

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 199

Issued by the authority of the Attorney-General

Crimes Amendment (X-ray) Regulation 2013

Section 91 of the *Crimes Act 1914* (the Crimes Act) provides that the Governor-General may make regulations, not inconsistent with the Crimes Act, prescribing all matters required or permitted by the Crimes Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Crimes Act.

Regulation 6C of the Crimes Regulations prescribes wrist X-rays as a procedure for determining age under Division 4A of the Crimes Act. In the past, the AFP have arranged for wrist X-rays to be taken in order to have an expert analysis of those X-rays put before the court as evidence in an age determination. Removing wrist X-rays as a prescribed procedure will not change current age determination processes, but will respond to criticisms about the use of wrist X-rays. The removal of wrist X-rays is supported by advice from the Office of the Chief Scientist that there is not sufficient scientific data to support the use of wrist X-rays to determine whether a person is a minor.

The purpose of this Regulation is to amend regulation 6C to remove the reference to wrist X-rays to accord with current practice in procedures for determining whether people smuggling crew are minors. This ensures that age determination procedures provide the best evidence for a court to determine the age of people smuggling crew who claim to be minors.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Crimes Amendment (X-ray) Regulation 2013

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Crimes Act provides a regime for determining age. Under the Crimes Act an officer can seek permission to carry out a 'prescribed procedure', either with the consent of the person whose age is in question, or by order of a magistrate.

Currently, the only prescribed procedure for determining age under the Crimes Act is 'radiograph of the hand and wrist of the person whose age is to be determined'.

This Regulation amends Regulation 6C of the Crimes Regulations to reflect changes to current age determination processes that were announced in July 2011. In the past, the AFP have arranged for wrist X-rays to be taken in order to have an expert analysis of those X-rays put before the court as evidence in an age determination hearing. However, since August 2011, wrist X-rays have not been used as a method of determining age unless requested by the defendant. The Government notes that this amendment implements the recommendation of the Senate Legal and Constitutional

Affairs References Committee, and responds to concerns raised by Australian Human Rights Commission and advice from the Office of the Chief Scientist that there is not sufficient scientific data to support the use of wrist X rays to determine whether a person is a minor. It also confirmed that wrist x-rays did not allow for precise estimation of chronological age and that results varied according to ethnic and socio-economic conditions.

The legislative instrument does not make any substantive amendments to Commonwealth law or policy in relation to age determination procedures. It reflects current practice in age determination procedures, which is that age determination is a matter for judicial determination after both the prosecution and the defence have had the opportunity to put evidence, and ensures that age determination procedures provide the best evidence for a court to determine the age of people smuggling crew who claim to be minors.

Human rights implications

These amendments promote the rights of juvenile defendants under:

- the Convention on the Rights of the Child (CRC), and
- Articles 10(2) and 10(3) of the International Covenant on Civil and Political Rights (ICCPR).

Children's rights

Article 3 of the CRC requires that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. This legislative instrument will promote the best interests of the child by ensuring that those persons claiming to be minors will have their claims determined by a judicial officer in a court on the basis of the best evidence put before them. This process will also be supported by measures already undertaken by the Australian Federal Police in gathering evidence from Indonesia, as outlined in the *Australian Government response to the Senate Legal and Constitutional Affairs References Committee report: Detention of Indonesian minors in Australia*, December 2012.

Article 37(c) of the CRC relevantly provides that each child deprived of their liberty shall be treated with humanity, in a manner that takes into account the needs of persons of his or her age and shall be separated from adults unless it is considered in the child's best interest not to do so.

Article 10(2)(b) also provides that accused juvenile persons shall be separated from adults. This instrument will promote children's rights by ensuring that a person's age is determined on the best evidence available.

Conclusion

This legislative instrument is compatible with human rights as it promotes the rights of juvenile defendants under the Convention on the Rights of the Child and Article 10 of the ICCPR.

[The Hon Mark Dreyfus QC MP, Attorney-General]

Other Issues

This regulation addresses recommendations made by the Senate Legal and Constitutional Affairs References Committee report into the Detention of Indonesian minors in Australia, and the Senate Legal and Constitutional Affairs Legislation Committee's report into the Crimes Amendment (Fairness for Minors) Bill 2011, as well the Australian Human Rights Commission's report of the Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children

If in the future any procedure for determining whether a person is an adult or a minor is identified as appropriate and consistent with Australia's human rights obligations, consideration will be given to prescribing such a procedure in the Crimes Regulations.

The Regulation is not likely to impact on business or restrict competition.

The Regulation is a legislative instrument for the purposes of the *Crimes Act 1914*.

The Regulation commences the day after the Regulation is registered.

Details of the Regulation are set out in Attachment A.

ATTACHMENT A

Details of the Crimes Amendment (X-ray) Regulation 2013

Regulation 6C of the Crimes Regulations prescribes wrist X-rays as a procedure for determining age under Division 4A of the Crimes Act. In the past, the AFP have arranged for wrist X-rays to be taken in order to have an expert analysis of those X-rays put before the court as evidence in an age determination. Removing wrist X-rays as a prescribed procedure will not change current age determination processes, but will respond to criticisms about the use of wrist X-rays. The removal of wrist X-rays is supported from the Office of the Chief Scientist that there is not sufficient scientific data to support the use of wrist X rays to determine whether a person is a minor.

The purpose of this Regulation is to amend regulation 6C to remove wrist X-rays to accord with current practice in procedures for determining whether people smuggling crew are minors. This accords with current practice, and ensures that age determination procedures provide the best evidence for a court to determine the age of people smuggling crew who claim to be minors.

Section 1 – Name of regulation

This section provides that the title of the regulation is the *Crimes Amendment (X-ray) Regulation 2013*.

Section 2 – Commencement

This section provides that the regulation commences the day after the Regulation is registered.

Section 3 – Authority

This section provides that this regulation is made under the *Crimes Act 1914*.

Section 4 – Schedule(s)

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendment

Item [1] – Regulation 6C

Repeal the regulation.