



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

Submission to the Senate Standing Committee on Legal and
Constitutional Affairs

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About the Human Rights Law Centre

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We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

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1. Introduction

The HRLC makes the following submission to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the *Crimes Amendment (Fairness for Minors) Bill 2011 (Bill)*. The Bill proposes a number of changes to the way in which Commonwealth authorities treat individuals who are suspected of people smuggling offences and who claim to be less than 18 years.

This submission responds to the Bill with a specific focus on Australia's obligations under the Convention on the Rights of the Child (**CRC**) which recognises that children – defined as persons under 18 years of age¹ – are entitled to special care, assistance and protection by reason of being a child. The CRC requires state parties, including Australia, to give primary consideration to the best interests of the child in all actions concerning children.² The CRC also imposes a number of relevant and specific obligations on Australia with respect to children, as discussed below.

The HRLC considers that enactment of the Bill is necessary to give effect to Australia's obligations under international human rights law. The HRLC recommends that the Bill be passed.

2. Age assessments and the 'benefit of the doubt' principle

Age assessments have profound implications for persons accused of people smuggling. This is because current Australian government policy makes a significant distinction between adults and children who are suspected of committing a people smuggling offence. Minors are usually deported, whereas adults are prosecuted and typically remanded in adult correctional facilities awaiting trial. Suspects who are charged but who maintain that they were minors when the alleged offence occurred are often forced to spend months in detention, including adult correctional facilities, awaiting a judicial age determination process. Where convicted, adults may also be subject to mandatory minimum sentences of imprisonment.³ Each of these processes may involve human rights abuses, as discussed below.

Age assessment processes usually begins when a suspect is taken into immigration detention, after which the Australian Federal Police (**AFP**) and the Commonwealth Department of Public Prosecutions (**DPP**) may become involved. Recent failures in the age assessment processes have highlighted inaccuracies which, in turn, have caused Australia to be in breach of its human rights obligations towards children.

¹ CRC, Article 1.

² CRC, Article 3.

³ For a discussion of these issues see Australian Human Rights Commission, *Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children: Discussion paper*, December 2011, available at:

<http://www.humanrights.gov.au/ageassessment/downloads/AgeAssessment_DP20111206.pdf>

For example, while it is the Federal Government's policy *not* to prosecute children for people-smuggling offences, a number of children have been incarcerated – often for long periods of time – in adult correctional facilities before being able to establish their status as a minor. One Indonesian boy reportedly spent a year and a half in custody before his lawyer was able to prove that he was a child.⁴ In another case, a Melbourne Magistrate dismissed charges against Indonesian teenager, Syrafudin Min, who spent 16 months in detention (including two months in an adult facility) after a Magistrate determined that the prosecution had not discharged the burden of proving, on the balance of probabilities, that Syrafudin was an adult when the alleged offence occurred.⁵ In another case, a Department of Immigration Official assessed a suspect, Ose Lani, to be a child but the AFP nevertheless charged Ose with people-smuggling offences on the basis of a wrist x-ray. Ose was subsequently sent to an adult correctional facility in Brisbane. He was reportedly released and returned to Indonesia after lawyers went to his home village and obtained evidence which proved that he and two other boys also in jail were all minors.⁶ Each of these examples highlights significant and systemic failures in the current system.

International human rights law requires that Australian authorities carry out age assessments expeditiously and in a manner that is consistent with the best interests of the child. Specifically, the UN Committee on the Rights of the Child, in its *General Comment Number 6 (Treatment of unaccompanied and separated children outside their country of origin)*, has called on state parties to ensure:⁷

Prioritized identification of a child as separated or unaccompanied immediately upon arrival at ports of entry or as soon as their presence in the country becomes known to the authorities (art. 8). Such identification measures include age assessment and 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.

The principle of best interests of the child also requires that, where scientific procedures are used to assist in the age determination process, 'margins of error should be allowed'.⁸ In other words, Australia is not entitled to place undue reliance on procedures such as bone and dental assessments which cannot accurately determine a person's age.

For these reason, international best practice requires authorities to adopt a variety of information-gathering techniques including focussed age interviews, which should be carried out

⁴ Hagar Cohen and Rebecca Henschke, 'Child casualties in the war against people smugglers', *ABC News*, 29 October 2011 < <http://www.abc.net.au/news/2011-10-29/casualties-in-the-war-against-smugglers/3607994>>.

⁵ Michael Gordon and Steve Butcher, 'People-smuggling case against Indonesian teen dropped', *The Age*, 2 December 2011.

⁶ *Ibid.*

⁷ United Nations Committee on the Rights of the Child, General Comment Number 6, [31(i)].

⁸ United Nations High Commission for Refugees, *Guidelines on Policies and Procedures on Dealing with Unaccompanied Children Seeking Asylum*, February 1997, [5.11(b)].

by professionally qualified and specially trained persons with appropriate knowledge of the psychological, emotional and physical development and behaviour of children.⁹

Moreover, the UN Committee on the Rights of the Child also requires state parties to apply the ‘benefit of the doubt’ principle. In other words, ‘if there is a possibility that the individual is a child, she or he should be treated as such’.¹⁰

The HRLC welcomes the introduction of the Bill which, if implemented, would go a long way towards ensuring that Australia meets these international human rights obligations. Proposed new section 3ZQAA (2) of the *Crimes Act 1914* 9 (Cth) would provide that, for the purposes of relevant criminal proceedings, a suspect who claims to be under 18 years is presumed to be a minor unless a Magistrate decides, on the balance of probabilities, that he or she was an adult when the alleged offence occurred. This amendment would ensure that the ‘benefit of the doubt’ principle – required under international human rights law – is given legal effect in Australia. The HRLC strongly supports this amendment.

In addition, the Bill would remove the possibility of Commonwealth authorities taking an x-ray of a person’s body part as a prescribed procedure for age determination and would provide statutory guidance about the types of evidence which may be relied on at an age determination hearing before a Magistrate, including birth certificates, affidavits from family members, school reports and medical reports. The HRLC reiterates the principle that any scientific procedure used in the age determination process should be afforded a margin of error and unreliable or discredited age assessment techniques should not be used in evidence.

3. Amount of time spent in detention

International human rights law requires that Australia must only arrest, detain and imprison a child ‘as a measure of last resort and for the shortest appropriate period of time’.¹¹ In addition, Article 9 of the International Covenant on Civil and Political Rights (**ICCPR**) provides that:

1. Everyone has the right to liberty and security of person. **No one shall be subjected to arbitrary arrest or detention.** No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. **Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other office authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.** It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

⁹ *Ibid* [5.12].

¹⁰ United Nations Committee on the Rights of the Child, General Comment Number 6, [31(i)].

¹¹ CRC, Article 37(b).

4. **Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.**
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. (*Emphasis added*)

The Australian Human Rights Commission has confirmed that it is aware of 'a number of cases where individuals suspected of people smuggling offences were acknowledged to be children after they had spent long periods of time in detention, including in adult correctional facilities'.¹² In other cases, children have reportedly been held in immigration detention 'indefinitely', while Commonwealth authorities decide whether to lay charges.¹³ As at 17 October 2011, there were 32 individuals who claimed to be children in immigration detention or remand facilities for suspected people smuggling offences, seven of whom had not yet been charged.¹⁴ The HRLC submits that it is entirely inappropriate for children, or persons claiming to be children, to spend long periods of time in either immigration detention or prison facilities while awaiting formal charges or age determination hearings.

For these reasons, the HRLC welcomes the Bill's proposal to establish clear and confined time limits for laying charges against suspected people smugglers and making an application for an age determination hearing before a magistrate. However, the need for expediency must be balanced against fairness in the age determination process. Extensions of time may be necessary in some cases to enable the investigating authorities to obtain appropriate evidence of the suspect's age (e.g. birth certificates, affidavits from family members, school reports and medical reports from the suspect's home country).

4. Conditions of detention

International human rights law imposes strict conditions and limitations on the detention of children. Specifically, Article 37(c) of the CRC expressly states that:

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. (*Emphasis added.*)

¹² Australian Human Rights Commission, above n 3, p 8.

¹³ The Attorney General may issue a Criminal Justice Stay Certificate under s.147 of the *Migration Act 1958* when he considers that a non-citizen should remain in Australia temporarily for the purposes of the administration of criminal justice (s. 147(1)(a)(iii)). See, for example, ABC News, 'Indonesian children released from Darwin detention centre', 24 June 2011, < <http://www.abc.net.au/news/2011-06-24/indonesian-children-released-from-darwin-detention/2770880>>.

¹⁴ Commonwealth, *Parliamentary Debates*, Senate, 1 November 2011, p 35 (Senator the Hon. Joe Ludwig, Minister for Agriculture, Fisheries and Forestry). At <http://www.aph.gov.au/hansard/hanssen.htm> (viewed 14 November 2011), in Australian Human Rights Commission, *Inquiry into age assessment in people smuggling cases*, *Discussion Paper*, December 2011, p.7.

The detention of foreign-national children in Australian adult prisons is a clear breach of Australia's obligation under the CRC. These circumstances have also caused Australia to be in breach of its obligations to:

- treat children in a manner which takes into account their age and the desirability of promoting reintegration;¹⁵
- protect children 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;¹⁶
- ensure that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family and home;¹⁷ and
- make secondary education available and accessible to every child.¹⁸

The Bill would guarantee that suspected children remanded on people-smuggling charges are separated from adults. Specifically, proposed new subsection 15(2) would require the Commonwealth to place any child suspected of people-smuggling offences in remand *only* in a 'youth justice facility' and, therefore, not in an adult correctional facility. The HRLC supports this amendment, which would assist Australia in meeting the human rights obligations outlined above.

¹⁵ CRC, Article 40(1).

¹⁶ CRC, Article 19. One Indonesian child incarcerated in an adult correctional facility on people smuggling charges was reportedly sexually abused while in detention: Sarah Hanson-Young, 'End the shame of locking up Indonesian children', *Sydney Morning Herald*, 15 November 2011, available at <<http://www.smh.com.au/opinion/politics/blogs/gengreens/end-the-shame-of-locking-up-indonesian-children-20111114-1nfqb.html#ixzz1kdJkrpAm>>

¹⁷ CRC, Article 16.

¹⁸ CRC, Article 28.