

UNSW



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Migrant and Refugee Rights Project
Australian Human Rights Centre

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Senate Legal and Constitutional Affairs Committee
Via online submission

Dear Committee Secretary,

Re: Inquiry into the Crimes Amendment (Fairness for Minors) Bill 2011

The above bill contains a number of welcome amendments that would bring the *Crimes Act 1914* (Cth) into closer to compliance with Australia's obligations under international law as they relate to children – including the obligations to ensure a fair trial and freedom from arbitrary detention, and to implement policies in the best interests of children, regardless of their nationality. We write to draw the Committee's attention to these obligations, and the ways in which the proposed amendments would mitigate failures in the current statute and procedures. We also recommend a number of further amendments to the *Crimes Act 1914* (Cth) and the *Migration Act 1958* (Cth) to achieve consistency between domestic law and Australia's international legal obligations in this area.

I. Introduction

Under current Australian government policy, a person under 18 years of age will generally not be prosecuted for people smuggling offences, but instead will be returned to Indonesia.¹ If under exceptional circumstances the child is charged with a smuggling offence, a court can dismiss the charges without conviction if it is found on the balance of probabilities that the person was under 18 years at the time of the

¹ Australian Human Rights Commission, 'Inquiry into the treatment of individuals suspected of peoples smuggling offences who say they are children' Discussion Paper (December 2011), at 7.

offence.² And if a child were to be convicted, a court would not be required to impose the mandatory minimum sentences that ordinarily apply to smuggling offences.³

Although these laws and policies appear to provide important safeguards, they leave significant gaps in the protection of children's basic human rights, and their implementation is undermined by systemic errors, arbitrariness and delay at various stages of the criminal prosecution process. In particular, inappropriate age determination procedures result in (1) incarceration of children in adult correctional facilities, and (2) exposure of children to the general human rights violations that affect all individuals charged with smuggling offences, including lengthy and arbitrary pre-charge detention, lengthy pre-trial detention, and the application of mandatory minimum sentences.

Each of these legislative and procedural failures undermines compliance with Australia's human rights obligations under international law, including under the *International Covenant on Civil and Political Rights* ('ICCPR'), and, in the case of children, the *Convention on the Rights of the Child* ('CRC').

These failures also place Australia in violation of its obligations under the *UN Smuggling Protocol*.⁴ The UN Smuggling Protocol is the primary international agreement between states on the criminalisation of people smuggling. It outlines the measures that states agree to take in order to address problems associated with smuggling, as well as the safeguards that states agree to implement in order to ensure that the human rights of vulnerable individuals are not compromised as a result of anti-smuggling initiatives. Specifically, article 19 of the Smuggling Protocol states that domestic legislation must be compatible with the rights, obligations and responsibilities of States and individuals under international human rights law. At the very least, this includes the human rights treaties to which Australia is a state party.

We support most of the provisions in this Bill and are of the view that they bring Australia into closer compliance with its international obligations as they relate to children.

However in order to bring Australia into compliance with its broader legal obligations under various international human rights treaties, as well as the UN Smuggling Protocol, we recommend that the Bill include further amendments to remove the mandatory sentencing provisions and to prevent lengthy and/or arbitrary detention in relation to *all* individuals charged with smuggling offences. Compliance with human rights standards is especially important in this area because of the heightened vulnerability of the individuals charged with smuggling offences – the overwhelming majority of whom are poor, uneducated Indonesian fishermen who are generally the victims of the organisers of people smuggling operations, lured by a small sum to work

² *Migration Act 1958* (Cth), s 236A.

³ *Migration Act 1958* (Cth), s 236B.

⁴ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime (2000).

as cooks and deckhands, generally without knowledge of the purpose or destination of the voyage, and without knowledge of Australian immigration or criminal laws.

II. Determination of age based solely on unreliable X-ray techniques violates Australia's international human rights obligations

The wrist x-ray technique became the sole procedure for determining age in 2001,⁵ after the *Crimes Act 1914* (Cth) was amended by the Crimes Amendment (Age Determination) Bill 2001 (Cth).⁶ Since 2001, it has been the primary source of evidence in determining the age of individuals accused of people smuggling where the person claims to be a child.⁷

The x-ray technique is considered unreliable by leading medical and other experts around the world, as detailed in the Appendix to this submission. It can, and does, result in the erroneous classification of children as adults. As such, reliance on the technique as the *sole* basis for determining a defendant's age is inconsistent with Australia's obligations under the *UN Convention on the Rights of the Child* ('CRC').⁸

The issue has been directly addressed by two UN human rights bodies. The UN Committee on the Rights of the Child, the treaty body that administers the CRC, requires states to take numerous sources of evidence into account when determining age.⁹ It also requires that states bear the burden of proof regarding age determination when an individual claims to be a child.¹⁰ The Committee states in General Comment 6 that:

... identification measures includ[ing] age assessment should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.¹¹

The United Nations High Commissioner for Refugees has similarly eschewed sole reliance on the x-ray technique in the context of determining the age of refugees under

⁵ *Crimes Act 1914* (Cth), ss 3ZQA-3ZQK and *Crimes Regulations 1990* (Cth), reg 6C.

⁶ Australian Human Rights Commission, 'Inquiry into the treatment of individuals suspected of peoples smuggling offences who say they are children' Discussion Paper (December 2011).

⁷ Australian Human Rights Commission, 'Inquiry into the treatment of individuals suspected of peoples smuggling offences who say they are children' Discussion Paper (December 2011).

⁸ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

⁹ UN Committee on the Rights of the Child, *General Comment 6*, para 31(i).

¹⁰ *Ibid.*

¹¹ *Ibid.*

the *Convention relating to the Status of Refugees*¹² (for which the X-ray technique is also problematically used in Australia):

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.

The Bill proposes a prohibition on the use of the x-ray technique as a form of evidence.¹³ In our opinion, it is not necessary (and indeed it is unusual) to prohibit reliance on a particular form of evidence. However given the unreliability of the x-ray technique, we recommend that the Bill instead prohibit age determination on the *sole* basis of x-rays. We support the examples of additional forms of evidence under s3ZQAA(5) ('birth certificates, affidavits from family members of the person, school records and medical records').

We further support the allocation of the burden of proof to the prosecution in such cases, particularly in light of the costs and practical obstacles that prevent defence lawyers from adequately contesting an erroneous classification. However in light of the serious irremediable harms that inevitably result from erroneous classification of a child as an adult in this context, and the problems with x-ray evidence, we recommend that proposed s3ZQAA(4) be amended require the prosecution to prove *beyond a reasonable doubt* that the person was 18 years or over at the time of the offence.

III. Further human rights consequences of erroneous classification of a child as an adult in the context of prosecution for people smuggling offences

A. Incarceration of children in adult correctional facilities

If the prosecution suspects that a person is an adult, or a court finds that the person is in adult (based on the x-ray technique), the individual will be detained in adult correctional facilities while they await trial, and when serving any sentence imposed at trial. The incarceration of children in adult correctional facilities violates Australia's obligation under the ICCPR to ensure that accused juveniles are separated from adults in prison (article 10(2b)). This requirement applies regardless of whether the child is an Australian national or a noncitizen, because the ICCPR requires states to ensure that 'every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his

¹² Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

¹³ Crimes Amendment (Fairness for Minors) Bill 2011, s3ZQA(2).

family, society and the State' (article 24(1)).¹⁴ Similarly, all persons, including children, 'shall be equal before the courts and tribunals, and is entitled to a fair and public hearing...' (article 14(1)).

The CRC goes further than the general prohibition on arbitrary and unlawful detention in article 9(1) of the ICCPR. In addition to the requirement under article 3 that the best interests of a child be a primary consideration in all actions concerning children, article 37(c) requires that a child deprived of his or her liberty be treated in a manner which takes into account the needs of a person of his or her age and that the child is separated from adults:

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

We therefore support the insertion of proposed s15(2), which requires the government to ensure that a person suspected of a smuggling offence who claims to be a child is remanded in a youth justice facility, unless a decision has been made by a Magistrate determining that they are an adult based on the balance of probabilities.

B. Delays in bringing charges, after an indefinite period of immigration detention – in many cases lasting several months – without timely access to legal advice

We understand from defence lawyers that under current government practice, individuals suspected of involvement in people smuggling offences are held in immigration detention for arbitrarily long periods of at least several months before being charged with any offence. We further understand, based on conversations with defence lawyers, that those individuals generally do not have access to legal advice before being interviewed by immigration authorities, or, in the case of children, before being asked to consent to having x-rays taken for evidentiary purposes.

Indefinite pre-charge detention, frequently of several months' duration, violates Australia's obligations under the ICCPR in relation to any person suspected of a smuggling offence, including children. Under the ICCPR anyone who is arrested must be informed, at the time of arrest, of the reasons for his arrest and must be promptly informed of any charges against him or her (article 9(2)). Anyone arrested or detained on a criminal charge must be brought promptly before a judge and is entitled to trial within a reasonable time or to release (article 9(3)). Article 9(1) prohibits arbitrary

¹⁴ In *Human Rights Committee Communication No: 1069/2002 (Bakhtiyari v Australia)*, the Human Rights Committee found that detention of the Bakhtiyari children for two years and eight months was a violation of Australia's obligation under article 24(1).

detention, which includes detention that continues beyond the period for which a state party can provide appropriate justification. In the case of smuggling offences, there appears no justification for an average period of months before charges are issued, even if the prosecution gathers additional evidence. When the individuals are children, indefinite pre-trial detention also violates article 24(1) (right to such measures of protection as are required by an individual's status as a child).¹⁵

Indefinite pre-charge detention also violates Australia's obligations under the CRC, which recognises that children, as well as adults, are entitled to protection of their basic human rights, but that children require special protection because of their vulnerability to exploitation and abuse. Paramount to the CRC is article 3, which requires that the best interests of a child be a primary consideration in all actions concerning children. Article 37(c) specifically requires that a child deprived of his or her liberty be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. This clearly precludes lengthy pre-charge immigration detention, without access to legal advice.

We therefore support the Bill's imposition of reasonable time limits within which children must either be charged or released.¹⁶ We recommend that the Bill further require facilitation of timely access to legal advice, and that regulations require that children are afforded communication with their family. In order to bring Australia into compliance with its obligation under article 9 of the ICCPR to ensure freedom from arbitrary detention, we recommend that the 14 day time limit for bringing people smuggling charges (and any requirement of access to legal assistance) apply to all individuals – the vast majority of whom are, in practice, impoverished Indonesian fishermen with multiple levels of vulnerability, including lack of English language skills and unfamiliarity with the Australian legal system.

C. Lengthy pre-trial delays

Individuals charged with smuggling offences are remanded for lengthy periods before being brought to trial – in some states, up to 18 months. This includes individuals who are ultimately found not guilty of any offence at trial. In addition to the profound violation of the individual's right to liberty, these delays have severe consequences for the individual's family and dependants left behind in Indonesia, frequently without their breadwinner.

In the case of children, the failure to swiftly and appropriately determine the age of individuals who claim to be children results in their incarceration in adult remand facilities for extended periods of time. For the reasons identified in sections 2A and 2B above, this further violates Australia's obligations under the ICCPR and CRC.

¹⁵ *Ibid.* Indefinite pre-trial detention may also, depending on conditions in immigration or other detention, potentially violate articles 7 (prohibition of cruel, inhuman or degrading treatment or punishment) and 10 (treatment of people deprived of liberty).

¹⁶ Crimes Amendment (Fairness for Minors) Bill 2011, s 15BA.

We therefore support the Bill's introduction of a reasonable time-limit of 30 days in which an investigating official may make an application for a Magistrate to determine the age of individual.¹⁷ This would prevent unjustified further detention of children who would, upon determination of their age, be sent home under current government policy.

We recommend that measures be taken to reduce the length of pre-trial detention for individuals who are adults. These include increasing resources to address the unanticipated burden that smuggling trials have placed on Legal Aid, prosecutors and the courts of several states. We further recommend the repeal of mandatory sentencing provisions which, we understand from defence lawyers, provide a powerful disincentive against guilty pleas and unnecessarily increase the number of cases that proceed to trial (and related burdens on the criminal justice system).

D. Mandatory sentencing

The people smuggling offence under section 233C of the *Migration Act* is an "aggravated offence" that requires all judges to impose a mandatory sentence of five years imprisonment with a minimum 3 year non-parole period. The only "aggravating" factor that differentiates this offence from the standard smuggling offence under s233A is the element that five or more noncitizens were brought to Australia. Because unauthorised boats invariably carry five or more people, all defendants are charged with this "aggravated" offence and liable for the mandatory five year sentence – regardless of their personal circumstances, level of involvement or moral culpability.

These mandatory minimum sentences do not apply to children – provided the individuals are correctly determined to be under 18 years of age.¹⁸ Children incorrectly determined to be adults, for example based solely on x-ray evidence, must be sentenced to at least 5 years imprisonment if found guilty under s 233C.

Mandatory sentencing regimes are contrary to Australia's obligations under the ICCPR. Because mandatory sentencing does not allow consideration of the proportionality of the sentence to the crime committed in light of individual circumstances, *by definition* it may result in penal sentences that constitute arbitrary detention, prohibited under article 9. Detention is "arbitrary" if it is unjust or unreasonable, even if sanctioned by law.¹⁹ Mandatory sentencing arguably also violates article 14 of the ICCPR, because it does not permit the right to a hearing before an independent tribunal and to a review of sentence by a higher tribunal. This is because the sentence is imposed by the legislature, is not subject to judicial control, and there is no system for sentences to be reviewed.²⁰ Mandatory minimum

¹⁷ Crimes Amendment (Fairness for Minors) Bill 2011, s 3ZQAA(3).

¹⁸ *Migration Act 1958* (Cth), s 236B.

¹⁹ See eg *A v Australia*, UN Human Rights Committee (1997); reports of the UN Working Group on Arbitrary Detention: <<http://www2.ohchr.org/english/issues/detention/>> (accessed 12 April 2010).

²⁰ See eg S Pritchard, 'International Perspectives on Mandatory Sentencing' [2001] *Australian Journal of*

sentences and the fettering of judicial discretion to apply standard sentencing principles in light of individual circumstances is inconsistent with the principle of proportionality between sentence and offence that is a fundamental principle of Australian domestic law.²¹

Mandatory sentencing further violates numerous provisions of CRC, including the fundamental requirement under article 3 that the best interests of a child be a primary consideration in all actions concerning children. Mandatory sentencing prohibits judges from considering *any* interests of the defendant when imposing a sentence.

In order to bring Australian law into compliance with the country's obligations under international law, we recommend that the Bill include the repeal of mandatory sentencing for people smuggling offences, and that it reinstate judicial discretion to impose sentences proportional to an individual's culpability in light of his or her personal circumstances.

Thank you for your time in considering our submission.

Yours sincerely,

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Human Rights 17. Mandatory sentencing may also raise issues under articles 7 (prohibition of cruel, inhuman or degrading treatment or punishment) and 10 (treatment of people deprived of liberty) of the ICCPR.

²¹ See eg *Veen v The Queen (No 2)* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ). In the past, the UN Human Rights Committee has found that mandatory sentencing laws in the Northern Territory and Western Australia raised "serious issues of compliance with various Articles" of the ICCPR, UN Human Rights Committee, "Concluding Observations of the Human Rights Committee: Australia" (24 July 2000) UN doc A/55/40.

Appendix

Expert evidence on the wrist x-ray technique

Australian courts have upheld the wrist x-ray technique, despite it being widely discredited around the world, most notably by Sir Albert Aynsley-Green who served as first children's commissioner for England 2005 to 2010.²² Most recently, Sir Aynsley-Green provided expert commentary on the wrist x-ray technique's use in Australia for age determination and found that 'it is not possible to use the GP Atlas to provide a statistical probability that a person is under 18 years of age'.²³ The GP Atlas was published in 1959 to help assess the skeletal age of children by reference to wrist x-rays, based on middle class white children from the United State, born in the 1930s. It is commonly used today to interpret the wrist x-ray in Australia.

The Royal College of Paediatrics and Child Health (UK) has advised that ionising radiation (including x-rays) should only be used in cases of clinical need and not at the instigation of officials. They contend that:

... the accuracy of estimation of age from hand radiography amongst groups that have not been studied in detail remains in doubt.²⁴

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.²⁵

The reliability of wrist x-ray and similar evidence for the purposes of assessing a person's chronological age was originally discussed in a Senate Legal and Constitutional Legislation Committee hearing on 23 March 2001. During that hearing, Dr Kevin Osbourne, Secretary of the ACT Branch of the Royal Australian and New Zealand College of Radiologists, gave evidence to the Committee that the hand/wrist x-rays were designed 'to assess delays or advancement in maturation of the bone

²² Radio Australia, 'Questioning the reliability of x-raying suspected people smugglers: Interview with Edwina Lloyd, solicitor from Blair Criminal Lawyers, and Dr Ronald McCoy, 16th August: <http://blogs.radioaustralia.net.au/english/2011/asia/questioning-the-reliability-of-x-raying-suspected-people-smugglers>

²³ Sir Albert Aynsley-Green KT, Professor Emeritus of Child Health, 'Expert commentary on the age assessment of John Ndollu', prepared for Fisher Dore Lawyers, Brisbane, Australia, p 11 in AHRC, 'Inquiry into the treatment of individuals suspected of peoples smuggling offences who say they are children' Discussion Paper (December 2011) p 12.

²⁴ Ros Levenson & Anna Sharma, *The Health of Refugee Children. Guidelines for Paediatricians*, Royal College of Paediatrics and Child Health, November 1999, p. 14.

²⁵ *Ibid.*

knowing the chronological age' rather than as a means of testing chronological age.²⁶

In relation to the reliability of the wrist x-ray 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.²⁷

This is unlikely to ever be the case for Indonesian boys suspected of smuggling offences.

²⁶ Proof Committee Hansard, Senate, Legal and Constitutional Legislation Committee, 23 March 2001, p. L&C 3.

²⁷ *Ibid*, p. L&C 5.