



Commissioner for Children and Young People
Western Australia

All enquiries

Telephone:

Email:

Our reference:

Your reference:

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Inquiry into the Crimes Amendment (Fairness for Minors) Bill 2011
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

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

As the Western Australian Commissioner for Children and Young People I am responsible for monitoring the wellbeing of all children and young people in Western Australia and promoting laws, policies and services that further their best interests.

Section 20 of the *Commissioner for Children and Young People Act 2006* (the Act) requires me to give priority to Aboriginal children and young people and children and young people who are vulnerable or disadvantaged for any reason. Section 3 of the Act requires me to regard the best interests of the child as the paramount consideration. In undertaking my role section 20 of the Act requires me to have regard for the United Nations Convention on the Rights of the Child (the CRC).

I have spoken publically about my concerns regarding the issue of the treatment of alleged people smugglers who say they are under 18 years of age particularly my concerns that the current policies and practices may lead to young people under the age of 18 years being incarcerated in adult prisons. I have endorsed a joint submission to this Inquiry with Children's Commissioners and Guardians in other states and territories that proffered broad support for the aim of the Bill to enshrine greater legal protections for children who are suspected or accused of people smuggling offences. I would like to independently provide additional comments in relation to the legislative amendments, policies and practices I believe are required to fully meet our human rights obligations in these circumstances.

Underpinning principles and objectives of the treatment of children

The United Nations Convention on the Rights of the Child (CRC) sets out a number of articles under which children, defined as persons under the age of 18 years, are entitled to special treatment, assistance and protection due to their vulnerability to abuse and exploitation. The CRC specifies that all decisions in relation to children should give primary consideration to the best interests of the child. Other specific articles set out in the CRC are also of relevance in this matter, particularly article 37 which contains provisions relating to the detention of children. Article 37 requires state

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parties to ensure that children deprived of their liberty are only done so as a measure of last resort and for the shortest possible time. Where children are held in detention they should be able to access legal advice and other support and, where appropriate, maintain contact with their family. Children should also be separated from adults whilst in detention unless it is not in the child's interests to do so.

The United Nations High Commissioner for Refugees (UNHCR) also provide guiding principles on the treatment of unaccompanied children who are seeking asylum in a number of documents, that addresses the issue of age assessment. Although these relate to a distinct group of young people the broad principles behind these guidelines are transferable. Of particular relevance is the need to provide the benefit of the doubt to the individual where the assessment of age remains uncertain.

The recent cases in Australia where young people under the age of 18 have been detained in adult correctional facilities have placed Australia at risk of breaching numerous articles under the United Nations Convention on the Rights of the Child (CRC). Since 2006, four young people have spent time in Western Australian adult prisons, prior to being released and returned to Indonesia¹ and it is alleged that there are currently 14 Indonesian prisoners currently detained in adult prisons in Western Australia who say they are under 18 years of age who are waiting on an age assessment determination.²

Consideration should be given to the incorporation into relevant Commonwealth legislation of principles and objectives that enshrine those principles expressed in the CRC and UNHCR regarding the treatment of children and young people detained by a state party. The *Young Offenders Act 1994 (WA)* provides an example of such, with Part 2 setting out objectives and general principles to guide the interpretation of other provisions within that Act, including principles relevant to articles contained in the CRC. Inclusion of similar provisions into relevant Commonwealth legislation would provide a sound basis for the further development of legislation, policies and processes that assist Australia to meet our international obligations and respond appropriately to the needs of children in the care of the Commonwealth and particularly those accused or suspected of committing Commonwealth offences. Examples of principles relevant to actions concerning children that could be incorporated into legislation include, but are not limited to,

- in all actions concerning children the best interests of the child shall be a primary consideration,
- where there is uncertainty as to the age of an individual they shall be given the benefit of the doubt and treated as a minor,
- the arrest, detention or imprisonment of a child shall only be used as a measure of last resort and for the shortest appropriate period of time,
- every child deprived of their liberty shall be separated from adults unless it is not in their best interests to do so, shall have prompt access to legal and other appropriate assistance and shall be able to maintain contact with family unless exceptional circumstances exist.

Age assessment processes

The assessment of age is not a precise science. All methods currently in use internationally are limited in their ability to accurately pin point an individual's age and

*'most involved commentators would acknowledge that whatever the method employed a significant margin of error must always be allowed.'*³

I acknowledge that in July 2011 the Commonwealth Government announced⁴ that additional methods, such as dental records, seeking to obtain birth certificates and interviews, will be used in the age assessment process. Currently however, the only prescribed method of age assessment determination under the *Crimes Act 1914* (Cth), is the wrist x-ray and this procedure has been the principal method for determining the age of a person to date and will continue to be a part of the age assessment process.

The wrist x-ray has largely been discredited along with other radiological examinations, including dental x-rays, as a method of accurately determining chronological age, *'because of the concerns that such methods are inaccurate, unethical and potentially unlawful, every relevant statutory and professional body in the UK has argued that radiology should not be used for the administrative purposes of age determination.'*⁵ It is considered that the use of bone growth provides an assessment of age which, *'In most cases the margin of error is taken to be plus or minus two years.'*⁶ Such variability is then of little use in determining the chronological age of an individual with the preciseness required for the purpose in this issue, to determine whether someone is under or over the age of 18 years.

Whilst it is acknowledged that other methods for determining age are also imprecise, given the legal and ethical concerns associated with radiological methods and its limited use in providing the necessary information, such methods should not form part of the age assessment process and I support the amendments in the Bill to remove the use of radiological methods for this purpose.

Timeliness

I am also concerned at the length of time involved in the age assessment and prosecution processes. The periods of time young people are being held in custody pending an outcome to the age assessment process is excessive. While I support the creation of statutory timeframes, it is not possible for me to comment on the exact detail of timeframes to be set, however such timeframes should act in the best interests of young people to ensure both sufficient investigation and consideration of age assessment information and the expeditious management of these cases to reduce undue delay.

Place of detention

As previously stated article 37 of the CRC requires minors to be separated from adults should they be held in detention. Therefore during the age assessment process it is important that, where there is uncertainty, that the individuals concerned are treated as minors and detained separately from adult prisoners. It is not possible for me to comment on what the most appropriate facility is to detain these young people when detention is considered necessary, however, alternative options that considers the best interests of the individual needs to be urgently established to ensure that vulnerable young people are sufficiently protected from exploitation or harm while they are in the care of the Commonwealth Government.

In conclusion I note the current *Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children* being held by the Australian Human Rights Commission (AHRC) that is canvassing views on, amongst other issues, the legislative framework relevant to this issue. Any legislative amendments should

have regard to the findings of the AHRC Inquiry which is scheduled to report in mid 2012.

I would be happy to provide further comments should this be required.

Yours sincerely

MICHELLE SCOTT

Commissioner for Children and Young People WA

9 February 2012

¹ The Hon. Simon O'Brien MLC. Legislative Council, Parliament of Western Australia. Hansard, Wednesday 30 November 2011

² The Hon. Alison Xamon MLC. Legislative Council, Parliament of Western Australia. Hansard, Wednesday 30 November 2011

³ Smith, T & Brownlees, L (2011) *Age assessment practices: a literature review & annotated bibliography*. Discussion paper. United Nations Children's Fund (UNICEF) New York. pp 41

⁴, The Hon. Brendan O'Connor MP, Minister for Home Affairs and Justice and The Hon. Robert McClelland MP, Attorney-General. *Improved Process for Age Determination in People Smuggling Matters*. Press release, Friday 8 July 2011.

⁵ Aynsley-Green, A. (2011) *The assessment of age in migrants claiming to be children*. Aynsley-Green Consulting. Report prepared for Fisher Dore Solicitors, Brisbane Australia. pp 7

⁶ op cit. Smith, T & Brownlees, L (2011) pp 15