



Australian
Human Rights
Commission

Inquiry into the treatment of individuals

suspected of people smuggling

offences who say they are children

DISCUSSION PAPER: DECEMBER 2011

ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
Complaints info line 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

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1 What is this Inquiry about?

On 21 November 2011, the President of the Australian Human Rights Commission, Catherine Branson QC, announced that the Commission would conduct an Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children.

The majority of individuals suspected of committing people smuggling offences are Indonesian nationals who have worked as crew on boats bringing asylum seekers to Australia. In many cases these individuals have reported to investigating authorities that they are under the age of 18 years, in some cases as young as 13 or 14, at the time they were apprehended.

There are very serious consequences for any person suspected of a people smuggling offence who is found to be an adult. Current policy is that children will not be prosecuted for people smuggling offences, but instead will be returned to Indonesia. If anyone is convicted as an adult of certain people smuggling offences they are subject to a mandatory minimum sentence of imprisonment of at least five years.

During the course of 2011, the Commission has become increasingly concerned that errors made in age assessment processes may be leading to the prosecution of children for people smuggling offences, and if they are convicted, to the imprisonment of children in adult correctional facilities for long periods of time.

This Inquiry will consider all aspects of the treatment of individuals suspected of people smuggling offences who say that they are children. It will primarily focus on the actions of the Commonwealth agencies responsible for detaining these individuals, for investigating potential charges of people smuggling and for prosecuting alleged offences.

2 What are the Terms of Reference for the Inquiry?

The President will inquire into Australia's treatment of individuals suspected of people smuggling or related offences who claim to have been under the age of eighteen years at the date of the offences of which they are suspected (the individuals of concern), including by inquiring into acts and practices of the Commonwealth with respect to:

- a) assessments of the ages of the individuals of concern made by or on behalf of the Commonwealth for immigration purposes, including by any 'officer' as defined by section 5 of the *Migration Act 1958* (Cth);
- b) assessments of the ages of the individuals of concern during the course of the investigations of the people smuggling or related offences of which they were suspected;
- c) assessments of the ages of the individuals of concern for the purpose of decisions concerning the prosecution of the people smuggling or related offences of which they were suspected;
- d) decisions concerning whether, and the processes and procedures used, to:

- i. facilitate contact between parents/guardians and the individuals of concern; and
 - ii. contact and obtain information relevant to age assessment from parents/guardians of the individuals of concern;
- e) the preparation for and the conduct of legal proceedings in which evidence concerning the ages of the individuals of concern was, or was intended to be, adduced;
 - f) the detention, including the determinations of the places of detention and the conditions of detention, of the individuals of concern;
 - g) the provision of guardians or other responsible adults to ensure that the interests of the individuals of concern, including with respect to age assessment, were protected;
 - h) the provision to the individuals of concern of legal advice, assistance and representation, including with respect to age assessment; and
 - i) any other matters incidental to the above terms of reference.

NOTE: References in these terms of reference to, or to the doing of, acts include references to refusals or failures to do such acts (see section 3(4) of the *Australian Human Rights Commission Act 1986* (Cth)).

3 What are the powers of the Commission to conduct this Inquiry?

The Commission was established by the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). It is recognised by the United Nations as Australia's independent national human rights institution.

The functions of the Commission under the AHRC Act that are relevant to, and relied upon, for the purpose of this Inquiry, include:

- examining enactments for the purpose of ascertaining whether the enactments are inconsistent with or contrary to any human right and reporting to the Minister the results of any such examination (section 11(1)(e))
- inquiring into acts or practices that may be inconsistent with or contrary to any human right (section 11(1)(f))
- promoting an understanding, acceptance and public discussion of human rights in Australia (section 11(1)(g))
- advising on laws that should be made by the Parliament or action that should be taken by the Commonwealth on matters relating to human rights (section 11(1)(j)).

The Terms of Reference of this Inquiry rely primarily on the Commission's functions under section 11(1)(f) of the AHRC Act. The 'human rights' specified in the above functions are outlined in a number of human rights treaties and instruments scheduled to the AHRC Act. The Inquiry will investigate, in particular, whether the treatment of individuals suspected of people smuggling offences who say that they

are children is consistent with Australia's obligations under the *Convention on the Rights of the Child* (CRC).

4 What is the Inquiry's intended methodology?

Individuals who are suspected of people smuggling offences come into contact with a number of Commonwealth agencies. This Inquiry will look particularly at the conduct of those agencies that have some input into age assessment processes for these individuals, including:

- the Department of Immigration and Citizenship (DIAC), which is responsible for them while they are in immigration detention, and which may assess age for the purpose of determining an appropriate place of detention
- the Australian Federal Police (AFP) which is responsible for investigating potential charges of people smuggling
- the Commonwealth Department of Public Prosecutions (CDPP) which is responsible for prosecuting alleged offences of people smuggling.

The Inquiry will also consider the role of the Attorney-General's Department (AGD) which has broad responsibility for law enforcement.

On 21 November 2011, the Commission issued notices to each of these agencies requiring the production of information and documents relevant to the Inquiry. Each agency is required to provide this material to the Commission by 21 December 2011. The first task of the Inquiry will be to analyse closely the information and documents provided in response to the notices.

It is likely that the Inquiry will hold hearings in order to explore the manner in which each of these Commonwealth agencies dealt with individuals suspected of people smuggling offences said that they were children. The Inquiry may also hold general public hearings to hear from individuals and organisations with specific expertise, including medical and legal experts.

In order to encourage the maximum possible participation from the public, individuals and organisations will have the opportunity to provide public or confidential submissions to the Inquiry. Public submissions will be published on the Inquiry website.

Following the close of the submission and consultation processes, the Inquiry will prepare a report containing findings and recommendations. The report will be tabled in Parliament by the Attorney-General.

The Inquiry aims to transmit this report to the Attorney-General by mid-2012.

5 How do I make a submission to the Inquiry?

The Inquiry strongly encourages lodgement of submissions by email. You can email your submission to: ageassessment@humanrights.gov.au.

Submissions may also be mailed to:

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

The Commission welcomes submissions from individuals or organisations with an interest in the issues raised by this Inquiry. The Commission is particularly interested to hear from medical experts regarding processes of age assessment, and from legal experts regarding all aspects of the conduct of cases against individuals suspected of people smuggling offences who say that they are children.

The Inquiry will place a strong emphasis on transparency and would therefore like to publish submissions as soon as possible.

When you send your submission you will receive an acknowledgement of receipt. At that time you will be notified that submissions received in electronic format may be posted on the Inquiry's website unless you specifically indicate that you would like your name or your comments to be kept confidential.

If you would like your name or your comments to be kept confidential, you may either:

- ask the Inquiry to keep your name confidential but allow the Inquiry to publish or use all of the content of your submission (any references to your submission will then be identified by a number and the title: 'Name Withheld')
- ask the Inquiry to keep your name as well as some, or all, of the content of your submission confidential.

As a matter of course, the Inquiry will edit your submission to protect the identity of any third parties you may refer to. The Inquiry will also remove personal contact details such as phone numbers, email and postal/street addresses from the body of your submission.

Submissions are due by the close of business on **Friday, 3 February 2012**.

6 Why is the age of a person who has been charged with a people smuggling offence a significant issue?

An assessment or determination that he or she is probably an adult has significant consequences for an individuals who is suspected of, or has been charged with, people smuggling offences.

This is because, under the *Migration Act 1956* (Cth) (Migration Act) mandatory minimum sentences of imprisonment apply to some people smuggling convictions. For example, a mandatory minimum sentence of five years (with a non-parole period of three years) applies to a conviction of the aggravated offence of people smuggling (at least 5 people).¹

These mandatory minimum sentences do not apply to minors.² If a person has been charged with people smuggling offences a court may discharge them without conviction if it is found on the balance of probabilities that they were under 18 years of age at the time of the offence.³ In addition, in most cases, current policy is to not proceed with a prosecution if a person is found to be less than 18 years of age.⁴

Consequently, in this context an assessment of a person's age is extremely important. If Australian authorities accept that a person suspected of people smuggling offences is under the age of eighteen, they are unlikely to face charges. If there are exceptional circumstances and they are charged and convicted, they will not be subjected to mandatory minimum sentences. On the other hand, adults who have brought asylum seekers to Australia by boat are likely to be charged with people smuggling offences. If they are convicted of aggravated people smuggling they will be subject to mandatory minimum sentences of imprisonment.

People who are suspected of being adults or who have been found to be adults are generally detained in adult correctional facilities. They are held in adult facilities while on remand awaiting trial, unless they are granted bail, and while serving any sentence imposed after conviction.

7 How many individuals suspected of people smuggling offences say that they are children and how long have they been in detention?

Generally, people who work as crew on boats that bring asylum seekers to Australia are recruited from poor fishing communities on the Indonesian coast. For example, lawyers who travelled to Indonesia in June 2011 to seek affidavit evidence of the age of one of their clients reported that he 'survived by working as a farmer and a fisherman on a cashless subsistence existence which can only be described as dirt ditch poor'.⁵

It is difficult to estimate how many Indonesian crew on boats bringing asylum seekers to Australia in recent years have been minors. However, some statistics were provided in a recent response to a question without notice in the Senate. On 1 November 2011, the Australian Government reported that since September 2008, 76 people had been

returned to their country of origin without charges proceeding because they were either found by a court to be a minor; assessed to be a minor following an age determination process; or given the benefit of the doubt by law enforcement authorities and no exceptional circumstances existed to warrant their prosecution.⁶

It was further reported that, as at 17 October 2011, there were around 25 people in either immigration detention or remand facilities charged with people smuggling offences, who said that they were children and a further seven people in immigration detention who said that they were children and had not been charged.⁷ These figures do not include people who have been found or assumed to be adults in court proceedings and subsequently convicted and imprisoned, but who continue to say that they are children.

People under investigation for people smuggling charges who are suspected of being adults have frequently spent very long periods of time in detention before their cases

are finalised. Immediately after they are apprehended, they are taken to immigration detention facilities, initially on Christmas Island and subsequently on the mainland. Age assessment processes usually commence while a person is in immigration detention. If a person is suspected of being an adult, and a decision is made to proceed with a prosecution, they are charged and subsequently transferred to an adult correctional facility. Ordinarily, they will then face an age determination proceeding prior to their trial. In some cases these processes can result in very long periods of detention.

8 Are there cases where individuals suspected of people smuggling offences were acknowledged to be children after being held in adult correctional facilities?

The Commission is aware of a number of cases where individuals suspected of people smuggling offences were acknowledged to be children after they had spent long periods of time in detention, including in adult correctional facilities.

For example, in a recent New South Wales case, charges were dropped after the accused's lawyer travelled to Indonesia and obtained affidavit evidence about his age. The affidavit evidence established that the boy was 14 when he was apprehended. By this time he had spent approximately 21 months in immigration detention and prison. This boy had been found to be an adult in an age determination hearing before the Magistrates Court of NSW (based on wrist x-ray evidence) and was awaiting his trial. The CDPP discontinued his prosecution following receipt of affidavit evidence from Indonesia about his age.

In a well-publicised case in Queensland earlier this year, three people accused of people smuggling also had their charges withdrawn after their lawyers travelled to their home villages and obtained affidavit evidence as to their age. In one of these cases, the affidavit evidence indicated that the boy was 14 when he was taken into custody on 26 April 2010. He was detained in immigration detention and then at the Arthur Gorrie Correctional Centre for a total of 15 months. The evidence of his age obtained from Indonesia was presented during a bail hearing. Bail was granted, and within two weeks, charges were dropped and all three boys were sent home to Indonesia.

The Commission is concerned that there may be further cases in which errors in age assessment procedures have resulted in children spending long periods of time in immigration detention and in adult correctional facilities. The Inquiry will consider why errors of this nature have occurred and what measures should be taken to ensure that they do not occur in the future.

9 Why do age assessment processes raise human rights concerns?

9.1 *Incorrect age assessment may lead to significant human rights breaches*

The *Convention on the Rights of the Child* (CRC), ratified by Australia in 1990, is the key human rights treaty regarding children's rights. The CRC recognises that

children, as well as adults, are entitled to protection of their basic human rights, but that children require special protection because of their vulnerability to exploitation and abuse.

For the purposes of the CRC, children are defined as individuals who are under 18 years of age.

Article 37(c) is the key right outlined in the CRC which would be breached in the case of a foreign crew member accused of people smuggling who was incorrectly determined to be an adult. Article 37(c) requires that a child deprived of his or her liberty be treated in a manner which takes into account the needs of a person of his or her age and that the child is separated from adults:

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances' (art 37(c)).⁸

If a child is treated as an adult in the criminal justice system, and is imprisoned in an adult prison because of an error made in an age assessment process, there is a risk that the following rights under the CRC have also been breached:

- The right to be treated in a manner which takes into account a child's age and the desirability of promoting child's reintegration (article 40(1)).
- The right to be arrested, detained or imprisoned only as a measure of last resort and for the shortest appropriate period of time (article 37(b)).
- The right to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child (article 19).

There are a range of other rights that may be breached as a result of an inadequate process of age assessment, including:

- A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State (article 20(1)). Such 'alternative care for such a child' may be met through the appointment of a guardian. Article 18 (2) specifies that the best interests of the child shall be the basic concern of a legal guardian.
- A child who is separated from one or both parents has the right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests (article 9(3)). Where such separation results from any action by a State Party (including detention of the child), the State Party shall, on request, provide both parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent members of the family unless it would be detrimental to the well-being of the child (article 9(4)).

- No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family and home (article 16).
- Secondary education should be made available and accessible to every child (article 28).

9.2 Age assessment processes should reflect human rights principles

Although there is no direct reference to age assessment processes in the CRC, article 3 requires that the best interests of a child shall be a primary consideration in all actions concerning children. According to the UN Committee on the Rights of the Child (UN Committee), article 3 requires the Australian Government to take positive steps to ensure that age assessment processes in the case of unaccompanied and separated children are conducted in a child's best interests.⁹

In General Comment 6, the UN Committee states that a child needs to be identified as separated or unaccompanied as soon as their presence in the country becomes known. General Comment 6 also states that:

Such identification measures include age assessment and should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.¹⁰

In addition, in General Comment 10, the UN Committee emphasises the importance of a provable date of birth, without which a child is vulnerable to all kinds of abuse and injustice. The Committee states that:

Every child must be provided with a birth certificate free of charge whenever he/she needs it to prove his/her age. If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt.¹¹

The UNHCR has also produced documents which provide guidance on the use of age assessment processes for refugee and migrant children.¹² These guidelines emphasise that age assessments should

- be comprehensive, taking into account both physical appearance and psychological maturity
- be conducted in a safe, child and gender sensitive manner
- allow margins of error or caution when scientific procedures are used
- provide children with the benefit of the doubt in cases of uncertainty
- give children clear information about the purpose and process of assessment procedures in a language they understand

- appoint a qualified, independent guardian to advise the child prior to an assessment procedure.

10 What age assessment processes are currently used in criminal proceedings in Australia?

In 2001 the *Crimes Act 1914* (Cth) was amended to provide a regime for assessing age.¹³ The amendments provide that an officer can seek permission to carry out a 'prescribed procedure', either with the consent of the person whose age in question, or by order of a magistrate.¹⁴ Currently, the only prescribed procedure is 'radiograph of the hand and wrist of the person whose age is to be determined' (wrist x-ray).¹⁵

These amendments are in response to a 2000 decision in the Northern Territory Supreme Court, which found that the Migration Act did not provide statutory authority for the taking of a wrist x-ray for the purposes of age assessment, in the absence of an individual's consent.¹⁶

There is significant doubt amongst medical experts about the reliability of wrist x-rays for age assessment purposes. However, until July 2011, wrist x-rays provided the primary source of evidence of age in matters where age was in dispute.

In February 2011, the President of the Australian Human Rights Commission wrote to the Commonwealth Attorney-General to express concern about the use of wrist x-rays for age assessment purposes and to raise some associated issues, including the manner in which consent for the procedure was obtained. Subsequently, the Attorney-General requested that the issue be considered by a working group of Commonwealth agencies, including the AGD, AFP, CDPP and DIAC.

On the 8 July 2011, the Australian Government announced that a range of alternative measures would be used to supplement the standard wrist x-ray process when assessing the ages of people accused of people smuggling. The additional measures include:

- offering dental x-rays as a supplementary procedure to wrist x-rays¹⁷
- offering focused age interviews conducted under caution by AFP officers
- the AFP taking steps as early as possible to seek birth certificates and other relevant information from Indonesia where the age of people suspected of committing people smuggling offences is contested.¹⁸

The Attorney-General has also proposed that the 'benefit of the doubt principle be applied more proactively where a person is claiming to be a minor'. This means that if, prior to a person being charged, AFP investigations reveal that there are conflicting results between procedures, or where documents verified by the Indonesian Government indicate that an individual is a minor, the individual will not be charged and will be removed from Australia.¹⁹

In November 2011, the CDPP announced that it would no longer oppose bail in cases where the age of a person suspected of people smuggling is in dispute.

11 Can wrist x-rays provide a reliable measure of a person's age?

In Australia, when wrist x-rays are obtained for the purposes of age assessment, they are usually interpreted with the aid of the Greulich-Pyle Radiographic Atlas (the GP Atlas). The GP Atlas was published in 1959 to help assess the skeletal age of children by reference to wrist x-rays.

The GP Atlas consists of a series of standard hand-wrist x-rays for specified skeletal ages.²⁰ Each standard is based on a group of 100 children of that chronological age. The reference sample used is a selection of mainly white middle-class children from the United States who were born in the 1930s.

While there are other atlases that have been developed to help assess skeletal age, including the TW3 manual and its TW2 predecessor,²¹ the GP Atlas is the atlas most commonly used, and appears to be the only atlas used for age assessment purposes in Australia.

A wrist x-ray assessment consists of taking an x-ray of the hand and wrist, then comparing the image against a standard atlas of skeletal age in order to estimate a person's skeletal age. As the skeleton matures, the growth plates change in a well-defined way. The fusion of a person's radial epiphysis with its shaft is considered to indicate the skeletal maturity of the hand and wrist.

The Commission is aware of significant concern amongst medical experts at the use of wrist x-rays for age assessment purposes. Concerns of which the Commission is aware include that:

- the GP Atlas was designed for assessment of skeletal age if the chronological age is known, rather than the reverse²²
- it is not possible reliably to estimate a person's chronological age from an assessment of their skeletal age using the GP Atlas²³ as results could be affected by a trend towards earlier maturity²⁴, differences in skeletal development in different ethnic groups²⁵, and differences in skeletal development due to socio-economic background and nutrition²⁶
- it is not possible to use the GP Atlas to provide a statistical probability that a person is under 18 years of age²⁷
- wrist x-rays cannot be used to assess age with an adequate degree of precision
- the use of wrist x-rays for administrative purposes raises ethical concerns.

The Inquiry is particularly interested to receive submissions from medical experts with experience in considering whether wrist x-rays can reliably be used for the purposes of age assessment. It also hopes to receive submissions from medical experts and others on the ethical considerations involved in taking wrist x-rays for age determination purposes.

12 What other methods of assessing age may be used in Australia?

As mentioned above, on 8 July 2011 the Australian Government announced that a range of alternative measures would be used to supplement the standard wrist x-ray process, including:

- dental x-rays
- focused age interviews
- seeking documentary evidence.

This new age assessment process appears to offer some improvements over exclusive reliance on wrist x-rays as evidence of age. However, the Commission is concerned that, in practice, the new process will continue to result in reliance on radiography for age assessment purposes.

This is largely due to the acknowledged limitations in conducting focused age interviews and difficulties in obtaining documentary evidence. The Attorney-General has acknowledged that for a focussed interview to be reliable as evidence it would need to be conducted under caution and participation must be voluntary. The Attorney-General further stated that the AFP, based on general experience with people under investigation on people-smuggling charges, expect that at least some crew claiming to be minors will decline to be interviewed. Further, the Attorney-General has acknowledged the difficulty in obtaining documentary evidence to support the age claims of Indonesian crew.²⁸

12.1 Dental age assessment

The working group of Commonwealth agencies recommended to the Attorney-General that dental x-rays be prescribed in the *Crimes Regulations 1990* (Cth), in addition to wrist x-rays. This would allow dental x-rays to be used where the person under investigation consents, or by court order if they do not consent. According to the Attorney-General, once prescribed, dental x-rays will supplement wrist x-rays in all matters where age is in dispute.²⁹

The Inquiry is particularly interested in receiving submissions from medical experts with experience in considering whether dental x-rays can reliably be used for the purposes of age assessment. It also hopes to receive submissions from medical experts and others on the ethical considerations involved in taking dental x-rays for age determination purposes.

12.2 Focused age interviews

The Australian Government has announced that the AFP will be offering focused age interviews, conducted under caution, where age is in dispute as part of the ordinary interview of people suspected of people smuggling offences. The Attorney-General has also indicated that the AFP will contract a consultant with appropriate anthropological, cultural and linguistic expertise to develop guidance material for investigators conducting interviews.³⁰

The Inquiry is particularly interested in receiving submissions from appropriately qualified experts concerning whether focused age interviews can reliably be used for the purposes of age assessment.

12.3 Documentary and affidavit evidence of age

The Attorney-General has indicated that the AFP is 'taking steps as early as possible to seek birth certificates and other relevant information from Indonesia about people suspected of committing people smuggling offences'.³¹

Documentary evidence of age, if it can be verified, is likely to be seen by a court as determinative of age. However, there are significant problems in obtaining documentary evidence in the case of Indonesian nationals who have been charged with people smuggling. Many such individuals will not have a birth certificate. There may be other documents which could be used as evidence of age, including records that might be obtained from local government, schools, police or religious organisations. Affidavit evidence could also be obtained from relatives or community leaders. However, obtaining evidence of this kind will usually require travel to Indonesia.

In some recent cases prosecutions of individuals charged with people smuggling offences have been discontinued following the production of affidavit evidence (and in some cases other documentary evidence) regarding age from family members and community leaders in Indonesia. Obtaining this evidence has required defence lawyers to travel to Indonesia.³²

The Inquiry is particularly interested in receiving submissions regarding the use of documentary and affidavit evidence for the purposes of age assessment, including regarding the process of obtaining such evidence and the extent to which such evidence has influenced conclusions drawn by investigating authorities regarding an individual's age.

13 What other issues are of interest to the Inquiry?

The Inquiry has an interest in a number of other issues related to age assessment processes. These include:

- whether contact has been facilitated between individuals of concern and their parents and guardians
- what efforts have been made to obtain information about age from the parents or guardians of individuals of concern
- the process of seeking consent for obtaining x-rays from individuals of concern
- the preparation and conduct of legal proceedings in which evidence concerning the age of the individuals of concern was provided to the court
- how decisions were made about where individuals of concern would be detained
- what measures were taken to provide a guardian or other responsible adult to ensure that the best interests of the individuals of concern would be protected

- the provision of legal advice, assistance and representation to each of the individuals of concern.

The Commission welcomes submissions from any individual or organisation able to comment on any of these issues.

14 Conclusion

This Discussion Paper provides some background information for those individuals and organisations interested in contributing to the Inquiry process.

The material in this Discussion Paper does not represent any finalised research, nor is it intended to limit the scope of submissions. Rather, the paper is intended to provide guidance on the types of issues that the Inquiry is interested in exploring. The Inquiry welcomes submissions on all matters relevant to its Terms of Reference. Submissions may be provided to the Inquiry at the following address:
ageassessment@humanrights.gov.au.

The Inquiry may also be contacted at the following address:

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

Further information about the Inquiry can be found at:
<http://www.humanrights.gov.au/ageassessment/index.html>

¹ *Migration Act 1956* (Cth), ss 233C, 236A, 236B.

² *Migration Act 1956* (Cth), s 236B.

³ *Migration Act 1956* (Cth), s 236A.

⁴ Minors are only prosecuted with people smuggling offences in exceptional circumstances on the basis of their significant involvement in a people smuggling venture or multiple ventures. Since at least September 2008, no prosecution has proceeded for people smuggling offences against a person found to be a minor: R McClelland, Attorney-General, Correspondence to the President of the Australian Human Rights Commission, 31 March 2011.

⁵ Affidavit of Mark Howden, The Queen and Ako Lani and Ose Lani and John Ndollu, 17 June 2011.

⁶ Commonwealth, *Parliamentary Debates*, Senate, 1 November 2011, p 35 (Senator the Hon. Joe Ludwig, Minister for Agriculture, Fisheries and Forestry). At <http://www.aph.gov.au/hansard/hanssen.htm> (viewed 14 November 2011).

⁷ Commonwealth, *Parliamentary Debates*, Senate, 1 November 2011, p 35 (Senator the Hon. Joe Ludwig, Minister for Agriculture, Fisheries and Forestry). At <http://www.aph.gov.au/hansard/hanssen.htm> (viewed 14 November 2011).

⁸ While Australia has a reservation to article 37(c) of the CRC, the Australian Government at the time of reservation made it clear that its concerns with the article related to whether children in juvenile detention could maintain contact with their families, given the geography and demography of Australia. See Australian Government, *Australia's Combined Second and Third Reports under the Convention on the Rights of the Child*, (2003), para 467. At http://www.dfat.gov.au/hr/downloads/australia_2nd_3rd_reports_convention_rights_child.pdf (viewed 14 November 2011).

⁹ According to the UN Committee on the Rights on Child, 'the best interests of the child must also be a guiding principle for determining the priority of protection needs and the chronology of measures to be

applied in respect of unaccompanied and separated children.’ This includes age assessment processes: UN Committee on the Rights of the Child, *General Comment 6*, UN Doc CRC/GC/2005/6 (2005), para 31. The UN Committee on the Rights of the Child has made several General Comments relevant to age assessment processes: See UN Committee on the Rights of the Child, *General Comment 6*, UN Doc CRC/GC/2005/6 (2005), and *General Comment 10*, UN Doc CRC/C/GC/10 (2007) at <http://www2.ohchr.org/english/bodies/crc/comments.htm>. These comments are considered to have interpretative value in considering rights under the CRC.

¹⁰ UN Committee on the Rights of the Child, *General Comment 6*, para 31(i).

¹¹ UN Committee on the Rights of the Child, *General Comment 10*, para 39.

¹² UNHCR, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009; UNHCR: *Guidelines on Policies and Procedures on Dealing with Unaccompanied Children Seeking Asylum*, February 1997, p 5; UNHCR, *Refugee Children: Guidelines on Protection and Care Preface*, 1994, Geneva.

¹³ Crimes Amendment (Age Determination) Bill 2001(Cth).

¹⁴ *Crimes Act 1914* (Cth), ss 3ZQA-3ZQK and *Crimes Regulations 1990* (Cth), reg 6C.

¹⁵ *Crimes Regulations 1990* (Cth), reg 6C.

¹⁶ *R. v Hatim & Others* (2000), NTSC 53.

¹⁷ The Working Group also recommended that the dental x-rays be prescribed in the *Crimes Regulations 1990* (Cth) in addition to wrist x-rays. Once prescribed, dental x-rays will supplement wrist x-rays in all cases where their age is in dispute: R McClelland, Attorney-General, Correspondence to the President of the Australian Human Rights Commission, 30 June 2011.

¹⁸ R McClelland, Attorney-General, Correspondence to the President of the Australian Human Rights Commission, 30 June 2011.

¹⁹ R McClelland, Attorney-General, Correspondence to the President of the Australian Human Rights Commission, 30 June 2011.

²⁰ WW Greulich and SI, Pyle, *Radiograph atlas of skeletal development of hand and wrist*, 1959.

²¹ Tanner and Whitehouse introduced a more complex process of wrist x-ray assessment in 1962 (TW2 method) in which every one of the 20 bones of the hand and wrist is scored against pictorial and written criteria from 2700 British lower and middle class children’s X-rays. The data for this method were updated in 1995 and 2001 (TW3 method), so as to reflect the secular changes that have occurred in the speed of bone development in adolescence: JM Tanner et al, *Assessment of skeletal maturity and prediction of adult height (TW2) method*, 1975; JM Tanner, RH Whitehouse, N Cameron, *Assessment of skeletal maturity and prediction of adult height (TW3 method)*, 2001.

²² Australian Paediatric Endocrine Group (APEG), Royal Australian and New Zealand College of Radiologists (RANZCR), Paediatric Imaging Reference Group of RANZCR, Australian and New Zealand Society for Paediatric Radiology (ANZSPAR), Royal Australasian College of Physicians (RACP)(APEG et al), Correspondence to C Bowen, Minister for Immigration and Citizenship, 19 August 2011.

²³ APEG et al, Correspondence to C Bowen, 19 August 2011; Professor Tim Cole, expert evidence in *R V Daud* (2011), WADC 175.

²⁴ T Smith and L Brownlees, *Age Assessment Practices: a literature review & annotated bibliography*, 2011, p 15.

²⁵ A Zhang, PhD et al, ‘Racial Differences in Growth Patterns of Children Assessed on the Basis of Bone Age’ (2009) 250(1) *Radiology* 228. At www.ncbi.nlm.nih.gov/pmc/articles/PMC2817832/ (viewed 15 November 2011); FK Ontell et al, ‘Bone age in children of diverse ethnicity’ (1996) 167(6) *American Journal of Roentgenology* 1395. At www.ajronline.org/cgi/content/abstract/167/6/1395 (15 November 2011); AM Zafar et al, ‘An appraisal of Greulich-Pyle Atlas for skeletal age assessment in Pakistan’ (2010) 60(7) *Journal of the Pakistan Medical Association* 552. At www.ncbi.nlm.nih.gov/pubmed/20578605 (viewed 15 November 2011). FK Ontell, M Ivanovic, DS Ablin, TW Barlow, ‘Bone age in children of diverse ethnicity’ (1997) 169(2) *American Journal of Roentgenology*, pp 597–8. See also S Mora, M Boechat, E Petka, HK Huang and V Gilsanz, ‘Skeletal age determinations in children of European and African descent: applicability of the Greulich and Pyle standards’ (2001) 50(5) *Paediatric Research*, 624-8.

²⁶ A Schmeling et al, *Guidelines for Age Estimation in Living Individuals in Criminal Proceedings*, 2000; Dr Kevin Osbourne, testimony to the Commonwealth Senate Legal and Constitutional Legislation Committee, 2 March 2001, Inquiry into the Crime Amendment (Age Determination) Bill

2001, cited in T Smith and L Brownlees, *Age Assessment Practices: a literature review & annotated bibliography*, 2011, p 14.

²⁷ Sir Albert Aynsley-Green KT, Professor Emeritus of Child Health, 'Expert commentary on the age assessment of John Ndollu', prepared for Fisher Dore Lawyers, Brisbane, Australia, p 11.

²⁸ R McClelland, Attorney-General, Correspondence to the President of the Australian Human Rights Commission, 22 August 2011.

²⁹ R McClelland, Attorney-General, Correspondence to the President of the Australian Human Rights Commission, 30 June 2011.

³⁰ R McClelland, Attorney-General, Correspondence to the President of the Australian Human Rights Commission, 30 June 2011.

³¹ R McClelland, Attorney-General, Correspondence to the President of the Australian Human Rights Commission, 30 June 2011.

³² Charges against three Indonesian boys were dropped on 1 July 2011 after the Brisbane Magistrates court found that there was lack of evidence that they were over 18 years of age. Lawyers had travelled to the remote island of Rote in June to obtain affidavit evidence from relatives and village officials.