



**Australian
Human Rights
Commission**

TRANSCRIPT OF PROCEEDINGS

O/N H-55449

**INQUIRY INTO THE TREATMENT OF INDIVIDUALS
SUSPECTED OF PEOPLE SMUGGLING OFFENCES
WHO SAY THAT THEY ARE CHILDREN**

THE HONOURABLE CATHERINE BRANSON QC, President

CANBERRA

9.30 AM, FRIDAY, 20 APRIL 2012

Continued from 19.4.12

DAY 2

MS BRANSON: Thank you, every one; I think we will start again. Now, Mr Anderson, we were going to start, I think, with Ms Harmer; is that right?

MR ANDERSON: Yes.

5

MS BRANSON: Would you perhaps like to come and take one of the seats by the microphone. Ms Harmer, did you take the oath or the affirmation yesterday?

MS A. HARMER: No, I did not.

10

MS BRANSON: I will just ask my associate to give you the cards and take an oath or an affirmation. Would you at the same time please state your position; how long you've worked in the Attorney-General's Department and your formal qualifications.

15

MS HARMER: My name is Anna Harmer; I'm employed in the Attorney-General's Department since – for approximately 13 years; I am the Assistant Secretary of the International Crime Cooperation Central Authority in the International Crime Corporation Division and I have a Bachelor of Laws.

20

MS BRANSON: Thank you.

ANNA HARMER, AFFIRMED

[9.32 am]

25

MS BRANSON: Thank you, Ms Harmer. Now, do you have in front of you an email that was sent on 2 April from Mr Rutherford to Ms Temby?

MS HARMER: Yes, I do.

30

MS BRANSON: And you will see down the bottom of the first page besides the number 4 there's a question, "Were Criminal Justice Stay Certificates kept under periodic review by AGD or any other agency? Please provide all documents relating to the issue and cancellation of CJSCs and criminal justice visas; do you see that?"

35

MS HARMER: I do.

MS BRANSON: The section beneath that which discusses in some detail Criminal Justice Stay Certificates; was that drafted by you or did you assist Mr Rutherford to draft that or how did it come to be prepared?

40

MS HARMER: It was drafted by officers within my Branch and my supervision.

MS BRANSON: And so you checked it and you're happy that it's an accurate representation?

45

MS HARMER: Yes.

MS BRANSON: Thank you. So I don't think I need take you through all of that; my questions are fairly limited. First, as that documentation sets out it is in section 147 of the Migration Act that provides essentially for the issue of the certificates, isn't it?

5

MS HARMER: It is.

MS BRANSON: And it provides that if an unlawful non-citizen is to be, or is likely to be removed or deported and the Attorney-General considers the non-citizen should remain in Australia temporarily for the purposes there set out the Attorney-General may give a certificate that the stay of the non-citizen's removal or deportation is required for the administration of criminal justice. Were you the delegates of the Attorney-General who exercised the decision-making power under this section?

15 MS HARMER: Yes.

MS BRANSON: And how long has it been the case that you've held the delegation?

20 MS HARMER: There are a number of officers in the Attorney-General's Department who hold the delegation; I'm the delegate who most commonly exercises it and I have held the delegation for as long as I've held my current position, which is approximately four years with a period of absence during some extended leave.

25

MS BRANSON: Thank you. And I assume in your position as the delegate for the Attorney-General you turned your mind to why the Parliament had given this power to the Attorney-General as opposed to anybody else?

30 MS HARMER: Yes.

MS BRANSON: Did you reflect that that was because the Attorney-General was the first law officer of the Crown and therefore would be an appropriate person to exercise a power of this kind?

35

MS HARMER: I'm not sure that my reflections were in precisely those terms but certainly I turned my mind to the purposes for which the certificates could be issued and that the purposes that certificates could be issued for were ones that were consistent with responsibilities that would be in the Attorney-General's portfolio.

40

MS BRANSON: Yes. You could understand that there might be – the Parliament could presumably have issued the power to perhaps the Commissioner for the Australian Federal Police; perhaps a Commonwealth Director of Public Prosecutions but, in fact, they gave it to the Attorney-General. Are you saying you didn't reflect on the significance of that or you did or did you just notice it and think, "That's how it is."

45

MS HARMER: I would have to say that I'm not sure that my reflections would have gone that far; certainly I've turned my mind to the purpose of the exercise of power but I'm not sure that they would be in quite those terms.

5 MS BRANSON: When you were exercising the delegated power you were alert to the fact that you were exercising it on behalf of the first law officer of the Crown?

MS HARMER: I was. Yes, that's correct.

10 MS BRANSON: In interpreting the phrase that the Attorney-General, meaning in your case, you as a delegate for the Attorney, may give a certificate that the stay of the non-citizen's removal or deportation is required for the administration of criminal justice, I assume you proceeded on the basis that that required you to be satisfied that
15 their stay – the stay of the removal was required for the administration of criminal justice?

MS HARMER: Yes.

20 MS BRANSON: It wasn't just that the Australian Federal Police or the Commonwealth Director of Public Prosecutions thought that you thought that it needed objectively to be established that their stay was required?

MS HARMER: Yes, the section does require me to be satisfied.

25 MS BRANSON: And I think you required the provision of substantial information to ensure that you could be satisfied?

30 MS HARMER: I certainly have required the provision of sufficient information to require me to be so satisfied, yes.

35 MS BRANSON: Thank you. Section 162 is the section that talks about bringing the certificates to an end. Where the presence in Australia of a non-citizen in respect of whom a Criminal Justice Certificate has been given which is no longer required for the purposes for which it was just given then if it was given under the relevant section the Attorney-General is to cancel it. You understand that to be a duty to cancel?

MS HARMER: Yes.

40 MS BRANSON: And the duty to cancel that arose in the circumstances that the person was no longer required for the purposes for which the certificate has been given?

MS HARMER: That's correct.

45 MS BRANSON: And you understood that to be an objective test you were required to be satisfied; it wasn't for the Australian Federal Police or the Commonwealth

Director of Public Prosecutions or the Department of Immigration to be satisfied; you were required to be satisfied?

5 MS HARMER: I certainly was required to be satisfied; my satisfaction derived from advice that I received but certainly I was required to be so satisfied.

10 MS BRANSON: In so satisfying yourself did you obtain throughout the period that you headed the delegation – that you’ve held the delegation evidence capable of allowing you to be objectively satisfied or did you just seek advice at least for certain periods of that time that somebody else thought was necessary that they stay?

MS HARMER: I sought advice on which I felt I could rely which led me to be satisfied that the Criminal Justice Certificate was no longer required.

15 MS BRANSON: You will see that the procedures that were in place for information to come to the delegate of the Attorney are set out in this document. In my copy it’s on the bottom of page 3:

20 *No formal timeframe requirements for reviewing CJSCs.*

True, but we’ve seen a duty to cancel in certain circumstances.

25 *AGD and relevant agencies have informally implemented practices as required to review the status; these informal review processes ensure that the AGD delegate can continue to be satisfied that the person is required ...*

And then...

30 *The process of reviewing changes from time to time according to operational needs.*

What precisely was meant by “operational needs”, Ms Harmer?

35 MS HARMER: In that context I believe we were referring to the volume of cases and the most effective way of ensuring that I continued to be satisfied in respect of the large number of cases.

40 MS BRANSON: In December 2009 the AFP agreed to provide regular updates to DIAC about the process of cases; what was the point of having AFP advise DIAC about the process of cases when the satisfaction was required to be in the Attorney-General or his or her delegate, Ms Harmer?

45 MS HARMER: Well, of course, AFP and DIAC have occasion to correspond on other issues relating to the criminal justice process and so I’m not sure that I would be well-placed to comment on the AFP’s particular purpose in agreeing to provide updates to DIAC because I’m aware that it does so for a variety of purposes.

MS BRANSON: You will see the paragraph ends:

AGD was not part of this formal monitoring process and continued to rely on AFP and CDPP instructions; instructions to cancel CJSCs where a decision had been made not to prosecute a person.

5 First, if the information flowing between AFP and DIAC was not relevant why is it mentioned here?

MS HARMER: I believe it's mentioned in the interests of completeness and in providing a context to it.

10

MS BRANSON: What do you say about the inference to be drawn from here that the delegate in the Attorney-General's Department took instructions on whether to cancel from the AFP and the CDPP?

15 MS HARMER: I take that to refer to the processes that were and continue to be in place whereby the AFP and CDPP continue to provide advice on circumstances in which they believe that a CJSC is no longer required and that they provide that advice to the Attorney-General's Department. I think perhaps the word "instruction" is perhaps a form of words that you might see as being perhaps inconsistent with the
20 fact of the Attorney making – or the Attorney's delegate making their own determination but I think I see the instructions as being the conveying of a view by both agencies which is one that informs the making of my own decision.

25 MS BRANSON: So the words "instruction to cancel" were just poorly chosen, you think, in reflection?

MS HARMER: Well, that – certainly those were instructions; I don't act upon those instructions; I take into account the information I receive in making my own view as to whether a certificate should be cancelled; those instructions are certainly
30 informative.

MS BRANSON: What were the nature of the instructions to cancel that were received by you from AFP or the Commonwealth Director of Public Prosecutions?

35 MS HARMER: The nature of the instructions vary depending on the circumstances of the individual case but they may include advising our department through me that the AFP have determined no longer to continue investigation of the person; that may include the DPP advising me that it had determined to discontinue a prosecution and not to proceed so the instructions that I would receive would be relevant to the
40 particular matter and the status of that matter.

MS BRANSON: So if you were relying on the Australian Federal Police and the Commonwealth Director of Public Prosecutions as you've indicated you would learn when they thought the person was no longer required?

45

MS HARMER: Indeed I would, yes.

MS BRANSON: How could you be satisfied earlier than the receipt of that advice that the person was no longer required?

50

MS HARMER: Well, I wouldn't ordinarily be able to be satisfied earlier of their views without them having provided them to me but certainly in some circumstances I may seek those views. So sometimes those instructions - - -

5 MS BRANSON: What was the source of information for you to be confident earlier than receiving that advice that they didn't want them any more; that they still were required?

10 MS HARMER: No, the predominant source of information would be the provision of advice from the investigation – the relevant agencies in this case the AFP and CDPP.

15 MS BRANSON: And at this time which we're looking at in December 2009 as I understand this procedure, although there was regular information going from the AFP to DIAC the information that was coming to you was only coming when they thought they didn't require the Certificate any more because the process from their point of view had come to an end; is that fair?

20 MS HARMER: I believe that's the case, yes.

25 MS BRANSON: In December 2010 following an increase in the number of investigations and prosecutions the AGD delegate asked the AFP to audit all CJSCs in effect for people smuggling cases and advise which cases had been referred for prosecution and which were still under investigation; was that the first – was that request made by you, Ms Harmer?

30 MS HARMER: That request was made by me but if I could provide – I think the material that's in this email before you is linked in to some other documents that are also before the Commission in relation to an agreement between the AFP and the Attorney-General's Department in relation to the review of current CJSCs which resulted in an agreement to both implement a monitoring process for the continuation of CJSCs going forward and also reviewing those that continue to be in place and as a result of that I tasked my team to liaise with the AFP in relation to the continuation of a number of certificates to ensure they continued to be required.

35

MS BRANSON: So just to make sure I understand what you're saying this document says:

40 *In December 2010 following an increase the AGD delegate asked essentially for an audit by AFP.*

My question really is is that the first time you asked for an audit?

45 MS HARMER: Yes.

MS BRANSON: And why did you ask for the audit?

MS HARMER: I asked for an audit following discussions with the AFP in which we considered it would be appropriate to examine the number of CJSCs in place having in mind that a number had been in place for some time and perhaps longer than might have been the case in investigations at other points in the history of the use of CJSCs to ensure that they continued to be required for the purposes of criminal justice.

MS BRANSON: So in a sense that was so you could be satisfied that they were still required for the purpose of section 162?

MS HARMER: It was an additional mechanism implemented to ensure that I could continue to be so satisfied.

MS BRANSON: Is it a fair conclusion from that that December 2010 was the first time that the Attorney-General's Department sought that sort of information as opposed to waiting to receive advice that the certificates were no longer required?

MS HARMER: It's not fair to say that it would be the first time; it would be the first time that it was systematically done so in relation to every case. Part of our routine practices – business practices do include periodic follow-up where some of the circumstances or the duration of the existence of a certificate might prompt us to ask indeed whether it continues to be required having regards to advice that was provided; this will be the first occasion on which there was a systematic review of all cases.

MS BRANSON: What procedures were in place to enable you and the other delegates to monitor how long certificates given by them had been outstanding?

MS HARMER: The issue of CJSCs is monitored through a database maintained by a number of officers within my branch; those track the particular dates at which actions are taken and enable us to track reminders to ensure – to look at matters periodically and consider whether action is required or whether the matter can be closed. Those – it's a database storage mechanism with in-built reminders effectively.

MS BRANSON: Do you know whether in practice other delegates and, in your case, was it your practice to act at regular intervals to review and then query the need for the certificate?

MS HARMER: Certainly it was the practice under my instruction for certificates to be followed up periodically; the question of regularity, I suppose, would depend on how I might characterise regular review but certainly in reviewing our caseload of a number of hundreds of cases that periodic enquiries would be made of the requesting agency to provide a status update. I'm not sure whether I could characterise that as regular; I could certainly characterise it as periodic.

MS BRANSON: It says in the same paragraph; the one that starts in December 2010:

5 *Following this, AGD also began to manually record in its database a follow-up date three months after the date of the issue of the certificate.*

The inference that I would have drawn from that is that the follow-up date was not in place earlier than December 2010 because of the words “following this AGD also began to manually record in its database a follow-up date”; is that a wrong
10 inference?

MS HARMER: No, that is correct and that is why I described these changes as being the first systematic review because a consistent follow-up date of 90 days was recorded. Obviously the duration of the requirement for a CJSC will vary on
15 particular circumstances and so 90 days would not always be appropriate given the range of circumstances in which a CJSC might be issued. It could be in place while a person is serving a substantial time of imprisonment but 90 days was the first systematic review whereas previously there were not systematic dates set of a particular duration but rather an ad hoc review in terms of reviewing the cases on
20 hand to determine in particular circumstances whether a particular matter ought to be revisited.

MS BRANSON: I think we’ve been told that there’s no policy document to guide delegates around issues of that kind; is that also your understanding?
25

MS HARMER: That’s correct.

MS BRANSON: So how would delegates know what to do and how could you be satisfied that delegates were doing what they were required to do?
30

MS HARMER: I imagine that the only way I could be satisfied is I’m currently the only delegate exercising those functions save those persons who would take on my duties during a period of absence. It is a small team and a very small number of staff working on these issues but you are correct, it relies on my personal satisfaction.
35

MS BRANSON: Thank you. The document then goes on:

40 *However, given the significant volume of CJSCs the practice of individual following up on cases proved inefficient.*

Can you just explain that to me?

MS HARMER: Well, the practice that we adopted after implementing the manual follow-up date of a set 90 days initially involved a case officer responsible for that
45 particular CJSC sending follow-up enquiries to case officers within the AFP enquiring as to the status of the investigation. The number of matters meant that there were obviously a large volume of emails following up on each of those

particular certificates and rather than sending individual emails in relation to each case we moved to a process of receiving a holistic spreadsheet which summarises the status of all matters in a single exchange and then reconciles them.

5 MS BRANSON: Do you have one of those spreadsheets with you, by any chance?

MS HARMER: I'm afraid I don't.

MS BRANSON: Would you be able to provide us with one?

10

MS HARMER: I can certainly look for one, yes.

MS BRANSON: What sort of information are you able to recall was in the spreadsheet?

15

MS HARMER: The spreadsheets identifies the – obviously the identity of each person subject to the certificate, their relevant identifiers, the date on which the CJSC was issued and it identifies the status of the matter and particularly whether it remains the subject of investigation or whether the matter has been referred for prosecution.

20

MS BRANSON: So it essentially told you the view of the Australian Federal Police about the need for the certificate?

25 MS HARMER: The Australian Federal Police or, indeed, if it had been referred for prosecution what had now become the views of the DPP but it summarises the status of the matter, that's correct.

MS BRANSON: Did you ever call for any files; do you go back and review whether you would have formed the same view as them as to whether a certificate remained required?

30

MS HARMER: In relation to each matter when I issue the certificate or I cancel it I certainly call for each of the files. In relation to the spreadsheet I do not personally review each of the files but the spreadsheets were reviewed by officers and then placed against our database which recorded that stage of the matter to review it.

35

MS BRANSON: You will see what I'm trying to get at; I see from what you tell me a fairly sound process for objective satisfaction about the issue but I'm searching for a sound practice to ensure objective satisfaction that it should stay in place because I haven't seen the spreadsheet but from what you're telling me it seems to me that it might be open to doubt whether that was enough objectively to support your view as opposed to letting you know what the Australian Federal Police and the Commonwealth DPP thought about it.

40

MS HARMER: Well, certainly it does let me know what the Commonwealth DPP and the AFP thought about the matter but I suppose what I would say in relation to

45

that is that they do provide information; that information is informative to me; it's certainly not determinative of my decision in the issue, cancellation or maintenance of a CJSC, but that being said, the AFP and the CDPP were, from my perspective, in my decision-making, of course, the competent authorities in terms of determinations
5 about the investigation of offences against the laws of the Commonwealth and the prosecution of offences against the laws of the Commonwealth and certainly, I did find their advice most instructive.

MS BRANSON: Can you remember an occasion when you called for further
10 information to effectively audit the appropriateness of the advice you were getting from the AFP or the Commonwealth DPP?

MS HARMER: I can certainly recall a number of occasions on which I've
15 requested additional information from the AFP and, less frequently, the DPP in terms of the issue of CJSC in the first instance to confirm their interest in continuing to investigate a particular matter, if it's correct.

MS BRANSON: Were you shown – you may not have been, Ms Harmer, but were
20 you shown the list of the 12 individuals who we identified to your department as being individual files we might look at with some care during this hearing?

MS HARMER: Yes, I was sent that list.

MS BRANSON: Can you recall whether you made any enquiries to the AFP for
25 further information about any of them?

MS HARMER: I'm afraid while I looked into the broad status of each of those
30 matters I couldn't tell you immediately whether I had made additional enquiries into each of those; certainly if I had done so the file note on the file of that particular CJSC held in the Attorney-General's Department would reflect that but I have to say I haven't checked the records in that particular regard.

MS BRANSON: That you would therefore think that with your colleagues here
35 from the Department, those file notes will be here today because presumably they got all the relevant file notes out with respect to those 12 individuals; do you understand that?

MS HARMER: No, I don't believe that's the case, no.

40 MR RUTHERFORD: Madam President.

MS BRANSON: Yes, Mr Rutherford.

MR RUTHERFORD: I think in your clarifying letter that you provided AGD was
45 not requested to provide information about individual cases as part of the now response to the notice. To that end Ms Harmer was not under an obligation to provide that information from our understanding.

MS BRANSON: Thank you, Mr Rutherford. If there are such documents on those files, Mr Rutherford, nonetheless, we would be very pleased to see them. Thank you. You will see then, Ms Harmer, it goes on in the document I'm looking at before the AFP now conducts its own internal review of individual cases at the investigation stage, and advises AGD when to cancel CJSCs accordingly; do you understand that to be a fair representation of the present position?

MS HARMER: In certain cases the AFP does provide advice on when it considers a CJSC should be cancelled, yes.

MS BRANSON: And you rely on what they advise or not?

MS HARMER: I draw on what they advise; as I said in some circumstances I might seek additional advice but certainly I do find their advice to be the primary source of advice that I would rely on in making my determination and subject to its accuracy yes, I would draw heavily on that advice for making my determination.

MS BRANSON: Yes. But by this stage, late 2011, the weekly and the monthly updates have ceased.

MS HARMER: Mm.

MS BRANSON: So is it the case you're then entirely reliant on the advice from AFP from its own internal review?

MS HARMER: It is the case that if those updates had not come through in spreadsheet format that, yes, I would then once again be reliant upon the advice of the AFP.

MS BRANSON: Thank you. Is there anything further you want to say on this topic before I release you, Ms Harmer?

MS HARMER: The only clarification that I should add is since the provision of this information to the Commission is that indeed in fact around the time of compiling this information those updates were resumed. Obviously there are a large number of persons who are working on these issues across the Commonwealth and that information had not been provided to my particular part of the department but it's now the case that that information in a consolidated form is being provided on a regular basis in addition to specific instructions into each matter once the AFP, or CDPP as the case may be, reaches a particular view.

MS BRANSON: Thank you, Ms Harmer. Actually there is one further thing. I've got another document which is headed Process To Clarify The Immigration Status Of Alleged People Smugglers In Immigration Detention Including Through The Issue Of A Criminal Justice Stay Certificate. I don't think it's dated. Do you know the date of the document or – approximately?

MS HARMER: I'm sorry. Could you give me – could you give me a reference number for the document? I'm not sure which you're referring to.

5 MS BRANSON: It's called Proposed Process To Clarify The Immigration Status Of Alleged People Smugglers In Immigration Detention.

10 MS HARMER: It has a – an – it appears to be an immigration document, so I couldn't tell you the date of its creation so – I believe it was created by the Department of Immigration. There is a reference in the footer that suggests some preparation around 15 December 2009. I certainly can't say that I saw it at that point. I was on a period of extended leave at that time but I would take from the Department of Immigration their advice on the time at which it was created.

15 MS BRANSON: Do you know if you ever saw it?

MS HARMER: I certainly have seen it. Yes.

MS BRANSON: Can you think when you first may have seen it?

20 MS HARMER: I couldn't tell you precisely but I believe – I certainly did review it in early 2011. I don't know whether I had seen it at a previous point but I could look into that.

25 MS BRANSON: Did you note when you were reviewing it that it makes no reference to juveniles, young people or to the Convention on the Rights of the Child?

MS HARMER: I don't know that I specifically noted that, no.

30 MS BRANSON: No. And you didn't draw that to the attention of whoever it was that was placing reliance on the document?

MS HARMER: No.

35 MS BRANSON: No. Thank you. Thank you, Ms Harmer.

MS HARMER: Thank you.

40 MS BRANSON: Now, is there anyone who wants to raise matters? I think you may want to raise some matters, Mr Colvin, before we go on. Is that right?

MR COLVIN: Madam President, if this is an appropriate time certainly there's a few matters that the AFP took on yesterday that we said we would seek to clarify for you and I can do that now.

45 MS BRANSON: Thank you. Yes.

MR COLVIN: Madam President, firstly, you asked questions around when we first became engaged with Dr Low and when he was – first provided assistance to the AFP.

5 MS BRANSON: Yes.

MR COLVIN: We caused a search of our records overnight. The first record that we could find on our information database is of the AFP utilising Dr Low on 27 September 2001 and that was actually in a people smuggling matter and that was the first use of wrist X-rays using the new Crimes Amendment Age Determination Act. I don't dispute that there – what you said yesterday that you believe we may have used him for other matters.

MS BRANSON: Other matters, yes.

MR COLVIN: I think that's consistent though with what I explained that that would have been transactional relating to the hospital making the decision that he was the best person. Well, we have no record of that before September 2001.

20 MS BRANSON: Thank you.

MR COLVIN: Madam President, you also took us to a document that was the matter of – I think it was a Northern Territory matter, R v Saprudin and Muhamad.

25 MS BRANSON: Yes.

MR COLVIN: This is a matter where the wrist X-ray determined the age as probably less than 19. I don't remember the exact terminology. I don't have it in front of me.

MS BRANSON: Yes. Something like that.

MR COLVIN: And you asked why we had proceeded to charge him.

35 MS BRANSON: Yes.

MR COLVIN: Again we've caused a search of records overnight to establish that. There was other evidence led in that matter. We actually had an identity card that was seized from Saprudin's possession showing his birth date as 1981, which made him 21 years at the time of the alleged offence. The nominal roll of DIAC, which is the roll that they produce on arrival, also had his date of birth as September 1981 consistent with – I would – I imagine that's probably from his identity card. He advised that he was 18 because that was what his mum told him that his age was and we know the radiologist report included that it was likely or possibly less than 19. I understand that on the day of the actual hearing the Indonesian consulate – an Indonesian consular officer provided the court school records which show his date of birth to be 1984, so not 1981 as on the identity card, and that was accepted by the

court on the balance of probability. So the reason that we proceeded, Madam President, is that on the balance of the information we had in front of us it was questionable his age and the identity card I would imagine was probably reasonably – would weigh heavily in our officers’ minds and that was why we proceeded. But,
5 as we know, the court accepted the evidence presented on the day.

MS BRANSON: Thank you.

MR COLVIN: Madam President, you asked some other matters which we took on
10 yesterday that I can help you with now, particularly around our policy and
procedures regarding the conduct of wrist X-rays and we’re aware of course that in
2001 – the law was changed which introduced wrist X-rays as a prescribed
procedure. In relation to the commentary from the Senate Committee and the First
15 Reading Speech, you asked about the wrist X-rays being an issue of last resort for us
to use. What we have found is we did have an AFP national guideline on taking
wrist X-rays to determine age and I believe we have provided that to the
Commission. It was initially generated in September 2001 and it has been updated
periodically since and it is actually going through a review at the moment, but I can
20 advise that – advise you, Madam President, that around the time of the wrist X-rays
coming into being as a prescribed procedure we did create a national guideline. I
will hasten to add though the guideline did not and still does not to this day reflect
wrist X-ray as a cause of last resort. It deals with – if we are doing a wrist X-ray
what the procedure should be. So I thought it was important to clarify that for you,
Madam President. Madam President, also you asked us in response to a letter from
25 the Commonwealth DPP from one of their Melbourne officers to their headquarters
where it made reference to a template – a statement template for Dr Low.

MS BRANSON: Yes.

MR COLVIN: We did cause some enquiries overnight on that. I can advise you
30 that AFP members recall attending the meeting with the Commonwealth DPP where
it was requested that Dr Low provide further details in his statement. I don’t have an
exact date for that. The AFP then provided Dr Low with a summary of the type of
information that was required and Dr Low, as I said yesterday, generated his own
35 statement incorporating this type of feedback. And that would be a normal process
of enhancing statements according to our view. And there is one final matter and I’ll
ask Mr Jabbour because it was one that you specifically spoke to him about.

MR JABBOUR: If I may correct the record. Yesterday you queried whether we
40 had – the AFP had ever consulted statisticians. I answer in the negative. I’m proved
wrong on that. We actually did in consultation with the DPP. Back in November of
2011 we did indeed make contact with a statistician to see if they could assist us with
this process and we then heard commentary from Mr Craigie yesterday in relation to
what eventuated thereafter, so just to correct the record we did indeed seek out
45 statisticians.

MS BRANSON: Remind me of the outcome, Mr Jabbour, would you?

MR JABBOUR: Unsuccessful to date.

MS BRANSON: In what sense unsuccessful? You couldn't find one or they couldn't help you or they declined to assist or something else, Mr Jabbour?

5

MR JABBOUR: No. We – in November 2001, together with the DPP and AFP officer met with a statistician to determine whether they could indeed assist us with this process. They were provided with some information from the Atlas and extracts from that. We then referred the matter back to the DPP and they pursued further enquiries, as I understand it, with other individuals. I'm not aware of the outcome of those enquiries.

10

MS BRANSON: Are you able to help us, Mr De Crespigny?

MR DE CRESPIGNY: Yes, Madam President. I discussed this with you yesterday. We had created spreadsheets which I believe have been provided to the Commission so our Perth office did research as to possible radiographers or sources of radiographers.

15

MS BRANSON: Yes. I recall that.

20

MR DE CRESPIGNY: And possible statisticians. I think three were identified as possible ones on the information which we had. A preliminary meeting was held between – we then decided that the AFP should take the primary lead because it involved engaging a witness. A preliminary meeting was held between an officer of the AFP and one of our officers with a particular statistician. It was only very preliminary. He indicated willingness to take it on. We then reflected on the matter as to how we could determine that that was the most appropriate statistician to consider this issue. As for - - -

25

30

MS BRANSON: Did you do that after receiving some preliminary advice from the statistician?

MR DE CRESPIGNY: No. We did it – we did it on the basis that we had three possible ones which we had identified. We reflected - - -

35

MS BRANSON: But you were meeting with one or you were meeting with the AFP without the statistician present?

MR DE CRESPIGNY: We were meeting with – this was a – an internal discussion within - - -

40

MS BRANSON: Discussion.

MR DE CRESPIGNY: - - - within in our office. And we reflected on it and two instances occurred. One was the Commission had indicated that it was going to ask medical experts to come along and provide evidence on the matter. The second thing

45

was that, upon reflection, we couldn't properly make a judgment as to who the most appropriate expert was to approach. It was really something where somebody with some forensic or scientific background should make that judgment. So our view was that we weren't capable of deciding who had the most appropriate qualifications and who could provide the best and most satisfactory advice.

MS BRANSON: And it then wasn't taken any further as you understand it.

MR DE CRESPIGNY: And it hasn't been taken any further.

MS BRANSON: Thank you.

MR DE CRESPIGNY: Thank you.

MS BRANSON: Was there any matters that anyone else wanted to raise? Yes, Mr Anderson.

MR ANDERSON: Madam President, there were a couple of matters that arose yesterday. You asked about the consultation within the department about the guardianship of the crew who claimed to be minors and when we discussed that with the Office of International Law. We raised that with the Office of International Law on 4 April 2011 and the Office of International Law then provided advice on 2 May 2011 and that advice has been provided to you.

MS BRANSON: We have that advice. But you specifically raised with them guardianship at that time?

MR ANDERSON: Well, the advice is in general terms. We did also consult the human rights branch of the department.

MS BRANSON: I'm sorry, Mr Anderson. I'm just trying to understand you. You said that guardianship was raised with OIL on 4 April. I just asked you to clarify that specifically you raised guardianship with them as opposed to seeking advice generally from them.

MR ANDERSON: No, sorry. We specifically – the advice was – that was sought was about Australia's obligations towards a crew who claimed to be minors so it did not go specifically to the point of guardianship.

MS BRANSON: Right. Specifically to guardianship. Yes. Thank you.

MR ANDERSON: It was about general advice. We did, however, consult the human rights branch which was not then in the Office of International Law – it was a different part of the department – as well as DIAC of course on the applicability of the Immigration Guardianship of Children Act - - -

MS BRANSON: Yes.

MR ANDERSON: - - - to people smuggling crew claiming to be minors when we were preparing the Attorney's response to you and this letter of 31 March.

5 MS BRANSON: Right. And you received advice that that Act didn't reach to these young people. Is that right?

MR ANDERSON: That's correct. Yes. There was further advice sought from the Office of International Law on the obligations under the Vienna Convention on Consular Relations following representations from the Indonesian Embassy about the possibility of Consular officials acting as guardians of crew. That advice was provided to us and – on 2 September. Now, we have not in fact provided – that was not a document that we disclosed so I apologise for that oversight. We can provide that here today if you'd like to see that.

15 MS BRANSON: Thank you, Mr Anderson. At the end of the day, has advice, to your knowledge, from your department been provided to either Minister McClelland or now Minister Roxon on Australia's obligations with respect to providing guardians to people who might be children who are not covered by the ICOG Act?

20 MR ANDERSON: Advice has not been provided to Attorney-General Roxon. Advice was provided – that issue was covered very briefly in submission to the Attorney covering his – the draft letter to you that he then signed on the 31st of March.

25 MS BRANSON: Yes. The - - -

MR ANDERSON: And you've seen – you've seen the nature of that advice, it was only fairly brief.

30 MS BRANSON: The letter of 31 March?

MR ANDERSON: Yes. I think you've seen it – the submission that went with that.

35 MS BRANSON: Thank you, Mr Anderson.

MR ANDERSON: The second matter. You asked us about the Greulich and Pyle Atlas and whether the department actually had a copy of that. When we were preparing the Crimes Amendment Age Determination Bill in 2001 as well as the Amendments to the Crimes Regulations 1990, after the prescription of wrist X-rays, we consulted with the Australian Institute of Radiography and that institute provided advice to the department on the use of wrist X-rays and they provided some details of the Greulich and Pyle Atlas. It's not clear, however, from available records whether we – the department itself actually considered the Atlas directly other than the parts that were drawn to our attention by the Institute of Radiography. That's the second matter. The third matter was just the literature search that was carried out. That's referred to in the Secretary's letter of 21 December. That, while it does refer to a literature search, is not intended to convey a formal scientific review of literature.

The process that we went through was to assess material that was provided by the Federal Police and by the Director of Public Prosecutions to the extent that material cited other sources regarding wrist X-rays and age assessment procedures. We then sought to access those, either online or through the departmental library. We then conducted searches also on – online searches to identify any other sources that we could and we have folders – not files, but folders – that are maintained within Mr Rutherford’s section, that contain all of the results of those searches, and those searches were primarily aimed at not wrist X-rays themselves, but at other methods that might be available or used internationally.

MS BRANSON: Are you speaking of electronic folders or hard copy folders, Mr Anderson?

MR ANDERSON: Hard copy folders.

MS BRANSON: Hard copy folders. Yes. Thank you.

MR ANDERSON: And in one further matter, just in terms of the discussion yesterday when you were asking Mr Rutherford about his – if it has been picked up in the media – him editing the Prime Minister’s question time brief. I just wanted to note that, in fact, that document is a document of the Prime Minister and the Department of the Prime Minister and Cabinet. Mr Rutherford suggested edits that might be made, but we don’t know what actually went to the Prime Minister. That’s a matter for the Department of the Prime Minister and Cabinet.

MS BRANSON: Yes, of course. Yes, thank you.

MR CRAIGIE: Madam President?

MS BRANSON: Yes, Mr Craigie.

MR CRAIGIE: You asked me some questions yesterday about document 36, which was a letter from Mr McCarthy of counsel to the acting deputy director in Brisbane.

MS BRANSON: Yes.

MR CRAIGIE: And I expressed some bemusement as to whether or not I had seen the letter. That matter was discontinued within the Brisbane office, so in fact, it’s not a letter that, in the ordinary course, would come up. In fact there would not have been a file coming up to me.

MS BRANSON: And you wouldn’t have expected the Brisbane office to draw to your attention the reports that were provided by Mr McCarthy on this issue that was so troublesome at the time, assessing age by reference to wrist X-rays?

MR CRAIGIE: It would depend on the judgment call made by the person in receipt of that letter as to whether they thought, in fact, it added to a general awareness that

we had as to controversy around the area, because that controversy has grown and been subject to a good deal of judicial comment since, so it would really be – what I would expect now and what I would expect then would probably be different things, but it's in the context of being before that cluster of cases and that's really towards
5 the last quarter of the year that perhaps things were coming to a head.

MS BRANSON: You can see now looking back, Mr Craigie, can you not, that what was of interest here was that we had a world-eminent biostatistician for the first time expressing views on the processes adopted by Dr Low?
10

MR CRAIGIE: Dr Low had been confronted with differing views on a number of occasions before within the courts and had been tested on – to that point, his view has been largely the view accepted. That position – that the tide, as it were, on that position, turned somewhat after this date.
15

MS BRANSON: We now know by looking at Professor Cole's report not only that – I think it's unchallenged – he's a world-leading expert on biostatistics, but he doesn't just express an opinion different from Dr Low's, he says Dr Low is wrong.
20

MR CRAIGIE: I think Dr Christie has also said that and has said it in contest in court, and there have been occasions on which – at least one occasion I can think of – where Dr Low, in the outcome of that contest before a court, was nonetheless preferred.
25

MS BRANSON: Dr Christie is not a biostatistician, I think, is he?

MR CRAIGIE: I can see that.

MS BRANSON: No. That's why I say this is the first biostatistician – report comes forward, and he attacks Dr Low's report directly on its statistics and says they're wrong.
30

MR CRAIGIE: Well, with the benefit of hindsight, it's the statistical method that is obviously the focus of controversy. That's certainly the case, and one would see it differently now as that was washed through the courts, that emerged in greater clarity.
35

MS BRANSON: Yes. I will seek constantly to keep in my mind that things are much easier seen in retrospect than they are at the time, but it is the case, am I right in thinking, that Mr McCarthy was a former employee of the Commonwealth Director of Public Prosecutions?
40

MR CRAIGIE: As you say it, I – yes. I remember he is. He was, in fact, senior assistant director in Darwin at one point.
45

MS BRANSON: Sorry, he was?

MR CRAIGIE: Senior assistant director running the Darwin office.

MS BRANSON: That's quite a senior position within your office.

5 MR CRAIGIE: It's a senior post that is not always occupied by people of great seniority for obvious reasons – remoteness and challenge – but he is a well-regarded and competent counsel.

10 MS BRANSON: Right. I raise that because there would have been no suggestion within your office that Mr McCarthy's views could be lightly brushed aside, having previously been holding no significant office in - - -

15 MR CRAIGIE: No. Not at all. And he would have been well-regarded in the Brisbane office which – I think, that's in fact now his home town.

MS BRANSON: Yes, thank you. I should just clarify something. I did say yesterday that I thought that the substance of the attack on Dr Low's reports had always been on his statistics. My colleagues have pointed out to me that that's not accurate, and I think we will later today look at a number of cases in which his reading of the wrist X-rays was different from that of other radiologists, so I apologise for saying something yesterday which I now understand is not correct. But I still think that the largest – the most substantial of the attacks, I think, was on his statistical method. All right. Shall we go back to the dreaded files of documents? I say again, but I'm going to try and speed up a bit today. Yes, I will do the best that I can. We were, I think, at the close of yesterday, looking at the document under tab 20 37. I think we can move on from there. Under tab 39, there's an email which I think is internal. Is it, Mr Craigie, to the Commonwealth Director of Public Prosecutions' office?

30 MR CRAIGIE: Yes, it is.

MS BRANSON: You stated 8 July 2011.

35 MR CRAIGIE: It is.

MS BRANSON: You will see there a statement in parentheses in the bottom of the largest paragraph:

40 *The doctor in question also expressed his reluctance to give evidence, as he has reservations about the use of G&P to determine age (he says you can't tell how old someone is from this).*

That was presumably noted within your office, was it, that we have yet another medical practitioner who says you can't tell age from a wrist X-ray?

45 MR CRAIGIE: That was something that I was unaware of. I've checked, Mr Sharp confirms he was not aware of it either – of this document or that observation.

MS BRANSON: And that's because there was no procedure within the office to centrally gather information about scientific opinion on the wrist X-ray technique; is that right?

5

MR CRAIGIE: There was no formal procedure, but certainly there's wide sharing around the office of matters that are adjudged important that reflect generally on the work that we're doing.

10 MR BRANSON: Right. But whatever that informal process was, it didn't bring this expression of view, this email, to the attention of Mr Sharp or yourself?

MR CRAIGIE: If I can jump two of your questions ahead, is it something that would have been better that had been brought to my attention and certainly Mr Sharp's, I think the answer is yes.

15

MS BRANSON: Yes. But it didn't come – at about the date of the email, didn't it come to the attention of either of you.

20 MR CRAIGIE: No.

MS BRANSON: Is the first time either of you has become aware of it?

MR CRAIGIE: Yes. Well, in my case, or Mr Sharp?

25

MS BRANSON: Yes. Mr Craigie.

MR SHARP: Madam President, I've checked my email system, I can't find a record of it and I have a large number of emails in my system, and I don't have a recollection of - - -

30

MS BRANSON: Right. You don't recollect hearing that this particular medical practitioner had expressed this view?

35 MR SHARP: I don't have a recollection. I can't put it higher than that.

MS BRANSON: Thank you. Under tab 40, we have the release. It's a media release, I think, Mr Anderson. Is it from the Attorney-General?

40 MR ANDERSON: I'm just calling - - -

MS BRANSON: And the Minister for Home Affairs and Justice?

MR ANDERSON: I'm just calling the document up now. Yes, that's correct.

45

MS BRANSON: It's dated 8 July 2011, it opens:

The Gillard government today announced stronger processes to help determine the age of individuals detained in Australia suspected of people smuggling.

5 It was the outcome of the work of the group that you chaired, Mr Anderson, is that right?

MR ANDERSON: That's correct.

10 MS BRANSON: About two-thirds of the way down the page, we have what the improved measures are to be:

15 *Under the improved criminal justice measures announced today, the Australian Federal Police will: offer dental X-rays to alleged people-smuggling crew claiming to be minors in addition to the existing process, commencing as soon as possible.*

It is the case, isn't it, Mr Colvin, that no processes were then in place to enable that to happen?

20 MR COLVIN: That's correct. There were no processes for dental X-rays. I think in the second step about seeking information as soon as possible, we obviously worked - - -

25 MS BRANSON: Let's deal with them one at a time, Mr Colvin, if you don't mind.

MR COLVIN: Okay. Sorry.

MS BRANSON: Yes. Processes weren't in place.

30 MR COLVIN: Correct.

MS BRANSON: I think Mr Jabbour was involved in trying to put them in place, is that right, Mr Jabbour?

35 MR JABBOUR: That's correct.

MS BRANSON: You ran into a number of obstacles on the way, I think?

40 MR JABBOUR: That's correct. We were – look, along the same lines, again trying to find facilities where there was a willingness to firstly take the image. We needed the – we devised, with the assistance of DPP, consent forms, because it wasn't regulated so it could only be done with the consent of the individual. We needed to ensure that we had those forms in compliance with DPPs advice and no, it was not a simple procedure to be able to effect immediately. We had certainly done the
45 research with persons we believed to be qualified to interpret the images, but there were challenges as to where we could go to obtain those images, whether we could

do it through a dental practice or whether it could be done in the hospital, so there were a number of logistical issues we needed to overcome.

5 MS BRANSON: Just to help me, can you turn your mind back and tell me how far advanced, if at all, on 8 July towards establishing a means whereby young people could have dental X-rays? For this purpose?

10 MR JABBOUR: We had certainly engaged with Dr Knott, Stephen Knott. Indeed, I had had a conversation with him. He had then provided supporting literature in relation to this procedure. That was provided to the DPP.

MS BRANSON: That was all along the lines of working out whether or not it was a procedure you could use at all.

15 MR JABBOUR: Yes. Yes.

MS BRANSON: I'm trying to concentrate on the next step.

20 MR JABBOUR: Yes.

MS BRANSON: Having decided you wanted it, how far advanced, if at all, were you in being able to find ways that if someone asked for one, you could have put the necessary arrangements in place?

25 MR JABBOUR: Well, at that stage, Madam President, we were not aware that we were likely to encounter some of the difficulties that we did in relation to finding practises willing to obtain the images and, indeed, then finding individuals who were prepared to assist in that process.

30 MS BRANSON: Is that because no steps had been taken as of 8 July 2011 to identify either those individuals or those practices?

35 MR JABBOUR: I think on our part, to be candid, there was probably a lack of understanding as to some of the opposition that we would encounter. In my - - -

MS BRANSON: Right. Is that to answer my question yes, Mr Jabbour? You hadn't taken any steps?

40 MR JABBOUR: That's – no, we had. We had certainly spoken with the gentleman in Perth who provided the information. We understood it was going to be quite a simple procedure, so we hadn't envisaged these issues. So there were certainly steps taken and it wasn't until we attempted to put it into practise, at that point, that we encountered these impediments.

45 MS BRANSON: Thank you. The second dot point is:

...take steps as early as possible to seek information from the individual's country of origin, including birth certificates, where age is contested.

This would have been another Australian Federal Police obligation, wouldn't it?

5

MR ANDERSON: Yes, that's correct.

MR JABBOUR: Yes.

10 MR ANDERSON: Correct.

MS BRANSON: What did you do at or about 8 July, either immediately before this announcement or shortly thereafter, to implement this?

15 MR JABBOUR: We had for some time been working closely with – we had liaison officers in Indonesia, AFP liaison officers based in Jakarta, and they had been working closely with the Indonesian National Police. We telegraphed through our liaison officers the need to obtain more documentary evidence to corroborate age of these individuals. The INP, the Indonesian National Police, indicated a willingness and ability to assist in that process. And then we tasked our members in post to work cooperatively with the Indonesian National Police to endeavour to collect evidence as it became available. Some of the challenges that we confronted there were availability of INP officers to assist us, particularly in remote locations where some of the individuals hail from, timeliness of responses, but also importantly compliance with the various Evidence Acts, whether it be the Foreign Evidence Act, uniform Evidence Act, of each jurisdiction where it applies, to be able to introduce those documents into evidence. And it became apparent that a mutual assistance request, a formal request via the mutual assistance regime was required and then lengthy delays were encountered. But we do have some afoot.

20
25
30

MS BRANSON: To summarise, some of the additional documents, you started to receive correspondence from the Commonwealth Director of Public Prosecutions saying, "Look, you better do more about this"; is that right?

35 MR JABBOUR: That's correct, yes.

MS BRANSON: Eventually, I think, you decided you had better send someone to Indonesia; is that right?

40 MR JABBOUR: We did that for a number of cases where we had some outstanding issues and we weren't able to get the level of traction that we were hoping for. So we did deploy an officer. We've done that on two separate occasions in recent times that I'm aware of to try and expedite the collection of material. That's correct.

45 MS BRANSON: Can you help me with the first date when you sent an officer to Indonesia?

MR JABBOUR: If I just return to my files if we do yes, do have a previous report.

MR COLVIN: Madam President, just while Mr Jabbour gets that - - -

5 MS BRANSON: Yes.

MR COLVIN: I will put it in the context that we actually have officers permanently in Indonesia who were routinely following these matters up. The decision to send an officer was to try and put more emphasis onto it with Indonesian police.

10

MS BRANSON: I understand that, yes.

MR COLVIN: And dedicate someone to it.

15 MS BRANSON: Perhaps - - -

MR JABBOUR: I apologise. It was certainly contained and I have an extensive report from that individual.

20 MS BRANSON: Is it possible that the first date was 21 November 2011 and the second 15 December two thousand – that he travelled between 21 November 2011 and 15 December.

MR JABBOUR: I think that's correct. Officer Wendall, yes, I think that's correct.

25

MS BRANSON: The delay between 18 July and 21 November is because you were seeking to exhaust the potential of the other arrangements; is that right?

MR JABBOUR: Well, there are other issues with that. It's a sovereign jurisdiction. We can't just attend Indonesia and make our own enquiries. We have to do it with the authorisation of the Commissioner of the Indonesian National Police and there are protocols that one must follow. We needed to collect – we needed to collate all the information required, transmit that to the Indonesian National Police, give them an indication of the evidence that we required and then seek their authorisation for a member of the AFP to travel in company with them throughout the archipelago to collect the information required. That's correct.

30

35

MS BRANSON: Are you able to tell me when the process of satisfying all those requirements commenced?

40

MR JABBOUR: Commenced? No, I would have to take that one on notice. I don't have that information with me but we certainly can do that.

MS BRANSON: Were you aware by the time that your first officer left that Defence representatives had been travelling to Indonesia?

45

MR JABBOUR: Yes, yes. We have been aware of that for some time that they have the ability to travel and collect information but, as was alluded by the DPP yesterday, we don't typically – DPP, typically, doesn't challenge the admissibility of the evidence presented by defence counsel.

5

MS BRANSON: We may look at that in a moment, Mr Jabbour. Yes.

MR JABBOUR: Sure. But we certainly must comply with the Evidence Act, as I've indicated, and so we must ensure that we follow those procedures to ensure admissibility before the court.

10

MS BRANSON: It's slightly peripheral to current purposes, Mr Craigie, but is it your view that the uniform Evidence Act is applicable to evidence around age determination?

15

MR CRAIGIE: Yes.

MS BRANSON: What provision of the uniform Evidence Act? I raise it for this reason. Section 140 - - -

20

MR CRAIGIE: I think I might pass that to Mr Sharp.

MS BRANSON: Mr Sharp.

MR SHARP: No, Madam President, it's not my view that that's applicable provision. The evidentiary provisions for - - -

25

MS BRANSON: If it's not your view, you need not go – it's not my view either, Mr Sharp, no.

30

MR SHARP: No, it's certainly not our view.

MS BRANSON: No. Thank you.

MR CRAIGIE: Well, I'm wrong. And can I happily concede I'm wrong. I have never run one of these cases.

35

MR SHARP: I should qualify that. Save for any matters that are held here in the ACT.

40

MS BRANSON: There is a curious provision – a curious feature of the uniform Evidence Act and the Attorney-General's Department might like to note it, that it talks about how evidence – what evidence is required in section 140 in a civil proceeding, and it talks about what's required in a criminal proceeding where you're proving things beyond the reasonable doubt; there is no provision that I can identify at all that says what is required to prove in a criminal proceeding something on the balance of probabilities.

45

MR CRAIGIE: However you classify this proceeding; that's another interesting question, I suppose.

5 MS BRANSON: Yes. But I think Mr Sharp is right, that there's not a provision in the uniform Evidence Act that covers it.

MR COLVIN: Madam President, if I may, and I will stand corrected, but certainly, from our perspective, whether it was right at law or otherwise based on what you've just said, we have always worked on the basis – and having been advised differently,
10 that we should be obtaining this evidence according to the requirements set out in the uniform Evidence Act as they apply in different jurisdictions. And that is a relevant factor to what I think you will reasonably see as delays in the process.

MS BRANSON: Yes. Thank you. If it's not the uniform Evidence Act it would be
15 the common law of Mr Colvin, yes.

MR SHARP: Certain, Madam President, there would be a requirement in all jurisdictions for it to comply with the requirements of both the Mutual Assistance in Criminal Matters Act which requires it to be in certain forms.
20

MS BRANSON: Thank you. So let's move on to some further documents. Under tab 42 is the letter that I wrote to the Attorney-General on 14 July. I think it's probably most efficient to look at that when we have the Attorney's response, Mr Anderson, so we will wait till we get further on in time to do that. We then come to
25 some documents which I've sought to summarise earlier as being requests by the Commonwealth DPP for greater action from the Australian Federal Police around getting information from Indonesia. Under tab 45 we have a document which is dated Friday, 12 August 2011. Refers to a Commonwealth agency's meeting on people smuggling crew issues, supporting a senior officials' committee teleconference; do we all have that?
30

On page 2 of that document – and we need not delay with it long – under final dot point under X-rays, we can see then that by then you had some arrangements in place for dental X-rays, I think, Mr Jabbour. But the bottom:
35

Commonwealth DPP noted that comprehensive submissions were being prepared by defence lawyers questioning wrist X-rays and that it was necessary to revisit issues associated with the evidentiary strength of X-rays.

40 Mr Craigie, can you or any of your colleagues tell me what was done about that?

MR CRAIGIE: I think Mr De Crespigny could tell you how we responded to that.

MR DE CRESPIGNY: Madam President, I believe it was referred to yesterday we
45 had received the Cole and Aynsley-Green report. And they did raise concerns with us. We proceeded to – in two separate matters, one in Brisbane and one in Perth – to conference – Dr Low, and - - -

MS BRANSON: This is when you asked Dr Low to reassure you that what he was doing was fine; is that right? Yes. Thank you. Under focus interviews we have – and this, of course, was the final point of the new procedures – I probably should not have moved away from the press release quite so quickly. But that indicated that, in fact, there were problems on that aspect of that new procedure as well, doesn't it?

MR DE CRESPIGNY: That's correct.

MR COLVIN: That's right, Madam President. We made enquiries to try and arrive at a point that we thought we could conduct these focussed interviews and while we're still keeping that as an open minded enquiry to try and establish something, it was unsuccessful at the time.

MS BRANSON: So we can conclude that more than a month after the announcement of the new improved procedures we still couldn't get them working.

MR COLVIN: That's correct.

MS BRANSON: Was there ever a time when we could, Mr Colvin?

MR COLVIN: Well, I don't believe we have conducted any of these focussed interviews since the 8 July announcement.

MS BRANSON: Thank you. Under tab 46 we have the report of the case in the local court of Bankstown in front of Magistrate Still, the case of the individual there named. I don't want to go through it in detail. It's the case, I think, where her Honour gave an ex tempore judgment favourable to the Crown. But may be useful just to draw attention to page 18 because it's a time where Dr Low was cross-examined about his statistical qualifications. So he is asked, at the bottom of page 18:

Doctor, in terms of your understanding of statistics and how they apply in cases such as this, where is that derived from?

And the answer is:

Statistics is – the statistics we're dealing with today, there's two kinds of statistics. There's relatively basic statistics. This is a relatively advanced statistic which I don't have the ability to look at.

I think he might have meant to say there is a relatively advanced statistic that he doesn't have the ability to look at.

This is basic statistics which is something, as a science student, I learnt in final year of high school/first year university. I'm also, as you can see from my credentials in my documents, what's called academic radiologist. So beside [sic] being someone that looks at X-rays when they go to a clinic, I spend my

life in studying the science of radiology. Actually, I'm a Professor of radiology here at the University of Western Australia. And part of that job is looking at scientific papers. Now, everything that is scientifically written has to be scrutinised and we have to look at the measurement. Again one more thing
5 besides being a Professor, I'm also a sub-editor for the college journal.

So if someone writes something wonderful, and new and sends it to us to look at or for something that couldn't be subscribed – so this has come along with it. So for example, someone might say, "I managed to cure 50 per cent of people with X-disease," and the statistics will try and show whether there's actually a worthwhile improvement or not a worthwhile improvement.
10

And there's something more that's not transcribable. So I think the substantive evidence then is that he studied statistics as part of science at high school and at first year university. And he has done some consideration of validity of information in his practice as a radiologist and as subeditor of a college journal. Then he goes on:
15

What we see today – which is normal distribution – is quite basic statistics which I'm well aware of, and I apply every day and my knowledge goes a bit further than that.
20

Now, of course, the question put to him was not whether he understood about a normal distribution which is, of course, exceedingly basic statistics, but whether he knew how to understand them and how to apply them in a case such as this. There's a real difference, of course, in knowing, once you've got a normal curve, what you can read from it, and knowing when it would be useful to generate one, and how to generate one and what information you would derive from it. And it's not, I think, we can see, something he really addressed in his answer. I raised it, of course, because of Professor Cole's qualifications in statistics and judgments being made as to who might know the more about statistics. Is there any comment anyone wants to make about that?
25
30

MR CRAIGIE: The only comment I will make is that – just to note that that was also a case where Dr Prelog had appended to her report a report – and I don't have that report – of Dr Cole. So in one sense the – a fairly open competition of the views was ventilated before the magistrate, although no, Dr Cole was not called.
35

MS BRANSON: This may be something that you were not aware of, Mr Craigie, but let me ask you. Were you aware that ultimately cases for age determination diminished if not ceased to be run at all in the Magistrates' Court at Bankstown when people prefer age in front of a District Court?
40

MR CRAIGIE: I'm generally aware that there was a change in the pattern where matters were run.
45

MS BRANSON: Did you happen to read the transcript of this hearing where the magistrate gave an ex tempore judgment immediately at the close of evidence?

MR CRAIGIE: Not until yesterday, quite frankly. No.

MS BRANSON: No.

5 MR CRAIGIE: Well, in fact, I didn't have it until the day before.

MS BRANSON: I just draw it to your attention. It might explain why people ceased to run their age determination cases in that court.

10 MR CRAIGIE: I wouldn't comment on that. The magistrate appears to have given the matter earnest consideration as she saw appropriate.

MS BRANSON: She proceeded immediately to an ex tempore judgment in very short terms.

15

MR CRAIGIE: I've seen Supreme Court judges do that, too. It doesn't necessarily undermine the validity of what they've done.

20 MS BRANSON: No. The next document under tab 47, which is dated 16 August 2001 – I stress the date – you will see is a letter on the letterhead – on your letterhead, Mr Craigie, sent to a Ms Belinda Lonsdale in certain chambers in Perth. I draw your attention to paragraph 6 on page 2:

25 *The Commonwealth DPP is not aware of any matters in which Dr Vincent Low's expert evidence has been discredited.*

It might have technically have been true, but do you think it appropriate advice at this time for your office to be providing to a defence counsel who seems to be looking for disclosure?

30

MR CRAIGIE: Well, at that time it was technically true. It was before - - -

MS BRANSON: Other evidence had been preferred, but I don't think, at this stage - - -

35

MR CRAIGIE: Well - - -

MS BRANSON: - - - there was a finding that his evidence was unreliable.

40 MR CRAIGIE: That's not quite the same thing.

MS BRANSON: No.

45 MR CRAIGIE: If one looked at the balance of where he was accepted and where someone else was accepting, at that time that was certainly a way that one could express it.

MS BRANSON: I've acknowledged that it was technically true. I asked you, nonetheless, what you thought about that advice going out from your office on that day.

5 MR CRAIGIE: It's – well, again, it's another benefit of hindsight characterisation. Now, 10 months later or more – not quite that – eight months later, one would have a different view about it.

10 MS BRANSON: You will recall that September 2010 was when your office received, I think, the shared – had shared with it by DIAC the research around wrist X-rays.

MR CRAIGIE: Yes.

15 MS BRANSON: The Federal Police had done some research of their own, and I assume you saw that. You may not have been aware of what IOMS has said. Were you aware of that?

20 MR CRAIGIE: Not – not specifically, no.

MS BRANSON: We know that your office, but not you, were aware that at least one radiologist was saying that he couldn't determine age from a wrist X-ray. Mr Sharp had done his paper then, where he examined quite a lot of material. Dr Christie had given evidence, so – there was a report from Dr Christie had been provided at least I think by mid-March to your office. And you would be comfortable with an officer – with that background, comfortable with an officer on 25 16 August 2011 telling a defence counsel that the Commonwealth DPP wasn't aware of any matters in which Dr Vincent Low's expert evidence had been discredited?

30 MR CRAIGIE: I would not have been comfortable with it being expressed in those terms. I – frankly, I would have been more cautious, in any event, but the reverse doesn't necessarily - - -

35 MS BRANSON: No.

MR CRAIGIE: - - - or doesn't arise. It certainly doesn't mean that my conservative view that it shouldn't be put that baldly supports the view that he had been discredited.

40 MS BRANSON: No.

MR CRAIGIE: And, of course, as I've indicated, we already had, at that stage, developing concerns, and then, of course, we had the four cases on the – the judgments on 8 September, 25 October - - -

45 MS BRANSON: They were later, of course.

MR CRAIGIE: - - - even up into November.

MS BRANSON: If this had come to you, Mr Craigie – I ask you to hypothesise. If
5 this had come to you on 16 August 2011, I think you would have understood that
someone was making requests for disclosure, wouldn't you?

MR CRAIGIE: Yes.

MS BRANSON: Would you have added, if you expressed it that way, that, “We
10 now make disclosure of some scientific information of which the Commonwealth
Director of Public Prosecutions is aware that reflects on the reliability of wrist X-rays
for age determination,” or something to that effect?

MR CRAIGIE: I suspect that if we had had a discussion in head office on 16
15 August 2011, it might have accelerated our concerns and might well have produced a
different response, yes.

MS BRANSON: We have, under document 48 – at least, I have – I think you have
20 transcript of the hearing in front of Magistrate Hogan in the Magistrates Court of
Western Australia. This I think may have been the first, as it were, full-frontal attack
on Dr Low's evidence; is that right?

MR CRAIGIE: Yes, I think that's a fair characterisation.

MS BRANSON: And it led findings I think that his evidence was not to be accepted
25 in the face of Dr Cole and Dr – Professor Cole and Dr Christie; is that right?

MR CRAIGIE: It was certainly that their evidence was to be preferred.

MS BRANSON: Thank you.
30

MR SHARP: Madam President, perhaps I should just qualify that. This is the first
occasion on which Dr Cole, of course, had been raised.

MS BRANSON: Professor Cole, yes.
35

MR SHARP: Professor Cole, sorry. Dr Christie, of course, had previously been –
had given evidence in matters where Dr Low and Dr Christie's evidence had been
40 tested.

MS BRANSON: Yes, of course. But - - -

MR SHARP: It's the first time – Professor Cole.

MS BRANSON: Yes. Yes, that's quite right, Mr Sharp. Thank you. But I identify
45 it as a full blown attack - - -

MR SHARP: Yes.

MS BRANSON: - - - because it seemed the most concentrated, focused attack directly on Dr Cole's qualifications, I think, to say what he was – say what –
5 Professor – sorry, Dr Low's capacity to say what he was saying. All right. If we go to tab 49, we have the copy of the letter that was, in fact, sent to the Minister for Immigration and Citizenship dated 19 August 2011. I think everyone would have been shown that letter somewhere around the date of its receipt; is that right – by the Department of Immigration? You look perplexed, Mr Craigie. Have you never seen
10 it before?

MR CRAIGIE: I won't make claims about how many agencies I deal with and how many trees have died across my desk, but I have no independent memory of it. May have been - - -

15

MS BRANSON: Do you think this might be the first time you've seen it?

MR CRAIGIE: I – I simply wouldn't speculate. I am generally aware that there have been these sorts of discussions. Mr De Crespigny may or may not recall
20 whether we, in fact, had that letter.

MS BRANSON: Mr De Crespigny, do you know whether it came to you – came to the director?

25 MR DE CRESPIGNY: Certainly we received – we received a copy of it. I'm not certain I – and - - -

MS BRANSON: Some time around August of 2011?

30 MR DE CRESPIGNY: Yes, I – Madam President, I can't tell you the date when – when we did, and while senior members of the office would have been briefed about it, whether they were provided with a hardcopy or just have been provided with the overview of it, I can't tell you.

35 MS BRANSON: Thank you. Mr Colvin, did it come to your attention, or someone in the Australian Federal Police, so far as you know, in about August of 2011?

MR COLVIN: Madam President, we're not sure that it did. Certainly, Mr Jabbour and I aren't aware of it. That's not to say it didn't come in the organisation
40 somewhere. It's consistent with other material at the time that was calling into question the procedure. But I don't recall – I don't believe have a record of the document itself coming to us, and I will stand corrected if that's wrong.

MS BRANSON: It came to the Attorney-General's Department quite promptly I
45 think, didn't it?

MR ANDERSON: Yes, it did.

MS BRANSON: Do you happen to know when, Mr Anderson?

MR ANDERSON: 25 August, I think.

5 MS HARMER: Yes.

MS BRANSON: I raise it because it seems to me, in the context, to be a very significant piece of correspondence. It's signed by the President, or the convenor, of four separate learned colleges or groups: the Australian Paediatric Endocrine Group, the Royal Australia and New Zealand College of Radiologists, the paediatric imaging reference group of that college, the Australian and New Zealand Society for Paediatric Radiology and the Royal Australasian College of Physicians. Dr Low himself, I think, is a member of the Royal Australia and New Zealand College of Radiologists, not I think of the paediatric imaging reference group of that college, and if we go to the first page, we find in the middle of the page:

20 *We consider that X-rays of teeth and wrists to assess skeletal maturity should be used only when a therapeutic use has been established between a doctor and patient. We consider it unethical to expose a young person to X-rays for purely administrative reasons. X-rays of teeth and wrists should not be used as evidence in a court of law, because the age assessments obtained by these means are very inaccurate.*

25 And it goes on specifically to focus on the need for consent, informed consent, for X-rays:

...where X-rays are used for non-clinical purposes, such as immigration control –

30 drawing attention to the fact that the practice would be unlawful in the United Kingdom, that the Greulich and Pyle method, which is a technique for evaluating the bone age of children by using a single frontal radiograph of the left-hand wrist:

35 *...is unreliable and not validated for the purpose. The methods were designed for assessment of skeletal age knowing the chronological age, not the reverse –*

40 and then pointing out the population base upon which the GP Atlas is framed, and pointing out that, for these reasons, the practice is not used by the United Kingdom and other European governments, nor the International Olympic Committee or FIFA. So if you had seen it, it would have caused you some concern, Mr Craigie, wouldn't it?

45 MR CRAIGIE: Many of those points, in fact, simply highlight that the Australian Parliament has taken a different view. The anxiety of the medical profession not to use procedures for other than therapeutic reasons has been known for a long time. I – in fact, I think it was directly addressed by the Attorney in his response to your letter, and there are a number of instances where not only the Australian Parliament,

but Parliaments of the States, override that particular traditional – and saying that is not to say I disrespect it, but that traditional view of medical practitioners. So - - -

MS BRANSON: But what about the unreliability?

5

MR CRAIGIE: In that sense, I'm not surprised. If – I note the eminence of the people who signed the document, but it represents a commentary on use – a fundamental difference of view in the Parliament creating this mechanism and, in effect, overriding that concern. As to it being regarded as unlawful in the United Kingdom, I've seen that expressed on a number of occasions. I don't know in what sense it was said to be unlawful in the United Kingdom. I'm aware, for instance, there are a number of practices that we use here – one that I can think of immediately is the use of telephone-intercept evidence, which would be unlawful in the United Kingdom, largely because of the impact of the United Kingdom's adherence to certain European conventions. I wouldn't be at all surprised if that's one of the reasons it's unlawful in the United Kingdom.

It may well have led to either related or free-standing legislation in the United Kingdom. The Greulich and Pyle method is described here as unreliable and not validated for this purpose. Of course, the Greulich-Pyle Atlas was created, in effect, by a historical accident that people were able to do such things in those days, and they left behind a - - -

MS BRANSON: But for the reverse purpose, you understand.

25

MR CRAIGIE: They left behind a legacy with which we work as a result of being given by the Parliament access to wrist X-rays; it wouldn't make sense other than an extremely limited and probably useless mechanism otherwise. The observation as to the GP method being based on white, middle-class Americans is part of the caveat that's within the Atlas, and, in fact, part of the caveat which, I might say, we apply with even greater rigour now, and you would have seen the comments that I made recently about it that it is not – that we have never regarded it as determinative; it is an indication of maturity, no more and no less, and, in many instances, its principal value has been as the mechanism is very sparse – and, in fact, in many instances, whether or not you apply the uniform Evidence Act, they're not of a kind that would convince a court that a person was not a juvenile.

It's very often the only tool that I have had to terminate proceedings, that has resulted in more than – now more than 50 young people being sent back to Indonesia. So I won't go on about it, but that document simply tells me all that one would expect – I read the UNICEF report. It said some very critical things about dental X-rays that said, in effect, that the Greulich-Pyle method was the least worst available, but it was available and of some utility, albeit limited. So, that's – I am not dismissive of the letter, but in a sense, it simply confirms what has been my developing response.

45

MS BRANSON: As at this state – and I know you don't think you saw this letter at this state – but in the - - -

MR CRAIGIE: I may well have.

5

MS BRANSON: Yes. In the second half of 2011 had you actually seen a report written – personally seen a report be written by Dr Low?

MR CRAIGIE: Yes, I had.

10

MS BRANSON: You were aware that he was calculating probabilities to two decimal points of someone being at a particular age, weren't you?

MR CRAIGIE: In a general sense, yes.

15

MS BRANSON: Thank you. We will – the answer by the Attorney is behind tab 51, the answer back to the various college presidents. Is it fair to assume that the first draft of the letter came from your area, Mr Anderson?

20

MR ANDERSON: That's correct.

MS BRANSON: Yes. Substantially changed by the Attorney, or substantially signed as drafted?

25

MR ANDERSON: I can't advise.

MS BRANSON: You can't remember from looking at the final whether it looked like it was – was it drafted by you or drafted by someone else?

30

MR ANDERSON: It was drafted by officers who work for me. If you want us to take on notice whether it was substantially changed, we can do that.

MS BRANSON: No. I don't want to unless you know, but I thought you – it wasn't Mr Rutherford who drafted it, for example?

35

MR ANDERSON: It would have been drafted by officers in Mr Rutherford's section.

40

MS BRANSON: All right. Are you able to say, Mr Rutherford, looking at it now, whether it seems to reflect the draft written?

MR RUTHERFORD: It – Madam President, without having gone through the draft to confirm every single word, it does look in accordance with what we provided as a draft.

45

MS BRANSON: Thank you. It makes reference to the Guidelines for Age Estimation in Living Individuals in Criminal Proceedings, developed by the Study

Group on Forensic Age Estimation of the German Association of Forensic Medicine, which you say that – well, sorry – which the letter says that the working group considered whilst it was considering steps that could be taken to ensure the courts had the best available evidence when assessing age. Do you happen to have the
5 guidelines with you, Mr Rutherford?

MR RUTHERFORD: We do have the guidelines. I would need to locate the folder that I've got on my desk.

10 MS BRANSON: They were probably at the back of our list of documents. Is that right?

MR RUTHERFORD: They're in the documents – much easier to access online.

15 MS BRANSON: Just check that they are, Mr Rutherford.

MR RUTHERFORD: Yes, Madam President. We have a copy of the guidelines.

MS BRANSON: So you will see on what, on my print of it, on page 2:
20

There's wide agreement about the most suitable methods presently available.

Do you see that?

25 MR RUTHERFORD: That's correct, Madam President.

MS BRANSON:

30 *These are physical examination and determination of anthropometric measurements – height, weight, constitutional type, inspection of the signs of sexual maturation and identification of any developmental disorders that might affect the age appropriate development, X-ray examination of the left hand, examination by a dentist with determination of the dental status, and X-ray study of the dentition.*

35

It goes on:

These methods should be used together to increase the diagnostic accuracy and to improve the identification of any relevant development disorders.

40

Do you see that? And on the next page under Examination:

45 *Each part of the examination shall be performed by a specialist experienced in setting up expert reports and participating in regular ring experiments, see below, for quality assurance. The coordinating expert has to give a comprehensive assessment on the basis of the different parts of the evaluation performed by the respective specialists.*

Then under The Report:

5 *The essential forensic aspect of an expert report is giving the most probable age of the individual examined and/or the degree of probability that the stated age is the actual age or that the individual's age is above the relevant penal age limit. The expert report has to quote the reference studies on which the age estimation is based. For each feature assessed, the report must state the most probable age, including the range of scatter of the reference population.*

10 There's an academic reference:

15 *What must also be noted is that this range may increase further by an empirical observer's error. The age-related variations resulting from application of the reference studies in an individual case, such as different genetic/geographic origin, different socioeconomic status and their potential effect on the developmental status (for the impact of socioeconomic factors and ethnic origin on skeletal maturation, see another publication by Schmeling and others) as well as diseases that might affect the development of the individual examined must be discussed in the report, including their effect on the estimated age. If possible, a quantitative assessment of any such effect should be given. The individual's most likely age is estimated on the basis of all partial diagnoses and a critical discussion of the individual case. When the age estimation arrived at by the different methods are summarised, it is generally assumed that the range of scatter is reduced. However, this reduction can only be assessed quantitatively at present.*

And under Quality Assurance:

30 *The committee of the study group organises annual ring experiments for continual quality assurance. An expert may also request an evaluation of age estimation before the report is written.*

The recommendation that was announced as the improved method fell quite a way short of what is actually set out in that paper, doesn't it, Mr Rutherford?

35

MR RUTHERFORD: I would suggest, Madam President, that we considered the report as part of the working group process, and the advice that we provided to the Attorney-General in the context of this letter was that there were aspects of that – those guidelines that were persuasive.

40

MS BRANSON: The last words, Mr Rutherford?

MR RUTHERFORD: They were persuasive about the procedures that were used and that that did not necessarily mean that we adopted the guidelines per se.

45

MR ANDERSON: And if I might add to that, Madam President. Obviously they recommend procedures that we decided would not be appropriate to pursue, such as the paediatric examinations. And - - -

5 MS BRANSON: Yes. But also such as quality evaluation, such as more than one person and such as getting a group to work together on the various methods that were used.

10 MR ANDERSON: That's correct. And while they recommended those particular approaches, it's also worth noting that they were not saying the wrist X-rays are fundamentally unreliable, contrary to the other views that have been put as well. So we took some comfort from the fact that here was a reputable organisation's document saying again that the wrist X-rays could in fact be one of the various techniques that could be used.

15 MS BRANSON: Do you know, Mr Anderson or Mr Rutherford, whether at the time that you were concentrating on the publication by Schmeling we've just looked at you became aware that Mr Schmeling and others – not the same group of others – one of the same group of others, but not the – a smaller group – had published a short communication Age Estimation of Unaccompanied Minors that was available online
20 on the – at least by 9 March? It was published in the Forensic Science International.

MR RUTHERFORD: Look, sorry, Madam President, to my mind specifically at that time I'm not sure - - -

25 MS BRANSON: You're not sure.

MR RUTHERFORD: - - - we were specifically aware of that.

30 MS BRANSON: No. I just draw it to attention because, apart from stressing the need for statistical parameters of variation to be made very plain, which I think is the answer to the issue about whether they are reliable, Mr Anderson, Professor Schmeling and the others expressed the view the skeletal development of hand bones is completed at age 17 years in girls and at the age of 18 years in boys, which, for the
35 reasons we noted yesterday, is a very important conclusion. I referred yesterday to an article, and I don't think I asked you, Mr Rutherford or Mr Anderson, whether you identified it. It was referred to somewhere else. An Appraisal of the Greulich-Pyle Atlas for Skeletal Age Assessment in Pakistan. Did your research turn that up, Mr Rutherford?

40 MR RUTHERFORD: I believe we're aware of that.

MS BRANSON: And you would be aware that the conclusion was that this study suggests against the applicability of the Greulich-Pyle Atlas to Pakistani children.
45 Were you aware of that?

MR RUTHERFORD: I was aware of that.

MS BRANSON: And that in males – Pakistani males – maturity was advanced during adolescence, so that they would be expected to read more mature than the Greulich-Pyle Atlas in their adolescent years.

5 MR RUTHERFORD: We were aware of that, Madam President, together with other studies suggesting retarded development from other populations.

MS BRANSON: Right. But so far as we're interested in what might be the case as we move into Asia, you're at least aware that in Pakistan it had been found that the
10 Greulich and Pyle Atlas wouldn't be reliable and it would tend to overestimate the age of the Pakistani youths.

MR RUTHERFORD: From that particular study.

15 MS BRANSON: Yes. And that the same had been found with respect to Turkish youths, which is apparent from that same study.

MR RUTHERFORD: I think it's fair to say, Madam President, the Attorney-
General's Department doesn't hold itself out as a scientific body evaluating quality
20 of the studies. We seek advice from other agencies to help us with those sorts of judgments.

MS BRANSON: And were you at this time aware that Sir Albert Aynsley-Green
25 had provided a report which said that 50 per cent of normal boys will have achieved adult appearance in their wrist by X-ray at the age of 17?

MR RUTHERFORD: I would have to check exactly what time we became aware of Aynsley-Green's study.

30 MS BRANSON: I think we referred yesterday to some other studies that spoke of people of Asian ethnicity tending to be skeletally mature in their adolescent years. Do you recall that?

MR RUTHERFORD: Probably, yes.
35

MS BRANSON: Yes. Mr Anderson, to your knowledge, was either Attorney-
General McClelland or, more recently, Attorney-General Roxon provided with any
40 précis of the scientific literature that was known to the Attorney-General's Department on this issue?

MR ANDERSON: I don't believe that we actually provided them with a detailed
45 précis of the scientific literature.

MS BRANSON: A non-detailed précis, Mr Anderson?

MR ANDERSON: There have been a range of discussions with the offices of
ministers as well as written documentation provided and, of course, the question of

the reliability of the X-rays was a matter commented about in the media and so we had discussions in relation to that. But I don't believe that either orally or in writing we actually had a, as I say, a detailed précis of the scientific literature. The questions were more around is this actually – is this an appropriate technique.

5

MR RUTHERFORD: And can I just supplement that, Madam President. Once again, as Mr Anderson has flagged, the focus was on the newer procedures, rather than full evaluation including a review of the wrist X-ray material as to whether we would continue to do that.

10

MS BRANSON: You're aware that as early as July 2011 I requested the Attorney-General to take – let me just turn up the letter. On 14 July 2011 I wrote to the Attorney expressing concern in the context of the Convention on the Rights of the Child about reliance on radiographs for the purpose of determining age, wrote at some – but relatively modestly, at some length about concerns about the accuracy of reliance on the Greulich and Pyle Atlas of skeletal development for the purpose for which it was being used and concluded by saying:

15

Given the serious nature of the potential breaches of the human rights of children, I request that you inform me by Friday, 5 August whether you will task an independent person or body with considering whether proper and reliable age assessment procedures are being conducted for Indonesian nationals claiming to be minors who are on remand or who have been convicted.

20

25

Did it occur to anyone, Mr Anderson, that for the Attorney-General to give proper consideration to that he should be advised of the available scientific literature touching on the use of wrist X-rays for age determination purposes at the age of 18?

30

MR ANDERSON: I don't believe that the Attorney-General actually needed to be advised of every piece of scientific literature. What the department provided him was advice as to the fact that there are differing views on the reliability of wrist X-rays and we provided him a range of commentary about that aspect in particular. He also, of course, had the option of calling for additional information if he so chose, and that's one of the options that was put to him in the submission.

35

MS BRANSON: You were alert, were you not, as others have expressed it today, that there was a growing appreciation of the need for concern about the use of wrist X-rays as they were being interpreted to establish age?

40

MR ANDERSON: Yes.

45

MS BRANSON: Yes. And that there were some young people who had been found to be adults by that procedure who, at the date of this letter, were probably serving sentences or being held on remand as a result of evidence about which growing concern had been developing?

MR ANDERSON: I certainly would have been aware that there would have been people who contested their age and – but who were subsequently convicted following an age determination hearing, part of the evidence for which would have been a wrist X-ray.

5

MS BRANSON: And you yourself had seen or were alert to the scientific criticisms of the kind that we've been discussing over these two days?

MR ANDERSON: Yes. I was alert to those.

10

MS BRANSON: Did the possibility of breaches of Australia's obligations under the Convention of the Rights of the Child occur to you?

MR ANDERSON: Yes, it had certainly occurred to me and we had been for some time having discussions with other agencies, such as the DPP, as to were they sure that this was – that the wrist X-ray was being properly used in evidence. When comments were made about Dr Low and reported in the media, we asked DPP about that. We were certainly concerned, and we were focused on coming up with an augmented process to ensure that there were other methods to complement the wrist X-ray as well.

15

20

MS BRANSON: We went through some of this yesterday, but they were forward-looking concerns, weren't they? You can see that my concern here was that we should be looking backward and - - -

25

MR ANDERSON: Yes, I - - -

MS BRANSON: - - - not just appreciation of whether we can do better in the future, but whether something might have gone wrong in the past.

30

MR ANDERSON: Yes. And when – with particular cases, when we've made enquiries about the manner in which those particular cases had been conducted, we – there was nothing that had come to our attention to suggest that there had been a problem with the way in which those cases had been conducted.

35

MS BRANSON: How did you seek to satisfy yourself of that, Mr Anderson?

MR ANDERSON: Discussions with the – in particular the DPP.

40

MS BRANSON: You didn't ask to look at any individual cases yourself?

MR ANDERSON: No.

45

MS BRANSON: You didn't go back and ask to see the evidence on which some earlier cases had been run?

MR ANDERSON: No, we didn't.

MS BRANSON: Did you satisfy yourself that nobody who was assessed to be under the age of 19 by this method had been prosecuted?

MR ANDERSON: No, we didn't.

5

MS BRANSON: The Attorney's reply of 22 August, do you have a copy of that? I don't think it's with our documents, but you may have it independently.

MR ANDERSON: No. I'm just searching for that.

10

MS BRANSON: We can give you a copy if you would like.

MR ANDERSON: Certainly.

15 MS BRANSON: Actually, it might be efficient, Mr Anderson, if we take the morning break now and then you can - - -

MR ANDERSON: Certainly.

20 MS BRANSON: - - - find the document and read it and be ready for when we come back. So it's just before quarter past 11. Could we try to all be here by 25 past 11. Thank you.

25 **ADJOURNED** [11.14 am]

RESUMED [11.28 am]

30

MS BRANSON: Sorry, Kate, I think we're going to have to proceed and I think Ms Pope might need her chair. Mr Anderson, since we were looking at a letter signed by the Attorney-General on 22 August 2011, again drafted within your area of the department is there any reason to think it was substantially changed after it was drafted?

35

MR ANDERSON: I believe we think that it probably reflects the draft.

40 MS BRANSON: I don't want to go through all of it because I think it would be to repeat what we had discussed before but you will see right on the last page in response to my request for an independent review that looked backwards, the letter reads that the Attorney is not convinced of the need for independent review of all age determination matters involving Indonesian nationals:

45 *I hold this view because the court considers all available evidence, is fully aware of the limitations of X-rays and the crew have independent legal representation. Further, by giving the benefit of the doubt in cases involving*

age in particular from verified documents relating to age, AFP and CDPP only proceed with cases with the highest probability that the person is an adult and where information gathering consistently indicates that this is the case.

5 That was written presumably on the basis of information provided to you by the AFP and the Commonwealth Director of Public Prosecutions office?

MR ANDERSON: Yes, probably not information specifically for the purpose of this response but information – that was our understanding.

10

MS BRANSON: That was your understanding having chaired the working group.

MR ANDERSON: Having chaired the working group and also having had arranged other regular interactions with the agencies concerned.

15

MS BRANSON: Thank you. I'm satisfied that the existing court processes for determining age provide for sufficient independent evaluation of all matters currently before the courts which is not to look backwards but then there's a talk about what people might do if they think they've been wrongly convicted and I'm asked to identify any specific cases. Now, of course, there would be people better placed than the President of the Australian Human Rights Commission to know the details of cases prosecuted by the Commonwealth Director of Public Prosecutions on briefs provided by the Australian Federal Police, wouldn't there?

20

25 MR ANDERSON: Yes, but on the other hand, President, there were also particular concerns being raised by you. There were particular concerns similarly raised by the Indonesian Consulate and we said to the Indonesian Consulate as well, while we believe these processes generally are appropriate, if there are particular concerns about particular cases please tell us what those are and we will have them investigated.

30

MS BRANSON: So you were sufficiently – you were persuaded that if I could identify a particular case it might be appropriate to look at it but you weren't persuaded of the need to do a comprehensive review of past cases.

35

MR ANDERSON: That's correct.

MS BRANSON: Notwithstanding that you were alert to the increasing concern about the nature of the scientific evidence that had been led in the early cases particularly.

40

MR ANDERSON: We were aware generally that there was increasing evidence to the contrary of Dr Low's. I'm not sure – just before the break I said I was aware at least generally of Aynsley-Green's evidence. I'm not sure that I was specifically aware of that at this point but we were certainly aware there had been reports with contrary views being put into evidence but also there were cases where that evidence was being preferred and where people were in fact being acquitted. We were aware that the judicial process seemed to be working so that people were able to dispute

45

wrist

X-rays and that gave us some confidence that the judicial process was able to deal with cases where people alleged that they were a minor contrary to the evidence that was put forward by the prosecution.

5 MS BRANSON: Did you make any enquiries as to the extent of disclosure of scientific materials from the Commonwealth DPP or the AFP to defence counsel in the earlier cases?

10 MR ANDERSON: Not specifically about that. We had had questions about what was being put to the court and we had received some general assurances that what was being put to the court was – covered both Dr Low’s views but also the limitations of the approach that was being pursued.

15 MS BRANSON: And I think you’ve said before, but just so I can confirm, as at 22 August 2011 when this letter was signed by the Attorney, Attorney McClelland, he had been given no précis of the scientific material that we’ve been talking about over these last two days?

20 MR ANDERSON: That’s correct.

MS BRANSON: The decision of District Court Judge Bowden in Perth in the case of Daud, was published on 25 October, so just a couple of months after this, was that drawn to your attention at or about the time the judgment came down?

25 MR ANDERSON: No. We became aware of new evidence quickly.

MS BRANSON: And the case RMA, District Court Judge Eaton in September, you became aware of that at about that time too?

30 MR ANDERSON: I’m not sure if I was aware of that case. I don’t believe I was aware of that specific case.

35 MS BRANSON: All right. The Daud case, Dr Low was not accepted in any matter in which he was in conflict with either Dr Christie or Professor Cole and in the subsequent – or in the earlier case, in fact, the RMA case Dr Low was found to be unreliable. Are you aware whether at any time either Attorney-General McClelland or Attorney-General Roxon have been advised of these judicial findings with respect to Dr Low’s evidence?

40 MR ANDERSON: I don’t believe they have been, no.

MS BRANSON: Not to date? Right through to today?

45 MR ANDERSON: I believe that’s correct. We, as an agency, have not put anything to the Attorney-General on those matters. I can’t speak for other agencies.

MS BRANSON: So when the Attorney was giving consideration to a request by me for there to be a review of earlier cases where decisions had been made by courts based on evidence of Dr Low, you didn't think it necessary to tell the first law officer that later court decisions had found that expert to be unreliable?

5

MR ANDERSON: No.

MS BRANSON: And to tell the first law officer that in a particular case his evidence had not been accepted when in conflict with other experts?

10

MR ANDERSON: No, and Madam President, we've previously talked about another document where the DPP had indicated in a working group discussion with officials that they were reviewing concerns they had about the efficacy of wrist X-ray evidence and then they had come back and said that they were satisfied. Now, obviously we canvassed that yesterday but we had received an assurance in that they had had regard to these criticisms and that they were satisfied and for one court to say or indeed two courts to say we don't accept the evidence of a particular witness, that does not necessarily impeach that witness for all time, but we did regard that as being something that was for the DPP to consider and we had some discussions with them about that.

15
20

MS BRANSON: And just to repeat, you didn't think the first law officer being asked to consider what should happen with those previously convicted wasn't something that the first law officer should be told about.

25

MR ANDERSON: Mr Rutherford is just drawing to my attention the fact that when the wrist X-ray procedure was first actually authorised by Parliament in 2001 it was made clear in the evidence given to the Senate Constitutional Committee that it would always be open to defence counsel to raise an argument about the procedure to challenge the validity of the Atlas, to challenge the validity of the studies.

30

MS BRANSON: Yes, we know all of that, Mr Anderson. We went through it yesterday, but my question was about these particular decisions and the evidence in fact that had been relied on by the Crown in prosecutions. That wasn't drawn to the attention to either Attorney-General.

35

MR ANDERSON: No.

MS BRANSON: I did subsequently write back identifying individuals. Do you know what happened with respect to those individuals?

40

MR ANDERSON: What happened to the individuals or to the response to the letter?

45

MS BRANSON: Well, was there a review of their cases?

MR ANDERSON: Yes, we went out to the AFP and DPP and we asked them – and to DIAC as well, Immigration – and we asked them for information, to gather information about those individuals. That process has been subsumed by further process of – there’s now 17 other individuals, a slight crossover, and that we’ve been
5 asked to look at. So we’re gathering information about those cases from the agencies.

MS BRANSON: And you’re aware that on 16 March of this year I wrote to Attorney-General Roxon during the course of this Inquiry identifying a number of
10 cases about which I held particular concerns. Do you know if anything has happened as a result of that letter?

MR ANDERSON: I believe I was just referring to that one as well and you identified 17 individuals in that particular letter and we are looking at both the 12
15 that had been initially raised and the 17. There’s some overlap of the individuals. So we are gathering information in relation to those cases.

MS BRANSON: Do you have a sense of when this exercise might be completed, Mr Anderson?
20

MR ANDERSON: We have asked the Department of Immigration to gather information in particular about the individuals that are named. They have, as at Wednesday afternoon I believe it was, reported to us their findings. We had also
25 asked the Federal Police to investigate documentation evidence that might be available from Indonesia and we’re awaiting response from the AFP as to when such is available.

MS BRANSON: One of them is a young individual who has been much in the press in the last few days and so I don’t hesitate to use his name because it has been all
30 over the press. His name is Ali Jasmin. Are you familiar with this case?

MR ANDERSON: Broadly.

MS BRANSON: I raise it because you talk about information coming from
35 Indonesia. There are a number of issues of interest about this case that we may look at if we have time later that the Indonesian Consulate faxed to the office of the Director of Public Prosecutions, a document that purported to be Ali Jasmin’s birth certificate. Were you aware of that?

40 MR ANDERSON: I am aware of that now, yes.

MS BRANSON: So it came, I think - - -

MR ANDERSON: If I can clarify. I’m aware that there has been reporting there
45 was a birth certificate or an extract of birth certificate provided. I’m not sure who it was provided to.

MS BRANSON: All right, and then subsequently the Republic of Indonesia National Police Force from eastern Indonesia on 12 October 2010 certified – what they said is:

5 *We send a legalised copy of the birth certificate of Ali Jasmin.*

So that at this stage in October 2010 there was in the possession of the Australian Government in some form what was said to be a legalised copy of the birth certificate of Ali Jasmin.

10

MR ANDERSON: And we've asked for any documentary evidence from agencies of the Commonwealth.

MS BRANSON: And were you aware that in June of last year, June of 2011 that office of the Commonwealth Director of Public Prosecutions, being in possession of the copy of the certificate, wrote to defence counsel and said:

15

We would object to the birth certificate –

20 sorry, I will go back a little, Mr Anderson. The Commonwealth Director of Public Prosecutions, not signing personally but on his letterhead on 18 October 2010 wrote to the lawyer for Mr Jasmin referring to the fact that the matter was listed for an age determination hearing on 8 December of that year, addressed their intention to rely on further report from Dr Low and then said:

25

In respect of the birth certificate we have received from DIAC which purports to relate to your client, whilst it is admitted that the birth certificate was provided by the Indonesian Consulate it is denied that the document was created prior to the offence being committed. The prosecution also disputes that the birth certificate is admissible in its present form without calling proper evidence establishing what it is in the circumstances as to how it came into being. I request that you please advise whether you will be adducing any evidence at the age determination hearing other than the birth certificate.

30

35 Were you aware that had happened?

MR ANDERSON: No, I wasn't aware of the correspondence. I became aware of Mr Jasmin's case relatively recently given that he's one of the individuals whose particular case has been raised and as I said we did ask for information, documentary evidence on birth from the AFP.

40

MS BRANSON: Were you aware of that, Mr Craigie?

MR CRAIGIE: Not at that time, no.

45

MS BRANSON: When did you become aware that your office had opposed the admission into evidence of a birth certificate from Mr Ali Jasmin that had been legalised by the Indonesian Government?

5 MR CRAIGIE: Well, I think that's probably best answered by Mr Sharp.

MS BRANSON: Mr Sharp?

10 MR SHARP: Yes. At the time we received this I was aware of his birth certificate and had asked for – in fact, prior to getting it I had indicated through one of my officers to the AFP that when we got it we would be seeking some verification of it and some clarification of it. Once I got the birth certificate and looked at the translated copy I noted that it had been – this birth had in fact been registered in
15 some time after the year 2006, which was well after the date of the birth and I was seeking enquiries as to how it came to be registered and by whom. Certainly I wasn't – my concern was we were aware that personal identity certificates can be applied for by one person on behalf of any other person. My concern was whether that was the same position for birth certificates and other documentations.

20 So, as I say, prior to getting this we had sought – we had indicated to the AFP that we would seek from them when we get it, verification of how it was registered, who had registered it. Subsequent to getting it we also sought from the AFP information as to whether we could get the marriage certificate of the parents and/or the birth certificates of the siblings and get to the purpose of looking at the verification as to
25 the dates when it might have been registered. Ultimately we got from the AFP or the AFP were able to get from the Indonesian police, as I understand it, the certified copy saying yes, this is a verifiable extract of the Registrar but we can't tell you how it came into being or how it was registered.

30 MS BRANSON: Were you aware – you've reviewed this file I think, Mr Sharp, haven't you?

MR SHARP: Yes.

35 MS BRANSON: Yes. Do you have the email sent by Candice Haynes on Friday, 17 June 2011 to you?

MR SHARP: 2011, sorry, what date, President?

40 MS BRANSON: 17 June 2011.

MR SHARP: I can't say I'm familiar with that, President.

MS BRANSON: I could perhaps read it to you, Mr – do you have that?

45

MR SHARP: Yes, I have it.

MS BRANSON: You will see it reads:

5 *Allan, as discussed, Ali Jasmin is the matter where we received a birth certificate from the Indonesian consulate. Defence had requested it but we actually received it in a roundabout way from HOF –*

what's HOF, Mr Sharp?

10 MR SHARP: Head office.

MS BRANSON: Head office, right:

15 *...who in turn received it from DIAC. Attached is a copy of the Indonesian birth certificate, a translation by Maurice Sawyer, a copy of Dr Low's report and District Court Keane Js decision.*

And then she goes on:

20 *We wrote to defence and said we would object to the birth certificate on the basis that its provenance could not be proved. As a result, defence did not seek to adduce evidence of the birth certificate at the age determination hearing on 8 December 2010.*

25 So that makes it fairly plain that at least in your office it's regarded as being a direct result of the attitude taken by the Commonwealth Director of Prosecutions to the admissibility of the document that led to the defence not seeking to adduce the birth certificate.

30 MR SHARP: That would be correct, yes.

MS BRANSON: Yes. There is no other birth certificate that has been identified with respect to Mr Ali Jasmin so far as you're aware?

35 MR SHARP: No, that's correct.

MS BRANSON: And you would know if another one had ever come into the possession of the Australian Federal Police or the Commonwealth Director of Public Prosecutions?

40 MR SHARP: I believe so, yes.

MS BRANSON: Yes, and no other one has come into their possession, has it?

45 MR SHARP: Not that I'm aware, no.

MS BRANSON: And so far as you're aware, no birth certificate at all was provided to the court that was asked to determine Mr Ali Jasmin's age?

MR SHARP: That's correct.

MS BRANSON: And you were aware that DIAC had assessed Mr Jasmin as being 14 years old?

5

MR SHARP: I am now. I'm not sure if I was at that time, but certainly, if I was – I am aware of that.

MS BRANSON: It is the fact, isn't it - - -

10

MR SHARP: Yes.

MS BRANSON: - - - that the DIAC interviewed him and formed the view he was probably 14 years old.

15

MR SHARP: Yes.

MS BRANSON: Thank you. He was charged by an adult – do you now know he was charged as an adult within one month of DIAC interviewing him and forming the view he was 14 or that he said he was 14?

20

MR SHARP: I'm aware of that now, yes. Yes. I wasn't at the time.

MS BRANSON: Thank you. I apologise for jumping around, Mr Anderson, but I was asking you about what was being done as a result of my most recent letter to the Attorney-General again asking that the circumstances of particular individuals be reassessed and I think you've identified the process that involves DIAC – involving them. When do we expect that process to come to an end?

25

MR ANDERSON: We've given some initial advice to the Attorney. We'll give some further advice. We only received some material from DIAC late on Wednesday and, of course, we've been here since then, so - - -

30

MS BRANSON: Right, so the DIAC part of the exercise has been done. It's the evaluation by Attorney-General's Department that's required; is that right?

35

MR ANDERSON: I believe it has been done. I haven't had the chance to actually look at what DIAC has actually provided us with in any detail.

MS BRANSON: Are you able to help us, Ms Pope?

40

MS POPE: I am aware that the interview work on the cases identified as being completed and that a report has been provided to the Attorney-General's Department.

MS BRANSON: Was there a written report, presumably?

45

MS POPE: Yes.

MS BRANSON: Are you able to give me the date of the report?

5 MS POPE: We were progressively advising through daily updates the outcomes of interviews as they were completed and I believe the date of the final report was 18 April.

MS BRANSON: And the first one?

10 MS POPE: It was early on in the piece because the first individual was about to be removed having completed his sentence and I believe we interviewed him on 4 April, yes.

15 MS BRANSON: Thank you. And steadily over time, further reports came in between those two days?

MS POPE: Yes.

20 MR ANDERSON: If I can just – my understanding is that what was provided was a summary of the outcomes but not actually the documentation of the interviews.

MS POPE: Yes, that's right.

MR ANDERSON: That was only provided late on Wednesday.

25 MS BRANSON: And you're proposing to ask for the documentation; is that right, Mr Anderson?

30 MR ANDERSON: We have already asked for the documentation. We asked in March following the receipt of your letter by the Attorney.

MS BRANSON: And when do you expect that I might receive an answer from the Attorney-General in respect to my request with respect to these individuals?

35 MR ANDERSON: I can only speculate as to when. We will, of course, be looking at the details provided by DIAC when we're back in the office and making judgment based on – the best way forward, based on what DIAC has done through the interview process.

40 MS BRANSON: In planning the workloads for your section into the future, what amount of time have you allocated for this process to be undertaken within, Mr Anderson?

MR ANDERSON: This is a priority process.

45 MS BRANSON: Can you give me a hint of when it might be finished?

MR ANDERSON: Look, I believe we should be able to go through the DIAC material relatively quickly, but as I said, I haven't actually looked at it so I'm not sure how voluminous it is. That part will be relatively soon, and when I say relatively soon, I would say a matter of days as the outside and then we will form a
5 view as to what advice to give to the Attorney based upon what has been provided then. There are a range of options obviously available just based on that material.

MS BRANSON: Thank you.

10 MS POPE: If I could clarify, Madam President, our reports were provided to the AFP on Wednesday, not 18 April.

MR CROSS: AGD. It was AGD.

15 MS POPE: Sorry, I don't need to correct then, my apologies.

MS BRANSON: It might now be helpful if you clarify, Ms Pope.

MS POPE: Yes. Well, I think I can confirm that the reports were provided on the
20 18th to AGD.

MS BRANSON: AGD. Thank you very much. Mr Craigie, I think you said before that you became aware of the decisions in the District Court of Western Australia the Daud and RMA cases very promptly after they were decided.
25

MR CRAIGIE: Reasonably prompt, yes.

MS BRANSON: I think you had officers watching them with great care; is that
30 right?

MR CRAIGIE: With great interest, yes.

MS BRANSON: Yes. Mr Colvin, did the Federal Police become aware of them as
35 well?

MR COLVIN: I'm most certain we did. And while I can't specifically recall those particular cases, I know there was a number of cases of this nature brought to my attention and I have no doubt that those cases were on my map.

40 MS BRANSON: Did you form a judgment thereafter about whether Dr Low could further be called to give expert evidence in an age assessment case?

MR COLVIN: Madam President, we continued to use him so I think it's fair to
45 assume that we did form a judgment and I would say that would be in consultation with the Commonwealth DPP but we continued to use Dr Low after that, yes.

MS BRANSON: How long afterwards did you continue to use an expert who has been found to be unreliable and whose evidence should not be accepted in the face of other evidence?

5 MR COLVIN: I can't state when. There's probably still matters before the court that a wrist X-ray has been relied upon but, of course, a change of procedure towards the end of last year – December last year – we've not taken any more matters to X-ray. I'm not too sure how many matters there would be in that. It would be - - -

10 MS BRANSON: Are you able to tell me, Mr Craigie, whether the Commonwealth DPP again, later than the date of those two cases, ever called evidence in a contested age determination hearing from Dr Low?

MR CRAIGIE: We ceased shortly after that. It was the last - - -

15

MS BRANSON: Is Mr Sharp able to tell me?

MR SHARP: I'm not. I'm not, Madam President. There have been many matters.

20 MS BRANSON: Mr De Crespigny?

MR DE CRESPIGNY: Madam President, after the decisions and being provided with the documents in our policy documents, we sent out a series of emails to our regional officers that it should not proceed on solely the probative evidence of wrist
25 X-rays but require other probative evidence and as well certain things concerning approaches to defence counsel for those cases where bail had not, at that stage, been applied for, and approaches to defence counsel where age had been raised at any stage during the matter. It wasn't currently being raised so to us [transcript unclear] age wasn't in dispute. So we took those series of actions. There was one other case
30 which were made for the court – that was the case of [redacted] – but the evidence of Dr Low had actually been called on. It was a drawn-out proceeding before the Melbourne Magistrates Court and the evidence of Dr Low had actually been called on 29 August.

35 MS BRANSON: In dealing with that case first, were instructions given to counsel representing the Commonwealth Director of Public Prosecutions to draw the court's attention to these two decisions?

40 MR DE CRESPIGNY: I'm not aware of the exact instructions which were given to counsel in that matter. But certainly, our Melbourne office was well aware of those decisions.

45 MS BRANSON: And you can't say whether they – even though Dr Low's evidence had been called earlier, they then went ahead because the case wasn't completed and advised the court of these adverse authorities?

MR DE CRESPIGNY: No, I think we made it clear to the court – or certainly my understanding – that the basis on which we decided to proceed with that case was that there was documentary evidence which we thought was highly persuasive. The magistrate took it differently but the reason for proceeding with that case was
5 because of that documentary evidence.

MS BRANSON: Yes. Nonetheless, are you able to tell me whether or not counsel for the Commonwealth Director of Public Prosecutions advised the magistrate of these two decisions of a superior court, superior to the Magistrate's Court?
10

MR DE CRESPIGNY: Madam President, I can't just assume that.

MS BRANSON: You're alert to a responsibility in counsel to alert courts to contrary judgments, aren't you?
15

MR DE CRESPIGNY: I am, Madam President.

MS BRANSON: Thank you. You yourself did nothing, Mr Craigie, to ensure either that Dr Low's evidence wasn't again relied on or if it was called, these authorities were drawn to the attention of the court?
20

MR CRAIGIE: I don't think – I'm not sure when the last time he was called was. Some of the occasions on which he was called are widely separated from when a judgment was actually delivered. But you may take it that during the course, certainly the September – I'm trying to think of an appropriate way of putting it – we wound down our reliance on his evidence.
25

MS BRANSON: My interest is in how quickly, Mr Craigie.

MR CRAIGIE: Well, it depended on a number of factors. One would be what else there was in the case.
30

MS BRANSON: Well, that's slightly different from whether you had his evidence before a court and advised the court about the difficulties in continuing to place reliance on it. Mr De Crespigny may wish to say something.
35

MR DE CRESPIGNY: Madam President, what we did do was we asked for a review of all the cases and we proceeded to discontinue a very large number of cases. I think prior to October, we had discontinued 14 matters where we had made assessments on the evidence available. After October, we discontinued a further 21 matters and they were matters which we identified where the wrist X-ray was evidence and that there wasn't probative evidence otherwise. So we did react in that way of reviewing all the matters and making certain that we discontinued any matter which we had before the court.
40

MS BRANSON: Thank you. There's only one other document in this pile that I want to go to. It's dated Friday, 2 December; it's behind tab 52. I don't think I've
45

drawn your attention to it before. It's under the implementation of new age determination procedures. In the first dot point – first of all, is anyone able to tell me who from the Office of the Commonwealth Director of Public Prosecutions was present at this Commonwealth agencies meeting?

5

MR DE CRESPIGNY: Madam President, as it says at the top, it was [transcript unclear] myself and [transcript unclear].

10 MS BRANSON: You're quite right; it does. So we will concentrate on you, Mr De Crespigny, because we have you. You noted it is reported that concerns of the efficacy of wrist X-rays have been lessened after reviewing documents submitted by defence lawyers questioning X-ray processes and after cross-examination of Dr Low in age determination hearings. Is that an accurate record of what you observed?

15 MR DE CRESPIGNY: Madam President, as I indicated in my previous evidence to you, Dr Low had been briefed – sorry, had been conferenced – in relation to those expert reports and we were – two officers which had done that were satisfied. There was a difference on my understanding – I don't know the details of that of – he had an explanation that Professor Cole was looking at the TW3 measurement rather than
20 wrist growth G&P measurement and our people understood. As well, I believe that at this stage, Dr Low may have been cross-examined in the Ali matter. The report back – which I have all of that – the views of the officers present was that he had met the challenges made to his evidence. So yes, it had lessened; it had not gone away, but it had lessened.

25

MS BRANSON: Thank you. It was noted that you were in the process of locating an alternative expert on a determination; is that accurate?

30 MR DE CRESPIGNY: Yes, as I've given evidence to you before, we put that process in place. It wasn't a fast process able to take place. Madam President, we had cases which we could not adjourn off while a full and proper search was undertaken, but those processes were being put in place.

35 MS BRANSON: Did you ever find anyone who would give evidence comparable to Dr Low's?

MR DE CRESPIGNY: As I – given the evidence before, Madam President, we decided not to proceed with - - -

40 MS BRANSON: And the final dot point there, under CDPP:

His advice that the benefit of doubt has been consistently applied to age determination cases.

45 How did that differ from the previous procedures?

MR DE CRESPIGNY: I don't believe it – no - - -

MS BRANSON: That it did?

MR DE CRESPIGNY: I don't believe that it did. I think that we took the same approach. I'm not certain if those were the words, because our approach was looking
5 at what evidence was going to be before the court, and what the court - - -

MS BRANSON: Thank you, Mr De Crespigny. I think that finishes those documents as such. In the half-hour that's left to us, we might look at a few individual cases. I think this will be principally, I think, relevant to the Australian
10 Federal Police and the Commonwealth Director of Public Prosecutions. I think if others wish to leave the bar table, I wouldn't be at all offended by that if you were – provided you were back here after – back here after lunch. The first one that I would like to look at, if you could – both the relevant agencies could get their papers out – is the individual who is known by the alphanumeric WAK089, on SIEV 51. Are you
15 assisted by the name or not? Right, so you've all got a schedule that - - -

MR CRAIGIE: We've got a legend here to guide us.

MS BRANSON: Yes.
20

MR CRAIGIE: It takes a little - - -

MS BRANSON: Ninth one down, fourth up from the bottom of the list, is one I think that we've seen before, because there was a decision of the court about the consent for the X-rays. I'm sorry, I'm told that's wrong, sorry. Ms Noble is the expert on all of these things.
25

MR COLVIN: I think we may have mentioned this matter yesterday - - -

30 MS BRANSON: I think we did mention it.

MR CRAIGIE: - - - but it's a different one to the one that was the consent to X-ray.

MS BRANSON: So this is a – do we all have some – the papers on this young individual? He was apprehended, as I understand it, on 12 September 2009; is everybody in agreement about that?
35

MR COLVIN: That was the date the vessel was intercepted.

40 MS BRANSON: He gave a date of birth when he was interviewed by DIAC on entry, which put him at 17 years of age at the time of the alleged offence. He is interviewed by Australian Federal Police with an independent person present. He gives a close but not identical date of birth, but still has him at 17 years of age.

45 MR COLVIN: I think that's correct, yes.

MS BRANSON: The consent form for a wrist X-ray is signed by him, but there's no independent adult.

MR COLVIN: That is correct.

5

MS BRANSON: That's, I think, a bit earlier than the one we looked at some other time; is that right? Was anything – was that noticed within the Australian Federal Police?

10 MR COLVIN: I don't believe it would have come to the attention of headquarters. Clearly, I don't disagree that it should have occurred, and it clearly is a breach or a break from our procedures.

MS BRANSON: In 15 October of that same year, Dr Low reported that he didn't
15 have a mature wrist X-ray – mature wrists on X-ray.

MR COLVIN: I understand that Dr Low reported that he was at least eighteen and a half years of age on 15.10.09.

20 MS BRANSON: Yes, but my question was, Dr Low reported that his hand wasn't mature on X-ray. The report stated 15 October. Just if I can read it to you:

25 *Examination of the bones of the hands of the individual as derived from the radiograph taken reveals a status close to maturity, a very short segment of growth plate remains unfused along the outside margin of the radius. The process of fusion at this site occurs during the age of 18 years. Since the –*

interesting observation by Dr Low for other reasons.

30 *Since the process is quite well advanced but not yet complete, it is a reasonable interpretation that the individual is about eighteen and a half years of age.*

Yes, so we - - -

35 MR COLVIN: We don't question that.

MS BRANSON: Yes. On what we saw previously, hearkening back to 2001, proceedings with respect to this individual should have stopped at that stage, shouldn't they, Mr Colvin?

40

MR COLVIN: Madam President, I'm not sure that the – I'm not sure that, hearkening back to 2001, that it was a clear policy at that time that if the person presented as less than 19 or as juvenile, that they were not to be charged. I think that is a policy that emerged over time.

45

MS BRANSON: Didn't the report of the Legislative Committee of the Senate that reported into the proposal to amend the Crimes Act note the statement from the

Australian Federal Police that no one would be charged who wasn't established to be 19 years of age?

5 MR COLVIN: Except for extenuating circumstances, that's correct, yes.

MS BRANSON: Yes. So if the Australian Federal Police were acting consistently with that statement, this person would have been released at this time, or at least - - -

10 MR COLVIN: I don't dispute that. Absolutely.

MS BRANSON: In fact, he was arrested, charged and remanded in custody on 16 October.

15 MR COLVIN: That's correct.

MS BRANSON: That was into adult custody.

MR COLVIN: Correct.

20 MS BRANSON: And then I think you received, Mr – well, by you, I mean the Australian Federal Police, Mr Colvin – in December of that year, received an email from the Commonwealth Director of Public Prosecutions saying that – to the effect that, after viewing the records of interview, that they had noticed a claim to be under 18; on what basis is he being prosecuted as an adult? And I think the AFP
25 responded – I should turn the document up – the date is 18 December, Mr Sharp, if you're looking for the documents, or Mr Craigie; it's an email from someone called Barry Abbott; it's dated 18 December 2009 with respect to those in SIEV 51, and it asserts:

30 *They have been wrist X-rayed, which shows they are all over the age of 19 years.*

That's given in a direct response to the email that I have earlier drawn attention to. That was just simply a false statement, Mr Colvin, as we would now appreciate, isn't
35 it?

MR COLVIN: We're just trying to pull the document up, Madam President, but I don't dispute that, no.

40 MS BRANSON: I can show you, if you would like to see it.

MR COLVIN: No, no, that's okay.

45 MS BRANSON: No.

MR COLVIN: We don't dispute it.

MS BRANSON: So it's immediate – it's on one of these chain of emails, so we have the request from the Commonwealth DPP that I've just read out.

5 MR COLVIN: Do you have a – sorry, Madam President, do you have a reference that we can go to from the documents?

MS BRANSON: Yes, CDPP.045.0195.

10 MR COLVIN: Is it annexed in those separate documents you provided, or - - -

MS BRANSON: No.

MR COLVIN: Okay. Well, we may not have it with us.

15 MS BRANSON: Your own email is dated 18 December 2009 at 8.22 am, and it comes from someone called Barry Abbott.

MR COLVIN: I don't dispute that.

20 MS BRANSON: You don't have it. All right.

MR COLVIN: Certainly, Madam President, this person was charged on the basis of the X-ray alone, and on face value, it would appear that that was questionable.

25 MS BRANSON: And then I've got a note, Mr Craigie, a handwritten note, which is CDPP.079.0148, and it's dated 21 June 2010, so the matter seems to have been left for approximately half a year. And it reports what is a discussion with Allan; that's probably you, Mr Sharp; is that right?

30 MR SHARP: Yes.

MS BRANSON: And Allan is recorded here as saying:

35 *Rely on the X-rays to prove age, not on the interviews.*

And there's a reference about it being objectionable, which I assume indicates your belief that the evidence about the interviews would have been objectionable had someone sought to adduce them in evidence.

40 MR SHARP: Yes, yes. Just letting them know if any of the DIAC interviews are objected on that basis.

45 MS BRANSON: You may recall, but I noted before that there was just an entry interview from DIAC where age was given, but there was a formal record of interview with the Australian Federal Police with an independent person present. Is it possible that it's that interview that you were saying was objectionable and is not to be led?

MR SHARP: That's also possible. I think there was problems with that record of interview.

5 MS BRANSON: And you're urging reliance on an X-ray. Did you know that it was an X-ray that didn't show maturity, the wrist?

MR SHARP: I don't think at that time I did, Madam President. I had only relatively recently come in – when this matter started, I wasn't involved in this, and I had come into it, I confess, Madam President, that I had not realised at that time (a)
10 of the undertaking given to the Senate Committee by the AFP, nor that this X-ray was, in fact, under 19 – or the significance of that, rather.

MS BRANSON: The brief to counsel in this matter is CDPP.046.0178; it's dated 18 October 2010.
15

MR SHARP: I will just get that document.

MS BRANSON: Yes. It could have come out of the co-accused's file, if you're having trouble finding the document. The number I gave you is your document
20 number.

MR SHARP: Yes. Sorry, Madam President, could we have the reference number again, just - - -

25 MS BRANSON: Yes, of course. Your reference - - -

MR SHARP: Yes.

MS BRANSON: - - - and then 046.0178. If there's a problem with it, Mr Sharp, it's
30 only a short passage I want to refer to.

MR SHARP: Perhaps I can assist you anyway, Madam President.

MS BRANSON: Yes. On the second page of the brief to counsel of 18 October
35 2010, it's noted that the accused had been remanded in custody since first appearing in the Perth Magistrates Court on 16 October 2009; that would have been in adult custody, wouldn't it?

MR SHARP: That's correct, yes.
40

MS BRANSON: And then there's a note that they initially claimed to be juveniles. X-rays performed prior to their arrest indicated with respect to this individual he was eighteen and a half years old. Were you alert, then, to anything about margin of error in age assessment? I mean, it's a very small amount of time over the age of 18, the
45 critical age.

MR SHARP: I can't remember whether I was absolutely conscious of that at that time or not. It would have been around that time, I think, or shortly after that where I

actually started to conduct the investigations which led to my paper. I don't think at that time I knew of the range of the margin of error.

5 MS BRANSON: Were you then conscious that, at the Senate Committee hearing back in 2001, there had been discussion of margin of error, and that had been addressed by the AFP, saying they would only prosecute where someone was shown to be at least 19 years old?

10 MR SHARP: Madam President, I think I only picked that up – and I actually had an email which I had referred to our head office in respect to some other cases shortly after this case was finalised. At the time that these instructions were given to counsel, I hadn't – I hadn't picked that up, no.

15 MS BRANSON: The brief to counsel wouldn't have been prepared by you, I imagine, Mr Sharp.

MR SHARP: No.

20 MS BRANSON: No. Going on to say:

I note that neither accused has raised the issue of age to date in the proceedings.

25 Were you then conscious of the fact that young individuals were being told that the wrist X-rays were a fairly reliable way of ascertaining age?

30 MR SHARP: I certainly would say that the – well, the Commonwealth DPP themselves would have had no direct contact with the young persons, and I wasn't aware that the AFP were telling them that. No, I don't know what the AFP were telling them, to be quite frank, at that point in time.

35 MS BRANSON: Yes. But just as a matter of logic, you would understand that if a young person actually didn't know their age and didn't know their birthday, if someone told them it was a scientific method of working out how old they were and then told them they were eighteen and a half, they might decide, "Well, that's how old I am."

MR SHARP: That's correct, Madam President.

40 MS BRANSON: And so the fact that they weren't challenging it might be the result of the process, as opposed to the result of any belief they had of themselves about how old they were.

45 MR SHARP: That's true; subject to any qualifications or certifications. But as a general rule, that's correct.

MS BRANSON: You were aware that this young individual went on to be convicted as an adult?

MR SHARP: That's correct, yes.

5

MS BRANSON: The total time this individual was detained in adult custody was 813 days; that's probably not something you're aware of, Mr Sharp?

MR SHARP: I do know from having reviewed the file subsequently that it was a lengthy period of time, yes.

10

MS BRANSON: And indeed, that was the date when this schedule was prepared. He's still in detention, I think, isn't he?

MR SHARP: I can't answer that. I think – yes, I would think so.

15

MS BRANSON: There is a document – the number is CDPP.078.0037, which I will try and turn up myself – do you have access to that, Mr Sharp?

MR SHARP: Do you have the date of the document, Madam President?

20

MS BRANSON: Yes, 31 January 2011.

MR SHARP: Is that the file name from the prison?

25

MS BRANSON: It's an email from Candice Haynes to Andrew Riches. Did you find it, or not?

MR SHARP: No.

30

MS BRANSON: That doesn't matter, Mr Sharp, I will read it to you. But the transcript of the hearing of this matter before District Court Judge Goetze, G-o-e-t-z-e, District Court of Western Australia, on 31 January 2011, raises the issue of age because there had been some press cover about unreliability, I think, of wrist X-rays at this time.

35

MR SHARP: That's true, Madam President. There had been a Magistrates Court hearing the previous week, I think, which was announced on the Friday and there had been press articles on that weekend.

40

MS BRANSON: Counsel for the defendant said to the court on that day – the Commonwealth was represented by Mr Davies, I think of senior counsel; is that right?

MR SHARP: That's correct.

45

MS BRANSON: And Mr Healy –

5 *Well it's, from our perspective – or from my perspective – it's a disclosure issue. If the Crown are in possession of information which suggests that there is some controversy about the reliability of this kind of evidence, then it ought to be disclosed to us so that we can make a decision about whether or not to take the point about jurisdiction.*

Where you alert to this request for disclosure in a – in this case, Mr Sharp?

10 MR SHARP: No, I wasn't particularly – personally, no.

MS BRANSON: His Honour drew some attention to the press reports – no, he raised attention to it from the interviews, the AFP interviews. Counsel for the two young individuals then referred to the fact that concern about it had been brought into focus by the press release because of – this is a quote:

15 *Because, of course, no person knows precisely when they are born.*

And then there is some discussion about hearsay, some reference about lack of records in the place from which these young people came. And then she asked for an opportunity to speak with Dr Low - - -

20 MR SHARP: That's correct, yes.

MS BRANSON: - - - and was given, I think, Dr Low's telephone number.

25 MR SHARP: There was certainly – and I don't know the precise details – certainly, arrangements were made for counsel to speak with Dr Low, yes.

MS BRANSON: And thereafter, I think, there was no challenge to age; is that right?

30 MR SHARP: That's correct, yes.

MS BRANSON: Right. And ultimately the individual was convicted on a file that the records of the DPP show was regarded by the DPP as “minimalist”, just to quote from a case note – I'm sorry, it was a case note of the Australian Federal Police. For whom did Candice Haynes work? For you?

40 MR SHARP: Yes.

MS BRANSON: Yes. Ms Haynes described it as “excellent result” in circumstances where the brief by counsel was described as “minimal”; were you aware of that?

45 MR SHARP: I'm not sure what she's referring to there. I don't think I was aware of that until some time after it.

MS BRANSON: It may, in fairness, not have referred to the age evidence.

MR SHARP: No, it may have referred to the totality of the evidence, or it may have referred to age; I can't answer that, what she was referring to there.

5

MS BRANSON: Looking back, do you concede the possibility that reliance being placed by the Commonwealth on a wrist X-ray that did not show maturity – had placed the individual only six months over the age of maturity – was regrettable in circumstances where the only expert advice available, it seems, to defence counsel, was Dr Low himself?

10

MR SHARP: In hindsight – in fact, if this had come to my attention probably a month or six weeks after it occurred, I would have not recommended the – to the director this should proceed at all. And in hindsight, in today's position – again, this certainly would not proceed.

15

MS BRANSON: Would not even be charged, would he?

MR SHARP: No – should not be, but certainly would be not proceeded with.

20

MS BRANSON: And we can see now that a judgment on the basis of a non-mature X-ray to place somebody at eighteen and a half years has a degree of precision about it that is entirely unwarranted.

MR SHARP: I would accept that the X-ray – it's – we could not have been that precise at all.

25

MS BRANSON: And that close to the age of 18 would be impossible to be confident that the person was under or over 18.

30

MR SHARP: That's correct.

MS BRANSON: And this person is still in adult jail?

MR SHARP: I think that's correct, yes.

35

MS BRANSON: Thank you. We will start on NTN031, which is the third one up from the bottom of the list.

MR CRAIGIE: Madam President, you didn't ask me, but for what it's worth I agree with Mr Sharp.

40

MS BRANSON: Thank you very much, Mr Craigie. So this is an individual who was detained on 29 December 2009. Just for completeness, the prosecution was discontinued 22 November 2011; so nearly two years later. If our calculations are correct, this individual was detained for a total of 689 days, 386 of them in adult detention. So for this individual, he's – at his DIAC entry interview he gave his date

45

of birth of 27 November 1993, putting him, I think at 17 years of age. He gave that date again when he gave consent for a wrist X-ray. A Dr Drogemuller read that report and estimated his – he said his skeletal age is estimated at approximately 18.4 years, so in fact there is no effort by that expert to calculate upon logical age; he just gives a skeletal age. Does that accord with your records?

MR SHARP: Yes.

MS BRANSON: And he was arrested on 16 October on the basis of that report?

MR SHARP: That's correct as I understand it from the records, yes.

MS BRANSON: It was three months later before the Commonwealth DPP notes to Legal Aid that he doesn't appear to be represented?

MR SHARP: Yes, there had been a number of adjournments where he hadn't been represented and I think in the end I gave him instructions that we ought to – you should write to Legal Aid and push this.

MS BRANSON: So that was regrettable, and no doubt not your fault, but time was slipping away, Mr Sharp, so far as this individual was concerned?

MR SHARP: Yes, I have to say that it was a concern, certainly from May of 2010 was concerned, I had – significantly, about the defendants and legal representation of the people smuggling matter in Western Australia. There were often delays where we were in court ready to go and there was no – simply no defence rep available.

MS BRANSON: On 12 April of 2011, there is an internal Commonwealth Director of Public Prosecutions email, the number is 315.0275. It was from you, I think, Mr Sharp. It's, I think, on 12 April of 2011 you sent out an email dealing with Age Determination as a matter of urgency with high importance, saying you will be attending the PSB meeting tomorrow to:

...discuss the cases below and how we will handle these matters. If you have a case in the table where the age is not 19-plus, please try to attend the meeting. I'm meeting with the AFP tomorrow morning to advise them of the matters and what we will be doing.

And then you point out that you've prepared a table of age determination matters in Perth, amended to include the evidence of the X-ray procedure, and witnesses as to determine – or to determine/assess age, see below:

There are five cases where the evidence does not support the accused being over 19 years.

That tends to indicate a consciousness then of the position that people ought not to be prosecuted.

MR SHARP: By then, yes I think, yes. Certainly by then, yes.

MS BRANSON: Yes:

5 *If the spirit in the letter of the AFP reference to the Senate Committee is to be met, then these five cases warrant the giving of the benefit of the doubt as to age and consideration of discontinuing the prosecutions.*

And this case is in that schedule, do you say?

10

MR SHARP: I think that's correct, yes.

MS BRANSON: And then, having presumably given consideration to that, a decision is made to approach Dr Low to see what he might say; is that right?

15

MR SHARP: That's correct, yes.

MS BRANSON: And Dr Low provided a report showing that the X-ray was mature?

20

MR SHARP: That's correct.

MS BRANSON: So, contrary to what I suggested yesterday, at this stage we have a case – at least one case, and I think there are others, where Dr Low is actually reading wrist X-ray images differently from other experts.

25

MR SHARP: Certainly, yes. I think that there was a difference in opinion between Dr Drogemuller and Dr Low as to the age to be assessed on the X-ray.

30 MS BRANSON: So you had an initial medical report from Dr Low, but also a detailed expert report, which seems to carry the same date: 26 April 2011.

MR SHARP: Yes.

35 MS BRANSON: So at that stage, you've got two different expressions of opinion by two qualified radiologists?

MR SHARP: That's correct.

40 MS BRANSON: I think an AFP officer travelled to Indonesia to work with the Indonesian National Police in investigating this and other matters, Mr Jabbour?

MR JABBOUR: That's correct.

45 MS BRANSON: But on 22 November, approximately two years after initial detention, the prosecution is discontinued?

MR SHARP: That's correct.

MS BRANSON: And on the basis of the conflicting evidence?

5 MR SHARP: And lack of other material, yes. We couldn't verify it.

MS BRANSON: And you were of course very alert to the time delay between the obtaining of the second report and the decision to discontinue?

10 MR SHARP: Yes.

MS BRANSON: And, indeed, the discontinuance actually was influenced by the fact that your initial estimate was of underage?

15 MR SHARP: Yes. It was also because – after the cases which gave considerable concern to use without any other documentation whatsoever.

MS BRANSON: Right. So, in short, the benefit of the doubt wasn't given in this case, when you received the expert report at 18.5 years?

20

MR SHARP: That's correct.

MS BRANSON: There was considerable delay; two years in this case?

25 MR SHARP: Yes, that's a long time.

MS BRANSON: This is a case in which I think at the interview, to get his consent for the wrist X-ray, the individual was given the misleading evidence about the nature of – what could be deduced from the wrist X-ray; are you aware of that?

30

MR SHARP: I haven't seen what he got on that occasion, no.

MS BRANSON: It is one of the cases, Mr Colvin, I think where they were being told it was a way to determine their age.

35

MR COLVIN: I'm not aware of that specifically; we were just checking that, but again I don't dispute that you have material in front – that's – probably says that.

40 MS BRANSON: The date might suggest that's likely, doesn't it? In view of the change then coming after the finding of the District Court that the consent was not obtained?

MR COLVIN: I don't dispute that.

45 MS BRANSON: And that, although in 12 April 2011 there is an email – yours, Mr Sharpe – suggesting that consideration should be given to discontinuing, what actually happened was that someone went to get a second report?

MR SHARP: That's correct, yes.

MS BRANSON: And a second report could never have lead to anything other than there being conflicting views on the matter, could it, Mr Sharp? And I'm not
5 suggesting it was your decision.

MR SHARP: Well, I suppose – Madam President, it could have led to the positive view that it was below either of those also and simply wash the matter. It wasn't - - -

10 MS BRANSON: Well, if he was entitled to the benefit of the doubt, he should have got out anyway, shouldn't he?

MR SHARP: In hindsight, I accept that.

15 MS BRANSON: So, in a sense, you didn't need delay to get the report for that purpose.

MR SHARP: I accept that.

20 MS BRANSON: And if conflicting reports didn't advance you, there was actually no need to get a second report.

MR SHARP: In hindsight, yes, that's correct.

25 MS BRANSON: And there were no active enquiries in Indonesia so far as you were aware until November 2011? Although, I think a request was made in August 2011; is that right?

30 MR SHARP: Certainly the request was made then. I'm not in a position to tell you whether there was or was not either the – enquiries were commenced but we certainly didn't know the results.

MS BRANSON: And I think they commenced in about August 2011?

35 MR SHARP: Again, I am not - - -

MS BRANSON: Is that when you – when someone from the Australian – the Office of the Director of Public Prosecutions asked for them?

40 MR SHARP: Asked for them, yes. As I say, I can't say what happened about their request.

MS BRANSON: No.

45 MR SHARP: Sorry, it's in June; 23 June.

MS BRANSON: In June? All right, thank you, very well. Thank you. Well, I – that’s the end of my consideration of that file and it’s a good time to break, I think. I might just – I don’t think we will have time to go through all the files, so it might help you if we told you over the lunch which ones are the ones we might go through.
5 Is that all right?

MR CRAIGIE: Certainly, Madam President.

MS BRANSON: OFD030, VMT011 and DUR041. And UPW031. Would you like
10 me to go through those again?

MR SHARP: Just the last one.

MS BRANSON: UPW031.
15

MR SHARP: Thank you.

MS BRANSON: If you need to check them, please just let us know. We’re just through the door. Thank you very much. So we will return at 2 o’clock. Thank you
20 for your help this morning.

ADJOURNED

[12.34 pm]

25

RESUMED

[2.00 pm]

MS BRANSON: Thank you everyone for being back so promptly. We will
30 commence again now. I should just give you an indication of how I’m hoping this afternoon will work out. We will deal with a small group. We’ve decided we just simply don’t have the time to go through the 12 individuals but we will finish the small group that we identified. Please understand that in our report, we may deal
35 with the others as well so we would ask you to remain on top of those issues because a time will come when you will see a draft report, at least so far as it reflects on your own agency, and you will be given – I apologise in advance – a quite limited time to provide comments on that draft and the necessity for that, of course, is the fact that I may leave this office at 30 July. It’s possible that I may work into August if there’s not a replacement person in a position to start but there is a risk I could leave on 30
40 July and we must have the report completed and ready for publication on that date. So we will be asking people to respond very promptly when we give them the opportunity to comment on a draft. So we will do a few.

I will go quite quickly through the joint submission, just for the purpose of clarifying
45 some issues. What I would like to do – and I’m telling you now because you may like to think about it – I would like to close by giving each agency a few moments to offer any reflections that they might wish with respect to the hearings. If anyone

thinks an issue has been left incomplete or in some way in a way that might not provide me the assistance that I require and they could clarify it in a few remarks, then I would wish to give every agency the possibility to do that. It may be that the time will not be more than five minutes or so per agency but you might like to think
5 if there are any critical issues you would like to draw to my attention at that time. That will have to start by half past 4 because I will have to close the hearing at 5 to 5, not only because it's Friday afternoon – I'm sure everybody wants to go home – but in fact I have a plane to catch and I have to leave here very tightly at 5 o'clock. My colleagues, fortunately, can stay a little longer and pack up but that will be the
10 outside point for today. So - - -

MR CRAIGIE: Madam President, there's a matter I think I should place on the record.

15 MS BRANSON: Yes, Mr Craigie.

MR CRAIGIE: It's just in relation to the review process that will no doubt ensue and I should just indicate that we were informed of your letter on 29 March – that's the letter in relation to a review – and as a consequence - - -

20

MS BRANSON: The review of the individual files?

MR CRAIGIE: Yes.

25 MS BRANSON: Yes.

MR CRAIGIE: And as a consequence, we forwarded to the Attorney-General's Department a disc with relevant material as to all 17 of those cases on the 11th of this month.

30

MS BRANSON: Thank you. Thank you very much. Right. Well, let's press on with our individual cases. Which one shall we – we will go to VMT011 from SIEV 073. This individual – and Mr Colvin, if you could just confirm, if you can – this individual was apprehended on 16 November 2009?

35

MR COLVIN: Sorry, Madam President. I will just get that detail for you.

MR COLVIN: I can indicate, Madam President, that accords with our records.

40 MS BRANSON: With your records, yes. Right. Okay. At his DIAC entry interview, I think he said he was 15 years old and said he had a phone among his property.

MR COLVIN: I've got it in front of me now, Madam President, and that's correct,
45 yes.

MS BRANSON: Yes. He gave consent to a wrist X-ray on 14 January.

MR COLVIN: Correct.

MS BRANSON: And a report was received from the radiologist who read that at the time it was taken.

5

MR COLVIN: That's correct, yes.

MS BRANSON: The Commonwealth DPP, I think, wrote to Dr Low requesting a second opinion.

10

MR SHARP: That's correct.

MS BRANSON: Why was that, Mr Sharp?

15 MR SHARP: Because the – Dr Koukourou report was neither definitive and also Dr Koukourou, of course, is stationed in Darwin, Northern Territory, and for the purpose of proceedings, Dr Low, of course, is based in Perth and there's significant cost, of course, and availability of doctors in the Darwin area.

20 MS BRANSON: All right. There was an email with CDPP.153.0340. Have you had that in front of you in giving me that answer?

MR SHARP: I don't, Madam President. I'm going off my memory of these events.

25 MS BRANSON: I see, yes. The email I'm concerned about is dated 26 February 2010. It came from Will Ellis; it went to Claire E. So it's from a Commonwealth Director of Public Prosecutions' officer to an AFP officer.

MR SHARP: That's correct.

30

MS BRANSON: Do you see that?

MR SHARP: Yes.

35 MS BRANSON: And the Commonwealth DPP officer says:

I've just noticed that the wrist X-ray report of the doctor has found that at this stage, this individual is at least 18 to 19 years old, about two months after the offending.

40

MR SHARP: That's correct.

MS BRANSON:

45 *Based on this report alone, the court may find he was a juvenile at the time of the offending and we would need to consider giving him the benefit of the doubt.*

MR SHARP: That's correct. It did say that.

MS BRANSON:

5 *Based on this limited information in this report, it's possible that he is being conservative and a finding that the individual is 19 or over is more applicable.*

MR SHARP: Yes.

10 MS BRANSON: So this is an instance, is it not, where at the officer level at least, it has been picked up that Dr Low is very likely to give a report that ages the individual more highly than the other radiologists and therefore there will be benefit in – where one radiologist doesn't give the age that is required for prosecution, go to Dr Low.

15 MR SHARP: That is certainly open on that email, yes, Madam President.

MS BRANSON: And in fact, Dr Low's opinion was obtained.

MR SHARP: That's correct.

20

MS BRANSON: And Dr Low did report that he was – a reasonable interpretation was that he was 19 years of age.

MR SHARP: 19 years of age or older, yes, Madam President.

25

MS BRANSON: Well – yes. The “or older” doesn't actually mean anything, does it, Mr Sharp, because you can only use the Atlas to get to 19.

MR SHARP: That's correct, yes.

30

MS BRANSON: Yes. Your own email in 18 April had indicated that the benefit of the doubt should be given. We looked at it before with the schedule of individuals.

MR SHARP: 18 April 2011. This one is dated February 2010.

35

MS BRANSON: Yes. But by 18 April 2011, you had indicated that the benefit of the doubt should be given where wrist X-rays don't show 19 years.

MR SHARP: That's correct, yes.

40

MS BRANSON: And that there should be consideration given to discontinuing.

MR SHARP: That's correct.

45 MS BRANSON: And then, Dr Low's report comes some days after that indicating a reasonable interpretation is that he is 19 years of age or older.

MR SHARP: Yes.

MS BRANSON: Yes. And defence seems to waiver a bit about whether they're going to put age in issue or not. By 14 July, the document 154.0036 with an
5 indication noted there that the individual may plead guilty but he may raise age as an issue.

MR SHARP: That's correct.

10 MS BRANSON: And the advice given to the defence was that if age was to be an issue, then she would need to obtain further instructions from the office.

MR SHARP: Yes.

15 MS BRANSON: And the officer goes on to – this is the officer of the Director of Public Prosecutions – goes through the history of the matter. So I think, consistently with what you observed, Mr Sharp, the request was made for a report from Dr Low quite early but in fact it didn't come in until April 2011.

20 MR SHARP: That's correct, yes.

MS BRANSON: Do you have any understanding about why there was that delay?

MR SHARP: I think it – and I can't speak for Dr Low and Dr Low of course was
25 providing them to us – there were a lot of matters at that time and Dr Low of course also had a full-time practice to run.

MS BRANSON: Yes.

30 MR SHARP: But I wouldn't want to speculate on what Dr Low's time frames for these matters were.

MS BRANSON: And the officer goes on to note that a number of the passengers described as individuals as being under 18 in their statements, and then again when
35 they were proofed.

MR SHARP: That's correct.

MS BRANSON: And I think that officer is seeking some instructions about what to
40 do in the event that the individual raises age; is that right?

MR SHARP: Yes.

MS BRANSON: There's then another DPP document. It's 155.0250 as I read it.
45 It's dated 6 July 2001 – 2011, I'm sorry, and this one concerns you, Mr Colvin, although it's not your document. It records a call to the Commonwealth Director of

Public Prosecutions from the Australian Federal Police expressing a very firm view that the prosecution should continue, age should be determined by the court.

5 MR COLVIN: Madam President, if I may, I may be able to shed some light on that. The information I have in front of me is that on the 8th of that month, so perhaps two days after that, we did receive formal notification from the INP that the result of their enquiries revealed a date of birth of 1987 so some seven years different from the date of birth that he had offered.

10 MS BRANSON: Was that disclosed to the Commonwealth Director of Public Prosecutions?

MR COLVIN: I presume it would have been, Madam President. I'm sure it would have been a significant document in our mind.

15 MS BRANSON: I don't think we have seen such a document and this file note doesn't refer to any such advice.

MR SHARP: Madam President, certainly my records don't indicate receipt of that information in any form.

MS BRANSON: If you are able to find it, you could let us have it but - - -

25 MR COLVIN: We have it in front of us, Madam President, so we thought that it was all part of the package that had gone to you so we will make sure that we get that to you, if you like.

30 MS BRANSON: Thank you. Now, this is the matter or at least one of the matters where there's record that the particular doctor says you can't determine age from a wrist X-ray. In the transcript of the proceeding with – we may have trouble giving the precise reference but we understand that in the transcript of the proceedings on 19 July 2011 it's put, I think, by defence counsel that the individual doesn't know how old he is but accepts from what he has been told that he must be over 18, and then he is convicted on 20 July. And the issues we would seek to draw out of that was another case where initial an X-ray puts him under 19 but in the 18 to 19 range, essentially eventually convicted, essentially on the basis of wrist X-ray evidence. He says he doesn't know and the wrist X-ray evidence is led, as I understand it. Is that right, Danielle? Yes.

40 MR COLVIN: I'm just not sure, Madam President, what weight was given or how this evidence from the INP may have - - -

MS BRANSON: I think it came in two days later, Mr Colvin. I think it wasn't available at the time of the trial.

45

MR COLVIN: The matter went to trial as I – Madam President, I will stand corrected. I understand the matter went to trial on 11 July and we had the information on 8 July. Now, admittedly that’s very - - -

5 MS BRANSON: The documents to us show that information at 22 July. We may together have to check all of that, Mr Colvin. And what at least from the information we have is an indication of a very long delay in contacting Indonesia and then a very prompt reply once they were contacted.

10 MR COLVIN: That is inconsistent. The length of time of the replies is inconsistent. This is a prompt reply, I agree. They’re not always that prompt, Madam President.

MS BRANSON: So the contact was at the time at the hearing and you had an answer within a week?

15

MR COLVIN: It would appear that’s the case, Madam President, yes.

MS BRANSON: Thank you.

20 MR SHARP: Madam President, I just should indicate that the accused was represented by counsel. There was a formal admission by the defence at the trial that he was an adult and over 18 years of age.

25 MS BRANSON: Yes, that’s what I was trying to find. It’s in the transcript of 19 July 2011 at what is marked as page 405, the judge asks, “How old is he?” The answer from counsel, “Well, he doesn’t know.”

30 MR SHARP: That’s in respect of the sentencing hearing. At the start of the proceedings there would have been oral admissions made by counsel as to facts that were not in dispute and one of those, your Honour, as I understood it, was the age issue.

35 MS BRANSON: Yes, it seems to be apparent from what Mr Williams says at this page that he does accept it. He accepts it because this is what he has been told the wrist X-ray discloses and that he doesn’t himself know his age. Now, we have only got statements being made but that’s recorded in the transcript at page 405.

40 MR SHARP: Your Honour, I have to say – sorry, pardon, your Honour. I have to say that I can’t speculate on what instructions – there were a number of occasions where instructions were taken from this particular person by his counsel and we’re simply not in a position to know what instructions were given and why age was not being an issue here.

45 MS BRANSON: Yes. But we have discussed before I think about the possibility – I’m sure there were cases where it was otherwise – but the possibility of young people in Indonesia not knowing how old they are and having been told that a wrist X-ray will determine it, deciding not to challenge.

MR SHARP: I accept that wholeheartedly, Madam President. This particular case – and as I say, we have no record of receiving the material from the Indonesian police but if that’s accurate and correct, it will equally draw an inference that he may have understood that the enquiries would produce that result.

5

MS BRANSON: Yes. I’m not seeking to work out in this whether the outcomes were right or not. I’m trying to examine the procedure, the acts and practices of the Commonwealth, Mr Sharp.

10 MR COLVIN: Madam President, I can clarify. We tasked the Indonesian authorities just before the start of the trial. We received a response approximately three weeks later which is after the matter had been concluded. So you’re quite right and which would explain why the DPP would not have the document.

15 MS BRANSON: Yes, thank you. Moving then to DUR041 from SIEV 122. This individual was detained on 28 March 2010. His bio-data form showed him with an age of – a birth age which would make him quite young. Entry interview, date of birth given consistently with that bio-data form. A wrist X-ray was taken on 15
20 April 2010. The report, which I think we probably don’t have in full, is described as using the word “approximately” in respect to an age of 19. DIAC sends an email – there’s an internal DIAC email showing that the case managers think that this individual is under 15 years and so should be removed. It’s possible that the other agencies didn’t ever know of that. Did you know of that so far as your records show, Mr Colvin?

25

MR COLVIN: We have no record of that, no.

MS BRANSON: Any record of that, Mr Sharp?

30 MR SHARP: No, your Honour. We did eventually get the DIAC age assessment but not until 1 November 2010.

MS BRANSON: And then I think the Australian Federal Police in a statement of material facts in this matter dated 29 September 2010 note that he was aware that the
35 results of the X-ray indicated he was 19, but he believed that he was not this old as his mother and father had told him he was born in 1999.

MR COLVIN: That’s correct, yes.

40 MS BRANSON: There’s some relevant internal DIAC documents but on 16 October 2010 DIAC – sorry, 6 October 2010 DIAC sends an email to the Federal Police. Do you have that, Mr Jabbour?

MR JABBOUR: I don’t, I’m sorry.

45

MS BRANSON: We have got a DIAC reference for it, we will just turn it up. It’s addressed to Mick and Doug. Do we know who Mick and Doug would be?

MR COLVIN: Yes, that would be officers in our headquarters in Canberra.

MS BRANSON: And the advice coming from the DIAC officer is:

5 *My team has just interviewed this individual in Darwin. I know he is due to be*
transferred into AFP custody imminently. The view of my team is that while the
client is unlikely to be 11 years old as he claims, I do not consider he is over 18
but more likely around 14 or 15 years of age. A written report will be prepared
10 *in due course. While I understand that you will continue with the transfer as*
planned based on the result of the wrist X-ray, I thought you should know our
views about the client as soon as possible.

And then it goes on:

15 *I understand that the client has indicated that his mother has his birth*
certificate and he will attempt to obtain a copy of it. I'm not sure how he will
be able to provide DIAC with that document once he is no longer in our care
but I will follow up within DIAC.

20 He was charged the next day in Silverwater, arrested and held as an adult; is that
right?

MR COLVIN: That would appear correct, yes.

25 MS BRANSON: Any evidence on your files of some concern about a fellow
Commonwealth agency assessing this individual as quite young and an immediate
decision was made whether it had been in the pipe line to proceed to charge him as
an adult and hold him in Silverwater?

30 MR COLVIN: No, there's nothing on the records that we have with us. Of course,
we can go back and see if there's a record that we're not aware of. I would presume
that that information would come into our headquarters and then be disseminated to
the relevant case officer but I can't be sure.

35 MS BRANSON: And there's a note on the file, it's an AFP document. It has got,
"Log 204" on it. I don't know if that means anything?

MR COLVIN: That could be a case log.

40 MS BRANSON: Right. On Thursday 7 October 2010, this individual was
transferred from Northern Immigration Detention Centre, Darwin, to Sydney Police
Centre, Surry Hills, Sydney Police Centre. He was placed under arrest and formally
charged with what he was charged with. On Friday 8 October he appeared before the
Central Local Court and the court ordered as follows:

45 *(1) the brief to be submitted by a day in November. The matter be adjourned to*
Bankstown Local Court on 1 November for the purpose of determining age. (3)

orders to indicate he might be 11 years old even though the X-ray indicates 19; to be kept with at least one other of the crew for company and bail refused.

5 It might be thought to reflect concern in the court about having this individual in adult custody. Did the police see it that way at the time?

10 MR COLVIN: I think, Madam President, consistently throughout this process we have had concern about that possibility. The evidence that we were bringing forward was that we were charging him as an adult and it seems clear to me that the court was aware there was certainly that question and there was an age determination hearing set. As I think I said yesterday, it was our standard practice and I hope it was our standard practice at this time to make sure that correctional facilities were advised if age was in question so that they could make appropriate arrangements if they felt it necessary.

15 MS BRANSON: On 18 – sorry, on 8 October 2010, Mr Sharp, the defence emailed the Commonwealth Director of Public Prosecutions to say that he doesn't look 18 and asked if anything could be done to confirm his full and correct date of birth with Indonesian authorities. Do you have that? It's 003.0138.

20 MR SHARP: Yes.

MS BRANSON: It's addressed to Louise Thompson.

25 MR SHARP: Yes, that's correct.

30 MS BRANSON: So it had obviously been raised with counsel in court and then asking whether the Federal Police have any way of confirming his full name and correct date of birth with the Indonesian authorities, and then expressing concern with the present medical certificate and in particular a number of factors with respect to it.

MR SHARP: That's correct.

35 MS BRANSON: And then the response, perhaps not enormously helpful, directs her attention to the provisions of the Crimes Act on wrist X-rays.

MR SHARP: It does, yes.

40 MS BRANSON: And says that the issues that you have raised have been raised with the Australian Federal Police?

MR SHARP: That's correct.

45 MS BRANSON: Was there a request to the Australian Federal Police at or about that day to conduct enquiries in Indonesia with respect to this individual?

MR SHARP: Excuse me one moment, we will just find it. I will check that. I should indicate, Madam President, this is a matter run at our Sydney office and on 12.10.2010, there was a letter from the Commonwealth DPP to the AFP saying that a brief of evidence was required with a list of outstanding material, particularly re the age having being raised by the defence and:

Can a more detailed report be undertaken particularly if one looks at variables such as race, nutrition, etcetera. Please provide as a matter of urgency and again, please advise if possible to obtain substantive records from Indonesia re age.

MS BRANSON: And did you get a response to that, Mr Sharp?

MR SHARP: There was a response there was a report done by Dr Low in respect of the age assessment. I'm not sure if we got a response on the Indonesian question. I think the next major thing that happened was that on 1 November we received the DIAC age assessment and by 25 November a reference had been made to the director personally with a recommendation which he adopted and the decision to discontinue was made.

MS BRANSON: Thank you. Mr De Crespigny, I think you may have been responsible for a communication on 8 October on this file. There's an email I am looking at, Mr Sharp. It's from you dated Friday 8 October 2010 to David Stevens, a copy to Mr De Crespigny and others. Do you have that?

MR DE CRESPIGNY: Sorry, Madam President, we have found the document.

MS BRANSON: So it's a response document:

I agree with your response, we are certainly taking the same line in WA. In addition, we have said that we will not automatically accept foreign documents as accurate and reliable. This is not to say we doubt the bona fides of the embassy or government department providing the document. What is in question is the provenance of the underlying material and the person providing that information as to when, in what circumstances and for what purposes it was provided. I also agree with the evidence of what the Australian Federal Police say about this case and age determination or claims already made or not made.

MR SHARP: That's correct.

MS BRANSON: And then I think there's an email – sorry, Mr De Crespigny, I don't think it does come from you. It seems to be from David Stevens to Allan Sharp but probably to you, and it's that one I think to which the one I just read is in answer. Is that right? Have I got the order right?

MR SHARP: No, my response was to one that is lower than that. It was sent to me on Friday 8 October by Mr Stevens which indicated:

We have a gentleman who was processed and charged this morning. Claims to be 11, very brief medical report which approximates age at 19.

MS BRANSON: Yes.

5

MR SHARP: That's the one.

MS BRANSON: And that's the one which I was the one I dealt with before was in answer to - - -

10

MR SHARP: Which I am responding to, yes, yes.

MS BRANSON: In response to, yes. Do you see at or about that date a reference to solicitors in the Commonwealth Director of Public Prosecutions Office being concerned that the individual could pass for 15 and that it's only a borderline expert report that he is 18 to 19?

15

MR DE CRESPIGNY: I apologise, Madam President. Is it in that chain of emails?

20

MS BRANSON: It's at the bottom of that one that starts out:

We have a gentleman who was processed and charged this morning who claims to be 11.

25

At the bottom it says:

I am concerned about this one. The solicitors here say he would pass for 15 when we have a borderline case for approximately 19. I'm wondering whether we should press on or send him back. I don't raise that as an issue for you at this stage. Thanks, David.

30

So at that stage at least there were officers within the Commonwealth Director of Public Prosecutions who had seen this individual and thought he looked or thought he could pass for 15.

35

MR SHARP: That's correct.

MR DE CRESPIGNY: Yes, yes, Madam President.

40

MS BRANSON: Dr Low was approached in this matter on 19 October 2010 to do a report.

MR SHARP: That's right, yes.

45

MS BRANSON: Dr Low's report said that the subject was over the 18 and close to reaching skeletal maturity but the bones were not fully fused. So I think on Dr Low's approach that would put him under 19.

MR SHARP: I would accept that, yes, Madam President.

MS BRANSON: On 28 October the defence were questioning the reliability of the wrist X-rays.

5

MR SHARP: Yes, that's correct.

MS BRANSON: And on 29 October 2010 there's a file note recording that the defence has got real concern about the application of the Greulich Pyle Atlas.

10

MR SHARP: Yes, that's correct, yes.

MS BRANSON: I think there's a CDPD memo 033.0044. It seems to record remarks of Eliza Amparo in response to a draft minute from Louise Thompson dated 2 November. Do we know who Eliza Amparo who?

15

MR SHARP: She is a member of the Commonwealth DPP office in our Sydney office.

MS BRANSON: She expresses a view that in view of the expert evidence and the informal – as she described it – AFP policy to return crew members in this age group, it would be unfair and inconsistent to prosecute this individual.

20

MR SHARP: We're just trying to find that document, Madam President. Madam President has it in front of you and if that's what it says, I accept that.

25

MS BRANSON: If you don't have it, let me read it out. It is headed, "Remarks of Eliza Amparo in response to the draft minute from Louise Thompson dated 2 November 2010 regarding this individual." And I will read it in its entirety:

30

Based on the available evidence, I'm of the view that a court would likely accept on the balance of probabilities that the accused is over 18 years of age at the time of the offence but had not reached 19 years of age. Given the apparent informal AFP policy to return crew members in this age group, it would be unfair and inconsistent to prosecute this accused. I also note his relatively minor role as a cook on the boat. In the circumstances, I agree with Louise's recommendations that the charges be withdrawn. However, the accused should be warned that he is unlikely to receive the same benefit if he should commit another offence.

35

40

MR SHARP: Yes, that's correct. That's what the document says.

MS BRANSON: On 2 November, in the document 033.0104 in an email from Doug Witschi to you, Mr Sharp, there's a reference to advice from the Sydney office which is seeking confirmation – which is asking for advice on views as a matter of urgency on the prosecution of this individual being discontinued.

45

MR SHARP: Yes, that's - - -

MS BRANSON: And the document I first refer to, this is stated:

5 *In this case, he tested at 19. The expert report details him as over 18, there are
no exceptional circumstances with this individual. Now that we have a DIAC
report that from my perspective the reliability of it is questionable as to its
conclusions, it appears this is now jeopardising prosecutions. Would value
your thoughts and issues on the subject and a clear direction on how to
10 proceed with this matter. The outcome now potentially means that any test of
19 in the adult through the X-ray process, the prosecution can be crippled by
the DIAC pilot assessment that has little academic rigour or foundation for the
conclusions made.*

15 Now, of course it had always been the policy not to prosecute, had it not, unless there
was a finding of 19 years of age?

MR SHARP: That was – yes, that was certainly the undertaking given to the Senate
Committee and that's absolutely correct.

20

MS BRANSON: The author of this note says:

25 *In the last 12 weeks I have had to respond to numerous ministerial requests
regarding the reasons and justifications for returning people without charge to
Indonesia.*

That's the passage we discussed I think yesterday.

30 MR DE CRESPIGNY: Madam President, I don't believe you had raised that
passage with us. Certainly my - - -

MS BRANSON: That must have been a comparable passage in another document.

35 MR DE CRESPIGNY: No, no - - -

MR COLVIN: Madam President, you raised it with the - - -

MS BRANSON: With you?

40 MR COLVIN: - - - the officer you're talking about all through that email is an AFP
officer. You raised it with us.

45 MS BRANSON: All right, so does this indicate, Mr Crespigny, that not only were
numerous ministerial requests going to the Australian Federal Police but numerous
ministerial requests were going to the Commonwealth Director of Public
Prosecutions?

MR DE CRESPIGNY: No, Madam President. What I wanted to say is - - -

MS BRANSON: It is the AFP document?

5 MR COLVIN: That's right.

MR [transcript unclear]: Yes.

10 MR DE CRESPIGNY: In effect it's – and we weren't receiving requests and nor would we take such matters into account.

MS BRANSON: All right, thank you. And the Federal Police served its brief of evidence later that month on 19 November?

15 MR SHARP: I think that's right, yes.

MS BRANSON: And on 22 November 2010 an email from David Stevens to you, Mr Sharp, and you, Mr De Crespigny. And the author here suggests a cautious approach:

20

Given the standard deviations involved whereby we treat such persons as juveniles unless there's other evidence or reasons to treat them differently. I think this will assist in our advocacy in prosecuting matters where the expert evidence is clear that the person's plates have fused. I don't think there will be many such cases and I think such an approach will stop us and the AFP agonising over marginal cases where we can better put our resources into the vast multitude of other cases where the situation is clear.

25

30 And it refers to a minute to the director being prepared to recommend that the prosecution be discontinued.

MR SHARP: That's what that document says, yes. Yes, Madam.

35 MS BRANSON: And it reflects, as far as you understand, views that were being expressed at the time within the office?

MR SHARP: Certainly the view of Mr Stevens, yes.

40 MS BRANSON: What about more generally?

MR SHARP: We were certainly discussing – I mean, you have seen our view of the DIAC assessment reports and the difficulties with it and that certainly was being as part of the general discussions.

45 MS BRANSON: Right. And there had long been discussion, had there not, and not always implemented in practice, but long discussion about not prosecuting unless you could establish by wrist X-ray that someone was 19.

MR DE CRESPIGNY: Madam - - -

MS BRANSON: Yes, Mr De Crespigny?

5 MR DE CRESPIGNY: Madam President, I think Mr Sharp gave evidence earlier
that while you have rightly pointed out that it was undertaken in the Senate – for the
Senate Committee back in 2001, certainly Mr Sharp and I were cognisant of that
when Mr Sharp undertook his paper in December 2010. Otherwise as far as our
10 position of going – only using the most certain evidence was – this was the initiation
of it and it was one which we adopted and it was put into Mr Sharp’s paper.

MS BRANSON: I’m not sure I heard all that, Mr De Crespigny, but are you saying
in the period ahead of Mr Sharp’s paper what was said at the time of the law coming
15 into effect, it had a bit slipped from consciousness in the Office of the
Commonwealth Director of Public Prosecutions?

MR DE CRESPIGNY: I certainly wasn’t aware of it at that time, and we, Mr Sharp
had previously said, I wasn’t aware of it at that time.

20 MS BRANSON: And the belief within the office was that a strong case for
prosecution could be made on a wrist assessment that placed an individual under the
age of 19?

MR DE CRESPIGNY: I don’t think we had turned our mind to it until this time,
25 Madam President.

MS BRANSON: But you needed to turn your mind, didn’t you, to it because you
had individuals like this and others whose wrist X-rays were not being read as
30 placing them at 19 or older? Is that right?

MR DE CRESPIGNY: I accept that, Madam President.

MS BRANSON: And then we have got a note over the name of David Stevens in
the Sydney office which has got the numbers 003.0088. That seems to be the basis
35 of the expression of views that we’ve looked at, summarised in another message; is
that right?

MR SHARP: We’re just trying to get that document up, Madam President.

40 MS BRANSON: It seems to be where that statement comes from that:

45 *A safe and sensible albeit conservative approach for the office is to treat
everyone whose plates have not fused, whether fusion has commenced or not as
a juvenile, unless there’s other evidence or other reasons to take another
approach.*

MR SHARP: I accept that, Madam President.

MS BRANSON: And it goes on to note, Mr Sharp, that you're preparing a more detailed paper on the topic.

MR SHARP: It does, yes.

5

MS BRANSON: There's a recommendation to discontinue or recommendation to withdraw proceedings based on age prepared by the Sydney office over the signature of Louise Thompson which is dated 23 November 2010.

10 MR SHARP: Yes, Madam President.

MS BRANSON: And on the 30th of that month the charges were in fact withdrawn.

15 MR SHARP: Yes, I think – the 30th it was withdrawn? Yes, the director in fact signed the minute to discontinue on 25 November and it was formally discontinued in court on 30 November.

20 MS BRANSON: So observations about this file which I draw to your attention if you want to remark upon them, and also the Australian Federal Police, that there was a DIAC age assessment being under 15 and indeed DIAC lobbying on the topic of his age but he was still charged and held in an adult facility. No evidence of his age other than a wrist X-ray. The documents don't disclose an attempt to contact officers in Indonesia. The initial report says approximately 19 and Dr Low confirms that fusion had begun but was not completed. And there's some evidence that the AFP
25 wanted to continue with the prosecution at the time that the Commonwealth Director of Public Prosecutions was urging discontinuance. Any observation you want to make about that, Mr Colvin?

30 MR COLVIN: No, Madam President.

MR SHARP: The only observation I would make, Madam President, is that this was one of those cases where the X-ray placed him at 19 and this was where a young age was claimed so that there was that very big disparity.

35 MS BRANSON: Approximately 19, I think. Approximately 19, yes.

40 MR SHARP: Approximately 19, but other than that – and of course while we used the DIAC age assessment to determine to discontinue this matter, I have already indicated our position on DIAC age assessments and the difficulties of using them in a proceeding.

45 MS BRANSON: Just to complete the matter, total time detained for this individual: 245 days, 58 of them in an adult facility. Now, we turn to UPW031 from SIEV 72. An individual apprehended on our records on 15 November 2009. DIAC entry interview: he gave a date of birth 29 January 1995. First wrist X-ray taken on 14 January 2010. The doctor who immediately read it reported:

It's difficult to accurately age the patient apart from stating that the skeletal age is thought to be between 18 and 19 years.

5 So we don't have a reading of 19 or over. The Federal Police record of interview doesn't proceed because of difficulties in getting the satisfaction that he understands the caution. A prosecution notice issued – perhaps you could explain to us what's the significance of a prosecution notice, Mr Colvin?

10 MR COLVIN: In what context, Madam President?

MR SHARP: Perhaps it would be easier if I deal with that given my location versus Mr Colvin's.

15 MS BRANSON: All right. Thank you, Mr Sharp.

MR SHARP: A prosecution notice is in fact the originating process for charging an accused person. What otherwise might be referred to as a charge sheet or court appearance notice in other jurisdictions.

20 MR COLVIN: Apologies, Madam President, I would know that as a charge sheet so.

MS BRANSON: So this is the initiating process in the Magistrates' Court?

25 MR SHARP: Yes, that's correct.

MS BRANSON: So he has been charged as an adult by this stage?

30 MR SHARP: On that day, yes.

MS BRANSON: On that day, right.

MR SHARP: The filing of the prosecution notice formally charges and commences the proceeding.

35 MS BRANSON: As an adult. And the only evidence of age in the possession of the Commonwealth Director of Public Prosecutions at that stage was a report stating that his skeletal age is thought to be between 18 and 19 years?

40 MR SHARP: Madam President, the DPP wouldn't have been in this matter at that stage. I think we first would have come into the matter the day following charging. It's a normal process. They're charged and - - -

45 MR COLVIN: And remanded.

MR SHARP: - - - there's a first mention, remanded or if it's early in the morning we would appear on the same day but not until after that has been filed.

MS BRANSON: So was it the Australian Federal Police, Mr Colvin, that decided to charge him as an adult in the Magistrates Court notwithstanding the only evidence was that his age was between and 18 and 19?

5 MR COLVIN: That's correct, Madam President.

MS BRANSON: There's a date of birth given on this prosecution notice of 15 November – no, that's not right. 11 February – that can't be right either. The date of birth is given as 29 January 1991.

10

MR COLVIN: On the prosecution report, so on the charge sheet, yes.

MS BRANSON: Do you have any idea where that date came from?

15 MR COLVIN: I have no idea. I have a number of different dates of birth that appear to have been given at different stages of the process. Given that we have charged him on the basis of the radiologist report, that's a fairly specific date for us to have given.

20 MS BRANSON: So 29 January is the day and the month that he gave but the year that he gave has been changed?

MR COLVIN: It's quite different, yes. I would be speculating, Madam President, as to what was in my case officer's mind at the time.

25

MS BRANSON: But it looks like they just decided to calculate a date based on what the radiologist had told them?

MR COLVIN: I would like to think that's not the case but it does appear that that was possibly the case.

30

MS BRANSON: It looks like it probably was, doesn't it?

MR COLVIN: Yes.

35

MS BRANSON: Yes. We've got a Commonwealth Director of Public Prosecutions email, 038.0441. Do you have that, Mr Sharp, it's not your office. It's not your memo, it comes from Will Ellis, the legal officer.

40 MR SHARP: Can I have that number again please, Madam President?

MS BRANSON: 038.0441.

MR SHARP: Yes, I have that document, Madam President.

45

MS BRANSON: It reads:

5 *I understand from speaking with you this morning, and from the AFP material facts sheet in this matter, he claims to be under the age of 18. The fact sheet refers to an X-ray taken on or about 14 January 2010 from which a conclusion was drawn that he was at this time between the age of 18 and 19. This is two months - - -*

MR SHARP: Sorry, Madam President, could I just verify that you - - -

10 MS BRANSON: Are you looking at a different one?

MR SHARP: - - - you indicated that this was an email to me?

MS BRANSON: No, I said explicitly it wasn't an email to you.

15 MR SHARP: Sorry, no, my apologies.

MS BRANSON: Yes, but you have got it there I think?

MR SHARP: I have, yes, in front of me.

20

MS BRANSON: Yes.

25 *The fact sheet refers to an X-ray taken on about 14 January 2010 from which a conclusion was drawn that he was at this time between the age of 18 and 19. This is two months after the SIEV was intercepted on 15 November 2009. You also advised there had been a conversation between AFP and[redacted] in which he discussed his age but gave conflicting information suggesting he either did not know his age or was fabricating it. It's important – will you please provide me with the X-ray report and also any other relevant material regarding his age. Could you please also advise whether any other material is being or will be sought. I presume background checks in Indonesia are unlikely to be fruitful, and if so, when it is likely to be available. It's important the question of whether he was a minor be resolved as soon as possible so that if he was a minor he can be treated accordingly.*

35

So it illustrates an active consciousness on the part of the Commonwealth Director's Office to be satisfied about the issue of age of this individual. Is that right?

40 MR SHARP: That's correct.

MS BRANSON: And then Will Ellis sends an email to Alison Flynn on 15 February:

45 *Will I get the wrist X-ray report this morning? If the defendant 4 is between 18 and 19 years old at the time of the X-ray, how can we prove he was 18 at the time of the offence two months prior to the X-ray?*

So it's the same concern.

MR SHARP: That's correct, an email dated 12 February.

5 MS BRANSON: And then a decision is made to approach Dr Low?

MR SHARP: That's correct.

10 MS BRANSON: Now, it's a similar situation to the one before – we looked at before. If you do get a report from Dr Low that says something else then all you have actually got is two conflicting expert's opinions, isn't it?

MR SHARP: Yes, that's correct.

15 MS BRANSON: And Dr Low in fact reported that at the time of the radiograph being acquired, this individual had demonstrated a skeletal age of 19 years or greater – doesn't appear to express a view at all on chronological age. Do you see that?

20 MR SHARP: The document number, please, Madam President?

MS BRANSON: Sorry, 004.0374. It's on the letterhead of Sir Charles Gairdner Hospital, 4 March 2010.

25 MR SHARP: Madam President, could I just ask what date is on that and it might assist us to get it quicker.

MS BRANSON: Yes. It's dated – the actual report is dated 4 March 2010. It's addressed to Federal Agent Flynn, 004.0374.

30 MR SHARP: Thank you, Madam President. Yes, we have it. Yes, Madam President?

MS BRANSON: The conclusion it expressed solely in terms of skeletal age.

35 MR SHARP: I agree with that, yes.

MS BRANSON: Above it, Dr Low has written:

40 *In my interpretation the X-ray illustrates skeletal maturity.*

He then describes that:

This landmark is reached at a standard age for a male of 19 years.

45 Now, if he meant this landmark is reached ordinarily at the age – birthday of 19 years, it's curiously inconsistent with other reports written by Dr Low, isn't it?

MR SHARP: I wouldn't necessarily agree with that, Madam President. But it's certainly - - -

5 MS BRANSON: Well, he normally gives a fifty-fifty possibility, doesn't he, at the age of 19 once he starts setting out probabilities?

10 MR SHARP: He does in subsequent reports. This is a very early report, I might indicate, and again I think the timing of these matters for Dr Low is important because this was a very early report. At that stage I wasn't even involved in these matters and it was some time after I had started work I had asked Dr Low to be more definitive and – or my staff to ensure that Dr Low was more definitive. That's when he started his greater exposition and more detail in his statement.

15 MS BRANSON: Yes:

This landmark is reached at a standard age for a male of 19 years.

20 On the face of it doesn't sit well with a 50 per cent probability of having a mature X-ray on your 19th birthday, does it?

MR SHARP: I think it simply doesn't refer to it, Madam President.

25 MS BRANSON: All right. We then have a statement on a document, a very short email from Will Ellis again, 038.0396 on which I can't – dated Friday 5 March 2010. It's very short, I can read it to you. It says:

30 *Martin, attached are the wrist X-ray reports. On the face of the report of the first doctor, his opinion is inconsistent with the Greulich and Pyle and should be disregarded in favour of Dr Low's opinion.*

It would seem to evidence an increasing confidence in officers of the Commonwealth DPP in Dr Low's views and in the fact that views expressed inconsistent with him are inconsistent with the Atlas and therefore probably unreliable. Do you read it that way?

35 MR SHARP: I don't think it goes anywhere as far as that, Madam President. I should indicate perhaps for the record that Mr Plummer who received this email was my predecessor. I believe he had been involved in some of the earlier matters. He does no more in this email than state that Dr Low should be preferred in respect of other opinions. I don't know what's in his mind.

40 MS BRANSON: Well, not quite. He says of the first report, the first doctor:

45 *The opinion of the first doctor is inconsistent with Greulich and Pyle and should be disregarded.*

So he is making a judgment on the expertise, the very expertise that these medical practitioners hold themselves forward as having?

5 MR SHARP: Yes, he says that, “On the face on the report,” that’s correct, yes.

MS BRANSON: We’ve got a court attendance record of the Commonwealth Director of Public Prosecutions of 10 June 2010. It’s the Commonwealth Director of Public Prosecutions’ document 038.0339. Do you have that, Mr Sharp?

10 MR SHARP: I’m just trying to find that.

MS BRANSON: It’s a court attendance in the standard format. So having given the record of the court attendance, which was that the defence sought an adjournment, there’s an asterisk and an “NB”:

15

The accused looks about 15 and moved in his seat like a young boy. I made these observations without hearing – without learning – without knowing he was my matter where he claims to be a juvenile and that he claims to be 15.

20 Exclamation mark:

There are two medical reports confirming he is over 18. We need to consider the accuracy of the technology in assessing bone density.

25 Is that regarded as a significant matter when an officer of the Commonwealth DPP should make such a note and highlight it?

30 MR SHARP: Look, I think the answer to that, Madam President – and I can’t speak for what’s in the mind, of course, of the officer – but my reading of that is the officer who did this was a relatively junior solicitor and may well have raised that concern and may not have been well informed of the processes and the practice itself. So I can understand why someone said, “I need to find out more about this.”

35 MS BRANSON: Sure. But no reason to think she wasn’t capable of making a sensible observation about what a person looked like when she didn’t even realise he was a defendant in her matter?

MR SHARP: To the degree that anyone can do that, that’s correct.

40 MS BRANSON: We have got a file note from the very same officer, I think. It’s next in my documents. It’s CDPP.038.0335. Do you have that? She had taken a telephone call in from someone who appears to be the representative of the defendant in this case. It’s dated 16 July 2010.

45 MR SHARP: That’s correct.

MS BRANSON: And the note is:

5 *He advises a prison visitor has some sort of birth certificate for this individual showing he is 14. He wants to know whether the wrist tests were infallible. I said from the enquiries I have made they are very solid in terms of the science behind them but certainly if he had a medical report that said otherwise we would certainly look at that as it is not our policy to prosecute juveniles of people smuggling when it is said to deport them. He, after further discussions, indicated that his client would probably plead guilty on 22 July 2010.*

10 Was it reasonable to assume that the view of this officer who only days before had noted how young this individual looked, that her views about the solidity of the science had come from discussions generated in the office after the writing of her memo?

15 MR SHARP: Two things, Madam President. It is not the same officer.

MS BRANSON: Is it not? I apologise.

20 MR SHARP: No, it is not. The first officer was a much more junior officer and an entirely different officer.

MS BRANSON: Well, just go back. I might be misreading it, Mr Sharp. The court attendant's record has got written for the prosecution, Mooney.

25 MR SHARP: I thought it was McKenzie.

MS BRANSON: McKenzie was for the accused. And it is Ms Mooney's email I have just read to you.

30 MR SHARP: I may be wrong on the first document.

MS BRANSON: Yes. And she is described as a principal legal officer so not so very junior.

35 MR SHARP: My apologies, Madam President. It is the same officer.

40 MS BRANSON: Right. So a principal legal officer, without knowing the individual is the accused in her case, observes how young he looks and makes a note of that, giving it some prominence. And within a few days is advising someone who represents that person that the science is very solid. And my question is, is it likely that her views have been influenced because he earlier identified the need to consider the accuracy of the science. He has not got a – at least telling somebody else that they are very solid in terms of science, that she is likely been talking with someone in the Office of the Commonwealth Director who has persuaded her that these reports are very solid in terms of science.

45 MR SHARP: Two things, Madam President, perhaps. That particular officer had only just commenced – although she is a principal legal officer she had only just

commenced at the Commonwealth Office, I think, on about 1 June or shortly before that: Certainly after my arrival in Perth. And previous to that she had been in private practice. Not with our office at all. And, secondly, I really – I am not in a position to answer the question what changed her view or what research she did
5 between that date and the subsequent hearing. I really can't answer it.

MS BRANSON: But from that note alone there seems at least a strong possibility, a connection, between her statement that the science is strong and the decision not to challenge age.
10

MR SHARP: Again, I really can't speculate on what defence counsel may have taken instructions on or read into it in terms of what he is told. I mean, she said what she said to him and one presumes experienced counsel would have made their own forensic decision on what they were doing.
15

MS BRANSON: And then there is a note, a court instruction sheet, by the same court officer on 22 July of that year, 038.0334, showing there was ongoing discussion with this officer in defence, showing that the defence at least was still very worried about the issue of age.
20

MR SHARP: That is correct, yes.

MS BRANSON: On 25 August of 2010 there is a note from the same principal legal officer on – about a telephone attendance on Allen Camm who I think we should assume now is the legal representative for the individual.
25

MR SHARP: Certainly in the early days of this matter, yes.

MS BRANSON:
30

Allen has a couple of statements in Indonesia which he is going to fax me. He said he thinks one is from the headman of the village or province and one is the headmaster of the school. He has the originals which he could also make available. He says that what he talks about is the fact that this boy is not yet 15 and –
35

I think that is it meant to be –

he is still at school. He also has his birth certificate. He was unable to tell me the date of issue. I asked him to send it to me so that we could make some assessment of the documentation and go from there.
40

MR SHARP: That is correct.

45 MS BRANSON: And then we have got a file note, 25 August 2010, over the name of the same principal legal officer:

Bruce Jackson now has the file as Alison Flynn has left. The AFP position is that any documents coming out of Indonesia cannot be confirmed as genuine. We will continue to rely on Dr Low's report. I said I will get him anything that Dr Low has done in terms of statements in other matters.

5

MR SHARP: That is correct. That is what is recorded.

MS BRANSON: There is an email from Elizabeth Mooney to Alison Flynn of 25 August 2010. It may be in the same chain. Notes that the document was issued
10 some five months after the interception. In the first one. But underneath that the email of 25 August at noon:

*I enclose a fax received from Allen Camm as listed for the above as evidence that his client is under 18, namely, 14 years of age at the time of offending. Documents, I am told, comprise a birth certificate, a letter from the provincial
15 leader and a letter from the school teacher. The originals are held by Allen Camm. However, he is happy to provide them to us for perusal. As the documents are entirely in Indonesian it is not possible to determine what they say or their veracity. I have previously seen the accused and he certainly has
20 every appearance of looking very young and I had previously commented on this.*

And at the end:

25 *In any event if a child – if the accused is a child the court will want to deal with the issues as soon as possible.*

I assume that the office would have as well, Mr Sharp.

30 MR SHARP: Yes, that is correct.

MS BRANSON: I think on 29 September 2010 there was an appearance in the Magistrate's Court and a plea of no jurisdiction was made, putting age in issue.

35 MR SHARP: That is correct.

MS BRANSON: The originals, I think, of the documentation from Indonesia were provided to the Director of Public Prosecutions on 2 September of 2010.

40 MR SHARP: Madam President, my records indicate that we were in fact given copies of them on 25 August. There was a new solicitor that came on 2 September or shortly before that and he provided a further copy of the birth certificate and the documents.

45 MS BRANSON: He provided you with the originals, I think, on that day.

MR SHARP: The originals, yes.

MS BRANSON: And asked for them to be returned as soon as convenient.

MR SHARP: That is correct, yes.

5 MS BRANSON: Yes. And then the Commonwealth Director of Public Prosecutions, over the signature of Ms Mooney, writes to Holgate Legal:

10 *In respect of the birth certificate it is denied that this document was created prior to the offence being committed. We also dispute that it is admissible in its present form or without calling proper evidence as to what it is and the circumstances of how it came into being.*

MR SHARP: Sorry, Madam President, could we just have a document number, please.
15

MS BRANSON: I do. 004.0396. Date, 12 October 2010. Do you have that?

MR SHARP: Yes.

20 MS BRANSON: Down the bottom of the page. So we have got to deny that the birth certificate was created prior to the offence, dispute its admissibility without calling proper evidence as to what it is in the circumstances of how it came into being. In relation to the letters from the two individuals that have previously been described, disputed that these documents provide any relevant evidence whatsoever.
25 In any event, to the extent you deem that such evidence has any relevance, we would require the parties to give evidence in person. Proceedings have been set down for hearing. It's a fairly strong approach by the Commonwealth Director of Public Prosecutions, Mr Sharp?

30 MR SHARP: Yes, Madam President. Perhaps I should say two things about that. Yes, and I think it's a question of the timing of this particular letter. At that time, certainly, we were concerned, as I have already indicated to you, about ensuring the documents, foreign documents were in a proper form and could be verified for the reasons I have previously given. But it is in strong terms and readily accepted that
35 my officer did this one error in as much as I concede that the creation of – or the extraction of a birth certificate on a particular date does not necessarily mean that it had been created after the event – the inference which – what is implied in there, I think, is either – well, it's certainly wrong. Whether it was intentionally wrong or not, I can't answer but certainly I think the view was taken that it's not the
40 registration of the birth on that particular date, it's the date it was extracted. I readily accept that. It's been an error that has been made several times with these sort of matters.

MS BRANSON: And it was decided to take the matter to trial with the only
45 evidence being the evidence of Dr Low.

MR SHARP: That's correct.

MS BRANSON: Then I think you were placed on notice that the defence intended to make a submission to the effect that there was no other investigations undertaken by the prosecution concerning the age of the accused?

5 MR SHARP: I'm not sure of that. Is there a document I – it's – may well be right.

MS BRANSON: 0040 – sorry, point 0415 dated 12 November 2010.

MR SHARP: I have that document at present.

10

MS BRANSON: And that was true at that stage, Mr Sharp.

MR SHARP: That's correct. Yes, ma'am.

15 MS BRANSON: And correct that there had been no enquiries in Indonesia? Mr Colvin, you might be - - -

MR SHARP: Certainly to my awareness, yes.

20 MS BRANSON: Yes. The Federal Police haven't told you of the outcomes of any?

MR SHARP: No.

MS BRANSON: No.

25

MR COLVIN: No. Madam President, I have that we – tasking the measure on 28 July 2011. That tasking was finalised four months later with no result. So there would be nothing to advise the Commonwealth DPP.

30 MS BRANSON: And then ultimately the magistrate handed down the finding on 3 December that he was over the age of 18 on the balance of probabilities.

MR COLVIN: That's correct.

35 MS BRANSON: And then you improved – you approved an indictment, Mr Sharp?

MR SHARP: I did, yes.

40 MS BRANSON: And the matter was listed for hearing in the Western Australian District Court.

MR SHARP: That's correct.

45 MS BRANSON: The defence asked for it to be discontinued, maintaining the plea that he was under age.

MR SHARP: That's correct.

MS BRANSON: And asking again for the AFP to undertake investigations in Indonesia.

MR SHARP: Yes, they did.

5

MS BRANSON: He then asked for a dental X-ray.

MR COLVIN: Madam President, we may be able to help there. We – as I understand it, we approached his defence and offered a dental X-ray. But, however,
10 no formal consent was ever obtained.

MS BRANSON: Well, there was an email, I think, on 18 July. There's a letter on the letterhead of the Commonwealth Director of Public Prosecutions dated 14 July. It's 039.0290 over the signature of C Gray for director. He states that on – it's sent
15 to the Australian Federal Police.

On 12 July 2011 we received a letter for a Mr Matthew Holgate, the legal representative for this individual. Further to the announcement of 8 July 2011 of the two ministers, Mr Holgate has advised his client would like to undergo a dental X-ray. Please contact Mr Holgate as soon as possible on the details below to make arrangements for his client to be X-rayed.
20

It goes on:

Mr Holgate has also requested, "that a proper investigation of the birth certificate, school and village papers that were provided to me by your office be undertaken" no doubt prompted by the aspects of the statement of July. I note that the witness statements in the trial brief consistently refer to my client as being 15 to 16, a boy and such like. Those materials had not been served at the time of the age determination hearing. Please attend to this as a matter of priority."
25
30

MR COLVIN: We may have more now, Madam President. I was advised during the lunch adjournment that we offered and no consent was given.
35

MR JABBOUR: We reached out, Madam President, through our Perth office to the lawyer seeking written consent and that was never received, I understand it.

MS BRANSON: There was an email, I think, of 18 July from a Federal Agent Stoykovski.
40

Hi, Katherine, I'm not aware of when the procedures will be finalised however I again reiterate the AFP will not be undertaking dental X-rays in the matter as the court has already ruled that the offender is not a juvenile.
45

MR COLVIN: Well, Madam President, we stand corrected that's different to the advice that we were just provided with. We can go back and see if there's something we are missing.

5 MS BRANSON: I think our understanding is that that was the response in July. There might have been a reconsideration later on but by then the willingness of the individual, I think - - -

MR COLVIN: Had changed.

10

MS BRANSON: - - - had changed. But the initial approach was that he simply wouldn't do it because his age had been determined already. In a DPP document, 039.0272, I think we can see that the defence lawyers became concerned about issues raised by the College of Radiologist where X-rays were being taken for a non-
15 medical purpose. By 15 September of 2011, the matter is still ongoing and the defence indicate that they would plead a lack of jurisdiction on the grounds of age, so they contest age again. And the defence sent to the Commonwealth Director of Public Prosecutions a copy of Dr Christie's report and a certificate from the Assistant Indonesian Consul. Now, I think we are familiar enough with Dr Christie's reports
20 and it was one of those reports, I think, Mr Sharp, that was provided in this case.

MR SHARP: That's correct.

MS BRANSON: And then a document from the – sent to the Consulate General of
25 the Republic of Indonesia in East Perth from someone described as the Regent of Wakatobi who conveys that the birth certificate is legal, as issued by the Wakatobi official government on 30 April 2010. So you had some evidence from Indonesia by then that the Indonesian authorities stood by the birth certificate.

30 MR SHARP: That's correct.

MS BRANSON: There was an age determination hearing in the District Court – sorry. I want then to turn to an email, 039.0069. It's sent by Principal Legal Officer Mooney to Mr Holgate, the defence lawyer.

35

*Hi Matthew, thank you for your letter enclosing a note from the Regent of Wakatobi. Am I to assume that this person, whose name is [redacted] on the official document you have emailed, is, in fact, supposed to be [redacted], your client. Is there any reason why, after you have clearly gone to considerable
40 trouble, you have provided from apparently an official source, a completely different name on the document. I also note the birth. This is from the DIAC entry interview date where your client describes himself as born on 29 January 1995. I note at the recent mention, your client told the court via the interpreter that he was 15 at the time of the offence after you had advised the court he had
45 been 16 and this latest document would make him 14 at the relevant time. Is there any reason for these discrepancies? No provenance of his age has been provided by you and this latest document has no forensic*

value. I also advise that the AFP has not received any response from Indonesian authorities.

5 So it's a fairly scathing response to a document sent by the Indonesian authorities, Mr Sharp.

MR SHARP: It was a strong response, your Honour.

10 MS BRANSON: Would we assume that she would have consulted with senior officers before sending such a memo?

15 MR SHARP: No, I don't think we can. It's not copied to anyone else for – then, I don't recall seeing this – because I wasn't the branch head at that time, but I don't recall seeing this. I think if this had been cleared by someone I would have heard about it. It's true, that these – there's nothing inaccurate in it and nothing false in this statement. The fact is that the document – the names did differ and dates of birth did differ and it gives rise to a question as to the – not the problems of the document itself and it's not disputed, I don't think, that it came from the official thing that we discussed – of course, the background to it, prior to that. But it is a strong response and I have to say it's one, had I seen it before it went out, I would not have sanctioned. So - - -

25 MS BRANSON: Thank you. And then we have a District Court decision on 11 November 2011 where there's a finding that he – of no jurisdiction. The court wasn't satisfied he was over 18 on the balance of probabilities at the date of the offence.

MR SHARP: That's correct.

30 MS BRANSON: There's a note, I think, that he's in custody and it would have been adult custody and he will remain there unless there's an application.

MR SHARP: That's correct.

35 MS BRANSON: Would the Commonwealth Director of Public Prosecutions now be quite so cavalier about leaving someone that the courts had found to be a child in adult custody?

40 MR CRAIGIE: I don't believe we were cavalier at that time. Mr Sharp has quite candidly – that – well, he will no doubt express it differently, but if he had known, a less robust response would have been given to defence counsel, the outcome that you point to, Madam President, is – I infer you link to this approach, would certainly not be one I would regard in a cavalier or casual fashion if, in fact, that was the outcome. If I might - - -

45 MS BRANSON: Might one expect - - -

MR CRAIGIE: I'm sorry, I interrupted Mr Sharp - - -

MS BRANSON: No, you're quite right. Not it's - - -

5 MR SHARP: Madam President, just in respect of that, I notice that – I note that the hearing for this age determination was held on 28 and 30 September 2011. But judgment wasn't delivered until 11 November 2011.

MS BRANSON: Yes. That was the date I gave. Yes.

10

MR SHARP: In this matter, the discontinuance notices went to my director on 13 November, which was a Sunday, and was signed by my director on 14 November and, in fact, this was a matter where I had directed, following the hearing, that we should be prepared for an eventuality that if this was – this age determination went
15 against us, we should be ready to discontinue.

MS BRANSON: Wouldn't it be possible to ask the judge who brought down the determination that the individual was under the age of 18 at the critical time to remand into a different facility rather than into the adult facility?

20

MR SHARP: It could have been, Madam President.

MS BRANSON: No request was made to remand into a juvenile facility when the judgment was announced, was there?

25

MR SHARP: I don't think it was, no.

MS BRANSON: And, in fact, the individual stayed three longer days in adult – at least three longer days in adult detention.

30

MR SHARP: I can't – I can't confirm or refute that, Madam President. The West Australian Corrections would clearly have been aware of the decision and they, of course, were responsible for the housing of someone on remand. I can't say whether they chose to house him elsewhere or not. I don't know.

35

MS BRANSON: Well, we do know that Mr Craigie, on 14 November, signed a warrant directed to the person in charge of Hakea Prison in Western Australia and to all other officers of the Western Australian Department of Corrective Services.

40 MR SHARP: In respect of that, that would have been true – my office would only have known of it being at Hakea when we drafted this, but in our view it made no difference which prison we actually put on the documents. If it was elsewhere, he had moved for any reason, they would simply have executed the warrant.

45 MS BRANSON: Have you any reason to think he didn't stay in Hakea over the weekend, the three days after the findings?

MR SHARP: Only in respect of – Madam President, we had had a lot of discussions with the West Australian Corrections Office and they had been very conscious of this. And I would have been – I actually would be surprised if they didn't, having got the decision, he wasn't moved, but I really can't answer it. I didn't – I wasn't a party to it.

MS BRANSON: So on the information that we have, Mr Sharp, he was released into DIAC's custody on 14 November, by that time he had been detained 731 days, 641 days of which he had spent in an adult correctional facility.

MR SHARP: I don't dispute those figures, Madam President, I was dealing with the period after the announcement.

MS BRANSON: I think you've seen in the course of that time the concerns that I have raised about this one, what was the evidence, the observations being made by people within the Commonwealth Director of Public Prosecutions' offices, apparent delay of 18 months before requests were made to Indonesia by the Australian Federal Police which seemed to be 10 months after Defence provided a verified birth certificate, and that this individual, ultimately found to be under the age of 18, spent 21 months in adult custody. A regrettable story, I think, Mr Craigie.

MR CRAIGIE: Madam President, it fits into the category of a matter, with hindsight, would have been handled differently and I don't think there's any point in trying to put a gloss on that.

MS BRANSON: Yes. You also agree, a very regrettable history, Mr Colvin.

MR COLVIN: I would agree, I would agree, Madam President, yes.

MS BRANSON: All right. There's a certain similarity that I thought we might stop but there's one incidence that I do want to draw attention to. It's in the matter of OFD030, it comes from SIEV 111.

MR CRAIGIE: Madam President, before we go onto that matter there's just one observation I feel bound to make.

MS BRANSON: Yes, Mr Craigie.

MR CRAIGIE: I certainly don't cavil with your overall conclusion that things could have been done better in that last matter but just as to your observations of comments made by people, having seen a person and remarking how young he looked, I think that, yes, that may be a concerning observation. But one would, of course, take account of the fact that, rather like cross-racial identification, there are difficulties. Many of us would have difficulties in assessing the age of a person of a different ethnicity and particularly – and I don't want to be trite about this – people of an east-Asian appearance and can be wrong either way. The quite middle aged can look strikingly young and sometimes, it can run the other way and you spoke earlier of

racial variations and I think you ranged, with respect, from just about everywhere east of the Bosphorus.

5 And, of course, across that whole region there is a whole range of ethnicities and a whole range of appearances and certainly, that alone – I don't suggest that you ignore it as a matter of concern, but that alone would not be conclusive and, of course, in these cases judicial officers also have people before them and they're entitled to make their own observations as to the weight they should give appearance alone.

10 MS BRANSON: Yes, yes, thank you, Mr Craigie. In this document I'm looking at what is an Australian Federal Police document. It's dated 16 September 2010. It's headed Charging Two Juvenile Crew from SIEV 111, do you have that?

15 MR JABBOUR: I'm just looking for it, ma'am.

MR COLVIN: Madam President, it would help if we just quickly see the document and we will be able to locate it, my apologies.

20 MS BRANSON: It may not matter - - -

MR JABBOUR: I apologise, no, I don't believe I do and I apologise because I have a very thick folder but it appears to be missing.

25 MS BRANSON: Let me just tell you what's there, Mr Jabbour.

MR JABBOUR: Sure.

MR COLVIN: Yes.

30 MR JABBOUR: Thanks, sorry to do that.

MS BRANSON: Perhaps in the interests of time, if you just listen.

35 MR COLVIN: Yes.

MS BRANSON: There's an email from David Horscroft to Paul Jones:

40 *Paul, as discussed, attached is a minute seeking authority to charge two juvenile crew members of SIEV 111. Authority is required from the NMCO –*
that's you, Mr Jabbour, I think, is that right - - -

MR JABBOUR: That's correct.

45 MS BRANSON:

- - - and the CDPP. Regards, Dave Horscroft.

The attached minute is headed Re: Charging Two Juvenile Crew for SIEV 111:

As discussed, I seek a recommendation from you –

5 Mr Jabbour –

*and from the Commonwealth Director of Public Prosecutions for the two
juvenile crew of SIEV 111 to be charged. It's not clear who was the master of
the SIEV, consequently both should be charged and brought before court to
10 determine who was in charge of the vessel.*

Are you alert to the fact that what went on was that they were both charged as adults?

15 MR JABBOUR: No, I wasn't aware of that fact. I understood - - -

MS BRANSON: Approval was received - - -

MR JABBOUR: Yes.

20 MS BRANSON: - - - on 21 September 2010, it was received from Doug Ritchie
that:

...approval had been given to charge alleged juveniles from SIEV 111.

25 And then on a case note entry details document dated 27 September 2'10:

*The charge sheets for the two crew of this SIEV both have dates of birth
indicating the crew members to be juveniles. These dates of birth have been
provided created by DIAC and will appear on the accompanying Serco
30 paperwork.*

And then there's a note:

35 *I contacted Gary Keilor, the officer in charge of the Brisbane City Watchhouse,
concerning these issues. He stated, "The issue concerning" –*

and he identifies the individuals –

40 *as juveniles was on the paperwork that he had received from his A/C –*
what's that?

MR COLVIN: A/C would be Assistant Commissioner.

45 MR JABBOUR: Assistant Commissioner.

MS BRANSON: Continuing:

The watchhouse sergeant for Thursday has been a workmate aware of the issue. They will charge these two as adults even though the DIAC paperwork indicates they are juveniles. Regards, Dave.

5 So approval to charge as juveniles, it appears a decision taken to charge as adults, the issue raised by the watchhouse. What can you tell us about that, Mr Colvin or Mr Sharp?

10 MR COLVIN: Well, just while Mr Jabbour checks his records, my understanding – and Mr Jabbour will be able to correct me – is the decision we made was whether to proceed on charging these juveniles, whether that was exceptional circumstances in that their culpability was such that they were possibly the captain. What you are bringing to attention is that they were charged as adults which I think has taken us by surprise.

15 MS BRANSON: Because the approval given was to charge them as juveniles, wasn't it?

20 MR COLVIN: We would - - -

MR JABBOUR: The approval was – that's correct because my understanding, my recollection of events was that the request came to me as per the policy position to determine whether these were indeed, exceptional circumstances with a view to then proceeding with charges against juveniles. So, yes, my understanding was we were going to proceed against them as juveniles. I'm not aware that there was evidence that came to light, albeit in the form of a human wrist X-ray, that then caused the case officers to actually charge them as adults.

30 MS BRANSON: There is – I don't want to go right through this but I – the evidence seems to be quite clear that they were charged as adults, that the defence made representations to discontinue, identifying evidence relevant to age. There's a document – it's a Commonwealth DPP document of 12 August 2011, number 293.0651, talking of:

35 *This is a stock standard thing that AFP have been getting a lot of age determination challenges. People smugglers are fully aware of the government policy in that juvenile crew members will not be prosecuted. Documents provided by defence are fake and cannot be corroborated. If the defence want to use the affidavit of the brother they shall call him as a witness. They should put up or shut up in court. The letter is another attempt to cut the prosecution early, jumping on the back of false reporting in the media on this issue.*

A sense of a fair amount of cynicism.

45 MR COLVIN: Sorry, Madam President, is that an AFP email?

MS BRANSON: It seems so, Mr Colvin. The CDPP document is 293.0651. It's dated 12 August, it comes from Victor Stoykovski and it's addressed to David Horscroft, headed Submission to Discontinue:

5 *I've read the submissions from [redacted]'s lawyers. It's virtually a stock standard thing –*

etcetera, etcetera. I used the name, I asked it, and I won't repeat it. All right. Look, I think we will take a short break, I think we will stop the individual cases now. But
10 be aware that we are thinking of reporting around the 12 which is not to say that we won't mention things from others but we may make case studies from the 12. So please be ready to respond quite promptly if you see a draft to that effect. Very well. So we will resume at quarter to 4. Thank you very much.

15

ADJOURNED

[3.36 pm]

20

RESUMED

[3.47 pm]

MS BRANSON: Do you expect to have a colleague, Mr Anderson, or are we proceeding without Mr Rutherford?

25 MR ANDERSON: Well, we could proceed without him, yes.

MS BRANSON: Yes.

30

MR ANDERSON: Yes. He hasn't left the jurisdiction.

MS BRANSON: All right. I now propose to turn to address, not I hope in great length, the joint submission that was provided to the Commission on behalf of the Attorney-General's Department of the Australian Federal Police and the
35 Commonwealth Director of Public Prosecutions. Can I say, first, I think everyone here is aware that the Department of Immigration and Citizenship ultimately put in a separate and brief submission. I'm not proposing to turn to that, nor am I interested to explore the circumstances in one agency was not making a joint submission with the others. It's entirely a matter of choice for agencies, I think, how they put a submission to the Inquiry, so I don't regard that as a matter of interest. That means,
40 Ms Pope, if you wish to leave, subject to losing your chance to make a final statement, you should feel free to go. You're also extremely welcome to stay.

MS POPE: Thank you. I will stay.

45 MS BRANSON: Thank you. Now I think, Mr Anderson, that I would like it confirmed that although this was, of course, a joint document, the coordination of its preparation was undertaken within the Attorney-General's Department. Is that right?

MR ANDERSON: That's correct.

MS BRANSON: And in your division.

5 MR ANDERSON: That's correct.

MS BRANSON: Yes. And I'm just interested in its process for its preparation. At an early stage, was there, for example, a drafting committee set up or what was the process undertaken?

10

MR ANDERSON: The process was that, very early on, we began to consult with relevant agencies, in terms of what the submissions should look like, the approach that should be taken. We consulted certainly with the Federal Police, PM&C, DPP, the Office of the Chief Scientist, Department of Health, a wide range of
15 Commonwealth agencies and also with different parts of the Attorney-General's Department. We provided a draft outline and sought comments on that, and then we continued - - -

20

MS BRANSON: I think, perhaps, stop for a moment, Mr Anderson. You're getting a little bit ahead of me, so for present purposes, I'm concerned by the engagement between the Attorney-General's Department, the Australian Federal Police and the Commonwealth Director of Public Prosecutions, so should I deduce from what you've just said that it was accepted that Attorney-General's Department could take the lead, and after some informal discussions, perhaps, ahead of informal
25 discussions, the draft of an outline was prepared within the Attorney-General's Department. Is that right?

25

MR ANDERSON: We proposed that we would take the lead and that was accepted. We, of course, chaired the – I, of course, chaired the age determination working
30 group, and we have generally taken the lead on trying to develop a Commonwealth approach to age determination.

30

MS BRANSON: Thank you. Did you then also take the lead in preparing a draft outline of what might be covered by the submission?

35

MR ANDERSON: We did.

MS BRANSON: Yes. How did you go about doing that, Mr Anderson? What did you have regard to in working out what might be covered by the submission?

40

MR ANDERSON: I will just confer with my colleagues on this one.

MS BRANSON: I'm quite happy to hear from Mr Rutherford directly, if that would be easier, Mr Anderson.

45

MR ANDERSON: Certainly. I might get him to give – we just sought to actually paint the picture of what is the process of dealing with crew who are claiming to be minors from when they first arrived through to when they're either returned to their

country of origin or go through the criminal justice process and the steps along the way.

5 MS BRANSON: As at what time did you attempt to depict that process?

MR ANDERSON: I believe, and I will be corrected if I'm wrong on this, but it was at the time of the submission.

10 MS BRANSON: Okay. You were alert, of course, to the Attorney-General's assurance of cooperation with the Inquiry at this time.

MR ANDERSON: Yes.

15 MS BRANSON: Yes. And you were aware that there were terms of reference for the Inquiry.

MR ANDERSON: Yes.

20 MS BRANSON: And you were aware that we had sought documentation that went back, I think, for individual cases, as far as 2008, and other information as back as far as 2001.

MR ANDERSON: That's correct.

25 MS BRANSON: You were aware from letters that I had written to the Attorney-General of issues of concern to me?

MR ANDERSON: Yes.

30 MS BRANSON: Had you identified, or did you think it likely, that what had triggered the call of the Inquiry was a response that I failed to receive from the Attorney-General, late in 2011, which was an assurance of going back to review cases, where people had been prosecuted, either substantially or wholly on the basis of X-ray evidence?

35 MR ANDERSON: I wouldn't speculate what were the reasons why you've called the Inquiry.

40 MS BRANSON: You were aware that I had been calling from February 2011 for a review of past cases, where substantial reliance had been placed on just X-rays.

MR ANDERSON: Yes.

45 MS BRANSON: And you were aware that we had asked for information about individual cases from 2008 forward?

MR ANDERSON: You had asked for individual cases in your letter in around July or so 2011. Just to make it clear, in case anyone else is listening, you've been asking for those, from 2008.

5 MS BRANSON: Yes, thank you. But when notices went out for the provision of information in documents to the Inquiry itself, the call was for documents about cases from 2008.

MR RUTHERFORD: Madam President - - -

10

MS BRANSON: Yes, Mr Rutherford.

MR RUTHERFORD: Your clarifying letter, explained that the Attorney-General's Department wasn't provided information about such cases.

15

MS BRANSON: No, but you were aware that I had called for them from other agencies.

MR RUTHERFORD: We were aware of that fact.

20

MS BRANSON: Yes, and you were coordinating a joint response that included those very agencies.

MR RUTHERFORD: Our response was focused on the policy arrangements.

25

MR ANDERSON: We weren't dictating what the actual contents should be. We were simply proposing an outline, and we went out to agencies and said, "Here is our proposal," and we asked for comments on that. We didn't, in any way, seek to limit or constrain those agencies in what they provided or said should be the content or the approach taken with the submission.

30

MS BRANSON: But you had offered to take the lead, and I think that not surprising in the circumstances that the Attorney-General's Department might take the lead. And you, as you've identified, decided that at least to propose a submission that addressed the current reality at the date of the submission, when my Inquiry was into past circumstances. Do you accept that?

35

MR ANDERSON: It's also worth saying, Madam President, that one never knows with an Inquiry such as this as to the way in which it's actually going to proceed. It's not that common for the Human Rights Commission to conduct an Inquiry. And so, the making of a submission is not necessarily envisaged as being the sole step that's going to actually – it's simply a first formal step, and we sought, with that submission we suggested to the other agencies, that it paint a picture of how the Commonwealth is actually approaching age determination. So I think we put that forward.

45

MS BRANSON: But it would be surprising if you weren't alert to the fact, Mr Anderson, that my Inquiry was likely to look backwards, because of my ongoing

concern about the cases where people had already been convicted on the basis of wrist X-ray evidence, and my ongoing request to the Attorney-General to have those cases reviewed. And the response I was getting, which was, in substance, that no general review of cases convicted, of individuals who were convicted on the basis of wrist X-ray evidence either substantially or wholly would be undertaken.

MR ANDERSON: That was the decision the Attorney-General had conveyed to you. Yes.

MS BRANSON: Doesn't it strike you that that might be something that I would be inquiring into? What was the evidence that would suggest these cases ought to be reviewed in a systematic way?

MR ANDERSON: I can only repeat what I've already said, Madam President. That this was not viewed as being the sole or only – the sole step that we would be taking formally in these proceedings. We're in your hands to how you want to conduct the Inquiry.

MS BRANSON: Right. So I don't want to debate it with you, so at an early time, a decision was made within the Attorney-General's Department to address the current state of affairs at the time of the submission and nothing else, and presumably, the other agencies agreed with you that that was the way to go forward. Is that right?

MR ANDERSON: That's correct.

MS BRANSON: Is that so, Mr Colvin, from your agency's point of view?

MR COLVIN: That is correct, Madam President. We saw this submission as a – I think as Mr Anderson has characterised it. As a painting the picture for you.

MS BRANSON: Did it occur to you that it might be more helpful, if I was looking at history of treatment of young Indonesians who said they were children from the date 2008 that it might be more helpful to help me understand what was happening in 2008, in 2009, in 2010 and in 2011?

MR COLVIN: No. It certainly did not occur to me at the time. I can assure you that with your various correspondence to us what we were at pains to make sure we felt that we were providing everything that we could that was helping satisfy you.

MS BRANSON: Did you think I was in much doubt that the date of this submission about what the current situation was?

MR COLVIN: I couldn't comment on that, because I don't have your correspondence in front of me, Madam President.

MS BRANSON: Mr Craigie, did you consider these matters or was it done on your behalf by somebody else?

MR CRAIGIE: Well, what was done on my behalf was to carry out my initial response to the Inquiry, and that was that we should do everything possible to expose and explain our processes. You will see from - - -

5 MS BRANSON: As at the date of the submission?

MR CRAIGIE: Yes. And you will see, also, that we responded to your later request, I think, with a good deal of material. You will see from the signature on that letter, I think, Mr Thornton was acting in my stead. I decided rather rashly to take
10 some leave around about Christmas time. Ms Hinchcliffe and Mr Carter were essentially the leaders of the team that put together our response. I've had some discussion with them, and we've agreed that probably the person best placed to explain the substance of that approach would be Ms Hinchcliffe. She has not been
15 sworn as yet.

MS HINCHCLIFFE: I haven't been sworn, Madam President, but if you would like me to be sworn I will be sworn to give you some - - -

MS BRANSON: If we find it necessary we will let you know.

20

MS HINCHCLIFFE: Yes.

MS BRANSON: You were alert to the fact that I had raised the issue of whether the Commonwealth Director of Public Prosecutions was complying with the prosecution
25 policy of the Commonwealth, weren't you, Mr Craigie?

MR CRAIGIE: Indeed.

MS BRANSON: It's not an issue, I think, addressed in any substantive way in the
30 submission.

MR CRAIGIE: No, I think it's implicit in the submission that the DPP would proceed in accord with its own prosecution policy.

35 MS BRANSON: But I think you agree that the submission that came to me really sought to set out what was the circumstance at the date of the submission and didn't look back over the history of the matter in any way.

MR CRAIGIE: Again, I would suggest to you that it's implicit even – and I don't
40 disagree in that expository document of the present situation that the DPP would assert that we have always adhered as best we can to our own prosecution policy – the Commonwealth prosecution policy to be accurate.

MS BRANSON: We've discussed that a little bit during the course of the two days,
45 particularly about disclosure of scientific material, haven't we, Mr Craigie?

MR CRAIGIE: We have, and you've no doubt noted the parameters of our agreement and some substantial parameters of a difference – a difference of opinion.

5 MS BRANSON: Nothing of that kind has been addressed in the submissions.

MR CRAIGIE: I think the submission actually does make reference to the prosecution policy of the Commonwealth.

10 MR CARTER: Perhaps I might add, Madam President, we had written to you earlier on 21 December which provided background information about our responsibilities, and that certainly was something that was going back over the period.

15 MS BRANSON: Yes, you answered questions that I had asked at that time. No one appeared to regard those questions as being indicative of what I might like further developed in submissions.

20 MR CRAIGIE: I'm not sure which of the questions you asked you feel were not addressed either in the letter by the accompanying material or our contribution in informing the joint submission.

25 MS BRANSON: All right. Let me turn to another issue, Mr Anderson or Mr Rutherford, whichever it is, we have the paragraph – and you've already addressed it, I think, Mr Anderson – the Attorney-General's Department has prepared this joint submission for the Australian Human Rights Commission Inquiry into the treatment of individuals suspected of people smuggling who say they are children in collaboration with a range of individuals. Now some, of course, obviously are the ones who were the joint parties to the submission. I note there's a reference also to the Office of the Chief Scientist. Now, I think we actually have the advice provided you by the Chief Scientist. Is that right?

MR ANDERSON: I believe you do.

35 MS BRANSON: Yes, I do. I think he indicates that a margin of error of two years would be appropriate for - - -

MR ANDERSON: That's correct.

40 MS BRANSON: You were aware at the time that this submission was written that on the Greulich and Pyle Atlas – an age above 19 simply could not be substantiated on the Greulich and Pyle Atlas.

MR ANDERSON: An age above 19?

45 MS BRANSON: Yes. That's as far as you can go. You can say the last wrist X-ray in the place is labelled 19, and the scientists have been saying well, it stays like that forever, so it's actually just a mature X-ray, so you can't assess an age beyond 19. Were you aware of that?

MR ANDERSON: Not specifically, no, and I haven't gone right into the details.

MS BRANSON: Right. Mr Rutherford, you were aware of that?

5 MR RUTHERFORD: I was broadly aware of that. I was also aware of the standard deviation, the 15.4 months.

10 MS BRANSON: Did it occur to you that on the advice you received from the Chief Scientist if two years margin of error had to be allowed, and the highest assessment that could be made was 19 years, you could never be satisfied of someone being 18 years of age on the Greulich and Pyle methodology?

15 MR RUTHERFORD: Madam President, at no point have we treated X-rays as being entirely satisfied that someone is over 18. It has merely been presented as a probability.

20 MS BRANSON: I understand that, but you see, you call in the summary here that you've consulted with the Chief Scientist. There's no reference, I think, anywhere in the document to what you consulted with the Chief Scientist about.

MR RUTHERFORD: Madam President, we consulted with the Office of the Chief Scientist about the entire submission, and the Office of the Chief Scientist replied to our request to review it and made some suggestions.

25 MS BRANSON: And the advice of the Chief Scientist was that the margin of error was two years.

30 MR RUTHERFORD: Madam President, we did not include the standard deviation reference in that submission.

35 MS BRANSON: Right. But at the time that you wrote a document that said it had been written in collaboration with the Office of the Chief Scientist what the Chief Scientist had told you was effectively that a Greulich and Pyle Atlas couldn't help you determine whether someone was 18 years old or not. Do you accept that?

MR ANDERSON: With respect, Madam President, we don't accept that. We didn't say we wrote this in collaboration with the Office of the Chief Scientist. We said that they were consulted in preparing that submission.

40 MS BRANSON: I'm sorry. I apologise for that. That's true. So you consulted with the Chief Scientist, but you made no reference in it to what he had said, and you understood, I think, Mr Rutherford, that what he said in fact amounted to advice that you couldn't use the Greulich and Pyle Atlas for a determination if the age you were interested in was 18 years.

45 MR RUTHERFORD: Madam President, we decided not to move into the disputed science that we were aware of at the time within the submission.

MS BRANSON: Were you conscious of the fact that if you advised me that you had prepared this submission in consultation with the Chief Scientist that I might think the Chief Scientist agreed with what was in it?

5 MR RUTHERFORD: Madam President, we had consulted with the full submission to the Office of the Chief Scientist and they had no issues with the content of the submission that was presented.

10 MS BRANSON: Well, you hold a letter signed by the Chief Scientist that tells you the margin of error on the Greulich and Pyle Atlas is two years, Mr Rutherford, and you had it, I think, at the date of the submission.

MR ANDERSON: I'm sorry.

15 MS BRANSON: Yes, Mr Anderson.

MR ANDERSON: The brief provided by the Chief Scientist with his letter says, amongst other things, that "the Greulich Pyle method is the most commonly used for estimating skeletal maturity and then chronological age", amongst other things. It goes on to say that "there is observed variation in skeletal maturity of two years within each gender." So yes, it does say that as well.

MS BRANSON: Yes, so he says two years.

25 MR ANDERSON: It does also say that it's the most frequently used and then makes comments about other things. It says:

30 *There's currently no single definitive test available to determine chronological age. It's not a precise science. There will always be a margin of uncertainty inherent in any method for age determination –*

and then talks about:

35 *...best practice needs to employ a case-by-case and multi-disciplinary approach to balance physical, developmental, psychological, environmental and cultural factors. Such an approach would currently consider a suitable combination of radiological tests in combination with interviews and available documentary evidence.*

40 And I believe that the combination of radiological tests and the combination of interviews and available documentary evidence is what is actually contained in the submission as the current position.

45 MS BRANSON: But am I right you yourself didn't turn your attention to the significance of his saying – referring to two years at the age – for all ages, and if you applied that to the year 18, then you would never be able to use it in the way that

scientists had tried to use it or purported to use it in cases that we've been examining over the last two days?

5 MR ANDERSON: Like Mr Craigie, I was actually on leave throughout this period, but I can say that the Department itself believed that it was correctly reflecting the views of the Chief Scientist having regard to those comments I've made.

10 MS BRANSON: There's also a reference immediately above it to a consultation with the Australian Radiation - - -

MR ANDERSON: Protection and Nuclear Safety Agency.

15 MS BRANSON: Sorry, just excuse me for a moment. In reference to what I've been talking about with respect to the Office of the Chief Scientist, I just draw your attention to the submission at page 11:

Accordingly, only those cases where there is the highest probability that the defendant was 18 years or older at the time of the offence and brought before the courts –

20

now, that's in the context of wrist X-rays. Did it strike you that that might be inconsistent with the advice of the Chief Scientist?

25 MR ANDERSON: Madam President, the reference in that line was to the highest probability that the defendant was 18 years or older. It wasn't that the defendant would be conclusively 18 years old.

30 MS BRANSON: So when it says "where there is the highest probability" are you asking me to find that that was intended to say comparatively as opposed to where one could be very highly confident that the person was aged 18?

MR ANDERSON: Once again, we weren't venturing into what was the standard deviation within the submission.

35 MS BRANSON: But your advice from the Chief Scientist would have made you realise that it would be very difficult to be confident at a high probability of the age of 18 on a mechanism that doesn't go beyond 19 years with a two-year margin of error?

40 MR ANDERSON: No, the Chief – again, if I might just – he said there's observed – or the brief, rather, attached to his letter – I don't know whether it was specifically from him – "there is observed variation in skeletal maturity of two years." So I don't think that that's actually inconsistent with saying there is a probability.

45 MS BRANSON: That's the very point, Mr Anderson, isn't it, because there is variation – wide variation you've got to have a two-year margin of error in the advice

of the Chief Scientist which is problematic if your scale runs out at 19, and you're concerned if somebody is 18 or not.

5 MR ANDERSON: Yes, he's saying "observed variation" and that means certainly you can't be conclusive as to someone's age. I appreciate that point.

MS BRANSON: Good. Thank you. Immediately above that there's a reference to the fact that the Australian Radiation Protection and Nuclear Safety Agency normally referred to as ARPANSA was also consulted. Now, I think there's a reference at 10 page 14 to ARPANSA's advice. Is that right?

MR ANDERSON: That's correct, and that does contain an error.

15 MS BRANSON: In fact, that doesn't accurately represent ARPANSA's advice, does it?

MR ANDERSON: I believe it does apart from the – it's omitting the word "must" – the second line of that paragraph. So where it reads "ARPANSA has also advised that the use of wrist and dental X-rays for age determination purposes satisfy 20 internationally accepted principles of radiation protection" it should be "must satisfy internationally accepted principles of radiation protection." ARPANSA suggested in their comments that in the submission we should go to – we should talk about how the principles of justification and optimisation apply, and I believe at other points immediately preceding that in the submission we do actually talk about justification 25 and optimisation of the use of wrist X-rays in terms of the dosage that's actually applied, and also the context of the criminal justice process and the very serious consequences either way.

30 MS BRANSON: You received, I think, advice from ARPANSA. It's in the document that I have headed Response to AGD Re Human Imaging for Age Determination. ARPANSA advises that:

35 *Recently revised guidelines from the International Atomic Energy Agency Basic Safety Standards recommends that human imaging using radiation that is performed for occupation or legal or health insurance purposes and is undertaken without reference to clinical indication shall normally be deemed to be not justified. Further, the revised IAEABSS recommends that if in exceptional circumstances the government or regulatory body decides that the justification of such human imaging for specific practice is to be considered the 40 requirements of –*

certain paragraphs which they provide you by extract –

45 *shall apply.*

They go on to say:

As it stands, the Australian Government submission does not reflect these recent changes to international best practice on this subject. ARPANSAs early advice to you should be amended along the following lines.

5 And they set out how it should be amended. It concludes:

10 *ARPANSA has also advised that the use of wrist and dental X-rays for age determination purposes must satisfy internationally accepted principles of radiation protection, in particular, the principles of justification and optimisation. Current international best practice would require that any use of ionising radiation for the purpose of dental or wrist X-rays for age determination must be subject to a formal process of justification to demonstrate that there is a net benefit from the exposure. Any such radiation exposure should be optimised to ensure the least dose of radiation needed to*
15 *achieve the necessary goals is used.*

Was that a variation from the advice previously given?

20 MR ANDERSON: I'm looking at the advice that they provided on 3 February. Do you have a reference for the advice there?

MS BRANSON: Mr Rutherford provided it to us. He might be able to tell us when that was.

25 MR RUTHERFORD: It was provided after the submission was lodged when we became aware of the missing word "must". We made ARPANSA aware of that omission and asked that they just confirm what they would like to do with that section of the submission, given how it was represented, and on the basis of that, ARPANSA did further research and provided the additional advice.
30

MS BRANSON: The request to ARPANSA followed a request from me that was conveyed to you by Ms Temby to see the advice from ARPANSA. Is that right?

35 MR RUTHERFORD: That's correct.

MS BRANSON: It's in fact not the case, is it, in Australia that there has been a formal process of justification to demonstrate that there's a net benefit from exposure either for wrist X-rays or dental X-rays?

40 MR ANDERSON: Prior to the submission actually being finalised and lodged, they simply said that the submission should note and demonstrate how the proposed practice of taking the X-ray will satisfy internationally accepted principles of radiation protection including the principles of justification and optimisation. So that was what we were having regard to when we were actually preparing the submission.
45

MS BRANSON: My question is that hasn't been done in Australia with respect to either wrist X-rays or dental X-rays, has it, Mr Anderson?

MR ANDERSON: Well, I didn't – I was on leave, but looking at that, I don't understand that note. I have not previously understood that note from them to be saying that they're actually referring to a scientific process of justification and optimisation.

5

MS BRANSON: You may or may not be aware that the medical practitioners advised me at the scientific hearing that they are not aware of any such process of justification having been undertaken. I don't want to spend a lot of time on this because I want to hand over to the agencies here, but you would accept, would you not, Mr Anderson, and also you, Mr Colvin, and also – well, I might stop there perhaps rather than go to you, Mr Craigie, at this stage, but a number of the statements that are made here would not have been true expressed to apply to an earlier period of time?

10

MR COLVIN: Madam President, I think it's quite clear from our perspective that our procedures have developed and enhanced over time and this reflects the procedures at the time that this document was written, not necessarily the procedures that had always been in place.

15

MS BRANSON: Right. To short cut, the documents that we've been looking at over the two days and the individual cases we've looked at today demonstrates earlier significant departures from the standards that are set out in this letter.

20

MR COLVIN: Clearly, yes.

25

MS BRANSON: The understanding that wrist X-rays and other measures of age are not individually conclusive, but in combination they can play a valuable role was not an understanding reflected by the cases we've been looking at. Would it, Mr Colvin, where we've seen prosecutions again and again where the only evidence offered by the Crown was wrist X-rays.

30

MR COLVIN: That's correct, Madam President. At the time of those, that was the only matters that we had we felt was admissible and of course over time dental X-rays and other things have been considered such as detailed interviews and more enquiries overseas.

35

MS BRANSON: And even the statement at page 11:

Accordingly only those cases where there is the highest probability that the defendant was 18 years or older at the time of the offence they brought before the court –

40

whatever. It's the accuracy of it at the time it was written didn't reflect past practice as we've seen today.

45

MR COLVIN: Madam President, I think it was the intention of the AFP that we only charged those that we assessed to be adult but I think you've clearly pointed out

cases where individual decisions were made and on reflection those decisions are inconsistent with that policy.

5 MS BRANSON: And Mr Craigie, the statement that the Commonwealth Director of Public Prosecutions will only contest people smuggling matters where age is an issue where there's probative evidence other than the analysis there is X-ray evidence to support the position that the defendant was an adult at the time of offending wasn't true over most of the period we've been looking at, as the cases we've looked at has revealed.

10

MR CRAIGIE: I think that that was a sound approach. It wasn't always reflected in the way we implemented our work.

15 MS BRANSON: Thank you. On the top of page 12, the Commonwealth Director of Public Prosecutions has specifically sought advice from an expert radiologist concerning the age of the studies that are used to analyse the wrist X-ray, the impact of racial differences on the results and the impact of malnutrition on the procedure. That's a reference to Dr Low, isn't it?

20 MR CRAIGIE: Yes.

MS BRANSON: Thank you. And it was Dr Low's expertise that was under challenge increasingly throughout the time that I've been concerned with and at a relatively advanced stage the Commonwealth Director of Public Prosecutions sought to satisfy itself by going to the very expert whose expertise was under challenge.

25

MR CRAIGIE: Part of the process, as Mr De Crespigny indicated today was to go back to Dr Low and to challenge him by putting some of the counter-expertise and seeking an explanation from him.

30

MS BRANSON: Ordinarily if you were concerned about whether someone was acting in accordance with accepted standards for their profession, you would think of asking somebody else in the profession rather than asking the person themselves, wouldn't you, Mr Craigie?

35

MR CRAIGIE: Well, that was not the order of our concern certainly in the initial phases. Our concern was that having long been accepted by the courts we were encountering situations where Dr Low was not finding favour with the courts and other opinions were being preferred. Those other opinions were put to him by a number of my officers. In effect, Mr De Crespigny said to proof him with those advices and opinions and make a judgment as to whether his responses were sufficient to render some comfort. Now, any comfort we had out of that exercise was guarded and short lived.

40

45 MS BRANSON: In retrospect, would you agree it might have been preferable to ask an independent person whether they could review Dr Low's opinions for you and

let you know whether they appear to accommodate acceptable professional standards including statistical standards?

5 MR CRAIGIE: If we had been able to promptly find an appropriate person, yes, that would have been an option. As it was, we embarked upon another option and nonetheless came to a conclusion that evidence of that kind should no longer be led.

MS BRANSON: Further down we have in the third paragraph, the longer one:

10 *The report and testimony provided by the expert radiologist ensures that the court is aware of the probability associated with the assessment of the person's age.*

Is again a reference to Dr Low?

15 MR CRAIGIE: Well, it's really a reference to how we come to be in some sense at this point of controversy but it starts because Dr Low took a step to be helpful to the court and has never been at all secretive about the processes of which he engaged, in fact, completely exposed not only the court's – and if I remember last year in some
20 of the media coverage was quite open about his approach.

MS BRANSON: By the date that this submission was prepared you were well aware that the courts had rejected the evidence of Dr Low when he calculated probability to two decimal points based on the Greulich and Pyle Atlas, weren't you?
25

MR CRAIGIE: Yes.

MS BRANSON: We've heard evidence I think of at least the Attorney-General's Department being aware of studies that indicated significant early maturing skeletal
30 maturing in young men from Asian countries, but there's a reference on page 13 to advice received from the Australian Federal Police is that a comparison of an Indonesian national with the available database would have a variation range of zero to 12 months, etcetera, etcetera. What was that advice, Mr Colvin? Do you see it in the submission at page 13?

35 MR COLVIN: Yes, I do. We're just checking, Madam President. Sorry, at first I was thinking we were talking about wrist X-ray but of course we're talking about the dental and we think that's the advice of the anthropologist.

40 MS BRANSON: Perhaps on another day you could let us know whether we have that advice - - -

MR COLVIN: Well, it's the advice of the - - -

45 MS BRANSON: - - - and where we would find it.

MR COLVIN: I think we may have provided it.

MS BRANSON: It's all right. I'm advised that we have it. Are you able to remind me where it came from?

5 MR JABBOUR: I'm pretty sure it's Professor Stephen Knott who provided us the original.

MS BRANSON: It's from Dr Knott?

10 MR JABBOUR: Yes.

MR COLVIN: Dr Knott, he was the only odontologist that we consulted about the application of dental X-rays.

15 MS BRANSON: Yes, thank you. On page 15 of 30 under the heading Age Enquiries in the crew's country of origin we have a reference of the AFP seeking to verify the authenticity of the information provided with the country of origin. From when was that done, Mr Colvin?

20 MR COLVIN: From – I believe we started as a more systematic process in mid-2011.

MS BRANSON: Right, and experienced I think quite considerable delays, is that right?

25 MR COLVIN: Sorry?

MS BRANSON: Experienced quite considerable delays in receiving the material?

30 MR COLVIN: Variations, big variations, Madam President, and mostly delays, yes.

MS BRANSON: And the reference at the bottom of that page that goes over to the top about working to managing risks of delays, that's a fairly recent development? Wouldn't have been in place much earlier than the date of the submission?

35 MR COLVIN: This is about prioritising requests?

MS BRANSON: Mm.

40 MR COLVIN: No, I think, Madam President, after we started to systematically do it for every available matter that we could and the blockages that Mr Jabbour spoke about earlier, we obviously worked to try and refine our process with the Indonesian National Police and helped them prioritise those requests.

45 MS BRANSON: So it was a statement that wouldn't generalise backwards.

MR COLVIN: No, absolutely. That's correct.

MS BRANSON: And from what we've seen, Mr Craigie, the statement that where an age determination matter proceeds to a hearing before a court the Commonwealth Director of Public Prosecutions does not generally oppose defence counsel adducing statements from friends and family even where the requirements of the Foreign Evidence Act have not been satisfied and notwithstanding the limited opportunity for the CDPP to test the veracity of statements before the courts wouldn't generalise backwards either, would it, from what we've seen from some files we looked at today?

10 MR CRAIGIE: As an office approach it would generalise backwards a fair way including before some apparent departures.

MS BRANSON: We've certainly seen some striking apparent departures, haven't we, Mr Craigie, in the files we've looked at.

15 MR CRAIGIE: Yes, indeed, and you would have seen my reaction to it, and Mr Sharp's reaction to it and the fact of the matter is that from a date that I don't have at the top of my head, but some considerable time ago, we took the position that we were not going to stand on technicalities when it came to material that someone may wish to produce in support of their claim.

MS BRANSON: Yes. Can you tell us from what point of time the decision was made not to take objections of a technical kind?

25 MR CRAIGIE: I think it relates to something that Mr De Crespigny circulated.

MR COLVIN: Madam President, may I just make a comment while - - -

30 MS BRANSON: Yes, Mr Colvin.

MR COLVIN: - - - just in clarification of my comment before. I wouldn't want the record to reflect that there would have been no enquiries prior to July '11 made with Indonesian authorities but clearly - - -

35 MS BRANSON: No, no, I didn't suggest that.

MR CRAIGIE: Certainly no later than August and I can't mark a definite point in time before then but certainly no later than that.

40 MS BRANSON: And what steps were taken then, Mr Craigie?

MR CRAIGIE: Well, the policy was implemented as from 18 August 2011 but we would take the stance in court not to - may I put it this way - not to stand on ceremony when it came to - - -

45 MS BRANSON: Is there a document you issued to staff, or how did that become implemented, Mr Craigie?

MR CRAIGIE: I don't recall issuing a document, but it was certainly to deputies and I would apprehend when it is known to deputies, it is known to branch heads.

5 MS BRANSON: Right. Is it because someone has spoken to them or because there's some official documentation in your office that prosecutors could refer to?

MR CRAIGIE: I can't recall, but it was part of an environment where we were becoming increasingly concerned about a number of matters surrounding the question of claims as to whether people be young persons or not and it was a
10 measure that we adopted across the office.

MS BRANSON: But you're uncertain whether there was a direction in writing or not, is that right?

15 MR CARTER: I might add, Madam President, it arose in a matter that we looked at, [redacted], and there was a note to the director dated 18 August 2011 in relation to that. Following that matter being discontinued that meant it was drawn to the attention of the regional officers and was discussed in the forums that we discussed.

20 MS BRANSON: Is that to say no written direction, but just discussion?

MR CARTER: There's no written discussion – no written direction.

MS BRANSON: Mr Craigie, do you ever adopt the practice of issuing written
25 directions to Commonwealth prosecutors as to how they conduct themselves in representing the Crown?

MR CRAIGIE: What more commonly happens - - -

30 MS BRANSON: But do you ever?

MR CRAIGIE: Sometimes in the form of amendments to the guidelines and directions, yes. Sometimes via occasional contact to the deputies that matters get around the regions and sometimes - - -
35

MS BRANSON: But that's not a written direction, is it? I'm asking do you ever issue written directions.

MR CRAIGIE: Well, it will result in memos from those deputy directors to their
40 staff.

MS BRANSON: Right, so the directions don't come from you. They come from another level, is that right?

45 MR CRAIGIE: Well, it would depend on the nature of the direction. I meet with my deputies quite regularly and out of those meetings will come concluded views and those views will then be implemented across the office.

MS BRANSON: But it's how, was what I was interested in, Mr Craigie. How can you be sure they're implemented?

5 MR CRAIGIE: I would love to have an answer as to how we went about it in this instance but I can assure you that there was no doubt from a point in the second half of last year and I can't identify right now when that was, that given the nature of these proceedings and the difficulties that both sides were encountering with them that we should not stand on ceremony about the provenance of documents.

10 MS BRANSON: Is it your practice either yourself or through your deputies to audit files for the purpose of quality control?

MR CRAIGIE: In all of the offices there are processes of auditing going down through deputy and branch head levels. We - - -

15 MS BRANSON: I hesitate to ask but is the process set out in writing, Mr Craigie?

MR CRAIGIE: Again it's one of those things that develops and is refined according to need as we proceed and in different areas of practice.

20 MS BRANSON: Does that mean no?

MR CRAIGIE: No, it doesn't mean no. We do such things as post-trial reports so that we can identify common threads. That is certainly a practice that we've adopted in the larger offices so that we can see common trends, common problems and phenomena that come up in our trials and otherwise I expect that the deputies and I know that they do with the branch heads, do monitor trends and common problems that pop up in areas of practice.

30 MS BRANSON: Am I right to deduce from that that although you understand that there is auditing there's no formal document that says what auditing is to be done throughout the offices of the Commonwealth Director of Public Prosecutions?

MR CRAIGIE: Not a blanket document, no.

35 MS BRANSON: Could I ask what documentation there is around quality control that you have provided to us?

MR CRAIGIE: Well, there are a number of things within the guidelines and directions that are very specific in the way certain matters are to be approached and the sorts of things required.

MS BRANSON: If that's what you are referring to then I have that already.

45 MR CRAIGIE: Yes.

MS BRANSON: Is there anything further you would like me to have? Reflect on it Mr Craigie and if there is please - - -

MR CRAIGIE: Can we take it on notice please?

5

MS BRANSON: Yes, if there is please let me know.

MR CRAIGIE: It may be that there are individual documents that go to some of these individual areas and I want to be accurate - - -

10

MS BRANSON: I know you do.

MR CRAIGIE: - - - in the answers that I give you but it's an enormously complex practice and there are variable directions across it.

15

MS BRANSON: I understand that. Mr Colvin, I would like to make the same request of you. We spoke briefly about quality control in your office. If there is any documentation that will help elucidate for me the systems in place for quality control within your office and auditing of individual files could you let me know what it is?

20

MR COLVIN: We can certainly provide that. Would you like me to give you some information now?

MS BRANSON: No, we have discussed it before. Let's not do it again, but if this is documentation to support it would you please be sure that we have that?

25

MR COLVIN: We can.

MS BRANSON: Thank you. Could I just ask – it will be I think a Federal Police issue to confirm that no one has been X-rayed for the purpose of determining their age in a people smuggling matter since December 2011, is that right?

30

MR COLVIN: I believe that is the case, yes, Madam President.

MS BRANSON: Thank you. Ms Pope, I don't know if you're able to tell us, how many DIAC assessments have been conducted since 2011 resulting in individuals being returned to Indonesia? Which is when the new practice was said to come into force.

35

MS POPE: From December.

40

MR CROSS: Sorry - - -

MS POPE: I believe it's 56.

45

MR CROSS: I think it's about 56, but I will get that spreadsheet.

MR ANDERSON: We may have that as well, Madam President.

MS BRANSON: And we could have those figures perhaps don't do for them now –
5 from the date of the new procedures through until today, thank you. I would like to
stop questioning now just in case there are agencies who would like to make a brief
statement before I close these two days of hearing. Ms Pope, would you wish to
make any statement?

MS POPE: No, Madam President.
10

MS BRANSON: Mr Anderson, would you like to make any statement of the
Attorney-General's Department. I'm not suggesting that you ought.

MR ANDERSON: We are straying over time. You asked Ms Harmer a few
15 questions and she endeavoured to get more – get back to you. Would now be
convenient to work through those?

MS BRANSON: I will just ask that someone pick those documents up. If they're
20 documents for me, is that right?

MR ANDERSON: If I can just briefly explain them, they are, yes.

MS BRANSON: Yes, of course.

MR ANDERSON: One is an example of a report provided by the Federal Police to
25 the Department.

MS BRANSON: Thank you.

MR ANDERSON: That's a monthly report - - -
30

MS BRANSON: Excellent, thank you.

MR ANDERSON: - - - just of cases. The other is of a weekly report provided and
35 then there are – you asked about a particular – sorry about reviews of the 12
nominated cases. There was a specific review of one of those 12 and this is the
documentation that goes to that and then she provided two other documents which
are just examples of her engaging with the Federal Police in terms of asking
questions so that she could satisfy herself.

MS BRANSON: Thank you very much, Mr Anderson. That's very helpful. Now,
40 I'm not suggesting that you need at all to make a statement but if there is any matter
which you think you would like to clarify or which you believe has been left in an
unsatisfactory state I am very happy to give you a few minutes to make a statement.

MR ANDERSON: Thank you for that, Madam President. I will be very brief.
45 Firstly, just going back to the question of principles of justification and

optimisation which require that any exposure must overall do more good than harm and be the least dose of radiation needed to achieve the necessary goal. I just note that in 2001, of course, the Minister responsible for the Therapeutic Goods Act did approve the actual process of the wrist X-rays so there was already that at least approval through the therapeutic goods process of the wrist X-ray radiation.

MS BRANSON: Thank you.

MR ANDERSON: From a policy perspective I just wanted to note that the initial media criticism of the use of wrist X-rays was 11 November 2010. The Department engaged with the AFP, DIAC and DPP from 19 November 2010 onwards on age determination issues. It's certainly not an easy area particularly in the criminal justice context. The implications are particularly serious either way. To have someone determined to be – to have some determined to be an adult when in fact they are a minor. That's a very serious matter and no one is resiling from that because there are consequences if people are – are assumed or assumed to be minors when in fact they are adults and that goes to both how they actually housed and treated at the time. You don't put an adult in with other minors.

There are those issues but it's a very difficult area. We have throughout the period made enquiries of the agencies actually responsible for progressing the individual cases. We have sought assurances from them from time to time about how the cases were being progressed, about the issues raised in the media. We have actively sought with these agencies to progress the developments of new options. As the submission notes we have now got a suite of measures in place. It involves everything from wrist X-rays, dental X-rays, the interviews being done by DIAC.

We are monitoring how that works in practice. It has been noted that the number of people claiming to be minors has risen dramatically although the number of the people being determined – to be assessed minors has not changed dramatically. We are continuing to consider whether there should be new processes and in particular we've noted whether dental X-rays should be prescribed and we are looking at scapula X-rays and things like that but it's our assessment still that there is no single way to determine age that's conclusive so this will remain a contentious area in that regard.

We are also reviewing a number of past cases and you suggested that it perhaps odd that we should be – that the Attorney would have asked yourself to suggest cases and that there would be other agencies better placed to - - -

MS BRANSON: I didn't suggest it was odd Mr Anderson but I did indicate we may not be in possession of the same amount of information as the age prosecuting agencies will be.

MR ANDERSON: I understand that entirely and I just go back on that and say it's also possible that you would be in possession of information that those agencies would not be. As it has been indicated there are times when individuals might not be prepared to talk to law enforcement agencies. They might say something to you that

they have not previously said. So, it is useful and in the same way that information has been gathered from the Indonesian Consulate, things might have been said to them or they might have been in possession of documentary evidence that hasn't been made available to the law enforcement agencies.

5

MS BRANSON: I was grateful to be given the opportunity but you would understand that it didn't meet my request for a systematic re-evaluation.

10 MR ANDERSON: No, I understand that entirely, not to say it does. I'm just saying noting that of course it is the process that is continuing outside the Inquiry as well to review those cases. I just also finally wanted to note that I do believe that officers of Attorney-General's Department have acted at all times with – ethically and with integrity. There have been suggestions as to whether we have withheld information. I don't believe that that's the case. I believe we have acted ethically and with
15 integrity throughout this period including in seeking to provide all assurance to or assistance to your enquiry.

MS BRANSON: Thank you Mr Anderson. Mr Colvin did you want to make any final observations.

20

MR COLVIN: Madam President there's probably no matter we want to redress that you've raised, and if there's matters we have taken on notice, we will do our best to make sure that we comply and get you the information. We realise you are on a tight deadline. We would like to make a final comment. Firstly, to thank you for the
25 opportunity that you have given us today and yesterday, as well as previously in other Inquiries and to provide the information we have.

I say that in the context that we share your objectives to protect the human rights of any person who comes into contact with the Australian Federal Police and who may be considered to have committed criminal offences, particularly those that are
30 juvenile or in some other way are considered to be at risk and we certainly share your objective in that. To that end we have committed a great deal of time and effort to provide as much material to the commission that we can to assist you with this Inquiry. It does concern me, Madam President, I will say that perhaps you have drawn inference that we didn't provide exactly what you were looking for and I will
35 make the comment now as I would have anyway that we stand ready to provide anything further that you would like of us because it's certainly been the intention of the Commissioner and myself and Mr Jabbour to dedicate considerable resources to make as much material available to you as possible.

40

MS BRANSON: Thank you Mr Colvin. Could I just say about that. I'm not querying at all the amount of material we gave. It was the extent to which the agencies assisted me in an analysis of that material which I have expected to see in the submission of which I am to a degree critical.

45

MR COLVIN: No, Madam President, I understand that entirely and I guess my point is we did not realise that was – that wasn't an intentional oversight on anyone's

behalf. We weren't intending to not provide material that you were expecting to get. Notwithstanding, I think that I have to accept that you highlighted a number of matters where on reflection the AFP actions could have been better. I wish they had been better and particularly with respect to the adherence to evidence that you led
5 our attention to yesterday that we gave at the Senate Committee Hearing in 2001 and the subsequent second reading speech when the Bill was introduced around X-rays being an option of last resort if you like or certainly an option once we had exhausted other enquiries.

10 It's clear that while we have had a policy that we do not wish to prosecute juveniles there has been a nuance difference and perhaps more than a nuance difference, in the way that has been applied when you consider standards of variation and probability. I am confident that at all times consistent with what Mr Anderson has said that the AFP officers have acted in good faith and any inference or evidence to the contrary
15 would be something that would concern the Commissioner greatly and we would certainly we would want to – we would want to take that and hear that evidence or that inference and we take it very seriously and follow up on that.

I also believe that from the evidence provided over the last couple of days as well as
20 the material given to you in writing and from my own personal observations over the last two years of this being one of the major matters that I have had to along with Mr Jabbour, worry about and concern myself with. I will say that the AFP has struggled at times to reconcile some of these processes and to deal with the issues but we have been very active with our partners and we have been very active with other agencies
25 at this table in attempting to find solutions and putting forward alternatives because we share a lot of the concerns as do members at this table about the treatment of juveniles or alleged juveniles.

This of course is always done within the context of our understanding of the law and
30 the environment that was prevailing at the time and I guess through the lens of our primary responsibility which was to investigate allegations of serious criminal behaviour which I believe the Parliament was quite clear in its intention to make this a serious criminal matter. I am sure it will give you little comfort but our processes, timelines and systems have improved considerably from the matters that you have
35 raised. I will not go as far as to say there won't be mistakes made because individual officers will make mistakes and I can only assure you that we will do everything in our power to make sure those mistakes aren't replicated but I am confident that we have come a long way over the last 18 months to two years and over the entirety of the last four years.

40 Finally, I would add and it goes without saying that this was done within the context of an extraordinary case load that confronted all agencies and officers involved. It was a magnitude and complexity which I think you have heard in the last couple of days that we weren't ready for or not that we weren't ready for, Madam President.
45 That's not fair. That we probably didn't expect and we needed to adjust our processes as we dealt with what was coming through the door at us. We have dealt with a small number of matters. I am sure there are more that you could bring to our

attention but of the 720 crew that have arrived since September 2008 we have returned 136 without charge – sorry 136 have been returned to their country of origin. Because they were assessed to be a minor they were given the benefit of doubt by law enforcement authorities or they were subsequently found by a court to be a minor and of that I think I mentioned yesterday 123 X-rays have been conducted and, while we have concentrated on those that we have decided to proceed on, there were 37 matters where we did not proceed because we believe on the balance of probability as well that it was not in anyone’s interest to do that. I will say that X-rays were conducted against the backdrop of limited if any admissible alternative evidence that we felt was available to us at the time and while I don’t say that to mitigate your comments around X-rays being a source of last resort for us it is contextual in terms of what was on my officer’s mind about what they could bring to bear in terms of assisting the court and ourselves in making that age determination. I close by saying that we do stand ready from this day until you make the final report available to provide any additional material that you would like from the Australian Federal Police.

MS BRANSON: Thank you very much, Mr Colvin. Mr Craigie did you or one of your colleagues wish to make an observation.

MR CRAIGIE: I might just say a few words, Madam President and perhaps I can echo something that the Commissioner just said. We have been faced since 2008 with a quite unprecedented challenge. Since then and up to the beginning of this week 376 matters have come to the DPP. Those matters have faced us with a number of challenges not least of all are inherent in the matters, the two grave concerns indicated by Parliament. One is the concern to effectively prosecute very serious offending and Parliament has given its implicit view of the level of offending by the penalties and the quite exceptional provision of a minimum mandatory sentencing provision. The other equal and great concern is the human rights of children to be protected as much as humanly possible. We have not been overly resourced in the last few years in this matter.

MS BRANSON: It’s a common problem, Mr Craigie.

MR CRAIGIE: Well, a common problem and one that we all share.

MS BRANSON: Mm-hm.

MR CRAIGIE: A problem in particular order in my case in that the numbers that I’ve just quoted resulted in what was effectively a doubling of the trial burden of the DPP. I have to say, my staff, at every level, have risen admirably to the challenge of confronting that trial load and all of the grave issues to which I have explained it. If I could put it that the justice system should strive, amongst other things, to do no harm. What we have seen today is a reflection of the fact that no criminal justice system is perfect. That does not diminish from the reality that the people in my agency, I

firmly believe, and I put the greatest integrity, have a very firm commitment to the prosecution policy of the Commonwealth and all of the layers of integrity demanded of them by the public service and indeed the legal profession.

5 Now, you referred to your desire that there be some re-evaluation of past practice. I have to say that we approached your request in this Inquiry with good faith and an enormous amount of effort. My view is given where we stood a few brief months ago when you made the request that you did make of us as you're totally entitled to. It was quite remarkable that the material that was gathered together was obtained.
10 Had we had the time and the resources and I suppose perhaps an explicit awareness, it's quite possible that we would have been able to have gone further into the material and achieve part of the exercises gone through today.

15 MS BRANSON: Mr Craigie, I think I started by thanking all agencies for the trouble they've gone to, to give us material and I've not at any time been critical of the provision of material. Indeed, it has been a very major task for us to assess and evaluate the material we have but I do appreciate the time and effort that all agencies put into that material – gathering of that material.

20 MR CRAIGIE: Well, and the last thing I would say to you, simply, I apprehend that it – and after an exchange of views that may come after the draft, you will be minded to make certain criticisms. When you make those criticisms, I would ask you to bear in mind historical context, the people approaching matters with goodwill and trying to adapt to challenges as they are revealed. I certainly never had any doubt of that –
25 the wrist X-ray process was anything other than a tool to be used cautiously. Whatever I may or may not have known at the beginning of this process – I was certainly aware of that and indeed the Parliament signalled that back in 2001 and lastly, can I just pay tribute particularly for the people around the bar table and those who are not here, for a quite magnificent effort in rising to the challenge – whatever
30 your view may be of the product that comes out of this Inquiry.

MS BRANSON: Well, I refer it, so it is an Inquiry taken perhaps in the circumstances but I thank you for your important reminder, Mr Craigie. I think I've indicated before but I will bear it constantly in mind – the danger of seeing things too
35 clearly when you're looking backwards when they're not so apparent looking forward and I will do my best not to fall into the errors of which you rightly alerted me. Thank you for the reminder.

40 MR CRAIGIE: Now, I wade into the gap between the appalling behaviour represented by some of the principal cases that you sent to me and whatever you might come to by way of criticism or findings of shortcoming as to disclosure by me, I would say, taking responsibility for everyone who signs a document. I would suggest that the gap between any finding you might make in regard to that and the sort of behaviour in the in the Birmingham Six or any of those cases, certainly is not
45 reflected in the facts.

MS BRANSON: Thank you. I refer to those cases with their principles which they represented rather than their individual facts, Mr Craigie, you will understand?

5 MR CRAIGIE: And I believe we're in noisy agreement as to what the principles are; the point of difference is whether the facts here are distinguishable or not.

MS BRANSON: Thank you. So could I thank everyone who took part in this Inquiry? As I noted before, no one was compelled to come. I greatly appreciate the time that you lost from your busy lives to come and be here to assist this Inquiry. I think it has been a great help to be able to talk with the people who came to look at the documents together and explore their significance and I think, particularly, to put the things into a chronological sequence which is often very helpful in revealing how things kind of happened. As I've indicated with the benefit of the help you've given me particularly over the last few days, which you see, I've had colleagues with me.
10 We will be moving to prepare a draft report.
15

We will get it to you at least as it reflects on your agencies just as quickly as we can but I do remind you again of my fairly imminent departure from this office and therefore the need to have this Inquiry completed by not later than we would hope, the middle of July. So I remind you again, you're likely to receive requests with quite short timeframes to assess material and put comments back to us but we will make sure we do have the opportunity to see and comment on observations about your agencies before they're published. So thank you very much for being with us – for attending this hearing and for your help.
20
25

MATTER ADJOURNED at 4.51 pm INDEFINITELY