2010-2011

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

Crimes Amendment (Fairness for Minors) Bill 2011

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator Hanson-Young)
A Bill for an Act to amend the *Crimes Act 1914*, and for related purposes

Outline

The Bill amends the *Crimes Act 1914* by defining timeframes and setting up 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* and who may have been a child (under 18) at the time of allegedly committing the offences.

The Bill seeks to remedy the current lack of legislative procedures around the treatment of minors in relation to alleged people smuggling. It responds to an urgent public policy crisis which has led to hundreds of children being imprisoned or detained in adult facilities for prolonged periods of time without charge or age determination. It also excludes any reliance on discredited and unethical skeletal x-rays in the age determination process.

The Bill:
- confirms that non-citizens suspected or charged with people smuggling offences who claim to be minors must be presumed to be such unless it is decided by a Magistrate on the balance of probabilities through an age determination proceeding that they are an adult;
- removes the ability of the Commonwealth prosecuting agency to obtain or rely on discredited wrist or dental x-rays as part of the age determination processes;
- reiterates the onus that is be borne by Australian prosecuting agencies to assemble a thorough brief of evidence to displace the presumption that the person is a minor;
- establishes a timeframe of 14 days from point of interception for the laying of charges;
- establishes a timeframe of 30 days from point of interception for the prosecuting agency to apply for an age determination proceeding before the court;
- ensures that no person who is presumed to be a child will be incarcerated in an Australian adult prison or remand centre.

NOTES ON CLAUSES

Clause 1 – Short Title

1. This is a formal provision specifying the short title.

Clause 2 – Commencement

2. The Bill's provisions are to commence the day it receives the Royal Assent.

Clause 3 – Schedules

3. This clause provides that an Act that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule operates according to its terms.
Schedule 1 – Amendments of Crimes Act 1914

Item 1
4. Item 1 removes the possibility of taking an x-ray of a person's body part as a prescribed procedure for age determination.

Item 2
5. Item 2 inserts a new subsection that ensures that the regulations cannot be used to re-insert the possibility of taking an x-ray of a person's body part as a prescribed procedure for age determination. It also ensures that existing regulations which, at the time the Bill commences, allow for the taking of an x-ray of a person's body part to determine age will cease to have effect on and after commencement.

Item 3
6. Item 3 inserts a new subdivision into Division 4A of Part 1AA of the Crimes Act. The new section 3ZQAA defines that people who will be affected by the rules in the new subdivision are people who: are not citizens of Australia; are suspected of committing a people smuggling offence; are claiming to have been a child at the time of the alleged offence; and have been taken into immigration detention on account of unlawful entry into Australia.

7. This item provides that for the purposes of criminal proceedings, a person who claims to be a child is presumed to be a child unless a Magistrate decides that the person was an adult at the time of alleged offending.

8. This item sets a time limit of 30 days for the investigating official to apply for an age determination hearing. The timeframe starts from when the person is taken into immigration detention (usually point of interception by Australian naval or customs authorities).

9. This item sets the standard of proof for the age determination as being the balance of probabilities.

10. This item sets non-exhaustive guidelines regarding what evidence the investigating official may rely on during the age determination hearing.

11. This item confirms that the above still stand even if the person is released from immigration detention status and placed on a visa, e.g. on a criminal justice visa.

Item 4
12. Item 4 inserts the number (1) for formatting clarity.
**Item 5**

13. Item 5 mandates that a person
   a. who is charged with people smuggling offences
   b. who is a non-citizen of Australia
   c. was by agreement or by their own claim aged younger than 18 at the time of alleged offending,
   d. and who has not been subject to an age determination by a Magistrate

must be remanded to a youth justice facility and therefore cannot be placed into an adult prison.

**Item 6**

14. Item 6 defines the people to which the rule in new subsection 15AB(2) of the Crimes Act (as inserted by this Bill) applies, which is a non-citizen of Australia who is suspected of people smuggling, claims to be a child and is in immigration detention.

15. This item sets a time limit of 14 days from when a person was taken into immigration detention for the laying of people smuggling charges against a person who fits the above criteria.

**Item 7**

16. Item 7 sets out the starting point for the amendments included in this Schedule. The removal of the ability to determine a person’s age by x-ray will apply on and after commencement, no matter when the person was charged or taken into immigration detention. The time limit on bringing charges against non-citizens who are, or claim to be, under 18 years applies in relation to anyone brought into immigration detention on or after commencement, as does the new rule about applying to a magistrate for an age determination. The requirement that, if a non-citizen is remanded, they must be held in a youth detention facility rather than an adult prison applies to non-citizens remanded on or after commencement.