



Australian  
Human Rights  
Commission

# Inquiry into Crimes Amendment (Fairness for Minors) Bill 2011

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO  
THE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE**

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## 1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Committees in their Inquiry into the Crimes Amendment (Fairness for Minors) Bill 2011 (the Bill).
2. For an individual who is suspected of, or has been charged with, people smuggling offences in Australia, an assessment or determination that he or she is probably an adult has significant consequences.
3. These consequences arise because under the *Migration Act 1958* (Cth) (Migration Act) mandatory minimum sentences of imprisonment apply to some people smuggling convictions. For example, a mandatory minimum sentence of five years (with a non-parole period of three years) applies to the offence of aggravated people smuggling (at least five people) pursuant to s 236B of the Migration Act.<sup>1</sup>
4. These mandatory minimum sentences do not apply to a minor.<sup>2</sup> If a person has been charged with people smuggling offences a court may discharge them without conviction if it is found on the balance of probabilities that he or she was under 18 years of age at the time of the offence.<sup>3</sup> In addition, in most cases, current policy is to not proceed with a prosecution if a person is found to be less than 18 years of age.<sup>4</sup>
5. The Commission recognises that there may be an incentive for an individual under investigation for people smuggling offences who is aware of this policy to make a false claim to be a child. The Commission agrees that there needs to be some method for assessing the age of any person subject to criminal proceedings who claims to be a child. However, human rights principles require that any doubt be resolved in favour of a possible child.
6. The President of the Commission is currently conducting an Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children (Age Assessment Inquiry). Information about this Inquiry may be found at the following website:  
[www.humanrights.gov.au/ageassessment/index/html](http://www.humanrights.gov.au/ageassessment/index/html). The Commission has serious concerns that age assessment procedures permitted by Australian law and frequently used in investigations of individuals for people smuggling offences may have led to errors in age assessment. Consequently, some children may have been charged and convicted as adults and spent long periods of time in detention.

## 2 Summary

7. The Commission supports measures that would improve legislative protection of the human rights of children who are accused of people smuggling offences.
8. In particular, the Commission would welcome:

- reconsideration by the Australian Parliament of whether wrist x-rays should be a prescribed procedure under the *Crimes Act 1914* (Cth) (Crimes Act) for the purposes of age determination in criminal proceedings
  - confirmation that an individual non-citizen who claims to be a minor is presumed to have been a minor at the time of the alleged offence unless a court is satisfied that the individual was an adult at the time of the alleged offence
  - the establishment of limits on the time available before which an application for a hearing to determine the age of a non-citizen who claims to be a child must be made and on the time taken to bring charges against a non-citizen in criminal proceedings relating to people smuggling offences.
9. The report of the Commission's Age Assessment Inquiry will be published in mid-2012. In order to not pre-empt the findings of the Age Assessment Inquiry, the Commission will not make recommendations on all of the provisions contained in this Bill, particularly regarding whether or not wrist x-rays should be a prescribed procedure under the Crimes Act. The Age Assessment Inquiry report, when published, will contain detailed recommendations on matters relevant to this Bill.

### **3 Recommendations**

10. The Australian Human Rights Commission recommends that:
- proposed s 3ZQAA(3) be amended so that the 30 day limit on bringing an application to a magistrate to determine a person's age applies from whichever is first of:
    - the date the person is taken into immigration detention or
    - the date on which the person first asserts that he or she was a minor at the time of the alleged offence
  - the Bill be amended to clarify that a magistrate may adjourn an age determination hearing where the interests of justice justify such adjournment
  - proposed s 15(2) of the Bill be amended to ensure that there is a presumption that an individual awaiting trial for people smuggling offences who has been determined to be a minor or who asserts that he or she is a minor be granted a Criminal Justice Visa and be released on bail with appropriate conditions.

### **4 Australia's human rights obligations**

11. Australia ratified the *Convention on the Rights of the Child* (CRC) in 1990.<sup>5</sup> The CRC is the key human rights treaty regarding children's rights. The CRC recognises that children are entitled to protection of their basic human rights and require special protection because of their vulnerability to exploitation and abuse.

12. Australia's obligations under the CRC apply to all children in Australia, regardless of citizenship or immigration status. For the purposes of the CRC, children are defined as individuals who are under 18 years of age.<sup>6</sup>
13. Article 37(c) of the CRC 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 be separated from adults.<sup>7</sup> Article 37(c) of the CRC states:

States Parties shall ensure that: ...

(c) 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[.]
14. Under the CRC, all children in Australia also have the right:
  - to be treated in a manner which takes into account the child's age (article 40(1))
  - to be arrested, detained or imprisoned only as a measure of last resort and for the shortest appropriate period of time (article 37(b))
  - to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child (article 19)
  - to be free from arbitrary or unlawful interference with his or her privacy, family and home (article 16).

## **5 Age determination – the use of wrist x-rays**

15. In 2001 the Crimes Act was amended to provide a regime for determining age.<sup>8</sup> The amendments provide that an officer can seek permission to carry out a 'prescribed procedure', either with the consent of the person whose age is in question, or by order of a magistrate.<sup>9</sup> A parliamentary inquiry into the 2001 amendments considered the value of x-rays in age determination. The inquiry noted a number of concerns about the precision with which an x-ray could be used to determine chronological age as distinct from bone age, including that there is no real correlation between bone age and chronological age, and that there has been found to be 'considerable differences in the level of maturation of the wrist bone, possibly arising especially from physiological variation in different societies'.<sup>10</sup>
16. Currently, the only prescribed procedure under the Crimes Act is 'radiograph of the hand and wrist of the person whose age is to be determined' (wrist x-ray).<sup>11</sup>
17. In Australia, when wrist x-rays are obtained for the purposes of age determination, they are usually interpreted with the aid of the Greulich-Pyle

Radiographic Atlas (the GP Atlas). The GP Atlas was published in 1959 to help assess the skeletal, as opposed to the chronological, age of children by reference to wrist x-rays. The GP Atlas consists of a series of standard hand-wrist x-rays for specified skeletal ages.<sup>12</sup> Each standard is based on a group of 100 children of that chronological age. The reference sample used is a selection of children from the United States, and possibly the United Kingdom, who were born in the 1930s.

18. The Commission is aware of significant concern amongst medical and other experts as to the use of wrist x-rays for age assessment purposes. Concerns of which the Commission is aware include that:
  - the GP Atlas was designed for assessment of skeletal age if the chronological age is known, rather than the reverse<sup>13</sup>
  - it is not possible, reliably, to estimate the probability that an individual is of a particular chronological age from an assessment of their skeletal age using the GP Atlas<sup>14</sup> as results could be affected by:
    - i. a trend towards earlier maturity<sup>15</sup>
    - ii. differences in skeletal development in different ethnic groups<sup>16</sup>
    - iii. differences in skeletal development due to socio-economic background and nutrition.<sup>17</sup>
  - it is not possible to use the GP Atlas to provide a statistical probability that an individual is under 18 years of age<sup>18</sup>
  - wrist x-rays cannot be used to assess age with an adequate degree of precision<sup>19</sup>
  - the use of wrist x-rays for administrative purposes raises ethical concerns.
19. The Commission acknowledges that wrist x-rays have been used, in some instances, to determine that a person suspected of people smuggling offences was a child and to facilitate the quick return of that child to Indonesia. However, as described above, serious consequences flow from a wrongful determination that an individual charged with people smuggling offences is an adult. Many of those consequences may impact significantly on the human rights of a child. Given the serious concern amongst relevant experts about the value of wrist x-rays for the purposes of determining the age of a particular individual, the Commission would be seriously troubled if wrist x-rays were being relied upon as sufficient evidence of themselves to establish that any individual is an adult.
20. As a part of the current Age Assessment Inquiry the Commission will consider in further depth the issues surrounding the use of wrist x-rays as a means of determining age for the purposes of criminal proceedings. The Commission will make recommendations about the use of wrist x-rays in the Age Assessment Inquiry report.

## 6 Time limits

21. The Commission is concerned that people under investigation for people smuggling offences whose age is uncertain have frequently spent very long periods of time in detention, both in immigration detention prior to charge and in adult correctional facilities after charges have been laid.
22. The Commission is aware that in a number of cases an individual suspected of people smuggling offences was acknowledged to be a child, and subsequently returned to Indonesia, after having spent over 18 months in detention in Australia.
23. Accordingly, the Commission supports the imposition of limits on the time a non-citizen suspected of people smuggling offences who claims to be a minor can be held in detention before an application is made to a court for an order determining age.
24. Proposed s 3ZQAA(3) provides that where a person's age is in dispute an investigating official must bring an application to a magistrate to determine whether that person was 18 years or over at the time of the alleged offence within 30 days of the person being taken into immigration detention.
25. The Commission understands that an individual suspected of people smuggling offences may not always assert that he or she is a minor at the time he or she is apprehended or initially detained. Accordingly, the Commission recommends that the 30 day limit on the time within which an investigating official must make an application seeking an order determining age apply alternatively from the time that an individual first asserts that he or she is a minor or was a minor at the time of the alleged offence.
26. Further, the Commission understands that there may be circumstances in which a magistrate may wish to authorise further delay in bringing the issue to trial, for example where evidence is sought from Indonesia or where documents must be translated. The Commission recommends that the Bill be amended to clarify that a magistrate may adjourn an age determination hearing where the interests of justice justify such adjournment.
27. **Recommendation:** The Commission recommends that proposed s 3ZQAA(3) be amended so that the 30 day limit on bringing an application to a magistrate to determine a person's age applies from whichever is first of:
  - the date the person is taken into immigration detention; or
  - the date on which the person first asserts that he or she is a minor or was a minor at the time of the alleged offence.
28. **Recommendation:** The Commission recommends that the Bill be amended to clarify that a magistrate may adjourn an age determination hearing where the interests of justice justify such adjournment.
29. The Commission is aware of cases in which an individual under investigation for people smuggling charges, who says that he or she is a child but who is suspected of being an adult, has spent very long periods of time in detention

until the investigation into matters relating to age is finalised and either prosecution is brought or he or she is removed to Indonesia. Lengthy periods of detention have a significant impact on the human rights of an individual and may be in breach of Australia's international human rights obligations to ensure that detention of any person is proportionate and necessary.<sup>20</sup> Prolonged detention may also breach the obligation to detain a child only as a measure of last resort and for the shortest time possible.<sup>21</sup>

30. Accordingly, the Commission supports the imposition of limits on the time a non-citizen suspected of people smuggling offences can be held in detention following a determination that he or she was an adult at the time of the alleged offence and before charges are laid.
31. Proposed s 15BA(2) provides that a charge for a people smuggling offence can only be brought within 14 days of a person who is or asserts that he or she is under the age of 18 years being taken into immigration detention.
32. The Commission is not presently in a position to comment on what might be an appropriate limit on the time within which a charge must be brought against an individual who is suspected of people smuggling offences. As a part of the Age Assessment Inquiry, the Commission is likely to consider the cause and effect of current delays in investigation and prosecution of people smuggling offences.

## **7 Place of detention**

33. The Commission understands that there are Indonesian nationals who assert that they are minors currently detained in adult jails in Australia. There have been cases where individuals had spent long periods of time in adult correctional facilities prior to a decision being made to discontinue a prosecution following the production of affidavit and documentary evidence from Indonesia.
34. Detaining children in adult prisons is clearly in breach of Australia's obligation under the CRC to detain children separately from adults and to make the best interests of an individual child a primary consideration in all decisions concerning them.<sup>22</sup> There are significant risks associated with detaining minors in adult correctional facilities, including that they may be subject to sexual or other forms of assault.
35. The Commission is aware that it is current Australian Government policy not to prosecute a minor for people smuggling offences. The Commission acknowledges that, where exceptional circumstances exist, a minor may be prosecuted and, if convicted, held in an appropriate youth justice facility. It is the Commission's view, however, that where a minor has been charged with people smuggling offences and is awaiting trial the minor should ordinarily be released on bail, with appropriate conditions.
36. Pursuant to proposed s 15(2) of the Bill, an individual who is charged with people smuggling offences who was or who asserts that he or she was a minor at the time of the alleged offences would be remanded in a youth justice facility while awaiting trial.



37. The Commission submits that holding a child on remand in a youth justice facility while awaiting trial may not be in their best interests. Holding a child in a youth justice facility may also be in breach of Australia's obligations to ensure any detention of a child is a measure of last resort.<sup>23</sup> Moreover, the Commission is concerned that an Indonesian minor would be culturally and linguistically isolated if he or she were detained in a youth justice facility without other individuals who share his or her language and culture.
38. The Commission recognises that current Australian Government policy is that bail will not be opposed by the Commonwealth in cases where age is in dispute. In cases where bail has been granted, the individual is usually held in an immigration detention facility where unaccompanied minors may be held. The Commission supports the policy of not opposing bail. However, in the Commission's view, the principle that the best interests of the child must be a primary concern should lead to consideration of whether a person granted bail should also be granted a Criminal Justice Visa and released into the community, with appropriate conditions, while awaiting trial.
39. In exceptional circumstances where it is decided to prosecute a minor for people smuggling offences, it is the Commission's view that it would ordinarily be in the best interests of a child awaiting trial to be granted a Criminal Justice Visa and to be released into the community on bail with appropriate conditions, while awaiting trial.
40. **Recommendation:** The Commission recommends that proposed s 15(2) of the Bill be amended to ensure that there is a presumption that an individual awaiting trial for people smuggling offences who has been determined to be a minor or who asserts that he or she is a minor be granted a Criminal Justice Visa and be released on bail with appropriate conditions.

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<sup>1</sup> *Migration Act 1956* (Cth), ss 233C, 236A, 236B.

<sup>2</sup> *Migration Act 1956* (Cth), s 236B.

<sup>3</sup> *Migration Act 1956* (Cth), s 236A.

<sup>4</sup> Minors are only prosecuted for people smuggling offences in exceptional circumstances on the basis of their significant involvement in a people smuggling venture or multiple ventures. Since at least September 2008, no prosecution has proceeded for people smuggling offences against a person found to be a minor: R McClelland, Attorney-General, Correspondence to the President of the Australian Human Rights Commission, 31 March 2011.

<sup>5</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), at <http://www2.ohchr.org/english/law/crc.htm> (viewed 27 January 2012).

<sup>6</sup> *Convention on the Rights of the Child*, above, article 1.

<sup>7</sup> While Australia has made a reservation to article 37(c) of the CRC, that reservation applies to limit the obligation to separate children from adults in prison only to the extent that a child's contact with their families may be compromised taking into account the geography and demography of Australia.

<sup>8</sup> *Crimes Amendment (Age Determination) Bill 2001* (Cth).

<sup>9</sup> *Crimes Act 1914* (Cth), ss 3ZQA-3ZQK and *Crimes Regulations 1990* (Cth), reg 6C.

<sup>10</sup> Senate Legal and Constitutional legislation Committee, Consideration of legislation referred to the Committee, *Inquiry into the Provisions of the Crimes Amendment (Age Determination) Bill 2001*, March 2001, pp 24-25.

<sup>11</sup> *Crimes Regulations 1990* (Cth), reg 6C.

<sup>12</sup> WW Greulich and SI Pyle, *Radiograph atlas of skeletal development of hand and wrist* (1959).

<sup>13</sup> Australian Paediatric Endocrine Group (APEG), Royal Australian and New Zealand College of Radiologists (RANZCR), Paediatric Imaging Reference Group of RANZCR, Australian and New Zealand Society for Paediatric Radiology (ANZSPAR), Royal Australasian College of Physicians (RACP) (APEG et al), Correspondence to C Bowen, Minister for Immigration and Citizenship, 19 August 2011.

<sup>14</sup> APEG et al, Correspondence to C Bowen, 19 August 2011; Professor Tim Cole, expert evidence in *R v Daud* (2011) WADC 175.

<sup>15</sup> T Smith and L Brownlees, *Age Assessment Practices: a literature review & annotated bibliography* (2011), p 15.

<sup>16</sup> A Zhang et al, 'Racial Differences in Growth Patterns of Children Assessed on the Basis of Bone Age' (2009) 250(1) *Radiology* 228. At [www.ncbi.nlm.nih.gov/pmc/articles/PMC2817832/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2817832/) (viewed 15 November 2011); FK Ontell et al, 'Bone age in children of diverse ethnicity' (1996) 167(6) *American Journal of Roentgenology* 1395. At [www.ajronline.org/cgi/content/abstract/167/6/1395](http://www.ajronline.org/cgi/content/abstract/167/6/1395) (viewed 15 November 2011); AM Zafar et al, 'An appraisal of Greulich-Pyle Atlas for skeletal age assessment in Pakistan' (2010) 60(7) *Journal of the Pakistan Medical Association* 552. At [www.ncbi.nlm.nih.gov/pubmed/20578605](http://www.ncbi.nlm.nih.gov/pubmed/20578605) (viewed 15 November 2011). FK Ontell, M Ivanovic, DS Ablin, TW Barlow, 'Bone age in children of diverse ethnicity' (1997) 169(2) *American Journal of Roentgenology*, pp 597–8. See also S Mora, M Boechat, E Petka, HK Huang and V Gilsanz, 'Skeletal age determinations in children of European and African descent: applicability of the Greulich and Pyle standards' (2001) 50(5) *Paediatric Research*, pp 624-8.

<sup>17</sup> A Schmeling et al, *Guidelines for Age Estimation in Living Individuals in Criminal Proceedings*, 2000; Dr Kevin Osbourne, testimony to the Commonwealth Senate Legal and Constitutional Legislation Committee, 2 March 2001, Inquiry into the Crime Amendment (Age Determination) Bill 2001, cited in T Smith and L Brownlees, *Age Assessment Practices*, note 15, p 14.

<sup>18</sup> 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.

<sup>19</sup> See for example, Senate Legal and Constitutional legislation Committee, Consideration of legislation referred to the Committee, *Inquiry into the Provisions of the Crimes Amendment (Age Determination) Bill 2001*, March 2001, para 3.46 and 3.62.

<sup>20</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), at <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 27 January 2012), article 9.

<sup>21</sup> *Convention on the Rights of the Child*, note 5, article 37(b).

<sup>22</sup> *Convention on the Rights of the Child*, note 5, article 37(c). See note 7 for the effect of Australia's reservation to article 37(c) of the CRC.

<sup>23</sup> *Convention on the Rights of the Child*, note 5, article 37(b).