



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney
alhr@alhr.asn.au
www.alhr.asn.au

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

Dear Secretary

Crimes Amendment (Fairness for Minors) Bill 2011

Australian Lawyers for Human Rights ('ALHR') is a national network of Australian law students and lawyers active in practising and promoting awareness of human rights. Our organisation has a national membership of over 2,000 people, with active National, State and Territory committees.

Introduction

ALHR welcomes the opportunity to comment on the Crimes Amendment (Fairness for Minors) Bill 2011 ('the Bill'). The Bill defines timeframes and establishes evidentiary procedures for the age determination and prosecution of non-citizens who are suspected or accused of people smuggling offences under the *Migration Act 1958* (Cth) ('Migration Act'), and who may have been a child at the time of committing the alleged offence. We note the Australian Human Rights Commission's ('AHRC') concern about:

*'errors made in age assessment processes [which] may be leading to the prosecution of children for people smuggling offences, and if they are convicted, to the imprisonment of children in adult correctional facilities for long periods of time.'*¹

For example, in 2011 three Indonesian boys arrived in Australian waters whilst working in an asylum seeker boat. Wrist x-ray evidence, a method of age assessment which is internationally discredited and outdated, was relied on and the boys were held in detention in an adult jail in Brisbane with

¹ AHRC, *Inquiry into age assessment in people smuggling cases*. Discussion Paper – December 2011

other prisoners.² It was later revealed that the boys were granted bail when lawyers managed to obtain birth extracts and other evidence that they were minors.³

Another Indonesian boy charged with aggravated people smuggling was finally released in 2011 after 16 months in detention when his lawyers from Victoria Legal Aid travelled to his village in Indonesia and gathered evidence of his age. He had initially been held without charge and the Australian Federal Police relied on wrist x-ray evidence to determine his age.⁴

There are many more Indonesian minors accused of people smuggling currently in detention in Australia, some of whom are being held without charge.⁵ Australia must respect and protect the human rights of all children, including those accused of people smuggling in accordance with Australia's obligations under the *Convention on the Rights of the Child* ('CRC').⁶ ALHR commends the introduction of the Bill which aims to improve the treatment of these children and ensure Australia is more compliant with our obligations under international human rights law.

Our submission will briefly outline the current provisions under the Migration Act regarding the treatment of minors and people smugglers. We then discuss Australia's international human rights law obligations and provide an analysis of the Bill in its current form.

Analysis of the Bill

The analysis below is based on the relevant human rights and domestic law which are explained following this section.

Compliance with Australia's Human Rights Obligations

The Bill enhances Australia's compliance with international human rights law by:

1. creating a displaceable presumption of child status ('the first measure'); and
2. establishing a time limit within which children may be charged with people smuggling and related offences ('the second measure').

The first measure ensures that, where the presumption has not been displaced, the child will be incarcerated only in a youth justice facility. This directly enhances Australia's compliance not only with Article 40 of *CRC*, but also Articles 19, 22, 27 and 37.

The second measure, in ensuring that any relevant charges are laid against the child within a strict timeframe, avoids the indefinite and arbitrary detention of the child otherwise allowed under s. 250 of the Migration Act. This directly enhances Australia's compliance with Articles 37 and 40 of *CRC*.

² Lindsay Murdoch, Kidnapped boys released from jail (2011) *The Sydney Morning Herald* <<http://www.smh.com.au/national/kidnapped-boys-released-from-jail-20110617-1g6st.html>> at 19 January 2011. Natalie O'Brien and Cosima Marriner, Boys in an adult nightmare (2011) *The Age* <<http://www.theage.com.au/national/boys-in-an-adult-nightmare-20111105-1n1d3.html>> at 19 January 2011.

³ *Ibid.*

⁴ Simon Lauder, Another minor goes free after smuggling case charge is dropped (2011) *ABC News* <<http://www.abc.net.au/pm/content/2011/s3381490.htm>> at 19 January 2012.

⁵ Second Reading Speech, Crimes Amendment (Fairness to Minors) Bill 2011.

⁶ *The United Nations Convention on the Rights of the Child* (1989) 1577 UNTS 3. Entry into force generally: 2 September 1990; Entry into force for Australia: 16 January 1991. See in particular Article 2(1); See also the UN Child Rights Committee General Comment 6 (2005) on the 'Treatment of Unaccompanied and Separated Children outside their Country of Origin' which elaborates further on the vulnerability of children in similar situations (UN Doc.CRC/GC/2005/6).

Recommended Further Amendments

ALHR notes that the first measure of the Bill purports at Item 3 to apply the presumption of child status to all stages of criminal proceedings ('including bail, committal, trial, sentencing and appeal proceedings'). However, this intention appears incompatible with current ss. 236A and 236B which mandate, respectively, that:

- the Court may only impose a non-conviction result if it is established on the balance of probabilities that the person charged was aged under 18 years at the time of the offence; and
- a minimum term of imprisonment for certain people smuggling offences, unless it is established on the balance of probabilities that the person charged was aged under 18 years at the time of the offence.

Without amendment of ss. 236A and 236B, which on their face place the onus of establishing child status on the person charged, ALHR is concerned that the displaceable presumption of child status will not extend to sentencing proceedings.

While ALHR commends the first measure as one means of preventing the prosecution of children, concerned that the Bill and the Explanatory Memorandum do not refer to any alternative measures to court proceedings. Nor do they acknowledge the vulnerability of children. Such references would enhance compliance with Article 40(3)(b) of CRC. ALHR suggests case assessments, conducted by public servants with the necessary human rights training, as one alternative to judicial proceedings.

Similarly, while ALHR welcomes the second measure, it recommends that the Bill go one step further in setting a timeframe within which a child's committal and/or trial must be commenced. Without such an additional requirement, ALHR is concerned that children may nevertheless be detained for a prolonged period under sub-s. 250(3)(b), which allows a non-citizen to be kept in immigration detention for, once a prosecution is instituted, 'such further period as is required for the purposes of the prosecution.'

ALHR recommends that the guarantee contained in the Bill that minors or presumed minors be *remanded* in a youth facility be formally extended to minors or presumed minors who are serving a sentence of imprisonment. While such a guarantee may be implicit in the current framing, it should be explicitly addressed so that there is no uncertainty.

Finally, ALHR is concerned that the Bill does not outline any standards for the questioning of children and their right to a legal guardian. The process for unaccompanied minors, for whom the Commonwealth is appointed the legal guardian, is also unclear. ALHR considers that these matters require clarification.

Ultimately, while ALHR considers that the Bill does produce some cautionary inconsistencies with Australia's international human rights obligations, ALHR welcome this Bill in its furtherance to uphold protections of the CRC.⁷

⁷ As compared with some of Australia's previous policy and legislative changes in child rights which have been heavily scrutinised: A World Fit for Children, GA res S-27/2 (2002); United Nations Children's Fund, The United Nations Special Session on Children: A First Anniversary Report on Follow-up (UNICEF, 2003); Committee on the Rights of the Child, Recommendation Adopted by the Committee on the Rights of the Child: The Administration of Juvenile Justice, UN Doc CRC/C/90 (1999) Ch I; Committee on the Rights of the Child, Day of General Discussion: To Speak, Participate and Decide – The Child's Right to Be Heard, UN Doc CRC/C/43/3, Annex II (2006); Committee on the Rights of the Child, General Comment 10: Children's Rights

The Migration Act

Australia's policy of mandatory detention of asylum seekers was introduced in 1992. Under sub-s. 189(1) of the Migration Act, if an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person. Sub-section 196(1) of the Migration Act provides that an unlawful non-citizen detained under s. 189 must be kept in immigration detention until he or she is removed from Australia, deported or granted a visa.

Under s. 250, a non-citizen detained under s.189 may be kept in immigration detention for such period as is required for the making of a decision whether to prosecute the person in connection with the offence concerned or instituting such a prosecution, and such further period as is required for the purposes of the prosecution. The effect of these provisions is that non-citizens suspected of people smuggling offences, including those who claim to be minors, are immediately detained without charge and for potentially indefinite periods of time.

The Migration Act sets out mandatory minimum penalties for certain people smuggling offences, with the general effect that a conviction must be recorded (s. 236A), and the offender must be sentenced to a minimum term of imprisonment of 5 years, with a minimum non-parole period of 3 years (s. 236B). However, both these provisions do not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed. This is why, under the legislative regime, the age assessment of the relevant person becomes critical. In a broader sense, it also has an effect on the discretion to prosecute; it is ALHR's understanding that the current policy of the relevant Commonwealth institutions is not to prosecute minors with people smuggling offences and instead return them home.⁸

Notwithstanding the consequent importance of age assessment, the only legislative provision that deals with it is s. 3ZQF of the Migration Act, which allows a judge or magistrate, if satisfied that it is necessary to ascertain whether or not the person was under 18 at the time of the alleged offending, to make an order requiring a prescribed procedure to be carried out.

International Human Rights Law

Australia's international human rights law obligations towards children stem from several international instruments, the most relevant being the CRC. The CRC provides protections for the welfare and development of children - including protections for children accused of a crime or crimes - which are not affected by the child's citizenship status.⁹ Rather, Article 22(1) of the CRC relevantly provides that:

in Juvenile Justice, UN Doc CRC/C/GC/10 (44th Session, 2007); Committee on the Rights of the Child, General Discussion on the Administration of Juvenile Justice, UN Doc CRC/C/43, Annex VIII (1995); World Summit for Children, World Declaration on the Survival, Protection and Development of Children and Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s, UN Doc CF/WSC/1990/WS-001 (1990); Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 Canberra (1997).

⁸ Australian Human Rights Commission, 'Inquiry into age assessment in people smuggling cases' (Discussion Paper, December 2011).

⁹ *The United Nations Convention on the Rights of the Child* (1989) 1577 UNTS 3, article 22(1). *Plyler v Doe* 457 U.S. 202 (1982); see further: Australian Human Rights Commission (AHRC), *A last resort? National Inquiry into Children in Immigration Detention*, April 2004, available at: <http://www.unhcr.org/refworld/docid/49997af31c.html>.

'States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.'

As such, there is an expectation that migrant minors should be entitled to the same rights afforded to children with full citizenship rights, and should not be treated any less favourably because of their citizenship status. The obligations set forth in the CRC are consistent with, and supported by, a larger body of texts, including the International Covenant on Civil and Political Rights ('ICCPR')¹⁰ and resolutions of the United Nations General Assembly, including the Beijing Rules,¹¹ the Riyadh Guidelines,¹² the Guidelines for Action on Children in the Criminal Justice System,¹³ and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty.¹⁴

Article 40 of the CRC is a focal point for the treatment of accused children. Article 40(2)(b) of the CRC sets out guarantees for children accused of a crime or crimes, such as the right to be informed promptly and directly of the charges against them, and a right to legal guardian.¹⁵

The CRC also encourages non-judicial intervention in dealing with a child accused.¹⁶ Article 40(3)(b), provides that it is preferable to avoid judicial proceedings for dealing with such children (note the alternatives listed in article 40(4)). That is, there must be other alternatives to judicial proceedings in dealing with children, in order to properly recognise their vulnerability.

Conclusion

ALHR considers that the Bill advances Australia's compliance with various articles of CRC, particularly Article 40, and therefore welcomes the amendments to the Migration Act that it contains. We do, however, urge consideration of further amendments to that Act, as outlined in this submission, to give consistency to the stated purpose of the Bill, and to enact further protections for accused children, in accordance with Australia's obligations under international human rights law.

¹⁰ United Nations, *International Covenant on Civil and Political Right*, 999 UNTS 171 and 1057 UNTS 407. Entry into force generally (except Article 41): 23 March 1976; Entry into force for Australia (except Article 41): 13 November 1980; note, Article 41 came into force generally on 28 March 1979 and for Australia on 28 January 1993.

¹¹ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules), UN Doc A/40/33 (1985).

¹² *United Nations Guidelines for the Prevention of Juvenile Delinquency* (The Riyadh Guidelines), GA res 45/112 (1990); *United Nations Guidelines for the Prevention of Juvenile Delinquency* (The Riyadh Guidelines), GA res 45/113 (1990).

¹³ *Guidelines for Action on Children in the Criminal Justice System*, ECOSOC res 1997/30 (1997).

¹⁴ *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, GA res 45/113 (1990).

¹⁵ See further, Article 22(1) with respect to the Right to Receive Appropriate Protection and Assistance.

¹⁶ United Nations Convention on the Rights of the Child (1989) 1577 UNTS 3, Article 40(3)(b); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), UN Doc A/40/33 (1985), r 11.2.