



### Age Determination in People Smuggling Prosecutions

Instruction Number: 4

Last Updated: June 2015

#### General

1. This Practice Group Instruction ('PGI') supersedes Director's Litigation Instruction No. 2, issued 16 December 2013.
2. The prosecution of alleged people smuggling offences may raise the issue of whether or not the defendant is an adult or a juvenile. The issue impacts upon the decision to prosecute, the court before which the defendant is to be prosecuted and the application of the mandatory penalty provisions set out at section 236A and 236B of the *Migration Act 1958*.

#### Juveniles and People Smuggling Prosecutions

3. Prosecutors considering the issue of age determination in a people smuggling prosecution are to be informed by the *Prosecution Policy of the Commonwealth* and applicable and relevant legislation in the jurisdiction to which the matter has been referred.

#### Seeking Confirmation of a Claim to Be a Juvenile

4. Where a prosecutor is made aware that there is information that a defendant may claim to be a juvenile, but no formal claim has been made by the defendant's legal representatives, the prosecutor will write to the defendant's legal representative seeking confirmation as to whether age is an issue in the prosecution, and inform the court at the earliest opportunity that age may be in issue.

An example of information that a defendant may claim to be a juvenile is where the defendant gave a date of birth prior to charging that would indicate that he was a juvenile at the time of the offence.

#### Bail

5. Since 28 June 2011, the CDPP's position has been not to oppose bail for defendants claiming to be juveniles who are charged with people smuggling offences.
6. If a defendant claims that they are a juvenile, the prosecutor will write to the defendant's legal representative informing them that the prosecution will not oppose bail for the defendant and, if no application is made, consideration will be given to raising this matter with the Court.
7. If bail is granted, the defendant, being an unlawful non-citizen, will be released into immigration custody.
8. If the prosecution obtains advance notice of a bail application by a person claiming to be juvenile, the prosecution will contact the Department of Immigration and Border Protection ('DIBP') to enable arrangements to be made for the defendant to be taken into DIBP detention if bail is granted.

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### Whether to Contest Age Claims

9. When a prosecutor is assessing material which is relevant to the age of the defendant, in determining whether to contest the defendant's claim to be a juvenile, considerations will include the following:
  - the court's need to be satisfied on the balance of probabilities that the defendant is an adult in order for the matter to be heard outside the Children's Court;
  - the benefit of the doubt should be afforded to the defendant in making an assessment of the material;
  - all evidence and other relevant material which is available to them, including all documentary evidence, whether or not it is admissible; and
  - any prior statements made by the defendant, whether or not they would be admissible.
10. Unless there is a concession on the record as to age, or documentary evidence supporting the defendant's claim to be a juvenile, it is unlikely that there will be sufficient material to contest an age determination hearing.
11. The Director will decide whether to contest a defendant's claim to be a juvenile.

### Request for documents and other evidence from the AFP

12. If a defendant makes a claim that they are a juvenile, the prosecutor will inform the Australian Federal Police ('AFP') immediately and request the AFP make inquiries in the defendant's country of origin for any documentary or other evidence that is relevant to establishing the defendant's age. In relation to documentary evidence, the inquiries should include evidence as to the authenticity and reliability of the information recorded in the document.
13. If the defendant's legal representatives provide documentary or other evidence relevant to the defendant's age this material will be provided promptly to the AFP with a request, when appropriate, that the AFP make inquiries regarding the authenticity and reliability of the information provided.
14. If a defendant makes a claim that they are a juvenile, consideration will be given as to whether a request to a foreign country for assistance in a criminal matter should be made. The decision as to whether the Attorney-General's Department ('AGD') should be approached to make such a request will involve consideration of the views and information from the AFP and the AGD.
15. If documentary or other evidence cannot be obtained by the AFP or by the Mutual Assistance process within a reasonable amount of time, the CDPP will consider the age claim of the defendant in accordance with paragraph 9 above without that evidence.
16. All material obtained relevant to the defendant's age is to be disclosed to the defendant's legal representatives in accordance with the CDPP's Statement on Prosecution Disclosure.

### Age Determination Hearing

17. Whilst noting the need for inquiries to be made to obtain documentation and information, prosecutors should seek to expedite an age determination hearing.
18. An age determination hearing is, in the normal course, a challenge to the jurisdiction of the Court. The CDPP accepts that a defendant may re-litigate the issue of age at a later stage of the proceedings, or prior to sentence. If the defendant seeks to have the issue of age re-litigated the matter should be listed for an age determination hearing.

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19. In conducting an age determination hearing, the CDPP has accepted that it bears the onus of proving on the balance of probabilities, taking into account the '*Briginshaw test*', that the defendant is an adult. Section 236D of the *Migration Act 1958* now provides that the prosecution bears the burden of proving, on the balance of probabilities, that the defendant was aged 18 or over at that time.
20. Prosecutors should seek to ensure as much as possible, that a Court hearing an age determination matter has before it all of the relevant material that may assist the Court in making the determination.

### Evidence

21. If a matter proceeds to an age determination hearing and the defendant seeks to:
  - call evidence from the defendant's family or other persons from the defendant's place of origin, whether in person, by audio or by audio visual link; and/or
  - the defendant seeks to call evidence to make admissible documents that the defendant wishes to tender during the hearing

the responsibility for making any arrangements to call such evidence will rest with the defendant's legal representatives. However, the CDPP will cooperate as much as it is reasonably able to do so with the defendant's legal representatives.

22. If a witness is unable to give evidence to the Court in person or by audio or audio visual link, or if a defendant is unable to call the necessary evidence to make a document admissible, then generally the CDPP will not dispute the admissibility of any affidavits from the defendant's family or from other persons from the defendant's place of origin that the defendant wishes to tender nor the admissibility of any documentary evidence the defendant wishes to tender. It may be appropriate for comment to be made about the weight the Court should give to any evidence.
23. The prosecutor may however dispute the admissibility of an affidavit or document; the information contained in the affidavit or document; call evidence or seek to cross-examine on the affidavit or document, if there are very cogent reasons for doing so.
24. Any decision to dispute the admissibility of such affidavits or documents should be discussed with the Practice Group Leader of the Human Exploitation and Border Protection ('HEBP') practice group, and, if necessary raised with the Director.

### Wrist x-rays

25. On 7 March 2013, the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* removed references to wrist x-rays as a prescribed age determination procedure.

### Review of Matters where the Defendant has made a claim to be a Juvenile

26. If a defendant makes a claim that they are a juvenile, the matter will be kept under review and consideration of age claims in accordance with paragraph 9 should be carried out promptly.
27. If further material in relation to age is provided after a decision has been made to continue a prosecution, the matter will be reconsidered in accordance with paragraph 9.
28. Should fresh material indicating that a defendant is a juvenile become available to the CDPP whilst the matter is on foot but after a Court has determined that the defendant is an adult, the matter will be reviewed in light of the fresh material.

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### Notification to the Director

29. The Director will be notified in a Minute of any matter where age is an issue, whether or not the defendant has raised the issue of age since the time of charging. The Minute should set out the evidence and material that supports the defendant being an adult and the evidence and material that supports the defendant being a juvenile.
30. The HEBP Practice Group Leader should be kept informed of developments in these matters as they occur.
31. As noted in paragraph 11, the decision to contest a defendant's claim to be a juvenile will be made by the Director.

### Liaison with Correctional Services

32. If a defendant makes a claim that they are a juvenile and that defendant is in custody, correctional services will be informed by the CDPP of the defendant's claimed age and should be provided with any material available to the CDPP in relation to the defendant's age.
33. If the defendant is not on bail, correctional services should be informed as soon as possible of a decision by the CDPP to discontinue a prosecution on the basis that the CDPP is not satisfied that the court would be likely to be satisfied on the balance of probabilities that the defendant was an adult and no exceptional circumstances apply (for example, significant involvement in a people smuggling venture or involvement in multiple ventures).

### Expeditious Trial

34. So far as is possible, the CDPP will seek to ensure the trial, including any age determination hearing, of a juvenile proceeds expeditiously.



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