



Australian Government

Australian Government response to the
Legal and Constitutional Affairs Legislation Committee report:

Crimes Amendment (Fairness for Minors) Bill 2011

DECEMBER 2012

Background

On 25 November 2011, the Senate referred the Crimes Amendment (Fairness for Minors) Bill 2011 to the Legal and Constitutional Affairs Committee for inquiry and report. The Committee held a public hearing on 16 March 2012, and released its report on 4 April 2012, with four recommendations. Senator Sarah Hanson-Young prepared a dissenting report, with three recommendations.

The Australian Government Attorney-General's Department (AGD), in collaboration with the Commonwealth Director of Public Prosecutions (CDPP) and the Australian Federal Police (AFP), made a joint submission to the inquiry (the Commonwealth submission). Commonwealth officers also gave evidence at the Committee hearing.

The Commonwealth's submission recommended that the Senate should not pass the Bill. In summary, Commonwealth agencies considered the Bill's proposal to impose strict timeframes for age determination and laying charges would not be practical or achievable. The limitations on laying charges would also be inconsistent with section 15B(1)(a) of the *Crimes Act 1914*, which permits the Commonwealth to commence prosecutions for serious Commonwealth offences at any time.

Further, Commonwealth agencies considered the proposed presumption of age and associated detention arrangements would jeopardise the Commonwealth's ability to flexibly manage detainees on a case-by-case basis, taking into account a range of factors in accordance with 'the best interests of the child' principle under the United Nations' *Convention on the Rights of the Child*.

This paper sets out the Australian Government response to the Senate Committee's majority and dissenting reports.

Government Response: Majority Report

Recommendation 1

The committee recommends that the Australian Government review the Australian Federal Police's procedural and legislative requirements in dealing with persons suspected of people smuggling offences, with a view to facilitating the prompt laying of charges where appropriate.

Agreed in principle.

The AFP has worked hard to reduce the amount of time taken to investigate people smuggling offences and prepare a brief of evidence, setting a benchmark of 90 days to lay charges.

As a result of continuing efforts to reduce time in detention, the AFP advises that for the period from 1 January 2012 to 12 November 2012, the average period of investigation from the date of formal referral of crew by DIAC to the date of charging by the AFP is 74 days.

The Government is committed to further reducing delays in the investigation and prosecution of people smuggling offences. Commonwealth agencies are developing solutions to address delays, including obtaining identity documents from Indonesian consular officials in the first instance, pending a mutual assistance request. These documents may then inform the AFP's decision about whether to give a person the benefit of the doubt about their age, prior to laying charges.

Unfortunately, there are often delays to the investigation process caused by environmental factors, which are difficult to avoid. For example, weather conditions may cause delays in conveying items of evidence, such as mobile phones and GPS equipment, which require forensic analysis by experts and equipment on mainland Australia. There may also be delays in securing interpreters of specific dialects required for interviews or investigations.

In addition, passengers on board people smuggling vessels are sometimes initially unable or unwilling to provide statements, which are necessary to proceed with most people smuggling prosecutions.

Recommendation 2

The committee recommends that the Australian Government introduce legislation to expressly provide that, where a person raises the issue of age during criminal proceedings, the prosecution bears the burden of proof to establish that the person was an adult at the time of the relevant offence.

Agreed.

Under the *Migration Act 1958*, penalties for aggravated people smuggling offences do not apply to persons where it is 'established' on the balance of probabilities that they are under the age of 18 years. However, the legislation does not specify whether the prosecution or the defence bears the burden of proof.

There has been some inconsistency in the courts as to who bears the burden of proof. However, in practice, the CDPP has assumed the obligation of establishing whether the person is a minor or an adult, in cases where the defendant raises age as an issue.

The Government will consider amendments to the *Migration Act* that would codify current practice by specifying that the prosecution bears the onus of proof in establishing age, where age is contested during a prosecution.

Recommendation 3

The committee recommends that the Australian Government review options to support the capacity of the legal representatives of persons accused of people smuggling offences who claim to be underage at the time of the offence to gather evidence of age from their place of origin.

Disagree.

Commonwealth agencies facilitate access to legal aid by accused people smugglers as soon as the AFP requests to interview them. Commonwealth funding for legal aid in each State and Territory is provided through the Expensive Commonwealth Criminal Cases Fund. As part of this funding, legal aid representatives are entitled to claim the costs of reasonable disbursements, including costs associated with calling expert witnesses and gathering evidence of a defendant's age in their country of origin. To date, all costs claimed by legal aid commissions, including the costs of travel to Indonesia to collect identity documents, have been approved for reimbursement.

Recommendation 4

The committee recommends that the Senate should not pass the Bill.

Government response: Dissenting Report

Recommendation 1

The Bill be amended to require facilitation of timely access to legal advice, and that regulations require that children are afforded communication with their family.

Agreed in principle.

To address the issue of clients having access to legal advice in a timely fashion, the AFP has amended its practises concerning minors and provides those accused of people smuggling offences the opportunity to speak with legal representatives at the first available opportunity following referral from DIAC.

People smuggling crew held in immigration facilities are permitted to make domestic and international phone calls, and are allowed to try several different numbers until they make contact with their family or friends. These calls last approximately two minutes, to enable them to let the receiver know of their wellbeing. Individuals are permitted further additional time on a case by case basis. Due to poor mobile coverage in some countries, telephone contact is not always possible, which is typically understood by those trying to contact people in particular countries.

Internet access is also provided in immigration facilities after people are accommodated.

The only time phone calls are not attempted on the day of arrival is when a significant number of individuals arrive on the same day, as there is no distinction in the allocation of phone calls between people smuggling crew and other passengers arriving by boat. In situations like this, phone calls are generally completed over two or three days. DIAC considers these phone calls to be very important and it is a priority for these calls to be made as soon as possible.

The States and Territories are responsible for the management of individuals on remand or serving sentences for Commonwealth offences. This includes facilitating communication between detainees with both their families and legal representatives. All jurisdictions allow domestic phone calls, and most allow international calls. A table comparing the facilitation of contact by State and

Territory correctional facilities between prisoners and their family or legal representatives is at Attachment A.

Recommendation 2

Item 3 of Schedule 1 of the Bill be amended so that proposed new subsection 3ZQAA(3) of the Crimes Act 1914 provides that the 30 day limit on bringing an application to a magistrate to determine a person's age applies from whichever is first of:

(a) The date the person is taken into immigration detention; or

(b) The date on which the person first asserts that he or she was a minor at the time of the alleged offence.

Disagree.

The recommended amendment does not change the practical effect of proposed new subsection 3ZQAA(3) in its current form.

Currently, the proposed subsection requires investigating officials to make an application to a magistrate to determine a person's age within 30 days of the person being taken into immigration detention. The recommended amendment to the subsection would require the 30 day timeframe to commence on either the date the person is taken into immigration detention, or the date on which the person first claims to be a minor; whichever is first.

In practice, a person will very rarely (if ever) be in a position to claim to be a minor *before* being taken into immigration detention. This is because immigration detention of people smuggling crew under section 189 of the *Migration Act 1958* commences at the point of interception by Border Protection Command (BPC) personnel. Unless a member of a people smuggling crew is able to communicate their age to BPC personnel (or potentially to any Australian Government official) at least one day or more prior to their interception, the commencement date for the application period will always be the date of interception. Accordingly, even if earlier notification of the person's claim was possible, the timeframe would be almost identical.

As such, the Commonwealth's concerns with the provision as set out in the joint submission are still applicable. In particular, the reference to 'magistrate' alone excludes the possibility of a superior court judge hearing an application. Further, the proposed provision does not clarify the meaning of 'application', which could be referring to the filing of an originating application, the age determination hearing before a magistrate, or both.

In addition, the period of 30 days to conduct an age investigation and make an application to a magistrate is impractical and will be, in some cases, impossible to comply with. The provision also retains the presumption of age in the defendant's favour, which has serious implications where the person is an adult and who, as a result of his claim alone, will automatically be required to be detained with minors.

The Commonwealth notes that other significant issues of concern about the Bill's remaining provisions, as set out in the Commonwealth's joint submission, have not been addressed by the recommendations made in the dissenting report.

Recommendation 3

That the Bill be passed by the Senate.

Attachment A: State and Territory correctional services facilitation of communication between prisoners and their families, and between prisoners and legal practitioners

	NSW	Vic	QLD	WA	SA	NT	Tas	ACT
Families								
Interpreter		✓	✓	✓		✓	✓ (not consistently available)	✓
Domestic phone	✓ (3 per week free)	✓	✓	✓ (five free/week)	✓ (charged)		✓	✓
International phone	✓ (up to 10 mins, charged)	✓	✓	✓ (two ten minute calls per week)	✓ (charged)		(may be facilitated by correctional manager)	✓
Email				✓ (at superintendent's discretion)				
Letters	✓ (2 per week)		✓	✓	✓			
Audio visual link	✓			✓ (at superintendent's discretion)				
Visits	✓			✓			✓	✓
Legal practitioners								
Visits	✓ (additional to private visitor allowance)	✓ (additional to private visitor allowance)		✓	✓		✓ (unlimited)	✓ (6 days a week)
Embassy/Consulate assistance available		✓	✓	✓	✓			✓
Fax	✓							
Phone	✓ (free)	✓			✓		✓	