



**Australian
Human Rights
Commission**

TRANSCRIPT OF PROCEEDINGS

O/N H-53052

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

THE HONOURABLE CATHERINE BRANSON QC, President

CANBERRA

9.29 AM, THURSDAY, 19 APRIL 2012

MS C. BRANSON QC: Good morning, everyone. For those of you who don't know me, I am Catherine Branson, the President of the Australian Human Rights Commission. I have with me on this side Danielle Noble from the Commission and on this side, Kate Temby. My associate is sitting there and also another of our staff members, Freyana, is there as well. They're just here to help if we need to move documents or do anything of that kind. We ask that members of the public and the press not sit in the first row of seating, if that's possible. We had reserved signs there for people who might come from any of the agencies, but the public and the press are happy to sit – are welcome to sit anywhere else in the room, apart from on that row.

That also might help, I think, with any issues of privacy about documentation. I know it's crowded, but I hope you've all been able to settle in reasonably comfortably. So, of course, this is the second of the public hearings into – as part of the Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children. So I welcome you all here for this. I thank you all for making the time available. I know it's not easy in busy lives to set aside two days for a hearing of this kind. And I think I should place on the record that no notices were served under the Australian Human Rights Commission's Act requiring anyone to attend, that every person here has been made available by their agency without any need for compulsion, and I greatly appreciate that. And I appreciate the statements of anxiety and wish to cooperate with the Commission in its Inquiry that have been made by every agency.

I thank you also for the provision of the voluminous documents that we have. We sometimes wondered how grateful we were, but overall we were very grateful that people made so much of their documentation available to us, and also the provision of other information that we requested. I'm, of course, extremely grateful to the Federal Court of Australia for making this room available and for the other facilities that they have made available for us. I think you know that Auscript will be taking a record of the proceedings, as it would do for legal proceedings. My assumption is that if anyone wants to order that transcript, they should do that in the usual way via Auscript. Yes, but we will, nonetheless, put the transcript eventually up on our website, but anyone who wants access to it more quickly than that will need to order their own copy.

We will need to know if people think there are significant issues of errors in the transcript, so that we can correct them before it goes up onto the website, and we will make sure that you see it before then to let us know if you think the transcription is not accurate. Now, as I've mentioned, we've scheduled two days of hearing. Not everyone, I think, will need to be here all of the time, but I think I need for you to make your own judgments about who needs to be here and when, when I tell you broadly what we will be doing. I will ask in this case that everybody take an oath or an affirmation. That oath and affirmation will remain binding for the two days of the hearing. If there's anyone not here who comes subsequently, who is then to give evidence, they can just take the oath and affirmation when they come. But if you leave and come back, of course, that won't be a problem, the oath or affirmation will remain binding.

You've been provided, I know, not with a lot of time, but they were largely your own documents, you've been provided with a list of documents to which I'm likely to make reference during the course of the two days of hearings, also the names of 12 individuals whose treatment might be examined in more detail. The extent to which we will be able to do that over the next two days will depend really on the progress that we make. And I think we will have to be fairly sort of careful not to waste time, to make sure that we can get a sensible use out of these two days. If there are other documents that we need to refer to, well, we can deal with any problems that might arise about that when the time comes.

And ordinarily, of course, I would only expect an agency to be able to speak about either its own documents or documents that it would have been expected to see. You weren't required, and I hope no one spent time, getting on top of too much details of documents of other agencies, which they wouldn't have been expected to know about before. It is, of course, useful to have all the agencies here together, although it's going to create logistic difficulties, because that will help me get a composite overall picture of the Commonwealth's treatment of these children, because that's my concern, you know, how the Commonwealth as a whole treated the people who claim to be children.

It's not necessarily an inquiry into detail of what individual agencies did, but what the outcome was ultimately in terms of the Commonwealth's treatment of the suspected people smugglers who said that they were children. People did identify, when they gave us documents, that some of them were confidential. We've tried to be as sensitive about that as possible. I don't think we have distributed any confidential documents, but if anyone is troubled by the fact that there are documents on the list we have distributed that might be either confidential absolutely or confidential from the public, then you will have an opportunity as we go through to let me know, and I can make such order as seems necessary at the time to deal with that.

I'm not proposing ordinarily to refer to any of the suspected people smugglers who say they are children by their names. We've got alphanumeric identifiers for them all and I think that's probably a more convenient way to refer to them, lest they are children and we want to be respectful of their rights, lest they are. We're sitting, as you know, it's a long day and it will be exhausting, but you can comfort yourself by the fact that it will probably be more exhausting for me than for any of you, from 9.30 to 12.30 and 2 to 5, just to get the greatest use of the time that we can. You will have noticed that the first and quite the largest tranche of documents in the materials we sent you are documents largely in chronological order.

Now, it's that tranche of documents that I propose to concentrate on first, and I do propose to go through them largely in chronological order to build up a picture of what was happening over time with respect to the Commonwealth's treatment of youthful – I call them youthful – people suspected of people smuggling who said that they were children. I'm trying to get a sense of how acts and factors of the Commonwealth, in a broad sense, through the agencies that are represented here,

changed and developed over time, if they did change and develop. Now, this exercise, I suspect, will take at least all of today, but it's not easy for me to make a judgment in the abstract, but that will be my expectation.

5 Thereafter, we will look at some individual cases of that 12 that you received advice
about; give some brief consideration to criminal justice stay certificates and
probably close tomorrow by spending just a little bit of time on the submissions
received. And, largely, that will be the joint submission, because that's the one that
10 covers the three agencies. So unless there's something that anyone wants to raise
with me, I will now ask my associate to assist getting everybody who might give
evidence to take an oath or an affirmation. But before I do that, does anyone want to
raise anything with me? Please feel free any time to raise any issue that you think
arises.

15 Well, then we've got a card that has got the oath on one side and the affirmation on
the other side. I'm sure there's no one in this room who needs to have it explained to
them what the difference between an oath and an affirmation is, is there? Obviously
you will take the oath if you have a belief in a religious entity. If you don't wish to
take a religious form of oath or affirmation, you would take the affirmation. Could I
20 ask you, just because I think it will be helpful, we might just start at one end of the
table and keep working until we run out of people that might give evidence, to state
your name, the position that you hold, the length of time you've been with your
department or agency and your formal qualifications, because I think if we get all of
that first, that would be quite helpful. Shall we start down with Ms Pope?

25 MS K. POPE: My name is Kate Pope. I'm the First Assistant Secretary of the
Community Programs and Children's Division in the Department of Immigration.
I've been in the department for 25 years. My formal qualifications are a masters
degree from Duke University in the US in migration studies and population and a
30 bachelor's degree in Indonesian studies from ANU.

MS BRANSON: Thank you.

35 **KATE POPE, AFFIRMED** **[9.39 am]**

MS BRANSON: Thank you. Thank you, Ms Pope. Mr Rutherford.

40 MR D. RUTHERFORD: Yes. My name is Douglas Rutherford. I am a Principal
Legal Officer of the Criminal Justice Division of the Attorney-General's Department.
I've worked in the Attorney-General's Department for over nine years. And my
formal qualifications: I'm a legal practitioner of the ACT Supreme Court, and I hold
a masters in government and commercial law.

45 MS BRANSON: Thank you, Mr Rutherford.

DOUGLAS RUTHERFORD, AFFIRMED

[9.39 am]

MS BRANSON: Mr Anderson.

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MR I. ANDERSON: Yes. Iain Anderson. I'm the First Assistant Secretary of the Criminal Justice Division, Attorney-General's Department. I've been with the Department for over 18 years. I have Bachelors Degrees in Laws and Economics.

10 MS BRANSON: Thank you.

IAIN ANDERSON, AFFIRMED

[9.40 am]

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MS BRANSON: Mr Colvin.

MR A. COLVIN: Your Honour, Deputy Commissioner Andrew Colvin. I have been with the Australian Federal Police for just over 22 years. I'm Deputy Commissioner for Operations, which incorporates the people smuggling operations. And I have a formal Masters of Public Administration.

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MS BRANSON: Thank you.

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ANDREW COLVIN, SWORN

[9.40 am]

MS BRANSON: Thank you. Mr Jabbour.

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MR R. JABBOUR: Ramzi Jabbour, Assistant Commissioner, Australian Federal Police, currently in charge of crime operations. I've been with the organisation for 20 years. I will take the oath.

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RAMZI JABBOUR, SWORN

[9.40 am]

MS BRANSON: Thank you, Mr Jabbour. Mr Thornton.

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MR J.E. THORNTON: John Edward Thornton. I'm the First Deputy Director at the Commonwealth DPP. I've been with the organisation for 27 years. And my qualifications are a Bachelor of Economics and a Masters in Law.

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JOHN EDWARD THORNTON, AFFIRMED

[9.41 am]

MS BRANSON: Thank you. Mr Craigie.

MR C.B. CRAIGIE SC: Christopher Bruce Craigie. I am the Commonwealth
Director of Public Prosecutions. I'm senior counsel and have been since 2001. I've
5 been a legal practitioner since 1976 and a barrister since 1980. And I think I have
been the DPP for four and a half years.

MS BRANSON: Thank you.

10 MR CRAIGIE: I will take the oath.

CHRISTOPHER BRUCE CRAIGIE, SWORN [9.41 am]

15 MS BRANSON: Mr Sharp.

MR A.J.D. SHARP: Allan James David Sharp. I hold a bachelor of laws. I'm an
admitted legal practitioner in the ACT, New South Wales – sorry, Victoria and
20 Western Australia. I'm a Deputy Director of the Perth office of the Commonwealth
DPP. I've been with the DPP for 12 years, and prior to that I had 27 years with the
Australian Federal Police.

25 **ALAN JAMES DAVID SHARP, SWORN** [9.42 am]

MS BRANSON: Thank you. Mr Sharp, if you've travelled from Perth for this
hearing, I express my appreciations of you having done that.

30 MR J.E. CARTER: My name is James Edwin Carter. I'm the Deputy Director in
the Office of the Commonwealth Director of Public Prosecutions, and I've been part
of the office for 25 years. I hold degrees in arts and in law and I would like to take
the oath.

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JAMES EDWIN CARTER, SWORN [9.42 am]

40 MS BRANSON: Mr Carter.

MR CRAIGIE: Madam President, I probably started on the wrong foot by
forgetting that some time in the last century I did get a law degree and an arts degree.

45 MS BRANSON: I assumed that, Mr Craigie, yes. Mr De Crespigny, yes.

MR R.M.C. DE CRESPIGNY: My full name is Richard Mark Champion De Crespigny. I'm Senior Assistant Director of the head office of the Commonwealth DPP. I hold a bachelor of commerce and a bachelor of law. I have been with the DPP for 22 years.

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MS BRANSON: Thank you.

RICHARD MARK CHAMPION DE CRESPIGNY, SWORN [9.43 am]

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MS BRANSON: Thank you, Mr De Crespigny. I will just ask the transcript provider whether she was able to hear that. Yes?

15 MONITOR: Yes.

MS BRANSON: Yes, thank you. Anyone else who may give evidence on that row? Down the end.

20 MR P. CROSS: My name is Paul Cross. I've worked at the Department of Immigration for about 14 years. I'm the Assistant Secretary of the Identity Branch. My formal qualifications are an arts degree and a credit diploma in computing. The oath, thank you.

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PAUL CROSS, SWORN [9.44 am]

MS BRANSON: Thank you. That completes - - -

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MS K. VISSER: Sorry. My name is Karen Visser. I'm the Acting Assistant Secretary of Community Programs and Children's Branch. I've been in DIAC for 20 years, I think, and I have a bachelor of arts degree.

35 MS BRANSON: Thank you.

KAREN VISSER, AFFIRMED [9.44 am]

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MS BRANSON: Thank you very much. Now, it is going to be challenging for the transcript providers. I suspect they've never been asked to record with quite so many people speaking before. I will try and indicate your name if you're about to speak. If I have not been able to do that, could you perhaps consider giving your own name before you start to speak, just to help them with that issue? And I will ask the Auscript representative just to sort of indicate to me with her hand, perhaps, if she can't hear at any time. Those of you who are not near one of the microphones, which

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don't of course amplify, but do allow the transcript providers to hear, you may have to move forward to give your evidence. All right. Now, does everyone feel that they can work in the way they've got themselves arranged? I know it's not ideal. I wouldn't be troubled if people sat with their back to me here, if you wanted people to help you with documents by doing that. Alternatively, we can just try for a while and see how it goes. Yes.

MR CRAIGIE: There may be some disorderly banging and shuffling as we get documents together, and I can see we will have some challenges, but we will do our best.

MS BRANSON: All right. Fine. The main thing, because of the crowding, is to watch the water jugs and the glasses of water. What I'm proposing to start with is just to go through some of the publications that I've identified, mainly through the websites of the agencies that help me understand the role of the agencies, just to make sure that my understanding is correct, and to get an understanding if there has been any change in that role over the time with which I am concerned. And I think we could sensibly start from about 2001, I think, when the bill about age determination came before the Senate Inquiry and then before the Parliament, then ultimately was passed by the Parliament.

So we have the APS values published by the Australian Public Service Commissioner. We know they've been slightly modified, but I think not substantially changed in their broad tenor over that entire period. Am I right in thinking every agency here is expected to comply with the APS values? Is your office, Mr Craigie?

MR CRAIGIE: Mine, most certainly, yes.

MS BRANSON: The police, I think, are, are they not?

MR COLVIN: Your Honour, we actually don't sit formally under the APS, but of course we have our own values, which are consistent with the APS values.

MS BRANSON: You've got your own values.

MR COLVIN: Yes.

MS BRANSON: Right. So you see them as being consistent, although technically they don't reach to you.

MR COLVIN: Absolutely.

MS BRANSON: Right. Now, of course, they do reach to the two departments. The Attorney-General's Department, I have been able to identify a client service charter. Mr Anderson, has that been in much this form for a long time, back to 2001, or was

that a fairly recent creation, the Attorney-General's Department Client Service Charter?

5 MR ANDERSON: I don't believe that it has changed in any material way over that period.

MS BRANSON: In the period of time. Good. And, essentially, of course, it just expands on the APS values anyway, I think, doesn't it, in broad terms?

10 MR ANDERSON: Yes.

MS BRANSON: And so far as sticking with the Attorney-General's Department is concerned, as far as the last of your annual reports that I could find, which is 2010/2011, which is, again, what you would expect, I think, the department has said
15 under the heading What we do, it reads:

*The Attorney-General's Department serves the people of Australia by upholding the rule of law and providing essential expert support to the Australian Government to maintain and improve Australia's system of law and
20 justice, its national security and emergency management systems and natural disaster relief.*

Has every aspect of that been there since 2001, or are some of those things new?

25 MR ANDERSON: Some of those things are comparatively more recent. Emergency management only came to the portfolio, I think, in around about 2002. But otherwise, the rule of law and national security, those have been ongoing roles, yes.

30 MS BRANSON: So the first part of that:

*...by upholding the rule of law, providing essential expert support to the Australian Government to maintain and improve Australia's system of law and
35 justice –*

is certainly an ongoing thing back for many years, isn't it?

MR ANDERSON: Indeed. Yes.

40 MS BRANSON: And then it goes on:

*The Attorney-General's Department is the central policy and coordinating agency of the Australian Government Attorney-General's portfolio and provides support for the Australian Attorney-General in his role as first law
45 officer.*

And that would have always been a very important role of the Attorney-General's Department and - - -

5 MR ANDERSON: Absolutely. And it has changed slightly when the Australian Government Solicitor moved out of the department, but the essence of the role has always been the same.

MS BRANSON: Yes, thank you. And the mission is:

10 *Achieving a just and secure society, including building a fairer Australia by improving access to justice, protecting and promoting human rights and promoting indigenous law and justice.*

MR ANDERSON: Yes.

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MS BRANSON: An ongoing responsibility of the department, presumably.

MR ANDERSON: Absolutely.

20 MS BRANSON: Then I looked at the organisational structure, and I think both you and Mr Rutherford come from the National Security and Criminal Justice Group. Is that right?

MR ANDERSON: Yes.

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MS BRANSON: Responsible for national security resilience policy and capability development, emergency management and disaster relief, national security law and policy, criminal justice and international crime cooperation.

30 MR ANDERSON: That is correct.

MS BRANSON: And in this context, criminal justice, presumably is, what? Has caused your involvement in the issues that I am concerned about; is that right?

35 MR ANDERSON: That is correct. We're both from the criminal justice division and we deal with the criminal justice issues.

MS BRANSON: Thank you. So the criminal justice division, I read, again, from the annual report:

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Provides policy and legal advice on criminal law and law enforcement issues. It provides advice –

I've jumped a couple of lines –

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It provides advice on reform of criminal law and enforcement powers, including potential amendments of the Crimes Act and the Criminal Code Act.

So that has also been ongoing over this period?

MR ANDERSON: That's correct.

5 MS BRANSON: Right. Human rights, I notice, is not listed there. Human rights, I know, is dealt with by another branch of the department.

MR ANDERSON: We have a specific division of the department that currently deals with human rights, that's International Law and Human Rights Division. Over
10 the period the part of the division – part of the department that has been responsible for human rights has changed, but that's where it currently sits. It has never actually been a responsibility though of the Criminal Justice Division.

MS BRANSON: Sorry, I missed that last bit?
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MR ANDERSON: Human rights has never been the responsibility of the Criminal Justice Division, it has always been a specific part of the organisation tasked with the primary responsibility for human rights.

20 MS BRANSON: But am I right in thinking that nonetheless the department, in its dealings with criminal justice, would always have wished to be fully informed about human rights and for its advice to be, so far as possible, advice that would keep the Attorney-General, as the first law officer, apprised of human rights obligations?

25 MR ANDERSON: Absolutely. The fact that there are different parts of the structure of the department with particular expertise doesn't in any way excuse other parts of the department from the obligation to give advice that's holistic advice. So we do consult with the parts of the department who had a responsibility for human rights.
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MS BRANSON: And, of course, over much of the time that we will be concerned about, human rights has been a high priority, I think, for the Attorney-General's Department. I think, of course, of the human rights consultation announced by the Attorney-General right at the end of 2008, then an ongoing consultation period that
35 kept human rights very much on the national agenda, but certainly on the Attorney-General's agenda, a report from that committee in September of 2009 and the announcement by the Attorney-General of a human rights framework in April 2010. Your division would, of course, been alert to all of those things.

40 MR ANDERSON: That is correct.

MS BRANSON: And alert to the Attorney-General's strong interest through those things in human rights in forming decisions of the Australian Government.

45 MR ANDERSON: Absolutely. The department understands the need to ensure that advice that goes to the government helps the government comply with all of its international and domestic legal and other obligations in human rights.

MS BRANSON: Thank you. Turning to the Department of Immigration and
Citizenship, bound, of course, Ms Pope, by the public service values. But I notice
that in your client's service charter, the secretary's forward says that the work of the
department is underpinned by a guiding principle of, people our business. I take that
5 to be something of a slogan, "people our business"?

MS POPE: Yes. Yes.

MS BRANSON: Yes:
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*We are committed to having well-trained and supported staff and to developing
and maintaining an open and accountable culture that is fair and reasonable in
dealing with our clients.*

15 And that's a principle that informs the work of your department?

MS POPE: Indeed.

MS BRANSON: Including the work with the individuals with whom this Inquiry is
20 concerned?

MS POPE: Yes.

MS BRANSON: And your service standards, I think, identify much the same set of
25 values.

MS POPE: Indeed.

MS BRANSON: Is that right?
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MS POPE: Yes.

MS BRANSON: If I turn then to the Australian Federal Police, you have published
on your website a document headed Values and Cultures, with which you will be
35 familiar, Mr Colvin, of course?

MR COLVIN: That's correct. Yes.

MS BRANSON: Yes. And under the AFP core values, we have integrity,
40 commitment, excellence, accountability, fairness and trust. And these are the things
that inform the work of the Australian Federal Police?

MR COLVIN: Absolutely, they do.

45 MS BRANSON: And under Integrity, I read:

Integrity is the –

which is the first listed, I should note:

5 *Integrity is the core requirement of the Australian Federal Police on an individual level. Integrity is displayed through soundness of moral principle, honesty and sincerity.*

It goes on to identify that:

10 *Integrity is to be demonstrated through complete honesty and forthrightness in all commitments with people.*

And that would also have informed the work of the AFP in the area with which we are concerned here?

15 MR COLVIN: That's correct. Yes.

MS BRANSON: And I don't think I need read out what is said under Accountability and fairness, but they, of course, being part of the core values, would it, informed everything?

20 MR COLVIN: They underpin everything we do, and we give them equal weighting, and I think they are as read and as understood.

MS BRANSON: And you've got an AFP Code of Conduct.

25 MR COLVIN: We do.

MS BRANSON: Which starts that:

30 *Adhering to the AFP Code of Conduct in this section is fundamental to complying with professional standards of the Australian Federal Police.*

MR COLVIN: That's correct.

35 MS BRANSON: And I don't think I need to list all of those out, but they deal with honesty, propriety, fairness, reasonableness.

MR COLVIN: No point that's them.

40 MS BRANSON: Yes. And, not surprisingly, that the Australian Federal Police compliance with all Australian law.

MR COLVIN: Correct.

45 MS BRANSON: I notice under the Australian Federal Police Act that the Commissioner or a deputy commissioner is only removable by reason of misbehaviour or physical or mental incapacity. That's correct?

MR COLVIN: That's correct. It's a statutory position.

MS BRANSON: So it has that independence from government.

5 MR COLVIN: Correct.

MS BRANSON: And capacity to direct the Australian Federal Police requires, I think, publicity to be given to any direction. Is that right?

10 MR COLVIN: We operate under a ministerial direction; however, there is that statutory independence in terms of how we conduct our business under that.

MS BRANSON: There has been no direction from the Minister about how AFP should conduct itself with respect to people smuggling, people suspected of people
15 smuggling, has there?

MR COLVIN: Matters that fall under that broad category are part of our ministerial direction, along with quite a long list of matters that the government would expect us to in our normal business focus on. But, no, there's no specific direction as to how
20 we do that.

MS BRANSON: Thank you. Turning to the Commonwealth DPP, Mr Craigie, you have a prosecution policy of the Commonwealth which is available from your website. I notice that the forward indicates that Mr McClelland, when he was
25 Attorney-General, presented to the Parliament a statement in February 1986. Now, I take it that that's not precisely the document that's now available on the website?

MR CRAIGIE: No. It's now into its third edition. There have been additions, rather than significant omissions from the document, largely to improve and react to
30 changing conditions. And the most recent edition was in 2009. It included some changes relating, amongst other things, to the treatment of mentally ill persons and victims. And prior to that, the last version had been 1998, so you would readily imagine there had been a number of movements in society generally, and they were taken into account with some additions to the standing policy. And the core policy
35 has basically remained the same for over a quarter century.

MS BRANSON: I see. If I were to assume that the document that I've recently printed off from your website was in substance, in effect, for the whole time that I am concerned about, I would be pretty accurate?
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MR CRAIGIE: In substance and in detail, yes.

MS BRANSON: All right. And the statement on prosecution disclosure.

45 MR CRAIGIE: Yes.

MS BRANSON: The same?

MR CRAIGIE: That is still current, yes.

MS BRANSON: All right. And the one that I have would have been the one that would have been in force over – since 2001, in all the matters of substance?

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MR CRAIGIE: Yes.

MS BRANSON: All right. And I just happened to note in a document that was prepared by Mr Sharp in December 2010, there was a reference to advice from Mr Peter Hastings QC about disclosure. That would have been regarded as being either
10 consistent with or informative of the disclosure policy?

MR CRAIGIE: Informative of, certainly.

15 MS BRANSON: It's noted, just taking it – and I'm relying entirely on Mr Sharp's paper – he says:

*The bottom line is that all participants in the investigative process share the obligation to ensure that an accused person receives a fair trial. If exculpatory
20 material exists, in whatever source, then it should be revealed to the prosecution by those who have custody of it for assessment as to whether it can be disclosed, whether public interest immunity prevents its disclosure, and if so, whether the proceedings should continue.*

25 That's the statement you understood me to be referring to?

MR CRAIGIE: Yes.

MS BRANSON: Yes. And you would have seen a list of authorities that we
30 provided to you that had some cases on it.

MR CRAIGIE: I have seen them, and I have long been familiar with them.

MS BRANSON: I'm sure you have, Mr Craigie. And are any of those authorities,
35 authorities with which you would wish to disagree or take argument?

MR CRAIGIE: Well, they're the authorities of superior courts.

MS BRANSON: So that particularly those that go to disclosure, you would regard
40 those as being authorities with which the Commonwealth DPP should comply?

MR CRAIGIE: The principles are unarguable.

MS BRANSON: Thank you very much. And I don't think we've got any need to
45 go to them in particular. So thank you for all of that. So let's now go to the documents that we sent. Does everyone have them in front of them, whether in hard copy or in electronic form? The first of them, you will see, is the Greulich and Pyle

Radiographic Atlas of Skeletal Development of the Hand and Wrist. I would like to enquire of each of the agencies whether they've ever seen it before they came into possession of the documents from us and, if so, when they first did. We have a copy of – we've got a full copy of it here, should anyone want to check it for any reason.

5 Mr Craigie, what is your understanding about the Commonwealth DPPs access to the Greulich and Pyle Atlas and in the full published form?

MR CRAIGIE: Well, I am familiar with particular parts of it, obviously because it has come up on a number of occasions. I haven't, myself, read the whole document,
10 but obviously parts of it, and its general purpose, and the caveats that accompany its use from the authors.

MS BRANSON: Now, it wasn't meant to be a trick question. It was tendered, I think, by the Commonwealth DPP in R v Udin - - -
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MR CRAIGIE: Yes.

MS BRANSON: - - - which is the second document on our list. So some aspect of the Commonwealth DPP had possession of some part of it, but you can't tell from
20 that whether it was a notional tendering of the volume actually represented by the handing up of some photocopied pages, whether of plates of wrist X-rays or of something else, or whether in fact the Commonwealth DPP actually possesses a print copy of the Atlas.

25 MR CRAIGIE: I would imagine that many of my case officers with expertise in this area would be particularly familiar with the document. Mr Sharp can tell you whether or not physically we have copies of it floating around the office, but I imagine that we are more than familiar with it.

30 MS BRANSON: Right. Mr Sharp, do you have a copy of the - - -

MR SHARP: Yes. Both, I understand, the Perth office and our head office have a library copy of the full volume of it.

35 MS BRANSON: And do you know how long they've had them, Mr Sharp?

MR SHARP: I can't answer that, except to say it was certainly in our possession before May of 2010. I can't tell you when we actually acquired it.

40 MS BRANSON: Right. And you don't know about what was in the possession of the Commonwealth DPP on or about 3 October 2000, when they tendered either actually or notionally the volume to a court in, where, Western Australia?

MR SHARP: No.
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MS BRANSON: Port Hedland, I think.

MR SHARP: I can't answer that, no.

MS BRANSON: You can't answer that. Thank you. The Australian Federal Police, Mr Colvin or Mr Jabbour, can you help us with whether you have a copy of it, and if so, from when you've had it?
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MR COLVIN: Your Honour, I would be surprised if we have a copy of it, but I will stand corrected. We are familiar with the document, but would not pretend to be experts in its interpretation. But we are familiar, and have been for a number of years, with its existence, insofar as the ability of the AFP to use wrist X-rays to determine, or to bring evidence to determine, a suspect's or a person of interest's age. So familiar with the document, but I could not say that we have a copy of it in hard copy.
10

MS BRANSON: Right. It's hard to know what "familiar" means. I mean, you can be familiar with the fact that radiologists use it.
15

MR COLVIN: Yes.

MS BRANSON: Is that the sense in which you mean "familiar" or do you mean familiar with its contents?
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MR JABBOUR: Ma'am, if I may? I was fortunate enough to be involved in people smuggling in 1999/2000 when it first came to bear. I was personally involved in the development of the policy that went forward. I did considerable research personally with Darwin Hospital at the time, to be able to have age determination introduced into the Crimes Act 1914. Prior to that, we had no method at all of being able to assist in the measurement of age. So I am personally very well aware of the process that is followed, and also the limitations involved in this procedure.
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MS BRANSON: Yes. I will go through it in a minute, but you will see that we sent you a number of pages, which is the very large proportion of the text that introduces the plates which are the actual reproduced X-rays.

MR JABBOUR: Yes.
35

MS BRANSON: Is that material with which you've been familiar from 2000?

MR JABBOUR: Can I – sorry, the - - -
40

MS BRANSON: The text part that we sent you.

MR JABBOUR: Yes.

MS BRANSON: Were you familiar with that back in 2000?
45

MR JABBOUR: Yes, absolutely.

MS BRANSON: Right. Just out of interest, you also saw a lot of Dr Low's reports, didn't you?

MR JABBOUR: Yes.

5

MS BRANSON: Did you ever notice any discrepancy between what you had read and what appeared in Dr Low's reports?

MR JABBOUR: No.

10

MS BRANSON: No.

MR JABBOUR: Not that I can recall, no.

15

MS BRANSON: We will deal with that further later on.

MR JABBOUR: Sure.

MS BRANSON: The Attorney-General's Department, Mr Anderson.

20

MR ANDERSON: Yes. I'm not aware whether we've got a copy of the actual document itself.

MS BRANSON: You're not aware?

25

MR ANDERSON: I am not aware that we have.

MS BRANSON: Not aware.

30

MR ANDERSON: I suspect that we don't. I do know that obviously it was a matter that was canvassed when the amendments were first introduced back in 2000/2001, but I'm not aware of the extent to which the officers then in the Criminal Justice Division themselves actually had regard to the document, or whether they simply had regard to extracts or to advice about its contents.

35

MS BRANSON: All right. What about more recently, Mr Anderson, when your area of the department has been more closely involved in consideration of the issues of evidence around age? Did you get a copy of it then?

40

MR ANDERSON: No, we haven't. Again, we have had regard to either extracts of it or advice about the effect of it and how it should be interpreted.

MS BRANSON: I don't – please correct me if I'm wrong – but I don't recall any extracts in the possession of the Attorney-General's Department coming to us in your documents. Would that be right?

45

MR ANDERSON: I think that's right. I think what I'm trying to convey is that we've certainly had advice about how it should be interpreted; we've had discussions about it, but as I said at the outset, I don't believe we've got a copy of the actual document itself.

5

MS BRANSON: Yes. Advice from whom, Mr Anderson, from the other agencies here or external advice?

MR ANDERSON: Advice from the other agencies here, and we've also been cognisant of advice that has been given by a range of other parties through the various parliamentary inquiries that there have been in recent times as well.

10

MS BRANSON: Right.

MR ANDERSON: So we've seen a lot of different views about how it should be interpreted.

15

MS BRANSON: Right. This is perhaps a question for another time, but let me ask it now while we're on this topic. I think either you or someone from your area of the department chaired the working group that was established.

20

MR ANDERSON: I chaired that working group.

MS BRANSON: Did you chair that?

25

MR ANDERSON: I did.

MS BRANSON: Yes. Was a literature review undertaken by you or officers reporting to you for the purpose of, you know, assisting you to chair that group?

30

MR ANDERSON: I don't believe so, no.

MS BRANSON: No. Thank you. So it's not an oversight that no record of research, even a literature study, came to us from your documents?

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MR ANDERSON: No.

MS BRANSON: Did you see the letter that the head of your department signed in response to the notice that I issued?

40

MR ANDERSON: I'm sure I've seen it at some point. I think I was actually on leave at the time that he signed it.

MS BRANSON: All right. Do you know who drafted the letter? I don't imagine that Mr Wilkins drafted it?

45

MR RUTHERFORD: That was drafted within my team.

MS BRANSON: Right. By you, Mr Rutherford, or was it a combined effort?

MR RUTHERFORD: It was a combined effort.

5 MS BRANSON: All right. You will remember that it makes reference to a literature search.

MR RUTHERFORD: It made reference to a literature search. The focus at the time had been on the material available for us, and it's, again, as Mr Anderson has
10 indicated, the full range of procedures, and our focus had been on new procedures.

MS BRANSON: All right. It may be unduly legalistic, Mr Rutherford, but when I think of a literature search, I think of a document coming out of it which indicates what literature was identified and to what it was relevant and what parts of it were
15 found to be relevant. No such document came with your material; is that because no such document was brought into existence?

MR RUTHERFORD: There wasn't a comprehensive document summarising our literature research.
20

MS BRANSON: Right. So if another officer from your division were later to be involved in considering an issue of this kind, they wouldn't actually have access to the research that was undertaken by your team to assist Mr Anderson chair this inquiry. Is that right?
25

MR RUTHERFORD: There is material that we have compiled, much of which has been presented and footnoted and put forward to this Inquiry and to inquiries by the Parliament.

30 MS BRANSON: If you were to leave your position, Mr Rutherford, and someone else turned up, efficient government business – you know, the efficient management of government business would make it desirable for that literature search not to have to be undertaken again, wouldn't it?

35 MR RUTHERFORD: That's correct.

MS BRANSON: What would someone find, who wished to identify what was the literature survey that was done by you and your colleagues?

40 MR RUTHERFORD: We have – and, once again, I can refer to the material that we're aware of, as Mr Anderson indicated, in discussion with the agencies and from our own research, much of that material has been documented.

MS BRANSON: Yes. It's that latter thing that I'm trying to get to. What would
45 they find by way of documentation to prevent them having to do again what you or your colleagues previously did?

MR RUTHERFORD: Well, much of the material has been provided as part of our submissions, and we have cited that material in extensive references. What we don't have is a single document that collates absolutely every piece of advice as an internal record per se.

5

MS BRANSON: No, it's the literature search I'm concentrating on, Mr Rutherford. And I think of a literature research is somebody going to a research tool, whether electronic or other research tool identifying relevant publications and then analysing them in some way, so that someone doesn't have to do that task again. Was that sort of exercise done or not? Was it a more informal thing than that?

10

MR RUTHERFORD: It was less – it was more informal.

MS BRANSON: All right. Okay. Ms Pope, does the Department of Immigration – I will refer it that way, because that's the relevant part of, I think, the responsibility.

15

MS POPE: Thank you.

MS BRANSON: Does the Department of Immigration have a copy of this book?

20

MS POPE: Not to my knowledge.

MS BRANSON: No. Are you familiar with it?

25

MS POPE: I wouldn't call myself familiar with it. I've heard of it and I have seen it referenced in various places, but I've never read it.

MS BRANSON: All right. Well, I think it might just be helpful to inform what we subsequently talk about, because this document is referred to – this publication is referred to so often, just to go through it a little bit. And I think everyone will be able to, from the documents we refer to, follow what I am drawing attention to. But, as I say, the volume is here if anyone wants to look at it. So if we could go to page (xii) of the small Roman (xii), which is the preface to the first edition, just because it's the part of the document that helps us understand what is in the Greulich Pyle Atlas. And we read that in 1929, under the leadership of the late Professor Todd, the Brush Foundation began preliminary studies on which to base its plans for a long term investigation of human growth and development at that institution.

30

35

The project got underway in 1931, when some three month old infants were enrolled in the study. Interestingly, a time before people realised the dangers even of mild doses of radiology. Thereafter, children ranging in age from three months to 14 years were added to the program during each successive year until the summer of 1942, when, as originally planned, the project terminated. The intensive study of the data collected during the course of the investigation was interrupted by the war, but then it resumed. We see the children selected were selected because they were relatively normal; they didn't have physical or mental defects of any obvious kind. And then it goes on to say:

40

45

5 *Since in addition they were admitted only on application of a paediatrician, their families were somewhat above average in economic and educational status. All the children were white; all had been born in the United States and almost all were of Northern European ancestry. They made up what will be referred to in this Atlas as the research series.*

So that we know the research series are all white, all born in the United States, all of Northern European ancestry:

10 *The children were examined at three-month intervals during the first postnatal year, at six-month intervals from 12 months to five years of age and annually thereafter. A series are from two to 21 hand films made at successive examination of each of 1000 of these children were utilised in the preparation of the Atlas.*

15 Mr Jabbour, I don't know if you've been following that, but - - -

MR JABBOUR: That's right.

20 MS BRANSON: - - - did something come to your attention about what Dr Low has been saying about this study?

MR JABBOUR: No, I'm sorry.

25 MS BRANSON: I will just read you from perhaps the longer report. Dr Low did a report that wasn't – I can't quickly turn that one up, but let me find one. I'm looking at the report, it just happens to be the one with respect to SIEV 155, a particular child, which is dated 8 August 2011, but the statement comes up in a number of Dr Low's statements. He says:

30 *The reference book, Radiographic Atlas of Skeletal Development in the Hand and Wrist by Greulich and Pyle is the standard guide. These standards are currently used worldwide, although they were developed from studies carried out in the United States and the United Kingdom in the late 1950s.*

35 Now, it would appear to be inaccurate. It might suggest that Dr Low is at least not familiar with at least the preface to the publication. And you will note that it was successive examinations of each of 1000 of these children, and you will find that Dr Low refers to 6000, I think of in excess of 6000, which actually is in this volume, but
40 it comes from another aspect of the publication.

MR JABBOUR: I understand. Yes.

45 MS BRANSON: Turning to the next page, page small Roman (xiii), we see near the top, he contrasts Professor Todd's Atlas with the one now under preparation:

In preparing the present volume, we have utilised not only the X-ray films to which he had access –

that's Professor Todd –

5

but also those which were obtained during the subsequent six years of the study.

And then slightly further down:

10

The X-ray standards in the present volume are therefore the first to be based exclusively on the research series of the Brush Foundation study organised and directed by Professor Todd up to the time of his death in 1938.

15 Now, we haven't got here the preface to the second edition, but it's available to be looked at, and what it reveals is that the same X-rays are used, although some of them are reimaged in the second edition. So if we turn then to the actual volume itself, it starts:

20

The rationale and technique of assessing developmental status of children from roentgenograms of the hand and wrist.

On page 2:

25

The relationship of the developmental status of the skeleton to that of the reproductive system –

and there's quite a deal of discussion about that –

30

but it's designed to establish the validity of an assumption that the degree of development of the reproductive system is a reliable indicator of the level of general bodily maturity.

35 So what it does is link, obviously, puberty and then maturity post-puberty with things you can see if you X-ray a skeleton. And he notes near the top of page 13:

40

The chronological age at which boys attain puberty is quite as variable as that of girls at the same period of life, due to both genetic and environmental factors. This variability is strikingly illustrated by the photographs reproduced in figure 5.

And we have the photographs there on the next two pages. And describing those photographs:

45

The boys shown were either 14 years, 14 years and one month, or 14 years and two months of age when the photographs were made. Despite their similarity in chronological age, they ranged from early pre-pubertal to only slightly sub-

adult stages of development. When the photographs were arranged in an ascending order of maturity on the basis of the boys' external appearance, it was found that their skeletal ages formed a continuous series from the least mature to the most mature member of the group.

5

And he gives that as another example of the close correspondence between the developmental status of the reproductive and skeletal systems as disclosed by X-ray films of the hand and wrist. And I think it is interesting to look at least at the first and the last of those rows of three photographs. So on the first row we have a boy on the far left-hand side whose chronological age is 14.2. It's not entirely clear to me whether that's 14 years and two months or 14.2 years, but it probably doesn't matter much. But his skeletal age is 12 – well, say, 12.4. At the other end of that series, there's a boy whose chronological age is 14.2, but whose skeletal age is 13.8. So they're examples of where someone's skeletal age is younger than their

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15

And then on page 15 we've got another series which shows the reverse tendency. The first boy, 14.1 chronological, 15.4 skeletally; the next, 14.2 chronologically and 16 years skeletally; and the final one, 14.2 years chronologically and 16.8 and 2.6

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25

There is discussion about illness, which I think we can overlook. There's then a discussion partly at page 22 on the value and limitations of the X-ray film of the hand and wrist in appraising the physical development status of children. We have the summary at the beginning about a single X-ray film of a child's hand provides the following useful information:

30

It affords an objective measure of the amount of progress which a child has made towards attaining physical maturity. That is, it enables one to determine the child's development status and to compare this with others of the same sex in age.

35

I don't think we need go to the other concepts. But at page 27 he discusses the concept of skeletal age, or they discuss the concept of skeletal age:

40

The standard X-ray plates in this Atlas depict the degree of skeletal development that can be found to be representative of groups of healthy children at successive chronological ages.

45

And then he talks about being customary to express the skeletal status in terms of a skeletal age:

5 *And it is thus employed, skeletal age corresponds to the chronological age at which the children on whom the standards were based usually attained the same degree of skeletal development. This device makes it possible to relate a child's skeletal status to chronological age which provides the basis for evaluating every other measurable aspect of its growth and development.*

We find that it doesn't matter much whether you do the left or the right hand, in the sense of using the left. And then on page 31 how the standards were selected:

10 *The children in our research series were examined at three month intervals during the first postnatal year, at six months intervals from one to five years and annually thereafter. So that we know at the ages with which we are likely to be concerned, the children were examined only once a year. The ages of the children whose hands films were used in the preparation of this Atlas did not vary more than two per cent from the age at which their examinations were scheduled.*

20 Now, I understand that to mean, and the figures in the document suggests this is right, that they were examined on their birthdays or a day or so either side. So the X-rays don't tell you anything at the ages with which we are concerned in that 12 months period that occurs between the times when the X-rays are taken. I'm at page 32 now:

25 *Each of the standards in this Atlas was selected from 100 films of children of the same sex and age. The films of each of these series were arrayed in the order of their relative skeletal status from the least mature to the most mature. In most cases the film chosen as the standard is the one which, in our opinion, was most representative of the central tendency or anatomical mode of the particular array. The anatomical mode was frequently, but not always, at or near to the mid point of the distribution of the 100 films. It was farthest from the midpoint at those ages when, as a result of a major change in the rate of development, differences in the degree of skeletal development of the children resulted in a skewed distribution of the array.*

35 So we know that in most, but not all cases, the film chosen was representative of a central tendency frequently, but not always, at the mid point of the distribution. And we don't know in which of the plates the film chosen as the standard was not the one that was most representative of the central tendency, but the inference is that some it wasn't, and that they would have been farthest from the mid point where there was a major change in the rate of development. And then beneath that:

45 *To the extent that we were able to do so without sacrificing accuracy, we have used as standards the hand films made of the same child over a period covering a number of successive annual or other regular examinations. This reduced the total number of children whose films were used as standards and so produced a more orderly developmental continuity in the standards.*

At page 33, in the middle:

5 *In constructing these standards our object has been twofold. First, to select films which would provide an adequate record of discernable stages of the normal development of the bones of the hand and wrist; and, second, to relate those stages as accurately as possible to the chronological age at which they typically occurred in the children of our research series. In a sense, the first of these objectives is more important than the second.*

10 So we know that chronological accuracy was not the first consideration; showing development was the first consideration. And at the bottom of the page, the bottom three lines:

15 *A child's skeletal status on any one of his birthdays or on any semi-annual or quarterly subdivision of the year is of itself no more important than his skeletal state at any other time. If an atlas of skeletal development is limited to illustrations of the skeletal status which existed at the time of those examinations, important stages of the process are almost certain to be excluded. Our failure to maintain a regular time interval between successive standards results in part from our attempts to avoid such omissions.*

And then at the bottom of page 34:

25 *The modal chronological age at which a given maturity indicator first appears in the films of these children is the skeletal age that has been assigned to that maturity indicator in this Atlas.*

I think people will understand the difference between a mean or an average in the mode. Yes. And then at page 40 we move to the applicability of the standards:

30 *This discussion would not be complete without some statement concerning the applicability of these standards to children other than those of our research series on whom they are based. These standards can be expected to fit reasonably well other children of comparable genetic and environmental backgrounds.*

Missing a few lines:

40 *There is no reason to expect that they will fit exactly any other group, nor is it possible to construct standards that will do so, unless each is assigned so wide an age range as to reduce very seriously its value in the assessment of individual children. This fact and the reasons for it should be understood and remembered. In the study of any aspect of the growth and development of children, one is constantly bedeviled by their variability. This factor must be reckoned with even in populations whose members are rather homogenous genetically.*

Missing a few lines:

The difference is in average stature and weight among children of the same sex and age in various parts of our country –

5

being the United States –

and similar regional differences in the age of onset of puberty, are but too many examples of this variability. Because of genetic differences, children grow and develop at different rates, even when they are adequately nourished and not handicapped by serious illness. There are early maturing and late maturing strains in our population, in addition to the great majority who are in this respect intermediate between them. In any chronological age –

10

15 I'm on page 41 now at the top:

In any chronological age group in a given population the relative number of children who are fast, slow or intermediate in their rate of physical development will determine the average, the mode and the range of skeletal age of that group.

20

And at the bottom of page 41:

Word of caution is perhaps justified, however, in evaluating the skeletal status of children of different racial groups.

25

And that discussion is one I think that Dr Low has called innate a number of times, to say that there are studies that suggest nutritional and socioeconomic factors might be more important than genetic factors, and that discussion continues to the top of page 43 with the reference to the often remarkable degree to which inadequate diet, ill health, and other unfavourable environmental conditions can retard or distort the skeletal development of children in our own country. Quite probable that lesser degrees of illness and deprivation are also responsible for much of what is often misunderstood as normal variability in this and other aspects of growth and development, suggesting that normally inadequate diet, ill health, will tend to make you skeletally more immature than the reverse.

30

35

There's then the accuracy of skeletal assessment. There's quite a lot of discussion about how accurately people can read and not read X-rays. I don't propose to concentrate on that. I'm not aware of a case in which – there may be some but the ones I know of the fight has not been about whether the X-rays were accurately read or not so I think we can leave aside that issue I think. But if you go to page 44 just below the middle:

40

45

If an evaluation of a technique is to be meaningful it must be made with due regard to the limitations inherent in it. No method that is presently available or, we believe, that is likely to be devised will make it possible to assess a hand

5 *film with pinpoint precision. The system described in this Atlas, for example, is intended to provide merely useful estimates of skeletal status – and it will do so, if it is properly used. Unfortunately, as in many other similar procedures, there is a tendency to attribute to, and to expect from it, a greater degree of precision than was intended by those who devised it, or indeed that is permitted, by the nature of the changes which it is designed to measure.*

10 And then there's some various other discussions I think we can go over. We have at page 48 then the discussion of what constitutes a significant deviation from normal. It starts:

15 *In evaluating the skeletal assessment of individual children one needs to know whether or not the extent to which they are advanced or retarded on the basis of these standards is to be regarded as significant.*

So that shows us the purpose for which this Atlas was developed, to see if a particular child was advanced or retarded in their development.

20 *This is quite as difficult to determine precisely as it is to say just how much a child may deviate from the height and weight assigned to children of his age and sex in a height-weight-age table without being considered abnormal. It is, however, possible to indicate within limits narrow enough to be useful how much deviation in skeletal status is to be expected among normal children at different ages. One of the largest number of children whose skeletal development has ever been studied over a period of years by repeated X-ray examinations are those who were enrolled in the Brush Foundation Study. Tables III and IV list the means and standard deviations of the skeletal ages of those children as determined by the assessment of 6879 hand films.*

30 You might recognise that figure, Mr Jabbour. I think Dr Low has transposed it to another category – and then that takes us, so far as boys are concerned, to Table III which is on page 51 and that's the table that gives the chronological ages from three months to 17 years and the standard deviation of skeletal age in months on the right-hand side of the page. Now, who was in the Brush Foundation Study we can tell
35 from the opening sections of the preface that I read to you before, and the indication here is that the boys in this study were examined until 17 years of age. See at the top of page 49. The girls ranged from three months to 16 years and the boys from three months to 17 years when the X-rays were made.

40 *Though the assessments were made according to Professor Todd's standards, which proved to be not quite advanced enough to fit the mean skeletal status of the children in the study at most chronological ages, they do show the amount of variability in skeletal development which existed in that group ... no reason to believe that the variability would be significantly greater than that recorded in the tables if those assessments had been based on the standards presented in the Atlas.*

45

So that assessment was not done by reference to the Atlas but by another means, but those who generated the Atlas doesn't think it would be a big difference.

5 *It is probably safe to assume that one standard deviation above and below the skeletal age corresponding to the child's chronological age will include approximately two-thirds of the white children in this country who are adequately nourished and in good health; two standard deviations would include 90 per cent.*

10 And then table V, which is the page 55 table:

15 *Table V and VI list the means and standard deviations of the skeletal ages of a group of boys and girls whose growth and development were studied over a long period of years by Dr Harold Stuart and his associates in the Department of Maternal and Child Health at the Harvard School of Public Health in Boston. Since the hand films of Dr Stuart's children were assessed by the use of this Atlas, the data in the table show how the rate of skeletal development of a group of Boston children, many of whom were from less privileged economic groups than our research series children, compared with that depicted in our standards. Within one or two exceptions, the values in the Stuart tables fall within two standard deviations of the corresponding means of the Brush Foundation children presented in the two preceding tables.*

25 And one can see that if you go to it, and see again that the skeletal age in months is given in figures that are at least at the older years, not markedly out of line with those in the preceding table which tends to support the assumption of the author.

The limits of "normality" suggested above –

30 going back to page 49 –

35 *should be considered nothing more than a useful rule of thumb for evaluating skeletal assessments of individual children. The reader who has dealt sufficiently with children to have been impressed with their variability and rate of maturation will understand why it is not advisable to attempt to define the limits of normality in skeletal status for age precisely. As in other aspects of human growth and development, this variability inherent in skeletal development should make us cautious about selecting one technique for evaluating "normality" range lest we lose sight of the differences in meaning of retardation and acceleration.*

45 So that I think gives us perhaps a better understanding than some people may earlier have had about how the Atlas was developed, for what purpose it was developed, and what those who developed say about its capacity to work out chronological age, and I think if we look at Table V, which I think of the two tables we have might be thought to be the more useful – table III being the one that came from the less variable group of young people – table V being the ones that were assessed by the Atlas and were a

more diverse range of children – we have by the age of 17 years a standard deviation at 15.4 months for someone whose mean age, that is, the average age at which they were X-rayed, was 17.16 years. So they were just marginally over the age of 17 years at that time.

5

So I know that has taken quite a bit of time but I thought it was just a useful way to start, to give the background to what we are now going to see. I put in the documents R v Udin, the judgment of his Honour Jackson, the District Court judge of Western Australia, mainly because it was the first case in which I'm aware of – it doesn't mean there weren't others, but it's the first one that I know – in which the Greulich and Pyle Atlas was provided to the court. There are, if I may say so, Mr Craigie, well before your time as Commonwealth DPP, other concerning aspects of this case, but I think in the interests of time they can be left aside. I don't think you have in your documents, do you, the transcript of the argument in front of his Honour in the District Court? I do have it.

15

MR [transcript unclear]: We do have it.

MR CRAIGIE: R v Udin?

20

MR [transcript unclear]: Yes.

MR [transcript unclear]: Yes.

25

MR [transcript unclear]: Yes.

MS BRANSON: You do have it? Right. Very good. Then you will see that Dr Sven Thonnell was called by the Commonwealth DPP, I think, Mr Craigie, here, and I think it – and it's at page 16 of the transcript of 8 November 2000 – you can see that Mr Allen – you won't know, I think, Mr Craigie, but someone might whether Mr Allen was actually employed by the Commonwealth DPP or was a barrister briefed? It doesn't matter very much.

30

MR CRAIGIE: He was employed, Madam President.

35

MS BRANSON: He was employed?

MR CRAIGIE: Yes.

40

MS BRANSON: Yes. Thank you. So at that stage at least we have what appears to be the Greulich and Pyle Atlas in the possession of the Commonwealth DPP. He calls Dr Thonnell, as we can see on that page, and Dr Thonnell starts to be questioned on page 17 of the transcript. Now, it would be a fair assumption – I'm sure, Mr Craigie, you will tell me if I'm wrong – that Dr Thonnell because he was believed by the DPP to be an expert in the area whose evidence was appropriate to be called by the Crown.

45

MR CRAIGIE: I think that's inescapable inference, yes.

MS BRANSON: Yes. So I don't want to spend a lot of time going through this, but I just draw attention to page 19 where Dr Thonnell says that the age of the last bones
5 fused by 18 years of age, almost totally fused by 18 years of age, certainly fused by
19, just above the middle of page 19, and I think everyone will understand the
importance of the age at which bones do fuse. The further you put it out the greater
risk you have of identifying wrongly whether someone is under or over the age of 18.
He then points out at page 21 how you can't calculate a standard deviation at the
10 high end of the scale. He talks about the page 51, which is the one we've been
looking at, but it only goes to 17 years.

We, I think, know that there's reason to think they only took the wrist X-rays up to
17, but he explains in a sense why that might be, because the bones are expected to
15 have fused at the age of 18 so you can't be generating standard deviations after that
age. He says at page 29 – there's some confusion in the evidence of Dr Thonnell that
might relate around the misuse of the expressions "chronological age" and "skeletal
age". So I don't want to pretend there's a complete consistency, but he makes some
very definite statements that tend to cause one to think in some earlier statements he
20 may have misused the expressions.

He says at the bottom of 29 from his experience it takes about two or three years for
bones to fuse after the age of 15, and in this particular case he was talking about a
defendant whose wrist showed maturity on X-ray. Now, the outcome of that I think
25 we all know, including and interestingly, Mr Craigie – and you may or may not be
able to explain this to me – these two individuals had been arraigned in the District
Court while protesting their age. They were each held I think in adult facilities.
They were found to be more likely than not under age. The judge wasn't satisfied in
either case that they were over 18. They were then immediately convicted. That
30 would be inconsistent, at least now, wouldn't it, with the Commonwealth's policy on
the prosecution of children?

MR CRAIGIE: With our current practices it would be. Yes.

35 MS BRANSON: Is there a reason to think it would have been inconsistent at the
time?

MR CRAIGIE: I don't know that I could speculate as to what our approach was
then beyond saying that it's only a recently developed approach that in these matters
40 most certainly you simply will not prosecute someone believed to be a juvenile.

MS BRANSON: Well, these ones were prosecuted by the DPP who believed they
were adults, adults but the question was they allowed the judge to go on and
immediately convict them and sentence them without a pause that would have
45 enabled consideration to be given to the prosecution policy about whether children
should be prosecuted. It just looked very odd to me. Do any of your team know - - -

MR CRAIGIE: I'm not, for obvious reasons - - -

MS BRANSON: All right.

5 MR CRAIGIE: - - - able to go into detail of what happened in 2000. I wish I was.
If there's anyone else amongst my staff who can assist - - -

MS BRANSON: But in any event it would be now regarded as entirely inconsistent
10 with the Commonwealth prosecution policy, wouldn't it?

MR CRAIGIE: It would be a different approach. Yes.

MS BRANSON: Yes. You did suggest earlier that that policy would have reached
15 back to this time, but you can't speak, no doubt, of a particular case?

MR CRAIGIE: No. No. We - - -

MS BRANSON: You indicated there hadn't been a big change in the policy.
20 Anyway, let's not bog down on it.

MR CRAIGIE: As a matter of practice – as a matter of practice – we would only
now consider prosecuting a juvenile, a known juvenile, if there were particular and
aggravating circumstances.

25 MS BRANSON: There's reason.

MR CRAIGIE: In fact that hasn't arisen for quite a long time.

MS BRANSON: Yes. I mean, it's only of historic interest, but you can pick up
30 from some of the earlier part of a transcript how these people - - -

MR CRAIGIE: Yes.

MS BRANSON: - - - who claimed to be children were in an adult court. It seemed
35 to have been said to be done for administrative convenience because you could get
there a judge who would act either as a Children's Court judge or as a District Court
judge, but you couldn't do that if you charged them in the Children's Court.

MR CRAIGIE: I wouldn't adopt that - - -

40 MS BRANSON: It wouldn't now happen.

MR CRAIGIE: - - - explanation lightly because the people who made the decisions
45 are not here to explain it, and there's nothing of which I'm aware that would indicate
that that's the explanation for it. There may be another, and of course this is 2000.

MS BRANSON: It's quite a time ago. Yes.

MR CRAIGIE: It's quite a time ago, and I suppose also it predates some earnest consideration given to a number of these matters back in 2001.

5 MS BRANSON: But not earnest pre-consideration to when you prosecute children.

MR CRAIGIE: Well - - -

10 MS BRANSON: Presumably the Commonwealth DPP has long had an attitude to when it's in the public interest to prosecute children.

MR CRAIGIE: I think what the 2001 discussions in the Parliament and ensuing legislation indicates was that certainly there was some anxiety around the general area, if I could say that.

15 MS BRANSON: But you don't suggest, Mr Craigie, do you, that – possibly you do – but there are different public interest consideration for prosecuting foreign children over prosecuting Australian children?

20 MR CRAIGIE: Absolutely not. Absolutely not.

MS BRANSON: No. No.

25 MR CRAIGIE: And that's not just an official position but it would be – if anyone took a moment to look at my CV and my prior occupation – a deeply held moral position.

MS BRANSON: No. But you weren't in DPP. You weren't at the DPP in the time we're talking about.

30 MR CRAIGIE: I wasn't.

MS BRANSON: But there was then, surely, some policy about when children would be prosecuted. I mean, I would have thought the DPP would long had a policy about when to prosecute children.

35 MR CRAIGIE: Well, we have. We have, and if you would like me to make a historical search as to the degrees of nuance over time that brought about that outcome I would be very pleased to do so.

40 MS BRANSON: Only if it has got some relevance at a later time. I don't want to bog down on a case that's this old. It was just an interesting factor. I thought it was
- - -

45 MR CRAIGIE: Well, it has got some relevance to the reputation of a quarter century old office, and I would not like - - -

MS BRANSON: If you would like to give us some material about it, please do, Mr Craigie.

MR CRAIGIE: Well, if we're able to shine some light on it we will.

5

MS BRANSON: Thank you. The next document we have, part of the history of bring into Australian law the provisions in the Crimes Act now relied on with respect to wrist X-rays, I'm very conscious of not wishing to either infringe the law or breach parliamentary privilege around the transcript but I think there's nothing wrong in drawing attention to the existence of the transcript and I think, Mr Anderson, were you in the division you're now in at this time?

10

MR ANDERSON: I was neither in the division nor the department at this time.

MS BRANSON: Fine. All right. Somebody may know; it might well be the Australian Federal Police. The initiative for this change presumably came out of an expectation, perhaps a fear, that there might be growing numbers of offences involving people smuggling where the age of the suspects could be an issue; is that right?

20

MR JABBOUR: I think that's correct. We were encountering a number of cases where we had no means by which to indicate their age. This appeared to be one measure, albeit not a conclusive objective test but certainly one measure to assist in that process, and it was for those reasons. We've not encountered this issue in any other crime type. It was unique to this cohort and this particular crime type because typically, when we deal with individuals in this country, we are able to verify their age through other records and other processes.

25

MS BRANSON: Yes. Thank you. Now, a Dr Osbourne gave some evidence to this committee. Do we know whether Dr Osbourne was at that time working with the Australian Federal Police?

30

MR JABBOUR: No. He wasn't.

MR COLVIN: No. He wouldn't have been.

35

MS BRANSON: No. I didn't mean working for you but working with you on developing a legislative proposal.

MR COLVIN: That would be very difficult for us to answer. What I would assume is that we would be – in the Attorney-General's Department there would be a range of people consulted, of which we would have been one and there would have medical experts, and I would suggest that Dr Osbourne was that expert.

40

MS BRANSON: All right. Do we think Attorney-General's Department might have found Dr Osbourne?

45

MR ANDERSON: May well have. I can take that on notice if you would like.

MS BRANSON: It doesn't matter. We just wondered.

5 MR ANDERSON: But it's correct, as Mr Colvin says, that the development of the legislative proposal would have been something primarily in the carriage of the department.

10 MS BRANSON: Good. Thank you. So I don't want to go into the detail of the evidence but we just note Dr Osbourne's evidence about that at page 4 of this transcript. He says things about standard deviations. He talks about margins of error at page 2 of the earlier page. I draw attention to those because I am interested ultimately in identifying what information about likely date of maturation, standard of errors, was available to Commonwealth agencies, and presumably Dr Osbourne
15 was thought to be reliable enough to give evidence to a senate estimates committee – to a senate legislative committee, and then evidence was given both by officers of the Attorney-General's Department and an officer from – two officers from the Australian Federal Police.

20 I just draw attention to Ms Davis from the Federal Police, her evidence at page 16, because it's referred to in the report of the committee. Also to the evidence of Ms Linabury at page 17 just up from the bottom, which reflects a recognition, which you also see in the early cases, that many young offenders don't know their age. It's not only just that you can't verify it; they actually don't know it.

25 MR COLVIN: That's very true. Correct.

MS BRANSON: There's a reference to the Convention on the Rights of the Child at page 18 from Mr McDonald from the Attorney-General's Department, and that's
30 followed through in the report. Then if we go through to the report itself, which should be your next document, we find reliance placed on the statement made by Ms Davies. There's the quite detailed consideration of the provisions of the bill but I don't think we need to spend time on those, consideration of the benefit of the doubt, and that's where the statement by Ms Davis is noted in paragraph 318. Although the
35 bill itself does not make such a provision, the Australian Federal Police advised that it was prepared to treat all persons who were not clearly adults as if they were juveniles, and they quote Ms Davis:

40 *In the absence of any other age identification documentation or other means of doing it, anyone who tested up to 19 would be treated as a juvenile because the X-rays would indicate that they were below that point a juvenile.*

The committee said that that should be stated in the bill, or at least the explanatory memorandum. Now, I think it was stated in the explanatory memorandum but it was
45 volunteered by the Australian Federal Police. Are you able to tell me, Mr Colvin or Mr Jabbour, what was done by the Australian Federal Police to ensure that all

officers were aware that the Australian Parliament had been told that those who didn't test 19 would be treated as juveniles?

5 MR COLVIN: No. I couldn't say conclusively what we did at the time. It's certainly our standard practise and policy in relation to this that we take into account that standard deviation. So, unless the evidence is that they are more than likely 19 or above, we would take it that they are juvenile and not charge them.

10 MS BRANSON: Right. Are you able to point to any direction issued by the Commissioner, or a Deputy Commissioner, or any protocol that went out to Federal agents to that effect?

15 MR COLVIN: I couldn't say what we had back then, your Honour. We would have to check. We certainly have guidelines and procedures, in which it would most likely be contained. It would not be something that I would expect the Commissioner or a Deputy Commissioner to put out a direction. We have different procedures for different crime types and that's why we create teams who are specialised in particular crime types. I couldn't presume that we had a specific reference to that back then, but we can check for you.

20

MS BRANSON: Well, what about now, Mr Colvin?

MR COLVIN: We do. We have in our guidelines. I will refer to Mr Jabbour - - -

25 MS BRANSON: If you could find anything. I'm not alert to have seen in your documents any such direction.

30 MR JABBOUR: I'm not aware that it is in writing. We will check, ma'am. As the deputy says, it's typically a conversation. It's known that we don't charge unless in exceptional circumstances, as Mr Craigie said, juveniles. We rely on the statement of the expert to indicate they are over 19, but we don't rely solely on that evidence, and then there will be a discussion with the CDPP because at the end of the day they're the ones that will take the prosecution forward or not us. But I'm not aware that there's anything in writing that specifically states if they're under 19, other than
35 in recent times correspondence entered into by myself where we make it abundantly clear that if they are determined to be a juvenile, but I don't think I qualified that by saying and that means under the age of 19. I rely on the – or we've relied typically on the evidence of the expert to interpret the X-rays.

40 MS BRANSON: Would it be fair for me to conclude from that, Mr Jabbour, that this statement, having been made to the senate committee and having been relied on, and I think referred to – we will look at it in a minute – in the second reading speech, nothing was formally done by the Australian – formally done by the Australian Federal Police to ensure that that was complied with?

45

MR JABBOUR: Not in writing, but I will – we will go back through our protocols, but I'm not aware of any written instruction or direction to that effect to put that into

effect other than it was adopted by officers. But I'm not aware of a prescriptive direction to that effect.

5 MS BRANSON: All right. Is it the practice of the Australian Federal Police to go back and audit its files, for example, for senior Federal Police to go back and audit the files to see what in fact is being done by the Federal agents in their handling of individual matters?

10 MR JABBOUR: There's certainly a quality assurance regime that we invoke on a case by case basis for these matters, particularly where there are concerns, and one of the measures we actually put in place for these issues was to appoint a SES1 in charge of people smuggling. Now, that's unique as far as we don't typically appoint a commander with a management team for one crime type but, given the nuances and some of the challenges we face with respect to people smuggling, for two years now
15 we've had a dedicated executive structure around this particular issue – crime type.

MS BRANSON: You are aware, aren't you, that people were charged by the Australian Federal Police while the evidence you had indicated they might be under
20 19?

MR JABBOUR: Yes. There were some cases I'm aware of. Yes.

MS BRANSON: Yes. That's why I'm raising this issue with you.

25 MR JABBOUR: I understand.

MS BRANSON: Yes.

30 MR JABBOUR: I understand.

MS BRANSON: So this assurance is given, nothing in writing has apparently issued to ensure it doesn't happen, and in fact the AFP does make decisions that are contrary to this assurance.

35 MR JABBOUR: That's correct. There have been some instances in the past. When I became aware of it, and I would have to check the date, but I think I was able to provide you with a copy of an advice from me to my staff particularly to advise that juveniles, unless in exceptional circumstances, are not to be prosecuted.

40 MS BRANSON: Did you or anyone else at the Australian Federal Police then cause enquiries to be made as to how many charges might have been laid without compliance with this statement?

45 MR JABBOUR: No.

MS BRANSON: And, of course, having read that report, the Australian Federal Police, of course, reading the Crimes Act – sorry, Mr Jabbour.

MR JABBOUR: Sorry, ma'am.

MS BRANSON: You will agree that this report emphasises the importance of
5 informed consent for two people for each case, and indeed that also was referenced
by the Attorney-General?

MR JABBOUR: Yes.

MS BRANSON: Not only formal consent but actually informed consent. I ask you
10 again, was anything done by the Australian Federal Police to ensure that in their
investigative procedures agents did ensure the obtaining of consents, informed
consent, in compliance with the Act from two people?

MR JABBOUR: We did introduce procedures, but I am certainly aware that there
15 were occasions where we did not fully comply with those requirements. We have
since put in procedures to overcome those issues in the future. We also identified –
indeed I think it may have been yourself that identified a shortcoming with respect to
our consent form, and in consultation with the DPP we then reviewed that consent
20 form to ensure that they were fully informed, and indeed the independent person
fully understood the implications of the procedure. But I am aware that we were not
fully compliant on all occasions.

MS BRANSON: All right. Do you know when you first became aware of that? I
25 mean, by you, the Australian Federal Police.

MR JABBOUR: No. I would have to say I became aware when the matter was
raised by yourself in correspondence.

MS BRANSON: Yes. Thank you. Mr Anderson, this may not be something that
30 you can answer, or Mr Rutherford either, but you will see at page 14 of that report
there's a footnote 35. During the course of the hearing there was a question about
the Convention on the rights of the child, and the footnote reads:

35 *The department –*
meaning the Attorney-General's Department –

40 *subsequently confirmed that it had obtained advice from its office of
international law in order to ensure that "the measures complied with
Australia's international obligations".*

Have you been able to identify that advice?

MR ANDERSON: No. I haven't.
45

MS BRANSON: Do you know if it's in writing or not?

MR ANDERSON: Let me just consult, if I may. Yes. We have an advice from the Office of International Law, 14 February 2001.

5 MS BRANSON: Do you know if that was provided to us? Sorry, my staff think we do have it and we will leave it with that, thank you. Can you give the date again, Mr Anderson?

MR ANDERSON: 14 February 2001.

10 MS BRANSON: We will go on and come back to it in a moment perhaps. You may have noticed, Mr Colvin and Mr Jabbour, that the committee itself noted that, while there was variations between individuals, they at least believe that the Australian Federal Police might have thought otherwise. Is it possible that the Australian Federal Police did, either then or subsequently, believe that the X-rays
15 gave more precise information than - - -

MR COLVIN: I would find it difficult, your Honour, to think that we would have pretended to be an expert on the medical radiological factors determining the age. So I would suggest that we would have been doing our best to bring forward whatever
20 information or evidence was available to inform the committee and in the absence of anything else, and as I understand it at that time there was nothing else that we were able to, or we collectively were able to, bring forward. I don't think it would be right – I would be surprised it would be right to categorise it as we were in some way at odds with what the standard itself said, was the variance was to be expected.

25 MS BRANSON: Right. Okay. I think in the interests of time we will go now onto the second reading speech and the documentation around that. We have the document that came from the Attorney-General's Department which we've used here. It starts with a memo to the Minister for Justice and Customs with an annexure being a second reading speech. We see on page 2 of the what was then a draft
30 secondary reading speech:

35 *The determination of the age of a suspect is particularly important in relation to people smuggling offences where foreign nationals refuse to provide details of their age or make false claims that they're under 18 years. There is no documentation or means to prove otherwise.*

40 That would have been drafted in the Attorney-General's Department I think, wouldn't it, Mr Anderson, although of course not by you?

MR ANDERSON: I'm sure it would have been. Yes.

45 MS BRANSON: Yes. I note because, of course, there was an earlier attitude that these children may not know – these young people may not know how old they are, but it's interesting that by now they're refusing to say how old they are. Just a shift in attitude, which may well have come, do you think, because of the concern around the whole notion of people smuggling?

MR ANDERSON: I would only be speculating on - - -

MS BRANSON: You couldn't say.

5 MR JABBOUR: Ma'am, if I may, there was a change. As time progressed one of
the reasons for that may have been, notwithstanding your previous comment which
we all fully agree with that they don't know, but there was a growing reluctance on
behalf of suspects to participate in interviews with police. So they were indeed
refusing in that sense to provide that information, notwithstanding they may not have
10 known it. But, by them refusing to participate in records of interview with police,
there was – that may have been how that comment arose.

MS BRANSON: Yes. And we have the reference at page 3 about the need for
informed consent, and I think I've already asked you about what protocols or other
15 issues – directions were issued by the Australian Federal Police, and I think the
answer is formally probably nothing.

MR COLVIN: We will check, your Honour. I mean, there are protocols around
how we deal with minors more generally that involve informed consent. What I
20 want to ensure myself is was there anything specifically about this particular
category of minors.

MS BRANSON: Okay. Thank you. Once we're looking at the examination of the
clauses one at a time, which is at page 4 of what I have, paragraph 9 down the
25 bottom:

*The bill does not contain an expressed requirement to exhaust all other avenues
before seeking a person's consent to, or magisterial authorisation, for a
prescribed procedure –*

30 meaning a wrist X-ray:

*However, in practice investigating officials will seek to determine a person's
age by all reasonable means by exercising the powers contained in the bill.
35 For example, if reliable documentary evidence of a person's age is available
then this may suffice. If an investigating official is required –*

and this meant legally required –

40 *to exhaust alternative avenues this will frustrate the intention of the proposed
measures which are predicated on determining a person's age early in the
investigatory process.*

But you will see the statement by the Minister that in practice:

45 *...investigating officials will seek to determine a person's age by all reasonable
means before exercising the powers contained in the bill.*

Again, can I ask, Mr Colvin and Mr Jabbour, were any directions or protocols put in place by the Australian Federal Police to ensure that agents knew that this was required of them?

5 MR COLVIN: Not to our knowledge.

MS BRANSON: Thank you. Do you know whether it happened or not?

MR COLVIN: Did we put protocols in place or - - -

10

MS BRANSON: No. Whether officials did seek to determine a person's age by all reasonable means before exercising the powers contained in the bill?

MR COLVIN: Well, on reviewing a number of the matters there are a number of cases where it appears we relied heavily on the X-ray. I can't speak for what was in the officer's mind about their visual interpretation of the person's age or circumstances of what that person may have told our officers to enable us to make further enquiries because, of course, without information to assist us to make enquiries it's difficult to rely on anything else. But certainly, in looking through matters, there are a number of matters where a wrist X-ray appears to have been one of the principal age-determining factors.

20

MS BRANSON: The first and the principal age-determining?

25 MR COLVIN: I'm not sure about first, your Honour, but certainly principal. Yes.

MS BRANSON: Thank you. We've got then lots of discussions about consents, but I think I've already asked you about what was done by the Australian Federal Police about that and the need for them to be informed in both cases. So we then go to the next document I have is the case of the Police v Mazela. It has just been drawn to my attention that it might be fair on everyone to give you a bit of a break and that this might be a good time. Would everyone like a short break? Could I urge you please not to be longer than 10 minutes, come back by 20 past 11 on that clock, and we have tea or coffee provided for everybody in the room just out to the right as you go out of the room. Right. So we will stop now. We will come back in 10 minutes and start again at 20 past 11. Thank you.

30

35

ADJOURNED

[11.11 am]

40

RESUMED

[11.22 am]

45 MS BRANSON: It would be quite nice to get started if we could. I don't mind if people have their tea and coffee at the table with them, but I'm very conscious of the limited time that we have.

MR CRAIGIE: Madam President, it would be helpful if I could just revisit the best of our recollections on the position back in 2000, and I should say I've asked Mr Carter - - -

5 MS BRANSON: Of course.

MR CRAIGIE: - - - who has a lengthier history with the DPP than I do, and indeed Mr Jabbour, and the consensus seems to be quite simply this, that in 2000 a view was taken in the context that the Parliament had sent a particular signal about the
10 maximum penalty. There was also, I suppose, a view taken in the context of the volume of people smuggling activity going on, and that the attitude of the DPP was simply consistent with wider Commonwealth policy. And although we're independent, we always, of course – particularly if it came to the public interest component of the prosecution test – we would also have to have our ears open to,
15 particularly, a strong and bipartisan policy position taken at that time by the Commonwealth.

MS BRANSON: Is that to suggest, Mr Craigie, that in 2000 the DPP took the view that the national interest might more readily justify a young person being charged
20 with a people smuggling offence than some other category of offence?

MR CRAIGIE: I think in 2000 it was simply, this was a very serious offence whether - - -

25 MS BRANSON: Being involved in people smuggling.

MR CRAIGIE: - - - one was dealing with a juvenile or not.

MS BRANSON: Right.
30

MR CRAIGIE: The somewhat out of focus picture I have, with the passage of a dozen years, gets no better than that.

MS BRANSON: Right. All right.
35

MR CRAIGIE: But Assistant Commissioner Jabbour and Mr Carter lived through those times – had official lives through those times. They may have a better memory than mine. No doubt they will correct or put into sharper focus what I've just said.

40 MS BRANSON: All right.

MR CRAIGIE: But I think it largely boils down to there being, at that time, no view that it required an exceptional - - -

45 MS BRANSON: Right.

MR CRAIGIE: - - - attitude, even to a juvenile offender, because of the maximum penalty. Now, attitudes have changed markedly since then.

5 MS BRANSON: Yes. I mean I'm not focusing my Inquiry on 2000. I used it because it illustrated things, and in fact I thought it potentially illustrated a positive move in the attitude of the Commonwealth Director of Public Prosecutions towards children. Because there appeared then to be little consideration for the prosecution policy concerning juveniles as we now know it, whereas later cases show a much more careful consideration of that policy, I think.

10 MR CRAIGIE: I thank you - - -

MS BRANSON: I mean I'm happy to find positive things.

15 MR CRAIGIE: I thank you for the credit, but I think it should be shared because – with the AFP – because that was obviously an attitude that they have adapted also, and I think it has come out of, further down the bar table, out of a considered policy view by the Commonwealth.

20 MS BRANSON: Thank you. Mr Anderson, I know that there's some more information you might like to give to us but if it's not needed now let's not deal with it now. But subject to this, I asked you about the legal advice on the bill. Am I right in thinking that the legal advice that you received concerned the ICCPR and not the Convention on the Rights of the Child?

25 MR ANDERSON: The legal advice does go to the ICCPR, that's correct.

MS BRANSON: And not the Convention on the Rights of the Child?

30 MR ANDERSON: That individual piece of advice does not go to the Convention on the Rights of the Child. There was a follow-up email from the Office of International Law, 26 March, which said that they have rechecked the Convention on the Rights of the Child, and it goes on to address both the ICCPR and the Convention on the Rights of the Child.

35 MS BRANSON: Could we see that one sometime too, if we don't have it? We have it? Right. Okay.

40 MR ANDERSON: I believe you already have that.

MS BRANSON: Thank you. Right, now then if we could turn to the Police v Mazela, a decision of the Children's Court of Western Australia. Mr Craigie, Mr Johnson appeared for the DPP. Do you, by any chance, or any of your colleagues, know whether he was an in-house DPP individual or an external barrister briefed?

45 MR THORNTON: I don't recognise the name as being an officer of the DPP.

MS BRANSON: All right.

MR THORNTON: But I can't seek to state that categorically.

5 MR CRAIGIE: Well if Mr Thornton doesn't know, I wouldn't.

MS BRANSON: It can't be found out. All right. Okay. It's not especially
important. On page 2 of the transcript of 12 February 2002, so we're sort of nearly a
year past from the bringing in of the new legislation, we have a slightly curious
10 situation where Henry Mazela has been charged in the Children's Court and the
Commonwealth DPP challenged the jurisdiction on the basis that he was adult.
Unusual incident?

MR CRAIGIE: Well, again you're asking me about what's unusual in 2002 and I
15 - - -

MS BRANSON: Well, would it be unusual now?

MR CRAIGIE: I would think so, yes.
20

MS BRANSON: With the Commonwealth looking at one eye, here we would seem
to have, one would have thought, at least some doubt about the age of this person and
the DPP challenging. I'm just wondering a little bit about consistency with giving
the benefit of the doubt to a younger person.
25

MR CRAIGIE: Well, I think the inferences you draw as to what happened in 2002
are certainly open, yes.

MS BRANSON: Thank you. The other interesting thing about it, although I don't
30 want to go into it, are that both parties admitted that the onus is not borne by one
particular party. Of course the second reading speech, the Minister said it would be
borne by the Crown.

MR CRAIGIE: Yes.
35

MS BRANSON: And that's the practice now, I think.

MR CRAIGIE: It is.

40 MS BRANSON: It's the practice, yes.

MR CRAIGIE: It is. I don't think it's productive to get into an academic argument,
but that, by nature of an enquiry or - - -

45 MS BRANSON: No.

MR CRAIGIE: - - - an adversarial system, but we've taken the view that it should be placed beyond argument by concessions where the tribunal expresses any doubt.

5 MS BRANSON: And this is a case where the prosecution didn't allege a deliberate falsification of age. It's the last one that I know of – I might be wrong – where I've seen that, that the prosecution didn't allege falsification of age. And what we see on page 5 is that the judge makes it plain there's no evidence, apart from the evidence of Dr Low, which can possibly throw any doubt on age. So we have here a case, Mr Craigie – again, I appreciate before your time – that exclusive reliance is being
10 placed by the crown on the wrist X-ray.

MR CRAIGIE: And Dr Low's report of his observations - - -

15 MS BRANSON: Well, that's what I mean by the wrist X-ray.

MR CRAIGIE: - - - and his analysis thereof, yes, obviously.

MS BRANSON: You know, without the wrist X-ray you don't have Dr Low.

20 MR CRAIGIE: No.

MS BRANSON: So it's really X-ray evidence alone that's being used by the Crown. The challenge here it seems, an age determination made by the Australian Federal Police. I just raise it because of the number of statements we read that the
25 crown does not proceed on X-ray evidence alone. It's just one very clear example where the Crown did so. Now, it may be that the Federal Police are better positioned to help me here than the DPP – is this the first use of Dr Low to give this sort of evidence?

30 MR CRAIGIE: It would certainly have been around that time. I couldn't say that this case was the first, but it was certainly around that time.

MS BRANSON: So it was about then that Dr Low - - -

35 MR CRAIGIE: Yes.

MS BRANSON: Now, Dr Low, I think, was known to the Australian Federal Police because he had helped in another sort of investigation. Is that right?

40 MR CRAIGIE: Prior to this - - -

MR JABBOUR: I'm not sure, sorry. I don't know.

45 MS BRANSON: I think I have read somewhere that Dr Low was first assisting the police in customs investigations. Does that ring a memory – ring a bell, Mr Jabbour?

MR JABBOUR: You're probably right, ma'am. I think it was drug-related. Internal couriers, or persons suspected to be concealing narcotics internally. And

typically in Western Australia we do take those accused to Charles Gardiner Hospital and it may well have been that's where we first came in contact with this individual.

5 MS BRANSON: Right. You wouldn't know would you, Mr Jabbour, how long Dr Low had been working with the Australian Federal Police in Western Australia?

10 MR JABBOUR: No, and when we say working with I should qualify that. We would have had an association with him and learned of his skills and expertise through our contact with the hospital but he was not privately engaged by the Australian Federal Police at that time.

MS BRANSON: No, but you would have been asking that hospital, in the unit where Dr Low worked, to take X-rays for you - - -

15 MR JABBOUR: Yes.

MS BRANSON: - - - for people suspected of drug smuggling.

20 MR JABBOUR: Correct.

MS BRANSON: And then using Dr Low to read the X-rays, presumably.

25 MR COLVIN: Not exclusively, your Honour. It would have been whatever doctor was capable and qualified to read an X-ray. It may be that in this particular hospital Dr Low was the recognised expert, and then read most of them. But I wouldn't want to put an inference that we sought Dr Low's advice.

30 MS BRANSON: No, I don't suggest that. But Dr Low would have been working with Australian Federal Police in this area.

MR COLVIN: He may well have done a number of them.

MS BRANSON: Yes.

35 MR COLVIN: Purely because he was the expert at the time.

40 MS BRANSON: Do you know whether or not it was Dr Low that approached the Australian Federal Police to advise them that he had skills about age assessment, or whether it went the other way round?

MR COLVIN: No, that I don't know.

45 MR CRAIGIE: Madam President, I probably should interpose that there was an earlier case that was in the Children's Court in Western Australia in February 2002. Dr Low was called in that case, as it so happened.

MS BRANSON: Thank you.

MR CRAIGIE: There was an acquittal.

MS BRANSON: February 2002?

5 MR CRAIGIE: Yes.

MS BRANSON: Yes, thank you. Now, we see summarised at page 5 portions of Dr Low's report in this particular case, where he identifies that the wrist is a mature wrist on X-ray. And then he says:

10

According to the standard reference, Radiographic Atlas of Skeletal Development of the Hand and Wrist by Greulich and Pyle, second edition, this event occurs in the male at skeletal age 19 years.

15 He then gives a standard deviation and he estimates the age at 19. There's no reason to think from the report, but I can't know, and it may be that no-one can now say, but it doesn't appear that Dr Thonnell's evidence in the case of Udin was relied on in this case. It might leave open the inference that there was not disclosure of
20 Dr Thonnell's evidence which would be inconsistent with this evidence. Are either the Australian Federal Police or the Commonwealth DPP able to throw any light on this?

MR CRAIGIE: No.

25 MS BRANSON: No.

MR CRAIGIE: No, we can't.

30 MS BRANSON: I appreciate it's well before your time, Mr Craigie, but you do accept that in compliance with the authorities to which I've drawn attention, Dr Thonnell's evidence should have been disclosed here, inconsistent with the evidence given by Dr Low. And had previously been called by the crown as being an expert of good repute, as this person was as well, and their evidence is not consistent.

35

MR CRAIGIE: I would not be comfortable saying it until I had seen – unless I had seen both reports, but - - -

40 MS BRANSON: You've seen I've brought attention to critical parts of their evidence?

MR CRAIGIE: Yes, yes.

45 MS BRANSON: You might like to reflect on it, Mr Craigie, and tell me - - -

MR CRAIGIE: I will.

MS BRANSON: - - - tell me subsequently about that. We then have evidence given at page 6 which has consistently been given by this witness, which gives probabilities concerning an individual to two decimal points. It does seem to have been – fall directly into the trap identified by the authors of the Greulich and Pyle Atlas, of a trying to ascribe a scientific precision to a technique that doesn't allow for that degree of precision. Do you agree, Mr Colvin?

MR COLVIN: Your Honour, it would seem that that is the case but, again, from the AFP perspective, that's the matter that the court would make a determination on Mr Low's credibility to give that evidence. It's not something that we would form judgment on.

MS BRANSON: Well, Mr Colvin, I'm pleased in a way that you've raised that, because that has been said in a number of documents given to us. You understand, I assume, the nature of a common law criminal court? Which is, that it's not allowed, neither entitled nor ordinarily allowed to make investigations of its own. What it's required to do is to evaluate the evidence provided by the parties, for which reason complete disclosure by the parties is critical to the court's understanding. And, in this case, the crown was alert to at least the fact that Dr Thonnell, probably Dr Osbourne, and it would appear the Atlas itself, said things not easily seen to be consistent with Dr Low's evidence; and, as I understand from here, none of those matters was disclosed.

MR COLVIN: I can't comment on that particular matter, but it would appear that you are right, that none of that was disclosed; and if that was disclosable, and should have been disclosed, that we would take advice from my colleagues in the CDPP, but we have an obligation as well. If we're aware of material that is disclosable, or dissenting, or in some way different, that we would bring that forward. I couldn't say why we did or did not at the time, whether that was a consideration, whether it was discussed and excluded.

MS BRANSON: Right.

MR COLVIN: Okay.

MS BRANSON: But I think let's deal with the more general point at once. Is there any party that wishes to contest that if expert evidence is being lead to the court, the court is not in a position itself to work out the extent to which that expert evidence is credible, but can only rely on material being provided by the parties. And that is the very basis of the obligation to disclose, to ensure that the court has the material that it requires.

MR COLVIN: I certainly would not dispute that.

MS BRANSON: You wouldn't dispute that would you, Mr Anderson?

MR ANDERSON: No, I wouldn't dispute that.

MS BRANSON: No. There were authorities, to that effect, on the list of authorities I had sent to your department, I think.

MR ANDERSON: Yes.

5

MS BRANSON: Yes. And I don't think you dispute it.

MR CRAIGIE: No, I've already indicated it's unarguable.

10 MS BRANSON: Yes. I mean on the face of it I would have thought most people reading what Dr Low said, as is recorded at page 6 of this transcript in front of her Honour, in the paragraph that starts "Dr Low presented statistics", that read through to the end, that would be at least mystified, if not persuaded, it lacked logical coherence. If anyone wants to dispute that perhaps they could let me know. And at
15 this stage Dr Low is saying, in fact, that only it would seem about 50 per cent of those who are 19 have a fully fused wrist. And, of course, that's consistent with this table of probabilities that he puts now in all of his, I think, of his reports.

I think I may have indicated that the Atlas wasn't before her Honour. Of course it
20 was, because her Honour, to some extent, is quoting from it by page 7 and picks up the statement about the tendency to attribute and expect a greater degree of precision than was ever intended by those who devised it, and that at page 7. And when we have a then a judicial finding from her Honour at the bottom of page 7:

25 *But bearing in mind the inexactness of the method –*

which is going back to what the authors of the Atlas themselves say about it –

30 *the sample from which the comparison is drawn, which is that it strongly represented white middle class children of northern European origin in the United States, the time the sample was taken, which was 1930 through to 1942, and the make-up of it –*

I'm not exactly sure what her Honour meant additionally by the make-up of it, and
35 the unchallenged evidence, she's not satisfied and doesn't accept Dr Low's conclusion. We've then, Mr Craigie, but let's not go further into it, got some references about what to do because of the finding that the person is a child. That decision went on appeal, as we all know – it's the next document in her Honour's judgment in that regard – was upheld and I think we can probably pass on from that
40 in the interest of time.

We then go to the case of, in front of Riley J in the Northern Territory, in the Supreme Court of the Northern Territory, the case concerning the two individuals, Safrudin and Muhamad, in 10 April 2002. Again Dr Thonnell has been called to
45 give evidence. I'm not sure in that case where there would have been disclosure of Dr Low's evidence, which would by then be an expert with a contrary view to Dr Thonnell. And the crown, it appears, then, through Dr Thonnell lead evidence –

it's not in dispute that at a skeletal age of 19 years skeletal growth and fusion are complete.

5 So, again, we have a statement which seems to be directly at odds with Dr Low's evidence, which is that skeletal maturity is not reached at 19 but at an average of 19. So 50 per cent under, 50 per cent over, at the age of 19.

10 We also see at page 8 of this transcript, in these reasons, that the original estimate by the radiographer of his age was estimated at 17 years. And the view was expressed that his chronological age, as I understand it, was somewhere between 17 and 18 years in March 2002, which appeared to have been the critical stage. So we have here a person not skeletally mature. Why was he charged, having regard to the evidence that we've had attention drawn to?

15 MR COLVIN: Madam President, I guess I draw back on the conversation we had before about the change in policy over time. I can't give you an exact answer as to why he was charged, other than that we saw these matters as serious offences at the time.

20 MS BRANSON: He wasn't charged as a child. He was charged as an adult. And your evidence was he was about 17 years of age. It seems to call for explanation, Mr Colvin.

25 MR COLVIN: We would have to look at the specific brief of evidence, Madam President, I'm sorry.

MS BRANSON: I assume that the Commonwealth Director of Public Prosecutions conducted the prosecution, Mr Craigie?

30 MR CRAIGIE: We would assume so, yes.

MS BRANSON: It looks surprising, doesn't it?

35 MR CRAIGIE: On its face, I agree with you, yes.

MS BRANSON: Not surprising it was a finding he was under 18, and he had served his remand, which was a not inconsiderable period of time, in an adult jail. I think both the Federal Police and the Commonwealth Director of Prosecutions would identify that as a very regrettable circumstance, wouldn't they?

40 MR CRAIGIE: I would agree, on the face value. Absolutely.

MR COLVIN: As we stand now, yes.

45 MS BRANSON: And he then went on and was sentenced, and that's presumably explicable on the basis that you've told me. But this does seem to be conduct by two Commonwealth agencies directly inconsistent with statement of the Minister on the second reading speech, and what was previously said to a parliamentary committee.

MR COLVIN: Madam President, I would want to look at the specifics of this case to see if there was any circumstances that lead us to that conclusion. I think on the basis of the way we view these matters, I would agree, but it's difficult for me to be specific in this matter.

5

MS BRANSON: Thank you.

MR CRAIGIE: I am in the same position as the deputy commissioner. I would need to know a lot more about the circumstances to wholeheartedly adopt that suggestion.

10

MS BRANSON: Thank you. I think next in the list chronologically is the appeal to the Supreme Court of Western Australia in the Mazela case. Its only interest is that the fact of the appeal tends to suggest the higher degree of belief in the reliability of wrist X-rays, than it would seem the authors of the publication itself suggested was the case.

15

MR COLVIN: I think that's fair on the basis of this, yes.

MS BRANSON: We then have the case of the applicant VFAY, a migration decision not a criminal prosecution. We know that Mr Sharp was alert to this judgment by 3 September 2010, but it's a 2003 decision. Do the records of the Commonwealth Director of Public Prosecutions reveal that the director knew – not you, I realise, Mr Craigie – knew of it at about the time it was published? You would expect they would, wouldn't they? Because you would think an ordinary research on age determination in preparation to do a prosecution about age determination would turn up a decision of this kind.

20

MR CRAIGIE: I hear what you're saying. I simply don't know the answer to that.

25

MS BRANSON: Right.

MR CRAIGIE: How wide the processes of collecting knowledge of that kind and where the boundaries, what would be relevant to our processes, might have been set at that time.

30

MS BRANSON: Do we know whether the Australian Federal Police knew of VFAY at about the time the judgment was delivered?

MR COLVIN: No, sorry, Madam President. Just trying to get that document up at the moment, but I don't think we would have specific knowledge of that, no.

35

MS BRANSON: What about Attorney-General's Department? Did you monitor decisions of the migration jurisdiction?

40

MR ANDERSON: I'm not aware that we actually did at the time, Madam President.

MS BRANSON: Thank you. It was interesting because two further experts come into play at this time – a Dr Radcliffe and a Dr Jensen. I don't want to go into it in detail, but Dr Radcliffe, his evidence is summarised from paragraph 29. It was based on the Greulich and Pyle Atlas. He gave evidence at paragraph – that's summarised at paragraph 33 – that some boys reach skeletal maturity before the age of 16 years. He refers to some interesting studies around ethnicity. One that showed – and I think we've got these studies if anyone wants to see them – one concerns the skeletal maturity of Afghani children, one concerning Turkish children, which shows average skeletal maturity – it's in paragraph 31 – average skeletal maturity 11 months in advance for the standard for a 16 year old American from the Atlas time. So that's very close to a year out. He said that gave a standard deviation for the normal Turkish boys up to 18 years six months. He considered the two studies with Pakistani boys. Concluded that the studies showed that Pakistani boys mature earlier after puberty than do the population of Greulich and Pyle.

Then a quite interesting study around the skeletal maturity of elite young football players of Asian origin. 38 per cent of that group, at a given chronological age of 16 years, showed mature wrists on X-ray. The authors found no satisfactory explanation. They suggested that one possibility was that they were lying about their age, and that's of course why sporting bodies try and test for age, but pointed out that in the developed countries of Japan, India and Thailand, where documentation exists, you probably wouldn't get away with putting your age up to that extent to play elite sport. They found that skeletal maturity of Portuguese soccer players, seven out of 43 boys aged 15 to sixteen and a half years had mature skeletal X-rays. The conclusion of that – the authors of that paper – was that soccer excluded late maturing boys. That is, if you're playing elite sport at a young age, those who were skeletally immature, they're probably going to have an advantage over others, so that there might be a distortion of the population. On the face of it, it seems a reasonable proposition.

It occurs to me, and it occurred to one of the medical witnesses that I heard from in Sydney, that if you're organising a people smuggling venture and you wish to recruit youngish people to sail with you, you might well look for the physically mature but psychologically immature. That is, the naive, well-developed young boy might be a good target for you. Strong enough to do the work you want, immature enough not to see the dangers of what was being offered to you in return for money. It at least seems logical, Mr Craigie, does it?

MR CRAIGIE: Well, it would depend on a number of things. One would be the pool from which one was able to draw if one was in a remote and small village. The other would, I suppose, depend on the degree of sophistication, deception, that which you give the planner at a given level of the operation. One set of conclusions may be those that you suggest, but the other may be that these things come together rather randomly as to who would like some money, and who is footloose and fancy free, and who is prepared to take the risk to the extent the risk may be appreciated in what's probably a fairly remote Indonesian fishing village.

MS BRANSON: Yes.

MR CRAIGIE: So I have to say, as I speak, my scepticism about something being that well-structured grows. I'm not an investigator - - -

5

MS BRANSON: No.

MR CRAIGIE: - - - I should say, and probably those sorts of reflections should be validated by someone like - - -

10

MS BRANSON: Well, I will ask the police. They're investigators. What do you think, Mr Colvin?

MR COLVIN: Well, Madam President, I think that the premise is logical, however, our experience of the situation on the ground – our operational experience on the ground – is that the sophistication of the recruitment of these crew is not particularly sophisticated. The knowledge of age of crew is not what we would expect here, so the idea that somebody would intentionally target a person of that - - -

15

20 MS BRANSON: It may be unintentional, Mr Colvin.

MR COLVIN: It may well be unintentional, that's right. I just don't know that there would be a conscious – I don't know that there would be a conscious – it's more a matter of who's available, who's got the money. Many of these are quite ad hoc and opportunistic.

25

MS BRANSON: Right.

MR COLVIN: But it's not - - -

30

MS BRANSON: Yes. I'm only raising the – we've seen some populations here where maturity appeared to be distorted from what was the normal. You can envisage circumstances with respect to youngish people who are crewing people smuggling boats, that might have also have distorted their population against the population upon which the Atlas was based, can't we?

35

MR COLVIN: Absolutely, and I would never discount the possibility - - -

MS BRANSON: And we just can't know.

40

MR COLVIN: - - - that they would target on those particular grounds, no.

MS BRANSON: Yes. And we do understand, don't we, that although people talk about – if you read a report of Dr Low's for example – there's a 22.79 per cent chance that this individual. In fact, the author can know nothing about the individual. What's actually saying is, in the broad population, 27, about 27, would be under and the rest would be over.

45

MR COLVIN: That's right, it's a statistical - - -

MS BRANSON: It's a statistic based on a population. It's not a statistic about an individual.

5

MR COLVIN: That's correct.

MS BRANSON: So there's a tendency in a sense to mislead by saying the chance of this individual, because in fact the statistics tell you nothing about the individual.

10

MR COLVIN: I think that's a fair assumption, yes.

MS BRANSON: It's probably too much to ask, but we see that the witness Dr Jensen, who gave evidence on behalf of the respondent, that is on behalf of the minister, had been referred to a paper authored by the academic Schmeling and others, and we hear later of work done by, I think, Professor Schmeling but I'm not sure. Ms Pope, are you able to assist us? It's – presumably your department had something to do with this case, and how that paper came into the hands of Dr Jensen. Because it's made plain that he didn't identify it. He didn't really believe you could determinate age from skeletal X-ray, and he was asked to read this paper and then said all right, well, probably you can. Do you know how he got to the paper?

15

20

MS POPE: I don't, I'm sorry.

MS BRANSON: Right. We will look at the paper for what it says, but it's another source of information, at least in the hands of part of the crown, by the date of this case and there's no evidence of its being disclosed in later cases. There's evidence then of an affidavit from a Professor Carlin at paragraph 42, and I just draw attention to what Dr Carlin had to say. And the finding then was that the individual in question was a juvenile. So we go then to a paper that is itself undated, but it comes from the Department of Immigration and Citizenship, Ms Pope.

25

30

MS POPE: I can provide the date. It was signed by me on 11 June 2010.

MS BRANSON: Thank you.

35

MS POPE: And it has come to my attention, Madam President, that the attachments referred to are not provided to you.

MS BRANSON: Yes.

40

MS POPE: I've had those sent to me electronically this morning.

MS BRANSON: Thank you.

45

MS POPE: And I can make those available, but I'm sorry that we neglected to attach them in the first instance.

MS BRANSON: I think we were able to identify them - - -

MS POPE: Okay.

5 MS BRANSON: - - - Ms Pope, so we probably do have them. They're not all in the papers, but some critical parts of them have been. Could you just tell us, Ms Pope, since you signed it, the purpose behind your preparation of this paper?

10 MS POPE: Yes. I was at the time the principal adviser on citizenship, settlement and multicultural affairs matters in the department, and it had come to our attention through settlement providers that young men who were claiming to be unaccompanied minors were then presenting to settlement providers. They felt that a proportion of them were not under 18, they were in fact over 18, and this was the first kind of exposure to the concern that we were treating as minors clients that were
15 in fact adults. And in one particular case someone who had claimed to be under 18 immediately told the settlement provider that he was 27 and he wanted to sponsor his family and children.

MS BRANSON: Yes.

20

MS POPE: So the context for this was, we realised we had an issue to deal with, and a two-fold risk of detaining people who claimed to be children with adults and vice versa. And it was advice to the minister about how we might approach dealing with the problem.

25

MS BRANSON: Thank you. I see on page 2 of the paper, there were discussions around the issue of default date. That is, if you don't know when someone is born
- - -

30 MS POPE: Yes.

MS BRANSON: - - - give them some date of birth and - - -

MS POPE: That's right.

35

MS BRANSON: - - - known here as a default date, and that – at the end of that section you say:

Before that date is mandated –

40

that is the default date. Whether it be 1 January or – the beginning of the year or the end of year, I think, were the options.

MS POPE: Yes.

45

MS BRANSON:

We will survey a range of other relevant agencies for their views. These agencies include DFAT –

what I assume is the Australian Tax Office:

5

...Centrelink, Attorney-General's, AFP, PM&C, Foreign Affairs, ASIO –

DOHA?

10 MS POPE: Department of Health and Ageing.

MS BRANSON:

...Customs and the AEC.

15

Did you do that?

MS POPE: Yes, we did, but the context, I should be clear, was about data, and the way data is held, and what default dates other agencies used. We were trying to be as consistent as possible, because we share data across systems with other agencies.

20

MS BRANSON: In the course of your engagements with the Attorney-General's Department and the Australian Federal Police for that purpose, did you disclose to them the other information that you had learnt and called in aid for the preparation of this paper?

25

MS POPE: I don't believe so. I think it was merely a request around the preferred date to be used for the purpose of the data exchange.

MS BRANSON: Thank you. And you will see that you refer in attachments to some decisions that have been based on bone scans, and I think they're VFAY and [transcript unclear]. You had researched, it seems, the position of the United Kingdom, including the Health of Refugee Children Guidelines for Paediatricians, published by the Royal College of Paediatrics and Child Health. And you had noticed that they had made a particular statement, and it's probably worth reading it out:

35

In practice, age determination is extremely difficult to do with certainty and no single approach to this can be relied on. Moreover, for young people aged 15 to 18 it is even less possible to be certain about age. There may also be difficulties in determining whether a young person who might be as old as 23 could in fact be under the age of 18. Age determination is an inexact science and the margin of error can sometimes be as much as five years either side, which is 10 years in total. The issue of whether chronological age can be determined from the estimate of bone age has been discussed at great length in the literature. The answer is that it cannot.

40

45

And then you refer to other attachments. Was that information shared with the Australian Federal Police, the Attorney-General's Department, or the Commonwealth DPP?

5 MS POPE: If I recall correctly, it had been discussed with the AFP prior to the preparation of this, but I can't say whether we provided it in hard copy form or not.

MS BRANSON: Are you able to recall whether you drew their attention to the publication from which I've read that you included extracts from in the paper.

10 MS POPE: I am because one of the next documents that you have is a record of a conversation between immigration and the AFP when I referred to the research that we had looked at, and that was the piece of research that we were relying on at the time.

15 MS BRANSON: Thank you. And there's a reference in consultations internal/external to Ian Dean, special counsel, Australian Government Solicitor.

MS POPE: Yes.

20 MS BRANSON: Would it have been drawn to his attention?

MS POPE: I can't remember what we were asking his advice about at the time. It may have been, but I don't think – my recollection is not that we sought his advice about that document.

25 MS BRANSON: No. Was the AGS part of Attorney-General's Department at the time, Mr Anderson?

30 MR ANDERSON: The AGS was part of Attorney-General's Department until 1999, September 1999.

MS BRANSON: Thank you. And then, I think, we've got some of the annexures here. It has been drawn to my attention that, maybe, with the documents we set out, that document, the Health of Refugee Children, the guide for paediatricians, may not have been included. Is that right?

35 MS POPE: No, it's not included.

40 MS BRANSON: No. But I can say it does say what Ms Pope said it says, and we've got a partial copy of it if you would like to see it. Do you have attachment C from Ms Pope's paper? No. I will perhaps just read a little of what's in the attachment C and, again, we can show you a copy. She says, under the heading Does Not Give a Definite Age. The first heading is Unreliable, and she refers to the age, and the class from which it was taken, and to studies indicating that the test to determine the age of Asian or Hispanic children often vastly overestimates age. Then under the heading Does Not Give a Definite Age:

45

5 *The result of wrist X-ray age determination tests are not definitive. The test is usually comparison based, with the results providing a mean age estimation and an error range only. Most research concludes the margin for error for the test is at least two years either way. The results are also subjective. It's possible for two professionals to interpret the same data differently.*

And then in dot points:

10 *In Switzerland the use of wrist X-rays for age determination purposes was stopped in 2000. The Swiss Asylum Appeal Commission determined that bone age may be up to three years different from chronological age.*

Next dot point:

15 *In the UK the Royal College of Paediatricians advised that wrist X-ray age determination testing can be inaccurate by up to five years.*

I think in truth you could have put 10 years, Ms Pope, because it's five years either way.

20

MS POPE: I guess so.

MS BRANSON:

25 *In Austria the use of wrist X-rays has been discontinued. It has been deemed unreliable.*

30 Then she discusses that it wasn't designed – that is, the Atlas – wasn't designed for age determination. That it's a non-medical use of X-rays. And then identifies what the current UK practice is with respect to age estimation. Now, as Ms Pope has said, I think that document came into the possession – that is, the broader document of Ms Pope – came into the possession of the AFP quite soon thereafter, is that right?

35 MR JABBOUR: I think that's right. And, indeed, I can take that one step further. To the best of my recollection, and as a result of discussions between the AFP and DIAC, we had a further meeting and, indeed, a teleconference which we involved Mr Sharp in Perth in the DPP to discuss in more detail age determination, and particularly wrist X-ray. And as a result of that, to the best of my recollection, Mr Sharp, you did further work in relation to that process?

40

MR SHARP: Certainly. It was part of the impetus for my subsequent paper, yes. But I should say the first document to which you have taken the other groups, I can't say I've ever seen that particular document.

45 MS BRANSON: Right. If we look at the next document that we have, and please let me know if I'm wrong about this – it's an email from Ms Pope to a number of

people in her own department, the senior officers of her department, and then copied to a wider group. Are they all in your department, Ms Pope?

MS POPE: Yes, they are, or they were at the time.

5

MS BRANSON: At the time, yes. On 3 September 2010. It refers to a productive meeting she had that morning with you, Mr Jabbour, and you, Mr Sharp, on the issue of age determination and wrist X-rays in prosecution of people smugglers. At that meeting, I would be right in assuming, that that document, Refugee Children, the guide to the paediatricians, would have been under discussion I think.

10

MR JABBOUR: I think that's probably right. I don't recall the exact document, but I remember we had good discussions around this issue.

15 MS BRANSON: Is that your memory too?

MR SHARP: My memory was this was the first occasion where the DIAC age assessment interview process was raised with us, and we were trying to get our head around what it actually was. I certainly – I was part of a telephone conference with that, so I was in Perth at the time. I had no documentations with me which were referred to during the course of that meeting.

20

MS BRANSON: Right.

25 MR SHARP: Which is probably why I never saw that particular document.

MS BRANSON: And your memory is that as at that time you didn't see that – the Health of Refugee Children document.

30 MR SHARP: That's right. I certainly did not.

MS BRANSON: When did you first see it, Mr Sharp?

MR SHARP: The first time I saw that was probably Tuesday, when the documents were unloaded for Commonwealth DPP. As indeed the email which has just been referred to as well.

35

MS BRANSON: All right. Thank you. And you will see that Ms Pope at least, formed the view that the two of you were of the view that the information that she had provided, and the approach that the Department of Immigration was taking, warranted reconsideration of your reliance on X-rays to these cases, to the extent that they've asked for assistance to determine age in approximately four cases of disputed minors currently in the process in Western Australia. Does that accord with your memory, Mr Jabbour? That you were troubled by that information, and you did think a rethink was necessary?

45

MR JABBOUR: Probably not so much a rethink. It was a matter of we were troubled by the discrepancies and, indeed, the contrary views that were emerging more and more. And this was one of the reasons we engaged with DPP on this particular issue, because DIAC had quite strong views in regard to the work they had done. We had received contrary advice from other alleged experts, and there was clearly a diversion of views within the expert community. And that certainly troubled us because, again, we need to ensure we're providing the most relevant and valid evidence to the court, and there were certainly now questions being raised, particularly in our own minds, with respect to this particular process and procedure.

MS BRANSON: You will see if you look down that Ms Pope also formed the view that you were going to look at cases where convictions, jail terms were already in place, where the decision was based solely on a wrist X-ray, because you might need to reconsider. Was she right in her understanding of what you then thought you were going to do?

MR JABBOUR: We certainly looked at – we weren't looking to review cases. We were certainly looking to review whether other evidence was available in these matters. Whether we relied on – how many cases we relied solely on the X-ray, and whether, indeed, there was any other evidence available to us at the time. The conclusions there were that there was no, as Deputy Commissioner Colvin said earlier, there were very few cases where other additional or corroborative evidence was indeed available. We had made enquiries with Indonesia, and Indonesian National Police, on a number of occasions and we learned over time that they don't maintain records as we do in this country, and there were significant challenges in trying to obtain corroborative evidence with respect to age of these individuals.

MS BRANSON: So am I right, you did go back and seek to identify the cases where convictions had been obtained on the basis of, essentially, wrist X-ray evidence only?

MR JABBOUR: No, that's not my recollection. We certainly looked to understand whether there were other avenues of enquiry available to us, but it wasn't to review cases whereby we had only provided evidence. We were looking at cases that might afford us information as to other avenues of enquiry that may be available to corroborate the wrist X-rays. It wasn't second guessing the - - -

MS BRANSON: You're saying you were only looking to the future?

MR JABBOUR: Correct. It was as a way forward, it wasn't to review previous cases in question, the evidence that we lead in those. It was definitely forward looking.

MS BRANSON: You weren't troubled by the fact that there were young people – by young people I mean to straddle the - - -

MR JABBOUR: Sure.

MS BRANSON: - - - the age range of 18. That there were young people who had been prosecuted on briefs provided by you, where the scientific basis of the evidence would appear to at least need to be re-examined, in the view of what Ms Pope had found out?

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MR JABBOUR: We didn't – well, again, based on what Ms Pope had found out, I'm not an expert and the AFPs view has always been that we're not experts, and not able to interpret these procedures and measures. That's up to experts, so we certainly wanted to expand the number of people qualified to give advice in this area. Without doubt, and that was one of the conversations we had with the DPP. Yes, we've always been troubled by the whole issue surrounding young people, where they're detained, the periods of detention, whether indeed they are juveniles, or whether indeed they're adults, because it's an inexact science. We've always been troubled by this, and we've always tried to find the best evidence available. And that is, as I say, exceedingly challenging. But, yes, we've always been troubled by it, and me personally, yes.

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MR SHARP: Would it assist you, perhaps, if I could indicate the DPPs – or my position in respect to this meeting.

MS BRANSON: Certainly, Mr Sharp.

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MR SHARP: I think the email substantially overstates (a) the purpose of the meeting, and (b) the outcome of it. That was the first meeting at which I was given any information about the age assessment by DIAC, including the fact there had been a pilot program of some 70, I think it was, refugee applicants. And at that meeting I sought details of the – further details of how the process would work and how it could then, with a view to considering how it could be applied in the criminal process. It certainly wasn't a case specific meeting dealing with any particular cases. I think there was general consensus that if the process in the criminal proceedings it would be a good alternative method, or adjunct method, to the wrist X-ray processes, but it went no further than that from my point of view. I have to say that I noticed that this is an internal email, and I never saw a copy of it until the other day. Had I saw such an email I think I would have taken issue at the time with the contents of it.

MS BRANSON: But you heard at the time, I think, about the publication, The Health of Refugee Children?

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MR SHARP: I can't say that I - - -

MS BRANSON: You said you didn't see it.

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MR SHARP: I didn't see it, and I don't think that that specifically – my recollection was that this was in fact a DIAC assessment process, as they had run it in the pilot program. I don't know that we went beyond that, and I don't recall – and I'm pretty certain that I didn't hear about that particular other at UK Health.

MS BRANSON: Right. Whether or not it was referred to by name, did you hear Ms Pope refer to the fact that at least a guide to paediatricians in the United Kingdom said this method was wholly unreliable?

5 MR SHARP: Well, it certainly – I think the term they used was discredited. Yes, that's correct.

MS BRANSON: Yes. Mr Craigie, you were the Commonwealth DPP at this time, I think?

10 MR CRAIGIE: I was indeed.

MS BRANSON: Yes. Were you told about this?

15 MR CRAIGIE: No.

MS BRANSON: To put it more formally, were you in about September of 2010 aware that it had been reported in a publication, in a guideline for paediatricians, that:

20 *In practice age determination is extremely difficult to do with certainty, and no single approach to this can be relied on, moreover for young people aged 15 to 18 it is even less possible to be certain about age. There may also be difficulties in determining whether a young person who might be as old as 23 could in fact be under the age of 18. Age determination is an inexact science, and the margin of error can sometimes be as much as five years either side. Assessment of age measures maturity, not chronological age.*

And then – were you aware?

30 MR CRAIGIE: No, I was not aware of that publication.

MS BRANSON: If you had been aware of it, you would have been seriously troubled I think, wouldn't you?

35 MR CRAIGIE: I would have.

MS BRANSON: Because you were aware that the Commonwealth DPP had been leading evidence, particularly from Dr Low, that suggested to the contrary?

40 MR CRAIGIE: Yes.

MR SHARP: If I could just clarify that. At the time we're talking of, at this meeting and this interview, I did not have a copy of that guideline. I did
45 subsequently get one, and it was referred to in my paper, and I think you've got a copy of my paper. That would have been around, I think, November or December. I don't think I got it until sometime in November. In fact, I think I got it from –

although I may be wrong on this – I got some of this material from the Attorney-General’s Department, who had got it from DIAC.

MS BRANSON: Thank you. But, Mr Jabbour, you knew about it?

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MR JABBOUR: Certainly it formed part of – I don’t recall the exact documents that were discussed – but certainly we discussed a divergence of views with respect to experts around the world, and certainly DIAC did raise the issues of the use of wrist X-rays for refugees. And they had previously some cases where there were certainly discrepancies in views between the experts. Yes, I can say that’s absolutely correct.

10

MS BRANSON: You have said that you didn’t think it appropriate to go back and examine completed cases where wrist X-ray evidence had been substantially the only evidence. If you had known of this publication, Mr Craigie, do you think you would have wanted to go back and look at determined cases where essentially only wrist X-ray evidence had been called?

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MR CRAIGIE: Can I say - - -

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MS BRANSON: I raise it for this reason - - -

MR CRAIGIE: Yes.

MS BRANSON: If errors had been made, there was a risk that people who were juvenile had not only been convicted contrary to the Commonwealth’s prosecution policy, as I understand it was then being applied, but they would be being held in adult jails.

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MR CRAIGIE: Absolutely. Can I just place this in context? From 2008, we were faced with the phenomenon of very large numbers of people smuggling cases generally. And buried within that phenomenon was a concerning phenomenon that there may be juveniles within the criminal justice system. Now I can’t tell when, but I know that all of my office, and me included, at some stage after that surge came upon us, and my colleague Mr Sharp took over a national role in managing this challenge – we all became acutely aware of the comments that had been made about wrist X-rays over the years. The need for great care, in not placing too much weight upon them, that they weren’t a silver bullet, they were a mechanism provided by the Parliament, that was a starting point and over time, of course, that there were challenges that emerged to the way that scientific evidence had emerged.

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So if you want to characterise my attitude, and I think it’s – I’m sure it’s the attitude that was across the office – it was an attitude that started with great caution, moved into concern as some of these issues developed, and that concern produced responses of various kinds. In particular, I have to say, after your own interest and interchange with the Attorney, culminating in a cluster of cases, illuminated some of the troubling

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issues with some of the evidence and what could reasonably be extracted from, in particular, Greulich and Pyle.

5 So I can't tell you precisely where I sat in that continuum at this time, but it would have been, probably, simply at a point where I was aware that we had this very considerable number of cases that of course, obviously, called for great care. Not just because it involved detention of juveniles, but because it involved a scientific method that had its limitations, as everyone, well, as seemed to be quite apparent, even back in 2001 when, before the Senate. But those were the tools, amongst the
10 limited range of tools that we were given, and we worked, I believe, as carefully as we could to make sure that we didn't damage anyone with the use of those tools. That's where we sat at that time.

15 MS BRANSON: Yes. Mr Craigie, I raise this issue with you as I did with Mr Jabbour, and I will in a moment with the Attorney-General's Department. We can see in the material we've been provided with an anxiety to look forward, to ensure that things were done better in the future. The issue I'm now raising is, looking back.

20 MR CRAIGIE: Yes.

MS BRANSON: Mr Jabbour didn't think it was necessary for the Federal Police's point of view. Your explanation about what you would have thought had you, on this day, known of the document, again is a forward looking statement.

25 MR CRAIGIE: Had I known of - - -

MS BRANSON: Yes.

30 MR CRAIGIE: - - - specifically that document, I would have been greatly concerned.

MS BRANSON: Would you have sought to identify the cases prosecuted by the Commonwealth Director of Public Prosecutions in which reliance for age
35 determination had been either exclusively or substantially based on a wrist X-ray? For the purpose of investigating whether it could have resulted in court being misled and children now being held in adult detention?

40 MR CRAIGIE: It would really depend – I would start by saying I would have been very concerned.

MS BRANSON: Did you learn of Mr Sharp's paper at or about the time he wrote it?

45 MR CRAIGIE: At some stage after Mr Sharp wrote it, I did find time to read the paper, yes.

MS BRANSON: By then - - - Sorry. Yes, Mr Carter?

MR CARTER: If I might add something, Madam President. Around this time we were aware of concerns about the wrist X-ray process from DIAC. We were aware
5 that we were working with them, and discussing those issues. There was a point in time when the number of cases that did raise age issues, and that a person had raised age were ascertained, and that stage when this was happening, there were very few cases where persons had actually raised. We were aware that there were issues about the detention of persons. We were aware that there were issues in relation to
10 concerns expressed about the scientific approach, but there were very few cases that had actually raised – where age had been raised. And I think you, Madam President, you would be aware that when you wrote to the Attorney, that further caused us to consider the cases that had occurred in that period since September 2008. Because, as you would be aware, there was quite a gap in terms of people smuggling activity
15 between those earlier cluster of cases that we had been examining - - -

MS BRANSON: Yes.

MR CARTER: - - - and September 2008. And, indeed, it wasn't until sometime
20 after September 2008, the numbers increased quite substantially to around 2010 or so. So these issues were not in the forefront of our consideration, if I might put it that way, in that intervening period. But certainly our concern has always been to identify the cases where age may have been raised, and in the period since February, it has been very much our focus to ensure that we are aware of what the position was
25 in relation to those initial cases.

MS BRANSON: Just so I understand you, Mr Carter, are you saying to find the cases not yet prosecuted where age is an issue, or - - -

30 MR CARTER: No, those cases – obviously I was speaking of the cases that were before the courts at that stage.

MS BRANSON: I'm trying to find out if at any time, and I start from this time, the Commonwealth DPP looked back over past prosecutions to identify those that had
35 been conducted, either exclusively or almost exclusively, on the basis of wrist X-rays for age determination purposes.

MR CARTER: We have gone back to September 2008 and - - -

40 MS BRANSON: When, Mr Carter?

MR CARTER: I'm sorry?

MS BRANSON: When did you do that?

45 MR CARTER: That process was commenced, I think, probably in early 2011.

MS BRANSON: Right. So in – not at this time where we’re talking about September/October 2010, but early in 2001?

5 MR CARTER: I can’t speak at this time. Mr Sharp would have a stronger recollection about that time. But, as I say, I am aware that at that stage there were not very many cases where age had been raised.

10 MS BRANSON: I raise it for this reason – and I will come to the Attorney-General’s Department in a moment – a number of documents that I have seen, some might think because they were addressed to me, some because they were speaking notes for ministers, have said, well, as to past prosecutions the court has made a determination and the reliability of the evidence was a matter for the court. That tends to suggest an unwillingness – suggests to me an unwillingness, and that’s what I’m trying to explore, in Commonwealth authorities, to go back and re-examine
15 prosecutions that are already completed. But your evidence is that from early 2011 you were seeking to identify closed prosecutions where reliance had been placed on wrist X-rays?

20 MR CARTER: Where age had been raised, that’s correct.

MS BRANSON: For the purpose of assessing whether the court received appropriate assistance, so far as expert evidence was concerned? And, if not, to consider whether the prosecution – the outcome of the case might be sound?

25 MR CARTER: Madam President, whether the outcome of the case is sound, of course, would be a matter for somebody else to make a judgment on, rather than the Commonwealth Director of Public Prosecutions, and we would stand ready to assist in that process or as much as we were able to.

30 MS BRANSON: But did you assist by identifying the cases of past prosecutions where the evidence of age had been either exclusively or substantially wrist X-ray material, for the purpose of having someone consider them?

35 MR CARTER: Not for that purpose, no.

MS BRANSON: Thank you. The Australian Federal Police didn’t, I think?

MR JABBOUR: No, Madam President.

40 MS BRANSON: No. Mr Anderson, this information came to the attention of the Attorney-General at some time. Can you pinpoint when that was?

MR ANDERSON: Not off the top of my head, Madam President.

45 MS BRANSON: No. Am I right in thinking that officers for the Attorney-General’s Department, therefore likely officers within your division if not you, have been preparing statements to the effect, because the courts have determined the age,

and it was for the courts to determine whether the material was reliable or not, there's no need to go back?

5 MR ANDERSON: I don't believe that statements actually go that far, but we have prepared statements, talking points, etcetera, that say that it's a matter of fact the courts have made determinations of age in these cases.

10 MS BRANSON: And that the reliability of the evidence was a matter for the court to determine?

15 MR ANDERSON: That's correct, and it's certainly – I mean, you pointed to Mazela, and that's a case where, for example, the court determined not to follow the evidence of Dr Low, and to prefer the oral evidence given by Mr Mazela. So it's the case that courts have been able to say, do they accept the expert evidence or not, and come to a particular view on that. We believe that that's a correct statement to put in a talking point or a brief for the Attorney. At the same time though, we have also been having discussions with agencies about the past cases.

20 MS BRANSON: And when did that start, Mr Anderson?

25 MR ANDERSON: I can't say for certainty when it actually started. We do have regular discussions with AFP, DPP, in particular, about the people smuggling crew cohort, and we have expressed concerns ourselves both orally and, more recently, in writing as to whether there might have been people who were, in fact, convicted on the basis of a wrist X-ray alone, and whether those cases should be looked at to determine whether they were properly handled.

30 MS BRANSON: Are you able to tell me whether your department or your Minister has at any time asked either the Federal Police or the Commonwealth Director of Prosecutions, or in some other way sought to identify the cases in which someone who claimed to be a child had been found to be an adult on the basis of either exclusively or substantially wrist X-ray evidence? Just asked for the cases to be identified?

35 MR ANDERSON: The Minister has not, the Attorney, Minister has not made that request, no.

MS BRANSON: Has the Department made the request?

40 MR ANDERSON: We have made requests.

MS BRANSON: When did you first make a factual request, Mr Anderson?

45 MR ANDERSON: The first request would have been made orally, and I can't say when we actually made them. It would have been June 2011. In the course of the regular discussions we had about people smuggling then.

MS BRANSON: And did you get an answer?

MR ANDERSON: We have had documents provided to us at various times by, I believe, the DPP in particular, identifying cases where there have been findings made
5 by courts on the basis of wrist X-ray. Particularly looking at the situation of whether someone had sought an age determination hearing or not, whether they had pleaded guilty or not, but that sort of thing.

MS BRANSON: Fortunately it's at 12.30, Mr Anderson. If you could help over
10 lunch time on more – providing me with greater detail about when a request was first made, and what response to that request you received, I would be very grateful. And if you think we have it, please speak with Danielle about where it can be found in the documents that we've received. So it is 12.30 and I think we should break. It's been a long morning. We're resuming at 2 o'clock, I know it's not such a long break,
15 particularly for you, Mr Anderson. But if you can't find it now, perhaps if you could let me know if by tomorrow you might be able to find it. I know there's a limit to what can be done over lunch time.

MR ANDERSON: Yes, Madam President.
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MS BRANSON: But if we could please try to make a prompt start again at 2 o'clock, that would be very helpful. Thanks very much.

25 **ADJOURNED** [12.30 pm]

RESUMED [1.59 pm]

30 MS BRANSON: Thank you everyone for being back so promptly. Mr Anderson, you were looking for information; is this a good time or would you prefer to talk to me about it tomorrow?

35 MR ANDERSON: I can certainly make some comments, Madam President.

MS BRANSON: Only go as far as you wish, Mr Anderson.

MR ANDERSON: We've spent the bulk of the lunch time searching for
40 documentation. It's certainly the case that later in 2011 there was a review process initiated. As you would be aware, that process followed a letter from the Attorney-General to yourself in June 2011 asking you - - -

MS BRANSON: Prompted by a letter from me I think.

45 MR ANDERSON: But in his letter to you - - -

MS BRANSON: Yes.

MR ANDERSON: - - - he asked you whether you wish to specify particular cases to be reviewed and so there has been that review process. And it's quite possible that
5 I've been contemplating that in my own mind that review process and the discussions had about that, as well as the earlier processes during the year where we certainly had discussions with the agencies about current cases and current cases ensuring that, for example, cases where age have not been raised or age had been raised or was not being raised, just to make sure that the defendants were fully apprised of the ability
10 to seek bail. So there were other review processes going on and there were lists of cases provided to us by the DPP to assist with those but I think I might have been confusing the two.

MS BRANSON: So it may be that, so far as looking backwards to past convictions were concerned, no Commonwealth agency initiated that until the Australian Human Rights Commission wrote to the Attorney-General?

MR ANDERSON: Until you actually responded to the Attorney-General's letter and nominated those types of cases, yes.

20

MR CRAIGIE: Madam President, I know you asked me - - -

MS BRANSON: Yes, Mr Craigie.

25 MR CRAIGIE: - - - some questions. I ask if I have time to put some - - -

MS BRANSON: Yes.

MR CRAIGIE: - - - material reflection. I'm doing my best with some legal
30 archaeology and casting my mind and my knowledge back to where we were in 2002 when the difference between two Crown witnesses, Dr Thonnell and Dr Low, is apparent on the face of these two reports. I would have to say that I would come to a different view to that which I suspect you have about disclosure first and I think there's probably a fundamental difference of view as to the extent of that disclosure
35 in this case. I would be assured that it was approached on the basis that what we had here was no more or no less than a difference between two experts called by the Crown in two different cases and a difference that was not fundamental to, certainly, Dr Low's standard. And you will remember, of course, that both witnesses did agree upon the applicability of Greulich and Pyle Atlas in these cases. I would have to say
40 I would make the same call in 2000, and I emphasise in 2000, knowing what one knew then; I would have seen it as no more and no less than simply a difference in a matter of detail.

MS BRANSON: I don't want to engage in a debate with you - - -

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MR CRAIGIE: At that point - - -

MS BRANSON: - - - Mr Craigie. As it happens, it's not relevant, but I – if it happens also think you can learn something - - -

MR CRAIGIE: Yes.

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MS BRANSON: - - - from the Greulich and Pyle Atlas. The question is how informative is that technique, not for determining age generally, but to help you determine whether someone is under or over the age of 18 which is a particular issue we've been involved with here. And then in addition to that, even if you find it
10 informative at that stage, within what parameters is it informative? And it would seem to me that critical to that is the issue of when males attain a mature wrist, as demonstrated by wrist X-ray. You will be familiar I think with the notion of a bell curve.

15 MR CRAIGIE: Yes.

MS BRANSON: And it was said by a number of witnesses, and I don't think it's been disputed, the attainment of maturity, as shown by a wrist X-ray, if a large
20 population is put onto a graph with chronological age on one axis and skeletal age on the other you will get a bell curve. What's critical, I think, is where the mean of that bell curve; that is where is it at its highest. To shift it to the right, that is to shift it towards higher ages has, as I indicated before, very powerful statistical tendency to disadvantage or cause increased numbers of errors that is calling people adults who could appropriately be called children. Put another way, although it's a slightly
25 different concept, the whole process has a tendency inevitable to disadvantage early maturing young people. And what did, I think, draw your attention was the difference in opinion between Dr Thonnell and Dr Low on that very critical issue of when, on average, a young man achieves mature wrist on X-ray. It was that difference which amounted to 12 months at the least and, in this area, 12 months of
30 course is vital. It's a period from which you calculate the standard deviations which are, themselves, in excess of 12 months at the relevant age, assuming you can even get one at the critical age of 18.

MR CRAIGIE: And I suppose what I would say in response to that sitting where
35 our lawyers sat in 2002 that would not be appreciated in the same light as we might appreciate it - - -

MS BRANSON: Now.

40 MR CRAIGIE: - - - now.

MS BRANSON: I certainly recognise that, yes.

MR CRAIGIE: And you will no doubt, I don't flatter myself, but I said something
45 about this in Senate Estimates which I think reflects that I appreciate that it has a very limited application. That's not to say the fact that over many years it's been

criticised and spoken of in very disparate terms was sufficient reason alone to simply abandon it.

5 MS BRANSON: And we're talking about disclosure, not abandoning, Mr Craigie.

MR CRAIGIE: So - - -

MS BRANSON: Thank you.

10 MR CRAIGIE: I hope I've stated my position - - -

MS BRANSON: Yes, I understand what you're saying.

15 MR CRAIGIE: - - - and I suppose I should say that you also asked me about what my response would have been if I had known the document of the day. Well, I would have been concerned and I am concerned every time I read something critical about a scientific method. It doesn't mean I've abandoned it.

20 MS BRANSON: I'm not urging abandonment; my issue, again, is disclosure and you've seen the authorities to which I've referred around Birmingham Six, the Ward case and - - -

MR CRAIGIE: And I've seen the circumstances in which they arise and would say they were entirely distinguishable circumstances.

25 MS BRANSON: I'm concerned with what the judicial officers said and they spoke about the need for anything that queried the science being called by way of an expert evidence to be disclosed. There were I think, undoubtedly, documents which we've identified and I think we will identify more - - -

30 MR CRAIGIE: I suppose it's - - -

MS BRANSON: - - - that called into question the science being applied; I don't know.

35 MR CRAIGIE: With respect, I won't get into a debate but I think that it's a matter of whether you take that to a point where every difference of opinion provides a disclosure obligation or not. But certainly, as we said, in 2002 I would have been in precisely the same position as the DPP was in and I would have made the same
40 decision. Both he and I, I would suspect in 2012, would not get into that decision because that kind of reference would not and has not conveyed a fairly defiant point last year in light of that.

MS BRANSON: Yes, thank you. Thank you for that. Mr Anderson, sorry, we
45 didn't quite finish our exchange about the Attorney-General's Department's involvement. You will be aware, I think, that it was in July 2011 that I first asked the

Attorney to conduct a retrospective review by an independent person, an assessment of whether there had been a proper and reliable assessment of age in past cases.

MR ANDERSON: Yes.

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MS BRANSON: And when did you indicate something was done about that?

MR ANDERSON: There were a number of steps taken about that. There was further correspondence between the Attorney-General and yourself about the cases.

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MS BRANSON: Which I took to be a disinclination to do what I had first asked, which is to get an independent person to review them all where there had been substantial reliance.

15 MR ANDERSON: And I believe the Attorney said that he was unwilling to - - -

MS BRANSON: He did.

MR ANDERSON: - - - enter into that review. When your office specified 11 further cases we were then within a process where the Attorney had us engage with the AFP and the DPP about those specific cases to carry out further investigations in relation to those cases.

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MS BRANSON: Just for the record when was that, Mr Anderson?

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MR ANDERSON: A lot of that was happening in November 2011. There were discussions prior to that. I'm advised that the first request took place on 30 September.

30 MS BRANSON: Asking him to help you identify cases or to look at particular cases?

MR ANDERSON: To look at those particular cases.

35 MS BRANSON: Thank you. Let's turn on then to what I think is the next document everyone will have which is the reasons of Magistrate Calder in the Magistrates Court of Western Australia in the Australian Federal Police v [redacted], 3 December 2010. Well, we're sorry, I'm told I'm at the wrong spot. Yes, we are, sorry. If we could go to document 12. So we're now at 14 October 2010 and we have an email from immigration, I think, to AFP officers; is that right, Mr Colvin?

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MR COLVIN: That's correct.

MS BRANSON: I think I want to move more quickly than we have but you will observe the content of - - -

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MR COLVIN: Yes.

MS BRANSON: - - - that and the concerns there expressed. But we have then set out some DIAC research and if we keep going over we discover that the Australian
5 Federal Police themselves have been undertaking research into this issue of age determination.

MR COLVIN: That's correct.

10 MR DE CRESPIGNY: Madam President, I was concerned about the first sentence of that email which is referred to there where it's said the DPP is unlikely to accept anything other than an X-ray report. Because that's not the CDPP position, and in actual fact, the next document just notes the meeting on 26 October 2010, and at that
15 meeting and I think importantly after the DIAC representatives had left I and the other senior DPP officers who appeared made it clear to the AFP team leaders we were meeting with that in considering a person's age they should take into account all the available information, not just the X-ray result

MS BRANSON: Thank you, Mr De Crespigny. But I think, to be fair, the
20 document does go on to say that the preferred option will be a combination of both interview methods and wrist X-rays. That bit's accurate, is it?

MR DE CRESPIGNY: But we would take into account that and other evidence that
25 - - -

MS BRANSON: Anything else there was. Yes, thank you, Mr De Crespigny. So then we have the Australian Federal Police research set out, including noting the United Kingdom position, the authority of The Queen v Merton London Borough Council. I don't think we go through that. I think their lawyers have probably read
30 what it is. The consultation paper issued by the British Government in 2007 and talking about the United Kingdom discontinuing the use of wrist X-rays and some explanation for why the European Council procedures directive. And so at this stage we can be fairly confident that the Australian Federal Police is in possession of quite a lot of information, Mr Colvin, about wrist X-rays.

35 MR COLVIN: That's correct, Madam President. We have certainly had some concerns and we were starting to do our own research to try and understand the situation.

40 MS BRANSON: Good. Then the document, which I think is 13, we have a people smuggling brief management conference on 26 October 2010. I think there were parties involved other than the Australian Federal Police. I think all agencies here were represented; is that right? I think you can pick that up by looking at who was
45 speaking. We've got a file note afterwards.

MR COLVIN: We're just reviewing to make sure we've - - -

MS BRANSON: Can you see that there's reference to AFP, to DIAC, to Commonwealth Director of Public Prosecutions and the questions from the Attorney-General's Department, so it seems like everybody was there.

5 MR COLVIN: That's right. I believe our Customs, Navy personnel – there's a range of people.

MS BRANSON: Right. Okay. So could you tell me just a little bit about the people smuggling brief management conference, sort of what it is and what it was
10 doing? Is it a one off, was it a thing that happened repeatedly? I just don't know anything about it, Mr Colvin.

MR DE CRESPIGNY: Madam President, I can answer that. That was a meeting we pre-arranged with the Federal Police.

15 MS BRANSON: Thank you, Mr De Crespigny. So it was arranged by the Commonwealth Director of Public Prosecutions?

MR DE CRESPIGNY: It was agreed between the Australian Federal Police - - -
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MS BRANSON: It might be that if you're going to be speaking a lot you might need to come to the table, somewhere nearer a microphone. Thank you.

MR COLVIN: Madam President, it was a one-off meeting. It was convened, as Mr
25 De Crespigny said, as a result of discussions that were ongoing and they were always ongoing, as you would expect, about concerns about brief management processes and what could be done to improve them, to speed them up and a range of factors, and that's why we had such a broad array of agencies and individuals involved as well.

30 MS BRANSON: Thank you, Mr Colvin. Is there anything you want to add to that, Mr De Crespigny?

MR DE CRESPIGNY: The focus of the meeting was in actual fact the evidence
35 which needed to be collected in people smuggling matters generally in order for them to be properly put before the court.

MS BRANSON: At what level of seniority did people attend this meeting, if either of you can remember.

40 MR COLVIN: Our most senior officer was a Commander, so an SES1. I would presume that it was senior levels, Madam President. Without a list of who was actually there – which officers – I'm not too sure.

MS BRANSON: Can you remember the name of your officer who was there?
45

MR COLVIN: Our officer was Peter Sykora, Commander Peter Sykora.

MS BRANSON: Can you remember yours, Mr De Crespigny, was it you or not?

MR DE CRESPIGNY: I was there; Mr Sharp was there; Mr Allen was there; and there's Andrea Pavleka was there and Mr David Stevens was there.

5

MS BRANSON: Commonwealth DPP well represented.

MR DE CRESPIGNY: They were the people involved – the senior officers involved in each of the regions dealing people smuggling and so we were there.

10

MS BRANSON: From your area, Mr Anderson?

MR ANDERSON: We only had a relatively junior officer, an APS5 officer; we were actually just observing at this conference.

15

MS BRANSON: Thank you. From your area, Ms Pope?

MS POPE: I attended myself and Katie Constantinou and Annette Kennan, who were both EL2s at the time.

20

MS BRANSON: Thank you very much.

MS POPE: I should say, Madam President, we were present from 9.30 till 11.

25

MS BRANSON: So not all of the meeting; is that right?

MS POPE: Just for the item at 9.30.

MS BRANSON: Right. Thank you. Who prepared this file note, do you know, Mr Colvin?

30

MR COLVIN: We would have prepared the file note. I imagine it would have been prepared at Peter Sykora's direction, possibly by Doug Witschi who is a Superintendent and was also present at that meeting.

35

MS BRANSON: Right.

MR COLVIN: If it's material, Madam President, I can try and find out exactly who prepared it.

40

MS BRANSON: It may not matter, Mr Colvin. We will wait and see. We see under the heading Juveniles, which is a critical part, I think, from my point of view:

45

AFP noted increasing levels of difficulties in using X-ray machines to determine bone density age readings.

Do you know or does Mr Jabbour know whether the difficulties meant there were very hard to find a machine or there are some scientific difficulties in getting people to accept the evidence or something else? I mean it's not normally difficult to use a machine provided you can get access to one. Look, if you don't know, let's not waste time speculating.

MR COLVIN: No - - -

MS BRANSON: But we know that by this time the Australian Federal Police had it's hands on a lot of research literature about this - - -

MR COLVIN: That's correct, yes.

MS BRANSON: - - - methodology of age determination, don't we. There was then some criticism, as I understand it, of the reports that medical practitioners were providing to you:

Terminology used can be very confusing. Examples of written statements on reports range from close to 18 years of age to closer to 18 years of age.

Now, all of those expressions, however precisely worded - - -

MR COLVIN: Yes.

MS BRANSON: - - - if the approach that had been discussed at the Legislative Committee of the Senate which should all have been discontinued, shouldn't they?

MR COLVIN: That would be correct, Madam President, yes; unless there was other extenuating circumstances or aggravating circumstances.

MS BRANSON: And you say the reports also lacked analysis from which the Federal Police could use.

MR COLVIN: That particular line – I am a little confused by that because we're talking about the reports of the expert. I'm not sure what analysis we would ordinarily expect to do so, again, without having the transcript of what was actually said and what the concerns were, I'm not sure what that line actually means there.

MS BRANSON: The bottom of the next paragraph there's a note there about the reluctance on behalf of medical staff to partake in court proceedings. In fact there were specialists or medical practitioners who were saying they wouldn't give that evidence, wasn't there?

MR COLVIN: That would be correct, yes.

MS BRANSON: And some of them said it because they were saying you can't determine age by this means.

MR COLVIN: That's correct, yes, Madam President.

5 MS BRANSON: And you understood them to be respectable practitioners in their areas?

MR COLVIN: Yes, absolutely.

10 MS BRANSON: And people with the expertise that had caused you to approach them in the first place?

MR COLVIN: I'm not sure that we would have approached them as individuals but certainly, in some way, they had been presented to us as persons who interpret X-ray and for reasons along those lines, and possibly others, they were prepared to assist
15 us.

MS BRANSON: For the reasons that I identified?

MR COLVIN: I can't say for every case that they're the reasons. It may be the
20 person was not prepared to give evidence in court for a range of reasons, but I don't
- - -

MS BRANSON: Some of them said what I've indicated?

25 MR COLVIN: I'm sure, yes, yes.

MS BRANSON: Thank you. Note at the bottom of that section AFP noted that if crew members identified as 18 and below there would be a high probability to have members sent back with all personal property including money. I imply no criticism
30 but that was something that the Australian authorities wished to avoid, wasn't it; having young people on these boats and then return to Indonesia with cash in their pockets?

MR COLVIN: I wouldn't put it expressly like that. I think it would - - -
35

MS BRANSON: What was the concern?

MR COLVIN: Well, it would more be matter of if we weren't prosecuting them then I'm not sure from an AFP perspective what our grounds would be to not return
40 them with their money and property. But we physically don't return them; we just simply make the decision not to prosecute them and they remain in the custody of DIAC and DIAC would go through their processes of deportation. I don't think we were positively trying to avoid them going back with money, albeit that that certainly
45 could possibly be construed as an incentive to do this.

MS BRANSON: I know that you almost certainly didn't prepare the note because you weren't there but what would you understand to be the reason for noting that in this place?

5 MR COLVIN: I could - - -

MS BRANSON: Precisely what you would expect, that people under 18 would be sent back; that's part of the Commonwealth prosecution policy, isn't it, unless they were heavily involved in the - - -

10

MR COLVIN: I know there are – and perhaps it's a question for DIAC. I know there are provisions under DIAC legislation for appropriate reparation to be made for the cost of deportation and there are ways that that can be done in terms of money that would be on an individual. I don't want to profess to be an expert on that but I can imagine that that may have been a discussion about if these people are to be deported is it appropriate for the Commonwealth to seek funds from the individuals who paid for the deportation. That may have been the consideration.

15

MS BRANSON: Out of frankness I could say to you it doesn't look like that, Mr Colvin, does it? It doesn't look to be like a concern about whether DIAC would ask them to pay for costs?

20

MR COLVIN: I must say, Madam President, I don't draw a conclusion that this was an intention on behalf of the Commonwealth to deprive a person of the money for any reason other than considerations like that. I don't know Madam President. I wasn't at the meeting.

25

MS BRANSON: Let's leave that document and go on to the next one. I don't think I need disclose the content of this document, but it's to do with the remuneration for Dr Low, that is I don't need to disclose the precise content of it. It is the case by now, is it not – and Mr Jabbour might be in a better position to answer – that Dr Low had become the expert of choice so far as the Australian Federal Police were concerned?

30

35 MR JABBOUR: That's correct.

MS BRANSON: And, indeed if other medical specialists were giving reports that did not state that the individual was 19 or above he was sending, in many cases, the X-ray to be re-read by Dr Low to see if he would say the person was 19 years or over.

40

MR JABBOUR: I'm not aware that we engaged anyone else other than Dr Low given that he was deemed to be an expert in the eyes of the court as he had given evidence previously. It was on that basis that we continued to engage Dr Low; it wasn't, to be frank, expert shopping – if I can put it that way. It was a matter that he was a qualified person as we understood it and we simply sought his advice on these issues.

45

MS BRANSON: You tried others as well, Mr Jabbour, hadn't you, other medical specialists?

MR JABBOUR: I'm not aware - - -

5

MS BRANSON: Dr Thonnell had been called - - -

MR JABBOUR: I thought - - -

10 MS BRANSON: - - - we've seen that.

MR JABBOUR: Yes, but my understanding – and I do stand to be corrected – is once we engaged Dr Low and he was an accepted expert we've remained with Dr Low. We were certainly very well aware of diverseness of views amongst the
15 practitioners. There was no doubt in that and we indeed saw that during some of the court cases where Dr Low gave his evidence and then an expert on behalf of defence gave their evidence. So we were very clear on that understanding. But I'm not aware that we engaged other people after we engaged Dr Low to provide that sort of information and interpret the X-rays.

20

MS BRANSON: You were conscious, were you not, because of what you saw from other experts that Dr Low's tendency was to put children at a greater and higher age than you'd seen other experts do?

25 MR JABBOUR: In - - -

MS BRANSON: That is you had initial radiographers reading this man might be 18.5, for example, years and you give it to Dr Low and he would come back saying at least 19?

30

MR JABBOUR: We were certainly – we'd formed a view that Dr Low was able to interpret the X-rays and that he had a level of expertise in that area, and we were certainly comfortable with the evidence he was able to provide in relation to that, but it was always subject to challenge, most definitely.

35

MS BRANSON: By 2010 how long had Dr Low been working in one way or another on customs offences or people smuggling offences with the Australian Federal Police?

40 MR JABBOUR: He was never working on customs offences with the Australian Federal Police.

MR COLVIN: Madam President, he may well have been in terms of internal concealments and interpreting X-rays.

45

MS BRANSON: Well, that's what we discussed this morning, Mr Jabbour - - -

MR JABBOUR: But he - - -

MS BRANSON: - - - that that's how Dr Low first came to the attention of the Australian Federal Police.

5

MR JABBOUR: I understand that but I'll make this point of qualification if I may. He was working for the hospitals. We would present a patient or a – it was a patient at the hospital, suspect to us – and a person on shift would interpret the images and Dr Low came to our attention in that process. Exactly the first engagement or the first time we came in contact with him I don't know, but certainly we knew of him and his qualifications from our dealings with the hospital previously. When did we first engage him for people smuggling matters, bear with me, I'll just check.

10

MS BRANSON: I think we identified that before; it was quite a few years earlier than this time.

15

MR COLVIN: Yes, 2001.

MR JABBOUR: 2001.

20

MS BRANSON: Yes. So have you got a sense of how many cases Dr Low helped you with; not only just those that went to court but how many cases?

MR COLVIN: People smuggling X-rays?

25

MS BRANSON: Mm.

MR JABBOUR: Well, certainly a lot - - -

MR COLVIN: Yeah, it would be the very vast majority of all - - -

30

MR JABBOUR: Yeah.

MR COLVIN: - - - X-rays that we have conducted and I think we would have that figure available to us to say how many X-rays we've done.

35

MS BRANSON: Right. It would be quite a lot, wouldn't it?

MR COLVIN: I guess that's a matter of perspective; I'm not sure if it's quite a lot but it's certainly more than the tens I would suspect.

40

MS BRANSON: Yes. And even when he was working on what I've described as customs cases – they may or may not have been customs cases but where he was reading X-rays about whether people internally were carrying - - -

45

MR COLVIN: Yes.

MS BRANSON: - - - prohibited substances – he would have had engagement with AFP officers about the reading of those X-rays, wouldn't he?

5 MR COLVIN: He would have, Madam President, because what would happen is –
he was in Perth and that wouldn't be a – we wouldn't have had a large number of
internals at that time through Perth I wouldn't suspect, just thinking about trends of
internal concealments. As Mr Jabbour has said our officers would take them to
hospital; if the hospital determined he was the person best qualified then he would
10 have dealt with our officers about giving them an interpretation if the person was
deemed to conceal something internally. I couldn't say how many though.

MS BRANSON: Right. You are aware that there are concerns about expert witnesses getting too close to a particular client, aren't you?

15 MR COLVIN: Absolutely.

MS BRANSON: Yes. So we know about doctors who are eventually are seen just to be plaintiff's doctors in the medical negligence cases and those who are just seen to be defence experts.

20 MR COLVIN: I'm very conscious of that, Madam President. I personally doubt if people categorise our relationship with Mr Low in that way and if I did have that concern it would certainly be something that we would seek to remedy. That's not something that we would be subscribing to.

25 MS BRANSON: It's certainly the case, isn't it, that – a good look at the documents – if you are uncomfortable with this. In a sense Australian Federal Police began to regard Dr Low as the expert and anyone who didn't agree with Dr Low was regarded as not being quite up to the mark so far as this area of expertise was concerned.

30 MR COLVIN: I'm not sure that I would categorise it that way, Madam President. I think Dr Low was a person who had experience and the court had accepted as an expert. I mean we look to bring somebody to the court that we believe will be taken as a credible and expert witness in this case. I will put it that way; I'm not sure
35 whether I would categorise it the way you did - - -

MS BRANSON: Okay.

40 MR COLVIN: - - - with all due respect.

MS BRANSON: And by the end of the day – I don't want you to disclose figures again; I think it's unnecessary – by the end of the day the Australian Federal Police paid Dr Low a lot of money, didn't it?

45 MR COLVIN: To be honest that's the first I've seen those figures and if that's what
- - -

MS BRANSON: The total figure has been disclosed by the Australian Federal Police to us.

5 MR COLVIN: Quite true, yes. Over the total cases he would have reviewed, yes.

MS BRANSON: And you would be aware of the possibility – I’m not saying in Dr Low’s case – but, theoretically, an expert who’s generating appreciable income from one client might, at the end of the day, be anxious to give evidence that will make that client continue to want their services.

10 MR COLVIN: That would be speculating, Madam President; I don’t think I can say that.

MS BRANSON: Right. Yes, I’m sorry, but the substantial sum, I think, was actually flagged via the Director of Public Prosecutions but - - -

MR COLVIN: Would be by the Commonwealth.

MS BRANSON: Yes, by the Commonwealth and because - - -

20 MR COLVIN: Yes; no, I accept that.

MS BRANSON: - - - in many cases because you had invoked Dr Low to do the work.

25 MR COLVIN: Certainly. And can I say, Madam President, it looks like at least – well, 123 times we have had a wrist X-rayed; I can’t say that he did all of them but it would be likely the case that he did the vast majority of them.

30 MS BRANSON: Thanks very much. We then turn to what I think is document 15. It comes from the Federal Police; it goes to the Commonwealth Director of Public Prosecutions. Do you we all have that?

MR COLVIN: Yes.

35 MS BRANSON: The second paragraph:

As detailed in the brief planning day last week –
40 that’s presumably the one we looked at before, is it?

MR COLVIN: I think so.

MS BRANSON:
45 *...we would seek to return all people that test to 18 years as part of the initial testing process unless there is exceptional circumstances.*

Why to 18, Mr Colvin? The undertaking earlier – undertaking might be too strong, but the view earlier expressed - - -

5 MR COLVIN: No - - -

MS BRANSON: - - - and repeated by the Minister was to 19.

10 MR COLVIN: I think perhaps that's an unfortunate way he's worded it but I think what he was referring to is somebody who tests as under 19, but I would take that as an unfortunate way that he's worded it.

MS BRANSON: It certainly doesn't say that, does it?

15 MR COLVIN: Certainly not; it's not consistent with the intent of our application of how we were approaching those matters.

20 MS BRANSON: Then we go on to a particular case, tested at 19. The expert report details him as over 18, no exceptional circumstances; that case proceeded, didn't it?

MR DE CRESPIGNY: Madam President - - -

MS BRANSON: Yes, Mr De Crespigny?

25 MR DE CRESPIGNY: - - - that case did not proceed and it was precisely that reason of the fact that we looked at the report and it indicated he had not tested to - - -

30 MS BRANSON: We will just get the file, Mr De Crespigny, thank you. He appeared in the Bankstown court on 1 November 2010, the day before this memo was written, and the charges were withdrawn on the 30th, so it took a month after this memo for this matter to come to an end.

35 MR DE CRESPIGNY: Yes, sorry, Madam President - - -

MS BRANSON: And - - -

40 MR DE CRESPIGNY: - - - by the term "proceed" I thought that you meant [transcript unclear] to proceed. When we looked at it we determined that the wrist X-ray was not - - -

MS BRANSON: Mr De Crespigny, my question was directed to the Australian Federal Police. They presented a brief of evidence on the 19th of this month - - -

45 MR DE CRESPIGNY: Yes.

MS BRANSON: - - - at least a fortnight after this memo but, from their point of view, my question was fair. They did proceed and they - - -

MR JABBOUR: He proceeded to be charged; no, absolutely - - -

MS BRANSON: He was charged, he proceeded; it was sent to the Commonwealth DPP.

5

MR JABBOUR: Yes, that's correct. Madam President, I can clarify that on this occasion we obtained the imaging report which determined the age to be approximately 19 years. Dr Low's report obtained on 22 October determined him to be over 18, closer to 19, and a decision was made to proceed on that basis.

10

MS BRANSON: Why was it, Mr Jabbour?

MR JABBOUR: Now, I can't qualify other than the decision was taken given that he was determined to be closer to 19, that it was viable to proceed on that basis and a decision was taken by the officers to proceed.

15

MS BRANSON: Yes, you charged him before Dr Low's report was obtained, didn't you?

MR JABBOUR: Yes, that correct, on the basis of the imaging report; that's correct. The imaging report was obtained on 15 April in which NT Medical Imaging determined the age to be 19 years and then Dr Low provided subsequent advice; that's correct.

20

MS BRANSON: Just going to the final substantial paragraph of this message.

25

In the last 12 weeks I've had to respond to numerous ministerial requests regarding the reasons and justification for returning without charge to Indonesia.

30

What can you tell us about that, if anything, Mr Jabbour?

MR JABBOUR: There was certainly interest at that stage in relation to the number of people that were being returned and the reasons for it. It was certainly generating interest. There's nothing more to read into that than as says. We were being asked questions in relation to the number of people we were returning and the basis for it. So as it stands really.

35

MS BRANSON: Numerous ministerial requests from whom, Mr Jabbour?

40

MR JABBOUR: Would be our Minister for Home Affairs, our office.

MS BRANSON: Any other ministers?

MR JABBOUR: Not to the best of my knowledge but I'd have to double-check, but, typically, we only report – for people smuggling matters at that time it was through the Minister for Home Affairs and Justice.

45

MS BRANSON: Was it common to get ministerial requests of this type?

MR JABBOUR: Again, I would have to check.

5 MS BRANSON: Let alone numerous - - -

MR JABBOUR: But it's certainly an area of particular interest and has been because of the indications and the media interest in relation to it so it was typically providing them with information to enable them to respond to media enquiries and
10 the like.

MS BRANSON: Because it had become a bit of an issue in the media by then, hadn't it?

15 MR JABBOUR: Most definitely, yes, absolutely.

MS BRANSON: And the political environment had become a difficult one.

MR JABBOUR: I can't comment in relation to that but I can certainly say it was a
20 point of particular interest.

MS BRANSON: Thank you. And you talked about numerous ministerial requests, what were the requests?

25 MR JABBOUR: Again, I would have to take that one on notice but, typically, that would be enquiries – if there was an incident report in the media we may well receive an enquiry from the office to provide information or background in relation to the matter that was reported in the press. And, given the frequency with which we receive matters like this raised in the media, it wasn't uncommon to receive a number
30 of requests from the office to provide background or information in relation to it.

MS BRANSON: Thank you. If we go to the next document, 16, it's the report of the decision of the District Court of Western Australia in Jamaludin v The Queen. And we need not go into detail about it, although there are a number of matters of
35 interest that we could perhaps look at another time, including the time period that passed between the alleged offence and the age determination, which was 14 months, you might notice. But what you would have learnt from that was that the AFPs procedures for taking wrist X-rays were defective.

40 MR JABBOUR: Yes.

MS BRANSON: What did the AFP do thereafter?

MR JABBOUR: If memory serves me, this was in relation to the consent form and
45 the procedure that we followed.

MS BRANSON: That's right.

MR JABBOUR: Correct. We modified the consent form and adopted procedures in relation to the manner in which we obtained consent who is present and we now have those procedures in place.

5

MS BRANSON: In view of the documentation I brought to your attention when we started about the imperative for officers of the Australian Federal Police to comply with the law - - -

10 MR JABBOUR: Yes.

MS BRANSON: - - - this was a finding of a failure to comply comprehensively; a requirement for two consents, neither of them obtained. One because it simply wasn't sought and the other because it was obtained by a defective process. What
15 was done within the Australian Federal Police to make sure that didn't happen again?

MR JABBOUR: Well, as I say, we introduced written protocols; we educated our members, and we do have a quarantine group of individuals involved in people smuggling investigations, albeit we can provide surge capacity from a flexible pool
20 of individuals to investigate if required. But there was education for those members before they deployed to Christmas Island, predominantly where this procedure was carried out, to ensure they were aware of and compliant with the new protocol.

MS BRANSON: Were wrist X-rays being taken on Christmas Island at this time?
25

MR JABBOUR: No.

MS BRANSON: No.

30 MR JABBOUR: No, people are initially detained on Christmas Island, but they're transported to the Northern Territory where the wrist X-rays are taken.

MS BRANSON: So would the contents normally be obtained on Christmas Island
35 - - -

MR JABBOUR: That's correct.

MS BRANSON: - - - and then actioned, as it were, in the Northern Territory?

40 MR JABBOUR: That's correct.

MS BRANSON: You speak of protocols issuing, what form did the protocol take, Mr Jabbour?

45 MR JABBOUR: A written protocol of standard operating procedures. I'm not sure of the exact title of it but - - -

MS BRANSON: We've seen rephrased, I think, consent forms but was there something more than that?

MR JABBOUR: Just bear with me.

5

MS BRANSON: Perhaps if they could be provided to me - - -

MR JABBOUR: Sure.

10 MS BRANSON: - - - and you might be able to take instructions about whether they exist but if they do I don't - - -

MR JABBOUR: I will do that.

15 MS BRANSON: - - - expect them to be produced immediately but I would like to see them.

MR JABBOUR: Thank you.

20 MR COLVIN: Madam President, if I may, I don't have personal knowledge of this matter but I would be interested to know whether it was a failure of an officer to follow guidelines and procedures that were established or whether our guidelines and procedures at the time were deficient leading to this.

25 MS BRANSON: Well, I asked earlier about protocols and my understanding was that there weren't any earlier so I just wondered if you had reconsidered after this judgment had come down about the need to have such things.

30 MR COLVIN: No, I think that's right, Madam President. There may not have been direct protocols but there were consent forms and there were practices that we had in place. I'm just not too sure of the advice it may have been failure of - - -

MS BRANSON: Yes. Thank you. It would be very nice if we could see what was issued.

35

MR COLVIN: Sure.

MS BRANSON: Just to make sure that Federal Police officers were alert to the provisions in the Crimes Act - - -

40

MR COLVIN: Certainly

45 MS BRANSON: - - - which was so sensitive to the use of this procedure. Are you able to tell me – and you may not be able to – whether this was a case in which Department of Immigration Officer was sitting with the young person and it involved the issue about whether DIAC was giving consent or simply taking children to interview?

MR COLVIN: I'm sorry, I just don't know, I apologise.

MS BRANSON: That did become an issue, didn't it?

5

MR COLVIN: Yeah, that became an issue, yes, yes.

MS BRANSON: If you could then turn to document 17 which is dealing with what I understand to be a question time brief. Mr Rutherford, of course that one comes from you. Mr Lynch, am I right thinking came from Prime Minister and Cabinet or did at that time?

10

MR RUTHERFORD: That's correct.

MS BRANSON: Yes. Mr Rutherford, you express concern about certain wording within a brief and, in particular, references to the reliability of wrist X-rays having been questioned in the international context; you didn't think that was untrue, did you?

15

MR RUTHERFORD: The context for this is really about a compilation of the different processes in which age determination is - - -

20

MS BRANSON: I wonder, Mr Rutherford, if you would mind just answering first the questions I ask you. You didn't think it was untrue, did you?

25

MR RUTHERFORD: No.

MS BRANSON: No.

MR RUTHERFORD: Not that it was untrue but it was attributed to a briefing covering two processes.

30

MS BRANSON: So what was set out here you refer to being concerned about the following lines in the background; DIAC has moved away from the use of wrist X-rays as the sole method to determine a client's likely age because reliability of wrist X-rays as a determinator has been questioned. In an international context the margin of error with this process has caused much debate within the medical profession and, more broadly, in asylum seeker receiving countries. And we've seen plenty today that would show that to be an accurate statement, haven't we, Mr Rutherford?

35

40

MR RUTHERFORD: That's correct.

MS BRANSON: And then you go on to talk about the two processes and things that you don't think, as I understand it, as necessary for the Prime Minister to know. And if we go over we can see the actual document with markings on it. And this is one of the times that we see a statement in your document as amended:

45

Where the AFPs age determination process is challenge during court proceedings it is up to the court to make a determination –

5 is, I think, as you wanted it to read. I don't want to go again over the debate that we had earlier but, of course, courts can only work with what they have, can't they?

MR RUTHERFORD: That's correct.

10 MR ANDERSON: Madam President, if I can just note again - - -

MS BRANSON: Yes, Mr Anderson.

15 MR ANDERSON: - - - we've discussed this morning at least one case, the Mazela case, where the court there was able to make a determination about the reliability of the evidence from Dr Low and heard the evidence from Mr Mazela himself on age. So the point we've been consistently saying – not that it's up to the court to make its own far-reaching inquiry, but that the court is actually able to make an assessment as to the credibility or the weight to be placed on the evidence.

20 MS BRANSON: Well, in that case, Mr Mazela did give evidence of having seen a document and what was on that document. He wasn't challenged in cross-examination and the magistrate, not surprisingly, therefore found that what he had seen indicated the age that it said that it did, faced with Dr Low giving evidence of the kind that he gave. I'm rather thinking of the need for courts to have – where
25 there is not evidence of that kind – that was rather a rare case I think you would agree where a young person said, look, I've seen my birth certificate and this is what it says. In most cases we don't have that; we have Dr Low. And my issue about disclosure is whether the other scientific material, to which Mr Rutherford has made reference, ought to have been disclosed at those places; and where it's not disclosed
30 the court's capacity to determine for itself will be very amateur.

MR ANDERSON: Yes, but the actual statement of Mr Rutherford clearly says it's up to the court to make a determination about the reliability of the evidence at the first stage that it's in court so I think that that's actually a correct statement.
35

MS BRANSON: Well, it is but it presupposes that in the cases here under consideration the court had all the necessary material and that's what I'm querying.

40 MR ANDERSON: Yes, I understand that, Madam President, but you were going back to the initial discussion about the role of the court and I think you need to actually distinguish this from that situation. I'm not actually saying that the court has to make a decision.

45 MS BRANSON: Mr Anderson, I think I should be completely frank with you; I'm seeking to identify how much of this is what the press would describe as political spin and how much is an attempt to give accurate information to a minister. Now, to say where the AFPs age determination process is challenged during court proceedings

it's up to the court to make a determination about the reliability of the evidence about the person's age that is before it is, of course, technically true, but it may be brushing over, may it not, that the court may not have received the assistance it requires to enable it to make that determination on a satisfactory basis.

5

MR ANDERSON: I think it's important to just state, Madam President, that I don't think that the statement is in any way untrue; that was the point that I was trying to make.

10 MS BRANSON: I didn't indicate it was untrue but I might well want to characterise it as spin, Mr Anderson; is there anything you want to say?

MR ANDERSON: If that's an inference you wish to draw, Madam President.

15 MS BRANSON: We then have a key point, the government takes the prosecution of people smuggling matters seriously. That's a reflection, I think, of the political context at the time, isn't it, that there was a lot of debate in the press and elsewhere about the need to take people smuggling seriously and to be tough on these people who are involved in bringing asylum seekers to Australia by boat?

20

MR ANDERSON: There's no doubt that the government certainly saw it as a significant issue and an offence that they need to take seriously and, of course, those comments, they're comments from people that - - -

25 MS BRANSON: Thank you. And then we've got the paragraph where there's doubt about whether a person arriving in Australia as an irregular maritime arrival is aged over or under 18 years of age, and a person suspected of committing a Commonwealth offence, the Australian Federal Police conduct an age determination process in accordance with the Crimes Act 1914. Now, I don't think this has been
30 altered at all by the Attorney-General's Department but, so far as it indicates that where there's doubt you go to the Crimes Act, it's inconsistent with what the Minister said in the second reading speech about when the age determination process would be used, I think, isn't it? Which is not when you go to X-ray but, rather, when you see what else you can find and, ultimately, you may be forced to X-ray.

35

MR ANDERSON: The age determination process that's undertaken has one prescribed procedure; the AFP is required to follow that procedure and that's what the talking points are drawing out. The talking points are not forcibly putting forward every piece of evidence that may be relevant to age; it's a procedure that's
40 required to be followed in the legislation.

MS BRANSON: Would it be a fair inference, do you think, Mr Rutherford, that by expressing it this way, where there's doubt, the Australian Federal Police can conduct an age determining process in accordance with the Crimes Act 1914; the
45 inference is that that is the mandated and lawful way to determine age.

MR ANDERSON: That's correct.

MS BRANSON: And what was said in the second reading speech by the minister in the paper written by the Attorney-General's Department was, in practice, investigating officials will seek to determine a person's age by all reasonable means before exercising the powers in the bill; that is what was meant to be a procedure of last resort does appear to be being presented here as the procedure of necessary resort.

MR ANDERSON: That's correct. It's quite clear from the transcript to the proceedings in the Senate Legal and Constitutional Affairs Committee where there was no available evidence this procedure should be used and I think that's the same here; where there's a doubt, i.e. there's no evidence to suggest that a person is over or under 18 and it's not clear, the procedure is to be used.

MS BRANSON: Then we've got:

Where an independent medical expert determines the person is 19 years or older the person is prosecuted as an adult –

did you know that there had been cases where people had been prosecuted who had not been determined to be 19 years or older?

MR ANDERSON: At that stage we were not aware of any cases that were made – we're not made aware of any cases suggesting that someone under the age of 18 might be prosecuted as an adult.

MS BRANSON: You now know that there were people who were found by X-ray to be - - -

MR ANDERSON: Correct.

MS BRANSON: - - - that they were prosecuted?

MS [transcript unclear]: Yes.

MS BRANSON: The one on the top of the next page:

An independent medical expert interprets the X-ray to determine the age of the person and the Commonwealth relies on the opinion of the independent medical expert in interpreting the X-ray –

do you think that suggests a degree of certainty about what can be determined from an X-ray that might be unwarranted?

MR ANDERSON: I think this is, again, stating the procedure that's conducted in accordance with the legislation that's a matter of policy and a matter of practice.

MS BRANSON: At the bottom of that page you've deleted, I think, Mr Rutherford:

5 *I'm advised that the immigration department worked cooperatively with the AFP to establish an individual's identity where their identity is in doubt. I understand the immigration department, guided by international approaches to refugee status determinations, uses a number of processes and information sources to verify the identity of asylum seekers including the use of biometrics.*

Why did you delete those, Mr Rutherford?

10 MR RUTHERFORD: The covering email explains the conflation of two pieces of information to this one question time brief. It should rather go out to the individual ministers responsible for the two procedures rather than to conflate the details of the two processes together as to the departmental actions that take place.

15 MS BRANSON: You didn't think either of those things were untrue, did you?

MR RUTHERFORD: No.

20 MS BRANSON: Or the one on the top of the next page that the immigration department take some account of the results of wrist X-rays when provided?

MR RUTHERFORD: No. And those are matters that are appropriate for the Minister for Immigration to talk about; as I've decided in there the question should be directed to that Minister.

25 MS BRANSON: You were anxious here to ensure that there seemed to be a clear separation between what DIAC did and what AFP did; is that right?

MR RUTHERFORD: That's correct.

30 MS BRANSON: Even though, in fact, there wasn't?

35 MR RUTHERFORD: Well, I think it was relatively clear that there are two different processes that apply; one, in terms of housing the person in immigration detention, and in terms of once the person is being investigated there is a process and law enforcement - - -

40 MS BRANSON: But you didn't doubt that DIAC did use wrist X-rays as the draft of this document said they did, for their purposes; and you didn't doubt the Australian Federal Police looked at DIAC interviews for their purposes as they said they did?

MR RUTHERFORD: No, I didn't doubt that.

45 MS BRANSON: What was the purpose of trying to divide the two, Mr Rutherford?

MR RUTHERFORD: It was a little detail that we didn't think appropriate for this brief covering two processes and we've suggested that level of detail where we refer to the individual Ministers.

5 MS BRANSON: Was the matter of detail not a matter of wanting to convey to Ministers that these were two separate silos of evaluation?

MR RUTHERFORD: It wasn't intended to provide silos; it's just to make it clear that there were two processes and the immigration processes are better off being referred to the Minister for Immigration and the law enforcement process to the Minister for Home Affairs.

MS BRANSON: Was it perhaps intended to minimise potential predecessors of reliance on the wrist X-ray?

MR RUTHERFORD: I don't know that it was necessarily to minimise criticism. It was, again, to raise the level of the brief to be – the Prime Minister only covering off on the broad picture with the more specific questions to go to each Minister.

MS BRANSON: I will put the question to you again because I don't think you directly answered it and I would like you to directly answer it. Did you suggest altering this document for the purpose of minimising potential for criticism of AFP relying on the wrist X-ray methodology?

MR RUTHERFORD: I probably can best answer it by saying we certainly didn't want the Prime Minister delivering a message that may be confused in the level of detail that one does not understand and may be perceived in a way that we felt that message should be from the relevant Minister.

MS BRANSON: Is it the case that you did not want the Prime Minister to say publicly anything that might suggest that wrist X-rays were not a reliable method of establishing age?

MR RUTHERFORD: Well, we wouldn't normally brief the Prime Minister to be talking about that level of detail.

MS BRANSON: Okay. You altered this document, Mr Rutherford; I'm asking you why you did.

MR RUTHERFORD: Well - - -

MS BRANSON: Was it so that the Prime Minister would not get a briefing that indicated that wrist X-rays may not be regarded as a reliable way of ascertaining someone's age?

MR RUTHERFORD: We were trying to avoid confusion about criticism of wrist X-rays. We were not trying to suggest either to the Prime Minister or publicly that

there was no such criticism or we didn't feel that the criticism was material to the question about age determination.

5 MS BRANSON: You made the choice not to tell them?

MR RUTHERFORD: Yes.

10 MS BRANSON: And just so that completely plain on the next page we see differences between AFP and DIAC approaches to age determination; do you see that?

MR RUTHERFORD: Yes.

15 MS BRANSON: And you suggested deleting the paragraph starting:

DIAC has moved away from the use of wrist X-rays.

MR RUTHERFORD: That's correct.

20 MS BRANSON: Again, I put to you that you deleted that because you did not want speaking notes to go to the Prime Minister that indicated there might be serious grounds to be worried about using wrist X-rays to establish age.

25 MR RUTHERFORD: No, I deleted that as, again, we were at a level of detail that we didn't feel was appropriate for the Prime Minister to be looking at this material when there were two distinct processes; DIACs view about wrist X-rays weren't, in our view, material to the points of the brief.

30 MS BRANSON: Why does it matter whose view they are? The process is either reliable or it's not reliable, Mr Rutherford. There was evidence around it which you were alert to suggest that it wasn't reliable.

35 MR RUTHERFORD: It's a procedure then conducted and DIACs views on that procedure and its practices in relation to that procedure aren't material to the point of issue here.

40 MS BRANSON: You didn't think DIACs views weren't reasonably founded. You may not necessarily have agreed with them but you knew they were founded on the basis of an international literature research.

MR RUTHERFORD: I was aware of DIACs views about wrist X-rays.

MS BRANSON: Did you just think they were wrong, Mr Rutherford?

45 MR RUTHERFORD: No, I did not suggest that they were wrong or think that they were wrong.

MS BRANSON: So, thinking they were right, you thought it best to take this out?

MR RUTHERFORD: I didn't suggest that they were right either, but I think the point that I removed from here was that the point DIAC has moved away from using
5 wrist X-rays as the sole method to determine a client's age.

MS BRANSON: Because the unreliability of wrist X-rays to determine age has been questioned in an international context?

10 MR RUTHERFORD: That's right. Nonetheless, we're aware in an international context of a large number of countries that do use wrist X-rays.

MS BRANSON: It's a question of what they use them for and with what margin of error, isn't it, Mr Rutherford, not whether they use them? You know very well, don't
15 you, that a wrist X-ray that shows lack of maturity is a powerful indicator of youth?

MR RUTHERFORD: That's correct. But, once again, we were focussing here on removing agency individual views and presenting a Commonwealth position; Commonwealth position involves two different procedures. In the law enforcement
20 context wrist X-rays are being used and are accepted by the courts and that at the time was the line that we were using and this was a broad approach that we'd agreed with agencies including DIAC.

MS BRANSON: Thank you. If we move to the next document we have a message
25 that follows a request to you, Mr Rutherford, from the Australian Federal Police about trying to use facilities on Christmas Island for wrist X-rays. All right. Okay. It's been pointed out to me that sometimes the header has been taken off your documents but in this case, at the bottom of the page, we've got a request to Mr Rutherford from Mr Witschi – is that how you pronounce it?

30 MR RUTHERFORD: Witschi.

MS BRANSON: Witschi. Then passed on, and the point I make on is that, Mr Rutherford, you learnt at this time that the Indian Ocean Territories Health Service
35 didn't want to do the X-rays and they thought using them for age determination was highly unreliable and they would be reluctant to expose individuals to radiation in those circumstances.

MR RUTHERFORD: Specifically for the Indian Ocean Territories Health Services, that's correct.
40

MS BRANSON: And you passed that on to the Australian Federal Police?

MR RUTHERFORD: That's correct.
45

MR JABBOUR: Can I just ask a question, sorry, if I may. I'm not sure that's entirely correct, unless I've missed something. They certainly were opposed, as I

understood, on what they referred to as ethical grounds, but it wasn't, I don't believe, unless I've forgotten something – unreliability of the procedure; it was that they didn't want to expose individuals to the radiation for a non-medical purpose.

5 MS BRANSON: All right. This email comes from Brook Robinson, the Assistant Director Strategic Policy and Projects, Territories West, Department of Regional Australia, Regional Development and Local Government. I would take her to be very likely a person on Christmas Island; is that right, Mr Rutherford?

10 MR RUTHERFORD: She's not based on Christmas Island; she's based in Canberra but she was liaising with the - - -

MS BRANSON: She has responsibilities for Christmas Island.

15 MR RUTHERFORD: Correct.

MS BRANSON: And you asked her to make the enquiries; is that right? And this is what she told you the outcome of the enquiries was.

20 MR RUTHERFORD: That's correct, yes.

MS BRANSON: What would make you think that that report wouldn't be accurate, Mr Jabbour?

25 MR JABBOUR: I'm sorry, but I am confused. I apologise; that wasn't my understanding of the opposition to it.

MS BRANSON: But it appears to be Brooke Robinson's understanding of it in any event and she seems to have been the one who approached them at Mr Rutherford's request.

30

MR JABBOUR: I stand corrected.

MS BRANSON: We then go to what I think you will find is document 19 which is another case in the Magistrates Court of Western Australia Australian Federal Police v [redacted], the case that I accidentally referred to you all before. We have an extract of proceedings on 3 December of 2010. Mr Craigie, it's my assumption – am I right that the Commonwealth DPP would have acted for the police in this matter?

40 MR CRAIGIE: Yes.

MS BRANSON: I assumed that because this appears itself to be a DPP document. Do we know what disclosure by December 2010 the Commonwealth DPP was making to defence counsel?

45

MR CRAIGIE: So far as whether there was some counter disclosure to Dr Low's opinion, not of the kind that we've discussed, no.

5 MS BRANSON: We know from page 2 in the middle of the page that the learned Magistrate said:

The evidence that I heard came solely from Dr Low.

10 MR CRAIGIE: Yes.

MS BRANSON: To some extent that was supplemented by the reports that he had received but, essentially, the Crown relies upon what Dr Low says. So this is quite late; this is December 2010. We've still got the Crown relying - - -

15 MR CRAIGIE: Yes.

MS BRANSON: - - - entirely on Dr Low - - -

20 MR CRAIGIE: Yes.

MS BRANSON: - - - whilst in possession or being informed of very substantial amount of international research about wrist X-rays and please let me know if I would be wrong to assume its existence was not disclosed by the Commonwealth DPP.

25 MR CRAIGIE: The fact that that research existed and the fact that it was, in certain contexts, critical of wrist X-rays was not disclosed but, in our submission, was somewhat beside the point as to whether at that stage Dr Low's evidence could properly be relied upon by us as we saw it then.

30 MS BRANSON: Why would that be, Mr Craigie?

MR CRAIGIE: Well, it goes back to the limited processes from which wrist X-rays should be represented at court, as was indicated back before the Parliamentary
35 Committee in 2001. I certainly was generally aware that it was a process that was not generally accepted. In fact, in a number of contexts, in other countries for certain purposes, it's certainly not accepted. But in the context of Australia where there was an act of Parliament that provided it and where, in a prosecutorial environment – a court environment – where it was often part of the fairly scant evidence available as
40 to age. We were at that stage comfortable to use it at that stage.

MS BRANSON: Notwithstanding that you knew – I don't want to spend a lot of time going back over it – that you knew of the publications that we've earlier discussed about the wide margin of error, for example; about its applicability to
45 populations, particularly of Asian young men approaching 18.

MR CRAIGIE: I don't know that I knew of all of those factors, and I don't dispute that it's possible I might have known that there had been criticisms in some of those areas, but certainly the crystallised difficulties with the margin of error and, in particular, the extrapolation of the point of standard deviation was not - - -

5

MS BRANSON: And the assertion that at the age of 19, on average, 50 per cent would not have reached a mature wrist.

MR CRAIGIE: I was not aware of that.

10

MS BRANSON: That's on the face of every substantial report of Dr Low, not his short reports.

MR CRAIGIE: You're asking me about my state of knowledge in December of 15 2010. I was certainly not personally aware that that was contested in a way that you say was contested.

MS BRANSON: What instructions had you issued to prosecutors for the Commonwealth about what they should do with scientific evidence that might 20 undermine evidence being led by them, if anything?

MR CRAIGIE: If, indeed, it might undermine?

MS BRANSON: So you would have known, as you told me and carried around in 25 your head, decisions like the Birmingham Six case, like the Ward case, like the case in Western Australia, no doubt, where the Court of Appeal spoke about the obligation of prosecutors with scientific evidence. As those judgments came to your attention did you at any time issue instructions to Commonwealth prosecutors about what they should do where scientific evidence was being relied on?

30

MR CRAIGIE: Certainly no general instruction but counter scientific evidence was required because of the state of our judgement as to where Dr Low's evidence stood at that time. We regard it as a matter for the courts to test.

MS BRANSON: They can't test without the information, can they, Mr Craigie; 35 that's the point I'm trying to make. The courts can't go out and research for themselves. They're dependent on the parties to bring the research for them. And here the Commonwealth DPP had the research; the legal aid lawyers were defending them.

40

MR CRAIGIE: With respect, it's an adversarial system where both sides have capacity to develop their own arguments and counter-arguments which is quite different to a situation where the credit of a witness has been undermined 45 substantially, undermined to the extent that it raises a disclosure issue. I think that's the point of departure between our two views.

MS BRANSON: Could I read you something that Smith J had to say in *Cooley v The State of Western Australia* [2005] WASCA 160 in the cases I drew to your attention. Having talked about a witness's evidence – I will read the whole passage.

5 *Had that material ... (it was a board's finding with respect to a medical practitioner) been before the jury it may well have caused them to have a reasonable doubt about whether or not the applicant had, in fact, told Dr Sirna that when he stabbed the deceased he intended to kill him.*

10 Sorry, I should tell you that this is at page 543 of the report if you're working from the Australian Criminal Reports. The critical passage is this.

15 *In this context it is not enough for the prosecution to simply say that the information was in the public domain or that the applicant should have made enquiries which would have revealed it. The defence was entitled to assume that a professional expert witness called by the State was a witness of integrity and credibility and that if there was any material showing otherwise the State would disclose it. The failure of the State to do so deprived the applicant of the opportunity to cross-examine Dr Sirna on an issue which bore directly on his credibility in circumstances in which the jury's assessment of that may have led to a different verdict. There was accordingly a miscarriage of justice.*

20

MR CRAIGIE: And in that instance there was evidence of the kind described that had that impact upon the expert witness. That's not, we say, is the fact that a body of evidence critical of the use of wrist X-rays existing constitutes.

25

MS BRANSON: In the Birmingham Six case at page 311-12 if you're using '93 Criminal Appeal Reports the UK Court of Appeal said:

30 *A disadvantage of the adversarial system may be that the parties are not evenly matched in resources but the inequality of resources is ameliorated by the obligation on the part of the prosecution to make available all material which may prove helpful to the defence.*

35 I'm not asking you what you thought then – you wouldn't now doubt that this material that we've been looking at today would be helpful to the defence, would you? It was trying to establish that a young person was under the age of 18 when the expert evidence against them was given by Dr Low?

40 MR CRAIGIE: We're talking about this in the context of whether it should have been disclosed.

MS BRANSON: Before you finish let me read you another passage to save going back and let you consider them all. The court went on at page 674 to say:

45 *An incident of the defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied*

on by the prosecution, that is whether such matters strengthen the prosecution case or assist the defence case. This duty exists whether or not a specific request is made by the defence. Moreover, this duty is continuous; it plays not only in the pre-trial period but also throughout the trial

5

And then later on that same page:

Forensic scientists employed by the government may come to see their function as helping the police. They may lose their objectivity. That is what must have happened in this case.

10

And what the court is saying is this duty of disclosure is necessary, as I read it, to protect people being disadvantaged by that tendency to lose objectivity in experts that may give repeat evidence for the Crown. And the Court of Appeal in Ward [1993] 1 WLR 676 went on – I will perhaps read it out so you’ve got the whole of the material. And they did that at page 676 of the report of Ward in the Weekly Law Reports:

15

We believe that the surest way of preventing the misuse of forensic evidence is by ensuring that there is a proper understanding of the nature and scope of the prosecution’s duty of disclosure in respect of scientific evidence. That duty exists in respect of any request by the defence. It’s also not limited to documentation on which the opinion or findings of an expert is based. It extends to anything which may arguably assist the defence. It is therefore wider in scope than the rule. Moreover, it’s a positive duty which in the context of scientific evidence obliges the prosecution to make full and proper enquiries from forensic scientists in order to ascertain whether there is discoverable material. Given the undoubted inequality as between prosecution and defence in access to forensic scientists we regard it as of paramount importance that the common law duty of disclosure as we have explained it should be appreciated by those who prosecute and defend in criminal cases and if difficulties rise in a particular case that the courts must be defining judge but, as they indicate, with the benefit of the full material.

20

25

30

35 You wouldn’t now think, Mr Craigie, would you that the courts that we have seen today had that benefit, full disclosure of the material?

MR CRAIGIE: I’m of the opinion that the DPP, in those cases, disclosed to the extent that it was apparent to the DPP was necessary and revealed by the state of knowledge that we had then, both in respect of the fact that there was a general division of opinion as to the utility of wrist X-rays and a difference of opinion that has emerged, one might say, with a great clarity in recent times between the experts, including the experts that have given evidence for this committee. And, frankly, the issue would not arise now if it was the nature of it, the evidence of the nature that is now called into question, would not be called because of our analysis of what has in particular over the last year.

40

45

MS BRANSON: Yes. Thank you. Just before we leave this case I can't help but read a passage on page 4 just to see if anyone noticed it nearer the time. The learned magistrate says in the middle of that page, he meaning Dr Low:

5 *He said that the study constituted a study in the United Kingdom and in United States the four to 500 children. You can see it in cross-examination that all of them were essentially Caucasian but he mentioned a couple of other non-Caucasian races, Eskimos and Indians, I think he said. I infer that none of the subject children were Asiatic and certainly none were Indonesian in particular.*

10 Did anyone notice that that would be a very hard passage to reconcile having made careful study of the Greulich and Pyle Atlas?

15 MR CRAIGIE: Madam President, that's the first I have certainly seen that transcript.

MS BRANSON: Having had it drawn to your attention and having had the content of the Atlas drawn to your attention it's a fairly remarkable statement, isn't it?

20 MR CRAIGIE: Well, it seems inconsistent.

MS BRANSON: We then to Mr Sharp's paper of December 2010. Which I say with respect, Mr Sharp, I think was a helpful outline of the circumstances. We see that it draws attention for the need to comply precisely with the requirements of the Crimes Act an issue that had arisen. It talks about consents and draws attention to the need for informed consents of two people. It discusses the fact that DIAC have been used and I think that might well be what gave rise to the circumstances of their being no independent person consent because there may well have been a misunderstanding generally about what DIAC were doing at the process which was not giving an informed consent, that someone able to protect the interests of the individual. And then there's a reference to currently Life Without Barriers, an NGO, was agreeable to and, in fact, act as the independent person for the purposes of the prescribed procedure. At the time you wrote that, Mr Sharp, were you alert to what the role of Life Without Barriers was when they accompanied young children?

35 MR SHARP: Yes. That information was, in fact, provided to me by the AFP, Australian Federal Police, and at that point in time was, yes, I had been aware of that.

40 MS BRANSON: You were aware of them but were you aware of the nature of the arrangement that they had with the Department of Immigration?

45 MR SHARP: I wasn't aware of that relationship, no. As I understood it the position was that Life Without Barriers were available at the detention centres and would assist various migrants what their relationship with DIAC was. I wasn't of it, no.

MS BRANSON: Were you aware that they had a contract with the Department of Immigration, Mr Jabbour?

MR JABBOUR: No, not, not to the best of my recollection. My understanding, along with Mr Sharp's, was they were an independent NGO on the island. Just trying to think back. I mean it doesn't shock me that DIAC would have contracted them to be there necessarily but they were performing definitely an independent role and were able to provide that support to the individuals.

MS BRANSON: Yes. In fact that was their role, wasn't it, to support individuals?

MR JABBOUR: Absolutely.

MS BRANSON: Yes. Ms Pope, you will, I think, be able to assist us. Am I right in thinking that Life Without Barriers had a contractual arrangement with DIAC?

MS POPE: Yes, that's right.

MS BRANSON: And what was the nature of that contract?

MS POPE: As you've outlined, to provide assistance to children in immigration detention in a range of roles and circumstances.

MS BRANSON: And you were aware that they accompanied young people when they were interviewed by the Australian Federal Police?

MS POPE: Yes, and in other interviews, in their immigration interviews.

MS BRANSON: What was your understanding of the role they played when they were at such interviews?

MS POPE: It was to be a support person to observe if the child might need a break, to provide any other sort of physical and emotional support to a child in those circumstances.

MS BRANSON: Have you ever had occasion to study the provisions of the Crimes Act about X-raying children?

MS POPE: Not in very much detail.

MS BRANSON: No. We didn't include it because we assumed those who would need to have it would have it with them. Do you have a copy, Mr Jabbour, with you?

MR JABBOUR: Of the Crimes Act?

MS BRANSON: The relevant provisions of the Crimes Act.

MR JABBOUR: No, no unfortunately. I have the consent forms which refer to the provisions.

MS BRANSON: I will just read the relevant bit to you. It's one of these things at which the Commonwealth is so good; section 3ZQC starting at subsection 1 and moving to various paragraphs.

5 *For the purposes of paragraph 3ZQB1(c) an investigating official is taken to have reclaimed requisite consent for the carrying out of a prescribed procedure in respect of a person if the following persons agree in writing to the carrying out of the procedure.*

10 *(a) The person in respect of whom it is sought to carry out the procedure.*

So that's the first one, the young person whose age is in dispute:

15 *(b) Either (i) a parent or guardian of the person –*

and I think you won't know of any cases where such a person was available, will you?

MR JABBOUR: [transcript unclear]

20

MS BRANSON: No. So we go to the next one:

25

If a parent or guardian is not available or is not acceptable to the person an independent adult person –

we will leave out the words that aren't now relevant:

30

...who is capable of representing the interests of the person and who, as far as is practicable in the circumstances, is acceptable to the person.

So what we know is that someone should be there, presumably against the possibility that the person is a juvenile, to protect their interests. I've now read a number of transcripts of interviews where Life Without Barriers people have been present. I will read from one because I think it's representative of what tends to happen. This one comes from a particular case. I won't give you the name but Danielle might be able to tell me the - - -

35

MS NOBLE: It's not one of the 12 priority cases. MAL011.

40 MS BRANSON: All note that Danielle is able to do that without regard to the documentation. In that matter and on 20 January 2010 the only part of the recorded interview that appears to be relevant – I should actually hand you, I think, Mr Colvin, a copy of the document I'm that I'm looking at.

45 MR COLVIN: Thank you, Madam President.

MS BRANSON: So you will see that it starts off on page 1 indicating of course the people present. Federal Officer Lee speaks:

5 *This the taped interview –*
etcetera.

MR COLVIN: Yes.

10 MS BRANSON: She goes on to say at question 8, addressing the individual:

*I'm now going to ask the interpreter to read through for you some of the
information relating to the procedure that you're going to be undertaking today
or that you're going to be consenting to today.*

15

The possibility of an alternative option doesn't seem to arise but we're going to overlook that I think. And then the interpreter says:

Okay. He understands.

20

As in he doesn't have any questions. Now, I think we know that there was a card in for Bahasa Indonesian that went through the materials that the act required to be given and so I think the fair inference is the card was given to the interpreter, the interpreter read it in Bahasa Indonesian, and so the only English that's recorded is the interpreter saying:

25

Okay. He understands that and he doesn't have any questions.

And then question 9 to the Life Without Barriers person:

30

Do you want to ask any questions?

She sensibly turns, I assume, to the individual and through the interpreter says:

*Could you just explain in your words your understanding of what you're
signing to happen today.*

35

And the interpreter gives back in English the answer that he was no doubt given in Bahasa Indonesian, and then the formal request to the young person is made. Ms Peard then comes into it again:

40

Are there any questions that you have?

That must have been addressed to the young person. The interpreter gives the answer:

45

No questions.

And then Federal Agent Lee asks the young person to sign and then question 21 appears to be addressed to the Life Without Barriers officers:

5 *Thank you. I've also provided –*
and she gives her name with a copy of the consent:

She can fill that out, please.

10 And the Life Without Barriers says to the young person:

Because you've indicated that you're under the age of 18 and there is no guardian that can be present here for you I will sign this as an independent observer for the consent form. Okay.

15 The inference that I draw from that is that the Life Without Barriers person consistently, as I understand it, with the contract between Life Without Barriers and DIAC was ensuring that the young person understood, wasn't overborne, understood what happened and then signed as an independent observer. That seems to be what's
20 happened; do you agree, Mr Colvin?

MR COLVIN: I would agree that's what's happened in this case; I'm not sure if that's consistent with the contract. I'm not aware of what's in the contract, but - - -

25 MS BRANSON: It doesn't look like a person who understood that her role was to protect the interests of the young person, does it?

MR COLVIN: I'm not sure what would have been explained to her about her role before the interview commenced, but I guess it's open to infer that she is just simply
30 ensuring that the alleged young person understands the process, not necessarily representing their interests in whatever way she may see that to be.

MS BRANSON: Okay. If you had a parent or guardian there you would expect that they would actually turn their mind to whether it would be in the child's interest to
35 agree or not agree, wouldn't you?

MR COLVIN: Yes.

MS BRANSON: And one of the things they take into account was, for example,
40 margins of error, what use might be made of the information and things of that kind.

MR COLVIN: I couldn't presuppose what they might take into account but that's reasonable if they knew that information.

45 MS BRANSON: If you were protecting the interests of a young person you would want to know stuff like that, wouldn't you, Mr Colvin?

MR COLVIN: Yes, if they were aware of those margins of error and that type of information, absolutely.

5 MS BRANSON: Do you have another statement attached to the papers I sent to you?

MR COLVIN: We have the consent form and, yes, we do have a statement.

10 MS BRANSON: All right. Now, this is to deviate a bit; because the document is in your hand I thought I might turn to it. This looks like a statement prepared by the Australian Federal Police; is that right?

MR COLVIN: I would presume it is, yes.

15 MS BRANSON: Yes. It's on AFP letterhead and it just happens to look like the typeface - - -

MR COLVIN: It's a police statement, yes.

20 MS BRANSON: Yes.

MR COLVIN: A statement prepared by police.

25 MS BRANSON: You see it referred to this same interview; we can tell that from date and things. Paragraph 3:

30 *During the interview I was requested to give written consent to the carrying out of a prescribed procedure, namely the taking of a wrist X-ray on the individual. Before being requested to give my consent I was informed of the following matters.*

which are listed. We've got the transcript. Do you agree she was not informed of any of those things?

35 MR COLVIN: I think that's true, that not during the taping, so that's correct. During the interview that was recorded those matters do not appear to have been explained to her and I can only presume that that was explained to her outside of the court before the interview.

40 MS BRANSON: Obviously we can't know that one way or another.

MR COLVIN: No.

45 MS BRANSON:

During the interview I was requested ... Before being requested –

bit of an inference in there that it happened at the interview, isn't there?

MR COLVIN:

5 *Before being requested to give my consent I was informed of the following matters.*

10 So you could draw the – I believe that it's open to draw the conclusion that she was advised of those circumstances prior to the formal interview. That's how I would read that.

MS BRANSON: Well, obviously yes, but how much earlier? The paragraph before says:

15 *On 20 January I was present.*

20 If she meant to say on some other earlier day I was advised, or ahead of the interview being started I was advised, you might expect a Federal officer to say so, wouldn't you?

25 MR COLVIN: Madam President, the normal course of events would be before the interview commenced we would explain to her what her role was and if she was prepared to perform that role – if she was happy then we would move to the formal interview and we would record that interview because that was the evidence that we needed to make available to the court.

MS BRANSON: You also need a record of her being told those things, do you not?

30 MR COLVIN: Well, I guess in some respects her agreeing to the statement is the record to report that she was advised of those events or those conditions.

35 MS BRANSON: In frankness I should tell you that, because we have identified this individual, serving a notice on her under the Human Rights Commission Act to require her to make a statement.

40 MR COLVIN: Madam President, that's very open for you to do that. I'm not trying to infer something that didn't happen.

45 MS BRANSON: Did you notice that one of the things required by the section is not listed there at all?

MR COLVIN: No, I haven't necessarily cross-referenced that, Madam President.

45 MS BRANSON: I think it's matter (h) in the section. Nor is there any mention of her being given a copy which I think she's required to have. I'm just looking for the provision about the requirement to – it's here.

MR COLVIN: So, Madam President, we're talking about the provision that says that to the extent possible the alleged juvenile to be X-rayed is allowed to have somebody present when that X-ray is taken?

5 MS BRANSON: Yes. Person of their choice; that's not mentioned there. And section 3ZQE of the act:

10 *An investigating official must, if practicable, ensure that the giving of information about the prescribed procedure and the responses, if any, of the person to whom the information is given are recorded by audio tape, video tape or other electronic means and a copy of the record is made available to the person.*

15 So we've got the record. Unless there was another record it would seem that that section wasn't strictly complied with in this case; is that right?

MR COLVIN: Madam President, I can see how you would draw that conclusion. I think, on the interpretation of that, our officers probably drew the conclusion that what was required to be recorded was our conversation with the alleged juvenile. I can see how it's certainly open to interpret that the Life Without Barriers representative is there to represent their interests and that perhaps a better procedure would be to record that as well.

25 MS BRANSON: You see the reference to persons in plural in subsection 1 paragraph (a), don't you?

MR COLVIN: Yes, I do.

30 MS BRANSON: So you're not in any doubt that the law requires the provision of information to the adult person to be recorded?

MR COLVIN: I won't argue with you on a point of law, Madam President.

35 MS BRANSON: Well, it's just that there's an 's' on the end of person so it sounds like more than one.

MR COLVIN: I can definitely see how that would be an interpretation. I think on a first blush a police officer would interpret that as the person that the procedure is to be carried out on but I accept your concern.

40

MS BRANSON: Well, it does say the:

45 *...giving of information about the prescribed procedure and the responses, if any, of the persons to whom the information is given –*

all right. Thank you. You would accept, wouldn't you, if a Federal officer offered a statement for someone to sign that was not accurate in its content that would be a serious thing?

5 MR COLVIN: I would expect that it would be a serious matter and I expect that the person wouldn't sign it unless they were satisfied that it was accurate.

MS BRANSON: My concern is, at the moment, with the conduct of the Federal agent.

10 MR COLVIN: I would be very concerned if any member of the police, be they an agent or not, deliberately presented information to be truthful that was not truthful.

15 MS BRANSON: Thank you. And I don't suggest that she did. I don't know one way or the other.

MR COLVIN: No. Thank you.

20 MS BRANSON: But on the material that I have there's at least reason for suspicion I think.

MR COLVIN: Reasonable suspicion that the - - -

25 MS BRANSON: Not reason for suspicion; I didn't say reasonable suspicion, reason for suspicion.

MR COLVIN: Madam President, okay, I'm not sure why we suspect that the police officer here in some way misled Ms Peard. Perhaps I'm missing the point.

30 MS BRANSON: I'm not saying that, but it looks like the Federal Police – I don't want to get into a debate with you.

MR COLVIN: No.

35 MS BRANSON: It looks like a document, as you agreed, prepared by the Federal Police.

MR COLVIN: Absolutely.

40 MS BRANSON: And on the face of it, it appears not to be consistent with the record of interview. If you don't accept that, that's fine, Mr Colvin.

45 MR COLVIN: I'm sorry, Madam President, I'm not trying to argue. Perhaps I'm missing the distinction that you're drawing but I don't see that the statement is inconsistent with the record of interview.

MS BRANSON: It is for debate, but I assumed that the record of interview would comply with the requirements of the act, that is record information being given to both the people. And, if you read it, it does not record that information being given to the Life With Barriers individual.

5

MR COLVIN: I accept that, yes.

MS BRANSON: Right. We were actually looking at Mr Sharp's paper when we deviated and looked at other things. We had a statement there, paragraph 18, about the practice of the Australian Federal Police which talks about being over the age of 18 when one might have expected to find over the age of 19. And if we are dealing here with that stage – I will just read it, sorry:

15 *Assuming the determination is that the suspected person is an adult that is over the age of 18 years and assuming that the AFP have sufficient evidence to initiate a prosecution, the AFP will proceed to charge the suspected person in an adult court and, if as is normally the case, the suspected person is remanded in custody he will be remanded to an adult correctional services facility.*

20 So there's a recognition in that statement which I think probably reflects the fact, as I understand it, that, assuming the advice given by a medical expert is that the person is over the age of 18, steps are taken with the knowledge that that person will go into adult custody.

25 MR COLVIN: At the time of this document that was our practice, yes. We believed they were an adult and we processed them as an adult and remanded in custody.

MS BRANSON: And then we have references to:

30 *Accordingly, the expert witness usually gives evidence to the effect that is there set out.*

and that's a reference to Dr Low, I think, isn't it, Mr Sharp?

35 MR SHARP: Yes, and others such as others who had given such evidence in the past.

MS BRANSON: Well, the standard deviations, they look like Dr Low's.

40 MR SHARP: Certainly the table comes from Dr Low's statement, yes.

MS BRANSON: Yes, thank you.

45 MR SHARP: The reference of expert witnesses in the third line though generally comes from all experts who had given evidence.

MS BRANSON: Right. But I don't think anyone other than Dr Low set out that table - - -

MR SHARP: No, exactly, exactly.

5

MS BRANSON: - - - because that's the famous table that has only 50 per cent of young people having mature X-rays at the age of 19.

MR SHARP: I accept that.

10

MS BRANSON: Are you alert to a single other person having expressed that view? Scientific - - -

MR SHARP: Not in terms of this table, no.

15

MS BRANSON: No.

MR SHARP: Dr Keenan, I think it was, in one of the immigration cases did, I think – and we haven't got a transcript of the evidence, but the judgment in that matter did indicate that Dr Keenan had at least made an assessment of the standard deviation against the age of 19. Think that was [redacted]'s matter.

20

MS BRANSON: But not, I think, with that 50 per cent there.

25

MR SHARP: Not with that, no; certainly not with those figures.

MS BRANSON: No. And I don't want to go again through the experts we've looked at before – Jenson, Radcliffe, Dr Thonnell – and I think if their evidence is accepted that figure is inherently unlikely, as I think we might also agree, if you look at the Atlas itself.

30

MR SHARP: I accept that.

MS BRANSON: Thank you. Sorry. Rightly drawn to my attention we should have a break. Shall we come back at 10 to 4.

35

ADJOURNED

[3.39 pm]

40

RESUMED

[3.51 pm]

MS BRANSON: I think we may because we're short of time, we may start again. I appreciate your resilience very much. Thank you for your cooperation. I think most of the other issues that could have been raised under Mr Sharp's paper have been touched on because they have come up in other ways, so I think we will move on and

45

perhaps go through to what I think is document 21 which is a Minister's office brief dated 6 January 2011. Do we all have that? This is, I think, an Attorney-General's document.

5 MR ANDERSON: That's correct.

MS BRANSON: It reflects, I think, doesn't it, Mr Anderson, the continued high political sensitivity really of this broad issue of people smuggling and the prosecution of young crew members.

10

MR ANDERSON: I don't doubt it was a matter that was in the media.

MS BRANSON: Thank you. Some of the issues in it are points we have discussed already and I don't want to go back over them again, but on the top of page 3 of 11 there's a statement, Mr Anderson:

15

The management of persons in prisons is a matter for authorities in the relevant state or territories.

20 Of course true but I think you would accept, wouldn't you, that the Commonwealth carries a responsibility to ensure that the Convention on the Rights of the Child is respected throughout Australia.

MR ANDERSON: We certainly have a responsibility but we can't absolve ourselves once someone goes into the custody of the state or territory but there are also questions as to how far we can take that responsibility.

25

MS BRANSON: And in fact you received some advice from what I think is known as OIL, the Office of International Law about that.

30

MR ANDERSON: That's right, that's correct.

MS BRANSON: And the contents of that are of course what you regard to be the case. Is that right?

35

MR ANDERSON: That's right.

MS BRANSON: Yes, thanks.

40 MR COLVIN: Madam President, could I just say something on that? I meant to say it before. In terms of those matters that come to our attention where age is in dispute and we, the Commonwealth may believe that they're an adult but that may be disputed and they go into adult custody, we do as a matter of course – and I don't know how long we have done this for – but I know we certainly do as a matter of course advise the correctional facility that age is in dispute so that they at least can
45 apply some context to the decisions they make about that person's custody.

MS BRANSON: Sure, thank you. Difficult then I imagine to take them out and put them in juvenile facilities if the Commonwealth charge them as an adult?

MR COLVIN: No, that's correct. That's fair.

5

MS BRANSON: You're trying to help them look after them in the adult facility; is that right?

MR COLVIN: I guess we're just trying to bring to their attention that it is in dispute and that they may wish to make certain arrangements if that's – they make the decision on the ultimate care of the person in their custody but that's a relevant factor in that consideration.

10

MS BRANSON: Yes, thank you. Mr Anderson.

15

MR ANDERSON: I was just going to say that there have also been instances where people, who on the one hand might be asserting that they are a minor although they have been charged as an adult, have been offered the opportunity of not being put into an adult custodial institution on remand and they have, in fact, said they preferred to be in an adult institution along with their other crew members, for example.

20

MS BRANSON: Yes, that has happened and indeed I think we know, do we not, of some instances where at least it's asserted that the reason they claim to be of a certain age when first interviewed was to stay with their colleagues.

25

MR ANDERSON: That's certainly one reason, yes.

MS BRANSON: Yes, thank you. At the bottom of that same page, 3 of 11:

30

To date the Commonwealth has not proceeded with a people smuggling prosecution when the court has affirmed a defendant to be a minor.

That's technically not right, I think, is it?

35

MR ANDERSON: That was our understanding at the time.

MS BRANSON: At the time, but you accept it's not right?

MR ANDERSON: Yes, we were subsequently advised by the DPP that that was not correct.

40

MS BRANSON: Yes, thanks. And, I mean, I don't need to go into great detail but we know that the reference to consent in the middle of the next – just above the middle of the next page about X-rays being done with the consent of the person and the consent of a parent or guardian, or if a parent or guardian is not available an

45

independent person, we know that in fact procedures went a bit wrong about that and so there were a number where that consent was not obtained.

5 MR ANDERSON: There might be some notes adding to what the procedures were intended to be.

MS BRANSON: Yes, thank you. Down the bottom of that page it states:

10 *Currently the age determination process used by the Australian Federal Police requires a wrist X-ray to be undertaken on all persons who claim to be a minor.*

Is that right, Mr Colvin, or was that right at the time?

15 MR COLVIN: No, I think “requires” is probably too strong a word. That is the prescribed procedure if the decision is made that we need to bring forward other evidence, that’s the procedure available to us under law.

20 MS BRANSON: But it was made very plain when the Crimes Act was amended that it was not required to undertake an X-ray, wasn’t it? And indeed the inference was - - -

MR COLVIN: It was a last resort.

25 MS BRANSON: - - - it was a last resort.

MR COLVIN: Yes.

MS BRANSON: Yes.

30 MR COLVIN: I’m not the author of the document, Madam President, but I think what they’re trying to infer is that should a decision be made that we need to go down a prescribed procedure, we are required to use the prescribed procedure that is outlined in the Crimes Act.

35 MS BRANSON: You might recall that there was some concern expressed at the time the bill was under consideration that if you put it in it would become the mandated procedure as opposed to a procedure of last resort. This is some evidence that in fact people’s thinking had begun to shift in exactly that direction, isn’t it?

40 MR COLVIN: Yes, I don’t recall that specific mention when the bill first introduced but, yes, I think that’s a very fair conclusion.

MS BRANSON: And we have got in the middle of page 5 of 11:

45 *Australian courts have accepted the accuracy of the X-ray test in age determination proceedings.*

What exactly was meant by that, Mr Anderson? Did you draft that or somebody else?

5 MR ANDERSON: No, no. I wasn't the author of this document and I don't think I approved it either, but I think - - -

MS BRANSON: Did you approve it or not?

10 MR ANDERSON: I don't believe I did.

MS BRANSON: Did - no.

15 MR ANDERSON: It has got a different person as the person who approved the document.

MS BRANSON: Would it have been in the branch that you work in?

20 MR ANDERSON: The person who is listed as being the person who approved it is the branch head of the branch that Mr Rutherford works in. It's one of the two branches of the division that I head and so I'm not sure whether I actually saw this as well, I may have.

MS BRANSON: Did you draft it Mr Rutherford?

25 MR RUTHERFORD: No.

MR ANDERSON: No, it wasn't Mr Rutherford either. It was an officer who works for Mr Rutherford.

30 MS BRANSON: What do you understand it was meant to convey, Mr Anderson?

35 MR ANDERSON: I think it's just saying that - and bearing in mind that this is a brief that is called into question as a result - or called into being as a result of media commentary and there are media articles attached to it, it's making the statement that courts have not uniformly found problems with the X-ray test. I think that's what it intended to convey.

40 MS BRANSON: There were by this stage a number of decisions where Dr Low would give evidence saying somebody, in his judgment, were of a certain age and the court would decide if they were at a quite different and younger age, were there not?

MR ANDERSON: That's correct.

45 MS BRANSON: So, "Australian courts have accepted the accuracy of the X-ray test in age determination proceedings," rather suggests that, you know, the courts have found that you can work out how old somebody is by this test, doesn't it?

MR ANDERSON: I don't read it that way. I mean, it's just saying that there are occasions where it has been accepted that - - -

5 MS BRANSON: It doesn't say occasions. You wouldn't expect the Attorney-General's Department to say, "Australian courts have accepted the accuracy," if they only meant some courts have but others have not, would you?

10 MR ANDERSON: If we meant to convey that it had been uniformly accepted, we would say in every case.

MS BRANSON: Really? Thank you. Well, there's a reference on page 7 of 11 to the Convention on the Rights of the Child, just to satisfy my curiosity why is that marked 'do not read out'?

15 MR ANDERSON: Because it's not actually seen as being something that would be helpful for the Minister to in fact read out if he was asked a question about that.

MS BRANSON: Thank you. And then as you say we have got the press releases which support what you say about it being a matter of media comment.

20 MR ANDERSON: If they're - they're not press releases, I think they're actually just articles.

25 MS BRANSON: Yes, thank you. So then we have got the document that was prepared by DIAC and released under Freedom of Information on 6 January. And we have, of course, the contrary statement or at least differently expressed statement on the second page of that:

30 *Wrist X-rays which have been found not to be an accurate determiner of chronological age.*

I think there was some concern in the Attorney-General's Department about that document being released under Freedom of Information. Is that right, Mr Anderson?

35 MR ANDERSON: I don't believe we were concerned about it and it's a matter for a different portfolio.

MS BRANSON: And then if we go through to document 22, I'm going to try and speed up a little. We have a DIAC document from Ms Pope.

40 MS POPE: It's not from me, I'm sorry.

MS BRANSON: I'm sorry. It's from - - -

45 MS POPE: It's from one of my staff.

MS BRANSON: - - - from Ms Wilson to Ms Pope.

MS POPE: No, sorry, it's from Katie Constantinou to Ms Wilson.

MS BRANSON: I think you were looking at a page which I hadn't intended to refer to, Ms Pope. I didn't give the date, I'm sorry, 27 January 2011.

5

MS POPE: I'm sorry, yes, I see. Thank you, I apologise.

MS BRANSON: I hope the other one wasn't circulated, was it? It wasn't intended to be circulated.

10

MR [transcript unclear]: It was.

MS [transcript unclear]: It was.

15 MS BRANSON: Are they? Right. I only wish to refer to the one of 27 January which shows discussions at the Commonwealth DPP concerning crew transfers across police jurisdiction and progress in prosecution of crew and particular individuals were discussed. And there was discussion then about wishing to avoid a situation in which an age determination undertaken by the AFP using one method and a separate – a different process is used by DIAC with different conclusions reached. So that was a matter of discussion between the agencies as far as you're aware, Ms Pope?

20

MS POPE: I wasn't at the meeting that Ms Wilson is referring to. There were two separate sets of meetings held but I believe from what she writes that that was the discussion that was had at that meeting.

25

MS BRANSON: Thank you. Mr Craigie, your staff, is it the case so far as you're aware that the Commonwealth DPP and the AGD are concerned to avoid that situation of two methods being used within government? One by DIAC and one by the Australian Federal Police?

30

MR CRAIGIE: I think the way that we expressed ourselves at that meeting might best be left to Mr De Crespigny.

35

MR DE CRESPIGNY: Madam President, my recollection was – and it was set out in Mr Sharp's letter – is that we had very real concerns about the structure and integrity of the age determination interview process which DIAC was undertaking. We did not believe that it was thorough enough or based on research to be useful and admissible in evidence. And yet on the basis of that, a DIAC officer was making a finding about a person's age and we were concerned about that. And we were keen, as you will see later on, and as mentioned in Mr Sharp's paper in an extract that there should be a detailed, chronological interview between [transcript unclear] best practice about the process.

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45

MS BRANSON: Had you by then done some research about best practice and interviewing for age purposes – age determination purposes?

MR DE CRESPIGNY: There was reference in Mr Sharp's paper about the chronological matters and I think in a later paper which he produced, we received the background papers which DIAC provided. Our view was that there should be an approach for an anthropologist to gain some more background information so that
5 useful information would be put, relevant information [transcript unclear] would be undertaken.

MS BRANSON: In this stage was this a fair reading: DIAC didn't think the wrist X-ray method was very reliable and the AFP and the DPP didn't think that their
10 interviews were very reliable?

MR DE CRESPIGNY: That – I wasn't certain about what DIAC's position was about wrist X-rays. DIAC operated in an environment, on my understanding, where for the majority of their clients they could not use a wrist X-ray process. It is only
15 applicable to people that are suspected of having committed an offence and for that reason they had gone down their method. They also had concerns about the accuracy. DIAC at a meeting indicated that if they were provided with wrist X-rays then they would take them into account. We certainly had concerns about these interviews. We had expressed the view in Allen's paper that the best practice we
20 understood was the combination of a paediatric examination, an X-ray and a chronological interview and we didn't view the interview which DIAC was undertaking as being thorough enough. And that was reflected, I think, in the decision where the interview was considered in the matter of R v Idris and W where the judge in that case expressed some concerns.

25 MS BRANSON: You were by then alert to the Schmeling paper, were you, about age assessment that recommended those three different things?

MR DE CRESPIGNY: I didn't do the research. Mr Sharp did.
30

MS BRANSON: Mr Sharp, were you alert to the Schmeling paper by then, Mr Sharp?

MR SHARP: Yes, in fact, I referred to the Schmeling paper in my paper and
35 numbered that.

MS BRANSON: In yours, don't you?

MR SHARP: So, Madam President, my perception of the DIAC interviews was
40 informed by our role as prosecutors and the fact that we would need to use that material in a criminal proceeding. And with all the inherent issues about it being a field for expert evidence which is probably undoubtedly not challengeable, but then the issues of the methodology behind it, the scientific data behind it and the qualifications of the person put up as a witness as the expert. You know, it was clear
45 from our discussions with DIAC that – and I had no difficulty – but for their purposes it was entirely different. It was for the purpose of determining how they may have done and didn't – weren't encumbered by the same problems that we would have been. And we looked at it from both points of view as to how if the assessment

said this person is over eighteen how we could possibly put it in as a prosecutor on the test of that sort of evidence, and likewise what we would have to do if the defence determined to use it in that manner. And it just was not credible with the ordinary test for that type of evidence and that's the difference between the DIAC position and ours really. That was how - - -

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MS BRANSON: Thank you. If we could then turn to the letter that I wrote to the Honourable Robert McClelland, the Attorney-General, on 17 February. I think all agencies saw that fairly soon after I wrote it; is that right? Did it come to DIACs attention, Ms Pope, or not?

MS POPE: I'm sorry, I'm just trying to work out which one it is because I don't have everything in this file.

15 MS BRANSON: I think it's document 23.

MS POPE: Document 23, I don't have it. Thank you.

MS BRANSON: Mr Craigie, it would have come to your attention quite promptly I think?

MR CRAIGIE: In late February, I believe I received it.

MS BRANSON: Can you tell me how late?

MR CRAIGIE: Mr De Crespigny, I think would be aware.

MR DE CRESPIGNY: Your Honour, my recollection from the document, and it would be only my recollection, it's about 22 February.

MS BRANSON: Right, okay, thank you. What was done within the Commonwealth Director of Public Prosecutions Office or by you, Mr Craigie, once you saw the letter?

MR CRAIGIE: Well, the first thing that was done it was drawn to the attention of the appropriate officers, Mr Carter and Mr De Crespigny. Obviously we took it to be a serious moment that this matter had been raised by you and they each in their way started to act upon it and to look at what I might call our prudential measures to see whether in fact we were satisfied with the position that we had taken. I think the next substantive document indicative of that would probably be a letter that Mr De Crespigny wrote to the AFP and he could probably tell you the steps that led up to that.

MS BRANSON: Asking them to disclose the DIAC interviews?

MR DE CRESPIGNY: Madam President, it covered a number of issues. It sought - - -

MS BRANSON: Sorry.

MR DE CRESPIGNY: I believe you have been provided with the document.

5 MS BRANSON: Mm.

MR DE CRESPIGNY: We had been concerned about the disclosure and had made it clear that the DIAC interviews were disclosed in all matters and had made that clear. You had suggested that they hadn't been disclosed. Our research indicated
10 that in the cases which had proceeded, none of the cases which had proceeded had involved one of those interviews but we wrote to the AFP to ask them to check that. We also raised with them the issue about the discussion – debate about collection and consideration of additional material in relation to age determination and the fact that it was said in practice all reasonable alternatives would be looked at. We also set out
15 what we understood was the best practice. We also said that it would be worthwhile considering trying to obtain any other relevant documentation from the Indonesian authorities. We saw that as a constant matter which we were concerned about and also to make certain that they were having reference to the AFMA records. I think some of those people may have come into contact with Australian authorities
20 previously. We were also concerned to make certain that all material, not just a wrist x-ray was being considered and we also pointed the issue of consent which you have raised in your letter.

MS BRANSON: Thank you. I'm not critical of any of those things, Mr De
25 Crespigny, but did the Commonwealth DPPs office turn its mind to whether it had – was in possession of scientific material that it ought to disclose to the defence? We know that since 3 September of the year before it had been in possession of quite a deal of international material critical of the use of wrist X-rays for age determination purposes.

30 MR DE CRESPIGNY: We didn't form the view at that time.

MS BRANSON: Did you turn your mind to it?

35 MR DE CRESPIGNY: Quite honestly, it was not raised. It was not thought to be an issue and this was an issue which was discussed amongst a large number of very experienced prosecutors. Nor am I aware of it having been raised with us by the defence in any their matters and matters where obviously they had access to experts who informed them of those issues.

40 MS BRANSON: Thank you. Mr Colvin, Federal Police – what if anything about consent was done at this time?

MR COLVIN: About consent?

45 MS BRANSON: Mm.

MR COLVIN: Or disclosure of the interviews, Madam President?

MS BRANSON: I was asking particularly about the consent issue because disclosure in a broad sense I think is a responsibility of the Commonwealth DPP but
5 of course they can only deal with material that you provide them.

MR COLVIN: Yes.

MS BRANSON: Did you do anything about disclosure?
10

MR COLVIN: We did.

MR JABBOUR: We did. It was at that point and it was as a result of your referral that we realised that the consent form was not actually fully compliant with the
15 legislative requirements. We amended the form and our practices as a result.

MS BRANSON: Did you turn your mind to about whether the consent of the independent adult was being appropriately obtained and whether the people being used to give that consent were the right sort of people?
20

MR JABBOUR: We did, but my understanding at the time with respect to the individuals we were using were appropriate. They were there to inform and ensure the rights of the individual were maintained and we were confident with the practices that were in place on the island at that time.
25

MS BRANSON: And when you speak of rights, you were thinking of rights such as ensuring that they understood what was being said to them, knew that they were entitled to refuse to answer, things of that kind?

MR JABBOUR: And understood the process and the procedures that were going to be undertaken, that it involved an X-ray and to have it fully explained to them so they could make an informed decision in relation to it.
30

MS BRANSON: But you didn't turn your mind, am I right, to whether this person was independent of the child considering what was in the best interests of the child or possible child?
35

MR JABBOUR: Well, we did but – no, we did. Our understanding – albeit you have highlighted the fact they were engaged by DIAC, but as I say given where the interviews take place on Christmas Island we need to be able to bring in individuals, translators and support staff so we were satisfied that they were indeed independent. They certainly weren't – albeit contracted to DIAC, they weren't a part of DIAC. They weren't part of the Commonwealth per se.
40

MS BRANSON: No, you misunderstand. It's not their independence I'm concerned about, Mr Jabbour.
45

MR JABBOUR: I'm sorry.

MS BRANSON: It's what they understood to be their role.

5 MR JABBOUR: I was certainly of the understanding that that was explained to them. It was certainly well-documented in the consent form and indeed in the forms that they signed and indeed the statements that I saw obtained from them that it indicated it had been explained to them, and that they be informed, or provided that information to the individuals concerned.

10 MS BRANSON: Just spell out what you understood that they did understand and that they explained to the individual, would you?

MR JABBOUR: The purpose and reasons for carrying out the procedure which is to determine the age of the person.

MS BRANSON: Sorry, you needn't read the Act out to me.

MR JABBOUR: Sorry.

20 MS BRANSON: You mean the matters set out in the section?

MR JABBOUR: I apologise, yes, yes, absolutely.

25 MS BRANSON: Yes, right. Thank you. Mr Anderson, there's a reference at the bottom of my letter to my concern that these Indonesian nationals are not covered by the provisions of the Immigration (Guardianship of Children) Act and therefore have no legal guardian while they are in Australia. Did the Attorney-General's Department give consideration to that and particularly in the context of the
30 Convention on the Rights of the Child?

MR ANDERSON: Madam President, we didn't immediately act on that concern. We have had discussions with the Office of International Law though about the matter that you raise. I will have to take it notice as to when we had those
35 discussions.

MS BRANSON: Thank you. And, Mr Jabbour, you will see on the bottom of page 3, I point out that:

40 *If the consent of an independent person is being relied upon to carry out wrist X-rays, that consent could not be characterised as an informed consent unless the person is aware of the unreliability of the wrist X-ray procedure for the purpose for which it is being used.*

45 Are you aware of any incidents where a recording of the obtaining of a consent has involved any discussion about the limits on the reliability of wrist X-rays for determining age?

MR JABBOUR: I'm not sure about a recording. The - - -

MS BRANSON: They are all required to be recorded, aren't they, the consent procedures?

5

MR JABBOUR: I'm going to take that one on notice, if I may, and come back to you with that.

MS BRANSON: But you would be aware to the contrary effect, wouldn't you, of a good number of records of interview that suggests that the federal agent suggested that the wrist X-rays would allow age to be determined?

10

MR JABBOUR: Yes, but to the best of my knowledge we do point out that it's not 100 per cent conclusive.

15

MS BRANSON: That change might have been made after I wrote my letter, I think, Mr Jabbour.

MR JABBOUR: I think that's right, sorry.

20

MR [transcript unclear]: It may well have been, yes.

MR JABBOUR: No, no, no, sorry, absolutely. After you brought it to our attention is when we made the amendments, that's correct.

25

MS BRANSON: And I think the alterations you made were – it gives an estimate I think in one of the - - -

MR JABBOUR: That's correct.

30

MS BRANSON: But no more detailed explanation about – derived from the material that you had seen about wrist X-rays was then divided - - -

MR JABBOUR: No, we don't go into a great deal of detail in relation to the divergence of views and the like other than to say that it is a procedure but there is – it's not conclusive, it assists us in determining.

35

MS BRANSON: My letter was in February, I wrote it on 17 February so presumably by roughly the 20th or that time thereabouts you would have seen it. When did instructions go out about changing the consent form and what date was it changed?

40

MR JABBOUR: On that I'm going to get back to you on it, if I may.

MS BRANSON: Let me suggest 19 August, does that seem right to you?

45

MR JABBOUR: Could well be right. We certainly revised our guidelines and indeed the form – consent form with input from DPP.

5 MS BRANSON: In a matter that concerned the rights of children and compliance with the Crimes Act, does seven months strike you as rather a long time for the AFP to move?

MR JABBOUR: Yes, yes, it does.

10 MS BRANSON: What's the explanation, assuming my date is right, Mr Jabbour?

MR JABBOUR: I don't know. I would have to – I will have to take that one on notice, if I may, and come back to you as to the chronology of events between your letter and when we implemented the procedures.

15

MS BRANSON: Let's go to the document – sorry.

MR COLVIN: Sorry, Madam President.

20 MS BRANSON: I will wait.

MR COLVIN: Madam President, we will have to come back to it. We have just been advised that the aide memoire was the formalisation of the process and it was signed off but the changes occurred before that. That sometimes happens but I can't tell you when the changes actually occurred.

25

MS BRANSON: If you can help me tomorrow that would be very helpful, Mr Colvin. Now, I know I keep saying this but I really do want to speed up. We then have the Attorney-General's Department meeting brief. Can you just tell me, Mr Anderson, the purpose of this meeting for which this was a brief?

30

MR ANDERSON: Which document are you referring to, I'm sorry?

MR [transcript unclear]: Number 24, madam.

35

MS BRANSON: It's 24, it's dated 1 March 2011.

MR ANDERSON: That's actually a record of a meeting. It's the record of a meeting of agencies that we convene to consider age determination issues.

40

MS BRANSON: It's headed Meeting Brief. Are we looking at the same document?

MR ANDERSON: I'm looking at document 24.

45 MS BRANSON: Does yours start "Attorney-General's Department – Meeting Brief"?

MR ANDERSON: No.

MR [transcript unclear]: No, no.

5 MR ANDERSON: It starts – it’s document 24 which is called – there’s a number –
“Minutes Age Determination Meeting”.

MS BRANSON: Right, okay. Then I’ve got the meeting brief but we can deal
without that. You will be familiar with that document, Mr Anderson, I think, won’t
10 you?

MR ANDERSON: Yes, okay, I’m familiar with that document. That was a
document prepared for the meeting of agencies that we convene on age
15 determination.

MS BRANSON: All right. So is that a meeting brief that somebody else prepared
for you to enable you to chair the meeting or that you prepared either for yourself or
for someone else or something else?

20 MR ANDERSON: That was prepared by my staff for me.

MS BRANSON: For you, so it refers to various things that we have discussed.
Under AFP Wrist X-ray Procedure you will see the statement:

25 *Australian radiologists almost universally use the Greulich and Pyle Atlas.*

Now, of course, we know that to be true but it’s not the case, is it, that they almost
universally use it for the purpose of determining chronological age?

30 MR ANDERSON: Yes, that would be correct.

MS BRANSON: And the final statement I think we have looked at before and we
know that not to be strictly true either, and then there’s a record of the record of the
history. We have got on page 6 of 9:

35 *Part of the DIAC criticism of wrist X-rays is that they have been discredited in
the United Kingdom. According to research by the Commonwealth DPP, this
is not accurate. While the United Kingdom government does not rely on X-ray
evidence in age determination for refugees, the refugee applicant’s
40 representative has often sought and obtained X-ray evidence, usually dental X-
rays for this purpose.*

You of course – and I know you didn’t write this – but you, yourself will understand
there’s a difference about using a wrist X-ray to show youth as opposed to using a
45 wrist X-ray to show maturity, don’t you?

MR ANDERSON: Absolutely, but I think on that point – and as you say I didn't write this – all I'm saying is that it's not the case that they have been completely discredited in the United Kingdom, that they are used for some purposes. As you say, they have particular value in showing youth and in Australia they have been
5 used to release 37 people solely on the basis of the wrist X-ray.

MS BRANSON: Quite right. You understand that even if one uses a margin of error of two years with a procedure that cannot establish age under 19 years, if you accept that, you can't use them to show maturity but you could always use them to
10 establish youth if the wrist X-ray is not mature. You understand that, don't you?

MR ANDERSON: I do. I understand that and the reference - - -

MS BRANSON: And that might explain why the defence uses them in the UK and why the prosecutor has been told they can't use them.
15

MR ANDERSON: And there are references in other documents that they're particularly valuable as a rebuttal point. If someone claims to be, for example, 12 or 13 it might actually show that they are highly unlikely to be of the age that they're
20 claiming. So it can be useful sometimes in that context as well, not simply to establish that they're more likely than not to be under the age of 19.

MS BRANSON: Just say that again?

MR ANDERSON: If someone made a claim that they were particularly young, it might be that the wrist X-ray would also show that that's a highly unlikely claim.
25

MS BRANSON: Yes.

MR ANDERSON: So it can be useful – all I'm saying is it can be useful in both contexts and again I didn't write this document.
30

MS BRANSON: Yes, sure. I don't want to labour the point but in the context that someone may not for the reasons we discussed earlier know how old they are, to
35 establish that the age they think they are is not the right age may not take you very further far, might it, Mr Anderson?

MR ANDERSON: It depends on whether they do know or not.

MS BRANSON: That's right. The assumption was being made – did you form the judgment by this time by the discussions you've had that the children in fact – or the people who asserted that they were children in fact did know their own age, that this was a common belief throughout government agencies at this time so that claims of age and credibility had become intrinsically conflated?
40

45

MR ANDERSON: No, I didn't form that view.

MS BRANSON: Did you see in any recent papers a suggestion that someone claimed to be a young age and the explanation might be that they didn't know what age they were?

5 MR ANDERSON: You have covered that already today.

MS BRANSON: In fact in most briefs and documents by this time, I think the AFP would agree that statements were being made that if they were found not to be the age that they claimed to be that that was being put forward to courts as evidence of
10 increased culpability, that is that they had sought to mislead the investigative process? Did you see documents of that kind?

MR ANDERSON: That's not a view that we had in the department and it wasn't something I had formed a view on with respect to other agencies.
15

MS BRANSON: You would have seen such documents, Mr Colvin, I think, wouldn't you?

MR COLVIN: Not personally, and I will stand corrected but I wouldn't have
20 thought that that would be our position because these people generally often don't know their age and are confused by the process of the questions we sometimes ask them, yes.

MS BRANSON: If that's the case, of course, the fact that they gave an age which a
25 wrist X-ray might make unlikely doesn't of itself carry weight as to what age they are, does it?

MR COLVIN: Well, it certainly doesn't prove age, no.

30 MS BRANSON: No, thank you. The talking points, Mr Anderson, on page 9 of 9 talk about the wrist X-rays:

...are an appropriate means for determining the age of Indonesian nationals suspected of crewing people smuggling ventures.

35 In view of the material we've seen, which presumably is identified by the literature review of which Mr Rutherford spoke, do you think now "determining" might have been a rather strong expression?

40 MR ANDERSON: Again, I didn't write this brief - - -

MS BRANSON: No, no - - -

MR ANDERSON: - - - and the meeting itself I think speaks clearly, that we were at
45 pains to actually find additional ways to approach the question of age because wrist X-rays were not - are not determinative.

MS BRANSON: But in the hands of the author it does tend to suggest a belief in an accuracy that by now was hard to maintain, Mr Anderson, would you agree?

5 MR ANDERSON: Look, I certainly wouldn't have used the words myself by saying they're an "appropriate method". I don't believe they're an appropriate method for determining the age.

10 MS BRANSON: Thank you, and we have got the minutes of the meeting as the next document?

MR ANDERSON: Yes.

15 MS BRANSON: I don't want to go back over what we discussed earlier about the different approaches being used by different agencies. Mr De Crespigny, you are recorded as saying that the current X-ray procedure was considered by Parliament and the AFP and the Commonwealth Director of Public Prosecutions are obliged to comply with that procedure. What exactly did you – first is that an accurate recording of what you said?

20 MR DE CRESPIGNY: Madam President, I couldn't honestly say exactly what words I said 12 months ago.

25 MS BRANSON: Right, but it's not your understanding, is it, that you were required to, is it?

MR DE CRESPIGNY: No, it's not my understanding. I don't believe it was my understanding at the time. On the other hand, the fact that Parliament had provided for it was certainly very relevant now.

30 MS BRANSON: And, Mr Carter, you expressed being concerned with what I understand to be DIACs criticism of the wrist X-ray procedure, is that an accurate record?

35 MR CARTER: I'm not sure if that's an accurate record. I don't recall the precise words I mentioned but I do recall that we were concerned about there being two different approaches and views about that. And I think my recollection is that the wrap up to those minutes really picks up the meeting in terms of the further work that was going to be done and we were talking about the potential for DIAC interviews to assist in the process of assessing people which may of course mean that matters did
40 not proceed to prosecution.

MS BRANSON: Yes, thank you. I think the other matters there have probably been dealt with. If we look at the document which I think is 25, which is I think from an
45 AFP officer of some sort to Ryan Kennedy, there was a request about how active a role Life Without Barriers were playing. Do you know, Mr Colvin, the background of this request?

MR COLVIN: Sorry, do I know, Madam - - -

MS BRANSON: The background to the request?

5 MR COLVIN: No, not specifically, Madam President. I mean, I have read this, I read it earlier today.

MS BRANSON: Now, Elsa I think – the Elsa who signed this was an AFP - - -

10 MR COLVIN: Yes. She is an AFP officer, she works in our policy area dealing with legislative reform, that type of – yes.

MS BRANSON: And at least by this stage she understood that there were queries about the role being played with Life Without Barriers?

15

MR COLVIN: That's correct. I take this as us querying whether we – our understanding of their role and our understanding of what they understood to be their role was consistent.

20 MS BRANSON: Yes, yes, and although she talks about them taking their role seriously, the issue was, as she rightly understood, what it was that they were taking seriously.

MR COLVIN: That's right.

25

MS BRANSON: Yes, thank you. Then moving on we see in the paper that I think is document 26, a discussion about the role of Life Without Barriers and that letter I think was sent to you, Mr Rutherford. That email was sent to you; is that right?

30 MR RUTHERFORD: Sorry, I'm trying to follow that. Yes, that's correct. We were drafting a letter in response to your letter, Madam President, to the Attorney-General and we were trying to collate information and part of that was about seeking input from agencies.

35 MS BRANSON: And the DIAC officer there named was giving you information about the limited role that Life Without Barriers was retained to undertake?

MR RUTHERFORD: That's correct.

40 MS BRANSON: And advised that there's no contractual requirement for the Life Without Barriers independent observers to take an active role in the Australian Federal Police processes - - -

MR RUTHERFORD: That's correct.

45

MS BRANSON: - - - and indicates that that was a matter that needed to be discussed further. Was that done, do you know, Mr Rutherford?

MR RUTHERFORD: I'm not aware that that issue was pursued. We did have that email correspondence that we just went over and we, I guess, were considering it in the context of the working group but I'm not aware that that issue was further resolved.

5

MS BRANSON: Was it further considered with the Australian Federal Police?

MR RUTHERFORD: I will have to defer to the Australian Federal Police.

10 MS BRANSON: Do you know that, Mr Colvin?

MR COLVIN: No, I don't personally, Madam President.

15 MS BRANSON: At about this time was it drawn to your attention by anyone that Life Without Barriers had this limited contractual responsibility?

MR COLVIN: Me personally or the AFP, madam?

MS BRANSON: AFP?

20

MR COLVIN: Not in there, no.

25 MS BRANSON: If you had become aware of it, you would have to have become concerned at least, wouldn't you, about the validity of the adult consent that you were obtaining under the Crimes Act?

MR COLVIN: I think that's right, yes.

30 MS BRANSON: Thank you. If we go on to document 27 which is another meeting brief. It highlights again I think the high political interest in this topic at this time which is April 2011. Do we all agree about that? Do you, Mr Anderson?

MR ANDERSON: Yes, an ongoing media interest.

35 MS BRANSON: And for that reason ongoing ministerial interest?

40 MR ANDERSON: This particular meeting brief is for a regular discussion that we have with senior officials from jurisdictions where people smuggling crew prosecutions are occurring. It doesn't actually involve ministers.

40

MS BRANSON: I think we will pass over its contents at the moment. Let's go to the document which I think you will find behind number 28 and there's an email from you, Mr Rutherford, to Tony Sheehan who I think was your superior, is that right, at the time?

45

MR RUTHERFORD: He is the deputy secretary of the National Security and Criminal Justice Group.

MS BRANSON: So he was then and he is now; is that right?

MR RUTHERFORD: That's correct.

5 MS BRANSON: And you alert him to the fact that the Australian Federal Police might want to contact him about people smuggling crew issues, and in particular that Mr Jabbour had suggested that defendants be bailed. Is that right?

MR RUTHERFORD: That's correct.

10

MS BRANSON: You advised on this day, 7 April, that the Attorney-General's Department hadn't been consulted about the proposal and you had advised the Australian Federal Police that the Attorney-General's Department didn't support it. Is that right?

15

MR RUTHERFORD: In summary, we were aware of the points that Mr De Crespigny had made in the preceding email exposing the risks of that potential approach. I noted to Mr Sheehan that we had not been consulted about that and suggested that it be – the matter be elevated as a result of those potential risks and that was the purpose of the email.

20

MS BRANSON: I know that you got formal advice from OIL a little bit later, I think you got that on 2 May. You got informal advice from them earlier than the formal advice, didn't you?

25

MR RUTHERFORD: There were discussions back and forwards with OIL.

MS BRANSON: Yes. When do you – do you remember when you got the informal advice from OIL?

30

MR RUTHERFORD: I will have to take it on notice specifically. We went back and forwards a few times.

MS BRANSON: I think it might have been 8 April, that is the day after this email.

35

But the day that you sent the email to Ryan Kennedy, you wouldn't, I suppose, remember whether you saw that – or you had that informal advice before or after you sent that email of 8 April?

MR RUTHERFORD: I would have to take that on notice. I mean, these were issues that we were discussing with the Office of International Law and at the same time with the AFP and DPP and DIAC.

40

MS BRANSON: So at about this time - - -

45 MR RUTHERFORD: At about this time.

MS BRANSON: - - - that you were talking to OIL about it?

MR RUTHERFORD: Correct.

MS BRANSON: Had they alerted you to the provisions of the Convention on the Rights of the Child and in particular the requirement that children be detained only as
5 a last resort and then as a last option and for the shortest time possible?

MR RUTHERFORD: We were aware generally about that obligation. We were seeking specific news from the Office of International Law about the application to a situation like this where the Commonwealth position is that these people have been
10 charged as adults and they're making a claim to be minors, and it's a somewhat unique position to be in in terms of the Convention on the Rights of the Child obligations.

MS BRANSON: Did it strike you as slightly ironic that it might be the Attorney-General's Department, that is the department whose minister is responsible for the Convention on the Rights of the Child to stand out in opposition to bail for people who might be children when it was being urged by the Australian Federal Police and the Commonwealth Director of Public Prosecutions?

MR RUTHERFORD: In view of the risks that Mr De Crespigny had indicated, they were far more ranging than just about the cohort that were claiming to be minors.

MS BRANSON: So the answer is it didn't strike you as being particularly ironic?

MR RUTHERFORD: No.

MS BRANSON: No. We then have a Commonwealth Director of Public Prosecutions document sent to you, Mr De Crespigny, on 13 April 2011. And just to summarise – do you have that document, Mr De Crespigny?
30

MR DE CRESPIGNY: Yes, Madam President.

MS BRANSON: Would you mind perhaps coming nearer a recording microphone? Now, this came to you from one of your officers in the Melbourne office; is that
35 right?

MR DE CRESPIGNY: Madam President, Andrea Pavleka at that time was in charge of the people smuggling area. She is the same level as I am in the Melbourne office.
40

MS BRANSON: Sorry, I missed that last part. You will have to speak up a little?

MR DE CRESPIGNY: She is the same level as I am. She is a senior assistant director.
45

MS BRANSON: But based in the Melbourne office?

MR DE CRESPIGNY: Mm.

MS BRANSON: Had the Melbourne office just started to be involved in the prosecution of people smuggling cases particularly for people who said they were children?
5

MR DE CRESPIGNY: I think that is the case. I'm not exactly certain when the first referrals into Melbourne came but certainly these were early cases.

10 MS BRANSON: So might she have been a person who was able to bring a relatively fresh mind to this issue because she was in Melbourne and Melbourne had only just started to deal with cases of this kind?

15 MR DE CRESPIGNY: Andrea had in actual fact been – because we were aware of the possibility of matters being referred to the Melbourne office. As I mentioned earlier, she took part in that meeting on 26 October 2010 so she had been in actual fact involved in part of the discussions for some time.

20 MS BRANSON: Well, whether or not she had been earlier involved, by this stage she was pretty concerned about the evidence being called from Dr Low, wasn't she? If you look at paragraph 13 of the paper, she had hit upon that statistic of 50 per cent at the age of 19 and thought through what it might mean.

25 MR DE CRESPIGNY: I wasn't exactly clear at that time and my understanding was that what she wanted was clarification from Dr Low and they had discussions with Dr Low to get clarification. But I'm – my best recollection at the time was I didn't understand that as referring to the average. I understand why from your perspective looking at it now, you may, but that wasn't my understanding at the time.

30 MS BRANSON: Well, it does say:

35 *Does the AFP together with the DPP need to meet urgently with Dr Low to clarify with him that there is a fifty-fifty likelihood of someone with a fused wrist bone being over – under 19. If this is the case then the line that has been drawn, with the AFP arresting persons who are over 19 and deporting those who are under, may well be illusory as the likelihood of either is simply the same.*

40 It suggests a certain degree of cynicism about the value of calling that evidence, doesn't it?

45 MR DE CRESPIGNY: I certainly understand that she wanted clarification and our Melbourne office had, I believe, further contact with Dr Low. So – and I don't recall them expressing a concern after they had that further contact.

MS BRANSON: There's a reference in paragraph 6 to the development of a template statement that the Australian Federal Police are developing for Dr Low. Dr

Colvin, do you know anything about the Australian Federal Police developing a template statement for Dr Low?

5 MR COLVIN: Madam President, it wouldn't surprise me that we had a statement that was standard in terms of form and the type of content that Dr Low needed to satisfy the court. I wouldn't want to draw an inference as to the template in terms of we are telling him what to put in his statement.

10 MS BRANSON: Do we have the documentation about developing – where the AFP currently developed a template for Dr Low?

15 MR COLVIN: No. Let me just – no, I mean, I'm getting blank looks, Madam President, about us developing a template statement for him, other than what I have said that it wouldn't surprise me that we certainly have certain things we need him to cover. We can consult and get back to you, Madam President.

20 MS BRANSON: It certainly looks – sorry, it certainly appears, doesn't it, to confirm what you told me earlier that by this stage the Australian Federal Police is really only looking to Dr Low?

MR COLVIN: Well, I think that's fair. We're developing a statement of what needs to be covered and it's Dr Low that we're using on almost every case, yes.

25 MS BRANSON: You had identified by this time, as we have already discussed, that there was fairly wide criticism of Dr Low's evidence or at least of the methodology being used by Dr - - -

MR COLVIN: A criticism of the methodology, yes.

30 MS BRANSON: Methodology, yes. There hadn't ever been criticism of his capacity to read a wrist X-ray, as I understand the document. No one said, "Well, you say it looks like a mature wrist X-ray and it's not a mature wrist X-ray." I don't think we have any cases like that, do we?

35 MR COLVIN: Not to my knowledge, Madam President, no. But I may be – I may stand corrected. I can't speak for every single case.

40 MS BRANSON: So the criticism was likely to be around how informative a mature wrist X-ray is?

MR COLVIN: How much weight can be given to that process, yes.

45 MS BRANSON: Well, we're talking really about what information you can deduce, that is, it gets back to what is the probability of someone having a mature wrist X-ray at a particular age.

MR COLVIN: That's right. I would agree with that, yes.

MS BRANSON: And you have seen cases in which those who took the X-ray and read it had given a different age from that subsequently given by Dr Low?

5 MR COLVIN: So the initial imaging analysis may be different to Dr Low's final expert evidence, yes.

MS BRANSON: But not because they took a different view about which plate in the Atlas was the relevant plate to look at but because they were giving different estimates of what could be deduced from looking at that plate?
10

MR COLVIN: I wouldn't want to presuppose what was in the minds of the people who did that. I'm not - - -

MS BRANSON: You don't need to because the reports tell you whether it's a report on a mature X-ray or a report on a wrist that is not mature.
15

MR COLVIN: I will take it as a given, Madam President. I don't have the reports and I haven't seen them personally myself.

MS BRANSON: You would be aware of that, wouldn't you, Mr Jabbour? That there weren't cases where one expert was saying, "This wrist is not mature," and Dr Low was saying it was. They were cases in which the doctors were in agreement that the wrist was mature but they were giving different assessments of the likelihood of being over the age of 18?
20

25 MR JABBOUR: That's correct. I am aware of some instances where that occurred, yes.

MS BRANSON: Now, if the difference wasn't about reading the X-ray, it had to be about - come from a different basis. Did it occur to you, Dr Jabbour, at that time that the difference had to be about the statistics?
30

MR JABBOUR: No, it was more for mine the expertise of the individuals concerned. Dr Low was in our view and had been accepted by the courts as an expert. Others in the industry by their own admissions were not experts with this process and procedure so we didn't - - -
35

MS BRANSON: But we have already agreed, Mr Jabbour, that we're talking about instances in which both medical experts, both Dr Low and another one agreed on the radiology, that is, that the wrist was mature.
40

MR JABBOUR: Yes.

MS BRANSON: And the issue was what did that tell you?
45

MR JABBOUR: So then it's one for interpretation, yes, I would agree.

MS BRANSON: Sorry, my point is that it can't be of interpretation of the wrist X-ray because they have taken the same view of the wrist X-ray.

MR JABBOUR: I understand. So it's an interpretation of the - - -

5

MS BRANSON: The difference has to be on the statistics, that is, what you can deduce.

MR [transcript unclear]: Of the Greulich and Pyle.

10

MR JABBOUR: Yes, correct.

MS BRANSON: Yes.

15 MR JABBOUR: Yes, I would agree with that. How they interpreted the table?

MS BRANSON: Yes, that's right.

MR JABBOUR: Correct, yes.

20

MS BRANSON: You understood that to be a matter of statistics, didn't you?

MR JABBOUR: Yes.

25 MS BRANSON: You were alert, were you not, that when asked in court about what experience he had in statistics, Dr Low primarily called in aid his high school education?

MR JABBOUR: From a statistical purpose, yes – basis, yes.

30

MS BRANSON: So we've got a statistical problem, we know that Dr Low is not a qualified at tertiary level statistician. Did anyone think to ask a statistician what they thought of the procedure that – of the quality of the reports of Dr Low on statistics?

35 MR JABBOUR: No, we did not.

MS BRANSON: Did the Commonwealth Director of Public Prosecutions ever think to get a statistician to comment on the reports of Dr Low?

40 MR [transcript unclear]: Not to my knowledge and I will be corrected if I - - -

MS BRANSON: Mr De Crespigny?

45 MR DE CRESPIGNY: Madam President, after the case R v Idris and W – and I think you have been provided with the material – we started the process of looking at a large number of experts both medical statisticians and radiographers.

MS BRANSON: With what outcomes, Mr De Crespigny?

MR DE CRESPIGNY: We collected a comprehensive series of names. The issue became whether we would approach them or whether it was more appropriate for the
5 AFP. We had discussions with the AFP about that. But your Inquiry then indicated that you were talking to medical experts as well and that was one reason why we didn't continue proceeding with that. As well we felt that it was better if a person who had some scientific training could work out who the most appropriate expert to go to was, and should undertake that task so somebody would be within the
10 Commonwealth who could work out which was the best expert to go to.

MS BRANSON: Thank you. Mr Rutherford, I should have asked you before, the advice that you received from OIL on 12 April, dated 12 April – sorry, your request was 12 April and you received the advice on 2 May, what prompted the request to
15 OIL?

MR RUTHERFORD: I think I have indicated, Madam President, that as these issues were being discussed, we were having discussions informally with OIL just to be clear of the application of the Convention on the Rights of the Child obligation in
20 this situation in which we weren't sure how the Convention obligations could be applied to where we have a cohort of claimed minors who are charged as adults and that's what prompted the request for advice.

MS BRANSON: Thank you. If we go – I'm going to jump a few documents just to move along, the document that I think is 35. It's the 27 May 2011 document. It's a minister's office brief for the Attorney-General and the Minister for Home Affairs and Justice. Have you got that, Mr Anderson?

MR ANDERSON: Mm.

MS BRANSON: Yes. We see again reference to media articles and I make the same observation I made before. Am I right in thinking that the first of the talking point suggests a perception of a need for the ministers to be seen to be firm on people smuggling:
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Law enforcement authorities investigate all persons suspected of being involved in people smuggling including minors.

MR ANDERSON: I'm sorry, I just think there's two document 35 - - -
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MS BRANSON: I'm looking at a Minister's office brief, 5507.

MR ANDERSON: Yes, there's two document 35s so I'm just calling it the second one. Yes, you're looking at the one which starts off, "Minister's Brief, 5507. Issue"
45 and then "Talking points". Two paragraphs under "Issue" and - - -

MS BRANSON: Yes, that's right. And the first talking point is building up a notion of being firm on people smugglers I think, isn't it?

MR ANDERSON: Well, I don't think that's a factual statement.

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MS BRANSON: But nonetheless listed to the top of the list because of an interest in being seen to be firm on people smugglers?

MR ANDERSON: If it's a factual statement and often with the media, there's a need to ensure that factual material is clearly set out as well.

10

MS BRANSON: If you go to the next page that is 2 of 12, do you see the first dot point:

15 *Where all available information indicates the person is unlikely to be a minor, the person is charged and brought before the court as an adult.*

MR ANDERSON: Yes.

20 MS BRANSON: As a lawyer do you see that suggests a reversal of the usual rule, the benefit of the doubt going the wrong way or at least a failure to give the benefit of the doubt to the young person?

MR ANDERSON: I can see that, yes.

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MS BRANSON: Is that your understanding of the fact at the time that that was the procedure?

MR ANDERSON: At the time, the procedure as we understood it was that the AFP and DPP would have regard to all available information to decide whether in fact a person was a minor or not. If they believed the person was not a minor then they would proceed with charging them.

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MS BRANSON: Well, we're talking here about "unlikely to be a minor" where we had right back in 2001 the statement about benefits of doubt I think being given to the person who claimed to be a minor, didn't we? This does look like turning it around the other way, doesn't it?

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MR ANDERSON: It does. I agree, it's not a felicitous use of words in terms of unlikely.

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MS BRANSON: And then I don't want to go again through things that we have discussed before. Let's go forward to a document which I think is 36 in your papers. It's the letter from Mark McCarthy, barrister at law, directed to the Deputy Director of the Commonwealth Director of Public Prosecutions in Brisbane, Mr Hunter. You will see, Mr Craigie, that Mr McCarthy provides here to the Commonwealth Director of Public Prosecutions or at least your office in Brisbane two reports by Professor Sir

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Albert Aynsley-Green and one report by Professor Timothy Cole. I think you now know who those people are, do you?

MR CRAIGIE: Indeed.

5

MS BRANSON: Yes. How long after 28 June 2011 did you learn that the Commonwealth Director of Public Prosecutions Office was in possession of these papers?

10 MR CRAIGIE: I have to say I have no independent memory of this case.

MS BRANSON: That's not particularly my question.

MR CRAIGIE: No.

15

MS BRANSON: It's the fact that you had Professor Cole and Professor Sir Albert Aynsley-Green's papers.

MR CRAIGIE: Look, I can't tell you. Frankly it's not something I - - -

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MS BRANSON: Would you expect to learn promptly if your office had been provided with papers of this kind?

MR CRAIGIE: It would depend whether the matter generally came to me, whether there was a reason for the matter to come to me generally. But there's a great body of documentation that flows in and out of the office.

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MS BRANSON: I can understand that but, Mr Craigie, you understand I'm concentrating my mind still on the obligation of the Director of Public Prosecutions to disclose scientific material. You would have heard my exchange with Mr Jabbour that the real dispute about wrist X-ray evidence in reality came down to an issue of statistics.

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MR CRAIGIE: Yes.

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MS BRANSON: Have you ever seen Professor Cole's CV?

MR CRAIGIE: To the extent that I have read the evidence that he gave before you, I'm aware of Professor Cole's standing.

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MS BRANSON: Well, he is a professor of medical statistics. He has a BPhil, which we call a PhD I think here, in statistics from Oxford. His professional history indicates a long involvement with issues concerning the growth of children. He has published I think over 550 publications, 380 in peer review journals and a good number of them around age assessment; a much more modest number but an appreciable number about age assessments in children. So he is not only an eminent statistician but he is an eminent biostatistician and his area of interest is the maturity

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and development of children. His views might be thought to carry particular weight in a debate about statistics so far as the reading of wrist X-rays is concerned. Would you have expected, since you headed an office that was prosecuting people suspected of people smuggling where age determination was an issue, to draw to your attention
5 that they had a report from such a person?

MR CRAIGIE: Not necessarily.

MS BRANSON: Could I just add before you finish your answer, his report says that
10 Dr Low is wrong, not that it's a matter of difference of expert opinion. He just says he is wrong.

MR CRAIGIE: I would expect the view that was taken in the Brisbane office – and I have no independent recollection of this coming before me and there would be,
15 unless a number of things triggered it coming up to the director, it wouldn't – I would expect that the Brisbane office would take the view that if there was going to be a contest of experts, it would be contested before the court if in fact the matter went forward. And that would not necessarily call for bringing it to the attention of the director.

20 MS BRANSON: Well, the Commonwealth was prosecuting suspects of people smuggling who said they were children all around the country at this time.

MR CRAIGIE: Yes.
25

MS BRANSON: Didn't you think prosecutors ought to know of the existence of Professor Cole's views since it had been drawn to the attention of the Brisbane office? Now, I know you didn't know about it but theoretically if your office had such a paper, you would want to make sure that everybody knew about it, wouldn't
30 you?

MR DE CRESPIGNY: Madam President?

MS BRANSON: Yes, Mr De Crespigny?
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MR DE CRESPIGNY: Madam President, my recollection is that the paper was – the two papers were separated and I don't have a particular recollection of this matter. Similar reports were provided in another matter in Brisbane and that matter went to the director and was discontinued on a number of grounds. It noted that we
40 were receiving expert opinions which were challenging Dr Low's evidence, and I think you got a document later on where I brought that to the attention of the senior officials' committee meeting.

MS BRANSON: I do.
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MR DE CRESPIGNY: What we did in relation to that, Madam President, is that our prosecutors and I know at least in one case independent counsel, had conferences with Dr Low

and discussed – which I understand is the normal process – and discussed alternate opinions with him and in both cases, that was in Brisbane and in Perth, they were satisfied with the explanations which he gave.

5 MS BRANSON: So having heard from someone of Professor Cole's qualifications that Dr Low didn't understand statistics, you thought to reassure yourself by speaking to Dr Low. Is that right?

10 MR DE CRESPIGNY: Madam President, the matters were discussed with Dr Low and, yes, they were - - -

MS BRANSON: And you were satisfied that he knew more about statistics than Professor Cole?

15 MR DE CRESPIGNY: We were satisfied with the explanation which he gave.

MS BRANSON: You didn't think it would be appropriate to ask somebody else, an independent person to help you understand?

20 MR DE CRESPIGNY: We regarded Dr Low as an independent person, Madam President.

25 MS BRANSON: But you knew he wasn't a statistician and the criticism was a criticism about his statistics, not his medical knowledge.

MR DE CRESPIGNY: Madam President, my understanding was in actual fact he referred to statistics and he had done it at university and my - - -

30 MS BRANSON: Well, I think he spoke of doing an introductory course early in his studies, yes. I think that's about the same level as me, Mr De Crespigny. It's not a very advanced level.

35 MR DE CRESPIGNY: Madam President, our understanding from Dr Low was that the statistics were complicated. I can only tell you what we did at the time and what we believed was the correct thing at that time to do.

MS BRANSON: Were instructions issued to your prosecutors that they were to disclose Professor Cole's report to all defence where age was in dispute?

40 MR DE CRESPIGNY: No, not - - -

MS BRANSON: And in fact it wasn't done, was it, Mr De Crespigny?

45 MR DE CRESPIGNY: No. I was aware though that it had been circulated within the defence community.

MS BRANSON: Did you think that satisfied the obligation of your director to ensure that adequate disclosure was made to defence counsel?

5 MR DE CRESPIGNY: Madam President, I think that the director has already indicated we didn't view that as part of our disclosure obligation at that time.

MS BRANSON: Is there anything you want to add to that, Mr Craigie?

10 MR CRAIGIE: Only to indicate, as I say, I had no independent memory of this matter and it would very much depend on what was considered necessary to inform me for the purposes of considering a recommendation to terminate the proceedings if – the report may or may not have been within that file.

15 MS BRANSON: I'm not assuming you knew of it, Mr Craigie, because you have told me that you didn't know of it at the time. But Mr De Crespigny tells me that he knew of it. Did you read it, Mr De Crespigny?

MR DE CRESPIGNY: I read Dr Cole's report, yes.

20 MS BRANSON: Professor Cole's report, yes.

MR DE CRESPIGNY: Sorry, Professor Cole.

25 MS BRANSON: And what about Professor Sir Albert Aynsley Green?

MR DE CRESPIGNY: My recollection is that I read that as well.

30 MS BRANSON: You observed that he was an eminent paediatrician and an endocrinologist? You understood that - - -

MR DE CRESPIGNY: Madam President, that's on the face of the document.

35 MS BRANSON: Yes, and he had been the Children's Commissioner in the United Kingdom so he was well familiar with the area, and you were aware that endocrinology was at the base of maturity, didn't you? That is, it's a hormonal thing.

MR DE CRESPIGNY: Madam President, I can't recollect what my knowledge of the word "endocrinology" was at that time.

40 MS BRANSON: Was then, all right.

MR DE CRESPIGNY: It may - - -

45 MS BRANSON: You now understand that?

MR DE CRESPIGNY: It may have been there on the face of the report.

MS BRANSON: All right, thank you. Sorry, I observe it's 5 o'clock and we will lose our transcript provider so we should stop now. Thank you all for your assistance. We will finish these documents in the morning, I hope quite quickly. We will then probably turn to some of the individual cases just to illustrate – or to see
5 illustrations of how the process worked out in practice and we will then look at the submission that was put to the Australian Human Rights Commission to assist it with its Inquiry, but thank you all very much for being here today. Mr Anderson, you have an officer who is concerned only with criminal justice certificates, I think.

10 MR ANDERSON: That's correct.

MS BRANSON: It might be convenient, I've got only a very few questions to ask about that. Would it do you think be convenient for your department if she was here first thing in the morning and we dealt with that straightaway?

15 MR ANDERSON: That would be very convenient.

MS BRANSON: All right. Well, perhaps we will do – if everyone happy we will do that. All right. Thank you very much. And we propose to lock the courtroom so
20 that everyone may leave their papers in the courtroom overnight. I know it can be very difficult carrying heavy things back and forth. I think it's a matter for you whether you wish to leave computers but we will secure it to the extent that we – it will be as secure as a Federal Court building in Canberra can be. All right, thank you very much and I will see you all again in the morning.

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MATTER ADJOURNED at 5.03 pm UNTIL FRIDAY, 20 MAY 2012