

The Parliament of the Commonwealth of Australia

Senate Legal and Constitutional Legislation Committee

**Consideration of legislation referred
to the Committee**

**Inquiry into the Provisions of the Crimes Amendment
(Age Determination) Bill 2001**

MARCH 2001

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FOREWORD

The *Crimes Amendment (Age Determination) Bill 2001* was considered within a short time frame. The Committee wishes to acknowledge the contribution of those organisations who made submissions and gave evidence (particularly the News South Wales Council for Civil Liberties and the Tasmanian Anti-Discrimination Commission) and the comments of other organisations who were unable to make detailed submissions but expressed their interest in several issues raised by the Bill.

The Committee also wishes to thank the Australian Federal Police and the Attorney-General's Department for their work on the Bill; and the Australian and New Zealand College of Radiologists, including the Chief Executive Officer, for obtaining information on a number of matters.

The Committee has made several recommendations as to redrafting parts of the Bill and the Explanatory Memorandum. These, along with recommendations relating to more detailed and longer-term work, are at Chapter 4.

Senator Marise Payne

Chair

March 2001

CHAPTER 1

INTRODUCTION

Background

1.1 The *Crimes Amendment (Age Determination) Bill 2001* ('the Bill') was introduced into the House of Representatives on 7 March 2001.

1.2 On 7 March 2001, the Senate Selection of Bills Committee¹ referred the provisions of the Bill to the Legal and Constitutional Legislation Committee ('the Committee') for inquiry and report by 27 March 2001. The Senate agreed to this reference.

Reason for Referral

1.3 The Selection of Bills Committee stated that the referral of this Bill was "to allow the committee to consider amendments which are related to the *Crimes Amendment (Forensic Procedures) Bill 2000*, which the Committee considered previously".²

Earlier Committee inquiries into similar legislation

1.4 The Committee has previously examined and reported upon legislation of a similar nature. In October 1995, it reported upon the *Crimes Amendment (Forensic Procedures) Bill 1995*. This bill lapsed when the Parliament was prorogued for the 1996 general election.

1.5 In May 1997 the Bill, with some modifications, was reintroduced into the Senate as the *Crimes Amendment (Forensic Procedures) Bill 1997*. It was referred to the Committee in October 1997, and reported on in November 1997.

1.6 More recently, the Committee examined and reported on the *Crimes Amendment (Forensic Procedures) Bill 2000*. This bill was referred to the Committee in October 2000 and the Committee's report was presented to the Senate on 5 December 2000.

1.7 The *Crimes Amendment (Forensic Procedures) Bill 2000* built on the existing forensic procedures which were placed in part 1D of the *Crimes Act* in 1997.³ The *Crimes Amendment (Forensic Procedures) Bill 2000* proposed to amend the *Crimes Act 1914* to reflect recent developments in forensic procedures and to facilitate the establishment of the CrimTrac national DNA database.

1.8 The Committee was told that the amendments made in 1997 to the *Crimes Act* were always seen to be an interim solution. According to the Commonwealth Attorney-General's Department, it was always understood that at some stage there would probably be a national DNA database.⁴ In its report the Committee unanimously recommended, amongst other

1 Selection of Bills Committee, *Report*, No. 3 of 2001

2 Selection of Bills Committee, *Report*, No. 3 of 2001

3 *Transcript of evidence, Crimes Amendment (Forensic Procedures) Bill 2000*, 10 November 2000, p. 1

4 *Transcript of evidence, Crimes Amendment (Forensic Procedures) Bill 2000*, 10 November 2000, p. 1

things, that the Bill be passed and that other jurisdictions be encouraged to adopt requirements as to the collection, use, storage and destruction of forensic material similar to those set out in the Crimes Act, as amended by the Bill.⁵

1.9 The *Crimes Amendment (Age Determination) Bill 2001* would also amend the *Crimes Act 1914*.

Other Inquiries

1.10 As outlined in the Committee's report of December 2000, the amendments to the *Crimes Act 1914* recommended in the 1995 and 1997 Bills, as well as those in the 2000 Bill, are based upon model legislation developed by the Model Criminal Code Officers' Committee. This is a sub committee of the Standing Committee of Attorneys-General (SCAG).

1.11 The Model Criminal Code Officers' Committee consulted widely during development of the amendments included in the 2000 Bill. Those consulted included Federal and State Privacy Commissioners and civil liberties groups, Federal and State law enforcement agencies and officers from the CrimTrac Project Team, which has responsibility for the establishment of a national DNA database.

Conduct of the present inquiry

1.12 The Committee wrote to a range of organisations and individuals on 7 March 2001 inviting submissions. The Committee received 9 submissions (including supplementaries), which are listed at Appendix 1.

1.13 The Committee held one public hearing in Sydney on 23 March 2001. A list of witnesses who appeared at this hearing is at Appendix 2.

Note on References

1.14 References made in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Hansard transcript are to the proof Hansard. Page numbers may vary slightly between the proof and the official Hansard transcript.

5 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Crimes Amendment (Forensic Procedures) Bill 2000*, December 2000, p. 18

CHAPTER 2

THE BILL

Purpose of the Bill

2.1 The *Crimes Amendment (Age Determination) Bill 2001* proposes to amend the *Crimes Act 1914* to permit prescribed procedures to determine a person's age, where that person is suspected of having committed a Commonwealth offence, or charged with a Commonwealth offence, and where it is not practicable to determine a person's age by other means.

2.2 The Explanatory Memorandum to the Bill states that these measures are desirable because in recent times, there has been a large volume of criminal activity relating to illegal fishing and people smuggling. Many of the suspected offenders of this criminal activity are relatively young and it can be difficult to ascertain whether a given suspect is a juvenile or an adult.¹

2.3 The Explanatory Memorandum also states that the measures of age determination are required for the following reasons:²

- The adult/juvenile distinction is important for determining whether special investigatory safeguards directed at juveniles are applicable;
- Whether the suspect should be prosecuted in an adult or juvenile court;
- Whether the suspect should be detained in an adult or juvenile detention facility; and
- Whether a conviction should lead to adult or juvenile punishments.

2.4 The Explanatory Memorandum states that existing provisions are inadequate for this purpose.

2.5 Part 1D of the *Crimes Act 1914* makes provision for obtaining evidence to confirm or disprove that a suspect has committed a relevant offence. However, evidence of age is only relevant for the purpose of determining whether a defendant should be dealt with according to legislative provisions applicable to persons under the age of 18. Currently, no express provision is made in the *Crimes Act 1914* for the use of equipment to determine the age of a person.³

2.6 The Explanatory Memorandum states that the measures are designed to be consistent with existing provisions in the *Crimes Act 1914* governing forensic and identification

1 Explanatory Memorandum to the *Crimes Amendment (Age Determination) Bill 2001*, p. 1

2 Explanatory Memorandum to the *Crimes Amendment (Age Determination) Bill 2001*, p. 1

3 Explanatory Memorandum to the *Crimes Amendment (Age Determination) Bill 2001*, p. 1

procedures, in Parts 1D and 1AA, respectively. For example, the measures are predicated on informed consent and contain similar safeguards to the forensic procedure provisions.⁴

Existing Provision

2.7 The Explanatory Memorandum outlines that previously, some reliance has been placed on section 258 of the *Migration Act 1958*, which provides:

Where a person is in immigration detention by virtue of this Act, an authorised officer may do all such things as are reasonably necessary for photographing or measuring that person or other wise recording matters in order to facilitate the person's present or future identification.

2.8 Under this section of the Migration Act, X-rays had been used as an identification procedure and the results of those X-rays could be used as evidence of the suspect's age.⁵

2.9 However, in *R v Hatim, Kadir and Others* [2000] NTSC 53, Justice Thomas of the Northern Territory Supreme Court held that section 258 did not authorise the use of an X-ray. In his decision, Justice Thomas stated:

I agree with the submission made by counsel for the defence that s 258 does not give the Immigration Officer the power to x-ray a person. I do not accept that a "photograph" includes an x-ray in normal parlance. A reading of s 258 makes reference to superficial means of obtaining identification by photograph or measurements that can be done by external observation of the Immigration Officer and under the control of that officer without the use of any intrusive procedures. An x-ray is an intrusive procedure that is carried out by a radiographer and subject to interpretation by a radiologist.⁶

2.10 Whilst Justice Thomas made the above statement, he also stated that he was satisfied that the X-ray taken of Mr Kadir's wrist was admissible for the purpose of that application.⁷

Necessity for the Bill

2.11 The Explanatory Memorandum suggests that despite the decision in *R v Hatim, Kadir and Others*, the provisions under section 258 of the Migration Act are too narrow for the purposes of determining the age of a suspect, for example, where a suspect is not in immigration detention.⁸ The *Crimes Amendment (Age Determination) Bill 2001* proposes to rectify this shortfall, as the procedure may be carried out in any appropriate place.

Provisions of the Bill

2.12 The amendments will be inserted into Part 1AA of the Crimes Act.

4 See Explanatory Memorandum to the *Crimes Amendment (Age Determination) Bill 2001*, pp. 1-2

5 See Explanatory Memorandum to the *Crimes Amendment (Age Determination) Bill 2001*, p. 1

6 Justice Thomas, *R v Hatim, Kadir and Others* [2000] NTSC, 53, para 25

7 Justice Thomas, *R v Hatim, Kadir and Others* [2000] NTSC, 53, para 27

8 See Explanatory Memorandum to the *Crimes Amendment (Age Determination) Bill 2001*, p. 1

Definitions

2.13 As outlined in the Explanatory Memorandum, proposed subsection 3ZQA(1) outlines the definitions for the terms as follows:⁹

a) ‘age determination information’ means a photograph (including an X-ray photograph)¹⁰ or any other record or information relating to a person that is obtained by carrying out a prescribed procedure. The definition is drafted with an eye to the future to allow for advances in age determining technology. At present, the best age determining technique involves taking a wrist X-ray to measure bone density to ascertain whether or not two particular bones have fused together in the suspect’s wrist. From this X-ray, a diagnostic radiologist can usually determine whether the suspect is a juvenile or an adult.

b) ‘investigation official’ is defined in the same terms as those in existing section 23B of Part 1C of the *Crimes Act 1914*. It is appropriate that officials on which Parliament has conferred arrest powers should have recourse to the powers to determine a person’s age.

c) ‘prescribed procedure’ is a neutral term to allow for future advances in age determining technology. It is necessary to fully define the term in the regulations because of the flexibility required to keep pace with anticipated technological developments. Under proposed subsection 3ZQA(2) each individual prescribed procedure must be specified in the regulations after appropriate consultation with the Minister for Health and Aged Care. This will ensure that only relevant equipment is prescribed and that all appropriate safeguards apply to protect suspects from any health risks associated with the use of certain equipment in a prescribed procedure.

2.14 Proposed subsection 3ZQA(3) outlines that a procedure prescribed in the regulations should ‘specify the purpose’ for which particular equipment is prescribed and that only ‘appropriately qualified’ persons, as nominated in the regulations, should operate that equipment.

2.15 Proposed subsection 3ZQA(4) provides for the imposition of a statutory obligation on the Minister for Justice and Customs to consult with the Minister for Health and Aged Care before prescribing a procedure in the regulations. According to the Explanatory Memorandum, this provision is to ensure that all health considerations are taken into account as the Minister for Health and Aged Care is responsible for the Therapeutic Goods Administration which regulates medical devices including X-ray equipment.

Circumstances

2.16 Proposed subsection 3ZQB relates to circumstances where an investigating official may seek authority to carry out a prescribed procedure to determine a person’s age. In order to do this, the investigating official must have “reasonable grounds to suspect that the person

9 See Explanatory Memorandum to the *Crimes Amendment (Age Determination) Bill 2001*, pp. 3-4

10 Thus overcoming the problem pointed out above at Paragraph 2.9.

may have committed a Commonwealth offence”.¹¹ The purpose of this threshold requirement is to allow a person’s age to be determined early in the investigative process so as to ensure that the suspect is treated appropriately as either an adult or a juvenile throughout the investigation.

2.17 Proposed subsection 3ZQB paragraph (1)(b) lists the circumstances for which it is important to know a person’s age:

- For the rules governing the person’s detention;
- The investigation of the offence; and
- The institution of criminal proceedings.

2.18 An investigating official may only arrange for an “appropriately qualified” person to carry out the procedure if:

- The official obtained the requisite informed consents¹² under proposed section 3ZQC; or
- A magistrate orders the carrying out of the prescribed procedure.

2.19 Before issuing an order, the magistrate must be satisfied of the following matters (proposed subsection 3ZQB(3):

- a) There are reasonable grounds for the suspicion that the person has committed a Commonwealth offence; and
- b) There is uncertainty as to whether or not the person is, or was, at the time of the alleged commission of the offence, under 18; and
- c) The uncertainty will need to be resolved in order to determine the applications of the rules governing the person’s detention, the investigation of the offence or the institution of criminal proceedings.

Determination of age during proceedings

2.20 Proposed subdivision C, subsection 3ZQF allows a judge or magistrate presiding at a committal, trial or appeal in respect of an alleged offence by a person to order the carrying out of a prescribed procedure if he or she is satisfied that it is necessary to ascertain whether or not the person is, or was, at the time of the alleged commission of the offence, an adult or a juvenile. Definitive knowledge of this is important for the judge or magistrate for sentencing purposes.

Obtaining of consents

2.21 Proposed subsection 3ZQC(1) states that two written consents are required before an investigation officer can arrange for the carrying out of a prescribed procedure:

11 See Explanatory Memorandum to the *Crimes Amendment (Age Determination) Bill 2001*, p. 4, Paragraph 8

12 See Paragraph 2.21-2.13

- i) Informed consent from the person who is a suspect; and
- ii) Informed consent from either a parent or guardian of that person, or if a parent or guardian is not available or is not acceptable to the suspect, another adult person capable of representing the suspect's interests.

2.22 Provision for written consent, as outlined above, is consistent with s 3ZJ of the *Crimes Act 1914*, which permits identification material to be taken from a juvenile if the same consent procedure is followed. In those instances where a parent is not available, an appropriate adult may give consent such as a senior Government official who is not connected with the investigation.

2.23 For consent to be “fully informed”, proposed subsection 3ZQC(2) outlines the matters an investigating official must communicate to each person, in a language in which the person is fluent.

Withdrawal of consent

2.24 Proposed section 3ZQD states that if a person withdraws consent to the carrying out of a prescribed procedure, either expressly or if the withdrawal can be reasonably inferred from the person's conduct, the carrying out of the procedure must stop. A prescribed procedure may still proceed despite the withdrawal of consent, if a magisterial order authorises the prescribed procedure.

Recording of information

2.25 Proposed section 3ZQE provides for the recording of information by the investigating official and the giving of consent “where practicable”. If recording is not practicable, a written record of the informed consent process must be made in the interests of procedural fairness and accountability.

Orders made by judges or magistrates

2.26 Proposed section 3ZQG provides for a procedure to be followed by both the investigating official and the judge or magistrate. The judge or magistrate must keep a written record of the order together with the reasons for making the order. Prior to the prescribed procedure, the investigating official must make the suspect aware of the following:

- i) The reasons for making the order;
- ii) The arrangements for carrying out the prescribed procedure; and
- iii) Reasonable force may be used on the suspect to secure compliance.

Appropriate medical standards

2.27 Proposed section 3ZQH provides legislative reinforcement that prescribed procedures must be conducted according to appropriate medical and other professional standards.

Reasonable and necessary force

2.28 The ‘reasonable and necessary force’ proviso is a standard provision in relation to investigatory powers.

Disclosure and destruction of age determination information

2.29 Proposed section 3ZQJ is designed to protect the privacy of persons who have undergone a prescribed procedure. Proposed subsection 3ZQJ(2) lists the purposes for which a person may disclose age determination information:

- Compliance with rules governing detention, investigation, institution of criminal proceedings; or
- For a purpose related to the conduct of proceedings, an investigation by the Privacy Commissioner or the Commonwealth Ombudsman; or
- If the person consents in writing to the disclosure.

2.30 Under proposed subsection 3ZQJ(1) it would be an offence, carrying a maximum penalty of 2 years imprisonment for improperly disclosing age determination information.

2.31 Proposed section 3ZQK provides for the destruction of age determination information if, after 12 months, proceedings have not been instituted against the person to which the information relates. Provision is made for information to be kept for longer periods (proposed subsection 3ZQK(3)) in cases where another investigation into, or proceeding against, the person is pending or a magistrate may extend the retention period if satisfied that there are special reasons to do so.

Amendment to Part 1C of the Crimes Act 1914

2.32 Item 2 inserts a new provision for subsection 23C(7) of Part 1C of the *Crimes Act 1914*. Proposed paragraph 23C(7)(fa) provides for the time taken in applying to a magistrate for an order authorising the carrying out of a prescribed procedure and the time taken for actually carrying out the prescribed procedure, not to be included in the calculation of the investigation period under Part 1C of the Crimes Act.

CHAPTER 3

ISSUES

3.1 Several issues were raised in submissions and during the hearing, including:

- the extent to which the Bill might be applied to persons other than those referred to in the Explanatory Memorandum and Second Reading speech;
- the importance of ensuring that juveniles were identified in order that their rights were protected;
- the amount of detail that would be in the regulations, and whether further information about the procedures should be included in the Bill itself; and
- whether x-rays and other procedures to determine age:
 - were an invasion of privacy;
 - could accommodate racial/ethnic variations, including possible effects of nutritional deficiencies, given that the reference point was North American children;¹ and
 - could determine chronological age with any accuracy.

3.2 The Committee has considered certain of these matters in greater detail. It notes, where appropriate, a number of other issues that were raised by witnesses.

Who will be affected by the Bill

3.3 The Bill is intended to ‘facilitate the determination of the age of persons suspected of committing, or charged with, Commonwealth offences, and for related purposes.’ The relevant age is 18, the age at which young persons become adults as far as Commonwealth legislation is concerned.² The most common scenarios to which this situation may apply are suggested by both the Explanatory Memorandum and the Second Reading Speech to be illegal fishing or similar activities in Australian waters and people smuggling, when the suspected or accused individual is part of the crew or deemed to be the captain.³

3.4 It may appear, therefore, that the Bill is intended primarily to determine the age of persons when there is no other reliable means of so doing: for example because there is no birth certificate, passport or other document that reliably identifies the individual and

1 The relevant source is WW. Greulich and S.I. Pyle, *Radiographic Atlas of Skeletal Development of the Hand and Wrist*, known as the Greulich-Pyle Atlas, first published 1959. The atlas is not only based on a small sample, but this is wholly Caucasian

2 *Crimes Amendment (Age Determination) Bill 2001*, Clause 3ZQB (1) (b)

3 See Explanatory Memorandum, *Crimes Amendment (Age Determination) Bill 2001*, p. 1

attributes an age to him or her. In the above-mentioned situations there is also likely to be some reluctance to accept the evidence of other crew.

3.5 The Explanatory Memorandum also referred to the need to make provisions additional to those in the Migration Act 1958 to determine the age of persons not in immigration detention.⁴ This suggests that the objective of the Bill is to provide specific powers in relation to persons from other countries who are not claiming asylum, who are suspected or charged with a Commonwealth crime, and whose status as a juvenile or an adult needs to be determined. As the Crimes Act makes ‘no express provision...for the use of equipment to determine the age of a person’,⁵ the Bill will rectify this omission.

Can the provisions be applied to others?

3.6 The Committee⁶ and some witnesses queried the possible extension of these provisions to others, given that there was no explicit prohibition in the Bill on so doing. Dr Scutt, for example, stated that, should others be charged under the legislation, it may be possible for people outside the groups mentioned to claim exemption on the basis that no reference had been made to anyone else except presumed non-residents and non-citizens, because of the nature of the offences mentioned.⁷

...from the point of view of a parliament concerned about the rights of people and also...concerned to be sure that legislation is explicit, if it is supposed to cover explicit situations, then I would say that the legislation itself should spell that out.⁸

3.7 In consideration of this matter, the Attorney-General’s department advised that in fact the legislation could be applied to anyone suspected of or charged with a Commonwealth offence:

...if there were some other offence where, for some reason, it just was not possible to get the evidence, this would be available as a source of evidence. There is no reason why we should discriminate between offences.⁹

3.8 However, the Department believed that in most instances people have appropriate identification information including age identification, or it can be obtained readily - therefore the procedures would not be necessary.¹⁰ This may be the case up to a point, but the Committee believes it is necessary to take into account the very real probability of some individuals not having identification in some circumstances or not having exact birth dates. Many people do not have drivers’ licences or birth certificates¹¹

4 See Explanatory Memorandum, *Crimes Amendment (Age Determination) Bill 2001*, p. 1

5 Explanatory Memorandum, *Crimes Amendment (Age Determination) Bill 2001*, p. 1

6 See *Transcript of evidence*, Senator Cooney, p. 9, Senator McKiernan, p. 24

7 See *Transcript of evidence*, Tasmanian Anti-Discrimination Commission, p. 24

8 *Transcript of evidence*, Tasmanian Anti-Discrimination Commission, p. 24

9 *Transcript of evidence*, Attorney-General’s Department, p. 12

10 See, for example, *Transcript of evidence*, Attorney-General’s Department, p. 17

11 See *Transcript of evidence*, Australian Federal Police, p.12. In any event, such documents are not necessarily proof of real identity, but evidence of the identity an individual is using

3.9 The Committee believes that the situation could be rectified by the Explanatory Memorandum noting that the Bill is universally applicable, although most obviously directed towards those involved in people smuggling and illegal fishing. With respect to provisions addressing the needs of special groups,¹² reference should also be made to the existing sections of the *Crimes Act 1914*, allowing for consideration of mental illness and intellectual disability, support for persons of ATSI background and of non-English speaking persons.¹³ However, certain of these factors do not appear to come into play at the beginning of a process.¹⁴ It is therefore important that the Explanatory Memorandum clearly states who is affected by the Bill, and what processes are available to minimise the risks of persons being inappropriately dealt with at the beginning of an investigation, rather than at a hearing or sentencing.

Age limits?

3.10 There is no specific reference in the Bill to particular ages,¹⁵ although the Explanatory Memorandum and the Second Reading Speech suggest the most likely application of the procedure is to persons between 16-19. Discussion during the Committee's public hearing also indicated that where it was difficult to determine age, a much wider age range than 16-19 may need to be assessed.¹⁶

3.11 As the specific purpose of the Bill is to determine, as much as is possible, if an individual is or is not 18 years of age, the Explanatory Memorandum should state that the procedure is to be applied for this purpose only, and that in most instances it is expected that the procedure will be applied only to persons apparently aged between 15-25. Any change of circumstances should be considered in separate legislation.

Protecting the rights of juveniles

3.12 Both the Tasmanian Anti-Discrimination Commission and the New South Wales Council for Civil Liberties considered that it was essential for the rights of juveniles to be protected. Insofar as the Bill may increase protection, including through controlling the circumstances in which procedures may be applied, it is seen as useful.¹⁷

3.13 However, the Tasmanian Anti-Discrimination Commission believed that the Bill's emphasis was primarily on ensuring that those over 18 be treated as adults:

12 For example, homeless people; those with psychiatric and intellectual disabilities; people of Aboriginal or Torres Strait Islander background; people from non-English speaking backgrounds

13 See *Crimes Act 1914*, Divisions 6-10. Clauses 3ZJ (6-8) provide some protection for people incapable of managing their own affairs; Clause 23K also provides some protection during an investigation period for a range of individuals

14 See *Crimes Act 1914*, Clause 20BQ

15 However, Clause 3ZQB (1) (b) refers to the need to determine whether the person was 'under 18'

16 See *Transcript of evidence*, Senator Mason, p. 8

17 See *Submission 1*, New South Wales Council for Civil Liberties, p. 4, Paragraph 3.5

An equal concern should be that people who are *not* 18 years or over *should not* be treated as adults, but should be afforded the full protection of the law as it applies to minors or children.¹⁸

3.14 This point was further discussed during the public hearing.¹⁹ It is an integral part of the approach taken by both the Tasmanian Anti-Discrimination Commission and the New South Wales Council for Civil Liberties, that legislation should explicitly seek to protect as well as to ensure that those suspected or charged are treated appropriately. In this it contrasts with the submission of the Australian Federal Police (AFP) in which much of the emphasis is on deterrence and on detecting fraudulent claims.²⁰ In discussing the need for legislation, for example, the AFP emphasises the deleterious effect on a case rather than on an individual:

Part 1C of the *Crimes Act 1914* requires that juveniles undergo different investigation processes than adults – breach of such processes could render the arrest unlawful and any evidence obtained inadmissible.²¹

3.15 Nonetheless, both the Australian Federal Police and the Attorney-General's department demonstrated in evidence²² that they were aware of the importance not only of treating adults as adults, but juveniles as juveniles.²³ For this reason, the Committee does not believe it is necessary to include a purposive clause, as was recommended by Dr Scutt.²⁴

Benefit of the doubt

3.16 The New South Wales Council for Civil Liberties also considered it was necessary to make provision for circumstances in which the individual's age could not be determined accurately, through giving them the benefit of the doubt. Because there are difficulties in determining age accurately through the use of x-rays,²⁵ there is a potential for individuals to be adversely affected or to be disadvantaged relative to others, as well as benefiting inappropriately. There is no specific section in the Bill providing that an individual be given the benefit of the doubt in cases where such doubt may exist.²⁶

We believe that it might be better to treat all people whose age is in question as though they were juveniles. ...

18 *Submission 2*, Tasmanian Anti-Discrimination Commission, p. 1

19 See *Transcript of evidence*, Tasmanian Anti-Discrimination Commission, p. 24

20 See *Submission 4*, Australian Federal Police, p. 1

21 *Submission 4*, Australian Federal Police, p. 3

22 *Submission 4*, Australian Federal Police, pp. 3, 4. *Transcript of evidence*, Attorney-General's Department, p. 11

23 See *Transcript of evidence*, Australian Federal Police, p. 14) , *Transcript of evidence*, Attorney-General's Department, p. 11

24 *Submission 2*, Tasmanian Anti-Discrimination Commission, p. 1

25 See below, Paragraphs 3.54-3.62

26 For example, in cases where there is no determined skeletal maturity, there is an appreciable margin of variation between bone age and chronological age. Apparently, once skeletal maturity is established, there is only upward variation –that is, age would be more not less - see *Transcript of evidence*, Dr Osbourne, p. 2

What we are talking about here really is where there is a person who is obviously a young person but whose age is uncertain – whether or not they are below 18 or above 18 by a small margin. They are the people whose ages will be difficult to assess. It is our view that there is no great harm going to be done by treating those persons as though they are under 18.²⁷

3.17 The New South Wales Council for Civil Liberties emphasised that this benefit of the doubt would not be advantaging older people or putting juveniles at risk; it would merely be continuing a process that existed already within custodial facilities and which did not appear to be a source of concern:

...what we are talking about here is not adults of 40; we are talking about adults of, say, 19. Currently in juvenile detention facilities you will find people of 19 or so, people who have started their sentence in juvenile detention and who, during the course of the sentence, have turned 18 or 19.²⁸

3.18 Although the Bill itself does not make such a provision, the AFP advised that it was prepared to treat all persons who were not clearly adults as if they were juvenile:

In the absence of any other age identification documentation or other means of doing it, anyone who tested up to 19 would be treated as a juvenile, because the x-rays would indicate that they were below that point a juvenile.²⁹

3.19 If this is the case, the Committee suggests that this point should be clearly stated in the Bill or at the least in the Explanatory Memorandum.

Consent

3.20 In general, there was support for the measures in the Bill providing for informed consent to be obtained in order for procedures to be undertaken.³⁰ There was also support for the measures which protected the information that had been obtained from a procedure and provided for its destruction/non-release.³¹ Nonetheless, witnesses also pointed out that there were some gaps in these, including the fact that the same protection was not afforded as was available in the Crimes Act Part 1D, relating to forensic procedures.

In particular, there are no provisions that would facilitate the young person:

- a. obtaining legal advice
- b. being accompanied during contact with the investigating official and during the conduct of a prescribed procedure

27 *Transcript of evidence*, New South Wales Council for Civil Liberties, p. 7

28 *Transcript of evidence*, New South Wales Council for Civil Liberties, p. 7

29 *Transcript of evidence*, Australian Federal Police, pp. 12-13

30 *Submission 1*, New South Wales Council for Civil Liberties, p. 4, Conclusion

31 *Submission 1*, New South Wales Council for Civil Liberties, p. 4, Conclusion

- c. making submissions to the magistrate asked to order the carrying out of a prescribed procedure.³²

3.21 Given that an effort seems to have been made to duplicate the processes developed for forensic procedures,³³ there seems no obvious reason why the provisions are not the same in all instances.

3.22 The Civil Liberties Council of NSW believed that greater effort had been made in respect of the protection of young persons in other provisions concerning consent to procedures. As noted, the Explanatory Memorandum suggests that the process applies primarily to persons from overseas involved or suspected of being involved, in criminal matters.³⁴ While there is no reference to any conventions (such as the Convention on the Rights of the Child (CROC)) or principles which may need to be considered as part of the process of interviewing, or assessing age,³⁵ there is an acceptance of the importance of ensuring that an appropriate adult or representative of the individual is present, presumably on the basis that the age of the individual has not yet been determined.

Obtaining of consent

3.23 Clause 3ZQC (1) identifies those persons whose consent must be obtained in writing to the carrying out of a procedure. These are the relevant individual, and either a parent or guardian of the individual or another adult who is acceptable, 'as far as is practicable in the circumstances',³⁶ to the individual and capable of looking after his or her interests. This is intended to ensure that should the individual be determined to be a minor, an appropriate adult has been involved.

Independent Adult

3.24 The Tasmanian Anti-Discrimination Commissioner noted that there was no specific provision in the Bill requiring that the adult acting *in loco parentis* be quite independent of the process:

It ought to be made clear that it has to be an independent person, because it seems to us that it would be quite wrong if the other person giving consent was somebody who was associated with the organisation that was seeking the consent.³⁷

3.25 The Commission suggested in its submission that this matter could be resolved to a degree by the insertion of the word 'independent' in Clause 3ZQC (1) (b) (ii).³⁸ The

32 *Submission 1*, Civil Liberties Council of New South Wales, p. 3, Paragraph 3.2

33 See *Transcript of evidence*, Attorney-General's Department, p. 11, p. 12 'there are safeguards which you will recognise from the other bill' (that is, the *Crimes Amendment (Forensic Procedures) Bill 2000*)

34 As noted at Paragraph 3.7, the Bill in fact applies to all persons in this age group who may lack accessible identification

35 *Transcript of evidence*, Attorney-General's Department, p. 14. The Department subsequently confirmed that it had obtained advice from its Office of International Law in order to ensure that 'the measures complied with Australia's international obligations.'*(Submission 6*, Attorney-General's Department, p. 3, Paragraph 9)

36 *Crimes Amendment (Age Determination) Bill 2001*, p. 5, Clause 3ZQC (1) (b) (ii)

37 *Transcript of evidence*, Tasmanian Anti-Discrimination Commission, p. 23

Committee accepts this suggestion, although it does note the opinion of the Attorney-General's Department on this point. The Department stated that it believed this issue was already covered because the Bill contained the words 'other than an investigating official involved in the investigation of the person.'³⁹ However, the Committee believes that the point of the Tasmanian Anti-Discrimination Commission was that the person should be 'somebody external to the organisation'.⁴⁰ A senior government official⁴¹ may not be independent of the organisation or outside the organisation

Investigating official

3.26 The Committee believes it would increase the protection of juveniles if the 'investigating official' position was restricted more than is the case in Part 1C of the Crimes Act.⁴² It notes the argument of the Attorney-General's Department that the powers are most likely to be applied to persons suspected of, or charged with, people smuggling and illegal fishing, offences which would ordinarily involve Customs and the Department of Immigration and Multicultural Affairs (DIMA).⁴³ The AFP also advised that the restriction on certain investigating officials would 'in practice' require AFP officers 'to apply for orders on behalf of other agencies such as DIMA or Customs.'⁴⁴

3.27 However, the current definition in Part 1C of the Crimes Act also includes State or Territory police.⁴⁵ Although these may not be involved in the original interception and detention of persons, the Committee does not believe it is necessary for x-rays to be carried out immediately to achieve identification, especially when suspects are apprehended or landed in remote areas.⁴⁶ For these reasons the Committee believes that the powers to request, or request an order for, an x-ray, and all associated powers,⁴⁷ be restricted to a person who is ordinarily a member of a State, Territory, or Federal police service.

Informed consent

3.28 A number of issues were raised in relation to the extent of information that was available to allow fully informed consent. These included:

38 *Submission 2*, Tasmanian Anti-Discrimination Commission, p. 3, Paragraph 3

39 *Submission 6*, Attorney-General's Department, p. 2, Paragraph 6

40 *Transcript of evidence*, Tasmanian Anti-Discrimination Commission, p. 23

41 *Submission 6*, Attorney-General's Department, p. 2

42 See *Transcript of evidence*, Senator McKiernan, p.20, p. 21

43 *Submission 6*, Attorney-General's Department, p. 2, Paragraphs 4-5

44 *Submission 4A*, Australian Federal Police, p.2, Paragraph 5

45 *Crimes Act 1914*, Section 23B (1), 'Investigating official means (b) a member of the police force of a State or Territory'

46 *Transcript of evidence*, Senator McKiernan, p. 21

47 Including responsibility for the use of force (see below, Paragraphs 3.81-3.84)

*Knowledge of the procedure and of the way in which it is to be performed*⁴⁸

3.29 This point, which is linked to the need to place additional information in the Bill rather than in regulations,⁴⁹ was discussed primarily by the Tasmanian Anti-Discrimination Commissioner. The Bill does state that information will be provided to the individual and the individual's 'guardian',⁵⁰ but it is not clear that the way in which the procedure will be carried out is covered by this. The term 'nature of the procedure'⁵¹ may be interpreted as not requiring anything more than a statement identifying the name of the procedure. It may not describe the manner in which it is carried out:

There is no indication in the Bill that the means or technology, etc by which age will be determined must be disclosed to the persons who are the subject of 'a prescribed procedure'. However, 'consent' – and particularly fully informed consent – must be based in all aspects of what the person is taken to be consenting to. Part of this must, in this instance, relate to the means that are to be employed, or the technology, etc to be used, to determine age.⁵²

3.30 In addition, any changes to procedures will also need to be spelt out to those persons whose consent is sought. Similarly, there is currently no requirement to provide the 'reasons' for the prescribed procedure, as well as the 'purpose' of it.⁵³

The extent of comprehension is not always easy to measure

3.31 The issue of comprehension, or full understanding, of information is also important, as noted by the Tasmanian Anti-Discrimination Commissioner:

In relation to Clause 3ZQC (2), there is an issue in terms of 'language' not only vis-à-vis languages other than English, but also as to whether the full meaning of what is being said is understood.

That is, there needs to be some attention paid/provision for persons whose intellectual capacity does not enable them to understand what is being put to them. This applies to 3ZQC (1) (a)- the person in respect of whom it is sought to carry out the procedure; and 'a parent or guardian of the person': it is possible that the parent or guardian may not have the intellectual capacity to understand. This is not covered by (1) (b) (ii) – because a parent or guardian *could be available* and could be *acceptable* to the person, but that parent or guardian may not have the capacity to understand fully what is being put.⁵⁴

48 *Transcript of evidence*, Tasmanian Anti-Discrimination Commission, p. 23

49 'if they [procedures] are to be in the regulations, it ought to be in the act itself that the person who is giving consent is properly and fully informed about what the procedures that are to be used are.' *Transcript of evidence*, Tasmanian Anti-Discrimination Commission, p. 23 See also below, Paragraphs 3.38-3.53

50 *Crimes Amendment (Age Determination) Bill 2001*, Clause 3ZQC (2)

51 *Crimes Amendment (Age Determination) Bill 2001*, Clause 3ZQC (2)(b), p. 6

52 *Submission 2*, Tasmanian Anti-Discrimination Commission, p. 2, Paragraphs 1.5-1.6

53 *Submission 2*, Tasmanian Anti-Discrimination Commission, p.4, Paragraph 3.4

54 *Submission 2*, Tasmanian Anti-Discrimination Commission, pp. 3-4, Paragraphs 3.2-3.3

3.32 Other persons who may have difficulty in fully understanding what is being said or meant are persons from a non-English speaking background with limited experience in spoken English and people with psychiatric disabilities. It is not apparent that these issues have been taken into account, although the Australian Federal Police noted that all appropriate provisions were made to have interpreting services available face to face or by phone as soon as possible.⁵⁵ Where understanding remains a problem, it may be appropriate for an independent adult to take the place of a parent or guardian who does not comprehend.⁵⁶ However, when a person is incapable of understanding and this situation appears unlikely to change, then it is more appropriate to assess the capacity of the individual to manage his or her own affairs and assume responsibility for actions.

3.33 The *Crimes Act 1914* does make provision for assessing capacity, but this occurs primarily at the sentencing and subsequent stages. The Committee notes that this is matter of considerable concern. While extensive recommendations on this matter are not appropriate in the context of this legislation, the Committee **recommends** that, with respect to Commonwealth offences, an individual's capacity to fully understand issues, procedures, questioning, and charges should be considered in detail by the Attorney-General's Department or the ALRC.

Literacy

3.34 Although provision is made for information to be provided in an appropriate language,⁵⁷ there is no explicit acknowledgment of illiteracy. While the persons consenting may understand, they may not be able to read or sign any document, and this is an integral part of the consent process.⁵⁸ Provision should be made to overcome this problem, perhaps by retaining a video record, where possible, of informed consent which includes a statement as to understanding.

Consent not required for order

3.35 There is no provision for consent of the parties if a judge or a magistrate orders an age determination procedure during prosecution for a Commonwealth offence.⁵⁹ It would be important for judges or magistrates to be fully aware of any potential problems with respect to comprehension prior to an order being made. Also, as noted above,⁶⁰ there is no provision for making a submission in respect of an order (and a submission may assist in this process), nor is there a specific provision about informing people that they may withdraw consent:⁶¹

55 See *Submission 4A*, Australian Federal Police, p. 2, Paragraph 7. See also *Submission 2*, Tasmanian Anti-Discrimination Commission, p. 5, Paragraphs 6-6.1: similar concerns about comprehension or 'language' are also raised in respect of Clause 3ZQG (1) (b)

56 See *Crimes Act 1914*, S23K (3) (d)

57 *Crimes Amendment (Age Determination) Bill 2001*, p. 5, Clause 3ZQC (2)

58 *Crimes Amendment (Age Determination) Bill 2001*, p. 5, Clause 3ZQC (1)

59 *Crimes Amendment (Age Determination) Bill 2001*, p. 7, Clause 3ZQF

60 See above, Paragraph 3.20-3.21

61 *Submission 2*, Tasmanian Anti-Discrimination Commission, p. 4, Paragraph 4

The Bill should make explicit that persons ‘consenting’ should be fully and properly informed that they can withdraw consent.⁶²

3.36 The Committee supports amendments to the drafting which would clarify and state precisely the rights of individuals.⁶³

Reasonable force

3.37 A measure of force is also permitted in respect of procedures being carried out by order.⁶⁴ In itself, this is not unusual,⁶⁵ but the Committee believes that the above-mentioned factors in relation to people being able to fully understand must be explored before any form of force is applied.⁶⁶

Regulations

The regulations may contain material that should be subject to consideration prior to operation

3.38 Both the New South Wales Council for Civil Liberties and the Tasmanian Anti-Discrimination Commission expressed some concern at the amount of detail that would be contained in regulations rather than in the Act itself. The basis of this concern was that the Bill is broad in its coverage, but limited in the detail as to possible means of implementation. References in the Bill⁶⁷ and the Explanatory Memorandum⁶⁸ are to x-rays, but there is no specific explanation of what this might cover.

3.39 The regulations are not available, and it was felt there may be issues within these requiring prior consideration – for example, privacy and related matters. It was also thought that all future changes might be made through regulations, and this was not to be encouraged, given that some changes could include matters of substance, which would similarly benefit from public debate.⁶⁹

The specification of the prescribed procedures should not be left to regulations. By their nature, regulations may be altered without the same rigorous scrutiny by parliament or public consultation as apply to the amendment of legislation.⁷⁰

It seems to me that if the parliament is endorsing a regime where people can be subjected to intrusive or potentially intrusive procedures then I would have thought

62 *Submission 2*, Tasmanian Anti-Discrimination Commission, p. 4, Paragraph 4.1

63 These are outlined particularly in *Submission 2*, Tasmanian Anti-Discrimination Commission

64 *Crimes Amendment (Age Determination) Bill 2001*, p. 8, Clause 3ZQG (1) (b) (iii); see also Clause 3ZQI

65 *Crimes Act 1914*, S23XJ

66 See also below, Paragraphs 3.81-3.84 with respect to the person responsible for the use of force in carrying out procedures

67 *Crimes Amendment (Age Determination) Bill 2001*, Clause 3ZQA (1),(2)

68 See Explanatory Memorandum, *Crimes Amendment (Age Determination) Bill 2001*, p. 1

69 *Transcript of evidence*, New South Wales Council for Civil Liberties, p. 7: ‘Basically, our major problem is that the testing procedures are to be set out in the regulations and not in the act itself.’

70 *Submission 1*, New South Wales Council for Civil Liberties, p. 2, Paragraph 3.1

the parliament should be keeping a very firm and clear eye on what these procedures are and really they should be stipulated in the act itself.⁷¹

Flexibility

3.40 As is the case in other legislative change, one of the main reasons for the Bill being non-specific is that it need not be amended with the development of new technology. The Explanatory Memorandum states that subsection 3ZAQ(1) is drafted so as to allow for advances in technology beyond x-rays.⁷²

‘prescribed procedure’ is a neutral term to allow for future advances in age determining technology. It is necessary to fully define the term in the regulations because of the flexibility required to keep pace with anticipated technological developments.⁷³

3.41 The evidence of the Attorney-General’s department emphasised a similar point:

It is very common to put these sort of detailed procedures in regulations and one of the biggest reasons in favour of it is that technology does improve and change, and when that happens we want to be able to change the regulations without having to bother the parliament with, say, the change of a serial number for the particular machine...⁷⁴

Possible limits to flexibility

3.42 However, the Bill allows the use of a wide range of procedures as well as simple x-rays. Although x-rays may perhaps be perceived as relatively commonplace and having a limited effect on privacy or health,⁷⁵ other procedures (including some that have been used in other countries) may be seen as more invasive. Such procedures would be authorised by the Bill⁷⁶ through the definition of ‘age determination information’ and of the contents of regulations:

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.⁷⁷

The 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.⁷⁸

71 *Transcript of evidence*, Tasmanian Anti-Discrimination Commission, p. 25

72 Explanatory Memorandum, *Crimes Amendment (Age Determination) Bill 2001*, p. 3, Paragraph 5(a)

73 Explanatory Memorandum, *Crimes Amendment (Age Determination) Bill 2001*, pp. 3-4, Paragraph 5(c)

74 *Transcript of evidence*, Attorney-General’s Department, p. 15, p. 16. See also *Submission 6*, Attorney-General’s Department, p. 1, Paragraph 3. See also *Submission 4A*, Australian Federal Police, p. 1, Paragraphs 2-4

75 However, see also below, Paragraphs 3. 68-3.71, and 3.85-3.90

76 As noted by *Submission 4A*, Australian Federal Police, p. 1, Paragraph 4. However, if a CT scan was considered useful, this may be a matter which should be subject to public discussion before it is put into practice

77 *Crimes Amendment (Age Determination) Bill 2001*, Clause 3ZQA (1)

3.43 There is no reference in the Bill to the nature of any other age-determination procedure, except perhaps the taking of an ordinary photograph. Nor is there any reference to the nature of ‘any other record or information’ that may be obtained from a prescribed procedure. However, such procedures and information may have the potential to invade privacy and may also have a psychological or physical effect on individuals, regardless of age or cultural background.

3.44 It was noted by one witness that in such instances, it would be preferable to provide considerably more detail in the act rather than in the regulations;

Where there is a procedure that really is being contemplated...I think it appropriate that that be specified in the act. While x-rays are invasive to a certain extent and carry some health risks, they carry less health risks than perhaps some other processes do...Other processes are more dangerous ... and involve more radiological exposure.... if that is being proposed...then we would suggest that it is appropriate to specify it... Any kind of invasive procedure should be done very carefully and with the greatest safeguards.⁷⁹

3.45 The New South Wales Council for Civil Liberties stated that there was already an instance in the Crimes Act where the procedures – relating to forensic examinations of persons - were set out in detail, rather than being provided in regulations.⁸⁰

Bill does not identify the drawbacks of x-rays

3.46 It was also suggested that the Bill does not acknowledge the known lack of precision of information provided by x-rays. Evidence provided by the Attorney-General’s department, especially with respect to the issue of ‘identification’ as opposed to ‘age-determination’, noted this fact.⁸¹ In addition, medical evidence provided to the Committee⁸² agreed that there were variations between individuals; that there were standard deviations,⁸³ that a poor reading by a radiologist could be about the same as a standard deviation;⁸⁴ and that poor nutrition and health could retard bone maturation (which would be beneficial to a person whose chronological age was greater than bone age:

My feeling is that the x-ray procedure itself is uncertain. We cannot be confident, it having only been tested on Caucasians in North America, that this process is any more certain than an appropriately qualified person giving an opinion based on other types of tests.⁸⁵

78 *Crimes Amendment (Age Determination) Bill 2001*, Clause 3ZQA (2)

79 *Transcript of evidence*, New South Wales Council for Civil Liberties, p. 8

80 *Submission 1A*, Civil Liberties Council of New South Wales, p. 1

81 *Transcript of evidence*, Attorney-General’s Department, p. 15

82 Note that although Dr Osbourne, who is providing advice to the AFP on radiology issues, is a member of the Royal Australian and New Zealand College of Radiologists, the College itself has not had an opportunity to assess the Bill – see *Submission 3*, Royal Australian and New Zealand College of Radiologists, p. 1.

83 *Transcript of evidence*, Dr Osbourne, p. 2

84 *Transcript of evidence*, Dr Osbourne, p.3

85 *Transcript of evidence*, New South Wales Council for Civil Liberties, p. 8

3.47 However, this contrasts somewhat with the submission of the AFP which suggested that the use of x-rays would be a definite proof.⁸⁶ Even though the AFP also expressed some reservations about the accuracy of x-rays in their oral evidence, this is not reflected in the Bill or the Explanatory Memorandum.

Other age-determination/identification procedures to be undertaken prior to x-ray

3.48 The Tasmanian Anti-Discrimination Commission noted several areas in the Bill where greater precision and clarity was required. Among these was the implication, noted by the Civil Liberties Council of New South Wales,⁸⁷ that other procedures would be used to identify an individual prior to those procedures enabled by the Bill.⁸⁸ However, the Commission agreed with the Council that it was important to specify that this would in fact be the case:

Although it may be in a sense implicit in the bill that you are meant to use other means before you go to a procedure, it ought to be explicit in any act that you go firstly to documentary evidence or other ways of determining a person's age before moving to an intrusive procedure.⁸⁹

3.49 These processes could include the checking of documentation,⁹⁰ and possibly other measures similar to those suggested by the Migration Act.⁹¹

The first means that we would use in the Australian system would be a birth certificate or an extract of birth. People may be carrying false documentation, but you would have to check on that documentation first and then you would say, 'We form a view that this is false documentation...we will move to the next step in the process.'⁹²

3.50 The Committee notes the comments by the Attorney-General's Department that this may not always be practicable.⁹³ However, while not wishing to encourage legal challenges on 'reasonable inquiries', the Committee notes that evidence provided has stated that other means would ordinarily used in any event prior to an x-ray being requested:

...we can only contemplate undertaking the procedure where it is necessary.⁹⁴

3.51 The Committee is not requiring exhaustive searches for non-existent, imprecise or falsified records or documents. It assumes, however, that ordinary records will at least be

86 *Submission 4*, Australian Federal Police, p.1, Points 2 and 5 of Opening Statement

87 See *Submission 1*, Civil Liberties Council of New South Wales, p. 3, Paragraph 3.3

88 See, for example, *Transcript of evidence*, Australian Federal Police, p. 13

89 *Transcript of evidence*, Tasmanian Anti-Discrimination Commission, p. 23. *Submission 1*, Civil Liberties Council of New South Wales, p. 4, Paragraph 3.4

90 *Transcript of evidence*, Tasmanian Anti-Discrimination Commission, p. 23

91 See below, Paragraph 3.64

92 *Transcript of evidence*, Tasmanian Anti-Discrimination Commission, p. 24

93 *Submission 6*, Attorney-General's Department, p. 2, Paragraph 7

94 *Transcript of evidence*, Australian Federal Police, p. 13

requested and other processes undertaken (as outlined at the hearing)⁹⁵ prior to moving on to medical procedures. The Bill does apply to all offences, and therefore obvious limitations on such procedures should be reinforced.

Women; Racial and Ethnic Groups

3.52 Additional points made in respect of the limited information in the Bill referred to the lack of discussion of x-ray information about females,⁹⁶ and the limited knowledge apparently available about bone age in cultures other than ‘European’.⁹⁷ In one respect, this reflects the emphasis of the Explanatory Memorandum and Second Reading Speech on the offences to which the Bill is directed, which are not generally associated with females. However, the limited concern about the relevance of ‘European’ standards applied to persons of Asian background is surprising because the major offences do appear primarily to involve people from this background.⁹⁸

3.53 Given also the potential application of the Bill to persons within a particular age group who may come from a wide range of backgrounds, it may well be important for more detailed information to be collected about bone maturation for women and persons of several racial and ethnic backgrounds. This is not to say that all such information need be added to the Bill, but that the Bill may require amendment depending on such information.

The value of x-rays in age-determination

3.54 X-rays are commonly understood to mean a simple procedure involving small amounts of radiation passing through the body ‘capturing the resulting shadows and reflections on a photographic plate.’⁹⁹ It is used primarily to determine if fractures have occurred, if there is infection or cancer in bones. It would also demonstrate the joining or fusion of bones, some of which occurs as a natural part of maturation.

3.55 As was noted in evidence, the calculation of chronological age from bone age is a reverse of the usual process in which the chronological age is known and the procedure is used to assess bone age and any delays or advance that may be caused by health problems.¹⁰⁰ Thus, there is less precision in determining chronological age using this procedure.

3.56 In the evidence provided by the radiologist who has been involved in the development of the Bill, it appears that ‘x-ray’ is currently understood in the Bill to mean a basic x-ray, known to all radiologists and radiographers, and requiring no special expertise for a radiologist to read.¹⁰¹

95 *Transcript of evidence*, Australian Federal Police, p. 12, p. 13

96 *Transcript of evidence*, Tasmanian Anti-Discrimination Commission, p. 23

97 See *Transcript of evidence*, New South Wales Council for Civil Liberties, p. 8

98 The limited interest demonstrated in this issue may arise in part from the belief that people would only be advantaged if their maturation rate was slowed. However, certain of the concerns expressed by other researchers are not reflected in the evidence of Dr Osbourne or the AFP

99 www.radiologyinfo.org/content/bone –radiography, *What is Bone Radiography?*

100 *Transcript of evidence*, Dr Osbourne, pp. 1-2

101 *Transcript of evidence*, Dr Osbourne, pp. 1, 3

3.57 In the Explanatory Memorandum, reference is made to current practice:

At present, the best age-determining technique involves taking a wrist x-ray to measure bone density to ascertain whether or not two particular bones have fused together in the suspect's wrist. From this x-ray, a diagnostic radiologist can usually determine whether the suspect is a juvenile or an adult.¹⁰²

3.58 Skeletal maturity is assessed through use of the Greulich-Pyle¹⁰³ atlas system, which contains a series of 'typical' bone age documents, against which others are measured. It is now seen as somewhat outdated. Some persons consider it is of greater value when used in conjunction with what is described as 'the newer and more precise method'¹⁰⁴ of Tanner.¹⁰⁵

3.59 This method evaluates each individual bone and gives it a maturational stage letter. However, the Tanner approach is considered a complex process and one not often used, at least in Australia. It and similar procedures would involve greater radiation exposure,¹⁰⁶ with possibly no improved result.

3.60 More sophisticated 'radiological' services include Magnetic Resonance Imaging (MRI), ultrasound,¹⁰⁷ and CT (Computed Tomography). All three of these processes may be encompassed by the general term 'x-ray' and if so, this should be specified since they are currently available.¹⁰⁸ The CT process is used in scans of the collarbone.¹⁰⁹ While none of the three may be especially useful in determining the age of young persons between 15-19, the Bill itself is not limited to this purpose.

3.61 It may also be the case that both ordinary x-rays and these more sophisticated services could be seen as invasive and alarming, particularly MRI. There is no reference in the Bill to the possibility that many persons, particularly those with limited English and who may not fully understand what is occurring, may be adversely affected by the use of such equipment.

102 Explanatory Memorandum, *Crimes Amendment (Age Determination) Bill 2001*, p.3, Paragraph 5(a). The source of this statement is not provided. The practice of wrist x-rays for age determination was previously used in Australian detention centres, presumably to determine if an individual was a minor (S258 of the Migration Act). Reference is also made in a Migration Review Tribunal hearing to use of a wrist x-ray to determine if an individual was 15 or 18 (and thus of marriageable age) – see Erkut, Ramazan [2000] MRTA 693 24 March 2000: the procedure was not carried out in Australia.

103 WW. Greulich and S.I. Pyle, *Radiographic Atlas of Skeletal Development of the Hand and Wrist*, known as the Greulich-Pyle Atlas, first published 1959.

104 www.howtall.com/faq

105 J.M. Tanner et al, *Assessment of Skeletal Maturity and prediction of adult height*, 1983. See also *Transcript of evidence*, Dr Osbourne, p. 2

106 *Transcript of evidence*, Dr Osbourne, p. 2

107 MRI and ultrasound do not use radiation, although CT does – see www.radiologyinfo.org/content/bone-radiography, *What is Bone Radiography?*

108 Recent developments in age-determination have been attributed also to the use of sonography, but this was not as reliable as the conventional methods (A. Catriota-Scanderberg et al, *Skeletal age assessment in children and young adults: comparison between a newly developed sonographic method and conventional methods*, *Skeletal Radiology* 27:5(1998) pp. 271-277 (www.ncbi.nlm.nih.gov)). Sonography

109 *Transcript of evidence*, Dr Osbourne, p. 2

Information not always precise

3.62 Although the wrist x-ray is intended to demonstrate the extent of fusion of two bones, there is no real correlation between bone age and chronological age. Variations can be as much as more than a year higher than chronological age, and up to 18 months younger than chronological age.¹¹⁰ Thus, within age cohorts in a developed society there can still be a wide variation in bone age.

Other means of measuring age

3.63 Reference is also made in medical and human rights literature to other means by which some estimate of age may be obtained, although certain of these measures also appear imprecise. These include X-rays of the collarbone and X-rays of the teeth. In the Netherlands, x-rays of the wrist or the collarbone¹¹¹ have also been used to determine age, because at one time there was more favourable treatment in that country of unaccompanied minors,¹¹² and it was believed some persons were taking advantage of this. No detail was provided on the usefulness of collarbone x-rays, or how they provided an indication of age.¹¹³ Reference has also been made to the usefulness of teeth x-rays, but it appears that although these match bone age, they are not necessarily a precise indication of chronological age.¹¹⁴ Nonetheless, if they were to be used, it may be necessary to specify this in any consent procedure, as well as taking into account the lack of precision of any information obtained from such procedures.

3.64 The Migration Act 1958 does refer briefly to authorised officers being allowed to do:

all such things as are reasonably necessary for photographing or measuring [a person in immigration detention] or otherwise recording matters in order to facilitate the person's present or future identification.¹¹⁵

3.65 Although this has recently been interpreted as not including the taking of an x-ray,¹¹⁶ the use of the words 'measuring' and 'recording' suggest a wide range of processes, which may not require complex equipment, and could include simple measurements.

Use of 'equipment'

3.66 Reference is made in the Explanatory Memorandum to the fact that the Bill is required, among other reasons, because 'no express provision is made in the *Crimes Act 1914* for the use of equipment to determine the age of a person.'¹¹⁷ In itself, this may be seen as

110 www.howtall.com/faq

111 See C. Asch and N. Weinreich, *Fortress Holland: sending the message abroad*, Humanity in Action (www.humanityinaction.org/2000/45.htm)

112 C. Asch and N. Weinreich, *Fortress Holland: sending the message abroad*, Humanity in Action, p. 2

113 See also *Transcript of evidence*, Dr Osbourne, p. 2

114 See A.B. Lewis, *Comparisons between dental and skeletal ages*, *Angle Orthod* 61(1991) pp. 87-92

115 *Migration Act 1958*, S258

116 See Explanatory Memorandum, *Crimes Amendment (Age Determination) Bill 2001*, p. 1. R v Hatim, Kadir and Others,[2000] NTSC, 53

117 See Explanatory Memorandum, *Crimes Amendment (Age Determination) Bill 2001*, p. 1

suggesting that the determination of age is something that will be measured by ‘equipment’, and that other means will be excluded. However, the Bill appears to be more comprehensive, referring more generally to ‘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.’¹¹⁸ Procedures do not necessarily involve the use of what may be considered equipment,¹¹⁹ although this is not defined.

Accuracy of using one method only

3.67 One of the arguments against a simple comparison process is that there have been found to be considerable differences in the level of maturation of the wrist bone, possibly arising especially from physiological variation in different societies. Not all children of the same age in a developed society will have the same maturation; children from another culture altogether may well have a norm which is different to that of other norms.¹²⁰ Bone ages can be higher in some people, indicating early maturity, although the chronological age might not correspond. Therefore, each cultural/national group may need to be measured against its own norm.¹²¹

These charts do not take into account ethnic, geographical, social, environmental or nutritional background. Radiologists unanimously state that bone age estimation by radiology does not necessarily correspond to the chronological age.¹²²

Health Risks

3.68 There is no reference in the Explanatory Memorandum to possible health risks of basic x-rays. In evidence, witnesses suggested that one of the benefits of the simple wrist-hand x-ray was the limited amount of radiation exposure involved:

...the dosage of radiation is very low. I will not say it is insignificant – but trivial, perhaps, is the degree of radiation.¹²³

3.69 In contrast, the other procedures required greater dosages, as well as greater expertise:

...there have been studies looking at x-raying the long bones which involves more irradiation, and there have been studies looking at CT scanning of the clavicle – the collarbone – which involves more radiation and cost. The degree of expertise for those techniques is not the same as it is for this standard technique.¹²⁴

118 *Crimes Amendment (Age Determination) Bill 2001*, Clause 3ZQA (1)

119 *Crimes Amendment (Age Determination) Bill 2001*, Clause 3ZQA (2), (3)

120 Although the Greulich-Pyle atlas has been updated, it is not clear if there are major changes which take into account socio-economic change from the 1950’s

121 R.M. Rikasor et al, *Skeletal maturity in Pakistani children*, *Journal of Anatomy*, 195:2 (1999) pp. 305-308

122 Separated Children in Europe Programme, www.sce.gla.ac.uk, *France-Country Assessment, Legal and Social Conditions of Unaccompanied Minors Seeking Asylum in France* (1999) p.9 ‘Age Assessment’

123 *Transcript of evidence*, Dr Osbourne, p. 3

124 *Transcript of evidence*, Dr Osbourne, p. 2

3.70 However, although other witnesses considered that the wrist-hand x-ray would probably result in minimal exposure, they were concerned at the fact that the process was for non-medical reasons. It should be used as a last resort:

An x-ray is an invasive procedure; it does carry some risks to health.¹²⁵

Other processes are more dangerous and involve more radiological exposure¹²⁶

3.71 The issue of health risks was linked particularly to the importance of ensuring that some information should be contained in the Bill rather than regulations. As some of the more sophisticated techniques involved greater exposure, but were not likely to be used, it was thought reasonable that the simple wrist-hand x-ray be specified as the only approved procedure:

Any kind of invasive procedure should be done very carefully and with the greatest safeguards.¹²⁷

Skills and Experience

Radiologists - Experience/expertise

3.72 Regardless of whether the Greulich-Pyle or the Tanner method is used, it is argued that ‘both ... require considerable experience.’¹²⁸ This information contrasts strongly with that offered by Dr Osbourne, who believed that one did not need to have qualifications in paediatric radiology with respect to simple x-rays, and that all radiologists would be able to provide an accurate reading, taking into account the standard deviations.¹²⁹

3.73 Reference to the expertise of the person reading the results of, as opposed to carrying out, the procedure, is not made in the Bill, although it may be included in the regulations. There is a reference to an ‘appropriately qualified person’ in the Bill (Clause 3ZQA (1)(a) and (b)). Clause 3ZQA (1) (a) also refers to ‘having suitable professional qualifications or experience to carry out the prescribed procedure, and (b) refers to being ‘qualified under the regulations to carry out the prescribed procedure.’

3.74 Nonetheless, it will be important to make a distinction between the various procedures - the taking of x-rays (which is generally done by radiographers), and the reading of them and other procedures, which is done by radiologists. While both require particular qualifications, it is the expertise of the radiologist which is likely to be crucial in the accurate determination of age. The ‘carrying out’ will need to encompass the full process.

125 *Transcript of evidence*, New South Wales Council for Civil Liberties, p.7

126 *Transcript of evidence*, New South Wales Council for Civil Liberties, p. 8, and see also p. 9

127 *Transcript of evidence*, New South Wales Council for Civil Liberties, p. 8

128 www.howtall.com/faq

129 *Transcript of evidence*, Dr Osbourne, p. 3

Persons qualified to use equipment or procedures

3.75 The Tasmanian Anti-Discrimination Commissioner in particular noted that there was a lack of precision in the language used to define those who would undertake procedures, and that this could lead to confusion.¹³⁰

3.76 The comments concern primarily Clauses 3ZQA (3) and 3ZQH. Clause 3ZQA appears to suggest that not all instances of age-determination may require the use of equipment, but that where it does, then certain standards will apply. However, the way in which this is currently expressed could be taken to read that any equipment to be used in a procedure might be operated by a qualified person, but also might not.

3.77 If this is not intended, the section could be rephrased so as to state that:

Where a procedure requires the use of equipment, this equipment must be operated by an appropriately qualified person.

3.78 As is noted by the Tasmanian Anti-Discrimination Commissioner:

It is inappropriate that equipment should be operated by someone who is *not* or may not be ‘appropriately qualified’ to do so....there is provision for flexibility as to the addition of new technology, so that there is an even more pressing need to ensure that anyone who is using equipment for this purpose is properly qualified.¹³¹

3.79 Similarly the Commission notes that Clause 3ZQH is also imprecise, and suggests that it would read better as:

A prescribed procedure must be carried out in a manner consistent with appropriate medical **and**/or other relevant professional standards.¹³²

3.80 The reasons for this suggested change are that there are various sets of qualifications being referred to and it is important that these all be covered. The first is that of the radiographer who will perform part of the procedure,¹³³ but who does not ordinarily have a medical degree. The second part of the procedure –the reading of the x-ray or other product of a ‘radiological’ procedure - is performed by a radiologist, who is medically qualified but not necessarily qualified to take an x-ray.

3.81 The third case is where a person is involved in applying reasonable force in order that a procedure be carried out. It was not entirely clear who in fact would be applying the force – an AFP officer, who is trained in the use of reasonable force, or the radiographer, who would understand what sort of force might be required in order to obtain an accurate or clear x-ray, or other procedure. In later evidence, the Attorney-General’s Department affirmed that

130 *Submission 2*, Tasmanian Anti-Discrimination Commission, p. 2, Paragraph 2

131 *Submission 2*, Tasmanian Anti-Discrimination Commissioner, p. 2, Paragraph 2.1

132 *Submission 2*, Tasmanian Anti-Discrimination Commissioner, p. 5, Paragraph 7, emphasis in original

133 See *Transcript of evidence*, Dr Osbourne, p. 3: ‘Anyone taking the x-ray would need to be trained in taking x-rays.’

the *responsibility* with respect to application of force rested with the investigating official.¹³⁴ However, this may need to be spelt out more clearly.

3.82 To a degree, the provisions exist in order to protect persons such as radiographers, in case they had to use force,¹³⁵ however moderate. In evidence to the Committee, this was seen as a possibility, but according to the AFP it was expected that there would be an attempt to de-escalate a situation, with the AFP officer and the radiographer working together:

The actual use of force provision in the proposed legislation will cover the medical practitioner in terms of any touching because...any touching, no matter how light, can be conceived as use of force. The AFP officer will also be restrained by the commissioner's order dictating how the use of force is to be applied. Therefore it would depend on the individual circumstances as to whether or not the medical practitioner is applying force...

Any actual use of force required under the more traditional definition...will be applied by a police officer...¹³⁶

3.83 However, as Clause 3ZQI currently reads, there is no clear distinction made between mild or greater force, and the radiographer - 'the person carrying out the procedure' - 'is entitled to use such force as is reasonable and necessary in the circumstances.' Further, the clause also states that:

Any person assisting that person, is entitled to use such force as is reasonable and necessary in the circumstances.¹³⁷

3.84 There was no evidence offered that radiographers – rather than radiologists – had been advised of their possible involvement in the application of even mild force. Nor is it apparent that there would be clear limits set to those persons who might be deemed to be 'assisting' the radiographer. This would suggest that the regulations will need to specify exactly who is deemed to 'assist' the radiographer; that this 'assistant' has the responsibility in respect of force under the 'more traditional'¹³⁸ definition; and if the radiographer is trained in the meaning of 'force' and how it should be applied in these circumstances.¹³⁹ However, it is also obvious that Clause 3ZQI needs amendment, to specify more clearly what is intended: that a radiographer may need to use 'force' in order to ensure the appropriate position and so

134 *Submission 6*, Attorney-General's Department, p.3, Paragraph 10

135 *Transcript of evidence*, Attorney-General's Department, p.18

136 *Transcript of evidence*, Australian Federal Police, p. 19

137 *Crimes Amendment (Age Determination) Bill 2001* Clause 3ZQI, p.8

138 See above, Paragraph 3.82

139 The Tasmanian Anti-Discrimination Commissioner also noted that a radiographer might be the person who could best determine the amount of force required to take the x-ray (*Submission 2*, Tasmanian Anti-Discrimination Commissioner, p. 6, Paragraph 8). However, this might differ from the amount of force required to subdue someone

forth is taken for an effective x-ray, and that the ‘investigating official’ will apply, or at least be responsible for, any other force used.¹⁴⁰

Privacy

3.85 There was limited discussion on the issue of privacy. The New South Wales Council for Civil Liberties stated that x-rays and other procedures were invasive and ‘ought not to be compulsorily imposed upon any person.’¹⁴¹ The Council also noted that, in part for health reasons but also because of the intrusive nature of procedures, these should be specified in the act rather than in regulations, as should details about the nature of the procedures.¹⁴²

3.86 These concerns are linked with other issues raised by the Council which refer to the need for young persons to have assistance and guidance at various stages of the investigation.¹⁴³ The Council also noted that the Bill provided appropriate protection of information obtained through procedures, which increased the privacy of individuals.¹⁴⁴ This would be enhanced, according to the Tasmanian Anti-Discrimination Commissioner, if other safeguards, such as advising people of their right to withdraw consent; ensuring they obtain a copy of consents quickly; and ensuring that the copy of the consent is provided before a procedure is undertaken.¹⁴⁵

3.87 There was no discussion on the possible effect on people of various procedures and whether certain procedures, or the way in which they were carried out, or the persons who performed them, might breach cultural mores or raise other problems. To a degree, there is some awareness of these issues evidenced by the discussion on the need for interpreters, appropriate guardians, and the concern that young people are detained in appropriate centres.¹⁴⁶ However, these matters may need to be developed in regulations.

Informed consent

3.88 As is noted in the discussion above on informed consent,¹⁴⁷ it is essential that individuals are aware of their full rights and also understand these.¹⁴⁸ If this is not provided for in the Bill, then the privacy of the individual may not be respected:

A ‘consent’ given without full disclosure...is not fairly to be regarded as a ‘consent’ or ‘fully informed’ consent.¹⁴⁹

140 It should also be noted that a ‘medical practitioner’ is not necessarily involved in the face to face part of the procedure, and therefore ‘the person carrying out the procedure’ is probably the preferable term.; see *Submission 6*, Attorney-General’s Department, p. 3, Paragraphs 10-11

141 *Submission 1*, New South Wales Council for Civil Liberties, p. 1, Paragraph 2.1

142 *Submission 1*, New South Wales Council for Civil Liberties, p. 2, Paragraph 3.1

143 *Submission 1*, New South Wales Council for Civil Liberties, p. 3, Paragraph 3.2. See also above, Paragraph 3.20

144 *Submission 1*, New South Wales Council for Civil Liberties, p. 4, Conclusion

145 *Submission 2*, Tasmanian Anti-Discrimination Commission, pp. 4-5, Paragraphs 3.5, 4.1, 5-5.2

146 See *Submission 4*, Australian Federal Police, p. 4, Paragraph 2

147 See above, Paragraphs 3.28-3.34

148 See *Submission 1*, New South Wales Council for Civil Liberties, P. 4, Conclusion

Privacy protected by persons applying procedure

3.89 The Committee has noted various recommendations for amendments which, among other things, would increase the level of privacy afforded to those covered by the Bill. In addition, it would expect that medical and/or professional standards or codes of practice of those involved in the procedure would enhance the privacy afforded to the individual undergoing the procedure.

3.90 To the extent that AFP officers are involved in the actual procedure, it is expected that both their directions about the use of force¹⁵⁰ and general principles about treating individuals with dignity, as referred to in the Crimes Act, would also apply.

149 *Submission 2*, Tasmanian Anti-Discrimination Commission, p. 2, Paragraph 1.6

150 See above, Paragraph 3.82

CHAPTER 4

SUMMARY AND RECOMMENDATIONS

4.1 The Committee believes that the Bill makes provisions that may assist in clarifying the age of some persons suspected of, or charged with, Commonwealth offences.

4.2 Nonetheless, it has found that there are several instances where more precise drafting could assist comprehension of the legislation, and could also increase the protections available to juveniles. It has noted these instances below, and recommends that a revised Bill and/or Explanatory Memorandum incorporate these changes.

4.3 The Committee believes it is also important that the Explanatory Memorandum clearly state the extent of coverage of the Bill. While this is implicit, it may not be apparent through reading either the Explanatory Memorandum or the Second Reading Speech.

4.4 As a consequence of the broad coverage, it is important that the particular needs of special groups are both considered and addressed. This was raised in submissions, but does not appear to have been taken into account by either the Australian Federal Police or the Attorney-General's Department. The Committee acknowledges that this may be because it is viewed that there are already adequate provisions in the *Crimes Act 1914* to meet such needs. However, it may also be that the emphasis on illegal fishing and people smuggling directed attention to such groups and away from others. Therefore, the Committee wishes to be advised of the extent to which the needs of special groups have been considered and met.

4.5 In order for the Bill to effectively meet its objectives, additional information on effective procedures, and on relevant variations between racial and cultural groups, and between men and women, should be regularly assessed. This intention may be implicit, but there was little apparent interest in such matters, despite the fact the Bill is intended to operate in a society whose population is diverse. Even assuming the Bill related primarily to the offences of people smuggling and illegal fishing, the Committee would have expected some effort had been made to assess available information on diversity within the Australian community.

Bill to specifically state it is applicable to all Commonwealth offences

4.6 The Committee considers that the application of these provisions is broad and not restricted to the examples provided in the Explanatory Memorandum and the Second Reading Speech.¹ Therefore, it recommends that the Explanatory Memorandum be revised to state specifically that the Bill is applicable to all Commonwealth offences.

The needs of special groups

4.7 Given that the Explanatory Memorandum and the Second Reading speech have concentrated on offences such as people smuggling and illegal fishing, little consideration appears to have been given to the needs of special groups of persons who may be affected,

1 See Chapter 3, Paragraphs 3.6-3.9

including people with intellectual and psychiatric disabilities.² The Committee believes that a statement should be provided confirming that the needs of such groups will be met at all points in any interview and other processes.

Age-determination applies only to young persons

4.8 The Explanatory Memorandum should state precisely that the Bill is intended to cover age-determination only in respect of young persons, and that its application should be restricted to persons apparently aged between 15-25.³

Benefit of the doubt

4.9 The Committee also believes it is necessary to state, either in the Bill, or the Explanatory Memorandum, that persons whose age cannot be precisely determined should be given the benefit of the doubt and treated as though they were juveniles.⁴ From evidence received, it appeared that this would not cause major difficulties and that the practice would be acceptable.

The Bill should contain all protections afforded in respect of forensic procedures

4.10 The New South Wales Council for Civil Liberties noted that certain of the provisions relating to forensic procedures were not available with respect to the proposed radiological procedures.⁵ There is no obvious reason why such protection as is outlined by the Council cannot be afforded.

Independent Adult

4.11 The Committee believes that the point made by the Tasmanian Anti-Discrimination Commission with respect to the importance of ensuring a guardian was independent is an important one.⁶ It recommends that it be accepted.

Investigating Official

4.12 The Committee believes it is appropriate that the investigating official in these matters be a person who is ordinarily a member of a State, Territory or Federal police service.⁷

Provision of information to enable informed consent

4.13 A number of issues, raised primarily by the Tasmanian Anti-Discrimination Commissioner concerned the need for greater clarity in the Bill to assist in informed consent.⁸ The Committee considers these suggestions worthy of support.

2 See Chapter 3, Paragraph 3.9

3 See Chapter 3, Paragraphs 3.10-3.11. The Committee notes that Clause 3ZQB (1) (b) refers to 'under 18', but would prefer the point to be clearly stated in supporting documentation

4 See Chapter 3, Paragraph 3.19

5 Chapter 3, Paragraphs 3.20-3.23

6 Chapter 3, Paragraphs 3.24-3.25

7 Chapter 3, Paragraphs 3.26-3.27

Information about withdrawing consent and making submissions in respect of an order;

Clarity about other steps to be taken to establish age before the use of procedures;

4.14 The Committee supports the drafting changes raised in respect of these matters.

An effort should be made to obtain further information about any variations in skeletal maturation in females and in persons of other races or cultures

4.15 The broad application of the Bill requires that information reflecting the varied racial and cultural background of Australians and other persons subject to the provisions should be assessed.⁹ If women generally have a different maturation pattern to men, then information on any possible differences should also be obtained and assessed.

Qualification of radiographers and radiologists

4.16 The regulations should clearly specify the qualifications, experience and expected role of the radiographer and radiologist, including with respect to the use of force.¹⁰

Clarity with respect to persons qualified to use equipment

4.17 The Tasmanian Anti-Discrimination Commissioner noted some lack of precision with respect to Clauses 3ZQA (3) and 3ZQH.¹¹ Clause 3ZQI may also require some clarification with respect to the person involved in using reasonable force.

Recommendation 1 - See Paragraphs 3.20-3.23

The Committee **recommends** that the following changes be made to the Bill:

Add to Clause 3ZQC (1) a provision that prior to an investigating official seeking consent to a procedure, the person to whom a procedure would be applied be advised of the availability of legal assistance, and assisted to obtain this

Add after Clause 3ZQH a provision that the person in respect of whom a procedure would be applied is entitled to be accompanied during the procedure by a person of his or her choice

Add to Clause 3ZQF a provision that the person at 3ZQF(a) is entitled to make a submission in respect of an order or proposed order.¹²

8 Chapter 3, Paragraphs 3.28-3.30, 3.31-3.33. Although literacy was not mentioned (see Paragraph 3.34) the point here should also be addressed

9 Chapter 3, Paragraphs 3.32-3.33, 3.46, 3.52-3.53

10 Chapter 3, Paragraphs 3.75-3.84

11 Chapter 3, Paragraphs 3.76-3.80

12 *Submission 1*, Civil Liberties Council of New South Wales, p. 3, Paragraph 3.2

Recommendation 2 – See Paragraphs 3.24-3.25

The Committee **recommends** that Clause 3ZQC 91)(b) (ii) be amended by the insertion of the word ‘independent’, to read:

‘If a parent or guardian is not available or not acceptable to the person – an **independent** adult person...’

Recommendation 3 – See Paragraphs 3.26-3.27

The Committee **recommends** that the power to request a person to undergo an x-ray or other procedure, and the power to request an order for an x-ray or other procedure, and all associated powers, be limited to a person who is ordinarily a member of a State, Territory or Federal police service.

Recommendation 4 – See Paragraphs 3.29-3.34

The Committee **recommends** that Clause 3ZQC (1) (b) (ii) be amended so as to acknowledge problems of comprehension in a parent or guardian who may be ‘acceptable’ to, and ‘available’ for, a person suspected of or charged with a Commonwealth offence, but who cannot fully understand the issues involved; and that Clause 3ZQC (2) be amended so as to acknowledge that, for many reasons, individuals are unable to understand their actions, the idea of responsibility for actions, and similar issues

The Committee **recommends** that Clause 3ZQC (2)(a) be amended to include before the word ‘purpose’, the words ‘reasons and’

The Committee **recommends** that Clause 3ZQC (2)(b) be amended to include after the word ‘procedure’, the words ‘including all steps in the procedure or procedures, including the way in which these are carried out and the information that each one provides’

The Committee **recommends** that Clause 3ZQC (1) be amended so as take into account the fact that some persons may not be able to read or write, and therefore either not be able to sign a document in the ordinary way, or may sign but not be able to read what is written. A video or at least a tape recording, clearly identifying the parties, should be retained as evidence that there was informed consent

Recommendation 5 – See Paragraphs 3.35-3.37

The Committee **recommends** that Clause 3ZQF be amended so as to add at (c):

‘The judge or magistrate must make a decision as to whether the person or his/her parent, guardian or independent adult has understood the issues relating to procedures and to consent’

The Committee **recommends** that Clause 3ZQF be amended so as to add at (d):

‘Where the judge or magistrate believes that the issue is fully understood by both parties, he or she may allow consent to be given by the parties rather than an order being made’

The Committee **recommends** that Clause 3ZQD be amended so as to include the following:

‘A person who has given consent must be advised by appropriate means that this consent may be withdrawn’

The Committee **recommends** that Clause 3ZQI be amended so as to require the persons applying any reasonable force to be aware of all relevant factors, including any problems of comprehension by the person to whom the procedure is to be applied.

Recommendation 6 – Paragraphs 3.48-3.51

The Committee **recommends** that Clause 3ZQB (1) be amended to include a statement that all other appropriate age determination procedures will be undertaken before any prescribed procedure is undertaken

Recommendation 6 – Paragraphs 3.75-3. 77

The Committee **recommends** that Clause 3ZQA (3) be amended so as to read:

‘Where a procedure requires use of equipment, this equipment must be operated by an appropriately qualified person’

Recommendation 7 –Paragraphs 3.79-3.80

The Committee **recommends** Clause 3ZQH be amended so as to read:

‘A prescribed procedure must be carried out in a manner consistent with appropriate medical **and**/or other relevant professional standards.’

The Committee **recommends** that Clause 3ZQI be amended to define those persons deemed to be a ‘person assisting’ ‘the person carrying out the procedure’, and the roles of such persons

Recommendation 8 –Explanatory Memorandum

The Committee **recommends** that the Explanatory Memorandum be changed to include:

A statement that the Bill is applicable to all Commonwealth offences (Paragraphs 3.6-3.9)

A clear statement that the Bill only applies to age-determination in respect of young people, and is expected to be used on persons aged between 15-25 (Paragraphs 3.10-3.11)

A statement that persons whose age cannot be precisely determined will be given the benefit of the doubt and treated as juveniles. (Paragraph 3.19)

Recommendation 9 - Statements

The Committee **recommends** that the Attorney-General's Department and/or the Australian Federal Police provide a statement confirming that the needs of special groups – including people with psychiatric disabilities, people with intellectual disabilities, people of Aboriginal and Torres Strait Islander Background, and people of non-English-speaking background-are met at all interview and other processes (Paragraph 3.9).

This statement should be available by the time the Bill is debated in the Senate and should be incorporated into Hansard.

Recommendation 10 -Information

The Committee **recommends** that information, including radiological studies, relevant to the age-determination of young persons of various racial and cultural backgrounds, including women, be regularly sought and used in order to ensure that the prescribed procedures are of maximum use (Paragraphs 3.52-3.53; 3.61; 3.67).

Recommendation 11 -Regulations

The Committee **recommends** that the regulations clearly specify the qualifications, experience and expected role of those persons involved in carrying out the procedures (Paragraphs 3.37, 3.72-3.84).

Recommendation 12 - Research

The Committee **recommends** that research be undertaken by either the Attorney-General's Department or the ALRC on the pre-sentencing assistance available to people with special needs suspected of, or charged with, Commonwealth offences. (Paragraph 3.33)

People with special needs include, but are not limited to, people with intellectual disabilities and people with psychiatric disabilities, both juveniles and adults.

Recommendation 13

The Committee **recommends** that, subject to the above recommendations being implemented, the Bill proceed.

APPENDIX 1

INDIVIDUALS AND ORGANISATIONS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

1. NSW Council for Civil Liberties
- 1a. NSW Council for Civil Liberties
2. Tasmanian Anti-Discrimination Commission
3. Royal Australian and New Zealand College of Radiologists
4. Australian Federal Police
- 4a. Australian Federal Police
5. The Law Society of NSW
6. Commonwealth Attorney-General's Department
7. Liberty Victoria

APPENDIX 2

INDIVIDUALS AND ORGANISATIONS APPEARED BEFORE THE COMMITTEE TO GIVE EVIDENCE

Friday, 23 March 2001

Royal Australian and New Zealand College of Radiologists

Dr Kevin Osbourne, Honorary Secretary, ACT Branch

NSW Council for Civil Liberties

Ms Pauline Wright, Vice-President

Commonwealth Attorney-General's Department and the Australian Federal Police

Mr Geoff McDonald, Assistant Secretary, Criminal Law Branch

Ms Annie Davis, Director, AFP Legislative Program

Ms Victoria Linabury, Principal Legislative Officer, AFP Legislative Program

Tasmanian Anti-Discrimination Commission

Dr Jocelyne Scutt, Commissioner

Ms Anna Crotty, Investigation and Conciliation Officer

