

CHAPTER 2

KEY ISSUES

2.1 Due to the time available to the committee in conducting the inquiry, and the balance of the issues addressed in submissions, the committee has chosen to focus on Schedule 3 of the Bill, which deals with amendments relating to people smuggling investigations and prosecutions. Support from submitters for other schedules in the Bill is also noted.

Amendments dealing with people smuggling matters (Schedule 3)

2.2 The provisions in Schedule 3 of the Bill attracted some commentary from submitters. Australian Lawyers for Human Rights noted that, while it was unable to sufficiently assess the Bill in the time available, it would 'likely support' the proposed amendments dealing with people smuggling, as they would improve the consistency of Australia's law with human rights standards.¹

2.3 The Joint Australian Government Submission (Government Submission) expressed support for the measures in Schedule 3, stating that the proposed amendments will 'enhance the effectiveness and efficiency of the investigatory and prosecutorial process' in people smuggling cases.²

Removal of wrist x-rays as a prescribed procedure for age determination

2.4 Subsection 3ZQA(1) of the *Crimes Act 1914* (Crimes Act) provides that the defined term 'age determination information' means 'a photograph (including an X-ray photograph) or any other record or information relating to a person that is obtained by carrying out a prescribed procedure'. Item 1 of Schedule 3 of the Bill would amend subsection 3ZQA(1) by omitting the words 'a photograph (including an X-ray photograph) or any other record or information' and substituting 'a record, or information'.

2.5 Subsection 3ZQA(2) of the Crimes Act provides that the Crimes Regulations 1990 (Crimes Regulations) may 'specify a particular procedure, which may include the taking of an X-ray of a part of a person's body, to be a prescribed procedure for determining a person's age'. Item 2 of Schedule 3 would amend subsection 3ZQA(2) by omitting the reference to taking an x-ray of a part of a person's body.

2.6 The Explanatory Memorandum (EM) states that these amendments are 'necessary to respond to concerns about the accuracy of wrist x-ray materials in

1 *Submission 1*, p. 1.

2 *Submission 5*, p. 4.

making a determination in relation to a person's age'.³ The EM also notes that consequential amendments to the Crimes Regulations will be required to remove wrist x-rays as a prescribed procedure for age determination.⁴

Previous consideration in committee and other inquiries

2.7 The removal of wrist x-rays as a prescribed procedure for age determination under the Crimes Act is an issue that has been canvassed for some time. As early as 2001, when wrist x-rays were first prescribed as an age determination procedure under the Crimes Act, concerns were raised regarding the reliability of this method to clearly determine the age of individuals.⁵

2.8 During this committee's inquiry into the Crimes Amendment (Fairness for Minors) Bill 2011, submitters and witnesses criticised or raised concerns with the use of wrist x-rays to determine the age of alleged people smugglers. These included medical experts such as the Royal Australian and New Zealand College of Radiologists, the Royal Australian College of Physicians, Professor Tim Cole and Professor Sir Al Aynsley-Green Kt.⁶

2.9 Similar concerns were raised by submitters and witnesses during the Senate Legal and Constitutional Affairs References Committee (References Committee) inquiry into the Detention of Indonesian minors in Australia.⁷ The main concerns raised in relation to the use of wrist x-rays are that:

- the accuracy of wrist x-rays as an age assessment tool has been discredited;
- variations in skeletal maturity based on environmental and ethnic factors lead to inaccurate conclusions of wrist x-rays;
- the skeletal atlases used for most wrist x-ray age assessments are out-dated and not suited to individuals of Indonesian ethnicity; and
- the use of x-rays for non-medical purposes raises serious ethical concerns.⁸

3 EM, p. 60.

4 EM, p. 60. Regulation 6C of the Crimes Regulations 1990 currently provides that an x-ray of the hand and wrist is a prescribed procedure for age determination.

5 See: Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Amendment (Fairness for Minors) Bill 2011*, April 2012, p. 12.

6 See: Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Amendment (Fairness for Minors) Bill 2011*, April 2012, pp 12-13; Royal Australasian College of Physicians, *Submission 7* to the committee's inquiry into the Crimes Amendment (Fairness for Minors) Bill 2011, pp 1-2.

7 Senate Legal and Constitutional Affairs References Committee, *Detention of Indonesian minors in Australia*, October 2012, p. 36.

8 See: Senate Legal and Constitutional Affairs References Committee, *Detention of Indonesian minors in Australia*, October 2012, p. 36.

2.10 The References Committee recommended:

Subject to the advice of the Office of the Chief Scientist regarding the utility of wrist x-rays as an age assessment tool, and noting evidence received by the committee raising significant doubts about this procedure, the committee recommends that the Australian Government consider removing wrist x-rays as a prescribed procedure for the determination of age under...the *Crimes Act 1914* and regulation 6C of the Crimes Regulations 1990.⁹

2.11 In 2012, the Australian Human Rights Commission (AHRC) also considered the use of wrist x-rays for age assessment in people smuggling cases, in its report *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*.¹⁰ The AHRC recommended that amendments to the Crimes Act should be made to restrict or limit procedures using x-rays as part of a prescribed procedure to determine age, and that wrist x-rays should not be able to be used in legal proceedings as evidence that persons are over 18 years of age.¹¹

Evidence presented to the current inquiry

2.12 The Government Submission noted that the proposed amendments to section 3ZQA of the Crimes Act, along with future proposed amendments to the Crimes Regulations, would address Recommendation 1 of the References Committee inquiry, as well as the recommendations made by the AHRC in relation to the use of wrist x-rays.¹² This submission also noted:

[These amendments] will not affect current practice as wrist [x-rays] have not been offered as a method of determining age by the Australian Federal Police since August 2011, unless requested by the defendant. It remains open to [the Department of Immigration and Citizenship], the [Australian Federal Police] and [the Commonwealth Director of Public Prosecutions] to use any method or combination of methods to determine whether a person is more likely than not to be a minor...

The proposal to remove wrist [x-rays] as a prescribed procedure will not change current age determination processes, but will respond to criticisms about the use of wrist [x-rays] and is supported by the Office of the Chief Scientist which has expressed the view that there is not sufficient

9 Senate Legal and Constitutional Affairs References Committee, *Detention of Indonesian minors in Australia*, October 2012, p. 60 (Recommendation 1).

10 Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*, July 2012, pp 161-231.

11 Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*, July 2012, p. 12.

12 *Submission 5*, p. 3.

scientific data to support the use of wrist [x-rays] to determine whether a person is a minor.¹³

Amendments to the Migration Act relating to people smuggling matters

2.13 Item 4 of Schedule 3 would insert proposed new sections 236C-236F into the Migration Act, which deal with several other matters in relation to people smuggling investigations and prosecutions.

Courts to take into account time spent in immigration detention when sentencing

2.14 Proposed new section 236C provides that, when imposing a sentence on an individual convicted of people smuggling offences, a court must take into account any time the individual has spent in immigration detention. In relation to this amendment, the EM states:

Experience has shown that the crew of suspected irregular entry vessels (SIEVs) can spend lengthy periods in immigration detention between arrival in Australia and possible conviction for people smuggling. However, as immigration detention is a non-custodial and non-punitive administrative arrangement, there may be doubt as to whether section 16E of the Crimes Act, and relevant State and Territory sentencing laws, allow a court to take time spent in immigration detention into consideration when sentencing individuals for people smuggling under the Migration Act...

The aim of this amendment is to ensure that, when imposing mandatory minimum penalties for people smuggling offences, all pre-sentence detention, whether administrative or custodial, is taken into account for people smugglers. It will also ensure consistent treatment of time spent in custody and immigration detention throughout State and Territory jurisdictions.¹⁴

2.15 The Government Submission noted that, in practice, courts are already taking time spent in immigration detention and remand into account when sentencing.¹⁵

Burden and standard of proof in age determination hearings

2.16 In its report on the Crimes Amendment (Fairness for Minors) Bill 2011, this committee recommended 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

13 *Submission 5*, p. 3. In relation to the advice provided by the office of the Chief Scientist, see also: Australian Government, 'Response to the Senate Legal and Constitutional Affairs References Committee report: Detention of Indonesian minors in Australia', *Submission 5*, Attachment 2, p. 3.

14 EM, pp 61-62.

15 *Submission 5*, p. 4.

an adult at the time of the relevant offence.¹⁶ This recommendation was reiterated by the References Committee in its inquiry into the Detention of Indonesian minors in Australia.¹⁷

2.17 Item 4 of Schedule 3 of the Bill seeks to implement these committee recommendations. Proposed new section 236D of the Migration Act would clarify the burden and standard of proof in relation to proceedings for people smuggling offences where the defendant claims to have been aged under 18 years at the time the alleged offence was committed. This proposed new section provides that the prosecution bears the burden of proving, on the balance of probabilities, that the defendant was aged 18 years or over at that time. The EM notes:

Subsection 236B(2) of the Migration Act establishes that mandatory minimum penalties for certain people smuggling offences do not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed...

Experience has shown that the majority of defendants being prosecuted for people smuggling offences do not possess proof of age documentation. This amendment ensures that such defendants are not unduly prejudiced by being required to prove age. Generally, investigative age determination processes establish age before a person is charged with a people smuggling offence.¹⁸

2.18 The Government Submission noted that this amendment reflects current practice in people smuggling proceedings where the age of the defendant is raised as an issue.¹⁹ This is consistent with evidence given to the References Committee inquiry in August 2012 by the then Commonwealth Director of Public Prosecutions, Mr Chris Craigie SC, who stated that he would be comfortable with this practice being codified in the Migration Act.²⁰

16 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Amendment (Fairness for Minors) Bill 2011*, April 2012, p. 30 (Recommendation 2).

17 Senate Legal and Constitutional Affairs References Committee, *Detention of Indonesian minors in Australia*, October 2012, p. 63 (Recommendation 6).

18 EM, p. 62.

19 *Submission 5*, p. 3. See also: Australian Government, 'Response to the Senate Legal and Constitutional Affairs References Committee report: Detention of Indonesian minors in Australia', *Submission 5*, Attachment 2, p. 6.

20 See: Senate Legal and Constitutional Affairs References Committee, *Detention of Indonesian minors in Australia*, October 2012, p. 49.

Use of evidentiary certificates in people smuggling prosecutions

2.19 Proposed new sections 236E-236F provide for the use of evidentiary certificates in the prosecution of people smuggling offences.

2.20 Proposed new section 236E provides that matters stated in an evidentiary certificate are to be received as prima facie evidence in a court, and details the types of information evidentiary certificates may contain. This includes factual information in relation to the location and boarding of ships or aircraft involved in alleged people smuggling activities, and the number of passengers and crew on such vessels. In relation to the need for evidentiary certificates, the EM states:

Different Royal Australian Navy (RAN) personnel and personnel assigned to Border Protection Command (BPC) will observe various different aspects of the boarding of a SIEV in Australian waters. To present a court with a complete account of the boarding of a SIEV, it is necessary to obtain evidence from a large number of RAN personnel and personnel assigned to BPC. This creates a logistical difficulty for prosecuting people smuggling offences as RAN personnel assigned to BPC have limited access to communications, other than secure communications, and because the intercepting vessels can remain on patrol for long periods for national security purposes.

It is important to minimise the time spent by RAN personnel and personnel assigned to BPC providing evidence to law enforcement agencies and appearing at court in relation to prosecutions of people smuggling offences. It is in the interests of national security that the capacity of such personnel to carry out border protection duties be restrained as little as practicable.

The evidentiary certificates inserted by this item will contain a consolidation of relevant observations made by RAN, BPC, or other relevant agency personnel, in the course of intercepting a SIEV or aircraft. In this way, the information provided in an evidentiary certificate may not be limited to the observations of one particular officer, although it will be signed by an individual officer.

In preparing an evidentiary certificate, an officer will be required to act in accordance with principles of administrative decision making in deciding whether to include a matter.²¹

2.21 Proposed new section 236F provides for certain procedural rules in relation to evidentiary certificates. Under these provisions, a defendant or their legal representative must be given adequate notice before the prosecution may adduce an evidentiary certificate in court, and the person who signed the evidentiary certificate may be called to appear and be cross-examined in relation to the matters stated in the certificate.

21 EM, pp 62-63.

2.22 The Government Submission noted that evidentiary certificates will contain material that is not likely to be in dispute, and that an accused person is entitled to challenge the contents of an evidentiary certificate in court.²² Further, the Bill provides that any evidence given in rebuttal of an evidentiary certificate 'must be considered on its merits and not discounted by reason of the fact that an evidentiary certificate has been admitted into evidence'.²³

Other Schedules of the Bill addressed in submissions

2.23 Some submitters commented on other aspects of the Bill, namely amendments in Schedules 2 and 4.

Amendments supporting victims of slavery, slavery-like and human trafficking offences (Schedule 2)

2.24 Australian Catholic Religious Against Trafficking in Humans commended the amendments in Schedule 2 of the Bill, stating that extending vulnerable witness protection to victims of slavery, slavery-like and human trafficking offences 'will be one way of reducing the level of re-traumatization of individuals giving evidence in relation to the harm they have suffered'.²⁴

2.25 Anti-Slavery Australia expressed strong support for these amendments, and in particular welcomed the following aspects of the proposed changes:

- the use of closed circuit television in the giving of evidence of vulnerable adult and child witnesses and special witnesses;
- the reduction of contact with or removal of the offender and public when giving evidence in court; and
- the provision for an accompanying support person to be present while giving evidence.²⁵

2.26 Anti-Slavery Australia also expressed support for the introduction of a victim impact statement scheme in the Crimes Act for victims of federal offences.²⁶

22 *Submission 5*, p. 4.

23 *Submission 5*, p. 4.

24 *Submission 6*, p. 3.

25 *Submission 4*, pp 2 and 4.

26 *Submission 4*, pp 4-5.

Amendments to the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Schedule 4)

2.27 The Clean Energy Regulator (CER) welcomed the provisions in Schedule 4 of the Bill which seek to add the CER as a designated agency under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. The CER stated that this amendment will enable AUSTRAC to share financial intelligence information with the CER, assisting the CER in ensuring that the regulatory schemes it administers remain free from criminal influence and exploitation.²⁷

Committee view

2.28 The committee is satisfied that the amendments in Schedule 3 of the Bill contain sensible amendments to improve the current processes around age determination, and the efficiency and effectiveness of people smuggling investigations and prosecutions.

Age determination matters

2.29 The committee welcomes amendments to the Crimes Act to facilitate removing wrist x-rays as a prescribed procedure for age determination. Removing wrist x-rays as a prescribed procedure is supported by the weight of expert medical opinion, the Office of the Chief Scientist, and previous recommendations of the Senate Legal and Constitutional Affairs References Committee and the Australian Human Rights Commission. Further, the committee has heard that this procedure has not been utilised by the Australian Federal Police since August 2011. The committee notes that consequential amendments to the Crimes Regulations will be necessary to fully implement this decision, and considers that these amendments should be brought forward as soon as practicable.

2.30 The committee also welcomes the introduction of proposed new section 236D of the Migration Act, to clarify that the prosecution bears the onus of proof in establishing that an alleged people smuggler is 18 years or older, in cases where age is in dispute. This measure accords with the current practice of the Commonwealth Director of Public Prosecutions, and has previously been recommended by this committee and by the Senate Legal and Constitutional Affairs References Committee.

Further amendments to the Migration Act

2.31 The amendments to the Migration Act to allow for the use of evidentiary certificates in people smuggling will help expedite the process of finalising people smuggling investigations and prosecutions. The committee considers that streamlining the process of establishing the facts in people smuggling cases is in the interests of Australia's Navy and Border Protection Command personnel, as it will allow them to

27 *Submission 3*, p. 1.

focus their time on operational matters rather than the administrative processes associated with providing evidence in people smuggling prosecutions. The use of evidentiary certificates will lessen the time taken to complete people smuggling prosecutions, facilitating the speedy administration of justice in these cases.

2.32 The committee also supports amendments to clarify that time spent in immigration detention can be taken into account by a court when sentencing in people smuggling cases. This is already the practice of some courts, and this amendment will bring consistency to the treatment of this issue across all state and territory jurisdictions.

Other schedules in the Bill

2.33 The committee notes the support in submissions for other aspects of the Bill, particularly the introduction of protections for vulnerable witnesses in slavery, slavery-like and human trafficking cases in Schedule 2 of the Bill. The committee commends these measures, which will make it easier for the victims of these serious offences to access redress through the courts.

Recommendation 1

2.34 The committee recommends that the Senate pass the Bill.

Senator Trish Crossin

Chair