

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Submission Author: Greg HOGAN

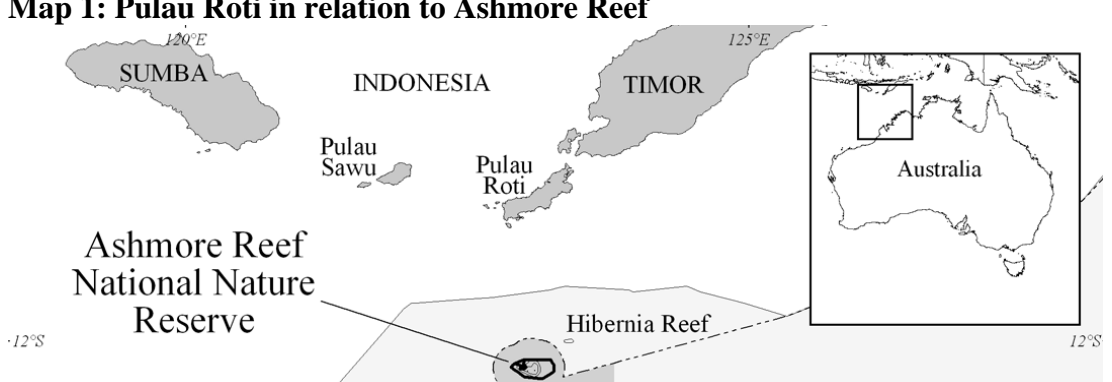
Submission Date: 3 February 2012



source: <http://chrocodiles.blogspot.com/2010/11/wonderful-indonesian-culture-of-shadow.html>

Contents	Pages
Prologue: Why I make a Submission?	2 - 3
Catchwords for this Submission	4
Background: People-Smuggling Prosecutions	5 - 6
Introduction: Location, Fisheries & Montara	7 - 10
Response to the Inquiry's Terms of Reference	11 - 36
Appendix A: Case Law	37 - 40
Appendix B: References	41 - 50
Appendix C: Glossary of Selected Terms	51 - 54

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

<p>PROLOGUE:</p> <p>Why I make a Submission?</p> <p>People Smugglers' modus operandi</p>	<p>My submission will address the Inquiry's Terms of Reference. It is sourced from <i>published research</i> related to the subject-matter of the Inquiry and, includes personal observation of information <i>made public in open court</i> in 2011, during the district court trials of Indonesian crew charged with people-smuggling offences.</p> <p>This Inquiry - into the treatment of individuals suspected of people-smuggling offences who say they are children - needs however to appreciate the way in which the Indonesian crew are organised onto the '<i>perahu layar motor</i>' (PLM Type III) boats destined for Australia's northern waters. It is important to understand that these voyages comprise two legs – the longer 1st leg eastwards across the Indonesian archipelago and the short 2nd leg beginning off Pulau Roti directly <i>due south</i> 60 nautical miles (110 km) overnight to Ashmore reef. See Map 1. The number of Indonesian crew that embark is almost invariably less than the number of crew upon intercept at Ashmore reef.</p> <p>Map 1: Pulau Roti in relation to Ashmore Reef</p>  <p style="text-align: right; font-size: small;">Source: ERIN, Dept of Environ & Heritage, Cth Aust. 2005</p>
<p>Whole-of-Government response</p>	<p>The perahu that they crew are known as Suspected Irregular Entry Vessel (SIEV). Each SIEV is designated with a consecutive number. All the persons on a SIEV, including the crew are denoted, by the authorities, as Potential Irregular Immigrants (PII). Each PII is given a number on a 'nominal roll' taken after intercept.</p> <p>Prosecutions entail a charge that the crew knowingly facilitated the bringing of the asylum-seekers to Australia. People smuggling trials are indictable offences before a jury. The AFP charge the Indonesian crew of a SIEV alleged to have committed a people-smuggling offence under the <u>Migration Act</u>. The AFP refers the matter to the CDPP. Before that, other government agencies such as the RAN, ACS/BPC and DIAC make decisions concerning the crew. All agencies involved are said to represent the whole-of-government approach to people smuggling. That approach could also be said to be at the heart of the problem now facing this Inquiry.¹</p>
<p>One concern</p>	<p>A concern is that this Inquiry might make recommendations that play into the hands of those who are the organisers of people smuggling. Should this Inquiry create a situation for Australian agencies that allows 'borderline' adult crew to escape charge due to 'technically unacceptable'² age assessment errors it may perversely encourage organisers to staff future SIEVs on the 2nd leg of the voyage with a majority of such crew (on 'training runs'). The crew so deported may simply become the next <i>kaptan</i> of</p>

¹ Warton (2002) at pg.17; Woolner (2011) at p.72, "*Whole of Government*": *Structural Roots of Weakness*

² See Garamendi *et al* (2005) at p.10, contrasts the "*ethically unacceptable*" from "*technically unacceptable*" errors.

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

<p>Causality</p>	<p>a SIEV who gets off at Roti and who-in-turn send fresh juveniles into the arms of the RAN / BPC.</p> <p>One reaps what one sows. A prior Indonesian government encouraged commercial foreign-owned trawlers to over-fish East of Longitude 130 E in Maluku province of the Banda & Arafura seas from 1998 - 2001. Australia's Operation Clearwater (2005) and Operation Breakwater (2006) cumulatively destroyed hundreds of perahu along with the fish-catch, fuel, nets and lines – the means of livelihood for Indonesian small boat fishermen 'illegally' fishing in/outside the 'MOU Box' area. Indonesia's '<i>joki</i>' system means the kaptan (and crew) remained indebted to the 'boss' for the forfeited boats and <u>Fisheries Management Act</u> fines. For 74 days after 21 August 2009, Australia's Montara rig spilt a large volume of crude oil into the Timor Sea. Indonesian fishing villages were allegedly affected by the subsequent 'clean up' using the chemical COREXIT EC9500 / EC9527. This 'dispersant' submerges crude-oil onto reefs; such that reef-fishing and alternative income from seaweed-harvesting projects (such as those funded by AusAID in 2004) was much damaged in 2010.</p>
<p>'Juvenile' crew</p>	<p>'Juvenile' Indonesian crew is not a new issue.³ The perahu '<i>Lima Tujuh</i>' arrived at Ashmore on 30 August 1999 with 29 PII including two Indonesian juveniles. In their trial of <i>Curtis v Sidik & Najar</i>,* the trial judge rejected [at para.24] the argument that because those who organise people smuggling employ juveniles as crew it is proper to impose the same punishment on juveniles as the organisers. The organisers are the ones who should be punished more severely. [* Note, trial references are to reported cases].</p> <p><i>R v Hatim</i> examined the wrist X-ray age assessment issue in 2000 in a matter involving the perahu '<i>Sinar Mutiara</i>', which arrived off Ashmore on 16 December 1999 with 133 PII including six crew. Another perahu, the '<i>Dhita Utama</i>' arrived at Ashmore on 3 June 2001 with 59 PII, including four Indonesian crew carrying <u>false</u> identification papers all showing date of birth (d.o.b.) under 18 years old. In their trial of <i>R v Sarip Abakar & Ors</i>, each had their left wrist x-rayed to establish and admit into evidence that they were adults. On 15 April 2009, 'SIEV 36' a Type IV perahu arrived at Ashmore with 49 PII, including two crew who "<i>falsely told officers</i>" they were 13 years and 17 years old respectively. In their trial of <i>R v Tahir & Beny</i>, the trial judge ruled [at para.13-14] that bilateral wrist X-rays reveal both the accused had the skeletal ages of males of at least 19 years old and though both do not know how old they are, they accept they are over 18 years old.</p>
<p>Advocacy</p>	<p>This Inquiry is 10 years in the making. The Inquiry could widen its Terms of Reference to examine the '<i>elephant in the room</i>', that is, the 5 years jail (with 3 years non-parole) mandatory sentencing of Indonesian crew convicted of people-smuggling offences. <i>Kaptans</i> who jump-off at Roti know about it. Juveniles are left to hold the <i>tangkai kemudi</i> ('tiller') for that final leg to Ashmore. Restore judicial discretion in sentencing; convicted crew will go home after the remand period and; the juveniles may be less likely involved in the first place. Redirect some of the \$'00s million spent remunerating the '<i>border protection industry</i>' to improving the lot in life of these impoverished small-boat fishermen & their families in Nusa Tenggara Timur province. Work closer with Indonesia to manage fisheries in these northern waters. Replace the 28 Commonwealth government agencies that 'manage' our maritime domain with a <u>singularly responsible</u> 'Coast Guard'. See Woolner (2011).</p>

³ Warton (2002) at pg.16


**Submission to AHRC Inquiry:
Age Assessment in People Smuggling cases**

CATCHWORDS for this submission	<p>Nusa Tenggara Timur (NTT) province – Livelihood of Indonesian small boat fishermen – MOU Box – Operation Clearwater – Operation Breakwater – Montara blowout – COREXIT 9500 – AusAID – Seaweed harvesting – People smuggling – INP SATGASDA – the Bali Process – RMIM – Kupang – Roti island – Ashmore reef – GAMSAs – Coast Guard.</p> <p>SIEV – PII – Nominal Roll – DIAC Record of Interview – Use of documents in evidence – cross-examination on documents – heresay – burden of proof.</p> <p>Commonwealth criminal trial – Non-English speaking Accused – declined AFP Record of Interview – Regional <i>daerah</i> (dialect/creole) – Bahasa Kupang Malay – Supply & Quality of Interpreters – NAATI Accreditation – <i>Kafkaesque</i> spectre – mandatory sentencing – no bill / <i>nolle prosequi</i></p> <p>Chronological age unknown – Guidelines for Forensic Age Estimation of live young adults involved in criminal proceedings – Study Group of Forensic Age Diagnostics (AGFAD) – German Association of Forensic Medicine – Bone age estimate – wrist X-ray – ‘Greulich & Pyle atlas’ – Other atlases – ‘Tanner-Whitehouse score’ – other scoring methods: TW2 (RUS) / TW3 / FELS / Risser – statistical Mean Average Difference (mad) / Standard error of measurements (s_{meas}) – Automation – Ethnic differences – Radiation dose — non-radiological methods (magnetic resonance imaging, MRI & ultrasound)</p> <p>Dental examination – orthopantomogram (OPG X-ray) – Third molar – ‘Demirjian method’ Stage H – Nutritional/socio-economic differences</p> <p>Combination of physiological methods – ‘technically unacceptable’ errors – ‘ethically unacceptable’ errors.</p> <p>Age determination – Interviewing techniques – Social workers – multi-discipline ‘holistic assessment’ of UASC – Credibility evaluation and asylum determination in the UK system – England & Wales Court of Appeal (Civil) / High Court (Admin) – Age assessment vis-à-vis burden of proof / balance of probabilities</p> <p>Application for bridging visa – Migrant Review Tribunal – Federal Magistrates Court of Australia – Wrist X-ray – Heresay evidence – No documentary evidence of age</p>
---	--

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

BACKGROUND:	<p>To appreciate the numbers of asserted juvenile crew under consideration by the Inquiry, it is useful to summarise the <i>overall</i> numbers involved: that is, the number of SIEVs, interviews, charges, trials, and convictions.</p> <p>Table 1: People-Smuggling Tally ^</p> <table border="1"> <thead> <tr> <th></th> <th>2009</th> <th>2010</th> <th>2011 YTD *</th> <th>Total</th> </tr> </thead> <tbody> <tr> <td>SIEV arrivals</td> <td>61</td> <td>134</td> <td>71</td> <td>266</td> </tr> <tr> <td>Passengers on SIEVs</td> <td>2849</td> <td>6879</td> <td>4672</td> <td>14400</td> </tr> <tr> <td>Passengers giving statements to AFP</td> <td>549</td> <td>1026</td> <td>128</td> <td>1703</td> </tr> <tr> <td>%Passengers giving statements</td> <td>19%</td> <td>15%</td> <td>3%</td> <td>12%</td> </tr> <tr> <td>Crew detained for interview</td> <td>146</td> <td>345</td> <td>165</td> <td>656</td> </tr> <tr> <td>Crew deported (under 18 yrs)</td> <td>-</td> <td>-</td> <td>-</td> <td>76</td> </tr> <tr> <td>Crew charged & remanded (Total)</td> <td>80</td> <td>202</td> <td>201</td> <td>483</td> </tr> <tr> <td>Crew remanded (claim to be < 18 yrs ?)</td> <td>-</td> <td>-</td> <td>-</td> <td>32</td> </tr> <tr> <td>Crew prosecuted</td> <td>30</td> <td>102</td> <td>304</td> <td>436</td> </tr> <tr> <td>Crew convicted ^</td> <td>27</td> <td>62</td> <td>81</td> <td>170</td> </tr> </tbody> </table> <p>* YTD ('year to date') may differ between the rows in the 2011 column ^ sources: APH (2/2011) and APH (12/2011)</p>		2009	2010	2011 YTD *	Total	SIEV arrivals	61	134	71	266	Passengers on SIEVs	2849	6879	4672	14400	Passengers giving statements to AFP	549	1026	128	1703	%Passengers giving statements	19%	15%	3%	12%	Crew detained for interview	146	345	165	656	Crew deported (under 18 yrs)	-	-	-	76	Crew charged & remanded (Total)	80	202	201	483	Crew remanded (claim to be < 18 yrs ?)	-	-	-	32	Crew prosecuted	30	102	304	436	Crew convicted ^	27	62	81	170
	2009	2010	2011 YTD *	Total																																																				
SIEV arrivals	61	134	71	266																																																				
Passengers on SIEVs	2849	6879	4672	14400																																																				
Passengers giving statements to AFP	549	1026	128	1703																																																				
%Passengers giving statements	19%	15%	3%	12%																																																				
Crew detained for interview	146	345	165	656																																																				
Crew deported (under 18 yrs)	-	-	-	76																																																				
Crew charged & remanded (Total)	80	202	201	483																																																				
Crew remanded (claim to be < 18 yrs ?)	-	-	-	32																																																				
Crew prosecuted	30	102	304	436																																																				
Crew convicted ^	27	62	81	170																																																				
Tally of people smuggling	<p>The prosecution's performance is 'conflagrated' by the sheer number of SIEV arrivals. Table 1 contains an estimate of people-smuggling matters processed by the AFP/CDPP/courts since 2009. As there is no single source available to me, I have brought together these figures from various <i>public</i> sources. Without dwelling on the minutiae, the overall picture appears as one of the AFP & CDPP being confronted in 2009, and stretched in 2010 & 2011.</p> <p>Faced with a large number of crew charged, it appears the authorities have taken too long to bring prosecutions to trial. The conviction rate is below the CDPP's own key performance indicator for its <i>Program 1.1 Objective</i>. This result is at a time that the media reports the CDPP is bringing forward (from its budget) an extra \$900,000 per month to prosecute people-smuggling offences. See Media (19 October 2011).</p>																																																							
Feu de joie	<p>The 'bottom line' is a result of a number of <i>apparent</i> factors: swelling in the number of accused; the transfer of many matters (beginning in Q3 2010) from Perth to the eastern States; the delays getting listed in the eastern State's district courts; the extent of legal argument by the defence barristers in these courts; a shortage of 'Professional' interpreters; the 'hung juries' with no verdicts; and the adaptability of the people-smuggling organisers to harness the youngest crew from further flung villages of NTT province, centred on Kupang (West Timor), as 'mules' smuggling people.</p>																																																							
Indonesian response	<p>On the latter point, IOM reported it did inform village fishermen in the Kupang area during April – August 2010 to not be recruited by people smugglers. See IOM Indonesia (2010). That information campaign was carried on flyers with 'value-based' messages, such as "<i>Aku Tau Penyelundupan Imigran Ilegal itu Salah</i>" (<i>I know people smuggling is wrong</i>). The campaign was also trialled in Tanjung Balai Asahan (North Sumatra), Sukabumi (West Java) and Manggarai Barat (Flores). Funded with \$4 million by ACS/BPC as part of 'the Bali Process' (www.baliprocess.net) and known by the acronym 'RMIM' (Reinforcing Management of Irregular Migration), the campaign had initial successes, but is not known to have been sustained in 2011. It is noted that units of the Indonesian Police's anti-people smuggling task force (i.e. 'SATGASDA' - <i>satuan tugas</i> - literally 'one task') are reportedly situated in places, such as Kupang,</p>																																																							

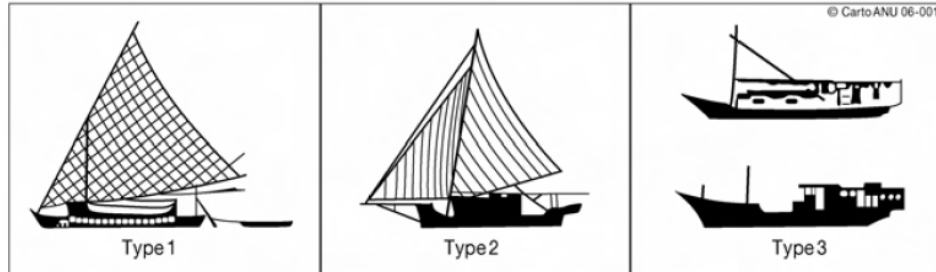
Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

<p>Example of a RMIM flyer</p> <p>(Reinforcing Management of Irregular Migration aka ‘Dark Migration Management Strengthening Program’)</p> <p>Translation:</p> <p><i>“Fishing is a respectable job ...I will not damage our families reputations by becoming a people smuggler”</i></p> <p><u>Source:</u></p> <p>Roberts, P. & Bonneau, L (2009); Prayitno (2011); Jackman (2011)</p>	<p>where people smugglers recruit SIEV crew. See INP (2010). RMIM and SATGASDA however are no panacea to stop the recruitment of juveniles.</p>  <p>In summary, for the purposes of this Inquiry, it should be noted that the number of crew detained/charged & remanded <i>who still claim to have been under 18 years of age at the time of intercept</i> appears to be small (32), though not insignificant, relative to large number of crew initially detained for interview (656).</p>
<p>BACKGROUND:</p> <p>Participants in people smuggling matters</p>	<p>R, the Queen (the Prosecution), comprising:</p> <ul style="list-style-type: none"> • Crown Prosecutors and CDPP solicitors • Crown Witnesses (asylum-seekers/SIEV passengers, Commonwealth officers of the AFP / RAN / ACS / BPC / DIAC agencies) • CDPP-supplied court interpreters (Bahasa Indonesian, Arabic/Persian/Hazaragi/Dari/Farsi languages) <p>‘Indonesian crew’ (the Defence), comprising:</p> <ul style="list-style-type: none"> • barristers/supporting solicitors/Legal Aid solicitors (advocates), • accused crew who chose to give evidence from the witness box • Legal Aid-supplied conference interpreters (Bahasa Indonesian)
<p>BACKGROUND:</p> <p>Relevant legislation & rules</p>	<p>Sections 5, 36, 42, 232A (repealed), 233C, 245F <u>Migration Act</u>;</p> <p>Sections 3ZQA–3ZQK, 23A, 23B, 23F, 23G, 23H, 23N, 23P <u>Crimes Act (Cth)</u>;</p> <p>Sections 26, 33, 36, 38, 43 – 45, 48, 55 – 58, 68(3), 69, 73, 89, 90, 91, 100, 101A, 110, 115, 128, 135 - 139, 142, 165, 171, 173, 174, 176, 178, 183, 184, 189, 190, 191 <u>Evidence Act</u>;</p> <p>Advocacy Rules 68, 72, 82 – 94 (Prosecutor’s duties), <u>NSW Barristers’ Rules</u></p>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

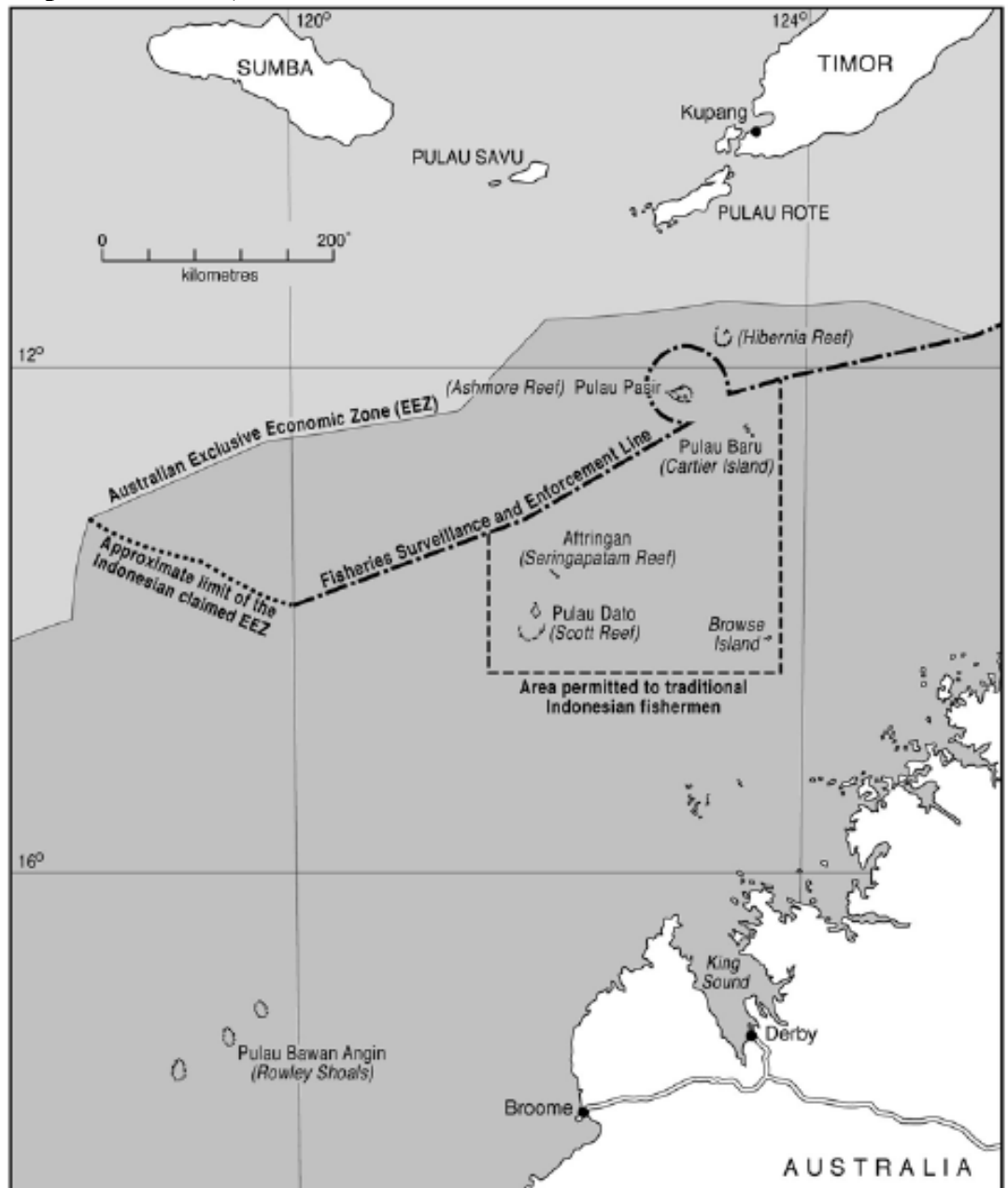
50 seconds to 14 degrees 25 minutes South). They also are denied **engines** (which would give them power to stop drifting outside the MOU Box, to haul in nets, or pump out bilges). In rough weather, during the monsoon season of November - March, the lack of engines puts lives at risk. See **Fox *et al* (2006), Fox & Sen (2002)**.

Diagram 1: AFMA Classification of Indonesian perahu types



Source: Stacey (2007)

Map 3: MOU Box, south of Australia's Fisheries Enforcement line



Source: Fox & Sen (2002)

Types of
boats

Indonesians
know the
reefs inside
the Box by
various names

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Boats & gear forfeited	<p>The agreement, revised in 1989, banned all fishing at Ashmore. Fishermen also lost access to southern shark-fishing grounds along the shallow waters of the Sahul Shelf (in the Timor Sea) that lie outside the Box. Fishermen went into deeper waters, using long-lines to a depth of 60 metres, inside the Box and to its north. The adoption of long-line gear (in place of traditional hand-lines and ‘<i>shark-rattles</i>’) was facilitated by the availability of credit, but it created financial strain on the fishermen, contributing to the migration of Bajau people from Tekang Besi (Wakatobi) islands, along with other fishermen from Alor & Pantar islands, to Pepela (Roti) throughout the 1990s.</p> <p><u>Enforcement of Australia’s Fisheries</u></p> <p>Australian authorities have pursued Indonesian fishermen south of the Fisheries Enforcement Line, destroying almost 470 <i>perahu / bodi</i> (i.e. sleek shark-fishing boats) in 2004 - 2007. See Table 2.</p> <p>Apprehensions were much lower in 2008 (91) and 2009 (26). The forfeiture regime under the <u>Fisheries Management Act</u> operates <i>at the time the vessel is used</i> (for the offence) and, without any judgement-at-trial. Crew risk imprisonment under the <u>Sentencing Act</u> in default of fines levied under the FM Act. See Baird (2007).</p> <p>Table 2: Apprehensions & Forfeitures of Fishing Vessels 2004 - 2007</p> <table border="1" style="width: 100%; border-collapse: collapse; text-align: center;"> <thead> <tr style="background-color: #0070C0; color: white;"> <th></th> <th colspan="2">2004-05</th> <th colspan="2">2005-06</th> <th colspan="2">2006-07</th> </tr> <tr style="background-color: #0070C0; color: white;"> <th></th> <th>Apprehensions</th> <th>Legislative Forfeitures</th> <th>Apprehensions</th> <th>Legislative Forfeitures</th> <th>Apprehensions</th> <th>Legislative Forfeitures</th> </tr> </thead> <tbody> <tr><td>Jul</td><td>13</td><td>3</td><td>3</td><td>41</td><td>41</td><td>0</td></tr> <tr><td>Aug</td><td>12</td><td>6</td><td>8</td><td>21</td><td>15</td><td>2</td></tr> <tr><td>Sep</td><td>13</td><td>9</td><td>27</td><td>71</td><td>45</td><td>0</td></tr> <tr><td>Oct</td><td>29</td><td>9</td><td>59</td><td>26</td><td>27</td><td>2</td></tr> <tr><td>Nov</td><td>19</td><td>28</td><td>29</td><td>47</td><td>33</td><td>0</td></tr> <tr><td>Dec</td><td>10</td><td>29</td><td>48</td><td>27</td><td>11</td><td>0</td></tr> <tr><td>Jan</td><td>17</td><td>11</td><td>21</td><td>12</td><td>11</td><td>1</td></tr> <tr><td>Feb</td><td>25</td><td>19</td><td>35</td><td>19</td><td>6</td><td>0</td></tr> <tr><td>Mar</td><td>10</td><td>20</td><td>46</td><td>4</td><td>7</td><td>1</td></tr> <tr><td>Apr</td><td>35</td><td>6</td><td>32</td><td>6</td><td>5</td><td>0</td></tr> <tr><td>May</td><td>12</td><td>19</td><td>37</td><td>6</td><td>14</td><td>0</td></tr> <tr><td>Jun</td><td>8</td><td>19</td><td>22</td><td>1</td><td>1</td><td>2</td></tr> <tr><td>Total</td><td>203</td><td>178</td><td>367</td><td>281</td><td>216</td><td>8*</td></tr> </tbody> </table> <p style="text-align: right; font-size: small;">Source: http://www.customs.gov.au/webdata/minisites/annualReport0607/pages/page30.html</p> <p><u>The Montara Oil-Rig Spill</u></p> <p>At 4am WST, 21 August 2009, Australia’s Montara oil-rig (operated by Thai-owned PTTEP) blew-out, spilling 30,000 <i>equivalent-barrels</i> of crude oil over the next 74 days into waters near Ashmore. Ashmore is 85nm/157km west from the well-head. Roti is 135nm/250km north-west from it. Darwin is 370nm/685km east of the well-head. Map 4 shows the spreading plume of oil, moving out from the well-head.</p> <p>Reported by Kimberley Whale Watching (2009), NASA satellite imagery analysed by SkyTruth between 30 August and 1 November 2009 showed the oil slick and sheen cumulatively ranged over more than 62,000km² of the Timor Sea. The slick and sheen</p>		2004-05		2005-06		2006-07			Apprehensions	Legislative Forfeitures	Apprehensions	Legislative Forfeitures	Apprehensions	Legislative Forfeitures	Jul	13	3	3	41	41	0	Aug	12	6	8	21	15	2	Sep	13	9	27	71	45	0	Oct	29	9	59	26	27	2	Nov	19	28	29	47	33	0	Dec	10	29	48	27	11	0	Jan	17	11	21	12	11	1	Feb	25	19	35	19	6	0	Mar	10	20	46	4	7	1	Apr	35	6	32	6	5	0	May	12	19	37	6	14	0	Jun	8	19	22	1	1	2	Total	203	178	367	281	216	8*
	2004-05		2005-06		2006-07																																																																																																					
	Apprehensions	Legislative Forfeitures	Apprehensions	Legislative Forfeitures	Apprehensions	Legislative Forfeitures																																																																																																				
Jul	13	3	3	41	41	0																																																																																																				
Aug	12	6	8	21	15	2																																																																																																				
Sep	13	9	27	71	45	0																																																																																																				
Oct	29	9	59	26	27	2																																																																																																				
Nov	19	28	29	47	33	0																																																																																																				
Dec	10	29	48	27	11	0																																																																																																				
Jan	17	11	21	12	11	1																																																																																																				
Feb	25	19	35	19	6	0																																																																																																				
Mar	10	20	46	4	7	1																																																																																																				
Apr	35	6	32	6	5	0																																																																																																				
May	12	19	37	6	14	0																																																																																																				
Jun	8	19	22	1	1	2																																																																																																				
Total	203	178	367	281	216	8*																																																																																																				
Montara blowout																																																																																																										

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

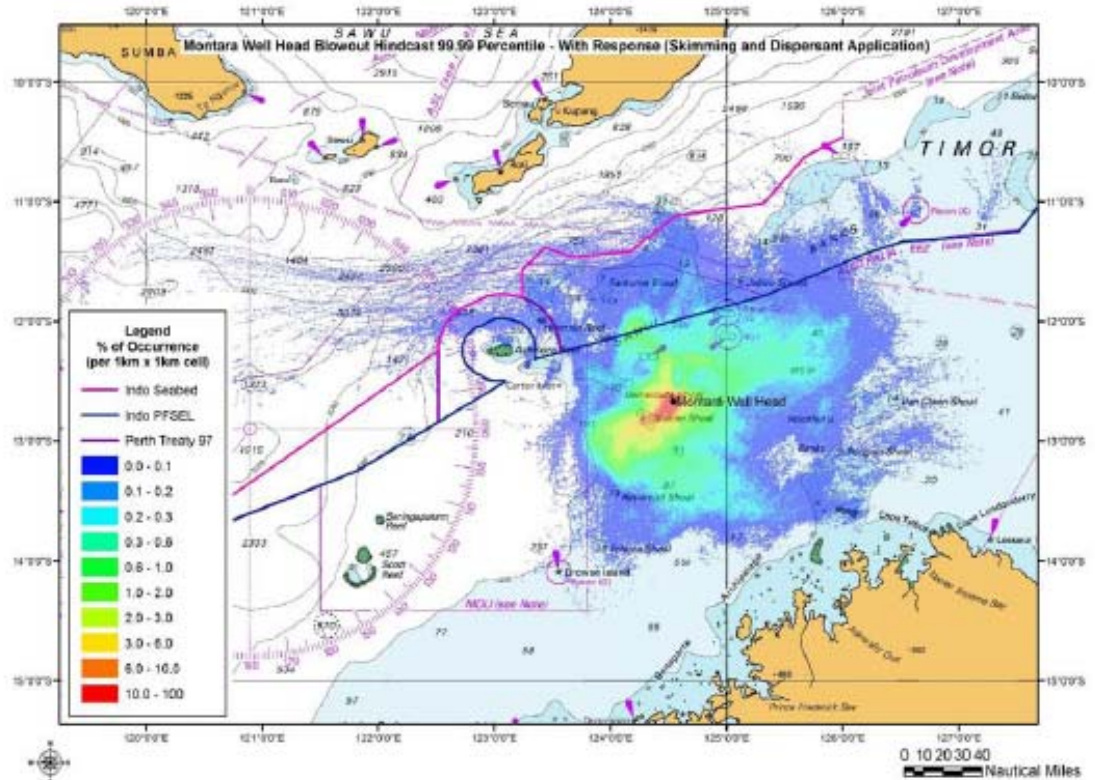
‘Cleaning-up’

was recorded within 64nm of the Timor coast. **King *et al* (2010)** noted that the spill occurred in relatively shallow coastal waters (less than 200 metres deep) such that the “tidal circulation component of the surface currents” was important to the drift of oil.

According to Australia’s **AMSA (2009)**, based on the audit of empty containers post-incident, the subsequent clean-up made use of large quantities of dispersants, including chemicals **COREXIT EC9500 (@17,000L)** and **EC9527A (@27,720L)**. **COREXIT** is noted by its manufacturers to be more toxic to marine life, but less toxic to life along the shore and animals at the surface because the dispersant allows the oil to stay submerged below the surface of the water. This effect of remaining submerged is alleged to have destroyed fishing and seaweed grounds near Roti. An Australian barrister visited Roti in March 2010 and gathered affidavits from local villagers to that effect.

The **West Timor Care Foundation** in conjunction with **Bond University** made a submission about the loss of fish and seaweed stocks to the **Australian Inquiry (November 2010) into Montara**. The \$2.4 billion claim made by Indonesia’s representatives regarding compensation for the environmental impacts of the oil-spill and its clean-up is reportedly ongoing today.

Map 4: Montara’s blowout spread oil north into Indonesian waters



Source: PTTEP Australasia (2011) citing: Asia-Pacific ASA S7.1, S7.2 scientific studies

In summary, the location of Australia’s Ashmore reef so close to Indonesia’s Roti island; the MOU’s direct & indirect impacts on fishermen’s livelihoods; the Australian authorities operations to apprehend Indonesian fishermen, to seize & destroy their perahu, gear & catch; and the Montara oil-spill & its clean-up have acted against the Indonesian small-boat fishermen’s interests. It is submitted that the result of this ‘causality’ is that some fishermen have turned to crew the people smugglers’ SIEVs.

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

<p><u>RESPONSE to the INQUIRY'S TERMS of REFERENCE:</u></p> <p>(a) age assessments by any 'officer' [at intercept of a SIEV]</p>	<p>While all people-smuggling trials differ factually, the way in which investigators treat the crew from the outset of the intercept off Ashmore does have implications for the outcome of the prosecution. The case of <i>R v Sukarni & Ors</i> * is a good example. The SIEV with 48 PII, including four Indonesians, arrived at Ashmore on 31 July 1999. The crew were issued with a 'detention notice' by a National Parks officer stationed on the <i>Aurelia IV</i> vessel who boarded the SIEV. The RAN ship, <i>HMAS Jervis Bay</i> arrived and took aboard all the PII. A second detention notice was issued and a 'Nominal Roll' of the PII was taken by the RAN. The AFP officers on board were directed to provide security by the RAN Commander. [* Note, <i>trial</i> references are to <i>reported</i> cases].</p> <p>The defence barrister at trial challenged the manner in which the crew were 'arrested' on <i>HMAS Jervis Bay</i>. The trial Judge ruled however that the AFP officers did not take the crew into custody during the journey from Ashmore to Darwin. The crew were simply in immigration detention and, not under arrest. The <i>Sukarni</i> case exemplifies 'the drill' that Australian authorities should anticipate at every intercept of a SIEV. The authorities refrain from asking questions and understand where immigration detention ceases & arrest begins. The Nominal Roll does however include recording the ages of all PII including that of the crew.</p> <p>My submission includes personal observation of information, <i>made public in open court</i> in 2011, during the district court trials of Indonesian crew charged with people smuggling offences. In one matter, a boarding officer testified that 'AFMA English/Indonesian language cards' were used when issuing the detention notice to the crew and that the Nominal Roll was taken of all PII on the SIEV.</p> <p>In a second matter, the defence conducted a <i>basha</i> to <i>cross-examine</i> the boarding officer, hoping to undermine his testimony about the events unfolding when issuing the detention notice to the Indonesian crew. The defence applied for the officer's entire statement to be ruled inadmissible under s.139(1) <u>Evidence Act</u>, arguing that the crew were not 'cautioned' when 'arrested'. The trial Judge rejected the argument, noting the exception under s.139(6) <u>Evidence Act</u> applied. The officer was not 'arresting' the crew but was carrying out a power under Australian law. The defence then argued that the Judge had discretion under s.90 <u>Evidence Act</u>, citing the authority of the HCA in the <i>Swaffield</i> and <i>Pavic</i> cases, to exclude the officer's evidence on the grounds of 'unfairness, having regard to the circumstances' that the crew were 'vulnerable', citing the HCA in the <i>Foster</i> case. The prosecution argued the officer was exercising a power to board the SIEV under s.245F <u>Migration Act</u>. The officer is not an 'investigating official' and ss.23A, 23B <u>Crimes Act</u> (Cmth) does not apply. The officer showed the crew the appropriate AFMA English/Indonesian translation cards. The crew acknowledged to the officer that they understood the cards explaining that they were being detained under Australian law. The Judge rejected the defence's application and allowed in evidence the officer's statement.</p> <p>In a third matter, the defence in <i>cross-examination</i>, sought to undermine the credibility of the boarding officer and attempted to enter into evidence a photograph of an accused crewman taken by someone after the intercept, also showing the name of the accused crewman and his age. On the <i>voir dire</i>, the evidence was that the age was transcribed from information recorded on the Nominal Roll taken by someone at the time of the intercept. The prosecution objected to the tender of the photograph, arguing</p>
--	--

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

	<p>that it was not part of the Crown case and it would not be adduced in evidence to identify the accused crewman. On the <i>voir dire</i>, the Judge noted the evidence-in-chief: the officer was not involved in the identification of the accused crew or in the taking of the Nominal Roll or, in taking the photograph. The photograph was inadmissible. The defence then argued that the photograph is a ‘business record’ and could be tendered as such in evidence. The Judge disagreed, as the recorded age on the photograph is heresay, being simply what someone wrote based on what someone told them at intercept. The boarding party did not test the information that someone else gave them. If the accused crewman gave the information, he could have been lying.</p> <p>In summary, the age of the accused crew will be recorded in the Nominal Roll at intercept of the SIEV and may be transcribed/transposed, but no assessment or determination of age can be said to have been undertaken.</p>
<p>(b) age assessments during investigations [by DIAC]</p>	<p>DIAC Records of Interview (ROI) typically contain details of the accused crewmen, including their age / d.o.b. These ROI are taken without giving the appropriate caution [s.23F Crimes Act (Cth)], so are typically inadmissible at trial.</p> <p>In one matter, on the <i>voir dire</i>, the accused crewman stated his d.o.b. during the DIAC ROI taken on Christmas Island – thereby recording his age as older than 18 years at the time of the intercept. The prosecution did not however adduce the DIAC ROI into evidence, as it was taken without caution to the accused crew and was therefore inadmissible. This state of affairs is not always the case.</p> <p>In another matter, the defence in its <i>Opening Address</i> to the Jury relied explicitly on the ROI between an accused crewman and DIAC. On the <i>voir dire</i>, the prosecution challenged this aspect of the defence’s opening and, arguing that the Crown could not have opened with such an un-cautioned ROI. The prosecution requested to call an additional witness from DIAC. The defence agreed, but wanted the video-recording of the ROI played in court. The defence would later play the video in open court, the accused speaking in a foreign language throughout. The defence also had the prosecution arrange for and tender a transcript of the DIAC ROI as evidence. In turn, the prosecution on the <i>voir dire</i>, referred to the otherwise inadmissible DIAC ROI. As the defence had opened with the contents of the DIAC ROI, the prosecution would be permitted to question a witness about the contents of the ROI.</p> <p>In a third matter, on the <i>voir dire</i>, the prosecution remarked that a procedure, similar to that undertaken at the boarding intercept, was undertaken on Christmas Island when DIAC interviewed the crew. The prosecution tendered on the <i>voir dire</i> the (other-wise) inadmissible DIAC ROI to support its counter to the defence’s argument concerning the detention procedure on the SIEV. The defence objected to the tender of the DIAC ROI arguing it didn’t arise in the <i>basha</i> cross-examination. The Judge, on the <i>voir dire</i>, allowed in the DIAC ROI.</p> <p>In summary, the DIAC ROI may record the ‘age/d.o.b.’ of the accused crew, but no age assessment or determination (‘under caution’) can be said to have been undertaken. Secondly, the DIAC ROI will not be admitted in evidence without leave of the court.</p>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

(c) age assessments tending to prosecution:

My submission will review the literature of physiological tests used to estimate age.

It is however worth noting that in the examples of the matters considered in this submission, the *witness testimony* is that the voyages embarked from central Indonesia with 5 – 6 crewmen but arrived at Ashmore with only 3 – 4 crewmen. See **Table 3**.

Table 3: SIEV Crew Statistics

Example Matter	#crew embarked	#crew get off @ Roti	#crew @ intercept
#1	6	2	4
#2	5	2	3

Testimony described these ‘jumpers’ variously as being ‘dominant’ on-board the respective voyages. In one matter, the corroborating passenger witness’ *evidence-in-chief* was that at least five men crew another boat eastwards before meeting the empty SIEV off Roti island. Two crewmen departed on that other boat to Kupang and, the remaining crewmen plus all the passengers get onto the SIEV to Ashmore. See **Map 5**.

One concern

A concern therefore arising from these accounts is that this Inquiry might make recommendations that play into the hands of those who are the organisers of people smuggling. Be wary if this Inquiry creates a situation for Australian agencies that allows ‘borderline’ adult crew to escape charge due to ‘*technically unacceptable*’ **age assessment errors** yet may perversely encourage organisers to staff future SIEVs on the **2nd leg of the voyage** with a majority of such crew (on ‘training runs’?). The crew so deported may simply become the next *kaptan* of a SIEV who gets off at Roti and who-in-turn send fresh juveniles into the arms of the RAN / BPC.

Map 5: Roti & Kupang (two centres for sourcing SIEV crew)



Source: Stacey (2007)

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Focused Review of Literature	<p><u>Literature Review: an introduction</u></p> <p>As I reviewed the literature* about the relation between physiological (skeletal or dental) measures and chronological age, I understood an important issue. It became obvious that this Inquiry should not evaluate clinical methods of age assessment <i>per se</i>, but examine how age assessment of ‘<i>Indonesian male youths facing prosecution who claim they are juveniles</i>’ is to be approached. [* Note, ‘author (year)’ are <i>published</i> papers].</p>
AHRC Discussion Paper	<p>This Inquiry should not be about how age assessment of ‘<i>claimed juveniles, both male & female, seeking asylum and refugee status</i>’ is approached. However we have this Inquiry’s Discussion Paper (December 2011) [at DP note 27] citing as reference the expert opinion of the “<i>first Children’s Commissioner for England ...into the circumstances of children and families seeking asylum</i>” in the UK. The expert opinion report by Aynsley-Green (2011) is for an accused crewman in the people smuggling case of <i>The Queen v Ako Lani, Ose Lani & John Ndollu</i>, [cited at DP note 5]. Critical of the radiological analysis of skeletal X-rays, authorised by the AFP in the <i>Ndollu case</i>, Aynsley-Green (2011)’s original emphasis [at page 5], states:</p> <p>“...radiology for age assessment is unethical, inaccurate, not fit for purpose..., and potentially unlawful....imaging of <u>bones or teeth</u> can NEVER tell <u>precisely</u> the chronological age”.</p> <p>However Aynsley-Green (2011) includes later in the same report [at page 11] comment by a colleague which Aynsley-Green (2011) <i>unreservedly agrees with</i>, that:</p> <p>“TW3 [Tanner-Whitehouse 3] is a sophisticated bone scoring method...both more accurate and up-to-date than Grulich-Pyle [skeletal bone atlas]”</p>
UK asylum context	<p>In conclusion, in the UK asylum-seeker setting, Aynsley-Green (2011)’s ultimate recommendation in his report for the <i>Ndollu case</i> is for age assessment that is a “<u>holistic multi-professional approach</u>” [at page 17]. (Note, <u>underlining</u> is my emphasis).</p> <p>Aynsley-Green (2009) wrote a ‘Letter to the Editor’ titled “<u>Unethical Age Assessment</u>” published in the British Dental Journal [Vol.206 No.7 April 11 2009]. This letter followed upon an earlier ‘Letter to the Editor’ [Vol.205 No.11 December 13 2008] from Cole (2008) titled “<i>Hot Potato Topic</i>”. What was the issue?</p> <p>It was a paper by Roberts et al (2008) headed “<i>Dental Age Assessment (DAA):...</i>” also published in the British Dental Journal. Cole (2008) had written about the Roberts et al (2008) paper, saying:</p> <p>“...methodological weaknesses of the [DAA] method described by Roberts et al make it unsuitable for assessment of dental age...particularly in emerging adults”</p> <p>In the same 2008 edition of the Journal, Roberts et al (2008) responded, as follows:</p> <p>“...to date, our approach has provided one of the most accurate estimates of age. This is supported by the excellent results obtained when we [compared it to] subjects of <u>known chronological age</u>”</p> <p>In the letter to the Editor, “<u>Unethical Age Assessment</u>” as cited above, Aynsley-Green (2009) wrote that the UK Government “<i>faces a serious practical dilemma in deciding</i></p>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

how to manage an individual seeking asylum who claims to be a child, yet who may not have evidence...to document age”

Aynsley-Green (2009) added that the government is “...*seeking a [objective evidence-based] method which will tell with great sensitivity the precise ‘age’ of the person, but sadly in focusing on dental X-rays they do not have what they are seeking...*”

Aynsley-Green (2009) recommends instead that age assessment “...*be performed...in a holistic way led by trained social workers who can interpret the narrative of the individual’s circumstance, coupled with expert paediatric, psychological and education assessment to determine the needs of the individual...*”.

Two of the authors of the Roberts *et al* (2008) paper, namely **Roberts, G. & Lucas, V. (2009)** make a lengthy and detailed rejoinder to Aynsley-Green (2009), entitled “*Ethical Dental Age Assessment*” published in the British Dental Journal [Vol.207 No.6 September 26 2009] that “...*Professor Sir Aynsley-Green...has long been an opponent of age assessment using dental radiographs*”. Robert & Lucas (2009) reject Aynsley-Green (2009) as being “*misleading exaggeration*”, “*gross overstatement*”, “*incorrect*” and “*not true*”.

Roberts & Lucas (2009) added that “...*the proposal to assess the age of children ‘...in a holistic way...’ would be acceptable if there was any evidence that this method were of value...it has not been possible to find any objective research indicating the reliability of age estimates using this holistic method...In this day of evidence-based clinical practice this is a fatal shortcoming and...unacceptable...*”.

The UK refugee system might take months for social workers to perform their holistic age assessment. Unlike the UK context, this Inquiry is not concerned with juveniles seeking asylum and refuge. This Inquiry is concerned with claimed ‘juvenile’ crew who are detained for potential charge / charged on very serious criminal matters and who are being held respectively in Australia’s adult detention camps / jails. So why don’t the authorities just move those crew claiming juvenile status to facilities housing children whilst their claim is assessed? Roberts & Lucas (2009) make the point:

“...[detained] *young men in their twenties claiming to be under [age] ...may be placed in close association with young girls and boys who will not have the maturity to cope with the behaviour exhibited by these men. This is an aspect of age assessment that Sir Albert has overlooked*”.

Importantly, asylum seekers are not charged with any criminal offence. By contrast, people smuggling is a serious crime. The accused crewmen are answering to that allegation, if charged. There are some very real differences between seeking asylum and defending potential criminal charges of facilitating people-smuggling. These are along a spectrum from ‘age assessment’, through ‘credibility evaluation’ to ‘the burden of proof’ (and ‘the balance of probabilities’). On these latter points, see the case of *AJ v The Queen* as discussed at **Response to Term of Reference (h)**.

“Assessing age or Assessing needs”: a literature review

Based on systematic PubMed searching, **Brendler-Lindqvist (2010)** (hereafter ‘**B-L’ (2010)**) carried out a literature review of the skeletal/dental/holistic methods of age assessment of Unaccompanied Asylum-Seeking Children (UASC). Of a total of 162

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Systematic PubMed literature search

web-hits/articles found, 13 articles were considered relevant and contemporary by B-L (2010). The 13 articles are listed below in **Table 4**.

B-L (2010) makes plain that her review does not include all literature about the relation between physiological measures and chronological age. Rather her focus is age assessment of asylum-seeking *children still living*, especially UASC whose chronological ages are unknown or *undocumented*.

Table 4: Literature Review of Age Assessment of UASC

#	Author	Publication Type	Methods Addressed	Publication
1	Aynsley-Green (2009)	Letter	Holistic approach	Br Dental J.
2	Benson & Williams (2008)	Case report	Holistic approach	Aust. Fam. Physician
3	Cole (2008)	Letter	Dental age assessment	Br Dental J.
4	Garamendi <i>et al.</i> (2005)	Reproducibility of results	Skeletal & Dental age assessment	Forensic Sci. Int.
5	Michie (2005)	Review	Holistic approach	Arch. Dis. Child
6	Olze <i>et al.</i> (2006)	Review	Dental age assessment	Forensic Sci. Int.
7	Roberts <i>et al.</i> (2008)	Research	Dental age assessment	Br Dental J.
8	Roberts & Lucas (2009)	Letter	Dental age assessment	Br Dental J.
9	Santoro <i>et al.</i> (2009)	Retrospective study	Skeletal & Dental age assessment	Forensic Sci. Int.
10	Schmeling <i>et al.</i> (2001)	Commentary	Skeletal & Dental age assessment	Lancet
11	Schmeling <i>et al.</i> (2003)	Retrospective study	Skeletal & Dental age assessment	Leg. Med.
12	Schmeling <i>et al.</i> (2006)	Review	Skeletal age assessment	Forensic Sci. Int.
13	Solheim & Vonen (2006)	Forensic methods & standards/ quality control	Dental age assessment	Forensic Sci. Int.

Source: B-L (2010)

Skeletal Age Assessment

B-L (2010) cites **Benson & Williams** (Table 4; #2) as authority for (i) variations in sexual maturation influencing the variation in skeletal age and (ii) the difficulty of age estimation after the adolescent period because ‘changes in the carpals’ (of the hand) are not clear. This latter point means the X-ray of the hand/wrist using the ‘Greulich-Pyle method’ cannot be used to assess age after a ‘fusion of the epiphyseal plates’ (wrist joints) which occurs at the mean age of 18 years in boys. B-L (2010) cites **Schmeling *et al*** (12) as authority for this latter point and for the standard deviation of the Greulich-Pyle method being 1.1 years *for boys at higher ages*.

In addition, as cited by B-L (2010), according to Schmeling *et al* (12), an X-ray or CT of the ‘sternal end of the clavicle’ is recommended in boys thought to be older than 18 years. According to **Santoro *et al*** (9), as cited by B-L (2010), an X-ray of the pelvis in addition to the hand/wrist is useful in “*borderline cases of sub-adult [males]*” as the ‘iliac crest’ appears at 16 years and fuses with the ‘iliac bone’ at 19 years; whilst the ‘iliac tuberosity’ appears at 17 years and fuses at 20 years. I observe however that a range of 16/17 – 19/20 years would appear to be of limited value if this Inquiry’s task is

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Social & Ethnic variation	<p>recommending methods of “<i>precisely</i>” assessing age to fall one side or the other of a crewman’s 18th birthday. Perhaps, this Inquiry might define ‘age determination’ to be the ‘<i>lower bound</i>’ (vis-à-vis the ‘upper bound’) of <i>probable</i> physiological ages for a crewman? So giving the ‘juvenile’ the maximum <i>benefit of the doubt</i>. Contrast, the ‘<i>mid-point of the range</i>’ being the ‘least extreme’ / ‘error prone’ estimate of age.</p> <p>Of particular interest to the Inquiry is the social & ethnic variation of bone development, given its target group is almost without exception the Indonesian male youth of Nusa Tenggara Timur province. B-L (2010) cites Garamendi <i>et al</i> (4) for reviewing a large number of studies on the impact of racial, ethnic and socioeconomic factors and finding the results to be contradictory. But according to Schmeling <i>et al</i> (11, 12), as cited by B-L (2010), delays in bone development are a result of <u>low socioeconomic status</u>, not ethnicity. If that is the case, skeletal age tests would <u>underestimate chronological age</u> and would <u>work-in-favour</u> of crew receiving an (under-18) age assessment result. For more, see Jahari <i>et al</i> (2000) as to effects of low nutrition on Indonesian infants’ skeletal development.</p>
Age Estimation error types	<p>The part of Garamendi <i>et al</i> (4) which I found most useful to this Inquiry is the distinction that these authors draw between “<i>technically unacceptable errors</i>” and “<i>ethically unacceptable errors</i>”. From a practical perspective, ‘technically unacceptable errors’ (i.e. ‘false negative results’) would see a crewman over 18 years assessed as a juvenile and thereby avoiding charge. Whereas ‘ethically unacceptable errors’ (i.e. ‘false positive results’) would have a crewman under 18 years assessed as an adult, charged & remanded as such, and perhaps convicted & jailed as an adult. In my submission, this Inquiry should regard that its primary task is to recommend processes and procedures that <u>eliminate ‘ethically unacceptable errors’</u>.</p> <p>‘Technically unacceptable errors’ however present a dilemma for this Inquiry. On the one hand, some might say that sending home a crewman over 18 years who is mistakenly assessed as a juvenile is unimportant. On the other hand such a crewman, having done his ‘training run’ and sent home, may simply become the next <i>kaptan</i> of a SIEV who gets off at Roti, and who-in-turn sends fresh juveniles into the arms of the RAN / BPC.</p>
Third molars: Demirjian stages	<p style="text-align: center;"><u>Dental Age Assessment</u></p> <p>B-L (2010) cites Olze <i>et al</i> (6) for recommending assessment of the degree of maturity of teeth using the ‘<i>Demirjian method</i>’. In late adolescence (after 17 years), assessment of dental age can be based on the ‘<i>third molars</i>’, as these are the only teeth which are continuing to form (i.e. denoted by Demirjian as ‘Stage G / H’). Other studies indicate a standard deviation of about two years for third molar formation. Solheim & Vonen (13) is cited by B-L (2010), for the methods used for dental age assessment in Norway and these methods yield a standard deviation of about two years. In Norway, the <u>lower bound</u> of the dental age estimate is used for age assessment. See Kvittingen (2010), p.18</p> <p>Also mentioned by B-L (2010), it is useful to appreciate that the presence (or absence) of the first and second molars may possibly influence the formation of the third molar. In the studies sourced by B-L (2010) there was however considerable disagreement regarding the importance of racial, ethnic and socioeconomic/nutritional factors upon dental maturation. For example, Roberts <i>et al</i> (7) claim external conditions only have minimal effect on dental age. Solheim & Vonen (13) disagree, believing that “<i>ethnic difference means less than individual variation</i>”.</p>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

<p>Statistics vis-à-vis Verification</p>	<p><u>Combination of Methods</u></p> <p>Santoro <i>et al</i> (9), as cited by B-L (2010), compared assessed age by physical examination, X-ray of hand/wrist, dental development and, X-ray of pelvis to find ‘<i>statistically significant differences</i>’. Schmeling <i>et al</i> (11) did the same comparisons against ‘verified chronological age’ and found a deviation between estimated and verified age of +/- 12 months in all but a few cases; and where <u>the difference</u> was greater than 12 months, it was <u>attributable to the verification sources not the age assessment</u>. Garamendi <i>et al</i> (4) likewise found a mean difference of 1.07 years between hand/wrist X-ray and verified chronological age, with a standard deviation of 1.76 years. However, Garamendi <i>et al</i> (4) cast <u>doubt on the (Moroccan) Birth Registration records as veracity of chronological age</u>. This latter point is quite important in the context of this Inquiry. See the Response to Term of Reference (d) wherein doubts about the veracity of Indonesian identity records might be very real. Also see Hailu <i>et al</i> (2011) as to the same issue with Ethiopian birth records.</p>
<p>Opposing camps in the UK asylum system</p>	<p><u>Holistic Evaluation</u></p> <p>The proponents of holistic evaluation, cited by B-L (2010), include Benson & Williams (2), Aynsley-Green (1) and Michie (5). Benson & Williams (2) presented an ‘age assessment tool’ which is underpinned by the ‘parent’s narrative account’ of the child’s upbringing. B-L (2010) sees a practical problem using such a tool where the child is an UASC; let alone an Indonesian crewman telling his story hoping to avoid a serious criminal charge! In any case, this ‘age assessment tool’ has accuracy “<i>within a range of approximately two years</i>”. More so, its authors add that the result “<i>should be expressed for educational purposes only</i>”. If only this Inquiry’s task was “<i>...education assessment to determine the needs of the individual [Indonesian crewman]</i>”, it would be so much easier to achieve recommendations.</p> <p>B-L (2010) confirm the Aynsley-Green (1) holistic evaluation approach, as cited above, and cite the Michie (5) approach as one which recommends trained assessors at major ports of entry, being “<i>social workers experienced with adolescents, accountable to and audited by a child protection team with paediatric opinion available to them in some form</i>”.</p> <p>The opponents of holistic approaches include Roberts & Lucas (8), as mentioned above. B-L (2010) doesn’t take sides in the argument, simply noting that <u>physiological measures</u> focus on establishing the chronological <u>age as accurately as possible</u>, whereas the focus of the <u>holistic</u> approaches is on <u>evaluating the needs</u> of the individual. For example, the Benson & Williams (2) approach “<i>will ensure [individuals receive]...correct vaccinations, [that they] are taught at suitable schools and are appropriately served by ...hospitals, and dentists</i>”.</p> <p>It appears to me that opposing supporters of physiological measures versus holistic approaches would be talking at cross-purposes when it comes to <i>age assessment of Indonesian crew detained on potential people-smuggling charges</i>.</p> <p><u>Other Literature: European developments</u></p> <p>I have examined dozens of articles on the topic of Forensic Age Estimation (FAE) of the living, enough to know that the experts disagree about age assessment methods. See Appendix B: References (Age Assessment).</p>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

AGFAD	<p>In particular, I urge this Inquiry to also examine the sample of 10 published works listed in Table 5, including, the guidelines by Schmeling et al (Table 5; #23). I note that Black et al (2010) indicates “...there is <u>no doubt that Germany leads</u> with regard to the research ... This [German] study group has given recommendations for forensic age estimation in [the] living...”. According to recommendations of the Study Group on Forensic Age Diagnostics (Arbeitsgemeinschaft für Forensische Altersdiagnostik, AGFAD), “age estimations for living adolescents and young adults should consist of a physical examination (including anthropometric data, signs of sexual maturation, and potential age-relevant developmental disorders) and a radiograph of the left hand, as well as a dental examination, including recording of the dentition status and evaluation of an orthopantomogram. At the age of 18, the hand ossification, third molar mineralization, and sexual maturation should be complete”. [ref. Ward (2011)].</p> <p style="text-align: center;">Table 5: Sample of Other Literature Reviewed</p> <table border="1" style="width: 100%; border-collapse: collapse; margin-bottom: 10px;"> <thead> <tr> <th style="width: 5%;">#</th> <th style="width: 20%;">Author</th> <th style="width: 25%;">Publication Type</th> <th style="width: 20%;">Methods Addressed</th> <th style="width: 30%;">Publication</th> </tr> </thead> <tbody> <tr> <td>14</td> <td>Andrade & Ferreira (2011)</td> <td>Bivariate research use of confidence intervals</td> <td>Combined Skeletal & Dental age assessment</td> <td>Int. J. Acad. Research</td> </tr> <tr> <td>15</td> <td>Giordano <i>et al.</i> (2009)</td> <td>Automated TW2 Research</td> <td>Skeletal age assessment</td> <td>MEMEA IEEE</td> </tr> <tr> <td>16</td> <td>Gurdeep <i>et al</i> (2010)</td> <td>Automated CT Clavicle Research</td> <td>Skeletal age assessment</td> <td>J. Indian Acad Forensic Med.</td> </tr> <tr> <td>17</td> <td>Hillewig <i>et al</i> (2011)</td> <td>Automated MRI Clavicle Research</td> <td>Skeletal age assessment</td> <td>Eur Radiol</td> </tr> <tr> <td>18</td> <td>IOM Vienna (2006)</td> <td>UASC Resource Book for European law enforcement</td> <td>Combination of Psychosocial Interview, Skeletal & Dental age assessment</td> <td>AGIS 2005 Project</td> </tr> <tr> <td>19</td> <td>Nicoletti (2007)</td> <td>Scoring percentiles Presentation</td> <td>Skeletal age assessment</td> <td>Inst. Legal Med.</td> </tr> <tr> <td>20</td> <td>Niemeijer <i>et al</i> (2003)</td> <td>Automated TW Research</td> <td>Skeletal age assessment</td> <td>SPIE Med. Imaging</td> </tr> <tr> <td>21</td> <td>Prieto (2007)</td> <td>Third Molar incl. IOFOS, Presentation</td> <td>Dental age assessment</td> <td>Inst. Legal Med.</td> </tr> <tr> <td>22</td> <td>Röttscher & Grundmann (2007)</td> <td>Review</td> <td>Skeletal & Dental age assessment</td> <td>Int Poster J Dent Oral Med.</td> </tr> <tr> <td>23</td> <td>Schmeling <i>et al.</i> (2000)</td> <td>FAE Guidelines in Criminal Proceedings</td> <td>Physical Examination, Skeletal & Dental age assessment</td> <td>AGFAD</td> </tr> </tbody> </table>	#	Author	Publication Type	Methods Addressed	Publication	14	Andrade & Ferreira (2011)	Bivariate research use of confidence intervals	Combined Skeletal & Dental age assessment	Int. J. Acad. Research	15	Giordano <i>et al.</i> (2009)	Automated TW2 Research	Skeletal age assessment	MEMEA IEEE	16	Gurdeep <i>et al</i> (2010)	Automated CT Clavicle Research	Skeletal age assessment	J. Indian Acad Forensic Med.	17	Hillewig <i>et al</i> (2011)	Automated MRI Clavicle Research	Skeletal age assessment	Eur Radiol	18	IOM Vienna (2006)	UASC Resource Book for European law enforcement	Combination of Psychosocial Interview, Skeletal & Dental age assessment	AGIS 2005 Project	19	Nicoletti (2007)	Scoring percentiles Presentation	Skeletal age assessment	Inst. Legal Med.	20	Niemeijer <i>et al</i> (2003)	Automated TW Research	Skeletal age assessment	SPIE Med. Imaging	21	Prieto (2007)	Third Molar incl. IOFOS, Presentation	Dental age assessment	Inst. Legal Med.	22	Röttscher & Grundmann (2007)	Review	Skeletal & Dental age assessment	Int Poster J Dent Oral Med.	23	Schmeling <i>et al.</i> (2000)	FAE Guidelines in Criminal Proceedings	Physical Examination, Skeletal & Dental age assessment	AGFAD
#	Author	Publication Type	Methods Addressed	Publication																																																				
14	Andrade & Ferreira (2011)	Bivariate research use of confidence intervals	Combined Skeletal & Dental age assessment	Int. J. Acad. Research																																																				
15	Giordano <i>et al.</i> (2009)	Automated TW2 Research	Skeletal age assessment	MEMEA IEEE																																																				
16	Gurdeep <i>et al</i> (2010)	Automated CT Clavicle Research	Skeletal age assessment	J. Indian Acad Forensic Med.																																																				
17	Hillewig <i>et al</i> (2011)	Automated MRI Clavicle Research	Skeletal age assessment	Eur Radiol																																																				
18	IOM Vienna (2006)	UASC Resource Book for European law enforcement	Combination of Psychosocial Interview, Skeletal & Dental age assessment	AGIS 2005 Project																																																				
19	Nicoletti (2007)	Scoring percentiles Presentation	Skeletal age assessment	Inst. Legal Med.																																																				
20	Niemeijer <i>et al</i> (2003)	Automated TW Research	Skeletal age assessment	SPIE Med. Imaging																																																				
21	Prieto (2007)	Third Molar incl. IOFOS, Presentation	Dental age assessment	Inst. Legal Med.																																																				
22	Röttscher & Grundmann (2007)	Review	Skeletal & Dental age assessment	Int Poster J Dent Oral Med.																																																				
23	Schmeling <i>et al.</i> (2000)	FAE Guidelines in Criminal Proceedings	Physical Examination, Skeletal & Dental age assessment	AGFAD																																																				
IOFOS	<p>Presentations by Nicoletti (19) and Prieto (21) are excellent for relaying respectively skeletal age (atlases vis-à-vis scoring) statistical concepts and ‘third molar’ dental age estimates. Prieto (21) also refers to dental age ‘<i>Quality Assurance</i>’ guidelines; see IOFOS (2008). Röttscher & Grundmann (22) reviews skeletal & dental age assessment methods-used-in-combination. Andrade & Ferreira (14), Giordano et al (15), Gurdeep et al (16), Hillewig et al (17) and Niemeijer et al (20) point in the direction of automation of skeletal age assessment.</p>																																																							
IOM Vienna	<p>The Resource Book compiled by the IOM Vienna (18) is a practical guide (esp. pg.63-64). It illuminates what is achieved by European investigatory agencies at least since 2006, including the ‘<i>conditions, preparations and use of evidential interviews</i>’ (ref. pg.119-153). It (at pg.59) gives the relative cost of X-ray / Computed Tomograph, CT / MRI; and quantifies the relative “effective dose” of radiation exposure of X-ray</p>																																																							

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

(hand)/orthopantomogram OPG (dental) / X-ray / CT (clavicle). See **Table 6**.

Table 6: Examination cost and Radiation dose

Examination Costs	
Hand X-ray, max. three images	57.67 Euro
Chest X-ray, posterior/anterior & oblique	40.10 Euro
Single slice CT max. 30 slices	225.61 Euro
Multislice CT max. 300 slices	175.54 Euro
MRI, the first sequence	405.39 Euro
“Effective Dose” of Radiation	
X-ray, left hand	0.1 μSv
Dental OPG	26 μSv
X-ray, clavicle	220 μSv
CT, clavicle	600 μSv [^]

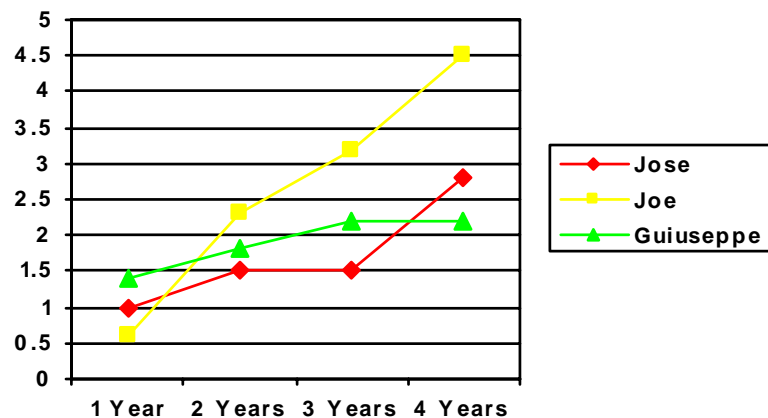
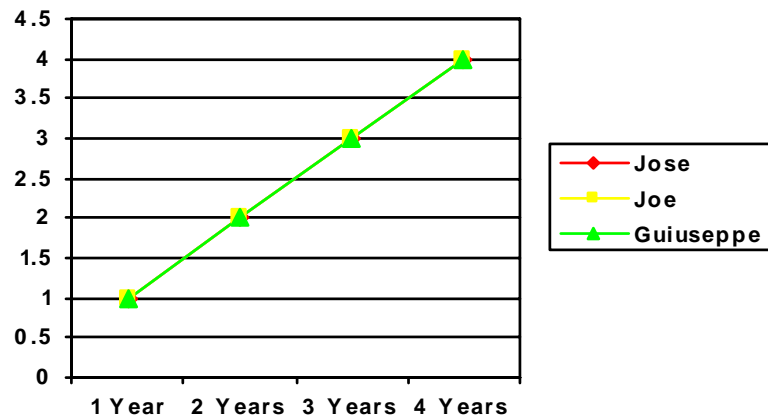
Source: IOM Vienna (2006), pg.59

[^] the Resource Book notes that dose is too high and may be difficult to implement legally

In reviewing the literature, the clichéd criticism of age assessment methods is their **non-linear relation** with **chronological age**. Prieto (21) responds quite elegantly in two *stylistic* charts, as seen below. Chronological age (the upper chart) follows its inexorable course be it for ‘Jose, Joe, or Guiuseppe’. Biological age (the lower chart) follows a more irregular & non-constant path, different each for ‘Jose, Joe and Guiuseppe’. Prieto however notes the “*temporal variability of development stages is limited due to genetic control...this variability...[is] inside predictable margins*”.

**Cost versus
Radiation**

**Linear versus
Non-Linear**



Source: Prieto (2007), ppt. slide 9

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

<p>Ethical considerations</p>	<p>In closing this Response to Term of Reference (c), as clearly there is no single answer, I refer the Inquiry to one of the more curious articles in my literature review. Weale (2001) refers to the Schmeling et al (2001) examination of skeletal age but reminds the interested reader of the early life of the <i>post-Impressionist</i>, Henri de Toulouse-Lautrec. <i>Reputedly</i>, his legs ceased to grow at age 14 so that as an adult he was only 1.5 metres tall, having developed an adult-sized torso while retaining his child-sized legs which were only 0.7 metres long. He however had hypertrophied genitals. There would no doubt be some ethical considerations in making an age assessment based on physical examination alone, were there to be such a pint-sized Indonesian crewman with an enlarged scrotum! Weale suggests that three attributes of the eye (<i>‘lacrimation, fluorescence of the cornea and lens, and accommodation’</i>) offer linear change with chronological age and present opportunities for <u>non-invasive assessment</u>. Weale notes the need for <u>specialist equipment and training</u> to assess <i>‘age...and crime’</i>.</p>
<p>(d) processes to contact parent/guardian and obtain age assessment documentation:</p>	<p>The Inquiry’s desire is no doubt that processes be instituted to contact the parent/guardian of the accused crewman claiming to be under 18 years old, and for identity documentation to support age assessment to be sourced from Indonesia. There are complications that might arise: locating the parent/guardian; the veracity of documentation; and interpreting language in the local <i>daerah</i> (dialect / <i>creole</i>) of the crewman. The matters considered in my submission highlight these issues.</p>
<p>Locating the parent/guardian</p>	<p>On the issue of parent/guardian, in one matter, the crewman’s uncorroborated <i>testimony</i> was that he resides in Kupang, having left his home-village on Flores island a decade earlier, when his dad died. His mum sent him, as a mere child, to be raised by an unrelated person in another village. Upon ending his schooling early, this crewman left Flores and went to Kupang looking for work. A few years later, he was recruited in the Kupang marketplace for the boat voyage. He had no contact with his mum.</p>
<p>Lack of Birth Registration</p>	<p>In any case, even if the parent/guardian is contacted, the sourcing of a crewman’s birth certificate is possibly going to be a frustrating endeavour. UNICEF (2010) using the latest 2004 data, reports that <i>“in Indonesia, 60 per cent of children under five years are not officially registered at birth. Although born in Indonesia of Indonesian parents, these children have no legal identity. Indonesia ranks in the bottom 20 countries of the world in its registration of children and the problem is worse in rural areas [such as NTT province where most crew hail from]”</i>.</p> <p>UNICEF adds that <i>“birth registration in Indonesia was only made officially free of charge in 2002 when the Law on Child Protection was adopted. A new administration in 2006 provided for free birth registration for newborns up to two months old. The government has further committed for all children in Indonesia to be registered by 2011. The number of local governments who have introduced free of charge birth certificates has increased from 16 districts in 2005 to more than 300 districts in 2009. Amongst those localities that have introduced birth registration programmes there are (however) broad definitions of the age by which registration should have taken place – from...two months up to 18 years old”</i>.</p> <p>All these positive developments come too late for the crew today claiming juvenile status. If their birth registration is late / non-existent, it could put in doubt the accuracy of age/d.o.b. on any identity document for a crewman, including their school records (assuming they went to school?) and even their Republic of Indonesia Resident</p>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

<p>Veracity of documents</p>	<p>Identity Card (Kartu Tanda Penduduk, KTP). The dark rose-coloured horizontal bars on the right-hand side of Chart 1 show that the occurrence of ‘<i>overage</i>’ children (i.e. children starting school late) in rural Indonesia was quite prevalent in 2003. One <i>suspects</i> the incidence of such in the 1990s may have been even higher, so casting doubt on school records as an accurate marker of age. In that case, investigators would fall back on the memories of the parent/guardian as to when the crewman was born, some 16 to 20+ years earlier. One could challenge the veracity of an affidavit by a parent/guardian as to the d.o.b. of a crewman, if it lacks evidence-based information.</p> <p>Chart 1: Overage Rural Children in Indonesia (right-hand side, dark rose-bars)</p> <p style="font-size: small;">Note: Official primary school ages: 7 to 12 years; official secondary school ages: 13 to 18 years. Source: DHS, 2002/03</p> <p style="text-align: right; font-size: small;">Source: UNESCO (2005)</p>
<p>Judicial discretion</p>	<p>In any case, the parent/guardian witness statement may be challenged if the witness is out of State and unavailable by video/audio link to testify. A trial Judge has discretion to admit the statement or not: see <i>Chaudhry v The Queen</i>. The judiciary also has discretion to give a ‘<i>Liberato Direction</i>’ to the Jury when there is conflict between the evidence of a defence witness and that of a prosecution witness: see <i>Kia v The Queen</i>.</p>
<p>Secondary evidence of birth certificate</p>	<p>The appellate court case of <i>Stoykovski [AFP] v “M” [a child]</i> explicitly examined proof of age by weighing-up the (secondary) evidence of Indonesian birth record versus the hand & wrist X-ray. The court, citing <i>Cross on Evidence</i> for when a (birth certificate) document is lost and <i>cannot be found after due search</i>, thought the document may be proved by secondary evidence where that evidence is not heresay. In this case, the credibility of M’s testimony outweighed the skeletal age estimation.</p>
<p>Interpreting languages of NTT province</p>	<p>On the issue of language, in one matter on the <i>voir dire</i>, the defence’s submission was that the quality of Indonesian language interpreting on Christmas island was ‘sub-standard’ during the time when the accused crewman gave his ROI to DIAC. According to the defence, on the <i>voir dire</i>: In the presence of a DIAC interviewing officer and a <i>Bahasa Indonesian</i> interpreter, the crewman spoke in an (unnamed) Indonesian daerah (i.e. dialect/creole) when talking on the telephone to his relative</p>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Kupang Malay	<p>back in Indonesia. The interpreter was unable to understand and translate to the officer what the accused was saying to the relative.</p> <p>In another matter, an accused crewman gave uncorroborated <i>testimony</i> of being born in a village on Flores island, of residing now in Kupang and, that whilst on the SIEV he did not understand the other Indonesian crewmen [who when together apparently spoke <i>Rotinese</i>]. He testified however to having conversed once/twice [communicating presumably in <i>Kupang Malay creole</i>] with the youngest of these Roti crewmen, when the latter pointed out his village on the shore of Roti island.</p> <p>In a third matter, the Bahasa Indonesian interpreter, supplied by the CDPP, was <i>affirmed to interpret</i> for the accused crewman in the dock. There was nothing put on-the-record regarding this interpreter’s qualifications or accreditation. On the <i>voir dire</i>, the defence foreshadowed a problem, submitting that this interpreter had earlier remarked to the AFP of the difficulty this interpreter had interpreting and communicating with the crewman.</p> <p>Another Bahasa Indonesian interpreter was later <i>affirmed as an expert witness</i>. The interpreter confirmed their qualifications as Professional Interpreter (i.e. old ‘NAATI Level 3’). The interpreter gave <i>testimony</i>, that:</p> <ul style="list-style-type: none"> (i) the accused crewman spoke a ‘creole’ of Kupang; and (ii) the interpreter had done research into Bahasa Kupang Malay to assist with the interpreting for this accused crewman. <p>The placename of Kupang arises repeatedly in people-smuggling trials. It is therefore considered prudent in the context of this Response to Term of Reference (d) to examine the language that crew from Kupang commonly speak.</p> <p>Indications are Bahasa Kupang Malay is a <u>different</u> language to Bahasa Indonesian: Whilst 19% of 3200 Bahasa Kupang Malay headwords are <i>exactly the same as</i> standard Bahasa Indonesian, 55% are <i>very different from</i> standard Indonesian; 26% are <i>similar to</i> standard Indonesian words, but there are slight differences in its pronunciation, its spelling, its behaviour in the grammar, its use, or its range of meaning;</p> <ul style="list-style-type: none"> 11% are <i>idioms</i> that reflect figurative meanings; 54% are composed of single words; 36% are composed of <i>phrasal lexemes</i> (2 or more words); 24% are <i>borrowing from other languages</i> (other than Malay or Indonesian); 10% are borrowed from <i>Rote languages</i>; 8% are borrowed from <i>Dutch</i>; 1% is borrowed from <i>Portuguese</i>; and 7% have <i>variant forms</i> in Kupang (e.g. <i>batong ~ botong</i>). <p style="text-align: right;"><small>Source: Grimes, C. , Jacob, J. (2008)</small></p> <p>We in the West might know of the word, ‘<i>Malay</i>’. Yet it is a rather ambiguous term. Malay is not only the language of Malaysia, i.e. the <i>Bahasa Melayu</i>. It has more than a dozen language variants, including Bahasa Indonesian and Bahasa Kupang Malay.</p> <p>Bahasa Indonesian is of course the <u>official</u> language of Indonesia. It is the language of government, the courts and big business. So much so, that for Indonesians, to be speaking Bahasa Kupang Malay is to be speaking ‘<i>broken Indonesian</i>’. The latter term translates as ‘<i>Bahasa Indonesia yang rusak</i>’.</p>
--------------	---

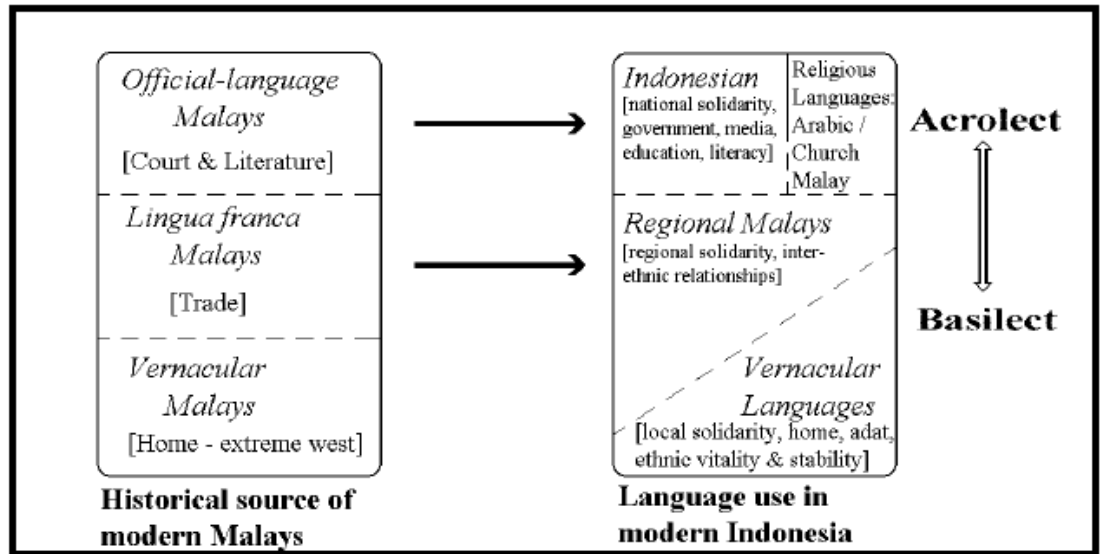
Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

A fisherman, born & resident of Kupang would likely know Bahasa Kupang Malay is also the language of the traders in Kupang's Oeba marketplace, that is, the *Bahasa Pasar* (literally the 'market language'). Bahasa Kupang Malay is a language without link to any single ethnic group. It is an inter-ethnic *lingua franca*. It is a Malay-based pidgin that has evolved into a creole. It is adopted by persons whose grandparents/parents moved to live and work in the Kupang area of NTT province. In a sort of post-creole continuum, speakers slide back & forth between 'high form' Bahasa Indonesian and 'lower form' Bahasa Kupang Malay.

Diagram 2 shows that Trade language (Kupang Malay) sits between the Official language (Indonesian) and vernacular Malays found today in western Indonesia (Sumatra) and in the immediately adjacent nation state of Malaysia.

Diagram 2: Sources and Uses of Malay

Post-creole
continuum



Source: Jacob, J., Grimes, B. (2006)

The **popular use of Bahasa Kupang Malay** among the residents of Kupang is reflected in the following story from contemporary school children in Kupang:

Kotong Bakawan

Beta pung nama Legowo, ma dong pange sang beta, bilang Ook. Beta lahir di Kupang. Beta pung orang tua tu, orang Jawa. Be pung tamán, ampa orang; andia Udin, Richard, Bagus deng Edi. Udin pung papa-mama orang Ende; Richard orang Rote; Bagus orang Bali; deng Edi orang Sabu.

Beta sonde bisa basa Jawa; Udin sonde bisa basa Ende; Richard sonde bisa basa Rote; Bagus sonde bisa basa Bali; Edi ju sonde bisa basa Sabu. Kotong ba'omong pake basa Kupang sa.

Hari-hari kotong bamaen di SMU I. Kotong bamaen kalereng, kayu do'i, deng bola kaki. Kalo su cape bamaen, kotong dudu-dudu maen gila di bawa pohong kadondong utan. Richard ana yang lucu, bekin kotong katawa sampe parú saki. Kotong bakawan, sonde parná bakalai.

We're Friends

My name is Legowo, but they call me Ook. I was born in Kupang. My parents are Javanese. I have four friends, who are: Udin, Richard, Bagus and Edi. Udin's parents are from Ende; Richard is [ethnically] from Rote; Bagus is Balinese; and Edi is from Sabu.

I can't speak Javanese; Udin can't speak Ende; Richard can't speak Rote; Bagus can't speak Balinese; and Edi can't speak Sabu. We just talk to each other using Kupang Malay.

Each day we play at school. We play marbles, flip stick, and football. When we're tired playing,

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Map 7: Languages of NTT province (with enlargement of Flores)



Language data from Centre for Regional Studies, Universitas Kristen Artha Wacana (1997)

Source: Lewis

More on the Indonesian language and four variant languages

(Bahasa) Indonesian

A language of Indonesia (Java and Bali islands)

ISO 639-3: [ind](#)

[Ethnic Population](#)

22,800,000 in Indonesia (2000). All countries: 23,187,680.

[Region](#)

Widespread in Indonesia. Also in Netherlands, Philippines, Saudi Arabia, Singapore and, the United States.

[Alternative names](#)

Bahasa Indonesia

[Classification](#)

Austronesian, Malayo-Polynesian, Malayo-Sumbawan, North and East, Malayic, **Malay**

[Language use](#)

Official national language. Over 140,000,000 L2 speakers.

[Language development](#)

Fully developed. Bible: 1974–2000.

[Writing system](#)

Arabic script. Latin script.

[Comments](#)

Reportedly modeled on Riau Malay [[zlm](#)] of northeast Sumatra. Has regional variants. Over 80% cognate with Standard Malay [[zsm](#)]. Muslim.

(Bahasa) Kupang Malay

A language of Indonesia (Nusa Tenggara Timur NTT province)

ISO 639-3: [mkn](#)

[Ethnic Population](#)

200,000 (1997 M. Jacob).

[Region](#)

West Timor island, Kupang area.

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

<p>Alternative names</p> <p>Dialects</p> <p>Classification</p> <p>Language use</p> <p>Language development</p> <p>Writing system</p> <p>Comments</p>	<p>Basa Kupang, Kupang</p> <p>Air Mata. 2 dialects.</p> <p>Austronesian, Malayo-Polynesian, Malayo-Sumbawan, North and East, Malayic, Malay, Trade, East Indonesian</p> <p>Vigorous. L2 speakers. All domains. All ages.</p> <p>Newspapers. Radio programs. Dictionary (2007).</p> <p>Latin script.</p> <p>Loanwords from Rote, Portuguese, Chinese, Uab Meto (Atoni) [aoz], Sabu [hvn], Spanish, Dutch [nld], English. Christian.</p>
<p><u>Rotinese / Dengka</u></p> <p>A language of Indonesia (Nusa Tenggara Timur NTT province)</p> <p>ISO 639-3: dnk</p>	
<p>Ethnic Population</p> <p>Region</p> <p>Alternative names</p> <p>Dialects</p> <p>Classification</p> <p>Language use</p> <p>Language development</p> <p>Comments</p>	<p>20,000 (2002 UKAW).</p> <p>Roti island northwest, Dengka and Lelain domains, east of Dela-Oenale [row], west of Lole (Ba'a).</p> <p>Rote, Rote Barat, Roti, Rotinese, Western Rote</p> <p>Western Dengka, Eastern Dengka, Lelain. Western Dengka dialect has marked intonation; some occurrences of 'ngg' in Eastern Dengka dialect become 'nd' in Western Dengka. Some vocabulary of Western Dengka is like Dhao [nfa]. Dengka and Dela-Oenale [row] are more divergent from other languages on Rote.</p> <p>Austronesian, Malayo-Polynesian, Central-Eastern, Central Malayo-Polynesian, Timor, Extra-Ramelaic, West</p> <p>Vigorous. All domains. All ages. Also use Kupang Malay [mkn] / Indonesian [ind].</p> <p>Bible portions: 2004.</p> <p>Christian, traditional religion.</p>
<p><u>Endenese</u></p> <p>A language of Indonesia (Nusa Tenggara Timur NTT province)</p> <p>ISO 639-3: end</p>	
<p>Ethnic Population</p> <p>Region</p> <p>Alternative names</p> <p>Dialects</p> <p>Classification</p> <p>Comments</p>	<p>87,000 (Wurm and Hattori 1981). 78,000 Ende, 9,000 Nga'o.</p> <p>Lesser Sundas, south central Flores island, west of Sikka.</p> <p>Endeh</p> <p>Ende (Endeh, Ja'o, Djau), Nga'o (Ngao, West Ende). A dialect subgroup. Li'o [lj] may be a dialect of Ende.</p> <p>Austronesian, Malayo-Polynesian, Central-Eastern, Central Malayo-Polynesian, Bima-Sumba, Ende-Lio</p> <p>Christian.</p>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

proof on the *voir dire* is the **balance of probabilities**. See **Greenhill (2007)**.

A fisherman who crews a SIEV may have prior convictions for Fisheries Management Act offences, or though less likely, for earlier people-smuggling offences. Typically, his prior conviction's **Prosecution Report** [containing the **age/d.o.b.** of the crewman] will **not be admissible** in evidence. So in one matter, the accused crewman's *evidence-in-chief* is that he owed a debt to the owner of a *perahu*. His testimony is he crews that *perahu* which earlier was seized & forfeited for fishing illegally in Australian waters. The defence *objected* that the prosecution is cross-examining the crewman on the details of the Prosecution Report. On the *voir dire*, the prosecution successfully submitted it was confining cross-examination only to crewman's testimony. The basis of the questions being to rebut the defence raised by the accused crewman. The prosecution did not put his prior conviction's Prosecution Report to the accused crewman.

In another matter, on the *voir dire*, the defence wanted to adduce evidence of a prior conviction. To support an excuse from guilt under the Criminal Code, the defence wanted to *cross-examine* an AFP officer about the prior conviction for earlier people-smuggling of a 2nd Indonesian crewman on the same SIEV now as the accused crewman. That other crewman was not on trial, as he had already pleaded guilty in another court, been sentenced and jailed. The Judge rejected the defence application on the grounds of heresy. The details of the prior conviction of the 2nd crewman could not be introduced via this AFP officer. That other crewman was not in court to hear the evidence about him. Neither could the defence tender a **Prosecution Report** of the other crewman's prior conviction, even if it has obtained a copy of such. The Judge **opposed** it on the **grounds of relevance**.

It is interesting to note, as reported on 7 December 2011, the Federal government now holds DIAC, not the AFP, as responsible to assess the age of crewmen. It is also possible on the '*proverbial SIEV*' that two or more crewmen could have their **recorded age** as less than 18 years old on the **Nominal Roll** and yet one or more might be charged by the AFP. There is no public database about the output of the tests conducted (by the AFP) to distinguish those crewman found to be over 18 years old at intercept when other crewmen are believed to be under 18 years old: [s.3ZQJ Crimes Act limits disclosure]. The AFP did however clarify its (then) age determination process on 6 January 2011. See **AFP (2011)**. Accepting the AFP is correct to charge one or more such crewman but not the other claimed juveniles, age assessment may still get an unintentional airing.

Typically during a prosecution case of a people-smuggling offence, a DIAC officer will be called as a witness to testify along the lines that all PII on the SIEV had no valid visas to enter Australia (which goes to liability for an element of the offence) and that a number of the passengers had, since intercept, been granted protection visas whilst other passengers were rejected protection visas. A list of all PII will serve that purpose. In the officer's statement there may however be an unintended 'age estimate', if in the officer's statement there is information transposed from the **Nominal Roll**. A crewman's age younger than 18 years as recorded on the Nominal Roll – regardless whether 'by hook or by crook' it be fair or foul – *might* get transposed/transcribed into the **DIAC officer's statement tendered** in evidence.

In summary, age assessment information during the use of documents in cross-examination / re-examination does not typically arise, but it might arise.

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

(f) the detention & remand of the accused

Crew of a SIEV are initially tried together, not given separate trials. **Table 7** sets out the *estimated* detention & remand periods in the matters which are the subject of this submission. It is *estimated* that the prosecution has taken, on average, 15 months to get these matters to trial.

Where the trial of a crewman results in a directed discharged which is no fault of the prosecution, or a hung jury with no verdict even after the trial Judge giving a ‘Black Direction’ to the jury-in-deliberations, the crewman will usually be remanded again for retrial.

As reported in the media, on 27 December 2011, “... *the Commonwealth had not provided any extra resources to run 'people smuggling' trials (in the NSW District Court)...there are 31 such cases listed for early 2012, which will tie up three judges...*”
source: <http://www.smh.com.au/national/people-smugglers-swamping-the-courts-20111226-1pajn.html>

No doubt some of these “31 such cases” are retrials of matters contested without verdict in the later half of 2011. It is *estimated* that crew to be re-tried will be remanded, on average, for an extra five months. Therefore, it is *estimated* that such crew to be retried will have spent a total, on average, of 20 months in detention and on remand.

Table 7: Detention and Remand Periods

Example Matter	Detained awaiting charge * (months)	Remanded awaiting trial * (months)	Time awaiting trial * (months)	Remanded awaiting retrial ** (months)	Total Time detained & on remand (months)
#1	8	6	14	5	19
#2	4	8	12	5	17
#3	9	11	20	5	25
		average =	15	5	20

* estimates based on intercept date of SIEV# (as per the indictment read-at-trial), the opening addresses to the jury and the Senate release APH (2/2011) Qu.25_AFP attachmt.

** estimated average wait to retrial deduced from the above media report when compared with initial trial dates.

Delays in prosecution whilst being detained as a juvenile on people-smuggling matters was considered in *Supriadin v Minister for Immigration & Citizenship*. The applicants, all crew aged from 12 – 16 years had been detained mostly for periods of up to 12 months. A **criminal justice stay certificate about a non-citizen** was in force against most of them. A number of them were due to be deported. The trial Judge declined their applications for a Writ of Habeas Corpus. The Judge however noted that the one applicant *held for 15 months* had been detained *an extraordinarily long time* whilst a decision to prosecute was made. The Judge noted the CDPP/AG was not joined as a respondent and the Minister was not responsible for the decision to prosecute.

Prior to the current mandatory sentencing regime, in the case of *Kadem v The Queen*, the accused, his family and some 350 PII arrived at Ashmore on the perahu ‘*Harapan Satu*’ on 1 November 1999. There was a delay of 15 months in charging him and a further delay of 8 months taking him to trial. On appeal against sentence, because of these delays, three Supreme Court Judges ruled [esp. para.53, 58] the trial Judge erred in sentencing. The appeal court reduced his gaol sentence by ¼ (from 4 years to 3 years) and imposed a recognisance release order for good behaviour after 18 months.

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

	<p>Under the current regime, on another view of the crew in these matters potentially facing retrial, it could be contended that the <i>public interest</i> supports a ‘no bill’ by the CDPP in respect of one or more of the accused crew. See the Response to the Term of Reference (i).</p>
<p>(g) guardians to protect the accused’s interests, including with respect to age assessment</p>	<p><u>Litigation Guardians: protecting whose interests?</u></p> <p>In the case of <i>Supriadin v Minister for Immigration & Citizenship</i>, one single litigation guardian was appointed for the accused and another 14 Indonesian juvenile crewmen. The accused crewmen’s applications for a Writ of Habeas Corpus were denied.</p> <p>Contrast the case of <i>Applicant VFAY v Minister for Immigration</i>, where the applicant was an Afghani UASC upon arrival. The applicant’s interests were found to <i>not require</i> a litigation guardian even though the applicant conducted his case by video-link from Port Headland detention centre using an Arabic interpreter and a <i>pro bono</i> solicitor who were both in a courtroom in Melbourne.</p> <p><u>Age Assessment = Credibility Evaluation?</u></p> <p>In October 2011, DIAC reported to the Senate Estimates hearing that it “<i>undertook a pilot [program] in terms of age determination which involved a detailed interview technique, with two skilled DIAC officers interviewing people who had declared themselves as being under 18, but whom [DIAC] suspected might have been older. Following that pilot..., which was undertaken in July-August..., out of 60 people interviewed, about 33 were found to be over 18 years of age. [DIAC has] since extended that pilot to a larger group of people, and that process has taken place since August [2011]. Over the period from 5 August to 30 September, [DIAC] interviewed 121 unaccompanied minors, and 30 of those have been assessed as being adults</i>”. [ref. ACPL (2011), it noting that the pilot was applied only to asylum-seekers and was not used with ‘people-smuggling’ crew].</p> <p>In the UK asylum system there is an established age assessment regime since 2004. Kvittingen (2010) however notes that across Europe, “<i>faced with rising numbers of undocumented asylum seekers claiming to be minors, age assessment is increasingly conceived as an integral part of asylum determination...[and yet] age assessment is so politicised in the UK...[where] ‘age-disputed persons’ [have] become a ...political problem...[and] their age assessment remain contentious despite a number of policy amendments...[such that the case of A & M] reached the Supreme Court...</i>”</p> <p>Kvittingen (2010) cites a UK asylum system policy advisor’s observation that: “<i>[G]enerally when people are [age] disputed, ... it’s a <u>lack of understanding about how to use credibility</u>. ... it’s a <u>lack of understanding about where they come from and what’s happened to them, a lack of ability to analyse information, (where) often <u>huge generalisations and sweeping statements</u> [are] made in these assessments (ref. 15).</u></i>”</p> <p>In this Response to Term of Reference (g), my submission draws out the salient points on guarding a claimant’s interests from the rulings by the UK’s High Court of Justice (Admin) and Court of Appeal (Civil) presiding over age assessment disputes. As recently as June 2011, the court in <i>R (Y) v LB Hillingdon</i> opened its judgment with the observation that age assessment disputes seeking judicial review is the “<i>new growth</i></p>
<p>DIAC pilot</p>	
<p>Judicial review in the UK asylum system</p>	

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

<p>‘Merton-compliant’ processes</p>	<p><i>industry</i>” [para.1]. Referring to numbers given in <i>R (FZ) v LB Croydon</i>, the judge noted that, as of January 2011, there were 64 age assessment cases in the Court’s list.</p> <p>Back in the beginning (i.e. in 2003), in what has become known as ‘Merton-compliant’ age assessments, the UK asylum system received the judgement in <i>R (B) v LB Merton</i>, which held that “<i>appearance, behaviour and the credibility of ...[the UASC’s] account are all matters that reflect on each other</i>” [para.28] and “<i>if there is reason to doubt the applicant’s statement about his age, the decision maker will have to make an <u>assessment of his credibility</u>, and he will have to <u>ask questions designed to test his credibility</u>” [para.37]</i></p>
<p>When assessment fails revert to the burden of proof</p>	<p>The question of who has the burden of proof in age assessment is expressed most recently in December 2011 in <i>R (MWA) v SSHD & Birmingham CC</i>, which thought “<i>the process is one of assessment and not in reality choosing between one of two alternatives, one of the other of which must represent the fact...it is comparing the likelihood of a wide range of dates and picking the one which the evidence suggests is the more likely than the rest to be accurate</i>” [para.16] and “<i>if the court is <u>unable to reach a decision after conducting the assessment exercise</u>, it would [after that] have to <u>fall back on the burden of proof</u> [and the balance of probabilities (para.17)] which would mean that it would <u>be for the claimant to show that he is or was under 18 at the material time he asserts a duty was owed to him as a child</u>” [para.18].</i></p>
<p>Procedural fairness</p>	<p>The case of <i>R (CJ) v Cardiff CC</i> found that the decision of the court is “<i>not necessarily fixed by the positions of the competing parties, one of which must be chosen as correct; the fact finding role permits <u>the Court to come to its own view</u> which may differ from both parties’ contentions, <u>subject to procedural fairness</u>” [para.81].</i></p> <p>The case of <i>SH v Secretary of State for Home Department</i> stated that “<i>assessment of age is <u>not an exact science</u>...[it] requires consideration of general background, family circumstances and history, and not solely appearance...and if there is reason to doubt the [individual’s] statement as to age, his <u>credibility must be assessed</u>...” [para.18]</i></p>
<p>The Experts versus The Other Experts</p>	<p>Similarly in the case of <i>A & WK v LB Croydon, SSHD & Kent City Council</i> the court noted “<i>the <u>margin of error with standard medical assessments</u> is at least two years either [way]; and assessment is particularly difficult for the age range 15 to 20”.</i> [para.15-17]</p> <p>So in contrasting paediatric expert evidence against that of a social worker, the judgement in <i>MWA’s case</i> [para.67] cited the judgement in <i>R (R) v LB Croydon</i>, which criticized the paediatrician’s report as, “<i>...an erroneous confidence in the accuracy and reliability of the statistical methods...employed. That misplaced confidence undermines the other evidence...It appears...that confidence leads...to relying primarily upon...statistical methods. Therefore [it] is very likely to be biased...assessment of age by reason of that misplaced confidence. Therefore it seems [one] must approach with ...great caution the conclusions...[it] reached...[and] <u>do not believe [the paediatrician’s] assessment of the age of the Claimant is any more reliable than that of a social worker</u>. Indeed, [the] assessment, ..., is likely to be less reliable because [it] places such considerable confidence in ...statistical methods that ... [it is], ... <u>not scientifically established and unreliable</u>...” [para.52].</i></p> <p>In the 2007 case of <i>R (A) v Liverpool CC</i>, an expert dental surgeon’s dental age</p>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Child-protection risks	<p>odontological (OPG) report clashed against a consultant paediatrician’s “holistic” age assessment.[*] Without making definitive criticisms of either expert, the court’s judgment makes clear that <i>“experts must limit themselves to their area of expertise”</i> and whilst <i>“either may express a view as to dental age...only a person with wider expertise can offer a view on non-dental factors in reaching a conclusion as to age”</i>, although <i>“[all] experts should confine themselves to setting out opinions [only in their particular field]”</i>, and <i>“commentary as to the independence of an opposing expert ...[or comment that] indicates a lack of professional detachment...is not an appropriate matter to be included in a report”</i> as <i>“the purpose of an expert’s report is not to fan the flames of the dispute [but] rather to identify particular questions of expertise and to explain in a fair and impartial way the information that is available on those questions...”</i> [para.46].</p> <p>* [Kvittingen (2010), pg.17-18 notes that whilst use of paediatric age assessment is in decline in the UK, general paediatric age assessment is used in parts of Germany; with various odontological age assessments employed in Norway, Sweden and Denmark; X-ray of the wrist is used in France, Belgium, Lithuania and Finland; psychosocial assessment is used in Germany; and ‘inspection interview’ is performed in Austria].</p> <p>The case of <i>TL, Re Applic. for Judicial Review of an Age Assessment</i> noted that the asylum-seeker, having been assessed as over 18 years old, only claimed to be a child when he was charged with a criminal offence. The court posed the question, <i>“was this the reason he now wanted to be treated as a child?”</i> [para.24], adding that <i>“while it is important to try and ensure that children are not treated as adults it is also important to try and ensure that adults are not treated as children”</i> [para.43], recommending that procedures should <i>“ensure children and adults are not accommodated together”</i> as <i>“adults inappropriately accommodated with children”</i> is <i>“a serious abuse”</i> [para.44].</p> <p>This latter point is perhaps something that should come out during this Inquiry: that is, Indonesian crew claiming juvenile status should not be housed with adults, nor should they be housed with children whilst their claim is assessed. Secondly, Kvittingen (2010) cited <i>A & M’s case</i> on appeal as having reached the UK’s Supreme Court. According to Kvittingen (2010) pg.25, the question for the courts, as perhaps too for this Inquiry, is: Can social workers make impartial age determinations? The Court found that <i>“the better the quality of the initial decision-making, the less likely it is that the court will come to any different decision upon the evidence”</i> [para.33].</p>
Advocacy	<p>In the light of <i>A & M’s case</i>, Davies (2010) sets out recommendations for age assessment, in the UK asylum context, to include: use of an interpreter in the correct dialect as the claimant; provision for an independent observer; copies of all documents for both sides; regular breaks / welfare checks on the claimant; and where there are inconsistencies in the claimant’s account, these contradictions must be put to the claimant in the age assessment interview. Davies (2010) emphasises that many claimants are vague about definite time-scales (as to their d.o.b., schooling, leaving home, and journeys undertaken) but that details must be asked for and there is a duty to inquire. Also see UKBA (2011) for guidelines in “special cases of disputed age assessment”.</p> <p>In the context of accused Indonesian crew, as a minimum feature, the provision of an independent observer, as noted by Davies (2010), should act as a guardian of their interests.</p>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

(h) legal advice to the accused, including with respect to age assessment	<p>Legal advice to the disputed ‘juvenile’ crewman would likely explain, in as plain language as possible, the ‘<i>prescribed procedure</i>’ including ‘<i>X-ray of a part of a person’s body</i>’ that may be used to determine a person’s age <i>for administrative purposes</i> in criminal law, and the consents [especially ss.3ZQC, 3ZQI <u>Crimes Act (Cth)</u>] as described in ss.3ZQA – 3ZQK <u>Crimes Act (Cth)</u>.</p> <p>The procedure however is not prescribed when age is to be proved in court: see <i>Applicant VFAY’s case</i>. <i>Applicant VFAY’s case</i> was cited in <i>Osman’s case</i> which noted that expert evidence of <i>bone age need not conclusively prove chronological age</i> [para.40]. <i>Applicant VFAY’s case</i> was also cited in <i>MRT Case No.V0504672</i> which noted the ‘standard deviation of the mean bone age’ assessment is weighed up against the Tribunal’s view that the applicant was a credible witness.</p>
Standard of proof	<p><i>AJ v The Queen</i> contains an appellate court discussion of the standard of proof as to an age assessment which is <i>in dispute</i>. The court doubted the appellant’s proposition that the Crown bore the burden of proof as to age. The proof of whether the crewman is under 18 years was on the balance of probabilities. The trial judge correctly identified the issue as being whether the crewman was under the age of 18 years at the time of the intercept. The judge found the crewman was, at the relevant time, of or over the age of 18. A corollary of which is that the crewman was not aged under 18 years. The judge rejected any merit in this case that a circumstance likely to result in a more severe punishment must be proved beyond reasonable doubt [para.11-13].</p>
Right to silence	<p>More generally, advice to crew facing people-smuggling charges may include:</p> <ol style="list-style-type: none"> 1. Right to silence, i.e. decline to give a Record of Interview ‘under caution’ to AFP; 2. Waiver of the right to a committal hearing; and 3. Maintain the right to silence at trial, i.e. decline to testify in one’s own case.
Anunga Rules	<p>It is noted that police-questioning of indigenous Aboriginal and Torres Strait Islanders (ATSI) is subject to the Anunga Rules. See Bartels (2011). Similarly, in the case of <i>R v Hatim & Ors</i>, the trial Judge found that the Anunga Rules applied to questioning the accused Indonesian crewman [at para.17]. The crewman was entitled to contact a friend / Indonesian consulate official / lawyer [at para.10].</p> <p>Crewmen that plead guilty may well give a ROI. In one matter, on the <i>voir dire</i>, the defence submitted that a crewman who pleaded guilty had given a false ROI to the AFP. That crewman was not in court, having been sentenced and jailed. The prosecution did not seek to tender his ROI. In respect however of the crewmen who contested the charges, only in one matter mentioned in this submission did the prosecution adduce evidence of an AFP ROI. When the AFP officer was giving testimony, the court heard replayed the ERISP (Electronically Recorded Interview of a Suspected Person) of the accused crewman. In all other matters mentioned in this submission, no evidence of an AFP ROI with the accused crewmen was adduced. One might therefore <i>assume</i> that these accused crewmen, under legal advice, declined to give a ROI under caution to the AFP.</p> <p>As opposed to the right of silence pre-trial, the right to silence at trial has been the subject of judicial comment, known as the Weissensteiner Direction. That is, “<i>not every case calls for explanation or contradiction in the form of evidence from the</i></p>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

	<p><i>accused. There may be no facts peculiarly within the accused's knowledge</i>": <i>Weissensteiner v R</i> [para.20]. Albeit, that case was one of circumstantial evidence, unlike people-smuggling cases which seek to draw inferences from direct evidence. See Anderson (2002) for discussion of 'the right to silence' cases: <i>R v Ryan</i>, <i>RPS v R</i> and, <i>Azzopardi v R</i>. Also see O'Donnell (2000) and Hocking & Manville (2001).</p> <p>In the matters mentioned in this submission, 1-in-3 of the accused who contested the charges, <i>presumably</i> under legal advice of their barrister at trial, did not enter the witness-box to give evidence in their own case.</p> <p>In summary, it <i>appears</i> that accused crewmen who intend to contest the charge of people smuggling decline to give ROI under caution to the AFP; and in some cases decline to give testimony-at-trial. Both elections coming after having received legal advice to that effect.</p>
<p>(i) any other matter incidental to the above terms of reference</p> <p><i>nolle prosequi</i></p> <p>'Hopeless' cases</p>	<p><u>No Billing, Restoring Judicial Discretion, and Maritime Governance</u></p> <p>The judiciary has spoken out against the mandatory 5 year sentence for people smuggling offences. The minimum gaol time, if convicted, is 36 months non-parole. Any crew re-tried in the matters that are the subject of this submission, it is <i>estimated</i> will spend, on average, an additional 16 months incarcerated. They will, in all likelihood thereafter be deported back to Indonesia. If acquitted at re-trial, they however will have spent, on average, about half of the total non-parole time awaiting trial/retrial.</p> <p>The NT Supreme Court Justices have long voiced their opinions in similar cases: no more than 18 months is the appropriate sentence if 'general sentencing guidelines' were to apply to the crew. Sentencing in people-smuggling cases, citing the authorities, is recently discussed in <i>R v Ambo</i>. It is contended that crew that have done 18+ months on remand should be deported rather than be retried. The CDPP has the discretion to not proceed further against any accused facing an indictment, even one that has already been presented. This discretion is the '<i>nolle prosequi</i>' or 'no billing' of the case. It is submitted that as the 'injustice of mandatory sentencing' gets into 'public interest consciousness' it might become increasingly difficult for the prosecution to achieve guilty verdicts from juries. Not to mention the cost to the taxpayer for retrials upon trials.</p> <p>It is instructive that a former director of prosecutions told a Bar Reader's Course that he was "<i>not interested in clogging up our Rolls Royce system of criminal justice with hopeless cases. The community cannot afford it...and if you can <u>satisfy the tests</u> (described below) on a rational basis,... <u>the proceedings will be terminated</u>. The decision...turns on three principal questions:</i></p> <ol style="list-style-type: none"> 1. <i>Is the evidence available capable of establishing each element of the offence?</i> 2. <i>Can it be said that there is no reasonable prospect of conviction by a reasonable jury properly instructed as to the law?, or</i> 3. <i>Are there nevertheless discretionary factors that require the matter not to proceed in the public interest? <u>The public interest is paramount</u>".</i> <p>In the matters the subject of this submission, where the accused crew face retrial, it is submitted that all three 'tests' could be answered in the affirmative and that the <i>public interest</i> supports a 'no bill' in respect of one or more of the remanded crew. Especially</p>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Raising the bar	<p>with the younger crewmen, whose appearance and demeanour in court looked to be that of youths or those barely of adult age?</p> <p>I note that the CDDP announced a change of policy on 2 December 2011: it will no longer prosecute a crewman who was not at least 19 years old (at the time of the intercept). Perhaps that ‘bar’ should be raised to an age of 20 years or even 21 years. An age of 20 years would accommodate the statistical deviations of bone- and dental-age in age assessment determinations. An age of 21 years would in part offset the seemingly ‘ethnic discrimination’ being practised in prosecutions against young Indonesians (who are mere fishermen). Other than a very small number of non-Indonesians, no nationals than Indonesian (fishermen and simple men) are prosecuted under the <u>Migration Act</u> offence of ‘aggravated people smuggling’.</p>
Kafkaesque rituals?	<p>Recall the words of the court in <i>U.S. v Carrion</i> 488 F.2d 12, 14 1st Cir 1973,</p> <p style="text-align: center;"><i>“no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment”</i></p> <p>This Inquiry is 10 years in the making. The Inquiry could either within this Term of Reference (i) or in a widening of its Terms of Reference examine the ‘<i>elephant in the room</i>’, that is, the 5 years jail (with 3 years non-parole) mandatory sentencing of Indonesian crew convicted of aggravated people-smuggling offences. <i>Kaptans</i> who jump-off at Roti know about it. Juveniles are left to hold the <i>tangkai kemudi</i> (‘tiller’) for that final leg to Ashmore.</p>
Advocacy	<p>Restore judicial discretion in sentencing: then convicted crew will go home after the remand period and the juveniles may be less likely involved in the first place.</p> <p>Redirect some of the \$00’s million spent remunerating the ‘<i>border protection industry</i>’ to improving the lot in life of these impoverished small-boat fishermen and their families in Nusa Tenggara Timur province. Australia could work more closely with Indonesia to manage fisheries in the northern waters of the Arafura, Banda and Timor seas. See Stacey (2001) & (2007).</p> <p>Replace the 28 Commonwealth government agencies (listed in GAMSA, see ACS/BPC (2009) pg.15-19], as cited by Woolner (2011), that manage our maritime domain with a ‘Coast Guard’. Woolner (2011) is an excellent discussion on how to improve the governance of Australia’s maritime domain.</p> <p>Woolner (2011) notes [at pg.55] that “<i>control of irregular immigration is only one of the many problems...across the vast spread of Australia’s maritime domain</i>”. He identifies [at 56] the “<i>crisis driven incrementalism</i>”, [at 60] “<i>the rise of a self-perpetuating entity allocated growing funding</i>”, all the while [at 72] “<i>no one ...owns the problem [of policing the maritime domain] as a whole...thus loss of focus is often...a structurally pre-determined outcome of the whole-of-government approach</i>”. Furthermore, adding [at 74] the “<i>loss of focus and reduced incentive to review policy outcomes are important weaknesses of the whole-of-government approach [and] without a [single] Minister responsible for implementation, whole-of-government also may lack the endurance to achieve [objectives]...</i>”. To conclude, he recommends [at 79-80] establishment of a singularly responsible Coast Guard, headed by a serving member of the ADF.</p>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

APPENDIX A:	<p>Age Determination – Australian case law <i>AJ v The Queen</i> [2011] WASCA 166 [re standard of proof where disputed age] <i>Stoykovski v “M” [a Child]</i> [2002] WASCA 193 [re secondary d.o.b. evidence] <i>R v Hatim & Ors</i> [2000] NTSC 54 [re x-ray evidence for skeletal age estimation] <i>Applicant VFAY v Minister for Immigration</i> [2003] FMCA 289 [re x-ray evidence] <i>Osman v Minister for Immigration & Anor</i> [2007] FMCA 1437 [re x-ray evidence] <i>MRT Case Number V0504672</i> [2007] MRTA 385 (13 August 2007) [re x-ray evidence]</p> <p>Age Determination – UK case law <i>A & WK v LB Croydon, SSHD & Kent City Council</i> [2009] EWHC 939 (Admin) <i>AS v London Borough of Croydon</i> [2011] EWHC 2091 (Admin) <i>R (A) v LB Croydon</i> [2008] EWHC 2921 (Admin) <i>R (C) v LB Enfield</i> [2004] EWHC 2297 (Admin) <i>R(CJ) v Cardiff CC</i> [2011] EWHC 23 (Admin) <i>R (A) v Liverpool CC</i> [2007] EWHC 1477 (Admin) <i>R (A & M) v LB Croydon & LB Lambeth</i> [2009] UKSC 8 <i>R (B) v LB Merton</i> [2003] EWHC 1689 (Admin) [re ‘Merton-compliant’ assessment] <i>R (FZ) v LB Croydon</i> [2011] EWHC Civ 59 <i>R (I & O) v SSHD</i> [2005] EWHC 1025 (Admin) <i>R (KN) v LB Barnett</i> [2011] EWHC 2091 (Admin) <i>R (MWA) v SSHD & Birmingham CC</i> [2011] EWHC 3488 (Admin) <i>R (P) v LB Croydon</i> [2009] EWHC 1993 (Admin) <i>R (R) v LB Croydon</i> [2011] EWHC 1473 (Admin) <i>R (Y) v LB Hillingdon</i> [2011] EWHC 1477 (Admin) <i>SH v Secretary of State for Home Department</i> [2011] EWCA Civ 1284 <i>TL, Re Applic. for Judicial Review of an Age Assessment</i> [2011] ScotCS CSOH_98</p> <p>Juvenile Crew in people smuggling cases <i>Curtis v Sidik & Najjar</i> [1999] NTSC 135 <i>R v Hatim & Ors</i> [2000] NTSC 53 <i>R v Sarip Abakar & Ors</i> [2001] NTSC, 3 October (sentence) <i>R v Mohamed Tahir & Beny</i> [2009] NTSC, 28 October (sentence) <i>The Queen v Ako Lani, Ose Lani & John Ndollu</i> (Qld DC, June 2011) <i>AJ v The Queen</i> [2011] WASCA 166 <i>Stoykovski v “M” [a Child]</i> [2002] WASCA 193 [re age determination]</p> <p>Delays in prosecuting people smuggling cases <i>Supriadin [& 14 Ors] v Minister for Immigration & Citizenship</i> [2011] NTSC 45 <i>Kadem v The Queen</i> [2002] WASCA 133</p> <p>Sentencing in people smuggling cases <i>R v Ambo</i> [2011] NSWDC 182 <i>R v Pot & Ors</i> [2011] NTSC, 18 January (sentence) <i>R v Dokeng</i> [2010] NTSC, 2 December (sentence) <i>R v Nafi</i> [2011] NTSC, 19 May (sentence) <i>R v Mohamed Tahir & Beny</i> [2009] NTSC, 28 October (sentence)</p> <p>Standard and burden of proof in people smuggling cases <i>AJ v The Queen</i> [2011] WASCA 166 <i>Bahar v The Queen</i> [2011] WASCA 2 [rejects the defence of reasonable mistake]</p>
--------------------	---

**Submission to AHRC Inquiry:
Age Assessment in People Smuggling cases**

Requisite mental element of s232A Migration Act

The Queen v Hungan [2000] NTSC 84

Boarding Intercept – Detention Notice – ROI

R v Sukarni & Ors [2000] NTSC 13

Bringing or coming to Australia

Rutu and Ladjilu v Dalla Costa (1997) 93 A Crim R 425

Anunga Rules – record of interview – age of accused in question

R v Hatim & Ors [2000] NTSC 54

R v Anunga (1976) 11 ALR 412

S232A Migration Act requires SIEV's entry to Australia's territorial sea

R v Ahmad [2011] NTSC 71

Rule against splitting the Crown case - Cross-examination by prosecution to elicit evidence that could have been tendered in chief - When permissible

The Queen v Chin [1985] HCA 35

Confessions and admissions – Discretion to exclude on the voir dire

R v Swaffield; Pavic v The Queen [1998] HCA 1; 192 CLR 159; 151 ALR 98; 72 ALJR 339 (20 January 1998)

Witness out of State & unable to give evidence by either video link or audio link – discretion to admit statement – prejudicial effect vs. probative value

Chaudhry v The Queen [2007] WASCA 37

Identification evidence – Photo boards – discretion to exclude on the voir dire

R v Al Jenabi [2004] NTSC 44

'Basha' cross-examination in criminal trials

R v Basha 39 A.Crim. R.337 at 339

R v Sanford (1994) 33 NSWLR 172 at 181

Voluntariness – Unfairness to admit confession and admissions

Foster v R [1993] HCA 80

Prosecution disclosure of a witness receiving favourable treatment to testify

Grey v R [2001] HCA 65, (2001) 75 ALJR 1708

The Rule in *Browne v Dunn* – Breaches by prosecution

R v Arnott [2009] VSCA 299 (17 December 2009)

Khamis v Regina [2010] NSWCCA 179 at para.45

MWJ v The Queen [2005] HCA 74

Duty to disclose material relevant to case overrides public interest immunity

Regina v Lipton [2011] NSWCCA 247; contra s.15A(6) Director of Public Prosecutions Act

Costs in Criminal Cases (Act) does not apply in Commonwealth prosecutions

Solomons v District Court of New South Wales [2002] HCA 47; 192 ALR 217 (10 Oct.)

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Co-conspirators Rule – Circumstantial evidence

Fonseka v The Queen [2003] WASCA 111

Defences of Duress, Necessity, Sudden/Extraordinary Emergency

R v Mahendra [2011] NTSC 57 (29 July 2011)

Kia v The Queen [2011] WASCA 104

Oblach v R [2005] NSWCCA 440

The Queen v Bryan Joseph Law & Ors [2007] NTSC 45

Tran v The Commonwealth [2010] FCAFC 80

Tran v The Commonwealth [2008] FCA 901

Nguyen v The Queen [2005] WASCA 22

Johnson v The State of Western Australia [2009] WASCA 71 at 60, 84, 123, 127, 129

Perka v The Queen [1984] 2 SCR 232

R v Rogers (1996) 86 A Crim R 542 at 545-546

Ahmadi v The Queen [2011] WASCA 237

Taiapa v The Queen (2009) 240 CLR 95

Judicially directed acquittal at trial (‘Doney Direction’)

Doney v R [1990] HCA 51, (1990) 171 CLR 207

Judicial ‘Invitation’ to Jury to Acquit (‘Prasad Direction’)

R v Prasad (1979) 23 SASR 161; 2 A Crim R 45.

Judicial ‘comment’ when accused does not give information peculiar to his knowledge (‘Weissensteiner Direction’)

Weissensteiner v R (1993) 178 CLR 217; [1993] HCA 65 [para.20]

R v Ryan [2002] QCA 92 (22 March 2002)

RPS v R [2000] HCA 3 (3 February 2000)

Azzopardi v R [2001] HCA 25 (3 May 2001)

Perseverance (exhortation) to Jury during deliberations (‘Black Direction’)

Black v R [1993] HCA 71, (1993) 179 CLR 44;

R v Rajakaruna [2004] VSCA 114;

Judicial Direction when conflict between the evidence of a prosecution witness and the evidence of a defence witness (‘Liberato Direction’)

Liberato v The Queen (1985) 159 CLR 507 at 515

Kia v The Queen [2011] WASCA 104 at 26-34

Elements of the Offence is an essential Roadmap for a jury

R v Elomar & Ors [No 1] [2008] NSWSC 1442

What is the relevant standard of interpretation?

Perera v Minister for Immigration & Multicultural Affairs [1999] FCA 507

Court to decide whether interpreter is qualified – Court to question interpreter

The Queen v Wurrarama [2011] NTSC 89

The standard of compliant interpreting (applies Canadian & Australian law)

Chala Sani ABDULA v The Queen [2011] NZSC 130 (1 November 2011)

Chala Sani ABDULA v The Queen [2011] NZSC Transcript 9 SC 80/2010

**Submission to AHRC Inquiry:
Age Assessment in People Smuggling cases**

Whether standard of interpretation competent & sufficient for fair trial?

De La Espriella-Velasco v The Queen [2006] WASCA 31

Right to come to Australia (s 232A (repealed), 233C Migration Act)

R v Mahendra [2011] NTSC 57 (29 July 2011) at [12]-[14]

Deterring People Smuggling Act 2011 (November)

Right of asylum – a right of States not individuals

NAGV and NAGW of 2002 v Minister for Immigration & Multi-Cultural and Indigenous Affairs (2005) 222 CLR 161

Min. For Immigration v Ibrahim (2000) 204 CLR 1

T v Home Secretary [1996] AC 742

Sale v Haitian Centers Council (1993) 509 US 155, 188-9

Applicant A v Min. For Immigration & Ethnic Affairs (1996-97) 190 CLR 225

Nguyen Tuang Cuong v Dir. Immigration [1997] 1 WLR 68 per dissenting judgment @69]

Right to come – Fault element *Recklessness* – Knowledge not required

R v Husen Baco & Ors [2011] NTSC 75

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

APPENDIX B:	<u>Age Assessment</u>
References	<p>AHRC (2011) <u>Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children</u>, Discussion Paper, December http://www.hreoc.gov.au/ageassessment/downloads/AgeAssessment_DP20111206.pdf</p> <p>Aggrawal, A. (2009) <u>Estimation of age in the living: in matters civil and criminal</u>, J. Anatomical Soc. Of Great Britain and Ireland, 11 May http://www.anilagrawal.com/ij/sundry/news_and_notes/estimation%20of%20age%20in%20the%20living_j_anatomy_2009.pdf</p> <p>Al-Hadlaq, A. <i>et al</i> (2008) <u>Interrelationship between Dental Maturity, Skeletal Maturity and Chronological Age in Saudi Male Children</u>, Egyptian Dent. J. 54(1)</p> <p>Andrade, M. & Ferreira, M. (2011) <u>Dental and Skeletal Age Estimates to Access Biological Age</u>, Int. J. Academic Research, Vol.3 No.6 November, 176-178</p> <p>Aynsley-Green, A. (2009) <u>Unethical Age Assessment in 'Letters to the Editor'</u>, British Dental J., Vol.206 No.7, 11 April <i>and</i></p> <p>(2011) <u>Expert commentary on the age assessment of John Ndollu prepared for Fisher Dore Lawyers</u>, (June)</p> <p>Benson, J. & Williams, J. (2008) <u>Age Determination in refugee children</u>, Aust. Fam. Physic. Vol.37, No.10, October</p> <p>Birang, Sh. (2008) <u>Estimation of Chronological Age According to Risser's Sign</u>, Iran J. Radiol, 5(3), 151-154, 6 August</p> <p>Black, S <i>et al (ed.)</i> (2010) <u>'Age Estimation in the Living: The Practitioner's Guide</u>, Wiley', September, 318 pages</p> <p>Boonpitaksathit, T. <i>et al</i> (2010) <u>Dental age assessment of adolescents and emerging adults in United Kingdom Caucasians using censored data for Stage H of third molar roots</u>, European J. Orthodontics, 6 December</p> <p>Brendler-Lindqvist, M. (2010) <u>Assessing age or assessing needs – a literature review of age assessment of unaccompanied asylum-seeking children</u>, Bachelor thesis, Med-6 semester, Uni. Of Copenhagen, Autumn, [as supervised by Nørredam, M. (Assoc. Prof. Uni of Copenhagen) and Hjern, A. (Adj. Prof. Nordic Sch. Of Public Health, Gothenburg), with Michelsen, N. Prof.]</p> <p>Büken, B. <i>et al</i> (2007) <u>Is the assessment of bone age by the Greulich-Pyle method reliable at forensic age estimation for Turkish children?</u> Forensic Sci Int. 2007 Dec 20;173(2-3):146-53. Epub 2007 Mar 27.</p> <p>Cameriere, R. <i>et al</i> (2009) <u>The Comparison between Measurement of Open Apices of Third Molars and Demirjian Stages to test Chronological Age of over 18 Year Olds in Living Subjects</u>, XXI Congress of the Intl Academy of Legal Medicine</p> <p>Cardoso, H. (2007) <u>Differential Sensitivity in Growth and Development of Dental and Skeletal Tissue to Environmental Quality</u>, Arquivos de Medicina, 21(1): 19-23</p>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Chiang, K-H *et al* (2005) The Reliability of Using Greulich-Pyle Method to Determine Children's Bone Age in Taiwan, Tzu Chi Med J 17 No.6

Cole, T. (2008) Hot Potato Topic in 'Letters to the Editor', British Dental J., Vol.205 No.11, 13 December

Davies, S. (2010) Tips for age assessments & practical advice workshop, Cornerstone Barristers, (September)
<http://cornerstonebarristers.com/wp-content/uploads/2011/11/SD%20Tips%20for%20age%20assessments%20&%20practical%20advice%20workshop%20slides.pdf>

Fleshman, K. (2000) Bone age determination in a paediatric population as an indicator of nutritional status, Trop. Doct., January 30 (1): 16-8

Garamendi, P. *et al* (2005) Reliability of the methods applied to assess age minority in living subjects around 18 years old: Survey on a Moroccan origin population, Forensic Sci. Int 154 (2005) 3-12

Giordano, D. *et al* (2009) An Automatic System for Skeletal Bone Age Measurement by Robust Processing of Carpal and Epiphysial/Metaphysial Bones, MEMEA Special Issue of IEEE Transactions on Instrumentation and Measurement

Gunst, K. *et al* (2003) Third molar root development in relation to chronological age: a large sample sized retrospective study, Forensic Sci. Int. 136 52-57

Gurdeep, K. *et al* (2010) Computed Tomographic Studies on Ossification Status of Medical Epiphysis of Clavicle: Effect of Slice Thickness and Dose Distribution, J. Indian Acad Forensic Med., 32(4), Oct.-Dec.

Hailu, S. *et al* (2011) Age Determination at Tikur Anbessa Specialized Hospital, Addis Ababa Uni., East and Central African J. Surgery 16 (2), July/August

Hillewig, E. *et al* (2011) Magnetic resonance imaging of the medial extremity of the clavicle in forensic bone age determination: a new four-minute approach, Eur Radiol, April, Vol. 21:4, pp. 757-767

IOFOS (2008) Dental Age Estimation: Quality Assurance, 12 February
<http://www.iofos.eu/Quality-Ass/Age-IOFOS.htm>

and

(2008) Forensic Odontology Report: Quality Assurance, 12 February
<http://www.iofos.eu/Quality-Ass/Report-IOFOS.htm>

IOM Vienna (2006) 'Resource Book for Law Enforcement Officers on Good Practices in Combating Child Trafficking', AGIS 2005 Project, March

Jahari AB *et al* (2000) Effects of an energy and micronutrient supplement on skeletal maturation in undernourished children in Indonesia, Eur J Clin Nutr. May; 54 Suppl 2:S74-9.

Kvittingen, A. (2010) Negotiating childhood: Age assessment in the UK asylum system, Working Paper Series No.67, Refugee Studies Centre, November

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Koc, A. *et al* (2001) Assessment of bone ages: is the Greulich-Pyle method sufficient for Turkish boys?, *Pediatrics Intl Official J. of the Japan Pediatric Soc.* (2001), Volume: 43, Issue: 6, Pages: 662-665

Martin-de las Heras, S. *et al* (2007) Third molar development according to chronological age in populations from Spanish and Magrebian origin, uncorrected proof, *Forensic Sci. Int.* doi:10.1016/j.forsciint.207.03.009

Melsen, B. *et al* (1986) Dental and skeletal maturity in adoptive children: assessments at arrival and after one year in the admitting country., *Ann Hum. Biol.* Mar-Apr;13(2):153-9.

Michie, CA. (2005) Age Assessment: time for progress? *Arch Dis Child*, Jun; 90(6): 612-3

Nicoletti, I. (2007) Techniques for age determination by assessment of skeletal maturity, Inst. Of Legal Medicine, FASE Meeting, Macerata Uni., 5-6 October
<http://agestimation.unimc.it/AgEstimation/Convegno%20AGESTIMAT/05.10%20Mattino/Nicoletti.ppt>

Niemeijer, M. *et al* (2003) Assessing the Skeletal Age from a Hand Radiograph: Automating the Tanner-Whitehouse Method, in 'SPIE Medial Imaging' Sonka, M. *et al* (eds) Vol.5032, 1197-1205

Olze, A. *et al* (2006) Age Estimation in Unaccompanied Minors. Part II. Dental Aspects, *Forensic Sci Int* May 15; 159 Suppl 1: S65-S67

Pedersen, C. (2004) Chronological Age Determination for Adopted Children, (14 June)
http://eprints.usq.edu.au/3839/1/Pedersen_Chronological_age_determination.pdf

Pereira, C. *et al* (2009) Estimating an Individual's Age: the particular issue of Juvenile Clandestine Immigrants, XXI Congress of the Intl Academy of Legal Medicine

Phillips, C. & Narayanasamy, S. (2010) Proof of age required: estimating age in adults without birth records, *Aust. Fam. Physic.* Vol.93, No.7, July

Prieto, J. (2007) The Third Molar: history of a scientific itinerary and recent developments, Inst. Of Legal Medicine, FASE Meeting, Macerata Uni., 5-6 October
<http://agestimation.unimc.it/AgEstimation/Convegno%20AGESTIMAT/05.10%20Mattino/MACERATA-FASE-Prieto.ppt>

Ritz-Timme, S. *et al* (2000) Age estimation: the state of the art in relation to the specific demands of forensic practise., *Intl J Legal Med.* 2000;113(3):129-36.

Roberts, G. *et al* (2008) Dental Age Assessment (DAA): a simple method for children and emerging adults, *British Dental J.*, Vol.204 No.4: E7, 23 February, *and*,

(2008) Reply to Cole, T. 'Hot Potato Topic' in 'Letters to the Editor', *British Dental J.*, Vol.205 No.11, 13 December *and*,

Roberts, G & Lucas, V. (2009) Ethical Dental Age Assessment in 'Letters to the Editor', *British Dental J.*, Vol.207 No.6, 26 September

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Rötzscher, K. & Grundmann, C. (2005) The Demand in Forensic Medicine to Assess the Age of Adolescents and Young Adults in Crime Procedures, Intl. Poster J. Dent. Oral Med. Vol.7 No.2, Poster 275

Tuteja, M. (2008) An Evaluation of Third Molar Eruption for Assessment of Chronological Age: A Panoramic Study, Masters thesis, Rajiv Gandhi University of Health Sciences, Bangalore

Santoro, V. *et al* (2009) Forensic age estimation of living individuals: a retrospective analysis, Forensic Sci. Intl, 15 Dec, 193(1-3): 129-4

Schmeling, A. *et al* (2000) Guidelines for Age Estimation in Living Individuals in Criminal Proceedings, Study Group for Forensic Age Estimation of the German Association for Forensic Medicine, 15 September

Schmeling, A. *et al* (2001) Age Estimation in Living Individuals in Criminal Proceedings, The Lancet, Jul 14; 358 (9276): 89-90

Schmeling, A. *et al* (2003) Statistical analysis and verification of forensic age estimation of living persons in the Institute of Legal Medicine of the Berlin Uni. Hospital Charite, Leg. Med (Tokyo) Mar; 5 Suppl 1: S367-S371

Schmeling, A. *et al* (2006) Age Estimation in Unaccompanied Minors. Part I. General Considerations, Forensic Sci Int May 15; 159 Suppl 1: S61-S64

Schmeling A. *et al* (2008) Forensic Age Estimation of Live Adolescents and Young Adults in 'Chapter 14, Forensic Pathology Reviews', Tsokos (ed), Volume 5,

Schmeling, A. *et al* (2011) Forensic Age Estimation in Unaccompanied Minors and Young Living Adults in 'Chapter 5, Forensic Medicine – From Old Problems to New Challenges', Intech, September
http://www.intechopen.com/source/pdfs/19163/InTech-Forensic_age_estimation_in_unaccompanied_minors_and_young_living_adults.pdf

Sisman, Y. *et al* (2007) Third-Molar development in relation to Chronologic Age in Turkish Children and Young Adults, Angle Orthodontist, Vol.77 No.6,

Solheim, T & Vonen, A. (2006) Dental age estimation, quality assurance and age estimation of asylum seekers in Norway, Forensic Sci Int May 15; 159 Suppl 1: S56-S60

Spampinato, C. (2009) Skeletal Bone Age Assessment, viewed at
http://homepages.inf.ed.ac.uk/rbf/CVonline/LOCAL_COPIES/SPAMPINATO/SKELETALBONEAGEASSESSMENT.pdf

UKBA (2011) Policy & Law: Asylum Process Guidance: Special Cases: Assessing Age, June (as amended)
<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/>
<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/assessing-age?view=Binary>

Ward, P. (2011) 3T MRI helps confirm age of asylum seekers and sports stars, (8 Apr)
<http://www.auntminnieeurope.com/index.aspx?sec=sup&sub=mri&pag=dis&ItemID=605001>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Weale, R. (2001) Age, eyes, and crime, The Lancet, Vol. 358, Issue 9293, 10 Nov.

Zhang, A. *et al* (2009) Racial Differences in Growth Patterns of Children Assessed on the Basis of Bone Age, Radiology Vol.250 No.1, January

Indonesian-related: Fishermen

AusAID (2004) Seaweed Harvest, *Focus*, September, pg.12-13

Baird, R. (2007) Foreign Fisheries Enforcement: Do not pass go, proceed slowly to jail – is Australia playing by the rules? ANZSIL Conference

Fegan, B (2003) Plundering the Sea, Inside Indonesia (1 January)

Fox, J. *et al* (2006) Searching for a Livelihood: the Dilemma of Small-Boat Fishermen in Eastern Indonesia, Macquarie University

Fox, J & Sen, S. (2002) A Study of Socio-Economic Issues Facing Traditional Indonesian Fishers Who Access the MOU Box, Environment Australia, October

Stacey, N. (2001) Crossing Borders: Implications of the MOU on Bajo fishing activity in northern Australian waters, *presented at* “Understanding the Cultural and Natural Heritage Values and Management Challenges of the Ashmore Region” Symposium, Darwin, 4-6 April, *and*,

(2007) Boats to burn: Bajo fishing activity in the Australian fishing zone, including Chapter 3: The Maritime World of the Bajo, Chapter 5: Australian Maritime Expansion, <http://epress.anu.edu.au/apem/boats/pdf/ch05.pdf>

UNESCO (2005) Children Out of School: Measuring Exclusion From Primary Education, UNESCO Inst. For Statistics, p.41
<http://www.uis.unesco.org/Library/Documents/oosc05-en.pdf>

UNICEF (2010) Children in Indonesia: Birth Registration, (June)
http://www.unicef.org/indonesia/UNICEF_Indonesia_Birth_Registration_Fact_Sheet_-_June_2010.pdf

White, M. & Molloy, A. (2010) Australian Maritime Law Update 2009: Fisheries, 24 A&NZ Mar LJ,

Indonesian-related: Language

Grimes, C., & Jacob, J. (2008) Kupang Malay Online Dictionary, ISBN 978-1-86892-594-0
<http://www.e-kamus2.org/index.html>

Jacob, J., & Grimes, B. (2006) Developing a role for Kupang Malay: the contemporary politics of an eastern Indonesian creole. Paper presented by June Jacob at the 10th International Conf. on Austronesian Linguistics held in Puerto Princesa, Palawan, Philippines, (17-20 January)

Lewis, M. Paul, Ethnologue: Languages of the World, Sixteenth Edition
http://www.ethnologue.com/show_country.asp?name=IDN

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Lowlands-1, Bahasa Melayu, <http://www.lowlands-1.net/anniversary/malay-info.php>

Indonesian-related: Montara

AMSA (2009) Total Dispersant applied during Montara Wellhead Platform oil spill response

http://www.amsa.gov.au/marine_environment_protection/Montara_Well_Head_Platform/media/MontaraDispersantUse.pdf

Kimberley Whale Watching (2009) Submission to the Inquiry into the Montara Platform Uncontrolled Hydrocarbon Leak, (22 December),

<http://www.montarainquiry.gov.au/downloads/SUBM.5002.0001.0001.pdf>

King, B. *et al* (2010) A case study of consensus modelling for tracking oil spills, 17th National Conf. of the Aust. Meteorological and Oceanographic Society, IOP Publishing

Mason, C. (2010) Submission by the West Timor Care Foundation (Yayasan Peduli Timor Barat) to the Report of the Montara Commission of Inquiry, (11 May)

http://www.ret.gov.au/Department/Documents/MIR/11_West_Timor_Care_Foundation.pdf

PTTEP Australasia (2011) Building on the Lessons of Montara, (11 August)

<http://www.au.pttep.com/uploads/PTTEP%20Staff%20Induction%20Handout%20d%2020.pdf>

Siewert, R. (2009) Commission of Inquiry Montara Well Head Platform Uncontrolled Hydrocarbon Release,

<http://www.montarainquiry.gov.au/downloads/submissions/Siewert%20-%20submission.pdf>

Tanoni , F. (2011) Montara Spill May Be Sickening Fishermen: NGO (3 November)

<http://www.thejakartaglobe.com/home/montara-spill-may-be-sickening-fishermen-ngo/476136>

and,

(2011) Timor seabed destroyed after Montara incident: YPTB

<http://www.antaranews.com/en/news/76764/timor-seabed-destroyed-after-montara-incident-yptb>

<http://deoilit.com/2011/10/environment-group-says-indonesia%E2%80%99s-timo-sea-largely-destroyed-due-to-2009-montara-oil-spill/> *and*

(2011) Coral reef destruction (near Sawu) caused by Montara explosion (26 August)

<http://www.antaranews.com/en/news/75159/coral-reef-destruction-caused-by-montara-explosion>

Indonesian-related: People Smuggling

ACPL (2011), Determining the ages of people smugglers, Commonwealth Parliamentary Library, 21 November,

<http://parliamentflagpost.blogspot.com/2011/11/determining-ages-of-people-smugglers.html>

ACS/BPC (2009), GAMSA: a Guide to Australian Maritime Security Arrangements, Australian Government, issued by ACS Border Protection Control

www.customs.gov.au/webdata/resources/files/GAMSA.pdf

AFP (2011), Blue Line: Clarification on the AFP age determination process, 6 January

<http://www.afp.gov.au/media-centre/news/afp/2011/january/clarification-on-the-afp-age-determination-process.aspx>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

- APH (2010), Senate Standing Committee on Legal and Constitutional Affairs: Australian Customs Border Protection Service, Question No.38, (18 October)
http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/sup_1011/ag/038_ACBPS.pdf
- APH (2/2011), Senate Standing Committee on Legal and Constitutional Affairs: Australian Federal Police, Questions No.6, 25, (22 February)
http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/add_1011/ag/006_AFP.pdf
http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/add_1011/ag/025_AFP.pdf
http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/add_1011/ag/025_AFP_Attachment.pdf
- APH (5/2011), Senate Legal and Constitutional Affairs Committee: Director's message – important developments for (the CDPP) in light of budget decisions, (25 May),
http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/bud_1112/ag/AG3.pdf
- APH (12/2011), Australian Government spending on irregular maritime arrivals and counter-people smuggling activity, (6 December)
<http://www.aph.gov.au/library/pubs/bn/sp/PeopleSmuggling.htm>
- Bailey, R. (2011) Exception, Precariousness, Power & Authority: irregular migrants in Australia law, www.criticallegalthinking.com
- Elmore, L. (2011) People Smugglers, Indonesian Fishermen and our extreme green policy, *Crikey*, (4 November)
- INP (2010) Concept of Immigrant Smuggling Handling in Indonesia, Presentation, Jakarta, April,
http://www.abc.net.au/4corners/special_ed/20100802/asylum//docs/smuggling_indo_police.ppt.
- IOM Indonesia, (2010) Irregular Migration, (Fact Sheet, Jan.), *and Public Information Campaign on Irregular Migrant,* (Newsletter, Vol.IV, Issue 2 Sept.-Nov.)
- Jackman, C. (2011) Caught in The Net: investigation into the lucrative trade of people smuggling, *The Australian*, 15 April
- James, L. (2010) Indonesian National Police and People Smuggling Investigations, *Jnl for Women & Policing*, Issue 26, Winter, pp 30-32
- Kelly, J. (2010) People-smugglers: saviours or criminals? A report on 16 convicted people smugglers in Australia between 2001 – 2006, ALHR, November
- Martin, C. (2011) Scum of the Earth? People smuggling Prosecutions in Australia 2008-2011, Uni.of Qld Law School, July
- Nolan, B. & Vincent, P. (2010) Australian law on Rote?, *Inside Indonesia*, (29 Oct.)
<http://www.insideindonesia.org/weekly-articles-102-oct-dec-2010/australian-law-on-rote-29101947>
- Prayitno, L (2011) Role of the IOM and the Relationship with the UNHCR for Handling Immigrants and Refugees in Indonesia, *abstract,* Universitas Lampung, 4 July
www.fhunila.ac.id
<http://repository.unila.ac.id:8180/dspace/handle/123456789/3210>

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Roberts, P. & Bonneau, L. (2009) Bali Process Ad Hoc Group: Information Campaigns to Combat People Smuggling, 'the Bali Process' Presentation, May
[http://www.baliprocess.net/files/2377415-v1-INFORMATION_CAMPAIGN_PRESENTATION_BALI_PROCESS_SOM%20\(2\).ppt](http://www.baliprocess.net/files/2377415-v1-INFORMATION_CAMPAIGN_PRESENTATION_BALI_PROCESS_SOM%20(2).ppt)

Schloenhardt, A. (2011) Migrant Smuggling & Organised Crime in Australia, Uni. Of Qld Law School, September

Warton, A. (2002) The changing tide of people smuggling, Jnl of the AFP, Platypus Magazine (Jun.)

Woolner, D. (2011) The Governance of Security in Australia's Maritime Domain, Security Challenge (Winter) pp55-80

Interpreters

Barnett M. (2006) Mind Your Language: The Role Of Interpreters in Immigration Proceedings , 10 UWCLR 109 -138, [2006] UWCLawRw 5;

Choolun, N. (2009) Lost in Translation? An Examination of Court Interpreting in Australia. Queensland Law Student Review, 2(1)

District Court of Western Australia, (2011) Language Services Guidelines & Protocols For The Use of Interpreters, Circular to Practitioners GEN 2011/2, 27 Sept.

Hale, S. (2001) The Complexities of the Bilingual Courtroom, Law Society Journal (July). pp.68-72 *and*

(2011) Interpreter Policies, Practices and Protocols in Australian Courts and Tribunals – A National Survey

Hayes, A. & Hale, S. (2010) Appeals on Incompetent Interpreting, 20 JJA 119

McKeown, C. Miller, M. (2009) Say what? South Dakota's unsettling indifference to linguistic minorities in the courtroom, South Dakota Law Review, (Spring)

Minnesota Sup. Crt Interpreter Advisory Committee, Appendix: H. Voir Dire for Judges and J., "Court Interpreting: View from the Bench", Best Practices Manual On Interpreters In the Minnesota State Court System, 1999 (as amended 2/2003)

Miller, M. *et al* (2011) Finding Justice In Translation: American Jurisprudence Affecting Due Process For People With Limited English Proficiency Together With Practical Suggestions, Harvard Latino Law Review, Vol.14, pp117-154

Morris, R. (1999), The Gum Syndrome: Predicaments in Court Interpreting, Forensic Linguistics 6(1) 1999, University of Birmingham Press 1350–1771, p.17

Preston, A. (2010) Indigenous Language Issues in the Australian Legal System, Farrago, (28 October)

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Media – People Smuggling in the Australian press

<http://www.theaustralian.com.au/national-affairs/process-our-accused-people-smugglers-faster-jakarta-urges-canberra/story-fn59niix-1225922562011> (14 Sept 2010)

<http://www.theaustralian.com.au/national-affairs/dpp-funds-cut-for-people-smuggling-prosecutions/story-fn59niix-1226062976775> (26 May 2011)

<http://www.abc.net.au/news/2011-10-19/people-smuggling-cases-overwhelm-dpp/3578080> (19 October 2011). Same story, see <http://www.garyhumphries.com/2011/10/1750>

<http://www.smh.com.au/national/people-smugglers-swamping-the-courts-20111226-1pajn.html> (27 December 2011)

<http://www.theaustralian.com.au/national-affairs/immigration/harsh-penalties-for-boat-crew-target-wrong-people/story-fn9hmlgu-1226233592962> (31 December 2011)

<http://www.theaustralian.com.au/national-affairs/immigration/jailing-smugglers-will-cost-taxpayers-112m/story-fn9hmlgu-1226235131691> (3 January 2012)

<http://www.theaustralian.com.au/national-affairs/immigration/jakarta-calls-for-release-of-juvenile-boat-crews/story-fn9hmlgu-1226247781427> (19 January 2012)

Prosecutions: general literature

Anderson, K. (2002) Developments in the law in relation to an accused person electing not to give evidence at trial, LegalAid Qld, CLE (6 August)

Barker, I. (2011) Circumstantial evidence in criminal cases, Bar News, (Winter), pp32-39

Bartels, L. (2011) Police Interviews with vulnerable adult suspects, Criminology Research Council, Report No.21, (July), www.aic.gov.au

Boniface, D. (1993) Foster v R, 3 Aboriginal Law Bulletin 65

CDPP (2010) Officer of the Director of Public Prosecutions: Outcomes and Program Information, <http://www.cdpp.gov.au/Publications/Budgets/PBS20102011-CDPP.pdf>
<http://www.cdpp.gov.au/Publications/Budgets/PBS2011-2012-CDPP.rtf>

Collins, B. (2009) The Use of Documents in Cross Examinations: The Rules of Practice, (19 October)

Cowdery, N. (2004) The Prosecutor's Duty of Disclosure, Public Defenders' Conference, Taronga, (8 May) *and*,

(2008) The Power of Persuasion – Some Practical Lessons for the Solicitor Advocate, The College of Law, CLE Seminar, (1 March) *and*,

(2009) The DPP's Decision to Prosecute, NSW Bar Practice Course, (August)

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

- Craigie, C. (2011) Management of lengthy and complex counter terrorism trials: an Australian prosecutor's perspective, AIJA Criminal Justice in Australia and New Zealand - Issues and Challenges for Judicial Administration Conference, (8 Sept.) *and*, (2011) From tax to terrorism, Common law to Code, Bar News, (Winter)
- Greenhill, R. (2007) Conducting a Voir Dire, NSW Bar Practice Course, (August)
- Greenwood, P. (2011) Case Analysis – How prepared are you?, (as amended, Jan.)
- Hamill, P. (2010) Opening and Closing Addresses, Public Defenders Conference
- Harris, W. (2003) Truth of Confession on the Voir Dire, Uni of Tas. Law School
- Hocking, BA. & Manville, LL. (2001) What of the Right to Silence: still supporting the presumption of innocence, or a growing legal fiction?, Macq Law Jnl 3
- Howie, Justice (2010) Interpretation of the Criminal Code, Public Defenders Conf.
- Lanham, D. (2006) The Anatomy of a Crime, Criminal Laws in Australia, Ch.1C
- Maiden, P. (2010) Cross Examination of Expert Witnesses, NSW Bar Practice Course (20 May)
- Martin, B. (1997) The Adversarial model in the criminal justice system: what change is happening?, Heads of Prosecuting Agencies in the Commonwealth Conference, Wellington, (24 September)
and
(1998) Prosecution issues, Australian Institute of Judicial Administration Conference...: Towards 2000, (27 February)
- McClintock, I. (2009) Addressing a Jury, Public Defenders Conference
- McDougall, Justice. (2009) Some Thoughts on Calling Expert Evidence, Speeches NSWSC, (13 November)
- Mellwaine, R. & Stone, A. (2007) Cross Examination on Documents, NSW Bar Practice Course (August)
- NSWLRC, (2008) Consultation Paper 4 - Jury Directions, (re Duress)
- O'Donnell, C. (2000) The silent accused, NSW Bar News (Spring) pp12-15
- Sullivan, A. & Greenwood P. (2011) Objecting to Evidence, NSW Bar Assoc. (March)
- Twigg, K. (ed), [2003] Guidelines on Brief Preparation, Commonwealth Director of Public Prosecutions, (as revised Sept. 2009) *and* Statement on Prosecution Disclosure

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

<p><u>APPENDIX C:</u></p> <p>Glossary of Selected Terms</p> <p>Source: IOM Vienna (2006)</p>	<p>Asylum seekers: Persons seeking to be admitted into a country as refugees and awaiting decision on their application for refugee status under relevant international and national instruments.</p> <p>Child: A child is an individual below the age of 18 years (definition of Article 3d of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime).</p> <p>Closed alternative question: This type of question invites one answer out of a given choice, e.g.: “What colour was the car, silver, grey or another colour?”</p> <p>Closed specific question: This type of question usually invites a single, specific answer, e.g.: Qu. “At what time of day did this happen?”; Ans. “In the morning”.</p> <p>Dentin: One of the two mineralized structures of the teeth. It consists of active cells or odontoblasts that are captured within a calcified matrix of hydroxyapatite and collagen.</p> <p>Disruptive investigation: This option is used in cases where the level of risk to the victim of trafficking demands an immediate response and/or where the proactive investigation is either not an option or precluded by national legislation. However, it must be mentioned that the disruptive investigative option is not a long term solution and may only displace or drive the problem to another location or “underground”.</p> <p>Emotional debonding: Loss of attachment to an emotional connection with another person.</p> <p>Enamel: One of the two mineralized structures teeth consist of. It constitutes the outer clinical part of the tooth as seen in the mouth. It is virtually dead material consisting of hydroxyapatite crystals covering and protecting the tooth crown.</p> <p>Evidential interview: The child is interviewed with the purpose of gathering evidences for use in legal proceedings, immigration matters, child protection issues and/or the prosecution of offenders. The evidential interview aims to obtain a truthful and accurate account of what the child has been victim of or witness to. It consists of four following phases: (1) Introduction/Rapport: introduction of each person and of the engagement of the conversation with the child; (2) Free narrative; (3) Clarification/Questioning; (4) Closing: recapitulation of the story in exactly the same order of events as the child has recounted it; comments and questions from the child.</p> <p>Flagging: Labelling the intelligence into categories that can be easily apprehended and retrieved by electronic means. The word “flag” relates to a computerized marker that is electronically attached to pieces of data so that they can be filed and retrieved from within the specifications imposed by the flag. On a paper system, the “flag” is simply the marker made against the written entry that shows what the intelligence relates to in the system.</p>
--	---

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Good practice: The term good practice is used to describe a practice in the field of combating child trafficking that has proved to be efficient in one country or more and to indicate that this system might be applicable and adaptable in a different setting. A model of good practice can also be derived from a model of bad practice. No model can be entirely duplicated due to different national settings. Each model of good practice also has disadvantages and might not work in a different setting, but it is still valuable as an effective method in the respective country.

Hand wrist radiograph: X-ray (radiography) of bones of hand/wrist. It is an instrument in order to reveal indications of skeletal age.

Identification: There are two different types of identifications: the identification of the child or determination of the identity of a child (searching for information that would be contained in birth certificate, or identity documents/passport: name, nationality, date and place of birth); and the identification of the child as a potential or actual victim of trafficking (important in order to assist in providing protective measures for the child and in the investigation and prosecution of traffickers).

Intelligence-led investigations: Police-led investigation, arrest and successful prosecution of traffickers without relying on the cooperation and testimony of the victim. In other words, it is a combination of intelligence-gathering, human and technical surveillance, the work of undercover agents and standard investigative techniques to identify the traffickers and instigate proceedings against them.

Investigation: Process of collecting data, information and declarations made by a probation officer in preparing allegations against the defendant.

Investigative methods: The main investigative methods are the following: proactive / intelligence-led investigation, reactive / victim-led investigation, disruptive investigation.

Joint investigation teams: Competent authorities of two or more states setting up a team for a specific purpose and a limited period, to carry out criminal investigations in one or more of the states setting up the team. (European Union Council Framework Decision of 20 June 2002 on Joint Investigation Teams)

Leading Questions: Questions misleading the person and planting false memory. It is imperative that the interviewer avoids using leading questions. Ex: Was the car grey?

Minor: A minor is to be considered as a child, meaning every person below the age of 18 years.

Monitoring room: Side-room where the video-recorded interview can be watched (e.g. behind a mirror).

Open questions: Questions beginning with words such as “Tell me”, “Explain to me”, “Describe to me”, with the purpose of enabling the child to recount as much detail as possible.

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Orthopantomogram (OPG): Radiological panoramic overview of the dentition. It reveals the teeth that are completely formed and calcified and those that are still in the process of being formed.

Post-Traumatic Stress Disorder (PTSD): The condition that occurs when a victim lives through an experience or series of experiences so extreme that he/she is unable to comprehend its nature or accept that this has happened to him/her. The symptoms can be various: intrusive images, visual or sensory hallucinations, vivid flashbacks and memory impairment. The victims may be unable to produce a description of what happened to them.

Proactive investigations: See Intelligence-led Investigations.

Prosecution: The institution and conduct of legal proceedings against a defendant for criminal behaviour.

Reactive investigations or victim-led investigation: The investigative teams rely on the cooperation and testimony of the victim to find available additional corroborative material to be used as evidence in judicial proceedings.

Risk assessment: Risk assessment is an operational risk evaluation in relation to existing and potential child victims of trafficking. Risk assessment is a continuing process during the preparatory phase of an investigation and intelligence gathering, the pre-arrest and post-arrest phase of a criminal investigation as well as in the pre-trial and post-trial phase. The operational risk assessment also focuses on the ideal investigative and multi-agency team and the joint action of police services and public service providers.

Rogatory Letter: Procedural act by which a court calls upon another court for a civil process or investigation which it cannot undertake.

Shelter: Accommodation in a safe environment.

Smuggling: The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the entry of a person into a State of which the person is not a national or a permanent resident (definition from the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention on Transnational Organised Crime, entered into force on 28 January 2004).

Sternal epiphyseal: The radiological assessment of the degree of ossification of the sternal epiphyseal cartilage of the clavicle is a diagnostic instrument in forensic age diagnosis of young adults, which reveals the stages of ossification.

Testimony: Oral evidence provided at a trial through an oral deposition.

Threat assessment (strategic analysis): This analysis contains activities and methods of collecting, processing and analysing data on potential exploitation situations of children. It collects and uses statistical data as well as qualitative data on the selected cases.

Submission to AHRC Inquiry: Age Assessment in People Smuggling cases

Trafficking: “Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”, Art.3(a) UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

Trauma: Trafficked children can be affected by two kinds of traumas: Trauma type I involves a single traumatic event, while trauma type II consists of multiple, chronic experiences. Traumatic events such as physical abuse, sexual exploitation, and psychological humiliation can cause the following consequences: narrowing of attention, dissociation, repression and Post-Traumatic Stress Disorder (PSTD).

Unaccompanied Minors: “The nationals of third countries who are under 18 years old who enter the territory of Member States and are not accompanied by an adult who is responsible for them, by law or by custom, and as long as they are not effectively cared for by such a person. The present resolution could also be applied to minors who are nationals of third countries and who have been left alone after entering the territory of the Member States”. (Article 1 (1) of the Council Resolution of 26 June 1997 on unaccompanied minors (UAMs) who are nationals of third countries defines UAMs).

Victim-led Investigation: See reactive investigations.

Voluntary Return: The assisted or independent return to the country of origin, transit or another third country based on the free will of the returnee.