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**Committee Secretary**  
**Senate Legal and Constitutional Affairs Committee**  
**PO Box 6100**  
**Parliament House**  
**Canberra ACT 2600**  
**Australia**

18 January 2012

Dear Committee Secretary,

***Crimes Amendment (Fairness for Minors) Bill 2011 (Cth)***

The Australian Lawyers Alliance welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee on the *Crimes Amendment (Fairness for Minors) Bill 2011 (Cth)*.

We support this legislation, as it assists in ensuring the greater protection and fulfilment of the rights of the child, and in particular, the rights of vulnerable children that have been the subject of significant and severe miscarriages of justice for some time.

The ALA is aware of cases of sexual abuse of minors within maximum security prisons, and other gross breaches of the rights of the child. Minors are being detained for, in some cases, periods of over 18 months while they await their age to be determined. Not only is this harmful to their education; their emotional well-being and psychological health; their physical safety – it is harmful to their development as a human being and to their future.

The ALA applaud Senator Hanson-Young for the introduction of this private members bill.

**Executive Summary**

Principally, we welcome the changes that this legislation brings in the areas of:

- Ensures fulfilment of Intention of legislature;
- Removal of the wrist X-ray test;
- Presumption of age;
- Establishing time limits;
- Evidence of age; and
- Ensuring no person presumed to be a child will be incarcerated in an Australian adult prison.

We also bring added recommendations in the areas of:

- Notifying families;
- Garnishing prison wages;
- Retrospective application; and

- Compensation.

We note that this legislation also strengthens and consolidates Australia's fulfilment of obligations under the *Convention on the Rights of the Child*.

## A. Support for the changes

### a. Ensures fulfilment of intention of legislature - *the intention of the Migration Act 1958 (Cth)*

The ALA believe that it was the intention of the legislature to exclude children from prosecution of an offence under Subdivision A of Division 12 of Part 2 of the *Migration Act 1958 (Cth)*. This can be seen in the following sections of the Act:

Section 236B which relates to mandatory minimum penalties, at s236B(2) provides that:

***This section does not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.***

In addition, s236A provides that:

***The court may make an order under s19B of the Crimes Act 1914 (Cth) in respect of a charge for an offence against s233B, s233B or 234A only if it is established on the balance of probabilities that the person charged was aged under 18 years when the offence was alleged to have been committed.***<sup>1</sup>

An order under s19B of the *Crimes Act* provides that the court may, by order, dismiss the charge or discharge the person.<sup>2</sup>

The specific inclusion of these provisions can be viewed as explicit reference to the policy intent to not imprison minors for these offences.

However, due to a lack of accompanying appropriate protections, and the use of inaccurate age determinant procedures, the practical operation of these sections has been distorted.

The ALA submits that legislative change is required to rectify this problem. The proposed changes within the *Crimes Amendment (Fairness for Minors) Bill 2011* aims to do this.

### b. Removal of the wrist X-ray test

To premise an individual's age on the basis of an inaccurate procedure is patently unjust, and leads to, and has led to many, miscarriages of justice.

**The ALA is in full support of the proposed removal of the wrist X-ray as a prescribed procedure of age determination.** This test has been critiqued by leaders in the field, and openly rejected in the UK for its lack of reliability. We have previously provided commentary

<sup>1</sup> *Migration Act 1958 (Cth)*, s236A

<sup>2</sup> See *Crimes Act 1914 (Cth)*, s19B(1)(c)(d)



regarding the test's unreliability previously, and sought for abolition of wrist X-ray age determination.<sup>3</sup>

However, there are a large number of cases of individuals who have currently failed to prove, on the balance of probabilities, that they are under 18 years of age. The use of the wrist X-ray test has been crucial in the development of cases against these individuals.

**Therefore, the ALA recommends that there be a retrospective abolition of the validity of the wrist X-ray test.** We recommend that there be a review of every and all cases of non-citizens that have been imprisoned for people smuggling, to ensure that no child continues to be housed in an adult prison.

### ***c. Presumption of age***

The proposed s3ZQAA(2) provides that where a person claims to have been under the age of 18 years at the time of the alleged commission of the offence,<sup>4</sup> the person is taken for the purposes of criminal proceedings in relation to the offence, to have been under the age of 18 years at the time.

Presuming this assertion is crucial, as it effectively reverses the burden of proof for relevant officers to prove that the individual is not a minor, and provides greater protection to individuals.

There have been immense challenges to lawyers representing such individuals, many of which have had to travel to Indonesia to obtain affidavits of family members, and school records in remote villages, to prove an individual's age. Reversing the burden of proof will mean extra protections on individuals, and ensure that they will not be held in remand with adults.

### ***d. Time limit***

The ALA is also in favour of the time limit of 14 days in which charges can be laid. This provides a protection on individuals

We also believe that there should be a time limit in which individuals can be held in detention.

### ***e. Evidence***

The ALA welcomes the change to include birth certificates, affidavits from family members, school records and medical records.<sup>5</sup> Such records are far more reliable than wrist X-ray tests, or dental examinations, where malnutrition and poverty has contributed to bone ageing, and where the standard is a relatively Western model.

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<sup>3</sup> See Australian Lawyers Alliance, *Understanding the complexities: People smuggling, deterrence and intersection with Australia's maritime regulation*, Submission to the Senate Legal and Constitutional Affairs Committee on the *Deterring People Smuggling Bill 2011* (Cth) (2011), at 6. Accessible at [http://www.lawyersalliance.com.au/documents/public\\_affairs/ala\\_understanding\\_the\\_complexities\\_november\\_2011.pdf](http://www.lawyersalliance.com.au/documents/public_affairs/ala_understanding_the_complexities_november_2011.pdf)

<sup>4</sup> See *Crimes Amendment (Fairness for Minors) Bill 2011* (Cth), s3ZQAA(1)(c)

<sup>5</sup> *Crimes Amendment (Fairness for Minors) Bill 2011* (Cth), s3ZQAA(5)

The ALA also believes that accessing this information should be made as easy as possible, taking into account the fact that many communities are rural villages with little or no access to internet or landline phones.

***f. Ensuring no person presumed to be a child will be incarcerated in an Australian adult prison***

The ALA has been informed about young men that have been convicted for people smuggling offences, and who despite claiming to be under 18 years of age, are being housed in the same prison unit as sex offenders, as there was a need for more prisoners to help run the prison laundry.

Further there is no punishment on either the individual who committed the abuse, or on the prison or government who sanctioned this treatment. No compensation has as yet been paid to individuals in these situations, however, there is certainly scope for such claims in the future.

Therefore, we support the proposal that where a person is remanded, they must be remanded in a youth justice facility, and that no person who is presumed to be a child will be incarcerated in an Australian adult prison.<sup>6</sup>

## **B. Our additional recommendations**

***a. Notifying families***

The ALA also believes that a legislative requirement should be inserted that the family of any individual (regardless of age) charged with people smuggling should be notified as to what has happened.

**The ALA recommends that there should be a minimum time period of 48 hours from when the individual has arrived in Australia, for notifying the families of those individuals claiming that they are minors.**

In some cases, families in Indonesia have been grieving for their loved ones who have gone missing, only to discover months later that they are in prison in Australia. Inserting this minimum time period would also mean that families would be informed as to the whereabouts of their loved ones.

Inserting a legislative requirement of notice would provide increased protection for individuals, and also parallel other Australian laws, where it is a requirement that an individual be able to make a phone call upon being charged.

***b. Garnishing prison wages***

The ALA have also heard reports that young men who have been imprisoned under people smuggling laws have had the meagre wages that they earn in prison garnished to pay for their immigration detention costs that they incurred upon arrival. As a result, their families

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<sup>6</sup> *Crimes Amendment (Fairness for Minors) Bill 2011 (Cth)*, Item 5(d)

who received their remittances are literally dying due to lack of income, which covered access to vital medications, such as asthma medication.

**The ALA recommend that there should be no garnishing of wages for non-citizens in Australian prisons charged with people smuggling offences.**

**The ALA recommend that a review should be established examining the issue of wages being garnished, and a legislative provision that compensation will be paid to those whose wages have been garnished exterior to court order.**

#### ***c. Retrospective application***

Item 7 of the proposed Bill concerns the application of the amendments. However, the ALA contend that the application of this Bill does not go far enough. There are a number of individual cases where the wrist X-ray test has been used as substantial evidence to affirm an individual's age. This will be the subject of an Australian Human Rights Commission Inquiry, however media estimates have cited that over 300 individuals are under 18 and being housed in Australian prisons currently for people smuggling offences.

**The ALA recommends that there be judicial review of all past cases of prosecution under Subdivision A of Division 12 of Part 2 of the *Migration Act 1958* (Cth), and that there should be retrospective abolition of evidence that has used wrist X-ray as an age determinant.**

#### ***d. Compensation***

The ALA also recommend to the Committee that legislation be developed to ensure redress for those individuals who, while under 18 years of age, have been held in adult prisons.

This legislation also should incorporate compensation to be paid to those individuals whose wages have been garnished in prison.

## **C. International law**

We note that this legislation also strengthens and consolidates Australia's fulfilment of obligations under the *Convention on the Rights of the Child*.

This Convention provides that:

*In all actions concerning the child, the best interests of the child will be the primary consideration.*<sup>7</sup>

The passing of this legislation is relevant to fulfilment of Articles 1; 2(1); 3; 4; 6; 9(4); 19; 34; 37; 40 of the *Convention on the Rights of the Child*, in particular, Article 19(1), which provides:

*States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,*

<sup>7</sup> *Convention on the Rights of the Child*, Article 3(1)

*including sexual abuse, which in the care of parent(s), legal guardians or any other person who has the care of the child.*

Also pertinent is Article 37, which provides:

*'States Parties shall ensure that...*

*the arrest, detention or imprisonment of a child shall be in conformity with the law and **shall be used only as a measures of last resort and for the shortest appropriate period of time**; and*

*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...***<sup>8</sup>

And also, Article 40, which provides:

*'Every child alleged as or accused of having infringed the penal law has at least the following guarantees: **to be presumed innocent until proven guilty**; to have the **matter determined without delay** by a competent, independent and impartial authority or judicial body **in a fair hearing** according to law; to have the free assistance of an interpreter...'*

And, Article 40(3), which provides:

*States Parties shall seek to promote... the establishment of a minimum age below which children shall be presumed to have the capacity to infringe the penal law.*

All of these provisions are relevant in light of the current crisis of Indonesian young people being kept in Australian adult prisons.

Legislation needs to be passed to ensure that these young people have access to the fulfilment of their human rights, and greater access to procedural fairness.

We note that while the Minister for Immigration has guardianship 'of every non-citizen child who arrives in Australia'<sup>9</sup>, this guardianship duty is not being upheld. The demonization of people smugglers in the public domain means that there is an conflict of interest in the Minister's duty of guardianship to young people charged with people smuggling offences. There is therefore no individual advocating for these young people and for their legal rights, in the absence of a National Children's Commissioner.

## Conclusion

We support this Bill.

Such a Bill is important in ensuring that the rights of vulnerable young people are protected. There have been extensive human rights abuses in this area that need to be rectified immediately. In the absence of a National Children's Commissioner, there is no individual

<sup>8</sup> *Convention on the Rights of the Child*, Article 37(b)(c)

<sup>9</sup> *Immigration (Guardianship of Children) Act 1946* (Cth), s6.



dedicated to specifically focusing on issues relating to the rights of the child, and any systematic abuse being delivered. There is a need for this legislation to be passed immediately, and we provide our full support to the passing of this Bill.

We warmly thank you for the opportunity to provide our views on this bill. We are also happy to provide further comment on any of the issues that we have raised within this Submission.

Yours sincerely,

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**Australian Lawyers Alliance**

**Emily Price**  
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