



Immigration Advice & Rights Centre Inc.

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## Introduction

1. The Immigration Advice & Rights Centre was established in 1986 as a specialist immigration law community legal centre. Due to its extensive knowledge of Australia's Immigration law and policy IARC has made contributions to law reform discussion enhancing the operation of migration and refugee law.
2. Drawing upon the Centre's experience in the provision of advice and casework we provide the submission below highlighting issues relevant to our clientele.
3. A number of our clients who have been granted protection in Australia may, at some point, utilised the service of a people smuggler. As an organization that advocates on behalf of refugees we are supportive of Government attempts to deter people smuggling. However we also submit that minors involved in the process should be recognized as minors under the *United Nations' Convention of The Rights of the Child* (CROC).
4. We are therefore in support of a bill that aims to safeguard minors from being subject to the detention, charging and prosecution for people smuggling offences under the *Migration Act* 1958.
5. The main premise of this submission is that current procedures for the prosecution of minors are inconsistent with our obligations under CROC. Currently potential minors are subject to inadequate assessments of age and subject to remand in an adult prison

## Submission

6. We submit that any laws that subject minors to a period of remand are contrary to Australia's international obligations particularly those under the CROC. Article 37 of the CROC states that:  
  
*1. No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*  
  
*2. That every child deprived of his or her liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner, which takes into the account the needs of persons of his or her age. In particular every child deprived of liberty shall be separated from adults.*
7. The rights above are non-derogable and as such cannot be avoided. It is submitted that the proposed legislation will work to secure fair criminal procedures and restore basic humanity to people smugglers who may be children. We therefore support amendments to strengthen procedures that establish age.
8. In light of the issues raised by many peak Australian medical bodies,<sup>1</sup> the use of dental x-rays as a method to determine age is unethical and unreliable. We urge the Australian government to limit use of unreliable and unethical practices that may lead to the remand of minors.
9. Article 27 d of CROC also states that:  
  
*Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance*

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<sup>1</sup> Letter available publicly that has been sent to the Minister for Immigration and Citizenship and the Minister for Home Affairs from peak medical bodies, including the Royal Australian College of Physicians, the Australian Paediatric Endocrine Group, the Australian and New Zealand Society for Paediatric Radiology and the Royal Australian and New Zealand College of Radiologists dated 19 August 2011.

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10. While there is an existing burden on the Commonwealth to take effective and swift actions to identify a person, what currently exists is insufficient to identify minors. We are in support of the Commonwealth in compiling a brief of evidence that establishes, on the balance of probabilities, that the accused is not a child. We therefore support field investigations to the defendant's country of origin to inform the brief.
11. The amendments to establish timelines for the determination process is also supported. The call to define timeframes for specific stages of the determination process aims to save children from inhuman and unnecessary detention.
12. *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* 128 ALR 353 highlights Australia's obligations to apply ratified conventions in national law. The High Court of Australia held that ratification of CROC created an expectation that in all cases involving children Article 3.1 of the Convention would be upheld where "the best interests of the child would be a primary concern".
13. In line with this decision IARC believe that the best interests of children must be of primary consideration. In respecting its obligations to CROC and keeping consistent with the decision in *Teoh's Case* we urge the Australian government to support amendments that aim to protect the child and in particular strengthen procedures that determine the age of potential children.

### Conclusion

14. IARC indirectly deals with people who have in one way or another had to avail themselves of a people smuggler. Accordingly, we believe that any efforts to address any illegal activity align with the intention of CROC and fulfil our obligations under the convention.