is however strong argument for the criminal standard of beyond reasonable doubt to apply.

There are a number of authorities that have specifically considered the issue of standard of proof in relation to questions of jurisdiction: *Thompson v The Queen* (1989) 169 CLR 1, *R v Abdulla* [2010] SASC 52, *R v Daud* [2011] WADC 175²².

While in *Thompson* there were compelling policy reasons why the majority of the High Court held that the civil standard of proof applied²³, the same policy arguments do not arise in the prosecution of young Indonesian boat crew. Their circumstances bear analogy to an important exception referred to by Brennan J in *Thompson* in the following terms: (at par 20)

“...I would therefore hold that the standard of proof required to satisfy the prosecution's onus of proving locality of an element (when that issue is raised) is generally proof on the balance of probabilities. There is an exception. If the conduct charged is an offence on one side of the border but not on the other or, in one forum, exposes the offender to punishment of a higher order than in another, locality is a fact on which liability to punishment depends. In such a case, the Woolmington rule (that the Crown bears the onus of proof in criminal prosecution beyond reasonable doubt) must apply in all its protective rigour”: *bracketed note and emphasis added*

The prosecution of young boat crew charged with people smuggling can be initiated in any State or Territory of Australia. The penalty these young people face if convicted as adults remains the same regardless of which State or Territory the conviction is imposed. However, their punishment will be significantly reduced if the CDPP fail to prove they were adults at the relevant time. Proof of their age is a significant fact from which liability to punishment flows and there are sound reasons in policy and law for the criminal standard of proof to apply.

Time limits for bringing charges and determining age

The Bill proposes time limits for the bringing of charges against accused people who claim to be children and also for applications to determine their age to be brought before a Court. We support these changes.

The following statistics relate to the eight accused assisted by Victoria Legal Aid whose charges were ultimately withdrawn after they were accepted as being children by the Commonwealth²⁴:

²² In addition there is High Court transcript dismissing an application for special leave on behalf of Abdulla by High Court Justices Creenan and Bell: *Abdulla and the Queen* [2010] HCATrans 225.

²³ *Thompson v The Queen* (1989) 169 CLR 1 per Mason CJ, Dawson J: “A wrongdoer clearly subject to the laws of one of two jurisdictions would escape the laws of both, even where such laws were identical, simply because the prosecution could not prove the place of the commission of the offence beyond reasonable doubt. The prospect of this outcome would be lessened if the civil standard of proof were to be applied.” (at par 26)

²⁴ One additional accused person was assessed as cognitively impaired and charges were withdrawn. A total of 9 accused people have had charges withdrawn, eight of whom were children.

- The children spent an average of 6.9 months in immigration detention before being charged (with one child spending ten months in immigration detention before being charged);
- The children spent an average of 9.3 months immigration detention and prison before having their charges withdrawn (with one child spending 16 months in detention and prison before the charges were withdrawn).

The United Nations Convention on the Rights of the Child 1989 provides that no one is allowed to punish children in a cruel or harmful way, that they should not be put in prison with adults and should be able to keep in contact with their families²⁵. The Convention also provides that Governments are required to provide minimum guarantees for the fairness and quick resolution of judicial proceedings²⁶.

The Bill would ensure Australia's compliance with these provisions in a simple and effective way.

We recommend that Parliament go further and require that all people suspected of people smuggling by bringing asylum seekers to Australia by boat be charged without delay.

Again, we point to statistics gleaned from the 63 relevant prosecutions initiated in Victoria to date where the average time accused have spent in custody before being charged is 7.4 months. The longest period spent in custody without charge was 10.5 months.

There is little to justify these delays. The accused are readily identifiable by virtue of their Indonesian appearance and presence on a boat in Australian waters with other people who appear Middle Eastern. It is hard to conceive of a more straightforward prima facie case. It is also hard to conceive of an easier investigation given that the witnesses are accessible because they are in immigration detention and the Australian Federal Police have a permanent presence on Christmas Island. For nearly every other offence prosecuted in Australia that results in the immediate detention of an accused, a charging decision is made within hours.

If one reflects on the public outcry about the detention of Dr Mohammad Haneef for a number of days without charge in 2007 on suspicion of terrorism offences, it is difficult to reconcile how the Australian Parliament can tolerate the systematic arbitrary detention of accused people smugglers for, in the Victorian experience, an average of over seven months.

It is important to note that the *International Covenant on Civil and Political Rights* entitles all accused to be "*tried without undue delay*"²⁷. Further the *Universal Declaration of Human Rights* decrees that "*no one shall be subjected to arbitrary arrest, detention or exile*"²⁸.

We 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

²⁵ Article 37

²⁶ Article 40

²⁷ Article 9.1

²⁸ Article 9

prosecution commenced. The prosecuting authorities would then be given adequate time to compile a brief of evidence. In Victoria, this is typically three months.

Conclusion

The prevalence of people smugglers recruiting children to work as crew on boats from Indonesia creates a need for caution when charging suspects with people smuggling offences.

Given the mandatory imprisonment that flows from conviction of the aggravated people smuggling offences, the highest, internationally accepted standards of proof of age must apply. Wrist x-rays therefore must not be relied upon as the sole determinant of age, and other information and expert evidence must be sought. The Crown must bear the burden of proving beyond reasonable doubt that an accused was an adult at the time the offence was allegedly committed.

The Victorian experience of delay in alleged people smuggling cases suspects highlights the need for strict time limits to apply for investigation and charging of all people smuggling accused.

AFFIDAVIT

I, Syarifudin Ari Hasan MIN

of Oelaba, Oelua Village, Subdistrict North West Rote, Regency of Rote Ndao

make an oath and say as follows:

1. I am 18 years old and I was born on 1 January 1993 in the village of Oelaba on Rote Island. I come from a family of fishermen.
2. In July 2010 I agreed to crew on a boat. I was told that I would be working on a fishing boat. Instead I found myself on a boat with many big people. The engine and the steering on the boat broke and it was letting in water. The boat drifted in the sea for days and was sinking. The waves were very big and I thought that I would die.
3. After I was rescued from the boat I was taken into detention on Christmas Island. I remained very frightened after my experience on the sea. I still think about this.
4. I wasn't able to contact my family while I was detained on Christmas Island. I think I was there for about 4 months. When I arrived I told the immigration

officers about where I lived and the names of my family. I told them my date of birth and my age. I was 17 then.

5. When I arrived at Christmas Island I was searched and my wallet was taken. Inside my wallet was a piece of paper with my brother's phone number written on it. When my wallet was returned to me a few weeks later the piece of paper was missing and I had no way of calling my family.

6. I was very stressed about not being able to contact my family. No one at the detention centre helped me with this. I couldn't sleep because I kept thinking about my family. I know how my mother is when her children are far away. She is very uneasy when I sail because my elder brother drowned at sea when he was about 12 years old. This had traumatised my mum.

7. I had told my mum that I was going on a fishing trip because that's what I was told. I didn't tell her how long I would be away because I didn't know.

8. After I had stayed at Christmas Island for a long time I was moved to a detention centre in Darwin.

At first I was kept in a house separated from the adults. I shared a room with 3 other people. I met someone from my village in this place and he was able to get me my brother's phone number.

9. When I rang my brother, my family hadn't heard from me for about 4 months. They thought I was dead.

I was only able to briefly talk to my brother. He told me that my mum had been very upset about me. I was able to get my sister's number.

10. While I was in Darwin I was interviewed by police and my wrist was x-rayed.

Then I turned 18 in January 2011 and I was moved to the adult section.

I was scared and confused. The men were stressed and some of them were sick and needed to see doctors.

11. I had to wait a long time until I was brought to Melbourne. I was confused and thought I would be taken to a detention centre.

It was the first time I had handcuffs put on me. I was crying.

12. I was shipsearched on the day I arrived in Melbourne. I was by myself. There was no interpreter to help me. They used hand gestures to direct me to take off all my clothes. In the beginning I refused, but I was afraid because the officers were big and had handcuffs. I was very ashamed.

13. Then I was taken to the prison. It was at night and they didn't tell me anything. I was a mess. For the first 2 weeks in the jail I was kept separate from the other Indonesians. It was a block with Australian and Vietnamese prisoners. I couldn't speak to them. Later I was put in with other Indonesians.

14. While I was in the prison I had headaches every day. I felt very threatened by the other prisoners except for the Indonesians. They were much bigger than me and I thought they could hurt me. I saw people fighting with each other every day. I was terrified that I would end up being killed.

15. For every visit I had from the Indonesian consulate and my lawyers I had to be shipsearched. I was very distressed by this. 4.

16. At first, when I was in the jail I didn't eat because I was very stressed. The food was not so good for me because I need to eat mostly rice to be healthy. There was not enough rice to eat in the prison.

17. After 2 months my lawyer got me bail. I was so happy. I thought that I was going back to Indonesia at first. When I realised that I had to stay in Australia I was very stressed again. The detention centre I have been in, in Melbourne is much better than the jail. I haven't had to be stripsearched and I have been looked after.

18. I have been in the detention centre in Melbourne for about 7 months. It is nearly 16 months since I have seen my mum. I haven't been able to talk to her during this time. While I was in Melbourne I heard that my mother had become very sick and had gone to hospital in Kupang.

19. I told an immigration officer that if my mum died it would be better if I died here.

20. The detention centre helped me to contact my sister and I found out that my mother was better. Then my lawyer travelled to my village and met my mother. She showed me photographs of my mum and my village that made me feel better.
21. I was promised 5 million rupiah by the boss who recruited me to crew on the boat. I was given half of that money before I left. I gave it to my mum because I needed to help support my family. I don't know if I will ever get the rest of the money.

Sworn at MITA Broadmeadows

on the 20th day of December 2011

SYARIFUDIN ARI HASAN MIN

By the deponent Syarifudin Ari Hasan MIN through the interpretation of Ennicandra Tampubolon NAATI Level 3, the said interpreter having first been sworn that he would truly, distinctly and audibly interpret the contents of the affidavit to the deponent and also the oath that was administered to the said Syarifudin Ari Hasan MIN

.....
Signature of deponent

Before me: *

of 350 Queen Street, Melbourne

An Australian Legal Practitioner

Within the meaning of the *Legal Profession Act 2004* (Vic)