



31 May 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia
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Dear Committee Secretary,

Thank you for the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Detention of Indonesian minors in Australia. Please find attached a submission from the Migration Institute of Australia (MIA).

The MIA is the peak body for migration advice professionals, representing more than 2000 Registered Migration Agents (RMAs) as well as qualified Education Agents (EAs) across Australia and overseas. The MIA holds interests in all areas of migration policy development and would appreciate the opportunity to contribute to future consultations regarding the *Migration Legislation Amendment (Student Visas) Bill 2012*.

Yours sincerely,

Maurene Horder
Chief Executive Officer

MIA Submission

The Migration Institute of Australia (MIA) holds the view that the detention, conviction and subsequent imprisonment of minors on people smuggling charges is in breach of international law, lacks humanity and is easily avoidable. This is particularly relevant when the alleged offender plays a minor role in the overall scheme of things, e.g. a cook or cleaner. It is hard to envisage how such alleged young offenders can even be prosecuted as a “people smuggler” when their knowledge of or consequences of the situation they find themselves in can only be construed at the level of an offending minor and their culpability in such circumstances must be limited. To sentence an alleged offending minor to maximum security prison for several years to be the fodder of predators and other criminals is beyond the realms of decency in our humane society.

The terminology used to describe alleged minor offenders as “people smugglers” needs to be changed to truly reflect upon the impact of their actual role in the offence. The term “people smuggler” has far reaching implications which is beyond those that can be construed from the role a young offender may play as a cook or cleaner.

Age determination is not only relevant to this class of persons but to a number of others. The determination of a refugee, immigrant or alleged people smuggler’s age has a significant impact on their legal rights.

This submission addresses the following terms of reference of the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Detention of Indonesian minors in Australia.

What checks and procedures exist to ensure that evidence given to an Australian authority or department about the age of a defendant/suspect is followed up appropriately?

For people with no record of their date of birth, authorities will often arbitrarily record a birth date of 1 January.¹ This can result in children born in the middle of the year or at the end of the year being given birth dates and in some cases there may be 18 months difference from their true birth date.

There are many reasons why it may not be possible to present enough documentary evidence to substantiate a person’s true date of birth. There may be no birth record in existence. In some cultures only a year is known, in remote parts of many countries birth certificates and identity documents are not issued by the authorities, in conflict zones documents that do exist are often left behind or destroyed and when young children are separated from their parents this information may not be known.

¹ Thousands of refugees celebrate 1 January as their birthday, too, Associated Press, 31 December 2009, http://www.cleveland.com/world/index.ssf/2009/12/thousands_of_refugees_celebrat.html

How Should Age be Determined?

Australian medical journals refer to wrist x-rays as 'a controversial means of assessing age' and cite research that shows the margin of error can be as much as 5 years either side. Age determination tools are considered even less reliable in circumstances of illness, under-nutrition, extreme stress and disrupted socialisation.²

Consideration of adopting alternative methods of testing age should be undertaken.

What Legal Mechanisms Exist to Prevent a Minor from being Convicted as an Adult?

At the moment, the presiding judicial officer, if not satisfied that a defendant had ascertained the age of 18 years at the time of the alleged offence, can order a prescribed procedure on their own initiative.³

The Australian Federal Police have the power to carry out a prescribed procedure in the case of an alleged people smuggler suspected of being a minor.⁴ A prescribed procedure is an x-ray.⁵ Crew on people smuggling boats are frequently from low socio-economic groups in poor countries and conflict zones. More reliance needs to be placed on the age they assert they are and less on tools such as x-rays.

The Commonwealth Director of Public Prosecutions (CDPP) has the discretion not to prosecute. In making this decision they can have regard to the age of the defendant and whether it is in the public interest to prosecute a minor.⁶ Should they choose not to rely on age information, then the CDPP should disclose all unused material to the defence.⁷

Conclusion

The Institute is of the view that an alleged people smuggler, if suspected of being a minor, should be treated as a minor until proven otherwise.

² Jill Benson, Age determination in refugee children, Australian Family Physician, Vol 37, No 10, October 2008, pgs 821 – 824, reprinted at <http://www.racgp.org.au/afp/200810/200810benson.pdf>

³ Section 3ZQF of the *Crimes Act 1914*.

⁴ Section 3ZQB of the *Crimes Act 1914 (Cth.)*

⁵ Ibid, s3ZQA.

⁶ Prosecution Policy of the Commonwealth, Guidelines for the making of decisions in the prosecution process, Part 2.15, accessed at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>

⁷ Commonwealth Director of Public Prosecutions Statement on Prosecution Disclosure, Part 4. Disclosure of unused material, accessed at <http://www.cdpp.gov.au/Publications/DisclosurePolicy/DisclosurePolicy.pdf>

Police should gather a narrative from the offender and if possible their family, and then use additional documentation such as dental records to supplement it. The CDPP should exercise their discretion and decline to prosecute if there is a possibility an offender is a minor, especially when they were not the ringleader, but rather a cook or played another incidental role. Judicial officers should exercise their power to order prescribed procedures where age is in doubt. Where age cannot be conclusively determined then the benefit of the doubt should be given, until a proper determination of the alleged people smuggler's age is made. As discussed above there are valid reasons why an alleged offender is unable to provide documentary evidence to prove their age on the balance of probabilities.