



The Chief Magistrate of the Local Court

3 February 2012

The Hon Catherine Branson QC
President and Human Rights Commissioner
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

Dear Ms Branson QC

Re: Age Assessment Inquiry

I write in response to your invitation to make a submission to this Inquiry.

The terms of reference raise a number of issues for examination. My response is necessarily limited to those that fall within the jurisdiction and activities of the Local Court of New South Wales. The comments that follow are general observations arising from the experience of members of the Court.

Overview of Local Court role

The Local Court is involved in proceedings for people smuggling offences from the time persons are charged by the Commonwealth Director of Public Prosecutions under the *Migration Act 1958* (Cth) and taken into custody from immigration detention to an Australian gaol.

Probably the most common charge encountered by the Court is people smuggling of a group of at least 5 people under s 233C, which attracts a mandatory penalty of at least 5 years' imprisonment with a non-parole period of 3 years under s 236B.

As the jurisdiction of the Local Court is limited to the imposition of a sentence of imprisonment of up to 2 years for a single offence, the Court's function in respect of proceedings under s 233C (and most other people smuggling prosecutions) is to determine whether the accused should be committed for trial or sentence to the District Court or discharged.

However, as no discount is available for a plea of guilty (which ordinarily attracts a reduction on sentence of around 25 percent when entered in the Local Court), the majority of matters are committed for trial because there is nothing for the accused person to lose by such an action.

Delay in proceedings due to age assessments

The most significant challenge facing the Court is delay and the effect of that delay upon accused persons being held in custody, particularly when it is considered that suspects (whether adults or minors) may already have been held in Immigration detention for some time prior to being charged. Since the commencement of people smuggling prosecutions in New South Wales in approximately September 2010, the delays experienced have reduced considerably but remain a concern.

The determination of an accused person's age generates considerable delay in the court process, but has significant consequences for the accused person as a result of the Commonwealth's decision that those found to be minors are repatriated to their country of origin rather than the proceedings against them continuing. Instances where the Commonwealth determines not to proceed independently of determination of age by the Court, discontinues the proceedings and repatriates the accused person have become increasingly common to the point that very few prosecutions now proceed. However, in those that do, the accused person's age continues to arise as an issue for determination with relative frequency.

While determinations of age could be resolved in the District Court upon committal, the Local Court at first instance is a more appropriate, timely and expeditious alternative. Notwithstanding the Court's best practice and Time Standards,¹ significant time is typically needed for this to occur.

Lengthy adjournments may be necessary where, quite rightly in the circumstances, the accused person's lawyers chose to contest the age of their client and, as the Commonwealth DPP has accepted, the onus is on the Commonwealth to prove to the Court that the accused person is an adult.

Although the Court does what it can to deal with all matters expeditiously, the need for procedural fairness will often necessarily result in significant delay where, for instance:

- A complete brief is not served;
- Protracted arrangements are made for attending and taking instructing from the accused person in custody;
- Limited interpreter resources are available or difficulties;
- Difficulty is experienced in interpreter assisted contact, whether face-to-face or via telephone or AVL, such as due to differences in dialect between the interpreter and the accused person;
- Examination and interpretation of x-ray reports and statistical extrapolation is required; and
- Reports relevant to age assessment are sought from cultural, sociological, educationalist and developmental experts.

All these processes may take a disproportionately long time, and where the accused person is in fact a minor, leave him or her in custody in inappropriate adult surroundings.

¹ No specific practice directions have been developed in respect of prosecutions for people smuggling offences. However, the Local Court has published Time Standards that relevantly include the disposition of 90% of proceedings for committal for trial or sentence in a higher court within 6 months, and 100% within 12 months.

In view of the resources available to the Commonwealth to determine the age of persons suspected of people smuggling, one possible alternative to limit the current protracted court process may be for steps to be undertaken to assess an accused person's age at a stage earlier than the institution of proceedings.

Method of age assessment

Section 3QZA of the *Crimes Act 1914* (Cth) and reg 6C of the Regulations provide a statutory mechanism for the possible assessment of the age of a defendant by way of x-ray. I understand that considerable doubt has been raised as to the scientific accuracy of this method. When challenged in proceedings before the Court, this can have consequences for the weight that may be given to the evidence, or even its admissibility.

As you would know, evidence of an accused person's age based on interpretation of x-rays (or any other method) is a matter for expert opinion evidence, the admissibility of which is regulated by s 79 of the uniform evidence legislation. Under that section, the opinion must be based upon expertise in a recognised field of 'specialised knowledge'. As Heydon JA noted in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705:

[85] ... [I]f evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"... **the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached:** that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight.... [emphasis added]

I do not purport to express a conclusion on the subjects of the reliability of the x-ray method or what method of age assessment should be preferred. I would simply observe that, in light of such concerns, the current inquiry into methods of age assessment and the investigation of alternatives to the x-ray method is strongly desirable.

Thank you for the opportunity to make a submission. Should I be able to assist the Commission further in this Inquiry, please do not hesitate to contact my office.

Yours sincerely,



Judge Graeme Henson
Chief Magistrate