

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Group 3

Question No. 51

Senator Seselja asked the following question at the hearing on 24 February 2014:

Senator SESELJA: How many prosecutions did not occur? Obviously, for this direction to apply, you would have to have a potential prosecution and then apply the test that you are not going to prosecute because there are a series of matters that you need to consider around whether the person fits a particular category. How many did not occur as a result of this direction being implemented?

Mr Bromwich: I know it was over 100 cases that were discontinued. I just want to get the precise figure, if I could.

Senator Brandis: I assume, Senator Seselja, that the number would be greater than 100, because the relevant question would be: how many cases were never commenced that would, in the ordinary course of events but for Attorney-General Roxon's directive, have otherwise been commenced?

Senator SESELJA: Correct. There must be some ability to gauge that number because, as I say, a test would have to be applied where a prosecution is not launched as a result of this direction. You would have to consider this direction and consider the circumstances of the individual.

Mr Bromwich: What happened was, when the direction was given, an assessment was carried out of existing prosecutions, and those matters that could not be continued in the application of that direction were discontinued. A number were continued in relation to lesser offences. Then, when it came to new matters coming through the door afterwards, they were measured against the direction, and from time to time a question came up for determination as to whether an exception to the direction applied—for example, whether someone was a repeat offender and so on—and, if the exception to the direction applied, then the prosecution would still be brought.

Senator SESELJA: So how many were discontinued?

Mr Bromwich: I will have to take that on notice. I do have the number here somewhere; I just cannot lay my hands on it. But it was something in excess of 100.

Senator SESELJA: Okay—in excess of 100, and you will get us that number. Do you have the ability to tell us how many were not launched as a result of this direction being applied?

Mr Bromwich: I will have to take that on notice. I do not know how readily that can be ascertained, because it becomes like any other criterion in deciding to prosecute. And we do not necessarily see all the matters at the higher levels where there is a decision not to prosecute any more than we see all the matters where there is not sufficient evidence. You have certain parameters—

Senator SESELJA: So this direction could then be applied at a low level, where a decision is just taken: 'Well, this person fits the exception—

Mr Bromwich: That is right.

Senator SESELJA: given by the Attorney-General, and therefore no prosecution.' So that would not necessarily be recorded anywhere?

Mr Bromwich: It is a question of whether it fits within the direction. If it fits within the direction, then it would not be prosecuted under the terms of the section, 233C, to which the direction applied. It would only come to me, for example, if approval was being sought to prosecute despite the direction by reason of exception to the direction, within its own terms, applying.

Senator SESELJA: It would come to you. But who is making that decision, then, if it is not coming to you?

Mr Bromwich: At a case officer level. I am not saying we did not measure it; I am saying I am not sure if we did or not.

Senator SESELJA: Sure. Is it possible to check whether that is ascertainable, whether that information exists?

Mr Bromwich: I will take that as a question on notice as to cases that were not prosecuted but could have been but for the direction, and I will ascertain whether we have that answer or not.

The answer to the honourable senator's question is as follows:

The answers given to the questions at the Additional Senate Estimates hearing on 24 February require some background, expansion and explanation in order to answer the questions taken on notice.

Most people smuggling prosecutions are commenced by way of arrest by the Australian Federal Police and briefs of evidence referred to the CDPP for prosecution in accordance with the *Prosecution Policy of the Commonwealth*.

On 27 August 2012, the then Attorney-General issued a Direction pursuant to section 8 of the *Director of Public Prosecutions Act 1983* to the CDPP. This Direction related to the prosecution of criminal offences pursuant to sections 233A and 233C of the *Migration Act 1958*. Section 233A provides for the offence of people smuggling. The maximum penalty is imprisonment for 10 years or 1,000 penalty units, or both. There is no mandatory minimum penalty if a person is convicted of an offence pursuant to section 233A.

Section 233C provides for the aggravated offence of smuggling a group of at least 5 people. The maximum penalty is imprisonment for 20 years or 2,000 penalty units, or both.

Pursuant to section 236B, there is a mandatory minimum penalty if a person is convicted of an offence pursuant to section 233C of at least 5 years imprisonment with a non-parole period of at least 3 years imprisonment or, if the conviction is for a repeat offence, at least 8 years imprisonment with a non-parole period of at least 5 years imprisonment.

The Direction provided that the Director must not institute, carry on or continue to carry on a prosecution for an offence under section 233C of the *Migration Act 1958* against a person who was a member of the crew on a vessel involved in the bringing or coming, or entry or proposed entry, of unlawful non-citizens to Australia unless the Director was satisfied that:

- (a) the person had committed a repeat offence or may have been convicted of a repeat offence in the same proceedings; or
- (b) the person's role in the people smuggling venture extended beyond that of a crew member; or
- (c) a death occurred in relation to the people smuggling venture.

The Direction further provided that in relation to members of a crew, the Director must consider instituting, carrying on or continuing to carry on a prosecution against the person pursuant to section 233A of the *Migration Act 1958* in accordance with the *Prosecution Policy of the Commonwealth*.

In accordance with this Direction, all prosecutions that were on foot pursuant to section 233C of the *Migration Act 1958* were re-assessed in accordance with the *Prosecution Policy of the Commonwealth* for possible charges pursuant to section 233A.

This process of re-assessment involved determining if prosecutions should continue pursuant to section 233C or pursuant to section 233A in accordance with the Direction, or should be discontinued altogether. In many matters, the reassessment necessarily involved careful consideration of the public interest factors listed in paragraphs 2.9 and 2.10 of the *Prosecution Policy* as to whether the prosecution should continue, particularly in light of the time the defendant had already spent in detention and/or custody as compared with the sentence a court was likely to impose if the prosecution was otherwise able to proceed in accordance with the Direction.

There were 101 matters on foot pursuant to section 233C of the *Migration Act 1958* when the Direction was given on 27 August 2012. Of these 101 matters:-

- 36 prosecutions were discontinued altogether, 2 of those by way of directed acquittals;
- 65 prosecutions were continued, 58 pursuant to section 233A, 5 pursuant to section 233C and 2 pursuant to section 233(1)(a).

The 27 August 2012 Direction was revoked by a further Direction made by the current Attorney-General on 4 March 2014. A copy of each of these Directions is attached.