



Bills Digest  
No. 113 2000–01

Crimes Amendment (Age Determination) Bill 2001



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INFORMATION AND RESEARCH SERVICES

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No. 113 2000–01

Crimes Amendment (Age Determination) Bill 2001

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# Crimes Amendment (Age Determination) Bill 2001

**Date Introduced:** 7 March 2001

**House:** House of Representatives

**Portfolio:** Justice and Customs

**Commencement:** Twenty-eight days after the day on which Royal Assent is given.

## Purpose

The proposed legislation is designed to provide a regime for determining age where:

- a person is suspected of committing or is being prosecuted for a Commonwealth offence
- there is uncertainty about the person's age, and
- it is necessary to know, for criminal justice system purposes, whether the person is or was, at the time the alleged offence was committed, an adult or a minor.

## Background

### Adults and juveniles in the criminal justice system

The Second Reading Speech and the Explanatory Memorandum clearly explain the ways in which a person's age can impact on how they are dealt with by the criminal justice system. For example, it may determine how the person is interviewed during a criminal investigation, the rights to which the person is entitled, the sorts of forensic procedure which can be carried out on them, the court in which they are tried, sentencing and detention. The Commonwealth has an interest in these matters because Commonwealth offence laws impact on juvenile as well as adult offenders. Also relevant, in matters relating to children, are the Commonwealth's responsibilities under international instruments such as the Convention on the Rights of the Child.

In some cases an individual may lack documentation which establishes his or her identity and age. A method of age assessment which appears to have been used by the

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Commonwealth in relation to some foreign nationals is wrist x-rays. The circumstances in which x-ray evidence is admissible in Commonwealth criminal cases was explored in the case of *R v. Hatim*. That case provided the impetus for the Bill.

### *R v. Hatim*

*R v. Hatim* was decided by the Northern Territory Supreme Court in July 2000. Six Indonesian nationals—Messrs Hatim, Lasani, Kadir, Bey, En and Rudianto—were indicted on people smuggling charges under the *Migration Act 1958*. Mr Kadir claimed that the court had no jurisdiction to hear the indictment with his name included because, at the time of the alleged offences, he was a juvenile. Mr Kadir said he was born on 10 October 1983—making him 16 years of age at the relevant time. Like the other defendants he had no documents proving his age or identity.

The case centred on whether evidence of an x-ray of Mr Kadir’s wrist was admissible for the purposes of deciding the application about jurisdiction.

In evidence to the court, a Department of Immigration official said that, together with an interpreter, she had asked Mr Kadir whether he would agree to being photographed and having his wrist x-rayed at a Darwin hospital ‘to determine his identity’<sup>1</sup>. The official’s evidence was that Mr Kadir had agreed. She also said that she believed section 258 of the Migration Act enabled her to require Mr Kadir to have an x-ray. Section 258 reads:

Where a person is in immigration detention by virtue of this Act, an authorized officer may do all such things as are reasonably necessary for photographing or measuring that person or otherwise recording matters in order to facilitate the person’s present or future identification.

The Northern Territory Supreme Court heard evidence that the x-ray showed Mr Kadir to be skeletally mature indicating that he was at least 19 years old.<sup>2</sup>

The Court (Thomas J) concluded that Mr Kadir had consented to the x-ray and that, as a result, evidence from it was admissible on the question of his age. His Honour also pointed to other evidence—ie observations of the immigration official, and the paediatric radiologist—and said that these and his own observations satisfied him, on the balance of probabilities, that Mr Kadir was an adult at relevant time. However, he remarked in passing that section 258 did not empower immigration officials to order x-rays to be taken. He said:

I do not accept that a “photograph” includes an x-ray in normal parlance. A reading of s 258 makes reference to superficial means of obtaining identification by photograph or measurements that can be done by external observation of the Immigration Officer and under the control of that officer without the use of any intrusive procedures. An x-ray is an intrusive procedure that is carried out by a radiographer and subject to interpretation by a radiologist.<sup>3</sup>

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A wrist x-ray is one medical procedure which is sometimes used to provide evidence about a person's chronological age by measuring skeletal maturity—in particular, whether the *ulna epiphysis* has fused or begun to fuse.

The Second Reading Speech and the Explanatory Memorandum state that as a result of the decision in *R v. Hatim*, section 258 of the Migration Act can no longer be relied on to authorise the x-raying of foreign nationals to establish their identity and age. The Second Reading Speech goes on to state:

In any case, there are cases where the necessary prerequisites for employing section 258 do not apply, for example, a suspect is not in immigration detention or an x-ray is not necessary to determine their identity.

## Determining age

In Australian law various means of proof are used when age is at issue in legal proceedings. These include an admission, testimony of a witness to the person's birth, a birth certificate combined with evidence that the person named in the certificate is the same person as the person in question, and the opinion of the person or others.<sup>4</sup>

As Thomas J indicated in *R v. Hatim*, the lawful use of medical procedures to determine a person's age is predicated either on consent or statutory authorisation.

Age determination involving the use of medical procedures appears to have been discussed in the international literature primarily in the context of assessing asylum seekers. It was also discussed by the South African Law Commission's inquiry into juvenile justice. The United Nations High Commissioner for Refugees remarks in relation to refugee children:

It is often necessary for an asylum country to determine the age of a young person who has, or is claiming, refugee status. There may be different procedures or programmes for refugees who are below a specific age, for example, 16 or 18 years. Laws which apply to the general population may also have age limits, such as juvenile delinquency laws. ...

States face practical problems in determining age. A refugee's birth might never have been registered, or identity documents never issued. Identity papers are sometimes lost, forged, or destroyed. Even when the papers are in order, authorities might question their validity.

When identity documents are not relied on to establish age, authorities usually base age assessments on physical appearance. Sometimes "scientific procedures" are used, such as dental or wrist bone x-rays. Precautions must be taken if such methods are used. First, these methods only estimate age. Authorities must therefore make sure their methods are accurate and allow for margins of error. Second, when technology is used, it must be safe and respect human dignity.<sup>5</sup>

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Age estimation has also been discussed in a recent paper produced by the Royal College of Paediatrics and Child Health (UK) as follows:

In immigration cases, the College takes the view that ionising radiation should only be used in cases of clinical need and not at the instigation of officials.<sup>6</sup>

Its paper continues:

... if an individual seeking entry wishes to support their case, an X-ray of the hand presents negligible risk of radiation. However ... the accuracy of estimation of age from hand radiography amongst groups that have not been studied in detail remains in doubt.<sup>7</sup>

The Royal College recommends that due weight be given to social and cultural factors as well as physical evidence in making age assessments:

The determination of age is a complex and often inexact set of skills, where various types of physical, social and cultural factors all play their part, although none provide a wholly exact or reliable indication of age, especially for older children.

Assessments of age should only be made in the context of a holistic examination of the child.<sup>8</sup>

Measures of age other than wrist x-rays certainly exist and are foreshadowed by the Bill. For example, the United States Immigration and Naturalization Service (INS) uses dental radiography examination. These tests have also been criticised as unreliable due to developmental, cultural and dietary differences between groups.

In the late 1990s, the South African Law Commission addressed the issue of age determination during its inquiry into juvenile justice. In South Africa, the issue of age estimation occurs not in the context of asylum seekers but because it is not uncommon for South African children and their parents to be unaware of their ages or dates of birth.<sup>9</sup> The Law Commission's 1999 Discussion Paper identified wrist x-rays as a more accurate method of determining age than assessment by a court.<sup>10</sup> However, the Discussion Paper and the Law Commission's Report on juvenile justice rejected the use of wrist x-rays as an expensive option. The Law Commission's draft legislation contains provisions relating to age estimations and determinations. The model proposed was that where it was uncertain whether a person was a minor, an estimation would be made by a probation officer. The probation officer would consider various factors in order of cogency including a previous determination by a magistrate, statements from parents or others with knowledge of the child, various records, and an estimation of age by a medical practitioner. An assessment made by a probation officer and the factors considered by him or her would form the basis of a determination by a judicial officer.

The reliability of wrist x-ray and similar evidence for the purposes of assessing a person's chronological age was discussed in a Senate Legal and Constitutional Legislation Committee hearing on 23 March 2001.<sup>11</sup> In evidence to the Committee, Dr Kevin

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Osbourne, Secretary of the ACT Branch of the Royal Australian and New Zealand College of Radiologists, said that a single x-ray of the hand and wrist was safe because it involves a ‘very low dosage’<sup>12</sup> of radiation. Dr Osbourne said that hand/wrist x-rays were designed ‘to assess delays or advancement in maturation of the bone knowing the chronological age’ rather than as a means of testing chronological age. However, in response to a question from Senator Cooney about the reliability of wrist x-rays for assessing age, Dr Osbourne said that:

If you know the medical condition and the state of nutrition of the person being radiographed and given those parameters then, yes, you can be reasonably accurate to within the limitations as discussed in the atlas [used by radiologists]—to the margin of error in the atlas.<sup>13</sup>

The Committee was also told that the atlas used by radiologists was prepared using test data from North American Caucasian subjects.<sup>14</sup>

## Commonwealth offences

The proposed legislation relates only to the investigation and prosecution of Commonwealth offences. Much of Australia’s criminal law is State and Territory law—for example, crimes against the person such as homicide, robbery and assault and crimes against property such as burglary and theft. However, there are Commonwealth offences which might be committed by people whose age is in question and who lack documentary proof of identity and age. The Second Reading Speech refers to people smuggling offences under the Migration Act.<sup>15</sup> Other existing and possibly relevant offences under the Migration Act include escaping from lawful immigration detention.<sup>16</sup> There are also offences of damaging Commonwealth property<sup>17</sup>, stealing Commonwealth property<sup>18</sup>, and illegal fishing.<sup>19</sup> The Bill applies to the investigation and trial of all Commonwealth offences where a person’s age is uncertain and needs to be determined. It therefore has the potential to impact not only on foreign nationals mentioned in the Second Reading Speech but on members of the Australian community—such as some Indigenous people—whose precise age may be uncertain.

## Main Provisions

**Item 1** inserts **new Division 4A**—‘Determining a person’s age’—into Part 1AA of the *Crimes Act 1914*.

## Definitions

**Proposed subsection 3ZQA(1)** is a definitions provision. It defines the following terms:

- ‘age determination information’—means photographs (including x-rays), records or information obtained from a ‘prescribed procedure’

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- ‘prescribed procedure’—means a procedure for determining a person’s age which is specified by regulations [also **proposed subsection 3ZQA(2)**]. The regulations may require that equipment used to carry out a ‘prescribed procedure’ is operated by an ‘appropriately qualified’ person [**proposed subsection 3ZQA(3)**].
- ‘appropriately qualified’—means having suitable professional qualifications or experience for carrying out a prescribed procedure or being qualified under the regulations
- ‘investigating official’—means a member of a federal, state or territory police force or a person with the power of arrest under a Commonwealth law.

**Proposed subsection 3ZQA(4)** provides that the Minister for Justice and Customs must consult with the Minister for Health before regulations are made under **proposed subsection 3ZQA(2)**.

## Investigations

### Threshold issues

**Proposed section 3ZQB** specifies when an investigating official can seek permission to carry out a prescribed procedure. Two threshold conditions must be satisfied.

- the official must suspect on reasonable grounds that a Commonwealth offence has been committed, and
- determining whether the person is or was under the age of 18 must be relevant to how the person can be detained, the alleged offence investigated or criminal proceedings instituted.

If these two conditions are satisfied the ‘investigating official’ can arrange for a prescribed procedure to be carried out in two circumstances:

- by obtaining a consent under **proposed section 3ZQC**, or
- by obtaining a magistrate’s order under **proposed subsection 3ZQB(3)**.

### Obtaining a valid consent

In order to obtain a valid consent the investigating official must:

- first inform each person from whom consent is sought in a language in which they can communicate with ‘reasonable fluency’ of the matters set out in **proposed paragraphs 3ZQC(2)(a)-(g)**. These matters include the purpose and nature of the procedure, the use to which information obtained from the procedure will be put, any known health

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risks of the procedure and the person's entitlement to a copy of record of consent under **proposed section 3ZQC**, and

- then get a written consent from the affected person and from the person's parent or guardian or a person independent of the investigatory process who can represent the person's interests.

### **Obtaining a magistrate's order during the investigation phase**

Before making an order under **proposed subsection 3ZQB(3)**, a magistrate must be satisfied that:

- there are reasonable grounds for suspecting that the person has committed a Commonwealth offence
- there is uncertainty about whether the person is or was, at the relevant time, under 18, and
- the uncertainty must be resolved in order to determine how the person will be detained, the offence investigated or criminal proceedings instituted.

### **What happens when a person withdraws consent to a prescribed procedure**

**Proposed section 3ZQD** provides that if a person expressly or inferentially withdraws their consent before or during a prescribed procedure, it cannot proceed except on a magistrate's order.

### **Recording requirements**

**Proposed section 3ZQE** provides that:

- when information is given to a person, their parent, guardian or 'acceptable' adult about a prescribed procedure, the giving of information and the responses to that information must be electronically recorded, if practicable, and a copy given to the affected person,
- if it is not practicable to make an electronic recording, a written record must be made and a copy given to the person.

### **Age determination during criminal proceedings**

**Proposed section 3ZQF** provides that if a person is being prosecuted for a Commonwealth offence, the presiding judicial officer can order that a prescribed procedure be carried out if satisfied that it is necessary to determine whether a person was under 18 when the alleged offence was committed.

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## Communication of orders made by judicial officers

**Under proposed section 3ZQG**, a magistrate or judge who makes an order for a ‘prescribed procedure’ is required to:

- keep a written record of the order and the reasons for making it
- ensure that the person is informed in a language in which they are ‘reasonably’ fluent that an order has been made, why it has been made and the arrangements for carrying it out, and
- tell the person that reasonable force may be used to carry out the procedure.

## Disclosure of age determination information

It is an offence to recklessly cause age determination information to be disclosed [**proposed subsection 3ZQJ(1)**]. The maximum penalty is two years imprisonment. **Proposed subsection 3ZQJ(2)** also sets out the circumstances in which disclosure is permissible. These include complying with rules governing detention and Commonwealth criminal investigation, the institution or conduct of Commonwealth criminal proceedings, investigations by the Privacy Commissioner, or if the person consents.

## Destruction of age determination information

**Proposed section 3ZQK** provides a statutory regime governing the destruction of age determination information. Such information must be destroyed:

- if proceedings against the person have not been instituted or have been discontinued—as soon as practicable once 12 months has elapsed since the procedure was carried out
- if the person has been convicted but no conviction is recorded or the person is acquitted and no appeal has been lodged—as soon as practicable unless another investigation or proceeding is pending.

However, a magistrate may extend the 12 month period mentioned above in special circumstances [**proposed subsection 3ZQK(3)**].

## Concluding Comments

The Second Reading Speech comments that the age determination powers will ‘... avoid the undesirable situation of placing adult suspects in juvenile detention facilities or vice versa’.<sup>20</sup> The Speech also states that the proposed legislation balances the public interest in age determination for these and other purposes with the interest of upholding an

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individual's physical integrity.<sup>21</sup> Other factors which some may regard as important are ensuring that any health risks are minimised and ensuring that age determination methods employed provide a reasonably accurate means of determining chronological age.

In general, Commonwealth offences are tried in State and Territory courts invested with federal jurisdiction. Section 20C of the Crimes Act provides that if a child or young person is charged with or convicted of a federal offence in a State or Territory he or she may be tried, punished or otherwise dealt with as if the offence were an offence against State or Territory law. The expression 'child or young person' is not defined in the Crimes Act. As a consequence definitions in State or Territory law could be picked up.<sup>22</sup> In most Australian jurisdictions, people are, in general, dealt with in the adult criminal justice system once they turn 18.<sup>23</sup> However, it appears that in Victoria and Queensland, the relevant age for some criminal justice purposes may be 17 years.<sup>24</sup> Proposed section 3ZQF which says that a judicial officer can make an age determination order to ascertain whether or not the person 'is, or was at the time of the alleged commission of that offence, under 18'. The question which arises here is whether these words are intended to cover the situation where the relevant age of majority in the particular jurisdiction is under 17 and, if this is the drafter's intention, whether the words achieve that intention.

Finally, the Explanatory Memorandum for the Bill states:

The measures are designed to be consistent with existing provisions in the Crimes Act 1914 governing forensic and identification procedures, in Parts 1D and 1AA, respectively. For example, the measures are predicated on informed consent and contain similar safeguards to the forensic procedure provisions.<sup>25</sup>

However, there are important differences between informed consent in the forensic procedure provisions in existing Part 1D and those in the Bill. Thus, under section 23WJ of the Crimes Act, a suspect must be told that he or she can refuse to consent and the consequences of not consenting.<sup>26</sup> There are no equivalent provisions in the Bill. A constable must also give a suspect an opportunity to communicate with a lawyer prior to giving consent.<sup>27</sup> Further, under Part 1D, where a constable proposes to ask a suspect to consent to a forensic procedure and believes that the suspect is unable to communicate with reasonable fluency in English, he or she must arrange for an interpreter and defer taking any action until the interpreter is present.<sup>28</sup> The Bill merely requires an investigating official to 'inform each of the persons from whom a consent is being sought, in a language in which the person is able to communicate with reasonable fluency' of certain matters before asking for consent.<sup>29</sup> This does not appear to require an interpreter to be present or even that a dialogue between the person and the official takes place. Further, under Part 1D of the Crimes Act, if the suspect is an Aboriginal person or a Torres Strait Islander, an interview friend or legal representative must be present while the suspect is asked to consent to a forensic procedure, unless this right has been waived by the suspect.<sup>30</sup> There is no similar requirement in the Bill.<sup>31</sup>

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## Endnotes

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- 1 *R v. Hatim & Ors* [2000] NTSC 53 [15].
- 2 *R v. Hatim & Ors* [2000] NTSC 53 [18]-[19].
- 3 *R v. Hatim & Ors* [2000] NTSC 53 [25].
- 4 *Halsbury's Laws of Australia*, 195-2245, 19-2255.
- 5 UNHCR, *Refugee Children: Guidelines for Protection and Care*, Chapter 2.I.
- 6 *ibid.*
- 7 Ros Levenson & Anna Sharma, *The Health of Refugee Children. Guidelines for Paediatricians*, Royal College of Paediatrics and Child Health, November 1999, p. 14.
- 8 *ibid.*, p. 14.
- 9 South African Law Commission, Project 106. *Issue Paper 9, Juvenile Justice*, 3.24.
- 10 SALC, Discussion Paper, *op.cit.*, p. 109.
- 11 The Committee conducted an inquiry into the Bill. However, this Digest was prepared before the Committee's report was tabled.
- 12 Proof Committee Hansard, Senate, Legal and Constitutional Legislation Committee, 23 March 2001, p. L&C 3.
- 13 *ibid.*, p. L&C 5.
- 14 *ibid.*, p. L&C 4.
- 15 For example, offences under sections 232A and 233.
- 16 Section 491.
- 17 Presently found in section 29 of the Crimes Act.
- 18 Presently found in section 71 of the Crimes Act.
- 19 Second Reading Speech, Crimes Amendment (Age Determination) Bill 2001, House of Representatives Hansard, 7 March 2001, p. 25215.
- 20 House of Representatives, *Hansard*, 7 March 2001, p. 25216.
- 21 *ibid.*
- 22 Richard G Fox, *Victorian Criminal Procedure. State and Federal Law*, Monash University, Clayton, 2000, p. 367.
- 23 Australian Law Reform Commission & Human Rights and Equal Opportunity Commission, *Report No.84. Seen and Heard: Priority for Children in the Legal Process*, 1997.
- 24 See subsection 3(1), *Children and Young Persons Act 1989* (Vic) and section 5, *Juvenile Justice Act 1992* (Qld).
- 25 Page 2.

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- 26 See paragraphs 23WJ(1)(i) and (j).
- 27 Subsection 23WF(2)(d).
- 28 Section 23YDA.
- 29 See **proposed subsection 3ZQC(2)**.
- 30 Section 23WG.
- 31 While in many regards the provisions in the Bill are more akin to Part 1AA of the Crimes Act (which deals with search warrants and powers of arrest), the parallel drawn in the Explanatory Memorandum in relation to consent provisions in the Bill is with Part 1D of the Crimes Act (the forensic procedures provisions). The differences between Part 1D and the Bill which are described in this Digest are, arguably, all matters which go to informed consent.

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