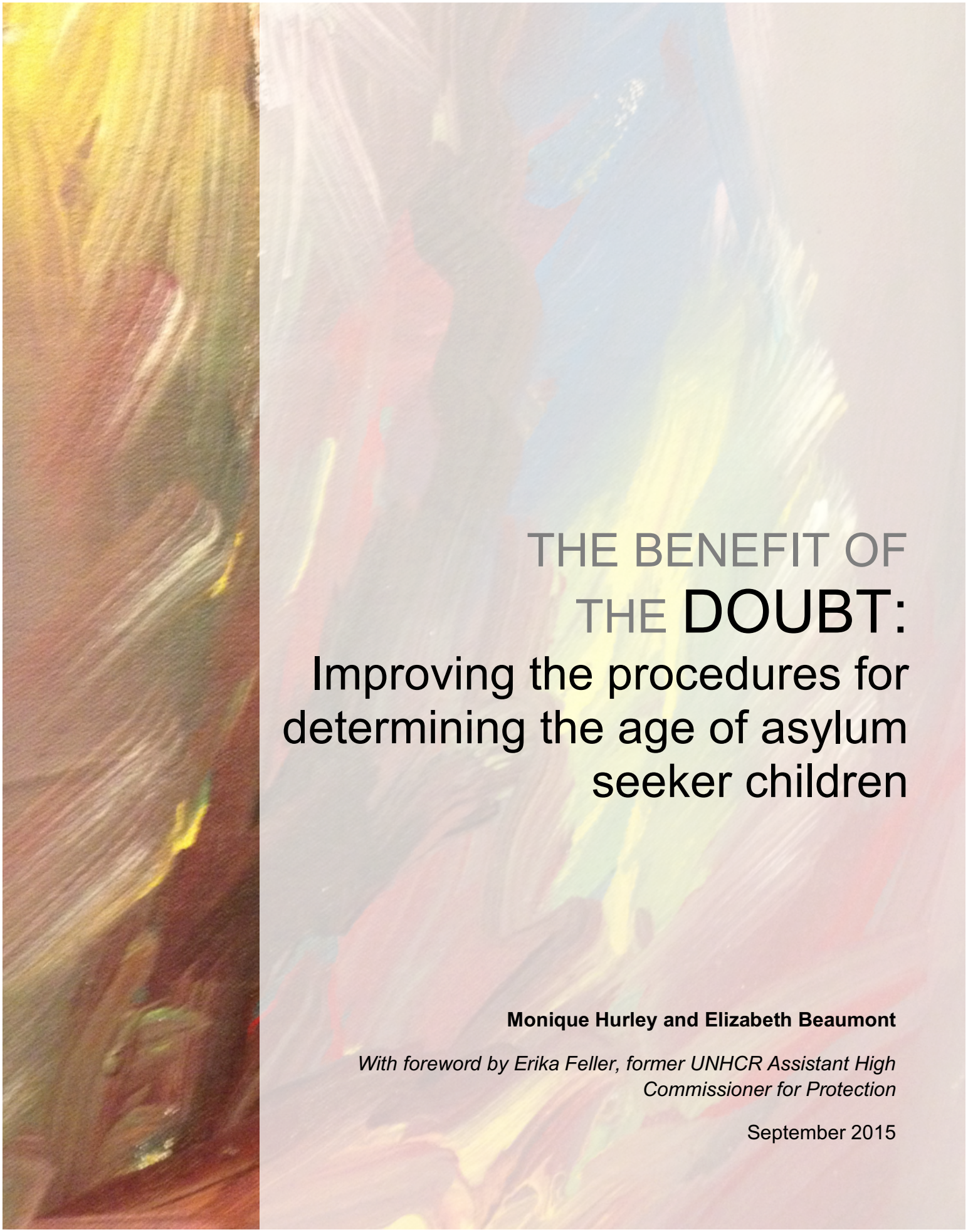

THE BENEFIT OF THE DOUBT:

Improving the procedures for determining the age of asylum seeker children

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With foreword by Erika Feller, former UNHCR Assistant High Commissioner for Protection

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ABOUT THE REPORT

This project began in response to alarming reports about age determination procedures adopted by the Department of Immigration and Border Protection. The information gathered, particularly from lawyers practising in refugee law, revealed gaps in the way in which age determinations were taking place, with repeated reports of age determinations being made by inadequately qualified officials without reliance on substantive evidence.

This report was produced by Young Liberty for Law Reform, a part of Liberty Victoria, which offers young professionals and law students the opportunity to engage in law reform and advocacy projects with leading human rights experts.

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The views expressed in this report are the views of the authors only and should not be taken to be the views of Liberty Victoria.

About Liberty Victoria

Liberty Victoria is one of Australia's leading civil liberties organisations. It has been working to defend and extend human rights and freedoms in Victoria for over 70 years. The aims of Liberty Victoria are to:

- help foster a society based on the democratic participation of all its members and the principles of justice, openness, the right to dissent and respect for diversity;
- secure the equal rights of everyone and oppose any abuse or excessive power by the state against its people;
- influence public debate and government policy on a range of human rights issues. Liberty Victoria have policy statements on issues such as access to justice, a charter of rights, freedom of speech and privacy; and
- make submissions to government, support court cases defending infringements of civil liberties, issue media releases and hold events.

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FOREWORD

Age determination is the gateway to child-friendly asylum. This report is recommended reading for all those who are engaged with the struggle – for that is what it still is, in many jurisdictions – to ensure child-sensitive protection frameworks are in place, functioning and accessible as a routine aspect of broader asylum and migration management systems.

Children have comprehensive rights under international law, yet in practice they are often deprived of the most basic ones. This is still too regular a reality when it comes to child asylum seekers, particularly those moving without accompanying parents or guardians, which is a growing and extremely worrying global trend. There are a variety of reasons for children moving, separated or unaccompanied, within an asylum flow. In many cases the cause links to conflict, as children increasingly become direct targets of violence. From Somalia to Syria, and way beyond, children are casualties, killed, tortured, forcibly recruited or arbitrarily arrested. For others, flight is a coping mechanism to deal with repressive national policies, such as those regulating military conscription. Economic pressures on family, or family reunion with relatives abroad, are additional reasons, with parents increasingly entrusting even very young children to the burgeoning smuggling and trafficking trade.

Whatever the reason, a child is a child. Because most asylum processes and systems have been created predominately with adult beneficiaries in mind, they usually necessitate particular tailoring when called upon to deal with child asylum seekers. There is a wealth of doctrine which places primacy here on the 'best interests of the child' principle as the primary determinant of all actions concerning child asylum seekers, from their identification, reception and referral, through finding appropriate temporary care arrangements, to participation in asylum processes and the adjudication of claims. The principle holds that it is not sufficient merely to consider the best interests of a child, but that these must be accorded substantial weight. This takes cognisance both of the extreme vulnerabilities of child asylum seekers and of the fact that the asylum needs of children and adults can be very different, in fact even conflict. The principle necessitates, as a result, that the authorities turn a child friendly lens to border controls, interception on the seas, detention of irregular arrivals, as well as the workings of the national asylum system more broadly. When it comes to having their claims to refugee status assessed, it means that child asylum seekers must have access to child and gender-

sensitive status determination processes which are professionally resourced to deal with child claimants, and which work with definitions that take directly into account child-specific manifestations and forms of persecution. Substantively, the same definition of 'refugee' applies to all individuals, regardless of age. Children may also flee because of a fear of persecution flowing from their race, religion, nationality, membership of a particular social group, or even political opinion, imputed or otherwise. This may, though, not always be immediately apparent because of the way children experience persecution, or express and manifest their fear.

For the benefits of a child-friendly system to be accessible, a child applicant must first be identified as such. Determining the age of a young claimant is the precursor to all that should flow to child applicants. It must be among the more vexing questions which a child protection framework has to address. Age determination is rarely possible with absolute certainty, even applying the more sophisticated methods, and certainly not with the unreliable techniques resorted to by many countries, which can include over-reliance on intrusive, culturally insensitive and frightening examinations. The fact that many unaccompanied and separated children travel without documents (or with false documents) is a complicating factor. The consequences of wrong assessments can be potentially very harmful.

A review several years back by UNHCR of unaccompanied minor trends in Europe brought to light many disturbing issues. These included widespread discounting of minor status despite the use of age assessment techniques which had been widely criticised. As the cases in question mainly fell within the Dublin Convention admissibility procedures, this meant that, after having been found to be 'adults', the minors were able to be detained, then deported. The same study brought out other unfortunate and unanticipated connections between age assessment and detention. Some groups of claimants were recorded as actually having tried to avoid declaring the minors among them in an effort to limit time in detention. Age assessment procedures proved so lengthy and cumbersome that a minor declaring to be an adult actually had a somewhat better chance of earlier release from detention and processing of the claim. The downside was that the claim was then assessed wholly through the adult lens, without the benefit of child-specific protections. Overall this and other such studies regularly substantiate the need for more holistic and inter-disciplinary methods, with assessments being made part of a comprehensive approach which takes into account physical appearance, psychological maturity and indeed the fact that age is not weighted, or given importance, to the same degree universally. They call in particular for a more flexible approach to

extending the benefit of the doubt and working with a presumption of minor age in case of doubt.

This timely report is very much in the vein of these earlier studies. It brings out that there is still room for much improvement when it comes to age determination procedures, which can be complicated, lengthy, often contentious and even flawed. The report makes a strong and cogent case for improving procedures and contains a host of sensible recommendations in this regard which, if acted upon, would go a long way to ensuring that the rights of child asylum seekers, envisaged under international law, are in fact accessible and guaranteed.

Erika Feller

Former UNHCR Assistant High Commissioner for Protection

ABBREVIATIONS

Act	*Migration Act* 1958 (Cth)
CISSR	Council for Immigration Services and Status Resolution
CRC	Committee on the Rights of the Child
CROC	Convention of the Rights of the Child
Department	Department of Immigration and Border Protection
IAAAS	Immigration Advice and Application Assistance Scheme
IMA	Illegal Maritime Arrival
FOI	Freedom of Information
OPC	Offshore Processing Centre
PAM	Procedures Advice Manual
SCEP	Separated Children in Europe Programme
SIEV	Suspected Irregular Entry Vessel
SOP	Standard Operating Procedures
Tribunal	Refugee Review Tribunal
UNHCR	United Nations High Commissioner for Refugees
YLLR	Young Liberty for Law Reform

EXECUTIVE SUMMARY

For most people, proving age is as simple as producing a driver's licence, passport or birth certificate. If these documents are lost, a replacement can be applied for. Each of these documents are seen as reliable proof of how old we are.

This is not the case for many asylum seekers, and it is certainly not the case for unaccompanied children seeking asylum. More often than not, asylum seekers have fled in haste from their country of origin without thinking to gather, or without being able to gather, original documents that prove their identity or age. Some asylum seekers come from countries that do not automatically issue identity documentation or have limited ability to record births and deaths.

In the absence of these types of identity documents, it is very difficult to assess and determine a person's age. In Australia and around the world, when such documents are absent, age is determined on the basis of an interview – a multi-factorial assessment to establish whether an asylum seeker is over or under the age of 18. These age determinations are an inexact science, relied upon to make fundamental decisions that significantly affect an asylum seeker's rights and treatment: in Australia, whether a person is a minor or an adult determines the location of regional detention – Manus vs Nauru – and the standard of care owed to this particularly vulnerable class of people by the Australian government. While international law recognises that asylum seeker children are particularly vulnerable, this report has found that the age determination practices in Australia do not appropriately address this vulnerability. In particular, this report raises three key concerns:

- age determination policies, as practised by the Department of Immigration and Border Protection, often deny children the benefit of the doubt when determining whether they are over or under 18 years of age;
- age determination officers are not appropriately qualified or experienced and are insufficiently trained to conduct age determination assessments; and
- asylum seekers are expected to navigate the age determination process without legal representation or an independent advocate in circumstances where access to reasons for an adverse decision and reviews of adverse decisions are limited.

RECOMMENDATIONS

The benefit of the doubt principle

1. The 'benefit of the doubt' principle should be the principle and overriding factor in all age determinations. The primacy of this principle should be made clear in the Department's Procedures Advice Manual and during the training of age determination officers.

Independence of age determination officers

2. Age determination officers should make an independent decision and should not discuss their conclusions or collude with each other before each reaching an independent decision about an applicant's status as a minor or an adult.

Qualifications and training of age determination officers

3. Age determinations should be undertaken by persons who have appropriate qualifications and experience in working with vulnerable children. Appropriate qualifications includes qualifications in social work, psychology or child development.

4. Age determination officers should receive more comprehensive training to help familiarise themselves with the different cultural backgrounds of children who claim asylum in Australia. Training should also emphasise the effect that torture and trauma can have on children and a child's ability to engage with interviewers, answer questions and recount traumatic events.

Evidence relied upon in conducting age determinations

5. An applicant's physical appearance should never be the sole basis on which an age determination officer concludes that that an applicant is not a minor.

6. Uncertainty regarding the authenticity of documentary evidence should not lead to an automatic presumption that the documentary evidence is fraudulent but rather should go to the weight to be attributed to that evidence

Procedure of age determinations

7. More than one age determination interview should be permitted where further assessment is required.

8. Age determinations should not be conducted remotely. All age determinations should be conducted via face-to-face interviews.

9. Children should be able to access free legal representation during the age determination process and for the purpose of reviewing an adverse age determination.

10. Children should have a formal right to review an adverse age determination.

11. An asylum seeker should immediately and clearly be notified of any decision and the reasons for the decision, without having to make a Freedom of Information request. If the child has legal representation, the lawyer should also be sent a notification of the outcome and the reasons for the adverse decision as a matter of course.

BACKGROUND

'Age determination' is the process by which a person's age is assessed. In the immigration context, it refers to the processes used by the country receiving asylum seekers to determine whether a person is a minor or an adult. In Australia, the need for an age determination usually occurs when officials of the Department of Immigration and Border Protection (**the Department**) suspect that a person is either a minor or adult, while the person in question maintains otherwise. Between August 2011 and 30 June 2012, the Department conducted 621 age determinations on asylum seekers and 272 were found to be adults.[1]

The difficulty in assessing age

"He described the age assessment interview as 'the worst thing I will never forget'" — Extract from the Australian Human Rights Commission's recent Inquiry into Children in Immigration Detention

Determining someone's age is a difficult process. This is because it is not uncommon for asylum seekers to possess little or no documentation that identifies their age, such as birth certificates, identity cards or passports. Such documents may never have been issued, may not be possible to obtain in their country of origin, may have been left behind, may have been confiscated by people smugglers or may have been lost prior to arrival. People may also be unsure of their age because, for example, they were born in times of conflict or never have had their birth officially recorded. Only 38% of children under the age of five have their births registered in developing countries.[2] It is therefore unsurprising that many asylum seekers, particularly minors, arrive in Australia without knowledge of their exact age or documentation that supports their date of birth.

Further, the age determination process relies on an understanding of how children develop physically and emotionally in different cultures and environments. There are a number of circumstances that can affect an asylum seeker's physical and emotional development. Illness, malnutrition, extreme stress, trauma and a fractured childhood all affect the way a person develops. This is in addition to the cultural factors that influence the development of a child, including different diets, attitudes towards a child's role in society, upbringing and perceptions of independence. These factors all contribute to making age determination a difficult process that, at best, can only ever produce an educated estimate of age.

[1] Department of Immigration and Citizenship (as it was then), 'Annual Report 2011-12'.
[2] UNICEF, 'Every Child's Birth Right: Inequities and trends in birth registration (12 December 2013) UNICEF website <data.unicef.org/resources/every-child-s-birth-right-inequities-and-trends-in-birth-registration>.

The imprecise nature of age determinations was affirmed by the Separated Children in Europe Programme (**SCEP**), a joint initiative of the International Save the Children Alliance and the United Nations High Commissioner for Refugees (**UNHCR**), which stated:

> It is important to note that age assessment is not an exact science and a considerable margin of uncertainty will always remain inherent in any procedure. When making an age assessment, individuals whose age is being assessed should be given the benefit of the doubt.[3]

While the 'benefit of the doubt' test is replicated in age determination procedures around the world, it is not always complied with in practice (as discussed below). This often stems from the perception of immigration authorities that asylum seekers claim to be a minor in order to receive more favorable treatment. The Department needs, however, to be cautious in its treatment of those who claim to be minors, because, if they are indeed minors, they are likely to be extremely vulnerable and in the greatest need of assistance. In this context, it is imperative that people are not pre-judged and that a 'culture of disbelief' is not the basis upon which age determinations proceed.

[3] Separated Children in Europe Programme, SCEP Statement of Good Practice (March 2010, 4th ed) Refworld website <www.refworld.org/docid/415450694.html>.

THE IMPORTANCE OF GETTING AGE DETERMINATIONS RIGHT

The determination that a child is 'likely' to be a minor is important because it determines the nature, standard and content of care owed by the Australian government to some of the most vulnerable people in the world – children seeking asylum. Ensuring that the rights of this class of people are protected is important in light of the fact that there are some clear examples of Australia breaching its duty of in this regard. By way of example, the Secretary of the Department confirmed to Senate Estimates earlier this year that, although it is not the practice of the Department to send unaccompanied minors to Manus Island, it has occurred 'inadvertently from time to time'.[4] This is particularly alarming in light of the fact that the UNCHR has said that Manus Island detention centre is not appropriate for children.[5] With a more robust process giving the benefit of the doubt to children, this would not have occurred.

The discussion below identifies some of the areas where children are commonly treated differently to adults in the Australian migration system. It is important to note that these are not 'benefits' in the sense of children are being given preferential treatment, but rather steps taken by Australia to tailor its treatment of children seeking asylum in order to comply with its duty of care and obligations under international law.

Offshore processing

According to the current government's policy, children who are identified as 'likely' to be minors should be detained on Christmas Island, or now, more likely Nauru, in special facilities designed for minors and families, rather than on Manus Island in Papua New Guinea. This outcome recognises that the Manus facility is plainly unsuitable for children and is supposed to ensure that children can remain with their families or, if the child in question is an unaccompanied minor, they can be housed in age-appropriate housing under adult supervision.

However, there have been instances where, as a result of incorrect age determinations, children have been sent to Manus Island. In some cases,

[4] Commonwealth, Estimates Hansard, 24 February 2014, 31 (Secretary of the Department of Immigration and Border Protection, Mr Martin Bowles PSM).
[5] UNHCR, 'UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013' (26 November 2013) UNHCR website <unhcr.org.au>.

the Department has later recognised that these people were children, and sent them to Christmas Island or Nauru. This can still be incredibly traumatising. One child described his and other children's experience on being accidentally sent to Manus Island:

> …they were pretty scared, including me. I wasn't sure [whether] this place is really detention or a prison. It was different from minor detention. It was different for adult, it was very strict.[6]

We are also aware of two instances where the Department has decided not to return a child to Christmas Island or Nauru in circumstances where the child was 'likely' to be a minor, but assessed as turning 18 within the year.[7] In one case, it was unclear whether the minor was separated from others during the time up until he officially turned 18 years old.[8]

The suitability of detaining children on Nauru has also recently been called into question, following the 'Review into recent allegations relating to conditions and circumstances in the Regional Processing Centre in Nauru' by Philip Moss. The review found evidence of rape, sexual assault of minors and guards trading marijuana for sexual favours from female detainees.[9]

Access to services

As a result of their vulnerable status, minors are also likely to be detained for a shorter period of time before being released into community detention pursuant to the principle in section 4A of the *Migration Act* 1958 (Cth) (**Act**). While in community detention, minors can access government schools and typically have a case worker to help them. Unaccompanied minors also have access to the 'meaningful engagement activity allowance', which can help fund participation in music and sport activities. [10]

Once a child turns 18, the so-called 'benefits' referred to above begin to evaporate. Children are required to rent housing and manage their own finances, often without the right to work. Access to government schools is

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[6] Interview with Ali Reza (a pseudonym). Draft transcript provided courtesy of Behind the Wire, 16 March 2015.
[7] Amnesty International, 'This is still breaking the people – Update on Human Right Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea' (May 2014) 9.
[8] Ibid.
[9] See Philip Moss, 'Review into recent allegations relating to conditions and circumstances in the Regional Processing Centre in Nauru' (6 February 2015) 23-42.
[10] Max Opray, 'How Immigration Decides Asylum Seekers' Age', *The Saturday Paper*, 6 September 2014.

generally lost at the end of the school term during which the child turns 18 and, if children fall into this category, they are at risk of losing their ability to complete secondary school. A spokeswoman from the Department The explained the policy as follows:

> In line with state and territory government legal requirements and community expectations, DIAC arranges for children of mandatory school age, which is 5 to 17, to have access to education. The Australian community does not expect adults to remain at school; there would be additional costs incurred in allowing adults to remain at school and the community would not expect to bear this burden given their immigration status is unresolved.[11]

There are members of the Australian community who would like to see children who turn 18 during their last year of high school (like most other Australian children) continue to access education, with instances of schools in New South Wales and South Australia allowing children to remain in school in order to complete their studies even after turning 18.[12]

"You should be aware that if you are assessed as a minor, you will be placed in accommodation where there is a permanent carer, you will not be permitted to smoke and it is likely you will be required to attend school" — Extract from the age determination interview process

The legal processes

Protection visa application

Children under the age of 18 can apply for protection as a member of a family unit and have the ability to seek protection based on the claims made by their parents.

Individuals over the age of 18, however, must make their own application for protection or meet additional criteria to demonstrate that they are dependent on their parents in order to still be considered a member of the family unit who receives protection.

Refugee Review Tribunal application

A child applying for a review of an adverse decision to the Refugee Review Tribunal (**Tribunal**) may be considered a 'vulnerable person' within the meaning of the Tribunal's 'Guidance on Vulnerable Persons'.[13] These guidelines provide that 'age' should be considered a factor in determining whether or not someone is vulnerable. The guidelines provide different

[11] Nick Olle, '18: The Legal Age To Be Denied An Education', *The Global Mail*, 16 July 2013. See also, Max Opray, 'How Immigration Decides Asylum Seekers' Age', *The Saturday Paper*, 6 September 2014.
[12] Ibid.
[13] Refugee Review Tribunal, Guidance on Vulnerable Persons (March 2015) Refugee Review Tribunal – Migration Review Tribunal website <www.mrt-rrt.gov.au>.

'strategies' that the Tribunal can adopt to make the process more 'child-friendly' which include:

- Create an informal setting for the hearing.
- Recording equipment should be placed so that the child does not have to raise his or her voice to be recorded.
- It will usually be appropriate for an adult person who is trusted to be present when the child is providing evidence. This person may or may not be the child's guardian or representative.
- When taking evidence from a child inform him or her that if they do not know an answer to a question, they should simply say so.
- Reassure the child that he or she is not expected to answer one way or another and that he or she should just answer what they can.
- If the child becomes distressed or uncomfortable during the hearing, ask if he or she would like a break or to talk to someone privately.
- Reassure the child that he or she is not expected to answer one way or another and that he or she should just answer what they can.[14]

The applicability of these Guidelines does not, however, have any bearing on the applicant's substantive claim for protection. Importantly, it equips the Tribunal with strategies to alter the often intimidating and formal nature of the Tribunal so that the process is more accessible and facilitates the re-telling of the substantive protection claim.

Minister as Guardian

Under the *Immigration (Guardianship of Children) Act* 1946 (Cth), the Minister for Immigration and Border Protection is considered the legal guardian of unaccompanied, non-citizen children in Australia.[15] The Act gives the Minister the same rights, powers, duties, obligations and liabilities as a natural guardian of the child.[16] The responsibilities of the Minister, as a guardian, include those relating to a child's basic human needs: food, housing, health and education.[17]

Having the Minister as guardian of unaccompanied minors, however, has been often criticised. The recent National Inquiry into Children in Immigration Detention undertaken by the Australian Human Rights

[14] Ibid 8-9.
[15] *Immigration (Guardianship of Children) Act* 1946 (Cth), ss 4AAA, 6. See generally Julie Taylor, 'Guardianship of Child Asylum Seekers' (2006) 34 *Federal Law Review* 185.
[16] *Immigration (Guardianship of Children) Act* 1946 (Cth), s 6(1).
[17] Department of Immigration and Border Protection, 'How does the Minister's guardianship work?' (2 May 2014) Department of Immigration and Border Protection's website <www.immi.gov.au>.

Commission explored this particular point in detail.[18] It has been the subject of sustained attack given the inherent conflict of interest between acting in the best interests of the child, and the Minister's role as administrator of the Act, which involves powers to detain children, to refuse visas and to order their removal.[19] As explained by the Court in *Odhiambo v Minister for Immigration and Multicultural Affairs*:

> [W]here children come to Australia as asylum-seekers there may be such a conflict. For example, the Minister may have a policy of detaining all asylum-seekers (or all persons falling within a particular class of asylum-seekers) pending final determination of their claims to be recognised as refugees. Yet a person acting independently of the Minister might see grounds, in the particular case, for the grant of a bridging visa permitting release of the child from detention during that period.[20]

The guardianship role of the Minister for Immigration and Border Protection was considered by the High Court in the case of *Plaintiff M70/Plaintiff M106 of 2011* (Plaintiff M70/106). This case considered the application of the Minister's guardianship duty in circumstances where the Australian government sought to transfer unaccompanied minors offshore (as part of the 'Malaysian Solution'). In Plaintiff M70/106, the High Court found that the written consent of the Minister was required prior to any transfer of unaccompanied asylum-seeker children to an offshore processing facility. The practical effect of this case was, however, overturned by amendments made to the Act and the *Immigration (Guardianship of Children) Act* 1946 (Cth) in August 2012. The new provisions also provide that all asylum seekers are subject to transfer to a third country, with no exceptions. Controversially, the guardianship duty of the Minister for Immigration and Border Protection also ceases when children are transferred offshore.

Litigation Guardian

Children who are deemed to be minors are usually required to have a litigation guardian (sometimes called a litigation representative) during

[18] See Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (February 2015) 166-169.
[19] See, eg, Australian Churches Refugee Taskforce, 'Protecting the Lonely Children: Recommendations to the Australian Government and the UN Committee on the Rights of the Child with respect to unaccompanied children who seek asylum and refuge in Australia' (July 2014); Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, Final Report (2012), Recommendation 19 [5.95]; Mary Crock, 'Lonely Refuge: Judicial Responses to Separated Children Seeking Refugee Protection in Australia' (2005) 22(2) *Law in Context* 120; Nicole Dicker and Joanna Mansfield, 'Filling the protection gaps: current trends in complementary protection in Canada, Mexico and Australia' (Research Paper No. 238, UNHCR, May 2012) 22; *Odhiambo v Minister for Immigration and Multicultural Affairs* [2002] 122 FCR 29, [91].
[20] *Odhiambo v Minister for Immigration and Multicultural Affairs* [2002] 122 FCR 29, [90].

Federal Circuit Court or Federal Court proceedings, unless the court orders otherwise.[21] The rules in relation to litigation guardians for different jurisdictions vary.

A litigation guardian is an adult who is responsible for conducting litigation on behalf of the applicant. A litigation guardian can be any adult who:

1. is willing to act as the litigation guardian;
2. does not have any interest adverse to the child; and
3. agrees to assist in the best interest of the child.[22]

Children who are deemed to be minors are not, however, required to have a litigation guardian when they appear before the Tribunal, unless they are so 'disadvantaged, by tender years or mental disability', as to render it impossible for the Tribunal to conduct a hearing without a guardian who is actively representing the child's interests.[23]

The Tribunal will not be criticised by the court in circumstances where the Tribunal does not feel that it is necessary for the child to be actively represented by the guardian. In *Odhiambo v Minister for Immigration and Multicultural Affairs,* the Court said that it was unnecessary for the children to be represented by a litigation guardian for the reasoning that:

> Although both appellants were apparently then under the age of 18, they were not "children" or demonstrably unable to have proper regard for their own best interests.[24]

In the circumstances of that case, the Court also said that the Tribunal could not be criticised for proceeding without a litigation guardian acting for each child because the Tribunal provided each child with an interpreter and was aware that each child had received qualified and independent assistance in the formulation of their application for a protection visa.[25]

No independent advocate

As outlined above, children in immigration detention have no independent advocate. This issue was discussed in the recent Australian Human Rights Commission in their National Inquiry into Children in Immigration Detention where it was reported that MAXimus Solutions workers, who are employed

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[21] Federal Circuit Court Rules 2001 (Cth), r 11.08 (2); Federal Court Rules 2011 (Cth), r 9.61.
[22] *WZAOT v Minister for Immigration & Anor (No. 3)* [2011] FMCA 967, [12].
[23] *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29, [94].
[24] Ibid [95].
[25] Ibid.

as independent observers to provide care and support to unaccompanied children, can only play a limited role in terms of protecting the best interests of unaccompanied children.[26] This is because:

> The Independent Observer has no casework, legal advocacy, or investigative responsibilities and cannot act as a qualified interpreter or advocate on behalf of an unaccompanied minor.[27]

These independent Observers are now to be present whenever the Department or other Government agency interviews unaccompanied children to provide support,[28] but due to the limited role that these Independent Observers play, it is difficult to see how this will significantly assist children navigate and understand the legal process.

Criminal Proceedings

An age determination can also be significant if it is later alleged that a child has engaged in criminal conduct. If the child is deemed to be an adult, it is likely that they will be prosecuted as one. If, however, the child is deemed to be a minor, they will be treated as such and, for example, will be prosecuted in the Children's Court rather than the Magistrates' Court. In sentencing minors, the principle sentencing consideration is the rehabilitation of young offenders.[29] The Children's Court is able to take a number of different factors into account when determining what sentence to impose and has a wide range of sentencing options available to it.[30]

[26] See Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (February 2015) 168.
[27] Department of Immigration and Border Protection, Submission No. 45 to the Australian Human Rights Commission National Inquiry into Children in Immigration Detention 2014, 51.
[28] Ibid 52-53.
[29] In Victoria, see the *Children, Youth and Families Act* 2005 (Vic).
[30] See generally the Children's Court website <www.childrenscourt.vic.gov.au/>.

AGE DETERMINATION AND INTERNATIONAL LAW

Convention of the Rights of the Child

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child* shall be a primary consideration" — Article 3 of the Convention of the Rights of the Child

The Convention of the Rights of the Child (**CROC**) sets out the civil, political, economic, social, health and cultural rights of children under the age of 18. Australia became a signatory to the CROC on 22 August 1990. Despite Australia ratifying the CROC on 17 December 1990, the CROC is yet to be incorporated into Australian domestic law. The general principles of the CROC have a significant impact on the age determination processes adopted in Australia. The obligation to ensure that the 'best interests' of the child, which derive from the CROC, is a paramount consideration.[31]

International law and assessing age

The Committee on the Rights of the Child (**CRC**) monitors the implementation of the CROC. In the CRC's General Comment No. 6 (2005) on the 'Treatment of unaccompanied and separated children outside their country of origin', the CRC outlines that the assessment for determining the age of a minor:

> [M]ust be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the *benefit of the doubt* such that if there is a possibility that the individual is a child, she or he should be treated as such.[32]

This sentiment is echoed in the UNHCR Guidelines, which states that '[a]s age is not calculated in the same way universally or given the same degree of importance, caution needs to be exercised in making adverse inferences of credibility where cultural or country standards appear to lower or raise a child's age.'[33]

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[31] United Nations General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol 1577, 3, Article 3.
[32] United Nations Committee on the Rights of the Child, General Comment No. 6 (2005): 'Treatment of unaccompanied and separated children outside their country of origin' (1 September 2005) CRC/GC/2005/6, [31].
[33] UNHCR, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, [75].

AGE DETERMINATION IN AUSTRALIA

Australian law and policy

The Act is silent on the processes that should be followed where there is uncertainty as to an asylum seeker's age. There is also no statutory recognition of the benefit of the doubt principle.

Rather, Australia's age determination procedures are governed by two key documents – the Department's Procedures Advice Manual (**PAM**) and Standard Operating Procedures: Age Determination for IMAs and SIEV Crew (**SOP**). The Department has adopted a test in the PAM and the SOP that provides that, in accordance with the CRC's General Comment No. 6, children should be afforded the 'benefit of the doubt' such that if there is a possibility that the individual is a child, she or he should be treated as such. As will also be discussed below, the fact that this test is set out in writing in the PAM does not mean that the test is applied in practice.

The policy employed by the Department is to make a determination as to whether the person is over 18 or under 18. The Department does not make a finding as to the exact age of the person. Once this finding is made, the person is given a default date of birth which is 31 December for the year which makes them 18 or under 18.

A formal age determination is conducted in circumstances where:

- IMAs who on arrival claim to be a minor - if, as identified by the Age Determination Team Leader or Detention Operations, there is doubt in relation to that claim.
- An IMA who claims on arrival to be an adult but subsequently claims to be a minor (or the reverse), unless the person is obviously a minor.
- IMAs who come to the attention of departmental officers or of service providers such as IHMS or SERCO may also be referred if there is concern regarding the initial assessment of minor or adult status.[34]

When an age determination is required, a 'focussed interview' approach is adopted and the child is given the 'benefit of the doubt' and treated as a

[34] PAM3: Act - Identity, biometrics and immigration status, Age determination - IMAs and SIEV crew (15 May 2013) 8.

minor until their age is established.[35] For that period, an Independent Observer should be available to ensure that the treatment of unaccompanied children is fair, appropriate and reasonable.[36]

Age determinations in the past

Prior to August 2011, the primary method of assessing whether an individual was under the age of 18 years was through the analysis of an x-ray of the person's wrist. The science of this approach was, however, widely discredited during the preparation of the Australian Human Rights Commission's inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children, which was published in July 2012.

The Department has since confirmed that no medical testing is carried out as part of the current age determination process.[37]

The current approach

The current approach used by the Department began in August 2011,[38] following a pilot study undertaken in mid-2010 and the publication of a draft report in April 2011.[39] This study was commissioned following 'public comment and long standing concerns' that asylum seekers arriving in Australian by boat were lying about their age in order to obtain the benefits of being a 'child' during the immigration process.[40]

The current 'focussed interview' approach incorporates a range of factors in the Department's decision-making process. These factors include a child's documentation, physical and emotional appearance, family history, social situation and any other matters that may be relevant. This approach is generally in step with growing international consensus that a holistic, multi-factorial approach is necessary to provide the most accurate age determination outcome.

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[35] PAM3: Act - Identity, biometrics and immigration status, Age determination - IMAs and SIEV crew (15 May 2013) 9.
[36] See Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (February 2015) 168.
[37] Amnesty International, 'This is breaking the people – Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea' (December 2013) 79.
[38] Department of Immigration and Citizenship (as it was then), 'Annual Report 2011-12'.
[39] See 'Age Determination Pilot Project June – October 2010 Draft Report – April 2011' prepared by the Principal Advisor's Unit, Citizenship, Settlement and Multicultural Affairs Division at the Department of Immigration and Citizenship (as it was then).
[40] Ibid 3.

This type of assessment is, however, also fraught with difficulty as it can be a highly subjective process based on an individual assessor's understanding of age. This is because, with the exception of documentation and information already held by the Department, almost all of the information used to determine age is obtained from an interview with the person claiming to be a minor.

While a holistic approach is recommended and endorsed by this report, there is a real concern that Australia's use of this approach is inconsistent with fundamental safeguards. This undermines the fairness and effectiveness of age determinations.

Incorporating the 'benefit of the doubt' principle

The most important safeguard of the multi-factorial approach (and any method of age determination) is the principle of 'the benefit of the doubt'. The Department applies this test in its policy that if both age determination officers do not agree that the child is a minor or an adult, 'the person is given the benefit of the doubt and is assessed as a minor.'[41]

In practice, this policy is not always followed. Haruz (a pseudonym), a child, was interviewed twice, without explanation. On the first occasion, one age determination officer found Haruz to be a minor, the other found him to be an adult. The policy of the Department, if followed, would have provided Haruz with the benefit of the doubt, and led to the outcome that he was deemed to be a minor. Instead, Haruz was again assessed by two age determination officers, who this time both concluded that he was an adult. This circumvented the benefit of the doubt test, and afforded the Department a 'second attempt', which is certainly not provided to asylum seekers in the event of an adverse finding.

The Department's internal policies also dilute the obligation to afford asylum seekers the benefit of the doubt. In its training manual, age determination officers are instructed to make decisions on the balance of probabilities and to 'err on the side of caution' when making an assessment of 'adult'.[42] In the context of a real risk of presumptive disbelief of a minor claim, these policies signal a shift away from ensuring that the benefit of the doubt is maintained in all age determinations. The instructions are also contradictory and leave such decision liable to be successfully challenged by way of judicial review in the courts.

[41] PAM3: Act - Identity, biometrics and immigration status, Age determination - IMAs and SIEV crew (15 May 2013) 9.
[42] Ibid. See also the Standard Operating Procedures: Age Determination for IMAs and SIEV Crew - Version 6.4 (10 October 2014) 6.

RECOMMENDATION 1

The 'benefit of the doubt' principle should be the principle and overriding factor in all age determinations. The primacy of this principle should be made clear in the Department's Procedures Advice Manual and during the training of age determination officers.

Age determination Officers

Two age determination officers conduct age determinations with the assistance of an interpreter, and, according to the Department, in the presence of an independent observer. The age determination officers both ask questions of the person. Both age determination officers are supposed to come to independent conclusions about a person's age. This is to ensure some level of objectivity and scrutiny of decisions. The requirement that these two officers make independent assessments is a fundamental aspect of the process.

This process is, however, significantly undermined in practice when age determination officers discuss their individual assessments with each other before a final determination is made.[43] This discussion takes place in the absence of the asylum seeker, independent observer and any interpreter, and removes the transparency and independence of the decision. It also risks offending the principle of the benefit of the doubt, by creating a situation where an age determination officer may change their opinion that a child is a minor after discussing their views with the other age determination officer.

We believe that this issue would be overcome to a large extent if each officer, before discussing with the other, had an opportunity to consider the information supplied by the child and independently prepare observations and reasons for their conclusions.

RECOMMENDATION 2

Age determination officers should make an independent decision and should not discuss their conclusions or collude with each other before each reaching an independent decision about an applicant's status as a minor or an adult.

[43] Interview with Jesse Taylor, Barrister, Melbourne (14 July 2014).

Qualifications of age determination officers

There is no requirement for age determination officers to have any special qualifications that relate to working with children. Age determination officers also do not currently need to have any special qualifications in fields such as childhood development, psychology, sociology, anthropology or medicine. Rather, the position requires:

> [E]xcellent administrative and time management skills. The occupant will be a trained age determination assessor who possesses significant interviewing experience in other business lines (excluding Arrival/Entry interviewing), well developed written skills and strong liaison and negotiation skills.[44]

The fact that age determination officers are not required to have particular experience and qualifications which relate to working with children is contrary to international perspectives on appropriate age determination processes. The UNHCR Guidelines state that:

> It is desirable that all interviews with unaccompanied children… should be carried out by professionally qualified and specially trained persons with appropriate knowledge of the psychological, emotional and physical development and behavior of children.[45]

The Council for Immigration Services and Status Resolution (**CISSR**), an independent advisory body to the Minister, has previously highlighted the importance of having appropriately qualified persons dealing with minors in an asylum seeker context. In considering this issue, the Chair of the CISSR, Paris Aristotle AM, said that the most appropriate people to interview minors are the people with specialist skills and experience with minors, and those who are sensitive to a child's cognitive capacity and cultural background.[46]

In South Australia, the Migrant Health Service has spent eight years developing a tool to assist clinical staff in making age determinations. The developers of the tool insist that its usefulness can only be realised by

[44] Department of Immigration and Border Protection Position Description for Age Determination Triaging and Assessing Officer (obtained via Freedom of Information request).
[45] UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997, 8.
[46] Council for Immigration Services Status Resolution, Minutes from 5th General Meeting, Brisbane (6 and 7 May 2010).

professionals who have significant knowledge of child development and about how child development varies across different cultural groups.[47]

The Royal College of Pediatrics and Child Health in the United Kingdom also recommends that professionals who have qualifications and experience working with children carry out age determinations. The current approach in the United Kingdom is to have the initial age determination carried out by two social workers.[48]

Training

Age determination officers receive two days of face-to-face training before conducting age determinations. This training involves mock interviews, evaluation and feedback.[49]

A two-day course is patently inadequate given the age determination officers need not have any prior experience or qualifications in working with children or understanding child development. Training delivered in an intensive mode like this is unlikely to equip an officer with sufficient skills to communicate effectively with highly vulnerable people and to understand and recognise the different physical and emotional features of children and young people.

Further, as discussed below, the training materials obtained from the Department raise serious concerns about whether age determination officers are appropriately trained in how to make assessments of age that are free from bias and prejudice. The training materials also appear to provide limited guidance to age determination officers as to how cultural and environmental factors unique to children from different ethnic and cultural backgrounds may impact their physical and psychological characteristics.

RECOMMENDATION 3

Age determinations should be undertaken by persons who have appropriate qualifications and experience in working with vulnerable children. Appropriate qualifications includes qualifications in social work, psychology or child development.

[47] Telephone interview with Jan Williams, Clinical Services Coordinator, Migrant Health Service (15 December 2014).
[48] Al Aynsley-Green, The Assessment of Age in Undocumented Migrants, A report for the Office of the Defensor del Pueblo, Madrid (March 2011) 11.
[49] Department of Immigration and Citizenship (as it was then), 'Annual Report 2011-12'.

RECOMMENDATION 4

Age determination officers should receive more comprehensive training to help familiarise themselves with the different cultural backgrounds of children who claim asylum in Australia. Training should also emphasise the effect that torture and trauma can have on children and a child's ability to engage with interviewers, answer questions and recount traumatic events.

Multi-factorial approach

The PAM explains that the age determination interview involves a focussed chronological exploration of lines of enquiry, including an examination of an asylum seeker's:

- physical appearance;
- behaviour and demeanor;
- family composition and history;
- education and employment; and
- social history and independence.[50]

The First Assistant Secretary of the Community Programs and Children Division of the Department of Immigration and Border Protection, Kate Pope PSM, has explained that the process looks at a whole range of factors that somebody might bring to bear in discussing their age. By way of example, children would be asked to respond to questions about their family composition, their education, the age of their parents and their siblings, where they fit in the family and so on.[51]

In practice, the interview should involve the age determination officers asking the child questions about their background, family, education and migration to Australia. This enables the age determination officers to establish a chronology of the applicant's life and assess whether or not their story is consistent.[52]

In the recent Australian Human Rights Commission's National Inquiry into Children in Immigration Detention, one child described the age determination interview as 'the worst thing I will never forget'. The

[50] PAM3: Act - Identity, biometrics and immigration status, Age determination - IMAs and SIEV crew (15 May 2013) 9.
[51] Commonwealth, Estimates Hansard, 25 February 2014, 83 (First Assistant Secretary of the Community Programs and Children Division of the Department of Immigration and Border Protection, Ms Kate Pope PSM).
[52] Amnesty International, 'This is breaking the people – Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea' (December 2013) 79.

Australian Human Rights Commission reports that the child went on to add that:

> 'I was very very upset, they didn't believe me', there was 'no one there to help me... I was very upset and I cried... there were questions non-stop, I was very very nervous and upset... I was very dizzy'.[53]

Physical appearance

Age determination officers appear to rely heavily on physical appearance when making assessments.[54] Age determination officers tend to, 'first and foremost', place emphasis on the applicant's physical appearance, and have considered as part of their assessment factors such as whether:

- a child has acne blemishes (or scarring);
- the female children have an ample bosom;
- the male children are muscular and tall; and
- the male children have an appropriate level of growth of facial hair.[55]

"They just looked at me and said I must be an adult" — Child claiming asylum in the

This approach is not, however, supported by any literature to suggest that age can be accurately assessed on the basis of physical appearance. To the contrary, it is clear that physical appearance is highly subjective and any appreciation of physical appearance relative to age requires particular knowledge of both a child's cultural group and circumstances of their childhood. Jan Williams, from the Migrant Health Service in South Australia, gives examples of Sudanese males being taller and generally slim and Burmese males being generally of small stature compared to other cultural groups.[56]

The circumstances of a person's childhood are also important to consider. Malnutrition, stress and trauma all affect the physical development of a child. Any physical assessment of age cannot be made before, or without, considering these factors.

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[53] Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (February 2015) 169.
[54] Amnesty International, 'This is breaking the people – Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea' (December 2013) 76; Max Opray, 'How Immigration Decides Asylum Seekers' Age', *The Saturday Paper*, 6 September 2014.
[55] Max Opray, 'How Immigration Decides Asylum Seekers' Age', *The Saturday Paper,* 6 September 2014; Interview with Elizabeth Bennett, Barrister, Melbourne (31 July 2014).
[56] Telephone interview with Jan Williams, Clinical Services Coordinator, Migrant Health Service (15 December 2014).

Training materials for age determination officers appear to emphasise the difficulty of determining age just by looking at a person. It is unclear whether the series of photos below, extracted from the training materials, represent children or adults or both. However, they nonetheless demonstrate how difficult it is to make an accurate assessment as to age based on physical appearance.

Images used as part of the training of age determination officers. Source: Department of Immigration and Border Protection, 2014 (obtained under the *Freedom of Information Act 1982 - FA 14/08/00200; ADF2014/27679).*

Reliance on physical appearance is particularly concerning on Manus Island, where age determinations have been conducted remotely. Behaviour and demeanor are hard to assess remotely, particularly given the short time frame in which assessments are conducted. Physical appearance, according to Amnesty International, appeared to be given significant weight in these circumstances.[57]

Age determination officers lack the clinical appreciation of how age physically manifests in children of different cultural groups and who may have unique circumstances in their childhood. The training materials, apart from the above photographs, are silent on any factors that may provide some guidance in this highly subjective area. As a result, age determination officers should not solely rely on an asylum seeker's physical appearance as supporting the conclusion that an applicant is an adult. This should be the case unless there is other evidence that strongly indicates that the applicant is not a minor.

[57] Amnesty International, 'This is breaking the people – Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea' (December 2013) 80.

RECOMMENDATION 5

An applicant's physical appearance should never be the sole basis on which an age determination officer concludes that that an applicant is not a minor.

Behaviour and demeanor

"Children cannot be expected to give adult-like accounts of their experiences… Children may not be able to present information relating to context, timing, importance and details with the same precision as adults..." — UNHCR Guidelines

Anecdotal evidence suggests that age determination officers draw inferences as to the age of an applicant based on highly subjective opinions about an applicant's presentation during the interview.

In the case of Hien (pseudonym), age determination officers reasoned that she was an adult, in part because of a perceived high level of maturity. This maturity stemmed from the way in which Hien answered questions, and age determination officers noted that she did not appear embarrassed to answer questions about whether she was married or had a boyfriend.[58] Their reasoning was that a child should have been more uncomfortable when personal questions of that nature were asked. The fact that Hien was softly spoken and able to maintain eye contact was also used to support a finding that she was an adult.[59]

Other factors that have been relied upon in the making of adverse assessments include whether an applicant is vague in recalling events or evasive in answering questions.[60]

As with physical appearance, assessments that give weight to these factors are problematic as they are based on each age determination officer's subjective expectation and understanding of how a child should behave and what the appropriate response from someone 'likely to be a child' should be.

In the case of *1214218* [2013] RRTA 92, age determination officers found that the applicant had a significant 'work history' because he sold bags in Pakistan for a few years before seeking asylum. This work history was relied upon by age determination officers as demonstrating that he 'showed a level of independence' consistent with them being an adult.[61] Findings such as these ignore the fact that children, sometimes as young as 12 or 13, are often required to sell goods to survive and earn money for

[58] Interview with Elizabeth Bennett, Barrister, Melbourne (31 July 2014).
[59] Ibid.
[60] *1214218* [2013] RRTA 92 (22 January 2013).
[61] Ibid.

themselves and their families, particularly in developing countries in the Middle East, Africa and Asia.[62]

This type of reasoning lacks any empirical basis, and goes against the UNHCR Guidelines which recommend:

> Children may not connect emotionally with what they are recounting in the same way as adults. Children may have no emotional reaction at all or react to emotional cues from the interviewer. The interviewer therefore, should be careful not to draw judgments about how a child feels toward a certain event or situation, based on adult reactions.[63]

It also appears common for age determination officers to draw adverse inferences from the fact that children have provided inconsistent accounts or responses to questions during the age determination process. This has been confirmed by Renate Croker, a senior Department official on Manus Island, who stated that inconsistencies in an asylum seeker's account as to their age was 'a significant negative factor in the determination that they were adults.'[64]

In *1214218* [2013] RRTA 92, the Tribunal noted that age determination officers had also relied upon an apparent 'adult' unwillingness and ability to avoid answering questions to make an assessment that the applicant was over 18.[65] The Tribunal ultimately disregarded this assumption, finding that the applicant was a child and therefore genuinely unable to answer basic questions and was not being purposely evasive.[66]

The UNHCR Guidelines confirm that age determination processes must be cognisant of distinguishing between inadvertent difficulties children have in recollecting dates and events, with intentional evasiveness.[67]

The Guidelines further state that 'children should always be allowed to say 'no' or refuse to answer questions. They should be allowed to change their minds and to make mistakes'.[68] Indeed, it is well accepted that children may provide misleading or plainly false information when being interviewed for different reasons, including fear, confusion or because they are

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[62] Ibid.
[63] UNHCR, UNHCR Guidelines on Determining the Best Interests of the Child (2008), 61.
[64] Amnesty International, 'This is breaking the people – Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea' (December 2013) 80.
[65] *1214218* [2013] RRTA 92 (22 January 2013), [117].
[66] Ibid [118].
[67] UNHCR, UNHCR Guidelines on Determining the Best Interests of the Child (2008) 60.
[68] Ibid 61.

attempting to give the answers they believe the interviewer wants.[69] According to Professor Aynsley-Green, research shows that the 'often intimidating' environment of the age determination interview can significantly impact on the reliability of the age determination.[70]

Alternatively, a person can make contradictory claims because of different cultural conceptions of adulthood or motivations for being treated as an adult.[71] For example, a child may claim to be an adult to smoke, get married or be able to reside with a partner who is over 18.

Despite these warnings, it is concerning that age determination officers continue to be trained and encouraged to 'draw [their] own conclusions'. As is recorded in a Department handout:

> Often you have little to go on – i.e. when client is vague, provides little concrete information (i.e. "don't remember", "I can't recall", "the people smuggler said to say that." "I was dizzy/confused after the voyage", "my mother told me". *You can note the vagueness, conflicting information, evasiveness etc and draw your conclusions taking this into account.*[72]

This guidance is tempered by a warning, albeit if somewhat contradictory, for age determination offices not to:

> [C]onfuse maturity with age – there may be reasons for a minor to act in a mature way e.g. Survival on the streets, hard life, even just personality. Sometimes best to acknowledge these possibilities in assessment – *you can still form the view that on balance the person is probably an adult.*[73]

Again, this language contradicts the benefit of the doubt principle and disregards the literature and particularly the comments of the UNHCR that emphasise the problems with making these assumptions when dealing with potential minors.

Lack of Reasons

While the cumulative effect of observations made by age determination officers may lead an officer to conclude that a child is 'likely to be an adult',

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[69] Asylum Division, 'Guidelines for Children's Asylum Claims' (Asylum Officer Basic Training Course, United States Citizenship and Immigration Services, March 21 2009) 33.
[70] Australian Human Rights Commission, An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children, July 2012, Chapter 5.
[71] Amnesty International, 'This is breaking the people – Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea' (December 2013) 77, 80.
[72] Training Handout, Department of Immigration and Border Protection, 2014 (obtained under the Freedom of Information Act 1982 - FA 14/08/00200; ADF2014/27679).
[73] Ibid.

there is a notable lack of methodology and explanation given by age determination officers in reaching their conclusions. Age determination officers relying on particular pieces of evidence, when similar evidence could equally indicate that the child is indeed a child, or nervous, or has suffered significant trauma, without any explanation as to the methodology used, is alarming and unacceptable given the consequences of an adverse assessment.

The lack of analysis provided by age determination officers also suggests that they may have made assumptions about the way in which children should behave, without having regard to different cultural norms. In the above example, the fact that a child demonstrated a lack of embarrassment when asked if she was married or had a boyfriend does not take into account the fact that, in a number of countries, girls can still be 'married off' at a young age.

Reliance on documentary evidence

As part of the age determination process, age determination officers are required to take into account all responses made by the child at the interview, their observations and any relevant documentation provided by the person or held by the Department.[74]

The Department places a lot of weight on documentary evidence, such as birth certificates, passports, school documents or identity cards. The Department encourages asylum seekers to provide documentary proof of their age from their home country, which is considered on its merits.[75]

In practice, however, it appears that age determination officers are encouraged to consider such documents presented by children to be 'presumptively fraudulent'.[76] For example, the SOP advises that 'there is a high level of fraud in the IMA caseload, particularly in relation to identity documents'.[77]

Furthermore, the SOP states that where a document is found to be altered 'in a way that *does not affect the genuineness of the document* – for example, the addition of pages' the Director of Age Determination 'may

[74] PAM3: Migration Act, Age Determination – IMAs and SIEV crew members (15 May 2013) 10.
[75] Ibid.
[76] Amnesty International, 'This is breaking the people – Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea' (December 2013) 80.
[77] Standard Operating Procedures: Age Determination for IMAs and SIEV Crew - Version 6.4 (10 October 2014) 16.

advise that the document will not be accepted for the purpose of verifying the IMAs identity'.[78]

The Department gives 'little evidentiary weight' to emailed or photocopied documents.[79] The justification for this position is that it is difficult for age determination officers to judge the veracity of scanned or photocopied documents.[80]

The problem with this approach is that instead of assessing the likely genuineness of a document, the documents are presumed fraudulent and do not form part of the evidence used in making an age determination. While there is an obvious need to scrutinise documents that are not in original form, documents should be considered in the context of all information that is gathered through an age determination assessment.

Psychological reports

Psychological reports held on the Department file should be considered during the age determination process. It appears that the Department is less inclined to place weight on this type of documentation, with instances where age determination officers have failed to review and consider, and gave little or no weight to, psychological reports kept on the Department file which provided insight into the psychological maturity of the applicant.[81] This is particularly concerning because, as discussed above, the behaviour and demeanor of children can be significantly affected by torture and trauma that they may have suffered.

RECOMMENDATION 6

Uncertainty regarding the authenticity of documentary evidence should not lead to an automatic presumption that the documentary evidence is fraudulent but rather should go to the weight to be attributed to that evidence.

Timing and location of age determinations

The timing and location of age determinations is also troublesome. It appears that, in most cases, two age determination officers from the

[78] Ibid.
[79] PAM3: Migration Act, Age Determination – IMAs and SIEV crew members (15 May 2013) 10.
[80] Amnesty International, 'This is breaking the people – Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea' (December 2013) 79.
[81] Interview with Jesse Taylor, Barrister, Melbourne (14 July 2014).

Department conduct one (typically two hour) interview. A determination is then made either immediately or within 48 hours. While the Department generally takes the view that children should not be held for longer than two hours, this is considered a 'reference point' that can be exceeded if age determination officers are able to justify doing so.[82] An example given in the SOP of when this could be justified is where the child has made an admission near the end of the two hours that the officers wish to explore.

Two hours is insufficient to undertake the task of assessing someone's age. Professor Aynsley-Green has argued that for this exercise to be performed properly, it 'demands time, often involving several separate interviews, and expertise in the interviewers in understanding the lives, education and culture of children in countries from which they have come.'[83]

A further issue with timing arises in the context of offshore processing. This has been problematic, with instances of asylum seekers having an age determinations on Manus Island being conducted remotely from Australia.[84] This limits the age determination officer's ability to interact with the asylum seeker. This is also at odds with the SOP, which provides that age determinations are usually undertaken at the facility where the child is accommodated. This also contradicts the Age Determination Protocol Post 19 July 2013, which outlines that:

> Where there is any doubt, the IMA should be formally assessed before being considered for transfer to an Offshore Processing Centre (OPC).[85]

Although a Department official is present at Manus Island for these remotely conducted hearings, the Department has been unable to identify any officials on Manus Island who had been trained in the age assessment methods.[86] There are concerns that these untrained Department officials take part in the remotely conducted interviews despite not being trained in age assessment procedures.

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[82] Standard Operating Procedures: Age Determination for IMAs and SIEV Crew - Version 6.4 (10 October 2014) 19-20.
[83] Australian Human Rights Commission, An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children, July 2012, Chapter 5.
[84] Amnesty International, 'This is breaking the people – Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea' (December 2013) 82-83.
[85] Standard Operating Procedures: Age Determination for IMAs and SIEV Crew - Version 6.4 (10 October 2014) 31 (Attachment A).
[86] Amnesty International, 'This is breaking the people – Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea' (December 2013) 77.

RECOMMENDATION 7

More than one age determination interview should be permitted where further assessment is required.

RECOMMENDATION 8

Age determinations should not be conducted remotely. All age determinations should be conducted via face-to-face interviews.

Legal Representation and Rights of Review

Legal Representation

The SOP provides that Immigration Advice and Application Assistance Scheme (**IAAAS**) providers or other legal representatives are not normally present at age determination interviews.

Assuming that the child has been able to obtain legal representation through IAAAS or otherwise, their lawyer will not be invited to attend the interview with the child and will be unaware of the time and date of the interview unless informed by the child. The Department's justification for this approach is that a lawyer does not need to be present for the interview because 'the assessment is primarily for placement purposes' or, in the case of SIEV crew, potential referral to the Australian Federal Police for possible prosecution.[87]

This approach is not, however, strictly correct given that inconsistencies between information provided at the age determination interview and protection visa interview can be used to make adverse credibility findings against an applicant's claim of minority.[88]

If a lawyer is made aware that an age determination interview will take place and wants to attend that interview, there is no automatic right for the lawyer to attend. Rather, the lawyer must request permission from the Department to attend the interview. It is unclear how often the Department allows lawyers to attend age determination interviews.

[87] PAM3: Act - Identity, biometrics and immigration status, Age determination - IMAs and SIEV crew (15 May 2013) 9; Standard Operating Procedures: Age Determination for IMAs and SIEV Crew - Version 6.4 (10 October 2014) 20.
[88] Interview with Elizabeth Bennett, Barrister, Melbourne, 31 July 2014.

This discussion is predicated on the assumption that the child will be able to obtain legal representation. This has become increasingly difficult for all

RECOMMENDATION 9

Children should be able to access free legal representation during the age determination process and for the purpose of reviewing an adverse age determination.

applicants to obtain, in light of the decision by the federal government to, as of 31 March 2014, restrict access to the IAAAS to non-citizens who entered Australia 'lawfully' on a valid visa and who meet an eligibility criteria related to whether or not an applicant is 'disadvantaged'.[89]

Right of Review

There is no real right of review available to a child if they are found 'likely to be an adult'. While Amnesty International previously reported that it is not clear whether children who are found 'likely to be an adult' are informed that they have a right to seek a review or that they are told how to seek a review of an adverse decision,[90] the pro forma notification letter attached to the SOP states that:

> There is no formal review process for this assessment. However, as discussed with you at the interview, the Department will reconsider this assessment if you can provide credible evidence (documentary or otherwise) that supports any claim you may have regarding your age.[91]

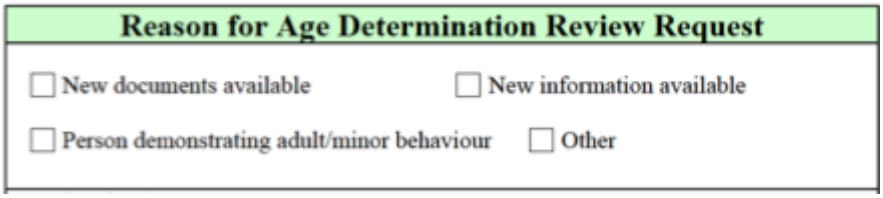
The PAM provides, however, for a review of an age determination in circumstances where:

1. new documentary or other evidence relevant to a person's status as a minor or an adult becomes available. For all such review requests, document examination results (if applicable) and the reasons for the request will be taken into consideration; and
2. the Protection Visa decision maker is of the opinion that the date of birth as recorded for the applicant is incorrect (particularly if this is

[89] Department of Immigration and Border Protection, 'Fact sheet 63 – Immigration Advice and Application Assistance Scheme', Department of Immigration and Border Protection website <www.immi.gov.au>.
[90] Amnesty International, 'This is breaking the people – Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea' (December 2013) 81.
[91] Standard Operating Procedures: Age Determination for IMAs and SIEV Crew - Version 6.4 (10 October 2014) 58 (Attachment G).

supported by credible evidence from the applicant submitted after the age determination was finalised).[92]

The 'Age Determination Review Request' form attached to the SOP appeared, however, to indicate that other grounds of review are available:



Age Determination Review Request form. Source: Department of Immigration and Border Protection, 2014 (obtained under the *Freedom of Information Act 1982 - FA 14/08/00200; ADF2014/27679).*

This review system is flawed. Asylum seekers are unaware of what 'other' rights of review that they may have and the reliance that the Department places on documentary evidence is troubling. This is because 'new documents', particularly emailed copies of documents, are often given little evidentiary weight by the Department for the reasons already discussed above.

It therefore appears that the only real review mechanism available for an asylum seeker is to complete a form 1022 (Notification of changes in circumstances (section 104 of the Act)) and submit it to the Department. This information may then be taken into consideration in any review of the determination, but it is unclear what the practical effect of filling out the form is, given that it does not, in itself, trigger a review.

The complex nature of age determination and the consequences of an adverse decision make it fundamental that asylum seekers are able to seek formal review of an adverse age determination. In the United Kingdom a right of review is automatic. An asylum seeker can appeal a decision to the local authority and then appeal again to an independent court if necessary.[93] The importance of this right of review is demonstrated by the United Kingdom case of *R (T) v Enfield.*[94] In that case, an appeal brought by an asylum seeker led to the High Court finding that the initial interview was 'unfair and unduly hostile having regard to the claimant's age, her

[92] PAM3: Act - Identity, biometrics and immigration status, Age determination - IMAs and SIEV crew (15 May 2013) 11.
[93] United Kingdom Visas and Immigration, 'Assessing Age: Instruction' (17 June 2011) United Kingdom Government website <www.gov.uk>.
[94] [2004] EWHC 2297.

vulnerable condition and her state of mental health' and that the age determination officers did not take into account relevant considerations during the interview process.[95]

RECOMMENDATION 10

Children should have a formal right to review an adverse age determination.

Access to reasons

A child will receive formal notification of the outcome of the age determination. The Department is, however, under no statutory obligation to provide the child with a copy of the determination and the reasons for the determination.

Rather, it is expected that a child who receives an adverse age determination will make a Freedom of Information (**FOI**) request in order to obtain a copy of the determination and the reasons for the determination. It is uncertain the extent to which this process is explained in the notification of the outcome of the age determination sent to the applicant. This places the burden on the child to inform their lawyer of an adverse finding (in circumstances where the child has legal representation). For a person who may be a minor, and who is most certainly a young person, this is a complex process.

Further, there is no guarantee that a child will receive the content of their age determination, given the fact that some or all of the content of the reports may be exempt from release as they could compromise the integrity of the process.[96]

RECOMMENDATION 11

A child should immediately and clearly be notified of any adverse decision and the reasons for that adverse decision, without having to make a Freedom of Information request. If the child has legal representation, the lawyer should also be sent a notification of the outcome and the reasons for the adverse decision.

[95] Ibid [61].
[96] Standard Operating Procedures: Age Determination for IMAs and SIEV Crew - Version 6.4 (10 October 2014) 18.

CONCLUSION

This report makes clear the need for Departmental reform in age determination procedures. It is of critical importance that children in immigration detention are afforded the benefit of the doubt during the age determination process in order to ensure that Australia is meeting the duty of care owed to this vulnerable class of people.

The authors believe that the recommendations made throughout this report, targeting the areas of most concern, are fundamental, not aspirational. Adopting the recommendations would bring Australia's age determination procedures in line with international law and would also ensure that the complex process of age determination is transparent and fair.