



DPP

Commonwealth Director of Public Prosecutions

Chris Craigie SC

Your reference:

Our reference:

12 July 2012

The Hon Catherine Branson QC
President and Human Rights Commissioner
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2011

Dear President

Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children

Thank you for your letter of 10 July 2012 and for providing this Office with a confidential copy of the final draft report of the Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children and for the opportunity to respond to this final draft and to address subsection 29(2)(e) of the *Australian Human Rights Commission Act 1986*.

Accordingly I would be grateful if this letter responding to your request was published as an Appendix to the Report. I note that this letter draws upon our earlier comments on the draft findings and recommendations.

Prosecution Policy of the Commonwealth

The period of the last surge of people smuggling prosecutions in the late 1990's to the early 2000's pre-dates the CDPP's present policy of not prosecuting minors for people smuggling offences except where there are exceptional circumstances. Previously, given the seriousness of the alleged offences, it had been considered appropriate to prosecute minors for people smuggling offences.

The CDPP had cause to reconsider its position in relation to the prosecution of minors for people smuggling offences in late 2010. This arose from the fact that the AFP had decided not to charge any persons considered to be minors. The CDPP's position also changed to one under which minors should not be prosecuted for people smuggling offences unless there were exceptional circumstances on the basis of the minor's significant involvement in a people smuggling venture or involvement in multiple ventures.

Where the CDPP is conducting a people smuggling prosecution and the defendant claims to be a minor, the CDPP assesses all material provided on the referral of a matter. This includes any additional material on age provided by the AFP or the defence in considering whether a court is likely to be satisfied on the balance of probabilities that the defendant was an adult in assessing whether there is a reasonable prospect of conviction in accordance with the *Prosecution Policy of the Commonwealth*. Where the CDPP has not been satisfied that a court would be likely to be satisfied on the balance of probabilities on all the evidence available that the defendant was an adult the CDPP has discontinued the prosecution. The CDPP has discontinued a significant number of people smuggling prosecutions at various stages of the prosecution process after coming to the view that we were not satisfied on all the evidence available that a court would not likely be satisfied on the balance of probabilities that the defendant was an adult. As previously indicated, the CDPP has discontinued 55 of the matters considered by the Commission in this inquiry where a claim has been made by the defendant to be a minor. This includes 22 matters which were discontinued prior to October 2011 without an age determination hearing having been conducted and a further 20 matters which were discontinued between October and December 2011 without an age determination hearing having been conducted.

The above approach has been and continues to be the CDPP's practice. Over the course of the latest surge of people smuggling prosecutions, that is, since September 2008, the CDPP has also implemented further policies in relation to the prosecution of people smuggling offences where the defendant claims to be a minor, as the assessment of these matters before the courts has evolved or issues have become apparent to the CDPP.

Expert evidence in relation to wrist x-rays

The draft report contains extensive discussion of the use of wrist x-ray evidence in relation to the investigation and prosecution of people smuggling offences. Evidentiary material provided to the CDPP in briefs of evidence relating to people smuggling offences has included wrist x-ray evidence taken in accordance with Division 4A of Part 1AA of the *Crimes Act 1914*. The CDPP has presented expert evidence in relation to wrist x-rays, including evidence by Dr Low, to courts in age determination hearings when age had been raised as an issue. Expert evidence on wrist x-rays provided to the CDPP was not limited to Dr Low. As provided in our email of 3 April 2012, the CDPP had been provided with expert evidence by 22 experts.

In most cases which went to an age determination hearing, the CDPP was provided with 2 expert reports in relation to wrist x-rays. The first was the initial report usually made in Darwin, after the x-ray was conducted. The second was a more detailed report, usually by Dr Low, for the purposes of providing evidence in an age determination hearing. In all matters where the CDPP relied on the evidence of Dr Low at an age determination hearing, the initial report was disclosed to the defence as well.

The CDPP did not consider that it was continuing to adduce wrist x-ray analysis as evidence of age in legal proceedings beyond a point in time at which the Office was or should have been aware that serious questions had been identified about the reliability of the evidence being adduced from their preferred expert witness. The CDPP had been provided with an expert who had been accepted by courts. The CDPP was aware that challenges were being made to the wrist x-ray evidence being relied on and considered that these constituted differences of opinion that should be assessed by the Courts.

In late 2011, there were matters in which the courts made critical assessments of the use of statistical probabilities by Dr Low in relation to wrist x-ray evidence. The CDPP responded

quickly to the critical assessments that have been made as to Dr Low's formulation of statistical probabilities in relation to wrist x-ray evidence. These assessments were made by the Court in the cases of *R v Daud* [2011] WADC 175 and *R v RMA* [2011] WADC 198 and, in response, the CDPP reviewed its position in relation to the use of wrist x-ray evidence. The CDPP's position was that no people smuggling matter in which age was contested should be prosecuted where the sole probative evidence that the defendant was over 18 years at the time of the offending was the analysis of the wrist x-ray.

The CDPP does not agree that this Office had a 'culture of disbelief' in relation to the age claimed or indicated by defendants. In relation to references to the CDPP having a high level of scepticism concerning the claims of young Indonesians to be minors, the CDPP's experience in prosecuting people smuggling offences involving crew from Indonesia is that these matters can involve complex situations and uncertainty as to precise dates of birth and accordingly the age of defendants. There have been instances of multiple dates of birth being provided and cases where different ages have been claimed by the claimant individual at different stages. These aspects, combined with other difficulties that have arisen in relation to potential evidence as to age including issues relating in particular to Indonesian documentary material, has meant that age determination can be extremely difficult, which has been reflected in the CDPP's conduct of these matters.

Disclosure

The draft report contains discussion of disclosure obligations in prosecuting and of the CDPP not disclosing scientific material. The draft report finds that the CDPP failed to disclose to defence counsel material of which it was aware that undermined the credibility of expert evidence proposed to be adduced by it.

The CDPP regards the Crown's obligations of disclosure as a core duty. The CDPP rejects any implication that the CDPP breached its duty of disclosure. The CDPP considered that the appropriate course was for the differing views of experts in relation to wrist x-rays, which were known and used by defence lawyers and provided to the CDPP by them, to be considered and decided by the courts. Accordingly, in 2011, contrary views on wrist x-rays were before the courts and were assessed through a number of age determination hearings and in this way were public knowledge, leading to the decisions of *R v Daud* [2011] WADC 175 and *R v RMA* [2011] WADC 198, as discussed above.

Documentary material from Indonesia

The draft report suggests that the CDPP has focused on admissibility when considering material from Indonesia. In prosecuting, the CDPP must scrutinise material to determine whether it is authentic, reliable and accurate. To do otherwise would constitute a grave derogation in our duty to the Court.

In people smuggling matters where the issue of age has arisen, the CDPP has had to consider whether the document or material provided does indeed go to establish an age for the person. This requires consideration of the provenance of the document and the underlying information which has been used to create the document, including the date of registration and the date of extract of the information.

The CDPP has also had a responsibility to consider whether the material is admissible in order to determine whether it could properly be tendered in evidence by the prosecution and whether objections could be taken to the material by the defence. The admissibility of

material from Indonesia has been a matter which the CDPP has been required to consider in detail.

Material from Indonesia which was not admissible was considered by the CDPP in determining whether a court was likely to be satisfied on the balance of probabilities that the defendant was an adult. In a number of matters the CDPP has discontinued the prosecution after considering documentary material, notwithstanding that it was not in admissible form.

Given the issues that the CDPP has encountered with documentary material from Indonesia, including admissibility issues and in some cases conflicting documentation, the CDPP's position evolved. This position only relates to the material that the defendant wishes to tender. The CDPP cannot require or expect that defence representatives will allow the CDPP to tender documentary material which is not admissible.

The approach that the CDPP has adopted in relation to documentary material from Indonesia that the defendant wishes to tender is a very unusual and permissive stance to be taken by a prosecuting entity. The approach has been taken as a result of practical issues confronting the CDPP in relation to documentary material from Indonesia. The CDPP does not have a similar approach in any other area of its practice. This approach has facilitated the CDPP's decisions in these matters and highlights the often unusual difficulties and issues which confronted the CDPP in people smuggling prosecutions.

Bail

The draft report's findings regarding bail suggest that the CDPP's change in policy regarding bail was not announced or communicated to legal representatives until November 2011. Prior to this, bail was raised by defence solicitors with CDPP prosecutors in individual matters as is normal practice. Bail was granted unopposed in a number of matters. In November 2011 the CDPP formally implemented a national practice of writing to all legal representatives of defendants claiming to be minors but who had not applied for bail. They were informed of the CDPP's position not to normally oppose bail for persons claiming to be minors.

Chapter 7

Whilst I appreciate that the statements in section 5.3 are expressions of opinion, I note that it is an element of the people smuggling offences that the defendant intentionally facilitated the bringing or coming to Australia or entry or proposed entry to Australia of another person and that a large number of defendants have been convicted by courts of these offences.

In summary:

- The CDPP notes the findings and recommendations made in the draft report;
- The CDPP has made detailed comments on a number of the findings in this letter;
- The CDPP's policies and practices in relation to people smuggling prosecutions have evolved, including in relation to issues arising from the use of wrist x-ray evidence;
- The CDPP's policies in relation to bail and documentary material from Indonesia address areas covered by the recommendations made in the draft report;
- The CDPP notes the recommendations relating to consultation between the Attorney-General and the CDPP;
- The CDPP will, subject to practical limitations as to matters within our control, continue to consider ways in which this Office can facilitate trials for people smuggling

offences involving defendants who do not admit to being over 18 years of age to proceed expeditiously through the court system; and

- The CDPP prosecutes in accordance with the Prosecution Policy of the Commonwealth, which is based on the principles of fairness, openness, consistency, accountability and efficiency and affirms the importance of an accused person receiving a fair trial.

Thank you again for the opportunity to comment.

Yours sincerely

A handwritten signature in cursive script that reads "Chris Craigie". The signature is written in black ink and is positioned above the typed name.

Chris Craigie SC