

12 July 2012

The Hon Catherine Branson QC
President
Australian Human Rights Commission
Level 3, 175 Pitt Street
SYDNEY NSW 2000

Dear President

Australian Human Rights Commission (AHRC) Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children (the Inquiry)

I refer to your letters to Commissioner Negus dated 9 and 10 July 2012 inviting the Australian Federal Police (AFP) to respond to the draft Inquiry report; in particular, to any of the findings or recommendations contained within the final draft. The AFP acknowledges that any such response would be published as an Appendix in the published report.

As I stated at your public hearing, I believe the AFP has acted at all times in good faith in relation to investigations of people smuggling crew. The AFP expects the highest integrity and ethics of its officers, individually and as an organisation, and shares your objective to ensure that the human rights of all individuals, particularly minors, are respected.

In terms of action the AFP has taken in response to the Inquiry, I can advise that the AFP will ensure that aide memoires relevant to the investigation of suspected people smuggling crew incorporate additional advice to address Recommendation 8. The AFP will consider its response to the report in full, once the final report is provided to the Attorney-General.

The AFP's role is to enforce Commonwealth criminal law and to protect Commonwealth and national interests from crime in Australia and overseas. Through the AFP Ministerial Direction, pursuant to subsection 37(2) of the *Australian Federal Police Act 1979*, the AFP is required to effectively contribute to Australia's border management and security, particularly protecting Australia from people smuggling. In achieving this priority, the AFP participates in whole-of-government approaches towards people smuggling.

In recognition of the seriousness of people smuggling offences and the associated penalties, it is incumbent upon the AFP to gather sufficient admissible evidence before charges are laid.

Over the period subject to the Inquiry, the AFP has investigated people smuggling ventures associated with the arrival of 255 Suspect Irregular Entry Vessels (SIEV). The SIEV arrivals resulted in the interception of over 12,800 Potential Irregular Immigrants and 634 suspected people smuggling crew, 180 of whom claimed to be minors.

I would like to acknowledge that following a review of the final draft, it is evident that the AHRC has taken into account major elements of the AFP's response. While I do not propose to re-state the material we provided in our comprehensive response to you of 6 July 2012, I also remain concerned that the report does not give adequate consideration of, or balance to, some aspects of that response.

Overall, the AFP assesses that Chapters 5 and 6 of the report, dealing with age assessment interviews and documentary evidence of age from Indonesia, have not appropriately reflected information made available to the Commission by the AFP. Specifically, the Chapters place an over-emphasis on the reliability of both age assessment interviews and Indonesian documentary evidence, despite evidence questioning their probative value. In this regard, the AFP believes that the Chapters do not present a balanced reflection of the material available to the Inquiry.

Specifically, the Inquiry's report pays particular attention to bio-medical age assessment methodologies; age determination processes and the investigative practices of the AFP. It is within these areas of the report that the AFP finds the Inquiry has given insufficient consideration to material submitted by the AFP to the Inquiry. Particular areas of concern for the AFP include findings regarding:

- AFP efforts to obtain documentary evidence;
- AFP approach to the use of age assessment interviews;
- Appropriate consent for wrist x-rays; and
- The use of wrist x-ray analysis as evidence a person was over the age of 18 years, despite concerns about its credibility.

Documentary evidence

The report finds that the AFP made inadequate efforts to obtain documentary evidence of age from Indonesia however, recognises it is not always possible to obtain credible documents that establish an individual's age. In submissions to the Inquiry, the AFP presented evidence of its long standing difficulty in obtaining credible documentary evidence of age; case examples of fraudulent identity documents and expert opinions from a Professor of Anthropology of the Australian National University and a Professor (Director of Asian Law Centre) of the University of Melbourne.

The expert opinions of the Professors demonstrate that identity documentation cannot be relied upon. The AFP does not believe that sufficient consideration is given to the impact these factors should have in forming an adequate conclusion for this report.

Age assessment interviews

The report finds that it is disappointing that the value of the Department of Immigration and Citizenship (DIAC) focused age assessment interviews (in 2010) were largely disregarded by the AFP. In mid-2011 following AFP participation in a whole-of-government working group on age assessment, the AFP sought expert opinions on the reliability and feasibility of conducting focused age assessment interviews. The expert reports of the Professors (above) were provided to the Commission in the AFP's response to the draft report on 6 July 2012. These reports question the value and credibility of age assessment interviews. The AFP is concerned that the report does not include any reference to the Professors' critique of the usefulness of DIAC's age assessment interviews, including in sections where

the Inquiry's findings support the DIAC process and the Inquiry's findings are substantially based.

The AFP believes that these expert opinions support the view that there remains no categorical way of establishing age, in the absence of reliable official documentation. The AFP believes that no greater weight can be placed on the utility of age assessment interviews, than on any other available technique to assist in determining age. Adequate consideration in the findings of the report must be given to the advice provided by the Professor of Anthropology of the Australian National University and the Professor (Director of Asian Law Centre) of the University of Melbourne in this regard.

Consent

The report finds that the AFP in some, and possibly all, cases involving the use of wrist x-rays, proceeded without the required consents having been obtained. The report also argues that independent persons present during consent procedures did not act in the interests of the individual, therefore rendering consent invalid. The AFP believes that this finding is not supported by evidence before the Inquiry, or the report. Indeed, evidence before the Inquiry established only one case where judicial proceedings found that consent was not properly obtained¹, and accepts that in one other case consent may not have been appropriately obtained². The AFP does not believe that this evidence supports such a broad finding.

Wrist x-rays

The report finds that the AFP continued to use wrist x-ray analysis despite questions being raised regarding its usefulness as an indicator of age. The AFP does not believe that this finding gives adequate consideration to the material submitted to the Inquiry.

Views about the utility of wrist x-rays in the investigation of people smuggling cases has changed over time, and continue to be contested. As there is no categorical way of establishing age, in the absence of reliable official documentation proving date of birth, this provides significant challenges for the AFP. The AFP continued to utilise wrist x-rays as an indicator of age on the information and advice provided to the AFP, that they remained the most reliable means of age determination available.

The AFP has, at all times, endeavoured to cooperate with the Commission, and this Inquiry. As I have stated earlier, we share your concerns to ensure that the human rights of all individuals, but particularly minors, are respected. To this end I trust that the material provided above, coupled with the earlier submission and evidence of the AFP, has assisted you in this Inquiry. We look forward to the final report being made available.

Yours sincerely



Andrew Colvin
Deputy Commissioner Operations

¹ ULT055

² FLE048