



Australian Government
Attorney-General's Department

Acting Secretary

11/28717

12 July 2012

The Hon Catherine Branson QC
President
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

Dear President

Thank you for your letters of 9 and 10 July 2012 in which you provided a revised draft of your Report on the Australian Human Rights Commission (AHRC) inquiry into the treatment of persons suspected of people smuggling offences who say they are children.

As you requested, I have outlined the actions the Department has taken in working with other Commonwealth agencies to address many of the issues raised in your Report. I have also included the Department's comments on your specific recommendations where they relate to this Department (**Attachment A**). I note your advice that this letter will be published in the Report.

Overview of actions by the Department on age determination

Following your initial concerns about age determination issues expressed on 17 February 2011 and in subsequent correspondence, the Department has engaged stakeholders across the Commonwealth to discuss, formulate and implement measures for operational agencies to expand and improve the procedures to assess the age of persons suspected of people smuggling offences who say they are minors. These measures include:

- establishing an interdepartmental working group on age determination issues
- changing the Government's policy framework on age determination for criminal justice purposes
- leading whole-of-government development of the Government's current policy to remove persons suspected of people smuggling offences assessed by the Department of Immigration and Citizenship (DIAC) as minors
- working with the AFP, CDPP and DIAC to conduct a factual evaluation of the cases of 12 persons, referred by the AHRC, who were charged with or convicted of people smuggling offences and who said they were minors

- conducting a review of 28 persons convicted of people smuggling offences who had raised age at some stage resulting in the Attorney-General granting 15 of these persons early release on licence as they may have been minors on arrival in Australia
- engaging the Office of the Chief Scientist to obtain independent advice on the scientific and statistical approaches to age determination
- working with the Indonesian Embassy and Consulates to more effectively identify persons who say they are minors and more quickly obtain age documentation for relevant Commonwealth agencies, and
- engaging with senior representatives of the States and Territories on the appropriate management of persons charged with or convicted of people smuggling offences, including for those who say they are minors.

The role of the Attorney-General's Department in developing age determination policy

The Department is the lead policy agency on Commonwealth criminal justice issues, including for persons suspected of people smuggling offences. The role of the Department includes coordinating a whole-of-government approach to these issues, including age determination policy, and providing advice to the Attorney-General and Minister for Home Affairs and Justice. The Department also administers the relevant part of the *Crimes Act 1914* dealing with age determination in the criminal justice context. While DIAC has administrative responsibility for offences under the *Migration Act 1958*, in practice the Department has taken the lead on legislative amendments as a result of similar offences in place in the Criminal Code, which the Department administers.

The Australian Federal Police (AFP) is the primary agency responsible for investigating breaches of Commonwealth criminal law, including offences under the Migration Act, and the Office of the Commonwealth Director of Public Prosecutions (CDPP) is responsible for prosecuting these offences. While the AFP and CDPP are agencies within the Attorney-General's portfolio, each agency makes decisions about the conduct of investigations and prosecutions independently of government.

Consistent with its role, the Department has taken the lead in progressing whole-of-government efforts to develop and implement improved techniques for the age determination of persons suspected of people smuggling offences who say they are minors. Media reports first raised the issue of the prosecution of such persons in around November 2010, and from this time the Department and other agencies were engaged in considering the issue of age determination.

On 1 March 2011, the Department led a senior interdepartmental working group with representatives from the AFP, CDPP and DIAC to examine options for providing additional information to the courts to assist them in making decisions about whether a person accused of a people smuggling offence is an adult or a minor. The working group concluded on 10 June 2011.

For the remainder of June 2011, the Department worked with the AFP, CDPP and DIAC to develop a submission to the former Attorney-General, the Hon Robert McClelland MP, and the former Minister for Home Affairs and Justice, the Hon Brendan O'Connor MP, on the next steps on age determination policy. The submission sought agreement to the outcomes of the interdepartmental working group. It also recommended a new age determination policy

framework to supplement existing wrist X-ray procedures, based on a more holistic approach to age determination which better reflects international practice.

The policy framework involved the AFP seeking documents and information from Indonesia as early as possible, and offering voluntary dental X-rays and voluntary interviews under caution using enhanced interview techniques. Importantly, if any one procedure or verified documents raised a doubt that a person may be a minor, the submission stated that AFP and CDPP would give the benefit of the doubt to the individual, which involved the investigation or prosecution being discontinued and the person being removed from Australia. This required agencies to give the benefit of the doubt about age where the available evidence did not clearly establish a person was a minor. In addition, the submission set out what became the CDPP's approach, implemented in early July 2011, of not opposing bail in court proceedings where age was an issue. The submission was agreed on 28 June 2011 and the Government announced the new age determination policy framework on 8 July 2011.

The Department also subsequently led the development of the Government's current policy to remove persons suspected of people smuggling offences assessed by DIAC as minors, where there are no exceptional circumstances to warrant their prosecution. Since 8 December 2011, any person suspected of people smuggling offences assessed to be minors by DIAC on the basis of an age assessment interview have been removed to their country of origin unless exceptional circumstances apply (for example, the person was a crew member on more than one venture, or a serious incident occurred on the vessel). If persons suspected of people smuggling offences are assessed to be adults they are referred to the AFP to consider investigation.

The Department also developed protocols that applied this policy, and DIAC and the AFP worked with the Department to implement revised standard operating procedures on referring and investigating persons suspected of people smuggling offences who say they are minors. The Department continues to play a coordinating role to ensure that the revised procedures are implemented in accordance with government policy.

The Department understands that since 1 December 2011, 101 persons suspected of people smuggling offences have said they are minors on arrival, of a total 155 persons suspected of people smuggling offences arriving in Australia (65 per cent of all persons suspected of people smuggling offences say they are minors on arrival). Of these, DIAC has assessed 44 persons suspected of people smuggling offences as minors and 57 as adults (as at 30 June 2012), demonstrating that less than half of persons who say they are minors on arrival are subsequently assessed by DIAC as minors. Since 8 December 2011, 84 persons suspected of people smuggling offences have been removed as minors to their country of origin on the basis of being assessed as minors by Australian Government agencies or determined to be a minor by a court.

The Department's approach to wrist X-rays as an age determination procedure

When wrist X-rays were introduced as a prescribed procedure in 2001, the Department was aware of concerns about the procedure and the limitations of the Greulich and Pyle Atlas. At the time, these concerns focused on the possibility of racial or ethnic variations between populations, the effect of malnutrition on skeletal maturity, and ethical objections to the use of a medical procedure for a non-medical purpose.

These issues were the subject of robust discussion by the Senate Legal and Constitutional Affairs Committee and by the Parliament in 2001. The Committee heard evidence about the

limitations of the Greulich and Pyle Atlas to assess chronological age from wrist X-rays. It also heard evidence that, notwithstanding the fact that the Atlas was developed to assess skeletal and not chronological age, the Atlas was 'still valid today' and was the 'simplest and most practical' method available that ensures 'radiation is kept to a minimum'.¹ After considering all of the available information, the Committee weighed the risks associated with the procedure against the reality that there are very few other age determination techniques, and recommended that the Government adopt wrist X-rays as a prescribed age determination procedure. This approach was subsequently endorsed by the Parliament.

Criticisms of the statistical methodology used by Dr Vincent Low as the expert witness for the Commonwealth arose in 2011. The Department was advised of the nature of these criticisms by the CDPP at a meeting of Commonwealth agencies on 12 August 2011. At that time, the CDPP advised the Department that Dr Low's approach had been contested by Professor Tim Cole in an age determination hearing. The CDPP advised that it was consulting further with Dr Low on the issues raised by Professor Cole. The CDPP subsequently advised the Department on 2 September 2011 that after these discussions it was satisfied with the appropriateness of Dr Low's approach and how wrist X-ray evidence was being presented. The Department did not receive documentation containing the substance of those criticisms until it received material for the evaluation of the 12 cases, which were referred to the Department by the AHRC between September and November 2011.

Engagement with the Office of the Chief Scientist on age determination issues

The Department has consulted the Office of the Chief Scientist on a range of scientific issues relating to age determination. In late November 2011 the Department requested advice from the Office of the Chief Scientist on the methods available for age determination in the absence of documentary evidence. On 11 January 2012 the Chief Scientist, Professor Ian Chubb AC, advised the Department on the available scientific methods for determining chronological age. The advice confirmed what the Department was aware of in 2001, that wrist X-rays did not allow for precise estimation of chronological age, that results vary with ethnic and socio-economic conditions, and that there were ethical considerations. The 'observed variation' of two years for wrist X-rays, identified by the Chief Scientist, further indicated to the Department that the science of wrist X-rays and statistical extrapolation from that science was a contested issue that required further expert consideration.

Between January and June 2012, the Department consulted further with the Office of the Chief Scientist on a number of age determination issues. This included seeking assistance on identifying available experts to assist the Commonwealth with the science of age determination, in particular to critically analyse the scientific and statistical basis for using wrist X-rays as an age determination procedure. On 29 June 2012, the Office of the Chief Scientist provided the Department with advice relating to statistics and wrist X-rays from Professor Patty Solomon, Professor of Statistical Bioinformatics of the University of Adelaide.

Professor Solomon reviewed the approaches of each of the experts who contributed to your inquiry. In her report, Professor Solomon concluded that there is not enough scientific data in either the Greulich and Pyle Atlas or the TW3 Manual for those experts to draw sufficiently precise inferences of chronological age for young Indonesian males. To address the issue, Professor Solomon suggested that '[w]ell designed, population-based studies are needed to

¹ Evidence of Dr Kevin Osborn, Secretary, ACT Branch, Royal Australian and New Zealand College of Radiologists from transcript of the Senate Legal and Constitutional Legislation Committee hearing on 23 March 2001 (pp.3 and 7).

properly evaluate the potential impacts of poverty, malnutrition and disease on patterns of skeletal development’.

Professor Solomon also indicated that, in her opinion, each of the experts who gave evidence to your inquiry applied oversimplified statistical methods or made statistical errors in their analyses. For example, Professor Solomon noted that Dr Low’s model is ‘simplistic at best and probably misleading’. She also concluded that she:

[does] not have confidence in Professor Cole’s probability model, including the often quoted 61% probability of attaining skeletal maturity before age 18.

In considering Professor Cole’s discussion of ‘likelihood ratios’, Professor Solomon further noted that she:

[does not] believe Professor Coles’ [sic] normal model assumptions to be true necessarily, and all subsequent calculations ensue from those assumptions.

As a result of Professor Solomon’s advice, the Department considers that it is premature to make specific findings about drawing inferences of chronological age from wrist X-rays given the contested nature of the science, the insufficient data sets that experts have been working from, and the errors and limitations in applying statistical analysis to the limited datasets by each of the experts.

A summary of Professor Solomon’s advice was provided to the AHRC on 6 July 2012, but her conclusions have not been reflected in the Report. The Department is concerned that the Report does not include any reference to Professor Solomon’s critique of the experts who gave evidence during the inquiry, including those upon whose opinion the AHRC’s findings are substantially based.

The Department’s review of persons convicted of people smuggling offences who raised age as an issue

The Department has taken seriously and been responsive to concerns about minors being imprisoned in adult gaols. On 14 July 2011, you requested an independent review of all age determination matters. In response to your request, the Department took steps to examine 12 cases following notifications from the AHRC after details of those cases were provided to the Department on 28 September 2011. The former Attorney-General provided you with details of the Department’s factual evaluation of these cases on 30 November 2011, as an input to your inquiry.

Following your letter of 16 March 2012, in which you again requested an independent assessment of age, the Department engaged with the AFP, CDPP and DIAC to review those cases of persons convicted of people smuggling offences who raised age as an issue at some stage between arrival in Australia and conviction as quickly as possible. On 29 March 2012, the Department requested additional information on each of the cases from the AFP, CDPP and DIAC for the purposes of conducting a review. The Department also separately sought documentation containing information about age from the Indonesian Embassy. The review was formally approved by the Attorney-General, the Hon Nicola Roxon MP, on 24 April 2012 and the Minister for Home Affairs and Justice, the Hon Jason Clare MP, on 2 May 2012. The review was announced publicly on 2 May 2012.

The Department finalised its review of 28 cases of persons convicted of people smuggling offences who said they were minors at some stage on 25 June 2012. The persons whose cases

were examined as part of the review were all legally represented at the time of trial, and were convicted as adults. Of these, 17 of them pleaded guilty. Only three contested age and they were determined by the court to be adults.

As part of the review, the Department considered information from age determination processes which was not available when the persons convicted of people smuggling offences originally advised Commonwealth they were minors. In particular, the Indonesian Embassy provided age documentation for 15 persons as part of the review (provided on 6, 8 and 20 June 2012), DIAC conducted age assessment interviews for all persons as part of the review (provided on 18 April and 12 June 2012), and the AFP and CDPP provided relevant case information for all persons as part of the review. Recommendations were made to the Attorney-General by the Department after it considered this additional material, as well as the material previously available in each case.

The review applied the benefit of the doubt in matters where information from the case file or further information raised a doubt that the person may have been minors at the time of arrival in Australia. For all persons assessed by DIAC as likely to be minors at the time of arrival, recommendations were put to the Attorney-General either within one week of receiving ministerial approval to conduct the review, or within six days of receiving that advice from DIAC. For all persons where documentation was provided by the Indonesian Embassy indicating they were a minor at the time of arrival, recommendations were put to the Attorney-General within five days of receiving those documents, except for one case where recommendations were put to the Attorney-General after 10 days.

On 29 June 2012, the Attorney-General announced the outcomes of the review. This involved:

- 15 persons being granted early release from prison on licence as there was a doubt they may have been minors on arrival in Australia
- two persons being released early on parole
- three persons completing their non-parole periods prior to the commencement of the review, and
- eight persons being assessed to be adults as there was no evidence supporting their claims to have been minors at the time of their arrival.

The Department has actively sought additional information on age from the Indonesian Embassy for persons subject to the review, and will continue to engage closely with the Embassy to obtain any further identity documentation where it becomes available. Any further information will be considered by the Department in accordance with the usual processes governing applications from federal offenders for early release from prison on licence.

The Department's outstanding concerns with the Report

The Acting Secretary of the Department, Tony Sheehan, wrote to you on 6 July 2012 responding to a draft of the Report and raised a number of concerns about the AHRC's proposed findings and recommendations. Some of these issues have been resolved in the final Report. However, a number of the Department's substantive concerns have not been addressed.

One of the Department's key concerns is that the findings and recommendations in the Report are underpinned by an over-reliance on age assessment interviews, without adequately recognising the difficulties in relying on that process for age determination in a criminal justice context. The Report also rejects X-rays as an age determination method, on the primary basis of expert opinion formed using an inadequate dataset.

I am also concerned that you have concluded that officers in the Department's Criminal Justice Division, in the course of their work on people smuggling issues, produced work that was deliberately 'misleading' and 'disingenuous'. The Department categorically rejects these assertions and any implications that officers of the Department did not strive diligently and professionally to advise on improving policy on age determination for persons suspected or convicted of people smuggling offences since November 2010. The Department believes that the enhanced age determination policies announced by the Government in July 2011 and those implemented in December 2011, as well as the review of individual cases in 2012, are a reflection of this.

The Department does not accept the emphasis you have selectively placed upon individual documents or statements with respect to this period and emphatically denies any suggestion that errors in briefings, talking points and submissions were deliberately made by officers of the Department with a view to misleading the public and relevant ministers. Where errors have been identified, they have been formally corrected as quickly as possible.

The Department thanks the AHRC for the opportunity to comment on the Report. If you have any questions about the information above, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Elizabeth Kelly', with a long, sweeping flourish extending to the right.

Elizabeth Kelly
Acting Secretary

Attorney-General's Departments comments on the Australian Human Rights Commission's recommendations from its inquiry into the treatment of persons suspected of people smuggling offences who say they are children

Recommendation 1: The Migration Act 1958 (Cth), and if appropriate the Crimes Act 1914 (Cth), should be amended to make clear that for the purposes of Part 2, Division 12, Subdivision A of the Migration Act, an individual who claims to be under the age of 18 years will be deemed to be a minor unless the relevant decision-maker is positively satisfied, or in the case of a judicial decision-maker, satisfied on the balance of probabilities after taking into account the matters identified in s 140(2) of the Evidence Act 1995 (Cth), that the individual is over the age of 18 years.

This recommendation is a matter for the Government as it proposes a legislatively prescribed presumption of age in all cases where an individual says they are a minor. The recommendation limits the proposed presumption to persons charged with offences under Part 2, Division 12, Subdivision A of the Migration Act. However, as the recommendation delineates between a 'relevant decision-maker' and a 'judicial decision-maker', the presumption appears to apply to such persons in both the immigration and criminal justice contexts.

The Department considers the recommendation already broadly reflects existing practices of agencies for the treatment of persons who say they are minors in immigration detention and criminal custody. For example, DIAC does not detain a person who says they are a minor as an adult unless they assess that person to be an adult. The AFP also does not proceed to charge a person if it considers the person is a minor, unless exceptional circumstances exist, such as if the person is substantially involved in the venture, involved in multiple ventures, or involved in a serious incident on the venture. Further, while the burden of proof in establishing a person's age is not legislatively prescribed in the Migration Act, the prosecution assumes this burden in practice.

A legislatively prescribed presumption of age was recently proposed as part of the Crimes Amendment (Fairness for Minors) Bill 2011, and rejected by the Senate Legal and Constitutional Affairs Committee in its report dated 4 April 2012. As set out in the Department's submission to the Senate Committee, there are a number of risks involved in legislating a presumption of age that would need to be carefully considered by the Government. These include the risk to other minors detained with the person, where the person's physical and emotional maturity suggests that they are in fact an adult. It is apparent from the Department's review of persons convicted of people smuggling offences who said they were minors that organisers in a number of cases told persons to claim to be minors in order to be quickly returned to Indonesia. The Report accepts that persons suspected of people smuggling offences do not necessarily tell the truth about their age, and the Department notes that at least one person the AHRC notified the Department about in September 2011 changed the date of birth claimed to the AHRC, indicating he was an adult rather than a minor. As such, applying a presumption of age on the basis of the person's claim alone presents a number of practical difficulties.

Further, the recommended 'relevant decision-maker' would need to be defined. It is not clear whether this is referring to the independent assessor in recommendation 9 below, or the AFP and DIAC. It is also not clear how the 'relevant decision-maker' should be 'positively satisfied' that a person is under the age of 18 years.

For background, the Commonwealth Evidence Act does not generally apply to Commonwealth criminal proceedings held in State and Territory courts, as the relevant States and Territory Evidence Acts apply. However, NSW, ACT, Victoria and Tasmania are all Uniform Evidence Act jurisdictions (like the Commonwealth) and have largely adopted the model Evidence Act that the Commonwealth Evidence Act is based on.

Recommendation 2: *An individual suspected of people smuggling who says that he is a minor, and who is not manifestly an adult, should be provided with an independent guardian with responsibility for advocating for the protection of his best interests.*

This recommendation is a matter for the Government, as implementation could involve funding decisions and potentially legislative amendments.

It is not clear what the status of the guardian being proposed would be. The Government would need to consider whether an independent guardian would be appropriate in the circumstances of a particular person suspected of a people smuggling offence who says they are a minor, and if so, who would perform that role. For example, there are a number of difficulties with consular officials acting in this capacity, where consular assistance is not accepted by the individual.

It is also not clear what makes a person ‘manifestly’ an adult, and if an assessment of whether a person is ‘manifestly’ an adult is separate to the age assessment processes by agencies. Given the recommendation proposes that a ‘guardian’ is provided to any person who says they are a minor who is not ‘manifestly’ an adult, it would be important to clearly define the meaning of ‘manifestly’.

Recommendation 3: *No procedure which involves human imaging using radiation should be specified as a prescribed procedure for the purposes of s 3ZQA(2) of the Crimes Act, or remain a prescribed procedure for that purpose, without a justification of the procedure being undertaken in accordance with the requirements of paragraphs 3.18, 3.61–3.64 and 3.66 of the International Atomic Energy Agency Safety Standard: Radiation Protection and Safety of Radiation Sources: International Basic Safety Standards – Interim Edition (General Safety Requirements: Part 3) or any later edition of these requirements. Such justification should take into account contemporary understanding of the extent to which the procedure is informative of chronological age.*

This recommendation is a matter for the Government.

Under the IAEA Safety Standard, performing human imaging using radiation for legal reasons is not normally justified unless the government or regulatory body considers it appropriate, with regard to the factors set out in paragraph 3.61 of the Standard. The Department agrees that any X-ray procedure to be prescribed for age determination purposes under the Crimes Act must meet the requisite justification processes set out in that Standard.

The framework for this justification process is contained in subsection 3ZQA(4) of the Crimes Act, which requires consultation with the minister responsible for the administration of the *Therapeutic Goods Act 1989*, prior to prescribing any new age determination procedure. The Therapeutic Goods Administration (TGA) advises the relevant minister for this purpose, currently the Minister for Health and Ageing.

Prior to introducing the framework for prescribing age determination procedures under the Crimes Act in 2001, a comprehensive process of parliamentary scrutiny took into account the views of all stakeholders. The Government and the Parliament decided that age was of

considerable significance for both individuals and investigating agencies, and wrist X-rays were assessed as delivering potential value in this context with minimal exposure to radiation.

Subsequently, prior to prescribing wrist X-rays as an age determination procedure in the Crimes Regulations, the TGA and the Minister for Health and Aged Care were consulted and agreed to the proposed regulations. Similarly, in late 2011, the Parliamentary Secretary for Health and Ageing, the Hon Catherine King MP, was consulted about the proposal to prescribe dental X-rays as an age determination procedure.

By way of additional ongoing safeguards for age determination procedures already prescribed, a procedure may only be undertaken with the person's consent, or by court order. If the court does not consider the procedure is justified in a given case, the authorities may not undertake the procedure.

Recommendation 4: *The Crimes Act 1914 (Cth) and, if appropriate, the Crimes Regulations 1990 (Cth), or alternatively the Evidence Act 1995 (Cth), should be amended to ensure that expert evidence which is wholly or substantially based on the analysis of a wrist x-ray is not admissible in a legal proceeding as proof, or as evidence tending to prove, that the subject of the wrist x-ray is over the age of 18 years.*

This recommendation is a matter for the Government as implementation would involve legislation.

The Department understands that wrist X-rays are not routinely being offered or used by the AFP and CDPP at present. However, they remain available for Commonwealth agencies to assist in investigations and prosecutions where appropriate. While the Department recognises that further research on their scientific interpretation is required, it would be premature to limit the admissibility of wrist X-ray evidence, as recommended, particularly as it is the role of the court to weigh this evidence and rule on its relevance and probity.

Recommendation 5: *Imaging of an individual's dentition using radiation (dental x-ray) should not be specified for the purposes of s 3ZQA(2) of the Crimes Act as a prescribed procedure for the determination of age*

Recommendation 6: *Imaging of an individual's clavicle using radiation (clavicle x-ray) should not be specified for the purposes of s 3ZQA(2) of the Crimes Act as a prescribed procedure for the determination of age.*

Recommendations 5 and 6 are matters for the Government.

The Department accepts that there is not sufficient scientific evidence to support the introduction of dental or clavicle X-rays as prescribed procedures for age determination at this time. However, the Department may seek further expert scientific opinion on the use of dental and clavicle X-rays for age determination purposes. As such, it does not rule out the possibility of providing advice on prescribing dental or clavicle X-rays age determination procedures to the Attorney-General and Minister for Home Affairs and Justice at some stage in the future.

Recommendation 7: *If any forensic procedure is specified as a prescribed procedure for the purpose of age determination within the meaning of s 3ZQA(2) of the Crimes Act 1914 (Cth), Part IAA Division 4A consideration should be given to amending the Crimes Act to provide that such a procedure may only be undertaken in the circumstances in which a forensic procedure within the meaning of s 23WA of the Crimes Act may be undertaken with respect to a minor.*

This recommendation is a matter for the Government.

Part ID of the Crimes Act sets out the requirements for undertaking certain forensic procedures on suspects, offenders and volunteers largely for the purposes of producing evidence that confirms or disproves the commission of an offence. The procedures authorised under Part ID mostly relate to obtaining a forensic sample from which a DNA profile can be derived and placed on the Commonwealth's DNA database. The authorisation requirements, including those relating to consent, contained in Part ID for carrying out a forensic procedure are specific to this purpose and are therefore not applicable to the circumstances in which age determination is required. However, the Department will give further consideration as to whether the authorisation requirements in Part IAA could be further aligned with those requirements in Part ID.

Recommendation 8: *Unless and until recommendation 9 is implemented, the Commissioner of Federal Police should ensure that all Federal Agents are aware of their obligations when acting as an 'investigating official' in reliance on s 3ZQC of the Crimes Act and should further ensure that protocols or guidelines are put in place to ensure that these obligations are met. Specifically, an investigating official should be aware that the role of any independent adult person is to represent the interests of the person in respect to whom the prescribed procedure is to be carried out and that he or she should be so advised.*

This recommendation is a matter for the AFP.

Recommendation 9: *Where it is necessary for an investigating official within the meaning of s 3ZQB(1) of the Crimes Act 1914 (Cth), who suspects that a person may have committed a Commonwealth offence, to determine whether a person is, or was at the time of the alleged commission of an offence, under the age of 18 years, the investigating official should seek the consent of the person to participate in an age assessment interview.*

Where reasonably possible, the interviewer should speak the language ordinarily spoken by the person whose age is to be assessed and should be familiar with the culture of the place from which the person comes. The interviewer, who ideally should be independent of the Commonwealth, should be instructed that he or she should only make an assessment that the person is over the age of 18 years if positively satisfied that this is the case after allowing for the difficulty of assessing age by interview.

All interviewers should be trained, should follow an established procedure and should record their interviews. Their conclusions and the reasons for their conclusions should be documented.

This recommendation is a matter for the AFP or, if legislative amendments are being proposed, the Government.

The recommendation reflects the AFP's current processes in terms of seeking the person's consent prior to participating in an interview under caution with investigating officials. The

AFP undertakes voluntary interviews for investigative purposes and those interviews include questions concerning the age of individual participating in the interview. The AFP's current process is not to undertake specific age assessment interviews. The AFP conducts interviews using an appropriately qualified interpreter.

The recommendation proposes that an independent assessor conduct the interview with the person. However, the recommendation does not address the issue of whether such interviews would be conducted under criminal caution. Further, there may be difficulties in locating sufficient numbers of qualified interviewers who are fluent in Indonesian and familiar with Indonesian culture, who could conduct an interview in this context.

Recommendation 10: Any individual suspected of people smuggling who says that he is a child and who is not manifestly an adult should be offered access to legal advice prior to participating in any age assessment interview intended to be relied on in a legal proceeding.

This recommendation reflects existing practice, whereby the AFP offers access to legal advice to all persons, regardless of age, prior to participating in a voluntary interview under caution conducted by the AFP for investigative purposes. It appears this recommendation does not propose that legal advice is provided to individuals prior to DIAC age assessment interviews, as these interviews are not conducted with the intention that they will be relied on in legal proceedings.

Recommendation 11: If a decision is made to investigate or prosecute an individual suspected of people smuggling who does not admit that he was over the age of 18 years at the date of the offence of which he is suspected, immediate efforts should be made to obtain documentary evidence of age from his country of origin.

This recommendation is a matter for the AFP. Under the policy framework announced on 8 July 2011, the AFP is to request documents containing information about the age of persons who say they are minors from their country of origin as soon as possible.

Recommendation 12: The Attorney-General should set and ensure the implementation of an appropriate time limit between the apprehension of a young person suspected of people smuggling who does not admit to being over the age of 18 years and the bringing of a charge or charges against him. The Attorney-General should further consult with the Commonwealth Director of Public Prosecutions concerning procedures put in place by the Director to ensure the expeditious trial of any young person who does not admit to being over the age of 18 years and who is charged with a Commonwealth offence. Should the Attorney-General not be satisfied that appropriate procedures have been put in place by the Director, the Attorney-General should issue guidelines on this topic under s 8 of the Director of Public Prosecutions Act 1983 (Cth).

This recommendation is a matter for the Attorney-General.

The Department supports measures to reduce delays in investigations for persons suspected of people smuggling offences who say they are minors. The AFP currently has a benchmark timeframe of 90 days from interception to laying charges. The Department understands the current average timeframe for laying charges is 112.9 days.

It is important that the AFP and CDPP have adequate time to consider all relevant factors when making a decision to charge or prosecute a person. The CDPP makes decisions relating to the prosecution process in accordance with the guidelines established by the *Prosecution Policy of*

the Commonwealth. The Prosecution Policy outlines relevant factors to be considered when exercising prosecutorial discretion, including specific factors relating to decisions about the prosecution of minors.

The CDPP makes decisions independently of the Government. However, the Attorney-General has the power to issue directions or guidelines to the CDPP under section 8 of the Director of Public Prosecutions Act. It is a matter for the Attorney-General to determine whether it is appropriate to issue directions or guidelines, in consultation with the CDPP.

Recommendation 13: *The Commonwealth should only in exceptional circumstances, and after bringing those circumstances to the attention of the decision-maker, oppose bail where a person who claims to be a minor, and is not manifestly an adult, has been charged with people smuggling. Where a person who claims to be a minor, and is not manifestly an adult, has been charged with people smuggling and granted bail, he should be held in appropriate community detention in in the vicinity of his trial court. The Minister for Immigration and Citizenship's guidelines for the administration of his residence determination powers should be amended so that such cases can be brought to the Minister's immediate attention.*

This recommendation in part reflects existing practices. The CDPP generally does not oppose applications for bail made by persons charged with people smuggling offences who say they were minors at the time of the offence. This policy has been in place since mid-2011. Provided the defendant's legal representative makes an application for bail, and this is granted by the court, the defendant will be released into immigration detention as an unlawful non-citizen until the court either reconsiders the issue of bail or the outcome of the prosecution is known.

The detention arrangements for individuals who have been bailed into immigration detention are a matter for DIAC, which ensures that minors are held in appropriate facilities. Where appropriate, DIAC holds these individuals in alternative places of detention, which may include rented accommodation in the community (such as hotel rooms or apartments). Community detention placement decisions are made by the Minister for Immigration and Citizenship using a non-delegable non-compellable power. Any guidelines on the use of this power are matters for DIAC and the Minister for Immigration and Citizenship.

Recommendation 14: *The Attorney-General should consult with the Commonwealth Director of Public Prosecutions concerning procedures put in place by the Director to ensure that the Commonwealth does not adduce expert evidence in legal proceedings where the acceptance by the court of that evidence would be inconsistent with the accused person's receiving a fair trial. Should the Attorney-General not be satisfied that appropriate procedures have been put in place by the Director, the Attorney-General should seek advice from an appropriately qualified judicial officer or former judicial officer as to the terms of guidelines on this topic that it would be appropriate for her to furnish to the Director under s 8 of the Director of Public Prosecutions Act 1983 (Cth).*

This recommendation is a matter for the Attorney-General.

The CDPP conducts prosecutions in accordance with the *Prosecution Policy of the Commonwealth.* The court also has the power to refuse to admit evidence if its probative value is outweighed by the danger of unfair prejudice to the defendant, and has the power to manage its processes in a way that ensures a defendant's right to a fair trial is protected. It is a matter for the Attorney-General to determine whether it is appropriate to issue directions or guidelines under section 8 of the Director of Public Prosecutions Act, in consultation with the CDPP.

Recommendation 15: *The Attorney-General's Department should establish and maintain a process whereby there is regular and frequent review of the continuing need for each Criminal Justice Stay Certificate given by the Attorney-General or his or her delegate. The Attorney-General's Department should additionally ensure that a Criminal Justice Stay Certificate is cancelled as promptly as compliance with s 162(2) of the Migration Act 1958 (Cth) allows when it is no longer required for the purpose for which it was given.*

The Department accepts the recommendation that the Department establish and maintain a process for regular and frequent review of criminal justice stay certificates (CJSCs). The Department currently has procedures in place for the review of CJSCs, and will continue to refine and document those procedures consistent with the Commission's findings and recommendations.

As indicated by the Department at the AHRC hearings, the AFP and CDPP are the competent authorities in relation to investigations and prosecutions, and the Attorney-General's delegate necessarily relies on advice from these agencies as to whether a person's presence in Australia is required for the purposes of the administration of justice. The Department's refinements to its procedures for review of CJSCs will however include guidance on appropriate follow up with AFP or CDPP, as relevant, for confirmation of the continuing need or otherwise for the CJSC to ensure cancellation of certificates promptly once a person is no longer required.

Recommendation 16: *If, at any time, the Commonwealth becomes aware of information that indicates that an individual suspected of people smuggling whose age is in doubt may have been trafficked, he should be treated as a victim of crime and provided with appropriate support.*

The Department accepts this recommendation in principle. However, in cases where Commonwealth authorities become aware that someone may be a victim of trafficking, the age of the suspected victim (whether in doubt or otherwise) is irrelevant. All arrivals on a suspected irregular entry vessel are referred first to DIAC to establish their reasons for travel. DIAC officers are provided with specific training to identify possible indicators of trafficking in persons. All suspected victims of trafficking identified by Australian authorities are referred to the AFP for assessment and possible referral to the Australian Government Support for Trafficked People Program.

Recommendation 17: *The Australian Government should remove Australia's reservation to article 37(c) of the Convention on the Rights of the Child.*

This recommendation is a matter for the Government.

As part of Australia's National Human Rights Action Plan, the Australian Government is reviewing its reservations to all United Nations human rights treaties, including article 37(c) of the *Convention on the Rights of the Child*.