

# A last resort?



National Inquiry into Children  
in Immigration Detention

**April 2004**



***Human Rights and  
Equal Opportunity Commission***

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*No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*

Convention on the Rights  
of the Child, article 37(b)





The Hon Philip Ruddock MP  
Attorney-General  
Parliament House  
Canberra ACT 2600

Dear Attorney

I am pleased to present *A last resort?*, the Commission's report of the National Inquiry into Children in Immigration Detention.

The report is furnished to you under the functions and powers conferred by sections 11(1)(e), 11(1)(f)(ii), 11(1)(g), 11(1)(j), 11(1)(k) and 13(2) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). As such, it is subject to the tabling requirements in section 46 of that Act.

I conducted the Inquiry with the assistance of Dr Robin Sullivan and Professor Trang Thomas pursuant to delegations from the Commission and the President of the Commission.

Yours sincerely

Dr Sev Ozdowski OAM  
**Human Rights Commissioner**  
April 2004



# Abbreviations and Acronyms

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Abbreviation	Term
AAIMH	Australian Association for Infant Mental Health
ACM	Australasian Correctional Management Pty Limited
AFP	Australian Federal Police
Beijing Rules	<i>United Nations Standard Minimum Rules for the Administration of Juvenile Justice</i>
Body of Principles	<i>United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment</i>
BVE	Bridging Visa E
CAMHS	Child and Adolescent Mental Health Service, South Australia
CARAD	Coalition Assisting Refugees After Detention
CAT	<i>Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment</i>
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination Against Women</i>
CERD	<i>Convention on the Elimination of All Forms of Racial Discrimination</i>
CERT	Centre Emergency Response Team
Commission	Human Rights and Equal Opportunity Commission
CRC	<i>Convention on the Rights of the Child</i>
DCD	Department for Community Development, Western Australia
Department	Department of Immigration and Multicultural and Indigenous Affairs, Commonwealth
DHS	Department of Human Services, South Australia
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs, Commonwealth
DoCS	Department of Community Services, New South Wales
DSC	Disability Services Commission, Western Australia
ESL	English as a Second Language
FACS	Family and Children's Services, Department for Community Development, Western Australia

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FAYS	Family and Youth Services, Department of Human Services, South Australia
HRAT	High Risk Assessment Team
HRC	United Nations Human Rights Committee
HREOC	Human Rights and Equal Opportunity Commission
HREOC Act	<i>Human Rights and Equal Opportunity Commission Act 1986</i> (Cth)
IAAAS	Immigration Advice and Application Assistance Scheme
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
IDC	Immigration Detention Centre
IDF	Immigration Detention Facility
IDS	Immigration Detention Standards 1998
IGOC Act	<i>Immigration (Guardianship of Children) Act 1946</i> (Cth)
Inquiry	National Inquiry into Children in Immigration Detention
IRPC	Immigration Reception and Processing Centre
JAS	Justice for Asylum Seekers
JDL Rules	<i>United Nations Rules for the Protection of Juveniles Deprived of their Liberty</i>
JSCM	Joint Standing Committee on Migration
Migration Act	<i>Migration Act 1958</i> (Cth)
Migration Regulations	Migration Regulations 1994 (Cth)
Minister	Minister for Immigration and Multicultural and Indigenous Affairs
MOU	Memorandum of Understanding
MSI	Migration Series Instruction
Notice 1 (N1)	Notice to Produce 1, issued to DIMIA on 18 July 2002
Notice 2 (N2)	Notice to Produce 2, issued to DIMIA on 18 July 2002
Notice 3 (N3)	Notice to Produce 3, issued to DIMIA on 18 July 2002
Notice 4 (N4)	Notice to Produce 4, issued to DIMIA on 24 October 2002
Notice 5 (N5)	Notice to Produce 5, issued to DIMIA on 24 October 2002
N1, F2, Q3	Notice 1, Folder 2, Question 3 (example of referencing for documents provided pursuant to Notices to Produce)
PPV	permanent protection visa

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PTSD	post traumatic stress disorder
QPASTT	Queensland Program of Assistance to Survivors of Torture and Trauma
RACS	Refugee Advice and Casework Service
Refugee Convention	<i>Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees</i>
RCOA	Refugee Council of Australia
RHP	Residential Housing Project
RILC	Refugee and Immigration Legal Centre
RRT	Refugee Review Tribunal
SCALES	Southern Communities Advocacy Legal and Education Service
Standard Minimum Rules	<i>United Nations Standard Minimum Rules for the Treatment of Prisoners</i>
STARTTS	Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, New South Wales
TIS	Translating and Interpreting Service
TPV	temporary protection visa
UAM	unaccompanied minor
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNHCR Detention Guidelines	<i>UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers</i>
UNHCR Guidelines on Refugee Children	<i>UNHCR Refugee Children: Guidelines on Protection and Care</i>
UNHCR Procedures Handbook	<i>UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees</i>
UNHCR UAM Guidelines	<i>UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum</i>
UNICEF	United Nations Children's Fund
UNICEF Implementation Handbook	<i>UNICEF Implementation Handbook for the Convention on the Rights of the Child</i>
VFST	Victorian Foundation for the Survivors of Torture
YAC	Youth Advocacy Centre

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# Preface

*Injustice anywhere is a threat to justice everywhere.*

Martin Luther King Jnr

This is an important report. It deals with our treatment of children in the most recent wave of boat people seeking refuge and a better life on our shores. It does so in the knowledge that there is a tension created by the community expectation that the Government will defend Australia's security while simultaneously upholding individual rights – the notion of the 'fair-go' for all. The report also challenges the argument that family unity within immigration detention centres is the only way that children's 'best interests' can be protected.

The findings of the report are the result of carefully balancing large volumes of solid evidence collected, mainly during 2002, which was then interpreted in a cautious manner. The Inquiry paid special attention to the principles of natural justice in reaching its conclusions. The Inquiry greatly appreciates the time and effort put in by the large numbers of individuals and community organisations that made written and oral submissions to the Inquiry. The Inquiry also thanks the Department of Immigration and Australasian Correctional Management for their assistance throughout the Inquiry. However, I am especially grateful to those detainees, temporary protection visa holders and former staff members who generously shared their personal experiences with the Inquiry.

The primary focus of this report has been on the human rights that all children in Australia should enjoy.

*The arrest, detention or imprisonment of a child shall be ... used only as a measure of last resort and for the shortest appropriate period of time.* Few people would disagree with these words from the *Convention on the Rights of the Child*. In fact, most Australians would agree that all other options should be explored before a child is locked up. The words from the Convention form the basis for the title of the report of the National Inquiry into Children in Immigration Detention: *A last resort?*

*A last resort?* talks about children who arrived in Australia to seek protection from despotic regimes like those of Iraq and Afghanistan where breaches of human rights were the norm. Most of these children arrived with their families, some were unaccompanied. More than 92 percent of all children arriving by boat since 1999 have been recognised by Australian authorities

## A last resort?

to be refugees. In the case of Iraqi children the figures are as high as 98 percent. This means they left their homelands because they had little real choice. Seeking asylum elsewhere was, for them, a *last resort*.

Yet, since 1992, we have welcomed these children by taking them to remote facilities, detaining them there to wait for a visa. Australia's immigration policy makes the detention of these children the first and only option and it puts no limit on the time that they are held there. Children wait in detention for months or years - one child spent almost five and a half years in detention before being released into the community as a refugee. In fact, as at the end of 2003, the majority of children in detention had been held there for more than two years. This policy seems a complete departure from the principle of detention as a measure of *last resort*.

Australians don't need a team of experts or dramatic media stories to convince them that detention centres are no place for children to grow up. However, this Inquiry analysed evidence from an enormous number of sources in order to objectively assess whether this gut reaction was right. The answer is conclusive - even the best-run detention centre is no summer school or holiday resort. In fact, they are traumatising places which subject children to enormous mental distress. This confirms the need to ensure that children should only be locked up in this environment as a measure of *last resort* and for the *shortest appropriate period of time*.

The irony is that the long-term impact of this system on children is likely to be borne by Australian society as a whole, since almost all children in the detention centres eventually become members of the Australian community. They will carry the effects of their experience with them throughout their lives.

However, even if we were to ignore these human rights concerns, what is the rationale for, or logic of, the current immigration detention system? Does this rationale withstand vigorous examination?

Some have argued that mandatory detention is necessary to prevent floods of boat arrivals. We must take a reality check here. Even if we agree that between 1999 and 2002 the number of people arriving by boat was relatively significant, from a mid-range time perspective the number of arrivals is small. Over the past 14 years approximately 13,500 people have arrived by boat - this number of people would fill approximately 15 percent of the Melbourne Cricket Ground. Compare this to the approximately 1.4 million new settlers who arrived in Australia over the same period. In other words, 'boat people' constituted roughly one per cent of our total intake over that period.

But even if these numbers were greater, the detention of one group of children to deter another group from coming to Australia raises the issue of the proportionality of our policy response. Compare this with our treatment of children who commit a crime: such young offenders are only detained after prompt and careful consideration by a magistrate, the period of imprisonment is strictly limited and is reviewable at several levels. Yet under our immigration laws, children who have not been accused

of any crime are detained automatically and for indefinite periods and there is also no real opportunity to argue their case before an independent tribunal or court. A comparison of the two regimes highlights the lack of proportionality of our immigration detention policy.

The international community must take into account the 'cause and effect' nature of migratory movements when developing policies; if one part of the globe is under pressure there is likely to be a corresponding increase in asylum seekers elsewhere. The Australian experience with boat people is testimony to this reality. People smugglers who risk children's lives by taking them on a perilous voyage in an unseaworthy boat, should be appropriately dealt with through international policing co-operation. However the answer to these issues lies more in international co-operation and planning than in the creation of 'fortress Australia'.

Others have argued that in the post 9/11-Bali world the terrorist threat requires a total embargo on unauthorised arrivals. I am fully conscious of the threat posed by terrorism which, when all is said and done, represents the utter negation of human rights. But in the case of boat people, these are the children who are the victims of the Saddam Hussein's of this world, not the perpetrators. That is why most of them left their homes in the first place. In any case, Dennis Richardson, the Director-General of ASIO, stated that not one person arriving by boat between 2001 and 2002 'had received an adverse security assessment in terms of posing a direct or indirect threat to Australia's security'.

Finally, some have warned that without detention, children and families will disappear into the community and will not be available for removal if they are found not to be refugees. This argument lacks supporting evidence and disregards the fact that, according to the Department's own statistics, around 90 per cent of boat arrivals - whether adult or child - are found to be genuine refugees. While there is always some flight risk, since almost all children arriving by boat are given protection visas in the end, there seems little incentive for these refugees to go underground. In any event, our domestic justice system deals with hundreds of children charged with a crime, who may also present a flight risk, but are released on bail. We accept this system as a necessary hallmark of a 'civil society', yet fail to apply these principles to children seeking asylum in Australia.

Since the announcement of the Inquiry, there have been some positive measures to improve the environment in which children in detention live. I commend the Department for introducing these changes without awaiting the formal outcome of this Inquiry. The transfer of unaccompanied children to foster homes, increased access to education outside detention and the creation of residential housing projects are steps in the right direction - although the housing project still has the inherent weakness of restricting liberty and excluding fathers. However, these measures ultimately represent a 'blu-tack' approach to repairing a detention system that is fundamentally flawed.

While recognising the right of each country to protect its borders, I hope that *A last resort?* removes, once and for all, any doubts about the harmful effects of long-

## A last resort?

term immigration detention on children. It warns governments, in Australia and around the world, that mandatory, indefinite and unreviewable detention of children is no answer to the global issue of refugee movements.

Even if there is no child in detention when this report is tabled in Parliament, it is now time for our elected parliamentary representatives to amend our immigration legislation to ensure that it complies with Australia's accepted human rights standards.

Let no child who arrives in Australia ever suffer under this system again.

Dr Sev Ozdowski OAM

**Human Rights Commissioner**

# Executive Summary

This executive summary is divided into two parts. Part A sets out the major findings and recommendations of the National Inquiry into Children in Immigration Detention (the Inquiry). Part B provides a chapter summary of the Inquiry's report: *A last resort?*

## Part A: Major Findings and Recommendations

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### Major Findings

The Inquiry has made the following major findings in relation to Australia's mandatory immigration detention system as it applied to children who arrived in Australia without a visa (unauthorised arrivals) over the period 1999-2002.

1. Australia's immigration detention laws, as administered by the Commonwealth, and applied to unauthorised arrival children, create a detention system that is fundamentally inconsistent with the *Convention on the Rights of the Child* (CRC).

In particular, Australia's mandatory detention system fails to ensure that:

- (a) detention is a measure of last resort, for the shortest appropriate period of time and subject to effective independent review (CRC, article 37(b), (d))
- (b) the best interests of the child are a primary consideration in all actions concerning children (CRC, article 3(1))
- (c) children are treated with humanity and respect for their inherent dignity (CRC, article 37(c))
- (d) children seeking asylum receive appropriate assistance (CRC, article 22(1)) to enjoy, 'to the maximum extent possible' their right to development (CRC, article 6(2)) and their right to live in 'an environment which fosters the health, self-respect and dignity' of children in order to ensure recovery from past torture and trauma (CRC, article 39).

## A last resort?

2. Children in immigration detention for long periods of time are at high risk of serious mental harm. The Commonwealth's failure to implement the repeated recommendations by mental health professionals that certain children be removed from the detention environment with their parents, amounted to cruel, inhumane and degrading treatment of those children in detention (CRC, article 37(a) – Chapter 9).
3. At various times between 1999 and 2002, children in immigration detention were not in a position to fully enjoy the following rights:
  - (a) the right to be protected from all forms of physical or mental violence (CRC, article 19(1) – Chapter 8)
  - (b) the right to enjoy the highest attainable standard of physical and mental health (CRC, article 24(1) – Chapters 9, 10)
  - (c) the right of children with disabilities to 'enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community' (CRC, article 23(1) - Chapter 11)
  - (d) the right to an appropriate education on the basis of equal opportunity (CRC, article 28(1) – Chapter 12)
  - (e) the right of unaccompanied children to receive special protection and assistance to ensure the enjoyment of all rights under the CRC (CRC, article 20(1) – Chapters 6, 7, 14).

A more detailed summary of all the Inquiry's findings is set out in the Chapter Summary in Part B.

## Recommendations

1. Children in immigration detention centres and residential housing projects as at the date of the tabling of this report should be released with their parents, as soon as possible, but no later than four weeks after tabling.

The Minister and the Department of Immigration and Multicultural and Indigenous Affairs (the Department) can effect this recommendation within the current legislative framework by one of the following methods:

- (a) transfer into the community (home-based detention)
- (b) the exercise of Ministerial discretion to grant humanitarian visas pursuant to section 417 of the *Migration Act 1958* (Cth) (the Migration Act)
- (c) the grant of bridging visas (appropriate reporting conditions may be imposed).

If one or more parents are assessed to be a high security risk, the Department should seek the urgent advice of the relevant child protection authorities regarding the best interests of the child and implement that advice.

2. Australia's immigration detention laws should be amended, as a matter of urgency, to comply with the *Convention on the Rights of the Child*.

In particular, the new laws should incorporate the following minimum features:

- (a) There should be a presumption against the detention of children for immigration purposes.
  - (b) A court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention (for example for the purposes of health, identity or security checks).
  - (c) There should be prompt and periodic review by a court of the legality of continuing detention of children for immigration purposes.
  - (d) All courts and independent tribunals should be guided by the following principles:
    - (i) detention of children must be a measure of last resort and for the shortest appropriate period of time
    - (ii) the best interests of the child must be a primary consideration
    - (iii) the preservation of family unity
    - (iv) special protection and assistance for unaccompanied children.
  - (e) Bridging visa regulations for unauthorised arrivals should be amended so as to provide a readily available mechanism for the release of children and their parents.
3. An independent guardian should be appointed for unaccompanied children and they should receive appropriate support.
  4. Minimum standards of treatment for children in immigration detention should be codified in legislation.
  5. There should be a review of the impact on children of legislation that creates 'excised offshore places' and the 'Pacific Solution'.

## Part B: Chapter Summary

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The table of contents for each chapter of the Inquiry report provides a detailed guide to the topics covered. The summary of findings at the end of each chapter sets out the Inquiry's factual and legal findings in some detail. This chapter summary highlights the key issues and findings in each of those chapters.

### Chapter 1: Introduction

The Inquiry was announced on 28 November 2001. The primary purpose of the Inquiry was to examine whether Australia's laws and executive acts and practices ensure that children can enjoy their rights under the CRC.

The Inquiry examined the immigration detention system as it applied to children who arrived in Australia without a visa, usually by boat (unauthorised arrivals). However, the rights discussed by the Inquiry apply equally to all children.

### Chapter 2: Inquiry Methodology

The Inquiry gathered evidence regarding the treatment of children in Australia's immigration detention centres for the period covering 1999-2002. However, where possible the Inquiry has updated its information.

The Inquiry heard from all relevant parties including: children and parents who are or were in immigration detention; the Department and its detention centre staff; Australasian Correctional Management Pty Limited (ACM) and its detention centre staff; State child protection authorities; organisations providing services to current and former detainee children; professional organisations; non-government organisations and individuals. Most of the evidence from children, and some evidence from detention centre staff and service providers, has been de-identified to protect their anonymity.

The Inquiry collected evidence in a variety of ways including: visits to all Australian detention centres; a public submission process (346 public submissions, 64 confidential submissions); public hearings (68 public sessions – 114 witnesses, 17 confidential sessions – 41 witnesses); and focus groups (29 groups). The Inquiry also obtained access to primary documents relating to the management of detention centres and the circumstances surrounding particular children and families who have been in detention for prolonged periods of time. The Department and ACM provided oral and written evidence and submissions. They had two opportunities to provide comments and submissions on the draft of this report and a third opportunity to provide information regarding actions taken in response to the Inquiry's findings and recommendations. The Inquiry carefully balanced and considered those comments and all other evidence when making its findings.

### **Chapter 3: Setting the Scene – Children in Immigration Detention**

The total number of children who arrived in Australia by boat or air without a visa (unauthorised arrivals), and applied for refugee protection visas between 1 July 1999 and 30 June 2003 was 2184. Since 1992, all unauthorised arrivals have been mandatorily detained pursuant to Australian law. Approximately 14 per cent of those children came to Australia alone (unaccompanied children). The highest total number of children in Australia's immigration detention centres over that period was 842 on 1 September 2001.

Most of the children in detention centres between 1999 and 2003 came from Iraq, Iran or Afghanistan. Almost 98 per cent of the Iraqi children who applied for asylum from detention centres during this period were recognised as refugees and released into the Australian community on temporary protection visas. Approximately 95 per cent of Iranian children and 74 per cent of Afghani children were also found to be refugees and released into the Australian community. They all waited in detention centres while their claims were processed – some for weeks, others for months or years.

At the beginning of 2003, children had spent an average of one year, three months and 17 days in detention. By December 2003, the average time in detention increased to one year, eight months and 11 days. As at 1 October 2003, 62 children (51 per cent of the total number of child detainees) had been in detention for more than two years. The longest a child has been held in detention is five years, five months and 20 days. That child was released in 2000 on a protection visa.

### **Chapter 4: Australia's Human Rights Obligations**

Sovereignty brings with it rights and obligations. While Australia has the right to protect its borders, it also has the obligation to ensure that border protection occurs in a manner such that all children in Australia's jurisdiction can enjoy the basic human rights that Australia has agreed to uphold.

The Inquiry closely examined the meaning of the various human rights in the CRC with the assistance of United Nations (UN) guidelines and the findings and comments of UN treaty bodies. The key principles are discussed in this chapter. More specific rights are discussed throughout the report.

### **Chapter 5: Mechanisms to Protect the Human Rights of Children in Immigration Detention**

The framework for the management of immigration detention centres failed to ensure that Australia fulfilled its responsibility to children in immigration detention.

The ultimate responsibility for ensuring the protection of the human rights of children in immigration detention lies with the Commonwealth – through the Parliament, the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister), the

## A last resort?

Department and the courts. Australia's legislation leaves it to the Minister and Department to ensure that the conditions of immigration detention meet Australia's human rights obligations to children.

In 1999 the Department contracted a private company - ACM - to provide services to children and others who were in immigration detention. The contract between the Department and ACM did not fully incorporate the rights which the Commonwealth owed to children in immigration detention. This meant that even full compliance with the contract did not guarantee that children in detention were enjoying all their rights under the CRC. Nor did the Department's monitoring systems reliably record or assess whether children were fully enjoying their rights under the CRC.

The Department made inadequate arrangements with the appropriate State authorities to provide the advice and services relevant to children in immigration detention centres. Several Memoranda of Understanding (MOUs) are still being negotiated despite the fact that mandatory detention of children was introduced in 1992.

## **Chapter 6: Australia's Immigration Detention Policy and Practice**

The evidence before the Inquiry demonstrates that Australia's immigration detention laws and practices create a detention system that is fundamentally inconsistent with what the CRC seeks to achieve. The result is a serious and ongoing breach of a child's right to personal liberty.

The CRC requires the detention of children to be 'a measure of last resort', but Australia's detention laws make detention of unauthorised arrival children the first, and only, resort. The CRC requires the detention of children to be for 'the shortest appropriate period of time', but Australia's detention laws and practices require children to stay in detention until they are granted a visa or removed from Australia – a process that can take weeks, or years. The CRC protects children against arbitrary detention and requires prompt review before an independent tribunal to assess whether the individual circumstances of a child justify detention. Australia's detention laws, on the other hand, require the detention of all unauthorised arrival children, irrespective of their individual circumstances, and expressly restrict access to courts. The result is the automatic, indeterminate, arbitrary and effectively unreviewable detention of children.

While the detention laws themselves breach the CRC, the manner in which they have been applied has exacerbated the impact of those breaches. Since 1994, the Minister has had the power to declare any place in the community a place of 'detention' (home-based detention). Children transferred to these places need not be supervised by ACM staff but they do need to be under the supervision of a 'directed person' like a foster carer or school principal. It took a hunger strike, lip-sewing and a suicide pact in January 2002 before arrangements were made to transfer a group of unaccompanied children to home-based foster care detention

in Adelaide. As at the end of 2003, only two families had ever been transferred to home-based detention.

Australia's laws also provide for release on bridging visas in limited circumstances, but only one unaccompanied child was released on a bridging visa into foster care over the Inquiry period. By failing to ensure that unaccompanied children were taken out of detention centres as quickly as possible, the Minister, as guardian to unaccompanied children, breached his duty to protect the best interests of these children and provide them with the special protection and assistance that they needed to enjoy their right to liberty under the CRC.

Furthermore, while residential housing projects offer improved conditions when compared to detention centres, children in these projects continue to be deprived of liberty and cannot live with their fathers. Until late 2002, the rules excluded boys more than 12-years-old from the Woomera housing project, other than in exceptional circumstances. Release or transfer of families to places in the community are a far preferable solution to the ongoing detention of children.

## **Chapter 7: Refugee Status Determination for Children in Immigration Detention**

The evidence before the Inquiry demonstrates that the Commonwealth failed to take all appropriate measures to incorporate relevant safeguards for children in its refugee status determination system over the period of the Inquiry and therefore breached the CRC.

The failure to implement these safeguards in a number of areas is especially serious for unaccompanied children who have no independent person to support and advise them through the asylum process.

A system which does not adequately recognise the difficulties faced by, or accommodate the needs of, children in detention leads to an increased risk that a child will be returned to a place where he or she faces persecution. It may also result in the prolonged detention of children.

The weaknesses of Australia's refugee status determination system, as applied to children in immigration detention, include:

- Children and their parents are kept in separation detention until they make an asylum claim. The purpose of separation detention is to isolate new arrivals. Generally, they cannot make or receive phone calls. Australian law does not require Department officials to tell families in separation detention that they have the right to seek asylum and the right to request a lawyer.
- Migration agents are provided to detained families for the primary and merits review stages, but the quality of assistance is compromised by restrictions regarding time with, and physical access to, children and parents in remote facilities.

## A last resort?

- Departmental officers are not specially trained to assess the claims of children. There are no guidelines on how to create a child-friendly environment and no requirements to take into account special considerations when assessing the substance of children's asylum claims.
- Australian law restricts access to judicial review of negative visa decisions, with the possible consequence that children may be returned to a place where they will be persecuted. The Department does not provide free legal assistance to children at the judicial review stage.
- There is a fundamental conflict of interest between the Minister as guardian of unaccompanied children in detention centres and the Minister as the person who makes decisions about visas. No other person has been appointed to fulfil the protective role of guardian, leaving unaccompanied children in detention centres without any independent advice or support.
- Children processed pursuant to Australia's 'Pacific Solution' legislation have no access to legal assistance or judicial review for their asylum claims.

## Chapter 8: Safety of Children in Immigration Detention

The evidence before the Inquiry demonstrates that the Commonwealth failed to take all appropriate measures to protect the safety of children in immigration detention over the period of the Inquiry and therefore breached the CRC.

Between 1999 and 2002, Woomera, Port Hedland and Curtin detention centres were the site of multiple demonstrations, riots, hunger strikes and violent acts of self-harm. The longer children were held in such an environment the more likely they were to be exposed to risks of harm.

When children are detained in a closed environment, the options available to shelter them from such events are limited. Thus the detention of children in immigration detention centres simultaneously increases the risk of harm and limits the options available to address that harm. The Department failed to take the appropriate steps to minimise the impact of violence on children within that context. The security standards, policies and procedures in detention centres did not make the protection of children a priority. While detention staff clearly had the obligation and right to protect themselves and other detainees, sometimes the security response added to the risk of harm for children and exacerbated the climate of fear to which children were exposed. The use of tear gas, water cannons and riot gear in the presence of children caused them particular distress.

Evidence before the Inquiry revealed other problems encountered by children.

- Lock-down procedures designed to contain violence trapped children within that violence.
- Headcount procedures were conducted in an obtrusive manner throughout the night, at certain times in certain centres.

- Children were sometimes placed in special 'security' compounds, even if they were not themselves being punished, exposing them to greater risks of harm.
- Accommodation of families and single men in the same compound increased the vulnerability of children to assault by other detainees. The new Baxter facility addresses this problem appropriately.
- It took until 2001 to clarify the reporting procedures to State child protection authorities in the event of suspected or actual assault of children. There has been appropriate reporting since that time.
- Child protection authorities have no jurisdiction to enforce their recommendations in detention centres. However, in the event of threatened or actual assault those recommendations were generally implemented.
- MOUs clarifying the role of State and Federal police authorities and State child protection agencies were still not finalised as at November 2003 (except in South Australia where an MOU was signed with the child protection authority in December 2001).

## **Chapter 9: Mental Health of Children in Immigration Detention**

The overwhelming evidence before the Inquiry demonstrates that the Commonwealth failed to take all appropriate measures to protect and promote the mental health and development of children in immigration detention over the period of the Inquiry and therefore breached the CRC.

With respect to some children, the Department failed to implement the clear - and in some cases repeated - recommendations of State agencies and mental health experts that they be urgently transferred out of detention centres with their parents. This failure not only constitutes a breach of a child's right to mental health, development and recovery, it also amounts to cruel, inhuman and degrading treatment.

It is no secret that the institutionalisation of children has a negative impact on their mental health. The experiences of children detained for long periods in Australia's immigration detention centres prove this point many times over. The longer children were in detention the more likely it was that they suffered serious mental harm.

Children in immigration detention suffered from anxiety, distress, bed-wetting, suicidal ideation and self-destructive behaviour including attempted and actual self-harm. The methods used by children to self-harm included hunger strikes, attempted hanging, slashing, swallowing shampoo or detergents and lip-sewing. Some children were also diagnosed with specific psychiatric illnesses such as depression and post traumatic stress disorder.

## A last resort?

Mental health experts told the Inquiry that a variety of factors can cause mental health problems for children in detention including pre-existing trauma, negative visa decisions and the breakdown of the family unit. These factors are either the direct result of, or exacerbated by, long-term detention in Australia's detention centres. Living behind razor wire, locked gates and under the constant supervision of detention officers also caused a great deal of stress. While many officers treated children appropriately, some used offensive language around children and, until 2002, officers in some centres called children by number rather than name.

Although individual mental health staff tried to assist children, there was no routine assessment of the mental health of children on arrival, insufficient numbers of mental health staff to deal with the needs of those children and inadequate access to specialists trained in child psychiatry. Children suffering from past torture and trauma had no access at all to the relevant specialist services.

The only effective way to address the mental health problems caused or exacerbated by detention, is to remove the children from that environment. The three case studies at the end of this chapter illustrate the importance of this measure.

## Chapter 10: Physical Health of Children in Immigration Detention

The evidence before the Inquiry demonstrates that the Commonwealth failed to take all appropriate measures to protect the physical health of children over the period of the Inquiry resulting in a breach of the CRC.

The quality of health care in immigration detention centres varied over time. The Inquiry recognises the significant efforts of individual staff members and the improvements made during 2002. However, children in immigration detention over the period of the Inquiry were not in a position to enjoy the highest attainable standard of health, as required by the CRC, due to the following factors:

- extreme climate and physical surroundings of the remote centres
- insufficient cooling and heating and inadequate footwear for the terrain at certain times in certain centres
- overcrowding, unsanitary toilets and unclean accommodation blocks at certain times in certain centres
- failure to individually assess pre-existing nutritional deficiencies
- food was not tailored to the needs of young children, was of variable quality and great monotony
- uneven provision of baby formula and special food for infants
- failure to conduct comprehensive initial assessments focussed on the health vulnerabilities of child asylum seekers

- inadequate numbers of health care staff with the paediatric and refugee health expertise needed to identify and treat particular problems faced by child asylum seekers
- inadequate numbers of health care staff to deal with the demands of children
- delays in accessing the appropriate secondary health care services, due to the remote location of centres and unclear referral procedures at certain points in time
- inadequate numbers of on-site interpreters for the purpose of medical examinations, especially in Port Hedland
- inadequate preventative and remedial dental care for children detained for long periods.

### **Chapter 11: Children with Disabilities in Immigration Detention**

The evidence before the Inquiry demonstrates that the Commonwealth failed to take all appropriate measures to protect the rights of children with disabilities in immigration detention over the period of the Inquiry and has therefore breached the CRC.

There is an inherent conflict between the detention of children with disabilities and the right of those children to enjoy conditions conducive to the 'child's active participation in the community' and 'fullest possible social integration and individual development' (article 23 of the CRC). Furthermore, while providing care to children with disabilities is always a challenging task, the detention of children in remote centres creates additional hurdles. The Inquiry closely examined the services provided to two families with children with serious disabilities who were detained in immigration detention centres in 2000 and released in late 2003. Despite the efforts of individual staff members and significant improvements over 2002, these case studies demonstrate a failure to ensure:

- routine and prompt consultation with State disability services
- prompt and comprehensive individual case management plans focussed on providing appropriate care and services
- prompt provision of appropriate aids and adaptations (such as a wheelchair and eating utensils)
- prompt provision of suitable educational programs conducted by appropriately qualified staff
- recreational programs tailored to the individual needs of the children
- adequate parental support focussed on coping with the stresses of caring for children with disabilities in detention
- prompt release or transfer from remote detention centres.

## Chapter 12: Education for Children in Immigration Detention

The evidence before the Inquiry demonstrates that the Commonwealth failed to take all appropriate measures to provide children in immigration detention with an adequate education over the period of the Inquiry and has therefore breached the CRC.

While there were significant variations in the amount and quality of education provided in different detention centres at different times, the education available to children at on-site schools always fell significantly short of the level of education provided to children with similar needs in the Australian community. Despite the significant efforts of teachers, the Inquiry found that there were fundamental weaknesses in the on-site schools over the period of the Inquiry.

- No curriculum to suit the needs and capacities of children in immigration detention. This was especially the case for children above the compulsory age of education. Until late 2002 there was no systematic attempt to adopt the State curricula available and apply them within the English as a Second Language (ESL) framework.
- Insufficient infrastructure, curriculum resources, and teachers to support an appropriate education program for the numbers of children in detention.
- Inadequate hours of schooling. Contact hours were often well below the standard school day.
- Inadequate educational assessments and insufficient reporting of children's educational progress.
- No teachers with ESL qualifications in certain centres at certain points in time. Detainees without teaching qualifications were sometimes used to make up the shortfall in qualified teachers. A high turnover of teachers also impacted on the quality of teaching.
- The inadequacy of on-site education combined with increasing depression in long-term detainees resulted in low attendance levels at on-site schools at certain points in time.

Many of these problems were substantially addressed when, in mid 2002, the Department arranged for increasing numbers of children in immigration detention to go to local schools. However, not all children were eligible to attend external schools and the fact that children had to return to detention centres every day prevented them from taking full advantage of the external educational experience. It is unacceptable that it took ten years of mandatory detention before the Department began negotiating MOUs with State education authorities regarding routine access by children in immigration detention to external schools.

## Chapter 13: Recreation for Children in Immigration Detention

The evidence before the Inquiry demonstrates that the Commonwealth provided children in immigration detention with sufficient opportunities for play and recreation to meet the low threshold regarding this right in the CRC. However, recreational opportunities are closely linked to a child's right to enjoy, to the maximum extent possible, development and recovery from past trauma. The programs and facilities provided in detention failed to meet those obligations. There has therefore been a breach of the CRC.

The Inquiry makes the following findings regarding the play and recreation opportunities provided to children in detention.

- There were no constraints on children regarding leisure time or access to outdoor areas, albeit that those outdoor areas were surrounded by razor wire and usually not grassed. The exception was that children in separation detention in Port Hedland had limited access to the outdoors.
- By 2002 all centres had play equipment, although the Inquiry notes with concern that it took two years for playground equipment to be installed at Woomera.
- Toys and sporting equipment were generally provided, although there were times when they were insufficient to meet the needs of children in the centres.
- Access to televisions and videos varied between centres, but they were generally available to children. There were some problems in Baxter.
- Each centre had a recreational program in place, although the quality of those programs varied. Understaffing and resource constraints meant that the needs of children in Woomera were not always met. Children detained in Villawood and Maribyrnong had greater access to recreational programs due to the proximity of outside community groups and facilities.
- Excursions were arranged on an ad hoc basis at all centres at different points of time. There were periods of time in some centres when no excursions at all were offered to children, and in some centres excursions were cancelled at late notice. However, concerted efforts to offer regular excursions to children began in late 2001.

Long-term detention impacted on the mental health and development of children which, in turn, impacted on their enthusiasm to play. At the same time, a disinterest in play impacted on children's mental health and development. This highlights the importance of ensuring that detention is a measure of last resort and for the shortest appropriate period of time.

## Chapter 14: Unaccompanied Children in Immigration Detention

The evidence before the Inquiry demonstrates that the Commonwealth failed to take all appropriate measures to ensure that unaccompanied children in immigration detention received the special protection and assistance they needed to enjoy their rights and therefore breached the CRC.

Australia's immigration detention centres are no place for any child, but long-term detention has a particularly significant impact on unaccompanied children. Since January 2002, the Department has taken action to address this issue by transferring most unaccompanied children to foster care homes in the community. As at December 2003 there were no unaccompanied children in detention centres. This is a commendable initiative, if somewhat delayed in the making.

Despite the efforts of individual staff members, the management systems designed to deal with unaccompanied children held in detention centres for long periods were inadequate to protect their best interests over the period of the Inquiry.

- Designated officers with the responsibility to watch over unaccompanied children were appointed in Woomera and Port Hedland in early 2001 and in Curtin by late 2001, long after large numbers of unaccompanied children started arriving in detention centres in late 1999.
- Individual case management plans were introduced in Curtin in March 2001 and in Port Hedland and Woomera in December 2001. They were formulaic, sparse in detail, failed to give an accurate picture of the needs of unaccompanied children or the strategies best suited to meet those needs. However, ACM Woomera staff initiated weekly Unaccompanied Minor Committee Meetings in February 2001 which, unlike the case management plans, indicate that a great deal of attention was given to unaccompanied children by ACM staff in that centre over 2001.
- The Unaccompanied Minor Teleconferences, which were specifically designed to bring together the Department's detention centre staff and central office staff to address the well-being of unaccompanied children, only commenced in December 2001, long after the children began arriving in detention centres.
- The Department Manager monthly reports to central office rarely mentioned unaccompanied children. Woomera Department staff, at best, only attended half of ACM's Unaccompanied Minor Committee Meetings each month. There were several months when Department Managers did not attend any meetings at all.
- State child welfare authorities were not routinely consulted for advice when children arrived in detention centres; however, they were called when things went wrong. For example, they were consulted in January 2002 when several unaccompanied children threatened to commit suicide unless they were released from detention.

The Minister, as guardian of unaccompanied children, and his Departmental delegates, failed to satisfy the duty to ensure that the best interests of unaccompanied children were their 'basic concern', as required by the CRC. There were two primary reasons why this occurred.

- There is an insurmountable conflict between the Minister's role as the executor of Australia's mandatory detention policy and his or her role as the guardian of unaccompanied children detained in furtherance of that policy.
- The Departmental staff on whom the Minister relied did not have child welfare expertise and were not given appropriate training, support or guidance in the form of policies and procedures until late 2002. They were, therefore, in no position to monitor the care arrangements made by ACM or fulfil that role themselves. The Department failed to ensure routine consultation with State child welfare authorities who do have the appropriate expertise.

The Inquiry is concerned that there were no clear policies ensuring that children who were temporarily separated from their parents (due to hospitalisation, behaviour management or imprisonment of parents) were provided with appropriate care. However, the Inquiry finds that sufficient efforts were made to facilitate regular contact between these children and their parents within the context of the detention environment.

In addition, the Inquiry finds that the Commonwealth complied with the CRC by providing appropriate tracing services to unaccompanied children with parents overseas.

## **Chapter 15: Religion, Culture and Language for Children in Immigration Detention**

Australia has provided children in immigration detention with sufficient opportunities for the practice of religion, culture and language to meet the low threshold regarding those rights in the CRC.

Children in immigration detention were provided with a range of facilities regarding religion, culture and language.

- Most centres reserved space for public prayers and services. Children could pray in those facilities or in their private accommodation, albeit in cramped conditions.
- Outside clergy were generally permitted access to the detention centres. However, it was difficult for many clergy to travel to remote centres. Detainees were free to appoint their own representatives to conduct religious services.
- In some cases, religious instruction and texts were provided. Parents were permitted to engage in the religious instruction of their children.
- Certain special cultural events and Muslim and Christian religious festivals were facilitated.

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- Efforts were made to provide halal food for the Muslim population.
- Detainee children were not denied the right to use their own language with their families and other detainees.

Some children in immigration detention felt unsafe due to fears of bullying and harassment regarding their religious beliefs. The Department took some general measures to try to protect children and their families from such harassment, for example by providing separate and secure accommodation to Sabian Mandaean families in a few instances. However, there is no evidence of a more comprehensive preventative approach to discrimination and harassment – for example through educational programs promoting tolerance and respect. The Inquiry also finds that there was insufficient cultural awareness training for most staff members working inside detention centres over the period of time covered by the Inquiry.

Further, the detention of children in remote areas limited a child's ability to fully enjoy his or her rights. In particular, access to appropriate temples, clergy, religious schools, language schools, cultural centres, culturally appropriate foods was limited. These factors were particularly problematic for children from Muslim and Sabian Mandaean religions. The impact of these restrictions increased the longer children were in detention.

## **Chapter 16: Temporary Protection Visas for Children Released from Immigration Detention**

Australia's laws fail to ensure that children released from immigration detention on temporary protection visas (TPVs) can enjoy their right to mental health, development, recovery from past trauma and family unity and therefore result in a breach of the CRC. The laws also fail to take into account the special protections owed to unaccompanied children and asylum-seeking children.

Children released from detention on TPVs fled their homes out of fear of persecution and sought Australia's protection. The evidence before the Inquiry demonstrates that the TPV system poses substantial barriers to their successful integration into Australian society for two primary reasons.

- The temporary nature of the visa creates a great deal of uncertainty for refugee children. This uncertainty affects their mental health and impacts on their capacity to fully participate in educational opportunities offered in Australia.
- The absence of the right to family reunion for the duration of the TPV (other than by the exercise of Ministerial discretion), combined with the effective prohibition on overseas travel, means that some children may be separated from their parents and siblings for long – potentially indefinite – periods of time.

Although temporary status and the denial of family reunion has a particularly high impact on unaccompanied children, those children are generally well cared for by State agencies on release.

The health, education and social services attached to TPVs satisfy the requirements of the CRC. However, the limited settlement services, including housing assistance, stringent reporting requirements in order to receive Special Benefit, limited employment assistance programs and limited English language tuition for adults all put additional strain on families trying to recover from their past persecution and detention experiences.

### **Chapter 17: Major Findings and Recommendations of the Inquiry**

The mandatory, indefinite and effectively unreviewable immigration detention of children who arrive in Australia without a visa has resulted in multiple and continuing breaches of children's fundamental human rights. The Inquiry's primary findings and its recommendations are set out in Part A of this Executive Summary. Those findings are in addition to the detailed findings in Chapters 5-16 summarised above.

The Inquiry's recommendations are based on Australia's human rights obligations, the practice of other nations around the world and submissions made to the Inquiry.

The Department expressed several objections to the recommendations made by the Inquiry. Generally speaking, the Department's objections are the result of a fundamental difference in perspective between the Inquiry and the Department as to what is required by international human rights law. Briefly summarised, the Inquiry's view (supported by UN and Australian experts) is that because deprivation of liberty is such an extreme measure to impose on a child, the need to detain must be justified in the case of each and every child. The Department, on the other hand, is of the view that detention need only be justified in a general sense.

The Inquiry rejects each of the Department's six primary objections:

1. *Introducing routine and systematic review of the need to detain in the individual circumstances of each case would clog courts and slow down visa processing.*
  - Adopting such a process would be no different to applying the existing domestic criminal bail procedures to children in immigration detention.
  - Extra expense and time is no justification for denying this fundamental right.
2. *Statistics suggest that all children must be detained to ensure availability for processing and removal.*
  - There are no domestic or international statistics suggesting that child asylum seekers are a special flight risk.
  - More than 92 per cent of unauthorised arrival children are genuine refugees and therefore have no incentive to abscond.

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- Even if there were evidence suggesting that children are likely to abscond, this would only justify detention of those specific children assessed to be an *actual* flight risk, and even then detention should only be used as a last resort.
3. *Mandatory detention helps deter children and families from coming by boat to Australia.*
    - There is no evidence linking mandatory detention with decreasing numbers of child boat arrivals. Mandatory detention has been in place since 1992 and since that time there have been ebbs and flows of arrivals.
    - If the purpose of the mandatory detention policy were deterrence, this would be contrary to human rights law.
  4. *It is too expensive to support children in the community during visa processing.*
    - Recent studies suggest that it would be cheaper to support child asylum seekers in the community than keep them in detention.
  5. *It is too difficult to codify human rights protections for children in detention in legislation.*
    - Difficulties in codifying human rights protections for children in immigration detention should be no barrier to engaging in the task.
    - State laws regarding the rights of juveniles in detention provide a good model.
  6. *There is nowhere to put unauthorised arrivals.*
    - There is plenty of room in Australia and a willingness in the community to welcome and support asylum seekers.

# Chapter 1

## Introduction

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# 1. Introduction

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Please do not limit the audience of these reports to the Immigration Department and the Minister. We would like to urge you to educate the public to pass on the report to newspapers and the other electronic media so that the public can learn what is going on in the immigration detention camp, and I know that public opinion is shifting when they become aware of what is happening.

*Father, Port Hedland, June 2002*

I think that the children should be free and when they are there for one year or two years they are just wasting their time, they could go to school and they could learn something. They could be free. Instead they are like a bird in a cage.

*Ten-year-old previously detained at  
Curtin, focus group, Perth*

The year 1992 marked a watershed in Australia's treatment of asylum seekers who arrive on our shores without a visa (unauthorised arrivals). Amendments to the *Migration Act 1958* (Cth) (Migration Act) introduced mandatory detention provisions for unauthorised boat arrivals.<sup>1</sup> A year earlier, the Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA) had commissioned Port Hedland Immigration Reception and Processing Centre (IRPC) in Western Australia as the first remote location detention centre, to hold and process these asylum seekers pending resolution of their cases.

In 1999, Port Hedland IRPC was joined by Curtin IRPC also in Western Australia and Woomera IRPC in South Australia. Curtin and Woomera were mothballed in 2002 and 2003 respectively and the Baxter Immigration Detention Facility opened in 2002 in South Australia. Other centres in metropolitan settings long used for immigration purposes, namely Perth Immigration Detention Centre (IDC), Villawood IDC in Sydney and Maribyrnong IDC in Melbourne, are also relevant to this report. Temporary facilities on Christmas Island and the Cocos (Keeling) Islands were also created. Furthermore, since late 2001, detention facilities in Nauru and Papua New Guinea have been used for persons seeking asylum in Australia.<sup>2</sup>

From mid-1999 there was a large increase in the total number of people taken into immigration detention to nearly 8000 per year, almost double the number for the

## A last resort?

year 1998-1999.<sup>3</sup> Many of these detainees were children arriving by boat and most were taken to one of the remote location detention centres. By late November 2001 when the Inquiry was announced, there were 714 children in immigration detention, 53 of them unaccompanied.<sup>4</sup>

In the Human Rights Commissioner's 2001 *Report on Visits to Immigration Detention Facilities*, the Commissioner noted that he was becoming increasingly concerned about the situation of children in detention, especially their psychological stress, their exposure to violence within the centres and the lack of educational opportunities.

The situation of children in detention also became the focus of the Australian community during 2001 with increased media attention about their plight. Of particular note was an ABC *Four Corners* program, detailing the situation of Shayan Badraie, a child detained at Woomera and then Villawood, who was seriously adversely affected by his experience of immigration detention.<sup>5</sup> Following a heightened awareness of the situation of children in immigration detention, non-government organisations also began communicating their concerns to the Human Rights and Equal Opportunity Commission (the Commission) regarding the rights of these children.

The mandatory detention of unauthorised arrivals has been the subject of numerous investigations by the Commission, parliamentary committees and other bodies. Reports include:

- *A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner 2001*, Human Rights and Equal Opportunity Commission, October 2002
- *A Report on Visits to Immigration Detention Centres*, Joint Standing Committee on Foreign Affairs, Defence and Trade, June 2001
- *Report into Immigration Detention Procedures*, Report to Minister for Immigration and Multicultural Affairs, Phillip Flood AO, February 2001
- *Not the Hilton*, Joint Standing Committee on Migration, September 2000
- *A Sanctuary under Review*, Senate Legal and Constitutional References Committee, June 2000
- *Immigration Detention: Human Rights Commissioner's 1998-99 Review*, Human Rights and Equal Opportunity Commission
- *Those who've come across the seas: Detention of unauthorised arrivals*, Human Rights and Equal Opportunity Commission, May 1998
- *Immigration Detention Centres Inspection Report*, Joint Standing Committee on Migration, August 1998
- *Asylum, Border Control and Detention*, Joint Standing Committee on Migration, February 1994.

The Commonwealth Ombudsman's office has also issued ten reports, investigations and submissions regarding immigration detention since 1995.<sup>6</sup>

As with the above reports, this report – *A last resort?* – predominantly focuses on the treatment of people arriving in Australia without a visa who are seeking asylum and hope to engage Australia's refugee protection obligations. Those who arrive by boat have been colloquially labelled 'boat people'; however, it is important to remember that unauthorised arrivals come to Australia by both air and sea.

So what does this report add that has not already been covered by these earlier reports?

First, the National Inquiry into Children in Immigration Detention is the first time that any institution examining Australia's mandatory detention regime has focussed purely on the impact that the system has on children. The Inquiry has rigorously assessed the experience of children in immigration detention against all of the relevant provisions of the *Convention on the Rights of the Child* (CRC). This is the first time that this has been done in Australia.

Second, despite this Commission's 1998 findings in *Those who've come across the seas* that Australia's mandatory detention regime is contrary to international law, the Australian Government persists in applying the policy to children and their families. The Commission believes that the Commonwealth of Australia should clearly understand the inevitable consequences that this policy has – both for individual children and families and on Australia's compliance with the CRC. The Commission hopes that this information will provide a more sound basis for assessing the appropriateness of the mandatory detention policy for Australia.

Third, while many community groups have explored the issue of children in detention over the past few years, this Commission has unique powers to require the Department and the detention services provider, Australasian Correctional Management Pty Limited (ACM) to produce documents relating to the management of detention centres. The Inquiry has used those powers throughout its evidence gathering process and cites those documents extensively. The Inquiry also convened public hearings and facilitated a public submission process that allowed many members of the staff involved in detention management to tell their stories. Similarly, the Inquiry visited detention centres to interview children and their families and also interviewed families released from detention, in order to capture the voices of children who have experienced immigration detention. The Commission hopes that these factors provide a unique perspective on the detention system and increased transparency for the public.

### **1.1 What power does the Commission have to hold an inquiry?**

One of the ways in which the Commission monitors Australia's compliance with its international human rights obligations is to conduct inquiries. The National Inquiry into Children in Immigration Detention was established according to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act).

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Under the HREOC Act, the Commission has specific legislative functions and responsibilities for the protection and promotion of human rights. Among other functions, the Commission can:

- examine enactments for the purpose of ascertaining whether the enactments are inconsistent with or contrary to any human right and report to the Minister the results of any such examination (section 11(1)(e))
- inquire into acts or practices that may be inconsistent with or contrary to any human right (section 11(1)(f))
- promote an understanding, acceptance and public discussion of human rights in Australia (section 11(1)(g))
- advise on laws that should be made by the Parliament or action that should be taken by the Commonwealth on matters relating to human rights (section 11(1)(j))
- advise on what action, in the opinion of the Commission, Australia needs to take to comply with the provisions of the International Covenant on Civil and Political Rights (ICCPR), the Declarations annexed to the Act or any relevant international instrument declared under the Act (section 11(1)(k)).

The Terms of Reference of the National Inquiry into Children in Immigration Detention rely primarily on the Commission's functions under sections 11(1)(e) and 11(1)(f) of the HREOC Act, in addition to the other functions listed above.

The 'human rights' specified in these functions are outlined in a number of human rights treaties and instruments scheduled to the HREOC Act. The Inquiry has investigated, in particular, whether the detention of children in immigration detention facilities is consistent with Australia's obligations under the CRC.

The Commission can conduct an inquiry in 'the manner in which it sees fit'. However, the HREOC Act does establish some basic requirements. When the Commission undertakes an investigation of an act or practice that may be inconsistent with Australia's human rights obligations, the Commission must endeavour to settle the matter by way of conciliation where it considers it appropriate to do so. However, the Commission considers that the nature of a public inquiry of this scale makes conciliation inappropriate. In the absence of conciliation or settlement, the Commission is required to report to the Attorney-General in relation to the inquiry.

The Commission is required under the HREOC Act to include in its report any recommendations regarding the amendment of laws 'to ensure that the enactment is not ... inconsistent with or contrary to any human right'. Those recommendations are contained in Chapter 17, Major Findings and Recommendations.

As set out in more detail in Chapter 2 on Methodology, the Department and ACM have the right to make submissions in relation to each act or practice about which the Commission has formed a preliminary view. They also have the right to indicate what action they have taken in response to the Commission's findings. This process

seeks to provide both parties with procedural fairness regarding all allegations adverse to them. The process adds to the integrity of the report. It also lengthens the reporting period.

## 1.2 What are the terms of reference for the Inquiry?

The Human Rights Commissioner announced the commencement of this Inquiry on 28 November 2001 and published its Terms of Reference on that same date.<sup>7</sup>

The Terms of Reference are as follows:

The Human Rights Commissioner, Dr Sev Ozdowski, will conduct an Inquiry into children in immigration detention on behalf of the Commission.

The Commissioner will inquire into the adequacy and appropriateness of Australia's treatment of child asylum seekers and other children who are, or have been, held in immigration detention, including:

1. The provisions made by Australia to implement its international human rights obligations regarding child asylum seekers, including unaccompanied minors.
2. The mandatory detention of child asylum seekers and other children arriving in Australia without visas, and alternatives to their detention.
3. The adequacy and effectiveness of the policies, agreements, laws, rules and practices governing children in immigration detention or child asylum seekers and refugees residing in the community after a period of detention, with particular reference to:
  - the conditions under which children are detained
  - health, including mental health, development and disability
  - education
  - culture
  - guardianship issues
  - security practices in detention.
4. The impact of detention on the well-being and healthy development of children, including their long-term development.
5. The additional measures and safeguards which may be required in detention facilities to protect the human rights and best interests of all detained children.
6. The additional measures and safeguards which may be required to protect the human rights and best interests of child asylum seekers and refugees residing in the community after a period of detention.

'Child' includes any person under the age of 18.

### **1.3 What is the time period covered by the Inquiry?**

The Inquiry sought to address the conditions in detention in the period starting 1 January 1999 and ending 31 December 2002. However, the majority of the evidence before the Inquiry relates to experiences between 2001 and 2002. Furthermore, due to the protracted nature of the reporting process, the Inquiry has been able to update some of the material facts up until December 2003. The time periods to which the specific evidence applies is set out in the text of the report to the extent possible.

### **1.4 Who are the Commissioners who conducted the Inquiry?**

Dr Sev Ozdowski, the Human Rights and Equal Opportunity Commission's Human Rights Commissioner, conducted the Inquiry. Dr Robin Sullivan and Professor Trang Thomas were appointed as Assistant Commissioners in order to provide expert advice.

Dr Sullivan has been the Queensland Commissioner for Children and Young People since April 1999, after a long career in the Queensland Department of Education.

Professor Thomas is a Professor of Psychology at the Royal Melbourne Institute of Technology and Director of Science at the Australian Psychological Society. Other current appointments include the Council for Multicultural Australia and the National Health and Medical Research Council.

Together with the Human Rights Commissioner, the Assistant Commissioners conducted public hearings and visits to immigration detention facilities. They also contributed to the development of the report and its recommendations. The Inquiry is grateful to have had the benefit of their expertise.

### **1.5 What is the structure of the report?**

Chapter 2 of this report sets out the methodology used for the Inquiry. Chapter 3 provides some background statistics on the children who form the subject of the Inquiry.

Chapter 4 briefly sets out Australia's obligations under international human rights law. Chapter 5 explains how those rights are enforced within the context of immigration detention, with a focus on the detention services contract with ACM.

Chapter 6 sets out Australia's immigration detention policy as it applies to children who arrive in Australia without a visa and assesses whether it complies with international human rights law.

Chapter 7 examines whether Australia's refugee status determination system properly takes into account the special needs of children.

Chapters 8-15 analyse whether the various rights to which children in immigration detention are entitled have been enjoyed within the detention environment.

Chapter 16 assesses whether children who are released from detention into the Australian community on temporary protection visas can enjoy their human rights.

Finally, Chapter 17 sets out the Inquiry's major findings and recommendations. It also explains the key principles that should guide the development of new laws applying to children who arrive in Australia without a visa.

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## Endnotes

- 1 For more on the history of immigration detention see Justice AM North and P Decle, 'Courts and Immigration Detention: The Australian Experience', Address to the Conference of the International Association of Refugee Law Judges, Wellington, New Zealand, October 2002.
- 2 For reasons that are more fully explained in Chapter 2 on Methodology, the Inquiry was unable to inspect the facilities in Nauru and Papua New Guinea. However, the Inquiry did receive some submissions about those facilities and is in a position to analyse the legislation that brings those facilities into play. Therefore, to the extent that the Inquiry feels able to comment it has done so throughout this report.
- 3 Unlawful non-citizens taken into immigration detention: 1997-1998, 2716; 1998-1999, 3574; 1999-2000, 8205; 2000-2001, 7881; 2001-2002, 7808. DIMIA, Fact Sheet 82, Immigration Detention, at <http://www.immi.gov.au/facts/82detention.htm>, viewed 19 August 2003.
- 4 The Inquiry was announced on 28 November 2001. Figures are for 28 November 2001 (unaccompanied children) and 1 December 2001 (all children). For further statistics on children in immigration detention see Chapter 3, Setting the Scene.
- 5 The Commission received a complaint about Shayan Badraie's treatment in detention and found that his rights had been breached by the Commonwealth. See Human Rights and Equal Opportunity Commission, *Report of an inquiry into a complaint by Mr Mohammed Badraie on behalf of his son Shayan regarding acts or practices of the Commonwealth of Australia (the Department of Immigration, Multicultural and Indigenous Affairs)*, HREOC Report No. 25, 2002. The Government did not accept that the treatment of Shayan Badraie breached its international obligations. See further the case study at the end of Chapter 8 on Safety.
- 6 Commonwealth Ombudsman, Australia, at [www.ombudsman.gov.au](http://www.ombudsman.gov.au).
- 7 For a detailed account of the methodology used by the Inquiry see Chapter 2 on Methodology.



# Chapter 2

## Inquiry Methodology

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## 2. Inquiry Methodology

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The Inquiry has been committed to hearing from all parties in the Australian community who have been involved with the immigration detention of children. This includes current and former detainee children themselves and their parents, the Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA), the detention services provider Australasian Correctional Management Pty Limited (ACM), former detention centre staff, State authorities, service providers who have offered families assistance after a period of detention, professional organisations, non-government organisations and individuals.

This chapter discusses the ways in which the Inquiry has gathered evidence, including:

- 2.1.1 Confidentiality directions issued to encourage people to speak out
- 2.1.2 Visits to immigration detention facilities
- 2.1.3 Public submissions
- 2.1.4 Public hearings
- 2.1.5 Focus groups and other interviews
- 2.1.6 Evidence from the Department
- 2.1.7 Evidence from ACM

The chapter then sets out the manner in which that evidence has been assessed. In particular it addresses the following issues:

- 2.2.1 General approach to incorporating evidence
- 2.2.2 Assessing the probative value of evidence
- 2.2.3 Selection and use of case studies
- 2.2.4 Context for analysis of the evidence

## 2.1 How did the Inquiry gather evidence?

### 2.1.1 Confidentiality directions to encourage the giving of evidence

Children's participation is a central theme of the *Convention on the Rights of the Child* (CRC):

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

*Convention on the Rights of the Child, article 12*

However, encouraging children who have experienced detention to speak out has not been easy. There was some concern that disclosure of personal information might give rise to concerns of persecution in some asylum seekers' countries of origin. Some detainee children and parents also told the Inquiry that they were afraid that talking about their situation might affect their claim for asylum. Even families living in the community on temporary protection visas were anxious that their applications for protection, when their current visas lapse, might be compromised if they spoke publicly to the Inquiry. For example, the Coalition Assisting Refugees After Detention, a community group in Western Australia, told the Inquiry that:

[R]efugees are most reluctant, we have found, to tell their story publicly because they fear that any implied criticism of the government will somehow harm their chances of converting their temporary protection into permanent protection. They feel very strongly about that.<sup>1</sup>

In the light of these concerns, on 19 April 2002 the Inquiry issued confidentiality directions to preserve the anonymity of all refugees and asylum seekers giving evidence, producing information or documents, and making submissions to the Inquiry.<sup>2</sup>

The Inquiry also granted anonymity to any other person who requested that their contribution be confidential, in order to encourage people to give evidence.<sup>3</sup> The Inquiry was nevertheless surprised by the number of requests for confidentiality. It became apparent that detainees and people living in Australia post-detention were not the only people concerned about speaking publicly. Many former detention centre staff wanting to talk to the Inquiry would only do so anonymously, nervous of the consequences of their speaking publicly. However, some of these people agreed to 'go public' after time had elapsed.

In addition, the Inquiry heard that service providers in the community who work with people living on temporary protection visas, and who receive funding from the Department, were reluctant to speak to the Inquiry. For example, the New South Wales Council of Social Services gave evidence that Migrant Resource Centres had expressed a reluctance to speak publicly about issues affecting temporary visa holders out of fear that if they did so they might lose their funding from the Department.<sup>4</sup>

While the confidentiality orders were necessary and desirable in themselves, they have, nevertheless, had an impact on the extent to which the Inquiry is able to transparently reveal the factual foundations underpinning some of its conclusions. This is discussed further in section 2.2.1 below.

Furthermore, the Inquiry made confidentiality directions in relation to some documents provided to the Inquiry by the Department and ACM. This is discussed further in section 2.1.6(b).

## 2.1.2 Visits to immigration detention facilities

Over 2002, the Inquiry visited every immigration detention facility within Australia. Other than the January 2002 visit to Woomera, all of the visits were conducted by the Human Rights Commissioner (the Commissioner), variously assisted by the Assistant Commissioners, and supported by staff from the Inquiry.

Visits were conducted as follows:

21-23 January 2002	Phosphate Hill Immigration Reception Centre, Christmas Island <sup>5</sup>
25-26 January 2002	Cocos (Keeling) Islands Immigration Reception Centre
25-29 January 2002	Woomera Immigration Reception and Processing Centre and Woomera Residential Housing Project (RHP) <sup>6</sup>
28-29 May 2002	Maribyrnong Immigration Detention Centre
11 June 2002	Perth Immigration Detention Centre
12-13 June 2002	Port Hedland Immigration Reception and Processing Centre
17-18 June 2002	Curtin Immigration Reception and Processing Centre
27-29 June 2002	Woomera and Woomera RHP
15-16 August 2002	Villawood Immigration Detention Centre
26-27 September 2002	Woomera and Woomera RHP
12-13 December 2002	Baxter Immigration Detention Facility

The Inquiry was also hoping to inspect the facilities on Nauru and Manus Island in Papua New Guinea. This is where asylum seekers removed from Australia's excised zones, or intercepted in international waters, are taken pursuant to the so-called 'Pacific Solution' legislation.<sup>7</sup>

On 11 July 2002, the Inquiry requested that the Department facilitate a visit to those detention facilities. On 29 July 2002, the Department responded to the request, expressing the view that 'since the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act) ... does not have extra-territorial effect, the Commission's inquiry function does not extend to those facilities'.

On 17 September 2002, the Commissioner wrote to the Secretary of the Department, expressing the view, on advice received from Senior Counsel, that the involvement of Commonwealth officers in both the operation of centres on Nauru and Manus Island and the forcible removal of asylum seekers to those centres, enlivened the Commission's powers. The Commissioner requested a reassessment of the

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Secretary's decision. However, on 4 October 2002, the Department reiterated its position that the HREOC Act did not have extra-territorial effect and declined to assist the Inquiry with these visits. In these circumstances, the Inquiry formed the view that it would be neither feasible nor productive to make further attempts to visit the detention facilities in Nauru and Papua New Guinea.

During the visits to the Australian centres, the Inquiry inspected the facilities and services available to detainees, observed the daily operation of the centres, conducted interviews with the Department and ACM managerial and operational staff, and attended meetings with detainee representative committees.

The Inquiry also interviewed all detainee families and children who wanted to speak with the Commissioner and staff. A total of 112 separate interviews were conducted with children and families in detention. The interviews were conducted in private, without the presence of the Department or ACM staff and, where appropriate, with the assistance of an interpreter.<sup>8</sup> Almost all of the interviews conducted were taped and transcribed and are quoted throughout this report.<sup>9</sup> Consistent with the directions made to protect the identity of refugees and asylum seekers, the Inquiry has taken care to avoid identifying detainees.

Where the Inquiry believed that it was appropriate to seek documents in relation to information given by detainee children or parents during interviews, the Inquiry first sought specific consent from parents.<sup>10</sup> Those documents, and the testimony of the children and parents themselves, form the basis of the majority of the case studies used in this report (see further section 2.2.3 below).

A significant challenge for the Inquiry during its detention centre visits was to appropriately balance the information provided by the Department or ACM against that provided by detainees and other observers. There was often considerable discrepancy in the various versions of events presented to the Inquiry. The Inquiry carefully assessed all of the evidence before attempting to resolve such discrepancies (see section 2.2.2 below).

The Inquiry was also concerned that, on occasion, the conditions it observed during the visits were not those ordinarily enjoyed by detainees. The Inquiry consistently heard from detainees that conditions in the centre were enhanced immediately prior to the visits from the Inquiry. For example, the Inquiry heard from detainees that televisions were repaired after a long period of disrepair immediately prior to the Inquiry's visit to Curtin IRPC in June 2002, and that children were also provided with new clothes prior to this visit. Similar claims by detainees have been reported by the Joint Standing Committee on Foreign Affairs, Defence and Trade.<sup>11</sup>

Furthermore, two former ACM staff members from two separate detention centres claimed that the centres had been 'prettied up' prior to a visit by the Human Rights and Equal Opportunity Commission (the Commission) and, at Woomera, that staff had been directed what to say.<sup>12</sup> On the other hand a Departmental staff member at Woomera reported that during his time there conditions such as food and cleanliness were not improved prior to official visits, although problems in getting

certain service staff, such as psychologists, were 'miraculously speeded up when there was a visit'.<sup>13</sup> Both the Department and ACM have told the Inquiry that any improvements that occurred prior to the Inquiry's visit would have been part of the regular repairs and service provision.<sup>14</sup> The Inquiry has taken all these views into account when assessing the evidence gathered during its visits.

Despite these challenges, the first hand observations and interviews conducted by the Inquiry during these visits were a vital source of evidence. They were invaluable in fully appreciating the physical and social nature of the environment in which children were being held, and understanding the difficulties that such an environment creates for meeting the needs of children. In particular, it was during these visits that the Inquiry began to appreciate the significant impact of detention on the emotional well-being of children, discussed in detail in Chapter 9 on Mental Health.

### **2.1.3 Public submissions**

On the day it was announced, 28 November 2001, the Inquiry called for public submissions. The original deadline for submissions was 15 March 2002. That date was extended until 3 May 2002 in response to a number of requests for further time. The Inquiry accepted submissions after that date at its discretion.

The Inquiry published Background Papers on the international legal principles relevant to the terms of reference on 22 February 2002, in order to assist organisations and individuals wishing to make submissions to the Inquiry.

The Inquiry received 346 submissions, including 64 that were confidential. Submissions came from a wide range of organisations representing detainees, human rights and legal bodies, members of the public, religious organisations, State government agencies and a range of non-government policy and service-providing groups. The Department also made a submission to the Inquiry. A number of current and former detainees, as well as former detention centre staff, also provided statements to the Inquiry.

Submissions took a variety of forms. The vast majority of submissions were in the form of detailed written commentary; however, the Inquiry also received tapes, drawings and poetry. Most of the public submissions for which the Inquiry was able to obtain an electronic copy have been placed on the web site. A complete list of submissions is provided in Appendix One to the report.<sup>15</sup>

In keeping with the Inquiry's confidentiality directions, submissions were amended where necessary to remove the names and identifying features of asylum seekers, and other individuals who were named. Some submissions were made confidential upon request, or at the discretion of the Commissioner.

The Inquiry is extremely grateful to all those who made submissions. The time, energy and expertise that members of the public devoted to this task was considerable. To the extent that the content of the submissions can be summarised, they broadly fall into the following categories of information:

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1. Stories about and from certain asylum seekers (most of which were de-identified).
2. Reports about the practices and conditions in detention centres.
3. Experiences and observations of former detention centre staff and consultants.
4. Evidence and analysis from medical and legal experts.
5. General comments on Australia's detention policy.

The submissions were useful in highlighting to the Inquiry certain areas which warranted further investigation. As a result of issues raised by submissions received, the Inquiry made a number of requests for primary records and information by way of Notices issued to the Department and ACM.

Many submissions provided useful and persuasive evidence. Some contained first hand accounts of the detention experience while others contained the views of qualified professionals, such as doctors, who were able to give opinions based on their experience with current or former detainees. The Inquiry was assisted by the legal analysis of the detention laws which was contained in some of the submissions received.

Submissions also provided an opportunity for members of the public to voice their views and concerns about the detention of children. It is an issue which has been the subject of significant debate in the community and the process of conducting the Inquiry provided an important forum in which these views could be raised.

### 2.1.4 Public hearings

The timetable of public hearings was as follows:

Melbourne	30-31 May 2002
Perth	10 June 2002
Adelaide	1-2 July 2002
Sydney	15-17 July 2002
Brisbane	6 August 2002
Sydney	12 September 2002 (DIMIA and ACM)
Sydney	2-5 December 2002 (DIMIA and ACM)
Sydney	19 September 2003 (ACM)

The hearings were conducted by the Human Rights Commissioner, assisted variously by the Assistant Commissioners and supported by Inquiry staff and legal counsel. All oral evidence was provided on oath or affirmation.



Inquiry Commissioner Dr Sev Ozdowski (*centre*) with Assistant Commissioners, Dr Robin Sullivan (*right*) and Professor Trang Thomas (*left*) at Brisbane Hearing.

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The primary purpose of the public hearings was to allow the Inquiry to further explore the information contained in written submissions and provide a forum in which the issues which were the subject of the Inquiry could be discussed. The Inquiry is grateful to all those who contributed their time, expertise and experience to the hearing process by providing oral evidence, including:

- former detainees
- representatives of the Department and ACM
- former staff of the detention facilities
- state government representatives
- professional representative bodies
- legal practitioners
- medical practitioners
- mental health practitioners
- educators
- non-government organisations
- academics
- agencies providing services to temporary protection visa holders
- interested members of the community.

A schedule of hearings is provided in Appendix Two to this report. Transcripts of all public hearings were placed on the Inquiry's web site. All witnesses were provided a copy of the draft transcript for corrections.

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As set out in section 2.1.1, in order to encourage full disclosure, the Inquiry offered all potential witnesses the opportunity to give evidence in confidence. As a result, the Inquiry heard 50 persons in 24 confidential sessions, including former detainees, former detention centre staff and non-government organisations. Some of those witnesses subsequently decided to make their evidence public.

The Inquiry offered the assistance of a counsellor to those persons it considered may have found it traumatic to give evidence to the Inquiry. Those witnesses were also encouraged to bring a support person while they gave evidence.

Three of the hearings were dedicated to obtaining evidence and legal submissions from the Department and ACM, as the bodies responsible for the management of the detention system. The first of those was convened to allow the Department and ACM to make submissions in support of an application to prevent the publication of documents provided to the Inquiry pursuant to the Notices that had been issued. This hearing was conducted *in camera* to allow free discussion about documents that were the subject of the application for confidentiality. However, an edited transcript of those hearings was later published on the Inquiry's web site.

The second hearing with the Department and ACM provided the opportunity for the Inquiry to obtain further oral evidence from the Department and ACM. The third hearing, which involved ACM only, followed a request by ACM to provide further oral evidence and submissions in response to the Inquiry's draft report. These latter two hearings are discussed further below.

In addition to being an important source of evidence, some of the oral evidence formed the basis for further investigation by the Inquiry. The public hearing process was an opportunity to stimulate public debate and discussion and ensure greater transparency of the system of immigration detention and the conditions under which children are detained.

### 2.1.5 Focus groups and other interviews

The Inquiry found that former detainee children generally would not provide written submissions and were not comfortable appearing in the formal setting of a hearing. The child-friendly environment of a focus group helped to enable children to fully express themselves.

Therefore, in addition to speaking to detainee children during visits to detention centres, focus groups with former detainee children and young people were held throughout the country to obtain first-hand views of the experience and impact of detention.

The following focus groups were conducted:

Melbourne	May 2002 (8 groups, 35 children)
Perth	June 2002 (5 groups, 36 children)
Adelaide	July 2002 (7 groups, 3 individual interviews, 58 children)
Sydney	March, April, July, September 2002 (5 groups, 44 children)
Brisbane	August 2002 (4 groups, 24 children)

Focus groups were generally organised with the assistance of State-based torture and trauma agencies. In most focus groups, either a representative from the relevant agency or a psychologist was present to offer support to the children. Participation in any focus group was voluntary and on the basis of complete anonymity.

Focus groups usually consisted of former detainee children only. However, some groups were composed of family groups and others included adult individuals with some connection to the children. For example, the Inquiry interviewed a group of Iraqi mothers in a playgroup with their small children.

In addition to focus groups, the Inquiry held a number of interviews with individuals in confidence. This included, for example, a former detainee mother, some unaccompanied minors and some former ACM staff members.

A generic list of questions was used as a guide for all the focus groups that were conducted. The topics covered included education, recreation, health care, safety, guardianship for unaccompanied children and the general experience during their time in detention.

Focus groups were a key means of understanding the emotional impact of detention on children and assessing whether there were any patterns in the experiences of children at various times or at different centres. To the maximum extent possible, the Inquiry has sought to reproduce the words of children from these focus groups in order to convey their impressions of detention.

However, the Inquiry was conscious of the potential difficulties in relying on evidence received in this setting. This is discussed further below.

### **2.1.6 Evidence provided by the Department**

The Inquiry is grateful to the Department for its efforts to assist the Inquiry.

As the Department is ultimately responsible for the protection of the human rights of children in immigration detention facilities, it has been the primary subject of scrutiny throughout this Inquiry. The Inquiry is required, and has been committed, to ensure that the Department has had appropriate opportunities to provide information and submissions regarding children in immigration detention, and that it has been afforded procedural fairness.

In addition to the general call for submissions, in April and May 2002 the Inquiry sought detailed information from the Department, including statistical information and documents detailing Departmental policy and instructions.

On 10 May 2002, the Department provided a substantial written submission to the Inquiry. In response to the requests in April and May 2002, further material was provided by the Department, after some delay, on 5 July 2002. These responses did not, however, address all of the questions asked by the Inquiry, nor did they provide the level of detail which the Inquiry sought. In particular, many of the documents provided were publicly available documents, rather than Departmental

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documents which would have assisted the Inquiry to better understand the system of immigration detention as it related to children.

In order to obtain more precise and useful information, the Inquiry utilised its power to compel the production of documents by issuing 'Notices to Produce' to the Department.<sup>16</sup>

### **(a) Evidence provided pursuant to Notices**

On 18 July 2002, the Inquiry issued three Notices to Produce to the Department, to require it to provide general documents regarding both policy and practice pertaining to the rights of children in detention (Notice 1), certain case management plans for unaccompanied and accompanied children (Notice 2) and certain incident reports concerning children (Notice 3). Notices 2 and 3 required documents from certain sample groups and points in time.<sup>17</sup> After discussions with the Department, the Inquiry agreed to extend the three-week deadline for provision of this material. The Inquiry invited the Department to provide the Inquiry with any other information that it considered relevant.

The Department provided documents in response to those Notices in a number of tranches throughout August 2002. Upon review of the material produced, the Inquiry was concerned that there may have been a failure by the Department to comply with some aspects of the Notices.

Specifically, the Inquiry was concerned about the absence of a report from the Department's Business Manager at Woomera in September 2000. The Department informed the Inquiry that the report had been deleted from its electronic records as it had been deemed incomplete by Central Office. There is no evidence before the Inquiry to indicate that this deletion was other than an isolated incident.

The Inquiry was also concerned about minutes from an Unaccompanied Minor Committee meeting during January 2002 when there was substantial unrest involving unaccompanied children, and which had been referred to in other documentation. The Department explained that the meeting had been abandoned due to the calling of a Centre Emergency Response at Woomera at the time.

More generally, the Department informed the Inquiry that it had gone to great lengths to ensure that the relevant documents were provided. The Department also said that the administration of immigration detention had evolved over time and that initially much of the administration was conducted orally. Furthermore, the Department stated that its submission described the practice of administering immigration detention at the time of writing, May 2002, and that:

Certain practices or information referred to in the Department's submission did not exist in that form a year and a half earlier and, as a result, there is no documentation for such practices until they were established.

The Department also asserted that during major disturbances including riots and hunger strikes, ordinary record-keeping practice may not have been adhered to.

Two further Notices to Produce were issued to the Department on 24 October 2002. The first (Notice 4) was focussed primarily on gaining a better understanding of the interaction between the Department and State authorities regarding immigration detention facilities. The second (Notice 5) requested further documentation about specific children and their families.

While there was some delay in providing the documents required by those Notices, all the documents required by the Notices were duly provided by the Department, and the Inquiry acknowledges and appreciates the considerable amount of work that was involved in the collation of this material.

### **(b) Inquiry hearings**

On 19 April 2002, the Inquiry first informed the Department that it would be given an opportunity to provide information and make submissions through a dedicated public hearing. At this stage, it was anticipated that the public hearing for the Department (and ACM) would be held on 15-16 August 2002.

However, the Department raised concerns about providing public evidence during the detention centre management contract tender process. On 18 July 2002, the Inquiry agreed to postpone the public hearings until 9-12 September 2002, after the closing date for the submission of the detention services contract tenders.

However, on 31 July 2002, the Department stated that 'deferring the public hearing only until after the closing date for tenders will not ensure the probity of the tender process'. The Department was concerned that a large number of the documents required by the Inquiry remain confidential until the tender process was fully completed. On 20 August 2002, the Commissioner wrote to the Department inviting formal submissions regarding the confidentiality of the documents by 28 August 2002.

On 27 August 2002, the Department sent a detailed submission, seeking directions of confidentiality under section 14 of the HREOC Act to:

- ensure the safety of detainees and staff in detention facilities
- ensure the enforcement of law (including the security of facilities)
- avoid potentially compromising the detention services tender process
- protect relationships with relevant State/Territory authorities
- ensure innovative service delivery solutions from the new detention services provider.

This letter also contained a formal request to defer the Department's hearing until after the signing of the contract with the new tenderer, which was expected to occur by November 2002.<sup>18</sup> The letter stated that the Department was of the view that 'deferring the hearing would enable the best possible canvassing and, to a very large extent, public discussion of the issues identified for the Department's hearing'.

As discussed in section 2.1.4 above, the Commissioner conducted an *in camera* Directions Hearing on 12 September 2002 to consider these various issues and

## A last resort?

later published an edited transcript of the hearing. The Commissioner assessed all the documents on a case-by-case basis to determine the need for confidentiality and granted some of the Department's applications on the grounds that the safety of detainees and the enforcement of law (security) needed to be protected. Directions regarding the confidentiality of documents were published on 9 October 2002.

The Inquiry also agreed to postpone the public hearing for the Department and ACM until 2-5 December 2002. The hearing was duly held over those four days. The Commissioner sat with Assistant Commissioner Trang Thomas and the Inquiry employed the services of a barrister in the role of 'Inquiry Counsel'. Both the Department and ACM, at the invitation of the Commissioner, were also legally represented at the hearing.

The purpose of the December hearings was to further explore, in public, some of the concerns that had been raised by the evidence before the Inquiry at that point. After an opening statement by the Department, the hearing proceeded by way of examination by the Inquiry Counsel. The Inquiry heard evidence from the Department on various issues, including:

- the Department's mechanisms for monitoring compliance with human rights in immigration detention
- the care of unaccompanied children in detention
- the mechanisms to deal with the deteriorating mental health of families in detention
- education in detention facilities
- provision of services to families with disabilities.

The Inquiry also explored four case studies in some detail.

Questions or issues that could not be fully answered at the time were taken 'on notice' and answers subsequently provided. Transcripts of the proceedings were provided to the Department and ACM to allow the opportunity to correct or amplify responses. The Department issued some supplementary comments on the transcript. All were published on the Inquiry web site.

### **(c) Further written submissions**

Due to budgetary constraints, it was not possible to raise every issue that concerned the Inquiry with the Department during the public hearings. Pursuant to section 27 of the HREOC Act, the Inquiry therefore provided the Department with an opportunity to supply further evidence and submissions after the first draft of the report had been completed.

The draft report, consisting of approximately 700 pages, and containing the Inquiry's preliminary findings, was sent to the Department in two stages. The first set of chapters was transmitted on 7 April 2003 and the second set of chapters was sent on 14 May 2003. The Department was given six weeks to respond. The Department requested, and the Inquiry granted, a two-week extension regarding the bulk of the chapters. The Inquiry received detailed evidence and submissions on every chapter by 14 July 2003. The Inquiry carefully considered the information contained in the

approximately 360 pages of comments by the Department and incorporated them where appropriate.

On 14 October 2003, the Department requested a further opportunity to provide comments on the revised draft report. Due to the substantial nature of the Department's (and ACM's) comments, the Inquiry felt that procedural fairness would be best met by granting that request. The revised draft was sent to the Department on 28 November 2003, and the Department was given a three-week deadline for its comments. All of the Department's comments were received by 19 December 2003.

Pursuant to section 29 of the HREOC Act, on 22 January 2004, the Inquiry provided the Department with a Notice setting out the Inquiry's final findings and the reasons for those findings. The Inquiry requested that the Department advise what, if any, action it was taking as a result of the findings and recommendations in the report. The Department provided its response on 6 February 2004.

### **2.1.7 Evidence provided by ACM**

The Inquiry was also concerned to ensure that the detention services provider, ACM, was given the opportunity to provide information and submissions to the Inquiry regarding its treatment of children in immigration detention, and was afforded procedural fairness.

ACM chose not to provide the Inquiry with a submission in 2002, and much of the information regarding ACM's detention management strategies and practices was provided by the Department throughout 2002. However, in 2003, ACM took a much more active role in the process.

The Inquiry is grateful for ACM's assistance throughout the process.

#### **(a) Evidence provided pursuant to Notices**

Notices to Produce, almost identical to those provided to the Department on 18 July 2002, were also issued to ACM on 18 July 2002. The Department responded to those Notices on ACM's behalf.

On 20 August 2002, the Commission issued ACM a fourth Notice (ACM Notice 4) requiring the production of ACM's internal monthly reports, and of reports regarding contract performance. On 24 October 2002, the Commission issued ACM a fifth Notice (ACM Notice 5) requiring the production of information and documentation regarding the case management of child detainees.

#### **(b) Inquiry hearings**

ACM appeared, assisted by legal counsel, at both the 12 September 2002 Directions Hearing and the 2-5 December 2002 public hearing.

During the December hearings ACM was given the opportunity to make an opening statement (which it declined), ask questions of Departmental witnesses and call witnesses of their own.

## **A last resort?**

On 30 July 2003, ACM requested the opportunity to provide further oral evidence and submissions in response to the preliminary findings contained in the first draft report. Pursuant to the HREOC Act and the common law requirements of procedural fairness, the Inquiry granted that request and a further hearing was held on 19 September 2003.

### **(c) Further written submissions**

As with the Department, the Inquiry provided a copy of the draft report to ACM in April and May of 2003. ACM provided its written response to the first seven chapters within six weeks but requested extensions of time regarding the remaining chapters on the basis that the draft report contained substantially more material regarding ACM's performance than it had expected. ACM also expressed to the Inquiry its concern about allegations in the draft report of which it had not previously been aware.

In the light of the circumstances, the Inquiry regarded it as fair and appropriate that ACM have additional time to address these concerns. The Inquiry received the bulk of ACM's written submissions by 5 September 2003. However, ACM continued to provide material after the 19 September 2003 hearings, in response to specific requests by the Inquiry. The Inquiry has carefully considered all of this information and incorporated the comments of ACM where appropriate.

ACM also requested a further opportunity to provide comments on the revised draft report. As with the Department, the Inquiry sent the revised draft to ACM on 28 November 2003, and gave ACM a three-week deadline for its comments. All of ACM's comments were received by 19 December 2003. The Inquiry also provided ACM with a Notice pursuant to section 29 of the HREOC Act on 22 January 2004. ACM provided its response on 6 February 2004.

## **2.2 How did the Inquiry assess, analyse and utilise the evidence before it?**

While the Inquiry is not bound by the rules of evidence, it has been conscious of the need to carefully scrutinise the evidence before it.<sup>19</sup> The Inquiry has only made findings where it is reasonably satisfied, on the balance of probabilities, of the facts relating to the subject of those findings. It is well established that factors such as the seriousness of allegations raised, the inherent unlikelihood of a particular event and the seriousness of consequences which flow from a finding must be taken into account in reaching a state of 'reasonable satisfaction'. The Inquiry has considered those factors and has been mindful of the source, quality and probative value of the evidence before it when making its findings.

### **2.2.1 General approach to incorporating evidence**

The Inquiry was strongly of the view that the experiences and assessments recounted in the written and oral evidence before the Inquiry should be reproduced, to the maximum extent possible, in the words of the author. Thus the Inquiry has sought

to extract the relevant evidence rather than summarise or paraphrase it. While this approach has added to the length of the report, the Inquiry is of the view that it is preferable for several reasons.

First, the Inquiry has been concerned to capture the voice of children and their parents, as well as the former detention centre staff who were eager to share their personal experiences with the Inquiry. It must be noted, however that most of this evidence, particularly from children, was provided on a confidential basis. As a result, the substance of many of the allegations could not be disclosed to the Department or ACM with sufficient detail to allow them to properly respond to that evidence, as to do so would have identified the person providing that information. In those circumstances, the Inquiry was not able to ensure that procedural fairness was afforded to the Department and ACM in relation to some allegations and it was therefore inappropriate to reproduce them.

Second, the Inquiry has received a great deal of expert evidence from mental health, child welfare and legal professionals. The Inquiry preferred to let those experts speak for themselves.

Third, the Inquiry has sought to increase the transparency of the detention centre management system by revealing the substance of many of the Departmental, ACM and State welfare authority documents to which the Inquiry has obtained access.

### **2.2.2 Assessing the probative value of evidence**

In considering the probative value that could be given to evidence received, a number of factors were of particular relevance in the context of the Inquiry.

First, the Inquiry was conscious of certain weaknesses in the evidence received from children. Some of the events described by children contained limited detail or were based on hearsay or general impressions, rather than direct observations. The stories and experiences shared by children were not given under oath and were not subjected to cross-examination. The focus group setting also raised the possibility that the evidence of the children may have been the result of peer distortion.

This did not mean, however, that such evidence was of no assistance to the Inquiry. The words of children remain important in giving children's impressions of the detention experience. Furthermore, consistency between the evidence given by children in different fora, and corroboration from other sources, enhanced the reliability and probative value of that evidence. The Inquiry has taken all these factors into account in determining the weight given to this evidence when reaching its findings.

Second, the Inquiry took into account the level of expertise and degree of direct experience and contact with detainees when assessing the relative weight of written submissions and oral testimony by medical, legal and other service providers. Where the evidence reflected primary experiences it was given greater weight than second

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hand evidence (and since access to detention centres and primary records is highly restricted it was difficult for many persons to obtain first hand evidence).

Third, the Inquiry has taken into account the fact that the issue of children in immigration detention is an area of intense debate and often polarised views. Many of the individuals and organisations which gave evidence to the Inquiry, both at hearings and in submissions, hold strong views in relation to the policy of immigration detention and the events that have taken place in detention centres in the period of the Inquiry. The Inquiry has balanced all these factors in reaching its conclusions.

### 2.2.3 Selection and use of case studies

The impact of detention on individual children and their parents may be best understood by telling their stories. The Inquiry had insufficient resources to conduct full investigations of the circumstances facing every child that has been in detention from 1 January 1999 to 31 December 2002. Furthermore, confidentiality concerns limited the Inquiry's ability to recount children's stories in full.

However, Notice 5 issued to the Department requested primary records concerning 33 families who were held in immigration detention centres. The families forming the subject of the Notice came to the Inquiry's attention either during its visits to immigration detention facilities, or from the incident reports provided by the Department pursuant to Notice 3, or from submissions provided to the Inquiry. The case studies used in this report are based almost exclusively on those documents.

The Inquiry does not assert that the case studies represent the experience of all children in immigration detention. Indeed, the cases are primarily concerned with children and families who were in detention for long periods of time. The Inquiry readily acknowledges that the impact of detention on children who spend short periods of time in detention is likely to be much less serious.

However, the nature of human rights is that they are designed to protect each and every individual. The case studies in the report illustrate the impact that Australia's immigration detention system can have on a child's ability to enjoy his or her fundamental human rights. To the extent that Australia's detention policy and practices have breached any one child's rights, this is an important story to tell.

### 2.2.4 Context for analysis of the evidence

Chapter 6 on Australia's Detention Policy sets out the Inquiry's finding that Australia's system of mandatory detention itself breaches international law and therefore children detained pursuant to those laws have had their rights breached. The Department suggested that this finding colours the analysis in all the following chapters. The Inquiry rejects the Department's suggestion in this regard.

The Inquiry has delineated which of its findings relate to the laws themselves and which aspects are the responsibility of the Department or ACM. However, the bottom line is that it is the Commonwealth's responsibility, as a whole, to protect children's rights (see further Chapter 4 on Australia's Human Rights Obligations and Chapter

5 on Mechanisms to Protect Human Rights). The Inquiry examines Australia's compliance with international law within that broader context.

More specifically, throughout this report the Inquiry examined: (a) whether the enjoyment of various children's rights are best protected if the children are not in detention; (b) what efforts have been made by the Department and ACM, within the detention environment, to ensure the enjoyment of children's rights; and (c) the impact of those efforts on the enjoyment of children's rights.

The Department also suggested that the Inquiry not be overly 'historical' in its focus and that it analyse the evidence against a backdrop of continuous improvement in the provision of services. The Inquiry recognises, and welcomes, improvements in the detention environment which have been implemented during the period of the Inquiry and since the completion of the Inquiry's investigations. It has sought to note those improvements where they have occurred.

However, the purpose of this Inquiry is to examine the experience of children, to the maximum extent possible, between 1 January 1999 and 31 December 2002. Where the evidence suggests that children's rights have been breached earlier on in that period, it is important to document those breaches in an effort to prevent repetition of such circumstances in the future. Furthermore, to the extent that the detention environment itself prevents the enjoyment of rights, such improvements within that environment may have minimal impact.

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## Endnotes

- 1 CARAD, Transcript of Evidence, Perth, 10 June 2002, p24. See also Asylum Seekers Centre, Transcript of Evidence, Sydney, 17 July 2002, p7.
- 2 Copies of these directions can be found at [http://www.humanrights.gov.au/human\\_rights/children\\_detention/privacy.html](http://www.humanrights.gov.au/human_rights/children_detention/privacy.html).
- 3 The Inquiry also made directions to protect the identity of third parties mentioned in evidence, unless they were public figures. This was done to avoid unfairness to persons who may have been named but were unable to have an adequate opportunity to respond to matters which related to them.
- 4 New South Wales Council of Social Service, Transcript of Evidence, Sydney, 15 July 2002, p46.
- 5 Immigration Reception and Processing Centres (IRPCs) and Immigration Reception Centres (IRCs) mainly hold unauthorised arrivals. Immigration Detention Centres (IDCs) may also hold other immigration detainees, including those overstaying or breaching visa conditions.
- 6 Two senior staff of the Commission conducted this visit to Woomera at the time of a hunger strike by detainees, including children, which was widely reported by the media at the time. The Human Rights Commissioner was not present during this visit, but was informed by those staff of their observations.
- 7 The closure of Manus Island facility in Papua New Guinea was announced by the Minister in July 2003: Minister for Immigration and Multicultural and Indigenous Affairs, *Pacific Strategy Success*, Media Release, Parliament House, Canberra, 28 July 2003. However, as at 2 September 2003, 356 asylum seekers remained in the facilities in Nauru and Papua New Guinea: Minister for Immigration and Multicultural and Indigenous Affairs, *Pacific Strategy Caseload Almost 80 Per Cent Finalised*, Media Release, Parliament House, Canberra, 2 September 2003.
- 8 In some cases detainees were happy to use an interpreter provided by ACM or the Department, based in the centre. On other occasions detainees preferred to use interpreters provided by the Translating and Interpreting Service (TIS).
- 9 Some detainees did not consent to taping of their conversation with the Inquiry.

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- 10 When concerns about a certain family were brought to the Inquiry's attention other than through the interviews conducted during detention centre visits, the Inquiry did not have the opportunity to seek consent. However, any such information has been de-identified for the purposes of this report.
- 11 Joint Standing Committee on Foreign Affairs, Defence and Trade, *A Report on Visits to Immigration Detention Centres*, June 2001, pp57-58 and p63. Detainees in Villawood and Maribyrnong told the Committee that certain preparations had been made before their visit in January-February 2001, including movement of bedding to make Stage 1 Villawood look less crowded and the posting of human rights information on billboards. At Maribyrnong, where a detainee claimed that the centre had been cleaned in preparation, ACM pointed out that the preparations were in fact part of an ongoing maintenance program for the centre.
- 12 Allan Clifton (former ACM Centre Manager, Woomera), Transcript of Evidence, Adelaide, 2 July 2002, pp5-7; Katie Brosnan (former teacher, Port Hedland), Transcript of Evidence, Perth, 10 June 2002, p4. The latter commented that 'Prior to each delegation there was always an effort on the part of ACM and DIMIA to beautify the environment. That may/may not have included painting, planting flower beds, sprucing up the school, putting up pictures, balloons, whatever was available to hand, fixing things that may have been broken for long periods of time'.
- 13 Anthony Hamilton-Smith, Transcript of Evidence, Adelaide, 2 July 2002, p6.
- 14 DIMIA, Response to Draft Report, 19 May 2003; ACM, Response to Draft Report, 19 May 2003.
- 15 Under Commonwealth Archives legislation, the Inquiry is obliged to archive all submissions and evidence to the Inquiry. These materials, other than confidential evidence and submissions, will be available to researchers subject to Australian Archives application procedures. To assist those wishing to research the submissions and evidence to the Inquiry, submission numbers are supplied when referred to in the text.
- 16 HREOC Act, s21(1).
- 17 The Inquiry sought to take account of the fact that DIMIA's electronic database for all detainees was introduced over the period of the Inquiry. This factor was balanced against the need to cover periods during which there were a large number of children in immigration detention.
- 18 The contract was eventually signed on 27 August 2003.
- 19 HREOC Act, s14(1).

# Chapter 3

## Setting the Scene – Children in Immigration Detention

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### 3. Setting the Scene – Children in Immigration Detention

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I want to tell you that actually I spent about fifteen nights in the ride to Australia. I was in a small boat if you want to call that a boat, because it was smaller than that, with lots of difficulties. When I saw [we were] getting near Australia I was becoming a little bit hopeful. When we passed Darwin I got to the detention centre as soon as I looked at these barbed wires my mind was full of fear. That was the time that I experienced fear ... When after all the negative experiences that I had in the detention centre, when I was released I felt like a normal human being and I felt that I was coming back to life!

*Unaccompanied Afghan boy found to be a refugee<sup>1</sup>*

I believe you [Australians] are nice people, peace seekers, you support unity. If you come to see us behind the fence, think about how you would feel. Are you aware of what happens here? Come and see our life. I wonder whether if the Government of Iran created camp like Woomera and Australians had seen pictures of it, if they would have given people a visa to come to Australia then.

*Unaccompanied child refugee, formerly in Woomera<sup>2</sup>*

This chapter attempts to provide some context to a discussion of the human rights of children in immigration detention centres in Australia by shedding light on who the children are, where they came from and what they think about their detention experience.

As well as capturing current and former detainee children's voices, this chapter contains facts and figures on children in immigration detention. It does not attempt to explain the reasons for detention, which are considered in detail in Chapter 6 on Australia's Detention Policy.

Almost all of the statistical material contained in this chapter was supplied by the Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA). Where the statistics come from other sources, those sources are noted.

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This chapter addresses the following questions:

- 3.1 Where can children be detained?
- 3.2 How many children have been in immigration detention?
- 3.3 How many detainee children have been recognised as refugees?
- 3.4 How long have children been in immigration detention?
- 3.5 What is the background of children in immigration detention?
- 3.6 How did the children get to the detention centres?
- 3.7 What did children and their parents say about detention centres?

### 3.1 Where can children be detained?

Prior to September 2001, children arriving on Australian territory (including Australian territorial waters) without a visa could be detained in any one of the following detention facilities: Curtin Immigration Reception and Processing Centre (IRPC), Port Hedland IRPC, Woomera IRPC or the Woomera Residential Housing Project (RHP), Christmas Island IRPC, Cocos (Keeling) Islands Immigration Reception Centre (IRC), Villawood Immigration Detention Centre (IDC), Maribyrnong IDC and Perth IDC.

Some of these detainees were transferred to Baxter Immigration Detention Facility (IDF) after September 2002.

After September 2001 asylum-seeker children who arrived on Christmas Island, the Ashmore Islands or the Cocos (Keeling) Islands, or who were intercepted by Australian authorities, were usually transferred to detention centres in Nauru and Papua New Guinea.

From 1998 Australasian Correctional Management Pty Limited (ACM) provided detention services in all Australian detention centres. In 2004, another company (Group 4 Falck) took over this role.

#### 3.1.1 Baxter Immigration Detention Facility

Baxter opened in July 2002, with the first detainees arriving on 6 September 2002. It is 12 km outside Port Augusta, a rural town 275 km north of Adelaide, South Australia. The facility's nominal capacity is 1160.<sup>3</sup> Within three months of opening there were 41 detainee children in a total population of 218 detainees.<sup>4</sup> As at December 2003, the maximum number of children detained in Baxter at any one time was 54 out of 248 detainees, on 2 January 2003.<sup>5</sup>

Baxter was a planned detention centre, intended by the Department to solve many of the problems facing children and families in the other facilities. The Woomera RHP was managed from Baxter once Woomera detention centre had closed.

On 19 November 2003 a residential housing project opened at Port Augusta West. As at 12 December 2003, 10 detainee women and 17 children had been transferred there from the Baxter facility and the Woomera RHP.<sup>6</sup>



Exterior view of Baxter Immigration Detention Facility, December 2002.

### 3.1.2 Curtin Immigration Reception and Processing Centre

The Curtin detention centre was situated outside the town of Derby in the West Kimberley, Western Australia, 2643 km north-west of Perth.<sup>7</sup> The site was recommissioned from the Curtin Air Base for immigration detention in September 1999. The detention centre was 'mothballed' on 23 September 2002 and most of its detainees were moved to Baxter.

Curtin's nominal capacity was 1200 detainees, although in January 2000 it exceeded that capacity. The maximum number of children detained there at any one time was 200 out of a total population of 894 on 1 April 2001.<sup>8</sup>

### 3.1.3 Maribyrnong Immigration Detention Centre

The Maribyrnong facility, situated in Melbourne, Victoria, opened in 1966. Like the Villawood and Perth detention centres, it mainly caters for visa overstayers and those whose visas are cancelled because they have failed to comply with their visa conditions. People refused entry to Australia at international airports and seaports are also detained there. Its nominal capacity is 80. The maximum number of children detained there at any one time was 13 children out of 71 detainees on 1 February 2001.<sup>9</sup>

### 3.1.4 Perth Immigration Detention Centre

The Perth facility, adjacent to Perth Airport, Western Australia, opened in 1981. The centre is small, with a capacity of 64 detainees, and mainly caters for visa overstayers. The building was built as a single level secure facility for the Australian Federal Police, but was converted shortly afterwards to an immigration detention facility. Very few children are detained there, and those who are generally only stay a few days. However, the Department's web site states that 'Perth IDC was recently upgraded and refurbished to improve the layout, amenity and capacity, particularly for women and children'.<sup>10</sup>

### 3.1.5 Port Hedland Immigration Reception and Processing Centre

The Port Hedland facility, on Western Australia's northern coast, 1638 km from Perth, was established as a detention centre in 1991, having been built in the 1960s as accommodation for single men in the local mining industry. Its nominal capacity is 820 detainees.<sup>11</sup> The maximum number of children detained there at any one time was 177 out of a population of 636, on 1 September 2001. However, Port Hedland's largest population was on 1 January 2000, when there were 839 detainees of whom 90 were children.<sup>12</sup>

On 19 September 2003, the Department opened a residential housing project in Port Hedland. As at 12 December 2003, one woman and two children had been transferred there.<sup>13</sup>



View through the perimeter fence at Port Hedland Immigration Reception and Processing Centre, June 2002.

### 3.1.6 Villawood Immigration Detention Centre

The Villawood facility, situated in the western suburbs of Sydney, New South Wales, opened in 1976. It has a nominal capacity of 700 detainees, and mainly caters for visa overstayers. The maximum number of children detained there at any one time was 47 out of a population of 360 detainees, on 1 March 2001.<sup>14</sup>

### 3.1.7 Woomera Immigration Reception and Processing Centre

The Woomera facility is situated just outside the remote town of Woomera, in the Simpson Desert in South Australia, 487 km from Adelaide. It opened in November 1999 and was 'mothballed' in April 2003.<sup>15</sup>

Woomera's nominal capacity was 1200, but from March to July 2000 the population was above that number.<sup>16</sup> The maximum number of children detained there at any one time was 456 children out of a population of 1442 detainees, on 1 September 2001.<sup>17</sup>



External view of Woomera Immigration Reception and Processing Centre, June 2002.

### 3.1.8 Woomera Residential Housing Project

The Woomera RHP opened on 7 August 2001. It originally had a nominal capacity of 25 detainees. In May 2003, the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) announced the expansion of the housing project to a capacity of around 40 detainees.<sup>18</sup> The maximum number of children detained there at any one time was 15, on 1 March 2002.<sup>19</sup> By June 2003, there were just

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seven children detained there.<sup>20</sup> The same number of children was there in November 2003.<sup>21</sup>

Women and children are detained in a cluster of houses in a street in the Woomera township. They are under supervision at all times by ACM officers. The housing project is open to women and girls (of all ages). Prior to September 2003, only boys under the age of 13 could apply for a transfer there.<sup>22</sup>

### **3.1.9 Christmas Island Immigration Reception and Processing Centre**

Christmas Island is part of the Australian Indian Ocean Territories, 2300 km north-west of Perth, a four-hour flight away. A temporary facility based at Phosphate Hill opened on 13 November 2001, with a nominal capacity of 500, although it has exceeded its capacity at times. Unauthorised arrivals were detained in Christmas Island's sports hall with tents set up next to it, as required, until December 2001.

The maximum number of children detained on Christmas Island at any one time was 160 out of a population of 529, on 1 December 2001.<sup>23</sup> After September 2001 most arrivals were transferred to Nauru or Papua New Guinea.

In 2002, the Government announced plans to build a permanent facility capable of housing 1200 detainees at a capital cost of \$230 million. Subsequently this was downgraded to an 800 detainee facility. Completion is not expected before 2005. The existing facility was 'mothballed' on 19 March 2003,<sup>24</sup> and then recommissioned in July 2003 when 53 Vietnamese asylum seekers were detained there.

### **3.1.10 Cocos (Keeling) Islands Immigration Reception Centre**

The Cocos (Keeling) Islands are part of the Australian Indian Ocean Territories, south of Indonesia, about half-way from Australia to Sri Lanka. They are a four and a half hour flight from Perth. On 15 September 2001, a former Animal Quarantine Station on West Island opened as a detention centre for unauthorised arrivals. West Island is small and isolated with basic infrastructure. At the time of the Inquiry's visit in January 2002, the facility was holding 131 detainees (122 men, four women, three boys and two girls). The detention centre closed on 24 March 2002.

### **3.1.11 'Pacific Solution' detention centres**

Since September 2001, when the Australian Government introduced the so-called 'Pacific Solution', children who arrived in Australia's 'excised offshore places' (including Christmas Island, Ashmore and Cartier Islands, the Cocos (Keeling) Islands) have been detained at Christmas Island or transferred to the 'offshore processing centres' on Manus Island and Nauru.<sup>25</sup> Manus Island is part of Papua New Guinea (PNG) and lies in the Bismarck Sea, north of the PNG mainland. Nauru is an island nation in the South Pacific Ocean.

The operation of the detention services on Manus Island and Nauru is contracted to the International Organisation for Migration. The Australian Government conducts refugee status processing in those detention centres.

As set out in Chapter 2 on Methodology, the Inquiry requested that the Department facilitate a visit to Nauru or Manus Island so that it could interview the children and families there. The Department declined the request and has not provided any statistics on the children detained there.

### 3.1.12 Other places of detention

Under the *Migration Act 1958* (Cth) (Migration Act), detainees can be held in any place approved by the Minister in writing, for example, a hospital, motel room, prison or private home.<sup>26</sup> The conditions in these facilities vary from place to place.

From late January 2002, most unaccompanied children were transferred from the Woomera and Curtin facilities to foster homes in Adelaide, which were declared 'alternative places of detention'.<sup>27</sup> As at 13 December 2002, there were 24 children in alternative places of detention such as private apartments or foster care. Three of the 24 children were under the age of 12, and nine were unaccompanied children.<sup>28</sup> A year later, as at 26 December 2003, 12 children were in alternative places of detention. Seven of these children were in foster care. Two of these children were under ten years of age, the remaining ten children were between 15 and 17-years-old. Eight of these children were unaccompanied children.<sup>29</sup>

## 3.2 How many children have been in immigration detention?

The total number of persons who have arrived in Australia by boat without a visa (unauthorised boat arrivals), since November 1989 is 13,593.<sup>30</sup> To put this number in perspective, all of the unauthorised boat arrivals in Australia over the last 14 years, when gathered together, would fill approximately 15 per cent of the seating capacity of the Melbourne Cricket Ground. Since 1992, all of these arrivals were mandatorily detained under Australian law – some for weeks, some for months, and some for years.

In Australia, 976 children were in immigration detention in the year 1999-2000, 1923 children in 2000-2001, 1696 children in 2001-2002 and 703 children in 2002-2003.<sup>31</sup> Most of these children arrived by boat.<sup>32</sup> The total number of children who arrived in Australia by boat or air without a visa (unauthorised arrivals), and applied for refugee protection visas between 1 July 1999 and 30 June 2003 was 2184.<sup>33</sup> These figures do not include children transferred to and detained on Nauru and Manus Island.<sup>34</sup>

The highest number of children held in detention at any one time between 1 January 1999 and 1 January 2004 was 842 on 1 September 2001. Of those children, 456 were at the Woomera detention centre.<sup>35</sup>

The lowest number of children in detention at any one time during the same period was 49 on 1 February 1999 and again on 1 May 1999. Most of these children were at the Port Hedland and Villawood detention centres.<sup>36</sup>

At the time the Inquiry was announced, in late November 2001, there were over 700 children in immigration detention.<sup>37</sup> By the time of the Inquiry's public hearing with the Department a year later, the number had reduced by 80 per cent to 139.<sup>38</sup> The

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number of children in detention has not decreased at the same rate since that time. There were still over one hundred children in immigration detention in May 2003.<sup>39</sup> As at 26 December 2003, there were 111 children in detention in Australia.<sup>40</sup>

The following four tables set out the numbers of children taken into immigration detention, where they were detained and the reason for detention from 1 July 1999-30 June 2003. The tables illustrate that child *boat arrivals* have been primarily detained in the remote facilities of Curtin, Port Hedland and Woomera, until 2003 when most boat arrival children were transferred to Baxter.<sup>41</sup>

**Table 1: Children in immigration detention by method of arrival: 1999-2000**

Children in detention 1999-2000	Overstayed visa	Boat arrival with no visa <sup>43</sup>	Air arrival with no visa	Other <sup>42</sup>	Total
Curtin	0	200	0	0	<b>200</b>
Port Hedland	8	258	20	0	<b>286</b>
Woomera	0	248	0	0	<b>248</b>
Villawood	26	7	100	13	<b>146</b>
Maribyrnong	7	2	41	0	<b>50</b>
Perth	0	4	1	1	<b>6</b>
Other facility <sup>44</sup>	3	29	1	7	<b>40</b>
<b>Total</b>	<b>44</b>	<b>748</b>	<b>163</b>	<b>21</b>	<b>976</b>

Source: DIMIA, Letter to Inquiry, 30 May 2003, Attachment.

**Table 2: Children in immigration detention by method of arrival: 2000-2001**

Children in detention 2000-2001	Overstayed visa	Boat arrival with no visa	Air arrival with no visa	Other	Total
Curtin	0	499	0	2	<b>501</b>
Port Hedland	8	330	12	1	<b>351</b>
Woomera	0	710	0	0	<b>710</b>
Villawood	69	27	35	33	<b>164</b>
Maribyrnong	9	9	8	2	<b>28</b>
Perth	2	4	4	7	<b>17</b>
Other facility	11	37	2	102 <sup>45</sup>	<b>152</b>
<b>Total</b>	<b>99</b>	<b>1616</b>	<b>61</b>	<b>147</b>	<b>1923</b>

Source: DIMIA, Letter to Inquiry, 30 May 2003, Attachment.

**Table 3: Children in immigration detention by method of arrival: 2001-2002**

<b>Children in detention 2001-2002</b>	<b>Overstayed visa</b>	<b>Boat arrival with no visa</b>	<b>Air arrival with no visa</b>	<b>Other</b>	<b>Total</b>
Curtin	0	232	0	0	<b>232</b>
Port Hedland	0	220	5	0	<b>225</b>
Woomera	0	583	1	0	<b>584</b>
Villawood	72	22	19	27	<b>140</b>
Maribyrnong	10	7	14	7	<b>38</b>
Perth	0	8	2	8	<b>18</b>
Other facility	5	124 <sup>46</sup>	1	85 <sup>47</sup>	<b>215</b>
Christmas	0	238	0	0	<b>238</b>
Cocos Keeling	0	6	0	0	<b>6</b>
<b>Total</b>	<b>87</b>	<b>1440</b>	<b>42</b>	<b>127</b>	<b>1696</b>

Source: DIMIA, Letter to Inquiry, 30 May 2003, Attachment.

**Table 4: Children in immigration detention by method of arrival: 2002-2003**

<b>Children in detention 2002-2003</b>	<b>Overstayed visa</b>	<b>Boat arrival with no visa</b>	<b>Air arrival with no visa</b>	<b>Other</b>	<b>Total</b>
Baxter	0	69	1	5	<b>75</b>
Curtin	0	1	0	0	<b>1</b>
Port Hedland	0	12	4	0	<b>16</b>
Woomera	0	36	0	0	<b>36</b>
Villawood	134	4	5	46	<b>189</b>
Maribyrnong	26	7	3	10	<b>46</b>
Perth	2	5	6	17	<b>30</b>
Other facility	14	29	1	248 <sup>48</sup>	<b>292</b>
Christmas	0	17	0	1	<b>18</b>
<b>Total</b>	<b>176</b>	<b>180</b>	<b>20</b>	<b>327</b>	<b>703</b>

Source: DIMIA, Response to Second Draft Report, 30 January 2004.

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As the above tables demonstrate, during the Inquiry period of 1999-2002, the vast majority of children taken into immigration detention were children arriving in Australia by boat without a visa. This report accordingly focuses on those children, although the Inquiry also interviewed other children during visits to detention centres.<sup>49</sup>

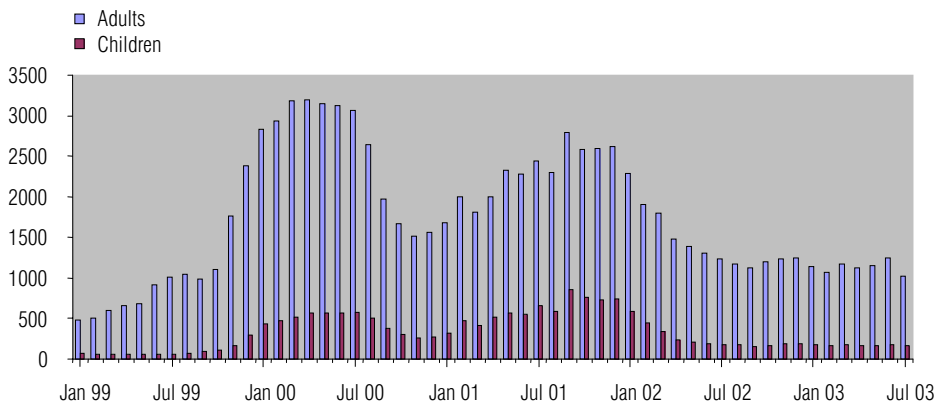
While the above tables demonstrate the total numbers in detention each year, the population of children in immigration detention centres varies from day to day. The following table gives a snapshot of the child detainee population on 1 January and 1 July from 1999 to 2003.

**Table 5: Child detainee population, biannually by centre: July 1999 – July 2003**

Child detainees	1.7.99	1.1.00	1.7.00	1.1.01	1.7.01	1.1.02	1.7.02	1.1.03	1.7.03
Curtin	–	147	133	167	153	63	33	–	–
Port Hedland	27	91	142	64	128	85	11	20	14
Woomera	–	118	215	16	304	281	45	11	–
Woomera Housing Project	–	–	–	–	–	7	0	6	10
Villawood	19	32	32	28	37	16	14	32	29
Maribyrnong	11	9	4	11	7	3	10	3	5
Perth	0	0	0	0	0	0	1	0	1
Christmas Island	–	–	–	–	–	79	10	5	–
Cocos K. Islands	–	–	–	–	–	5	–	–	–
Baxter	–	–	–	–	–	–	–	38	41
Other (hospitals, prisons, etc.)	1	2	16	1	2	4	14	17	11
<b>Total</b>	<b>58</b>	<b>399</b>	<b>542</b>	<b>287</b>	<b>631</b>	<b>543</b>	<b>138</b>	<b>132</b>	<b>111</b>

Source: DIMIA, Letter to Inquiry, 30 May 2003, Attachment; DIMIA, Response to Second Draft Report, 27 January 2004; DIMIA, Email to Inquiry, 6 February 2004.

In order to give an indication of the proportion of detainees who were children, the following chart shows the total number of detainees for every month between January 1999 and 1 July 2003, broken down into adult and child populations.

**Table 6: Number of children and adults in detention, 1 January 1999 to 31 July 2003**

The number of children who arrived by boat increased in late 1999. From 1 January to 31 October 1999, 62 boats arrived in Australia, with an average of 1.8 children per boat.<sup>50</sup> Just one boat in the period carried more than 20 children.<sup>51</sup> More than half of the 62 boats had no children on board at all.<sup>52</sup> However, over the period 1 November to 31 December 1999, 24 boats arrived, with an average number of 13 children per boat. Over the year 2000, the average number of children per boat was 10.<sup>53</sup>

In 2001, the average number of children per boat – and percentage of children per boat – grew further. Of the 32 boats that arrived between 1 January and 22 August 2001, one carried 154 children, which was 45 per cent of its passengers. Over the year, the average number of children per boat was 30.<sup>54</sup> The last boat to arrive before the *Tampa* incident and the legislative changes that became known as the ‘Pacific Solution’ was at Christmas Island on 22 August 2001. It carried 95 children and 264 adults.

Since August 2001, most boats have been intercepted pursuant to the ‘Pacific Solution’ legislation. This included 11 boats in the remainder of 2001 and one in May 2002.<sup>55</sup> A further four boats were intercepted at sea and returned to Indonesia.<sup>56</sup> In July 2003 a boat carrying 53 Vietnamese citizens entered Australia’s migration zone near Port Hedland in Western Australia. Its passengers were taken to Christmas Island for processing under the Migration Act. In November 2003, a boat carrying 14 Turkish citizens entered Australian waters but was returned to Indonesia.

While it is important to note that the number of child boat arrivals decreased to almost zero after August 2001, the numbers of detained asylum-seeker children decreased at a slower rate, since many children remained in detention for longer periods.

3.3 How many detainee children have been recognised as refugees?

The Minister has consistently stated that the Government does not detain refugees, because any asylum seeker who is found to be a refugee is immediately released. It is important to note in this regard that the United Nations High Commissioner for Refugees (UNHCR) takes the view that a person is a refugee as soon as his or her circumstances fit the definition, rather than when they are formally recognised as such. On this view those asylum seekers who are eventually identified as refugees, and who are detained throughout that process, have in fact been detained while they are refugees.

In the period between 1 July 1999 and 30 June 2003, 3125 asylum-seeking children arrived in Australia *with* a valid visa, and therefore were *not detained* on arrival.<sup>57</sup> The top three countries of origin were Fiji, Indonesia and Sri Lanka.<sup>58</sup> Only 25.4 per cent of children arriving with a visa were found to be refugees.<sup>59</sup>

In the period between 1 July 1999 and 30 June 2003, 2184 children arrived in Australia *without* a valid visa and applied for asylum.<sup>60</sup> They were mainly from Iraq, Afghanistan and Iran.<sup>61</sup> *All these children were detained* on arrival in the Department's immigration detention centres and 92.8 per cent of them were eventually recognised as refugees.<sup>62</sup> For some nationalities the percentage was even higher (see below).

The success rate of asylum seekers in detention demonstrates that almost all children arriving in Australia without a visa are genuine refugees who eventually end up living in the Australian community. In fact, many more asylum-seeker children who arrive in Australia *without* a visa and apply for asylum from detention centres (unauthorised arrivals) are found to be refugees than children who arrive in Australia *with* a visa (authorised arrivals).<sup>63</sup>

Table 7: Child asylum seekers found to be refugees

Year of application	Unauthorised arrival child asylum seekers recognised as refugees	Authorised arrival child asylum seekers recognised as refugees
1999-2000	95.2% (569 out of 598 applicants)	30.6% (260 out of 851 applicants)
2000-2001	90.0% (815 out of 906 applicants)	19.0% (185 out of 973 applicants)
2001-2002	95.2% (639 out of 671 applicants)	23.7% (178 out of 751 applicants)
2002-2003	33.3% (3 out of 9 applicants)	30.9% (170 out of 550 applicants)

Source: DIMIA, Response to Second Draft Report, 30 January 2004. The figures do not include protection visa applications awaiting a final outcome.

### **97.6 per cent of detained Iraqi children were found to be refugees and released from detention<sup>64</sup>**

Nearly half of the unauthorised arrival children who applied for asylum from detention between 1 July 1999 and 30 June 2003 were from Iraq.<sup>65</sup> As at 31 December 2003, 1030 of the 1055 children had been granted a protection visa.<sup>66</sup> Most identified as being of 'Arab' or 'Iraqi' descent.<sup>67</sup>

We came here because there was a fight in our country, and now we are in a safe place we hope that we can stay here.

*Primary school-aged Iraqi boy found to be a refugee<sup>68</sup>*

In Iraq, children live under what is arguably the most diabolical political regime in the history of human civilisation. The entire population survives in a state of constant alert, always fearing and preparing for an impending war. There is not a single Iraqi child alive today who has not seen war or the devastating effects of the combination of Saddam Hussein's despotic rule and the UN's crippling sanctions.

*Sabian Mandaean Association<sup>69</sup>*

Many of the asylum-seeker children who came from Iran are actually the children of exiled Iraqis. Survivors of the 'SIEV-X' drowning tragedy said:

Iraq is like a prison, we escaped to Iran, we were oppressed in Iran, they would not even admit our children into schools in Iran. In May and June 2001, the real estate agents in Iran were officially ordered not to rent property to foreigners and employers were also told not to employ foreigners. This was an official order applicable against Iraqis and Afghans. We are forced to seek asylum, we want to see our children go to school just like other children.<sup>70</sup>

### **95 per cent of detained Afghan children were found to be refugees and released from detention<sup>71</sup>**

37 per cent of unauthorised arrival children who applied for asylum between 1 July 1999 and 30 June 2003 from detention were from Afghanistan. As at 31 December 2003, 776 of the 817 children had been granted a protection visa.<sup>72</sup>

Of the detained Afghan children, 78.1 per cent were from the Hazara ethnic group,<sup>73</sup> which is a Shi'a Muslim minority in central Afghanistan.<sup>74</sup>

Hazara refugee children described their experiences in Afghanistan to the Inquiry staff:

In Afghanistan the Hazara people were in danger. The Taliban government announced this publicly, they said that 'Afghan people' have the right to stay in Afghanistan – that's the Pashtun peoples – Tajiks are going to Tajikistan, the Uzbeks are going to Uzbekistan, the Hazara people are going to the grave. And the Australian government was aware of us so why did they put us in detention centres?

*Unaccompanied boy found to be a refugee<sup>75</sup>*

The Taliban took my father and my older brother and my mother was very devastated by what had happened to us and she told me I had to leave. She

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thought that my cousin was going to leave and I could go with him and I had no idea of where we were going and what arrangements were made.

*Unaccompanied teenage boy found to be a refugee*<sup>76</sup>

The Taliban took two of my brothers and we do not know what has happened to them. And since then my father decided to save us as it was very difficult to lose any more of his family.

*Teenage girl found to be a refugee*<sup>77</sup>

### **74.2 per cent of detained Iranian children were found to be refugees and released from detention**<sup>78</sup>

A further 9.5 per cent of unauthorised arrival children who applied for asylum between 1 July 1999 and 30 June 2003 from detention were from Iran. As at 31 December 2003, 155 of the 209 Iranian children had been granted a protection visa.<sup>79</sup>

At Curtin, an Iranian father told the Inquiry:

I didn't choose Australia for living. I didn't come to Australia for disco. I didn't come for a better life. My life and my family's life was in grave danger, that's why I had no choice but to leave my country. I was forced to leave my country.<sup>80</sup>

The Sabian Mandaean minority from Iran comprised approximately 27.2 per cent of the Iranian detainee population as at 31 January 2003.<sup>81</sup> The Australian Sabian Mandaean Association told the Inquiry that:

In Iran, the children are forced to study the Islamic religion knowing full well that it is not the faith of their parents. They are bullied incessantly by Muslim children. Muslim children pick on them for being Mandaean, calling them 'negis', which means defiled. They are not allowed to play with Muslim children and are ostracised in school playgrounds. Disputes and disagreements between children are almost always resolved in favour of the Muslim child. They are not allowed to drink from the water fountains utilised by Muslim children as they are told they would contaminate the water due to their Mandaeanism. A number of Mandaean children have been abducted by Islamists and forcibly converted to Islam. A larger number have been threatened with abduction and forced conversion. This is often, but not exclusively, used as a tool by corrupt authorities and criminals to extort money from well to do Mandaean jewellers. An even more serious occurrence is the sexual assault of Mandaean children. Even in these instances, Mandeans have no recourse under Iran's Islamic laws and complaining only serves to exacerbate the situation for the Mandaean child and her parents.<sup>82</sup>

## **3.4 How long have children been in immigration detention?**

Since 1999, children have been detained for increasingly longer periods. By the beginning of 2003, the average detention period for a child in an Australian immigration detention centre was one year, three months and 17 days.<sup>83</sup> As at 26 December 2003, the average length of detention had increased to one year, eight months and 11 days.<sup>84</sup>

**Table 8: Length of detention of children over time**

Periods children detained	0-6 weeks	1.5-3 months	3-6 months	6-12 months	12-24 months	2-3 years	Longer than 3 years	Total children detained
1 Jan 99	26	23	4	4	0	1	1	59
1 Apr 99	19	9	16	6	2	1	1	54
1 July 99	19	5	15	17	0	1	1	58
1 Oct 99	37	29	6	20	4	0	2	98
1 Jan 00	220	128	27	8	14	0	2	399
1 Apr 00	72	110	299	22	18	0	2	523
1 July 00	51	51	169	252	19	0	0	542
1 Oct 00	94	9	34	138	14	4	0	293
1 Jan 01	122	48	55	24	33	5	0	287
1 Apr 01	212	107	87	47	30	3	0	486
1 July 01	174	170	184	71	29	3	0	631
1 Oct 01	193	242	153	108	44	0	0	740
1 Jan 02	5	87	288	104	52	7	0	543
1 Apr 02	8	4	13	98	69	10	0	202
1 July 02	9	2	2	33	85	7	0	138
1 Oct 02	14	6	3	13	79	19	0	134
1 Jan 03	14	13	6	4	56	36	3	132
1 Apr 03	17	3	14	9	33	49	0	125
1 July 03	8	2	11	10	10	69	1	111
1 Oct 03	12	24	3	13	7	54	8	121

Source: DIMIA, Letter to Inquiry, 30 May 2003, Attachment; DIMIA Response to Second Draft Report, 27 January 2004.

While many children are released within three months of being taken into detention, there have always been a number of children detained for longer periods of time. The Inquiry is concerned about the deprivation of liberty of *any* child for *any* period; however the large numbers of children in detention for longer periods are of particular concern.

Children were generally detained in remote centres for longer periods of time than in city centres. This is most likely because more of the children in metropolitan centres were overstayers rather than asylum seekers. At Curtin over 1999-2000, 84 per cent of the 200 children had been detained for longer than three months, and at Port Hedland, 78 per cent of the 286 children had been detained for longer than

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three months. In the same period, 99 per cent of 248 children at Woomera had been detained for longer than three months. This is in contrast with the children at Villawood and Maribyrnong, the majority of whom were detained for less than six weeks.<sup>85</sup>

At Curtin over 2000-2001, 69 per cent of the 501 children had been detained for longer than three months, including 63 children who had been detained for over a year. At Port Hedland, 74 per cent of the 351 children had been detained for longer than three months, including 38 who had been detained for over a year. In Woomera 78 per cent of the 710 children were detained for longer than three months, including 44 children from more than a year. By contrast, most children were detained at city facilities for less than six weeks.<sup>86</sup>

On 1 July 2000, 440 children (81 per cent) had spent more than three months in detention. By April 2001, although most child detainees had *not* spent more than three months in detention, 80 children (16 per cent) had been in detention for more than six months, and by 1 October 2001, that figure had increased to 152 (21 per cent).

Over 2001-2002, 77 per cent of the 232 children at Curtin, 94 per cent of the 225 children at Port Hedland and 94 per cent of the 584 children at Woomera had been detained for over three months. The majority of children at Maribyrnong, Perth and Villawood were detained for under six weeks. At Christmas Island, the majority of children were detained for between one and a half and three months.<sup>87</sup>

On 1 January 2002, 59 children (11 per cent) had spent more than a year in detention. By 1 January 2003, of 132 child detainees, 95 children (72 per cent) had been detained for more than a year; 36 of these children had been in detention for over two years and three had been in detention for over three years.

Over 2002-2003, 93 per cent of the 40 children at Curtin, 100 per cent of the 24 children at Port Hedland and 85 per cent of the 72 children at Woomera had been detained for over three months. The majority of children at Maribyrnong, Perth and Villawood were detained for under six weeks. However, 28 per cent of the 158 children at Villawood had been detained for more than 6 months and 13 per cent had been detained for more than a year.<sup>88</sup>

On 1 October 2003, only 30 per cent of the 121 child detainees had been detained for less than three months. 57 per cent had been detained for more than one year, 51 per cent had been detained for over two years and 7 per cent had been detained for more than three years.

The longest a child has ever been in immigration detention as at 1 January 2004, is five years, five months and 20 days. This child and his mother were released from Port Hedland detention centre on 12 May 2000.<sup>89</sup>

### 3.5 What is the background of children in immigration detention?

#### 3.5.1 How many children come without their parents?

So, you've heard about Moses, you know, the prophet? His mother left him alone in the small box in the water. So I am asking, did his mother not love him? Does his mother not love him to leave him alone in the small box? No of course not – no mother does not love her child. If he was still with her he would get killed from that time. So, also we have the same conditions in our families. So, we left our families.

*Unaccompanied boy found to be a refugee<sup>90</sup>*

Most asylum-seeking children arriving in Australia without a valid visa come with their parents. However, there are significant numbers of unaccompanied children.

**Table 9: Unaccompanied vs accompanied unauthorised arrival children who applied for a protection visa: 1999-2002**

Year	Unaccompanied children	Accompanied children
1999-2000	64	617
2000-2001	170	844
2001-2002	51	451

Source: DIMIA, Letter to Inquiry, 30 May 2003, Attachment.

Of the child asylum seekers who arrived in Australia without a valid visa between 1 July 1999 and 30 June 2003, approximately 14 per cent were unaccompanied children.<sup>91</sup> On average, 91.2 per cent of unaccompanied children in detention were found to be refugees.

**Table 10: Unaccompanied detainee children found to be refugees**

Year of application	Percentage of unaccompanied children in detention found to be refugees	
1999-2000	96.7%	(59 out of 61)
2000-2001	89.9%	(124 out of 138)
2001-2002	89.8%	(88 out of 98)
2002-2003		(0 out of 0)

Source: DIMIA, Response to Second Draft Report, 30 January 2004.

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54.5 per cent of the unaccompanied children arriving without a valid visa in Australia between 1 January 1999 and 30 June 2002 were 16 to 17-years-old, with 39 per cent in the 13 to 15-year-old age bracket and 6.5 per cent aged under 13.<sup>92</sup>

The vast majority (86.7 per cent) of unaccompanied children came from Afghanistan. The remainder were Iraqi (10.5 per cent) and Iranian (1 per cent). There was one unaccompanied child from each of the following countries: Pakistan, Palestine, Sri Lanka, Syria and Turkey. There were only four girls (two Iraqi and two Afghan).<sup>93</sup>

The following table provides a snapshot of the numbers of unaccompanied children in detention from 1999-2003.

**Table 11: Biannual snapshot of numbers of unaccompanied children in detention: 1999-2003**

Date	Unaccompanied children detained	Total children detained
1 Jan 1999	1	59
1 July 1999	2	58
1 Jan 2000	41	399
1 July 2000	49	542
1 Jan 2001	37	287
1 July 2001	121	631
1 Jan 2002	40	543
1 July 2002	12	138
1 Jan 2003	8	132
1 July 2003	8	111

Source: DIMIA, Letter to Inquiry, 30 May 2003, Attachment; DIMIA Response to Second Draft Report, 27 January 2004.

From the above table, it is clear that from the outset of 2000 there was an exponential rise in the number of unaccompanied children detained in Australia. This rise was commensurate with the increase of adults and families being detained over the same period.

On 1 July 1999 there were just two detained unaccompanied children, who had been detained for fewer than three months. Six months later, that figure had grown to 41. By 1 July 2000 there were 49 unaccompanied children in detention, 37 of whom had been detained for longer than three months. A year later, there were 121 unaccompanied children in detention, 22 of whom had been detained for over three months.<sup>94</sup> Their number grew to 143 during July 2001.<sup>95</sup>

At 1 January 2002, there were only 40 unaccompanied children in detention, but 90 per cent of them had been detained for longer than three months.<sup>96</sup> By 12 April 2002, 13 out of 21 unaccompanied children were living in foster care detention in the community.<sup>97</sup> By 2 December 2002, there were 17 unaccompanied children in detention, 12 in foster care detention and five in a detention centre (four in Villawood and one in Woomera).<sup>98</sup> By April 2003, there were just two unaccompanied child asylum seekers left in detention centres, one of whom had been in detention since 31 December 2000. As at 28 November 2003, there were five unaccompanied children in detention centres but by 26 December 2003 all unaccompanied children in immigration detention were either in foster care or in a private apartment as alternative places of detention.<sup>99</sup>

The numbers of unaccompanied children in detention may have decreased over 2002 due to a combination of the processing and granting of visas, the fact that some children may have turned 18 and hence been declassified as 'unaccompanied children' and because no more boats were permitted to enter and/or remain in Australian waters.

### 3.5.2 How old are the children?

The following table sets out the total number of children in detention as at 30 June from 1999 to 2003, sorted into age groups. It provides the average length of time that children in each of these groups had spent in the remote detention facilities. It also sets out the maximum period of time any child in each age group had spent in any detention facility.

**Table 12: Age and average length of detention of children, 1999-2003**

Age of children as at 30 June	Total number of children in detention	Av. time in detention for children in Woomera	Av. time in detention for children in Curtin	Av. time in detention for children in Port Hedland	Av. time in detention for children in Baxter	Max. time in detention of any child in any detention facility
<b>30 June 1999</b>						
0-4 yrs	23	—	—	245 days	—	1084 days
5-11 yrs	15	—	—	337 days	—	1681 days
12-17 yrs	23	—	—	46 days	—	257 days
<b>30 June 2000</b>						
0-4 yrs	164	157 days	160 days	129 days	—	665 days
5-11 yrs	208	173 days	173 days	140 days	—	675 days
12-17 yrs	162	170 days	157 days	132 days	—	623 days

## A last resort?

Age of children as at 30 June	Total number of children in detention	Av. time in detention for children in Woomera	Av. time in detention for children in Curtin	Av. time in detention for children in Port Hedland	Av. time in detention for children in Baxter	Max. time in detention of any child in any detention facility
<b>30 June 2001</b>						
0-4 yrs	144	66 days	143 days	105 days	—	1030 days
5-11 yrs	210	50 days	221 days	135 days	—	1030 days
12-17 yrs	278	69 days	128 days	147 days	—	600 days
<b>30 June 2002</b>						
0-4 yrs	33	479 days	580 days	590 days	—	605 days
5-11 yrs	54	468 days	579 days	659 days	—	918 days
12-17 yrs	53	467 days	637 days	665 days	—	965 days
<b>30 June 2003</b>						
0-4 yrs	32	680 days*	—	566 days	409 days	970 days
5-11 yrs	29	831 days*	—	1003 days	844 days	1040 days
12-17 yrs	52	845 days*	—	1010 days	830 days	1104 days

Source: DIMIA, Letter to Inquiry, 3 March 2003, Attachment B; DIMIA, Letter to Inquiry, 30 May 2003, Attachment; DIMIA, Response to Second Draft Report, 27 January 2004.

\*Children in Woomera on 30 June 2003 were detained at the Woomera RHP.

### 3.5.3 How many infants are in detention?

As can be seen from the above table, some infants (0-4 years) have spent substantial portions of their lives in immigration detention. For instance, on 30 June 1999, an infant had spent nearly three years in Port Hedland detention centre.<sup>100</sup> On 30 June 2000 there were 164 infants in detention.<sup>101</sup> Five of them had spent more than 18 months in detention.<sup>102</sup> On 30 June 2001 there were 144 infants in detention.<sup>103</sup> Two of these children had spent more than two and a half years in detention – more than half of their lives.<sup>104</sup>

Of the infants in detention, 95 per cent who applied for protection visas in 1999-2000 were eventually determined to be refugees. The following year, 94 per cent were recognised as refugees and in 2001-2002, 95 per cent were found to be refugees.<sup>105</sup>

From 1 January 1999 to 26 December 2003, 71 babies were born in detention to unauthorised boat arrival mothers.<sup>106</sup> A mother of children too young to be interviewed said:

It is sad that my baby was born in a prison. It is sad that I tried to give them a better life by coming here but in doing so I feel that I have made their lives worse. The children are worse off because of the things they have seen in here such as the guards beating people up, they have nightmare. I am not sure if the children will ever be able to forget what they have seen, once they leave.<sup>107</sup>

A paediatrician who examined a three-year-old Woomera detainee told the ACM Woomera Medical Officer:

I would further point out that this young man has been in detention for 20 months, this is a long time in adult terms but is a very long time in terms of this young man's age of 3¾ being some 40 per cent of his life. The ideal environment for this young man to settle would be a family home setting with appropriate social and other supports.<sup>108</sup>

On 1 April 2003, there were 38 infants in immigration detention centres: 11 had been in detention for more than a year, and three had been in detention for more than two years.<sup>109</sup> As at 26 December 2003, there were 29 infants in immigration detention: 13 had been in detention for more than a year, five had been in detention for more than two years and two had been there for more than three years.<sup>110</sup>

### **3.5.4 Are there more boys than girls?**

There are more boys than girls in immigration detention, although the percentage of girls has increased since 1999.<sup>111</sup> Overall, for the period 1 July 1999 to 30 June 2003, 37 per cent of unauthorised arrival child asylum seekers were girls.<sup>112</sup> In 1999-2000, 31.4 per cent of unauthorised arrival child asylum seekers were girls; that figure increased to 43.8 per cent in 2002-03.<sup>113</sup>

### 3.5.5 Which countries do the children come from?

The majority of children among 'boat people' in the late 1980s and early 1990s were from Cambodia, China and Vietnam. More recently, asylum-seeker children arriving in Australia without a visa have come from Iraq, Afghanistan, Iran, the Palestinian Territories and Sri Lanka.<sup>114</sup>

**Table 13: Nationality of unauthorised arrival children seeking asylum from detention, by year of application**

Nationality	1999-2000	2000-2001	2001-2002	2002-2003	Total
Iraq	326	297	433	2	<b>1058</b>
Afghanistan	189	481	150	0	<b>820</b>
Iran	37	89	78	7	<b>211</b>
Palestine	2	21	7	1	<b>31</b>
Stateless	14	1	0	0	<b>15</b>
Sri Lanka	5	5	1	0	<b>11</b>
Turkey	5	5	0	0	<b>10</b>
Syria	1	5	0	0	<b>6</b>
Algeria	5	0	0	0	<b>5</b>
Egypt	0	0	5	0	<b>5</b>
Other	18	14	3	6	<b>41</b>
<b>Total</b>	<b>602</b>	<b>918</b>	<b>677</b>	<b>16</b>	<b>2213</b>

Source: DIMIA, Response to Second Draft Report, 30 January 2004.

Most of the children are Shi'a Muslim. Most speak Iranian languages or Arabic. The following table shows the languages, religions and ethnic groups of children in detention.<sup>115</sup>

**Table 14: Children in detention 1999-2002: languages, religions and ethnicities**

Nationality	Language	Religion	Ethnicity
Iraq	Arabic	Shi'a and Sunni Muslims; Chaldean and Assyrian Christians; Sabian Mandaean	Arab; Kurdish; Armenian; Iranian; Palestinian; Turkman
Afghanistan	Dari (Afghan Persian); Hazaragi; Pashto; Uzbek	Shi'a and Sunni Muslim	Hazara; Tajik; Uzbek; Arab; Pashtun; Persian
Iran	Farsi (Modern Persian)	Shi'a Muslim; Sabian Mandaean; Zoroastrian	Persian; Arab; Armenian; Iraqi; Azerbaijani; Kurdish
Palestine	Arabic	Sunni Muslim	Arab; Palestinian
Sri Lanka	Tamil	Hindu	Tamil
Turkey	Turkish, Kurdish	Sunni Muslim	Kurdish

Source: DIMIA, Letter to Inquiry, 29 November 2002, Attachment, pp2-8, supplemented by Inquiry research.

### 3.6 How did the children get to the detention centres?

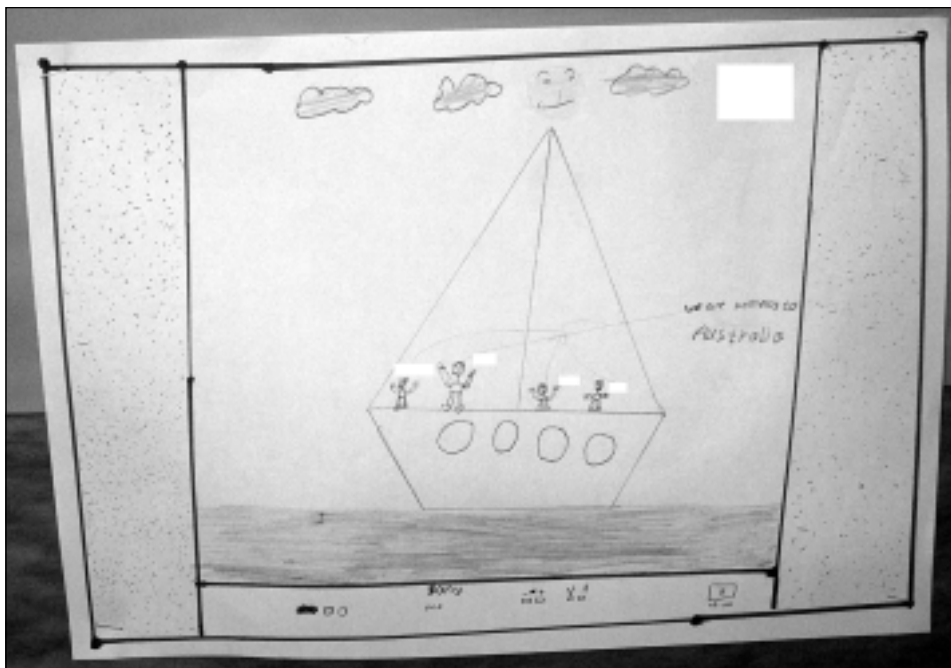
We came by boat and we were in the boat for ten days. It was very hot, horrible. We were in a small boat. I was saying, 'Dad, when are we changing our boat? We can't relax here; it is more dangerous than our country! We will drown!' And he was saying, 'don't worry, we will go to another boat, to a bigger boat' and he was just giving me hopes.

But it wasn't true; we stayed in the same very small boat. We were just going and we didn't have any food or drinks and you had just to vomit. And I said, 'When are we reaching it?' and he said, 'This is the boat we are going on!', because he got angry, I was just keeping asking. We were all down below, and it was very hot, you know, near the machine of the boat.

In the boat there were many different people from our country, they were Hazara but we didn't know them. Most of them were Hazara people, except one. He was Iranian. For my Mum, it was really, really difficult ... there wasn't any drink, and the seawater was coming on her and she was wet. She was so sick and we couldn't do anything.

*Afghan teenage girl found to be a refugee*<sup>116</sup>

## A last resort?



Drawing of a boat of children seeking asylum in Australia, by a child in immigration detention.

After a long trip from their home countries, asylum-seeker children typically come to Australia by boat from Indonesia. The boats are often not seaworthy and the trip usually takes several days in extremely crowded conditions, with limited food and water. For the most part, children arriving by boat land in northern Australia, at Ashmore Islands, Ashmore Reef or Christmas Island.<sup>117</sup>

The Ashmore Islands and Ashmore Reef are in the Indian Ocean, on the outer edge of the continental shelf. They are approximately 320 km off Australia's north-west coast, 170 km south of Roti Island (Timor) and 610 km north of Broome in Western Australia. Christmas Island is also in the Indian Ocean, 2300 km north-west of Perth, and is closer to Java than Australia, by 1040 km.<sup>118</sup>

Refugee children told the Inquiry about their first impressions of arriving in Australian waters:

When we arrived, they just announced, 'You're in Australian water, don't go anywhere!' and also there were some people who knew English on our boat and when they came in they were like lots of soldiers, they were looking like commandoes or something. And big, big guys said, 'Okay, who knows English here?' and half of the ship knew English, especially me, and I was scared they might throw me out or something and I go like 'mmmm'. There was no one to speak English and there was an old man, he just said [intentionally faltering], 'I am leetle bit good' and they just asked him 'where did you come from?' and then we stayed for one night in the water and then they just took us: 'Welcome!'

*Unaccompanied Afghan boy found to be a refugee*<sup>119</sup>

[W]e wanted help and we thought Australian ship was going to come and we would shout and scream that we need help. And they came to us and they said no, they can't do anything, they would fix it a little bit but we have to go back to Indonesia. So in that condition they were trying to send us back. And there were women pregnant and we were showing them they were pregnant and they were shouting that we had to go back. Those people were shouting and they were showing their hands like they wanted to hit us and saying, 'You have to go back' ... The Australian boat came again and said, 'Why don't you go back?' and we said, 'Our boat has a hole'. All of us were crying, all the small children and the women. And the men were crying. They put our food in the sea as the boat had a hole and we had to make it lighter and so we did that. And after one day the Australian boat came again and everything was going around our ship. (Aeroplanes?) Yes. We were shaking our hands and waving to show them we were needing help but they didn't do anything. After one day they came again and finally all the women, the children and the men were crying that we really needed help and they said, 'Okay, we are going to get you to Australia'.

*Teenage girl found to be a refugee*<sup>120</sup>

We arrived at Christmas Island but of course when we arrived the Australian boat came and said 'don't move, stay there', so they came and checked. They asked to move and got us on to their boats and then they took us to the island. They took us to a hall and there were 150 of us and two hours later they brought us some food.

*Teenage unaccompanied boy found to be a refugee*<sup>121</sup>

The children were not taken to detention centres immediately:

When we arrived the officers took us by bus to Darwin and then the interview started.<sup>122</sup> There was no interpreter for us. People who couldn't speak, they just...they asked our names and whoever could answer it, they answered them. And then they said 'you are here illegally so you will be detained' and then after they took us to the camp...When we arrived [at the detention centre] they give us just one piece of sandwich until the next morning. After 6 hours [we got] meat, rice, I think, I forgot. No drink, nothing else, no fruits.

*Teenage unaccompanied boy found to be a refugee*<sup>123</sup>

When we arrived in Australian waters, we were all happy. When I saw the aeroplane, I was shouting in my language to ask for help, because I didn't even have the least bit of English. My Dad said 'they don't understand you'. I said however 'I am shouting and screaming, they will help me'. Another woman was there and she knew English and she said, 'help!' And I said 'what the hell are you talking about, "help, help, help"'? [laughs]. I was going to tell her to say 'help' in our language but she said they don't understand it, so I said, okay.

Then the aeroplane just circled and he went and left us and then the navy ship came. We were all screaming and crying and they said 'you have to go back' and they tried to send us back. There was a man, he knew English very well, and he showed them my Mum, and explained she was very sick and the children. But they were still saying, 'we are not allowed to let you come to Australia, you have to go back'.

## A last resort?

After that, the women didn't know anything, they were just crying, they were trying to say, 'we need help'. And finally they took our names and they took us to Darwin and we stayed for one night. They gave us food. It wasn't good food, it was a sandwich, but it wasn't like really very good.

We stayed there for one night and after that they sent us to the detention centre, to Curtin, by plane from Darwin.

*Teenage girl found to be a refugee*<sup>124</sup>

### 3.7 What did children and their parents say about detention centres?

In Queensland, the Youth Advocacy Centre and Queensland Program of Assistance to Survivors of Torture and Trauma interviewed former detainee children for their submission to the Inquiry. One of the questions they asked children was to give one word to describe the detention centre. One child said, 'prison' and another said 'a grave'.<sup>125</sup>

Children and young people also told the Inquiry that detention made them feel like they were in a prison:

I have very bad impressions from the detention centre. When I was in detention centre I really did not think that it is going on and you know, I understood, I was like animal in detention centre, and because ... Australian police they captured us and they put in prison. This is not like a detention centre, I can't say it's a detention centre, it's prison, it's gaol, and no one has freedom and we cannot go outside and we cannot do things. And also there it is very hot. If you go outside the sun will burn, and there's many insects, reptiles and if you go outside, the insects bite us. Reptiles, I saw many reptiles around... we couldn't tell any things to officers or other people because we were afraid of them because maybe if we say something, something might happen.

*Unaccompanied Afghan boy found to be a refugee*<sup>126</sup>

Some children thought that detention was worse than they imagined prison might be, particularly because of the uncertainty as to when they would be released:

I know what most of the people don't know about the detention centre, like how it is, but I think every Australian knows what a prison is, what a prison looks like and what happens in a prison. All the people, even in prison, like the prisoners they know when they're gonna be released, when they're sentenced they know that for this long they're in prison and at that date they're gonna get their freedom.

So even they know, like for six months, for ten years or for twenty years so they are there and after that they're gonna get their freedom. But in detention centre, like no one knows when they're gonna be released. Tomorrow, day after tomorrow, for two years like, you know, waiting how much hard it is, only if it is only 15 minutes [and] they're under 18, they've been there for two years, [those] who came before us, they're still there. So just imagine how they would be.

*Teenage boy found to be a refugee*<sup>127</sup>

I can tell you that things are very, very difficult for us. I can say that you can never call that place a detention centre. It was of course a prison and a gaol. Even in prison you know at least for how long you will be in prison, but in a situation like that we did not know what was happening next. We did not know how long we would be spending in this place. And most of the time our roommates and the people who used to live with us, they were getting changed every three weeks or every two weeks, the people that we were getting around for a while they used to go and then some new people would replace them. And sometimes they would put the new arrivals with the people who have been there for a quite a long time who have completely lost their minds and their ability to think and when you spend some time with people like that who have been out of their minds so of course you lose your mentality, and you lose your thoughts as well and this is what was happening to us. Sometimes I was looking at those people I was thinking that we'll all end up in the same place so in short, I can say life was very horrible.

*Unaccompanied Afghan boy found to be a refugee*<sup>128</sup>

Several children likened themselves to birds in a cage.

I am like a bird in a cage. My friends who went to other countries are free. [One of his drawings was of an egg with a boot hovering above it ready to crush it. Pointing to the egg he said,] These are the babies in detention centres.

*16-year-old detainee who had spent three birthdays in detention*<sup>129</sup>

I think that the children should be free and when they are there for one year or two years they are just wasting their time, they could go to school and they could learn something. They could be free. Instead they are like a bird in a cage.

*10-year-old Afghan girl found to be a refugee*<sup>130</sup>

A teenager who had been detained at several different detention centres said of Woomera:

It's really a hell hole, the worst one of all. [Why?] I've never seen anything that's the same as that in my life. I've been in the gaol, the gaol is better than Woomera.

*Detainee boy*<sup>131</sup>

At the new Baxter detention centre at Port Augusta, the Inquiry heard:

The officers tell me how good it is here because we have two toilets, two showers. But [my son] says 'we don't need that, we need stimulation. We need that more than water'.

*Detainee mother, Baxter*<sup>132</sup>

We came here because we wanted freedom. We did not come to be imprisoned for three years. Nothing will help us, only freedom will help us. We want to be free that is all.

*Detainee boy, Baxter*<sup>133</sup>

## A last resort?

An Afghan father in detention asked the Human Rights Commissioner the following questions about the future of children in detention:

I have a request. What will happen with the future of these children, that they see in front of them people cutting themselves and hanging themselves? What is the effect on their minds? What can they get? They are the future... We do not want anything. We did not come here for a visa. [We would be happy] if we could be let out in some poor third world country. Just send my children to school and let them be in freedom. They should live in a human good atmosphere, they should learn something good, and not the things they are learning here.<sup>134</sup>

Many children were at pains to explain that they were not criminals:

They should keep us out of detention because the children have nothing, they are not criminals, they are just born, they want to be free, they are like birds. If we keep birds like this, we are the same ... We want to be one hand of Australia, like shoulder by shoulder, but I don't know what Mr Philip Ruddock thinks, he thinks we are criminals, it is impossible – how can we be criminals? We are just new, new generation. We have seen war a lot.

*Unaccompanied Afghan asylum seeker teenage boy  
in home-based detention*<sup>135</sup>

One boy said that he tried to hide his past from his new friends because he felt that his detention branded him as a criminal:

While I was in detention centre there was a lot of violence and I was treated like a criminal. The impact that I got out, when I got out of the detention centre, I still feel that I'm a criminal in Australia ... I was in detention centre about seven months while I haven't done anything, so now, when I got out I got friends but I'm by myself. They asked me, 'where are you from?' I say I'm from Spain because I can't face to say that I'm from Afghanistan because now the media is there ... now everybody knows about detention centres. Everybody, if you come from Afghanistan, if you say 'I'm from Afghanistan' then it's true that you are the person in detention centre and the way the media should ask, like, wants to come in Australia, like in search of food or like, they maybe, they want to come here to make a good life. But why should we, when we have got a country, if there is, if there is peace why should we flee our country? I mean, let's ask you a question, 'if in Australia now, do you want to go in any country?' In any other country like, you've got the working here. Of course not, you've been living here, you know everything about. The thing is our country, the problem is that there is no rule, no law, everybody kills each other, so we have come here to just to seek asylum. Of course to live as a human but now, I still have [the feeling that] I'm a criminal although I haven't done anything.

*Teenage boy found to be a refugee*<sup>136</sup>

Other children also felt Australians lacked compassion or empathy for them:

They say that the people will laugh at you and make fun of you. They are going to hate you. That's why we don't give you a visa.

*Unaccompanied Afghan girls and boys found to be refugees*<sup>137</sup>

It's just that I know that I have lots and lots of negative and better stories, I cannot finish all of them, it's just that I remember in Afghanistan when I was studying as a child, our teacher used to say that people of Australia were the most human and caring and loving people among the world and I was always thinking that they were, then as soon as I came to Australia in government detention centre my idea was completely changed. I found quite the opposite and I was just thinking if I had stayed in Afghanistan of course they would have killed me maybe in an hour or two but I ended up in here so physically they are keeping me alive but emotionally and spiritually they are killing me.

*Afghan unaccompanied boy found to be a refugee*<sup>138</sup>

I am not sure how people who are out of detention could sense or feel the situation of a person who has been in detention. It is that bad.

*Unaccompanied teenage boy found to be a refugee*<sup>139</sup>

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## Endnotes

- 1 Inquiry, Focus group, Melbourne, May 2002.
- 2 Inquiry, Focus group, Melbourne, May 2002.
- 3 'Nominal capacity' refers to the Department's preferred capacity for operational purposes. It does not mean the number of beds available. DIMIA, Response to Draft Report, 19 May 2003. The figure of 1160 for nominal capacity was provided in DIMIA, Response to Second Draft Report, Email to Inquiry, 12 January 2004.
- 4 Inquiry, Notes from visit, Baxter, December 2002.
- 5 DIMIA, Response to Second Draft Report, 16 January 2004.
- 6 DIMIA, Response to Second Draft Report, 17 December 2003.
- 7 Derby is the main port for the Kimberley region. It is a regional administrative and supply centre with 5000 permanent residents.
- 8 DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 9 DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 10 Minister for Immigration and Multicultural and Indigenous Affairs, Border Protection, Detention Centres – Perth Immigration Detention Centre, at [http://www.minister.immi.gov.au/borders/centres/perth\\_irpc.htm](http://www.minister.immi.gov.au/borders/centres/perth_irpc.htm), viewed 10 July 2003.
- 11 The Department has advised the Inquiry that 'the nominal capacity of Port Hedland IRPC is 820 without J Block'. DIMIA, Response to Draft Report, 19 May 2003.
- 12 DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 13 DIMIA, Response to Second Draft Report, 17 December 2003.
- 14 DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 15 Minister for Immigration and Multicultural and Indigenous Affairs, Detention Centres: Woomera Immigration Reception and Processing Centre, at [http://www.minister.immi.gov.au/borders/centres/woomera\\_irpc.htm](http://www.minister.immi.gov.au/borders/centres/woomera_irpc.htm), viewed 24 November 2003 and Minister for Immigration and Multicultural and Indigenous Affairs, *Last Detainees Leave Woomera For Baxter*, Media Release, Parliament House, Canberra, 18 April 2003.
- 16 DIMIA, Letter to Inquiry, 24 December 2002, Attachment F. From early 2001 Woomera's nominal capacity increased to 2000. DIMIA, Response to Draft Report, 19 May 2003.
- 17 DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 18 Minister for Immigration and Multicultural and Indigenous Affairs, *Expansion of the Woomera Residential Housing Project*, Media Release, Parliament House, Canberra, 9 May 2003.
- 19 DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 20 Minister for Immigration and Indigenous and Multicultural Affairs, Border Protection, Detention Centres, Woomera Residential Housing Project, at [http://www.minister.immi.gov.au/borders/centres/woomera\\_rhp.htm#capacity](http://www.minister.immi.gov.au/borders/centres/woomera_rhp.htm#capacity), viewed 10 July 2003.

## A last resort?

- 21 Minister for Immigration and Indigenous and Multicultural Affairs, Border Protection: Detention Centres: Woomera Residential Housing Project, at [http://www.minister.immi.gov.au/borders/centres/woomera\\_rhp.htm#capacity](http://www.minister.immi.gov.au/borders/centres/woomera_rhp.htm#capacity), viewed 24 November 2003.
- 22 See Chapter 6 on Australia's Detention Policy for a comprehensive analysis of the Woomera RHP.
- 23 DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 24 Minister for Immigration and Multicultural and Indigenous Affairs, *Another Detention Centre Mothballed*, Media Release, Parliament House, Canberra, 19 March 2003.
- 25 The Department asked the Inquiry to refer to the Pacific Solution detention centres as 'offshore processing centres' and to the detainees there as 'residents'. DIMIA, Response to Draft Report, 19 May 2003.
- 26 *Migration Act 1958*, (Cth), s5.
- 27 See Chapter 6 on Australia's Detention Policy for further information.
- 28 Question 1210 (1), (2), Commonwealth House of Representatives Hansard, 5 February 2003, pp11062-3.
- 29 DIMIA, Response to Second Draft Report, 16 January 2004.
- 30 According to DIMIA, Fact Sheet 74a, Boat Arrival Details, at [http://www.immi.gov.au/facts/74a\\_boatarivals.htm](http://www.immi.gov.au/facts/74a_boatarivals.htm), viewed 13,540 persons had arrived by boat without a visa between 1989 and April 2003. A further 53 persons arrived by boat (including 15 children) in July 2003, see Item 261 in Fact Sheet 74a.
- 31 DIMIA, Letter to Inquiry, 30 May 2003, Attachment; DIMIA, Response to Second Draft Report, 30 January 2004. The statistics provided include all instances of detention. Some children may be counted more than once due to transfers between detention facilities.
- 32 Children who arrived by boat: 1999-2000: 76.6 per cent; 2000-2001: 84 per cent; 2001-2002: 84.9 per cent; 2002-2003: 25.6 per cent. DIMIA, Letter to Inquiry, 30 May 2003, Attachment; DIMIA, Response to Second Draft Report, 30 January 2004.
- 33 DIMIA, Response to Draft Report, 30 January 2004. This figure does not include protection visa applications awaiting a final outcome.
- 34 Please note that the Department has not provided any statistics regarding the detainee population in Nauru and Papua New Guinea. See further Chapter 2 on Methodology.
- 35 DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 36 DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 37 On 1 December 2001 there were 714 children in immigration detention: DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 38 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p3.
- 39 Question 1404(1), Commonwealth Senate Hansard, 16 June 2003, p11583.
- 40 DIMIA, Response to Second Draft Report, 16 January 2004.
- 41 Data includes all instances of detention in the period – some children may be counted more than once due to transfers between detention facilities. DIMIA, Letter to Inquiry, 30 May 2003, Attachment; DIMIA, Response to Second Draft Report, 30 January 2004.
- 42 This category refers to all unauthorised child boat arrivals and offshore boat arrivals.
- 43 'Other' includes the following categories: Deserter; Fisherman; Smuggler; Stowaway; and children who breached the conditions of various categories of visa. DIMIA, Letter to Inquiry, 30 May 2003.
- 44 'Other facility' includes police watch houses, adult gaols and court police lockups in the ACT, NT, QLD, VIC and WA. DIMIA, Letter to Inquiry, 30 May 2003, Attachment.
- 45 Of the 102 children detained in 'other facilities' in 2000-2001, 35 were detained at Willie Creek Holding Centre north of Broome, WA. DIMIA, Letter to Inquiry, 30 May 2003, Attachment.
- 46 Most of these children were in transit in Western Australia. However, 35 of them were in hospital, including 10 at Woomera Hospital. 14 children were in foster care and a further six living in private apartments under ACM guard. DIMIA, Letter to Inquiry, 30 May 2003, Attachment.
- 47 These children were mainly detained in state gaols and police lockups. One child was housed in Banksia Hill Juvenile Detention Centre in WA. 60 per cent of these children were detained in the 'Northern Territory Harbour', presumably on their fishing vessels. DIMIA, Letter to Inquiry, 30 May 2003, Attachment.
- 48 Data includes all instances of detention in the period – some children may be counted more than once due to multiple transfers between administrative holding facilities.
- 49 Visa overstayer children in detention: 1999-2000: 4.5 per cent of child detainees; 2000-2001: 5.1 per cent of children detainees; 2001-2002: 5.1 per cent of child detainees. DIMIA, Letter to Inquiry, 30 May 2003, Attachment.

- 50 In 1998 there were 17 boats, of which only four carried children. There was an average of fewer than 10 boats per year for the previous decade. DIMIA, Fact Sheet 74a, Boat Arrival Details, at [http://www.immi.gov.au/facts/74a\\_boatarivals.htm](http://www.immi.gov.au/facts/74a_boatarivals.htm), viewed 10 July 2003.
- 51 A boat which arrived at the Ashmore Islands on 11 October 1999 carried 21 children, plus one infant. DIMIA, Fact Sheet 74a.
- 52 37 out of 62 boats carried no children. DIMIA, Fact Sheet 74a.
- 53 DIMIA, Fact Sheet 74a.
- 54 DIMIA, Fact Sheet 74a.
- 55 DIMIA, Fact Sheet 76, Offshore Processing Arrangements, at <http://www.immi.gov.au/facts/76offshore.htm>, viewed 10 July 2003. Their passengers would have been transferred to Nauru or Manus Island, either directly or via Christmas Island.
- 56 DIMIA, Fact Sheet 76.
- 57 DIMIA, Response to Second Draft Report, 30 January 2004.
- 58 Fiji (356 child applicants); Indonesia (266); Sri Lanka (206). These were followed by Korea (160); Iraq (150) and India (129). DIMIA, Letter to Inquiry, 26 June 2003, Attachment.
- 59 DIMIA, Response to Second Draft Report, 30 January 2004.
- 60 DIMIA, Response to Second Draft Report, 30 January 2004.
- 61 Iraq (1058 child applicants), Afghanistan (820), Iran (211). DIMIA, Response to Second Draft Report, 30 January 2004.
- 62 This figure does not include protection visa applications awaiting a final outcome. DIMIA, Response to Second Draft Report, 30 January 2004. Protection visas were granted to 2020 unauthorised arrival children who applied between 1 July 1999 and 30 June 2002. Only 71 of these children received a permanent visa. DIMIA, Letter to Inquiry, 30 May 2003, Attachment.
- 63 Of the 2819 children granted refugee status over the period 1 July 1999 to 30 June 2003, 2026 children (71.9 per cent) were unauthorised arrivals and therefore had applied from detention, not the community. DIMIA, Response to Second Draft Report, 30 January 2004.
- 64 DIMIA, Response to Second Draft Report, 27 January 2004.
- 65 DIMIA, Response to Second Draft Report, 27 January 2004; DIMIA Response to Second Draft Report, 30 January 2004.
- 66 DIMIA, Response to Second Draft Report, 27 January 2004.
- 67 DIMIA, Response to Second Draft Report, 16 January 2004.
- 68 Inquiry, Focus group, Perth, June 2002.
- 69 Sabian Mandaean Association, Transcript of Evidence, Sydney, 17 July 2002, p67.
- 70 Person 14, SIEV X Survivor Accounts, at <http://www.sievx.com/articles/disaster/KeysarTradTranscript.html>, viewed 10 July 2003.
- 71 DIMIA, Response to Second Draft Report, 27 January 2004.
- 72 DIMIA, Response to Second Draft Report, 27 January 2004.
- 73 DIMIA, Response to Second Draft Report, 27 January 2004.
- 74 See Dr W Maley, 'Hazara and why they come here: Australia's New Afghan Refugees: Context and Challenges' at <http://www.refugeecouncil.org.au/html/resources/agmAfghan.html>.
- 75 Inquiry, Focus group, Melbourne, May 2002.
- 76 NSW Commission for Children and Young People Submission 258, p14.
- 77 NSW Commission for Children and Young People Submission 258, p14.
- 78 DIMIA, Response to Second Draft Report, 27 January 2004.
- 79 DIMIA, Response to Second Draft Report, 27 January 2004.
- 80 Inquiry, Interview with detainee family, Curtin, June 2002.
- 81 DIMIA, Response to Second Draft Report, 27 January 2004.
- 82 Sabian Mandaean Association, Transcript of Evidence, Sydney, 17 July 2002, pp66-67.
- 83 Question 1210 (4), Commonwealth House of Representatives Hansard, 5 February 2003, pp11062-3.
- 84 DIMIA, Response to Second Draft Report, 27 January 2004. The exact figure provided is 619 days.
- 85 DIMIA, Letter to Inquiry, 17 July 2003, Attachment B.
- 86 DIMIA, Letter to Inquiry, 17 July 2003, Attachment B.
- 87 DIMIA, Letter to Inquiry, 17 July 2003, Attachment B.
- 88 DIMIA, Response to Second Draft Report, 27 January 2004.
- 89 Question 1210 (3), Commonwealth House of Representatives Hansard, 5 February 2003, pp11062-3.
- 90 Inquiry, Focus group, Melbourne, May 2002.
- 91 DIMIA, Response to Second Draft Report, 30 January 2004.
- 92 DIMIA, Letter to Inquiry, 30 May 2003, Attachment.
- 93 DIMIA, Letter to Inquiry, 30 May 2003, Attachment.

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- 94 DIMIA, Letter to Inquiry, 29 November 2002, Attachment; DIMIA, Letter to Inquiry, 30 May 2003, Attachment.
- 95 DIMIA, Letter to Inquiry, 13 December 2002, Attachment A.
- 96 DIMIA, Letter to Inquiry, 29 November 2002, Attachment; DIMIA, Letter to Inquiry, 30 May 2003, Attachment.
- 97 DIMIA Submission 185, p191. Three more unaccompanied children were moved from Curtin on 23 April 2002 to foster care in Adelaide.
- 98 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p3.
- 99 DIMIA, Response to Second Draft Report, 12 December 2003; DIMIA, Response to Second Draft Report, 27 January 2004.
- 100 DIMIA, Letter to Inquiry, 30 May 2003, Attachment.
- 101 DIMIA, Letter to Inquiry, 30 May 2003, Attachment.
- 102 DIMIA, Letter to Inquiry, 3 March 2003, Attachment B.
- 103 DIMIA, Letter to Inquiry, 30 May 2003, Attachment.
- 104 DIMIA, Letter to Inquiry, 3 March 2003, Attachment B.
- 105 DIMIA, Letter to Inquiry, 30 May 2003, Attachment.
- 106 DIMIA, Response to Second Draft Report, 27 January 2004.
- 107 Confidential Submission 110, p41.
- 108 Paediatrician, Port Augusta Hospital, Letter to ACM Woomera Medical Officer, 2 August 2002, copied to DIMIA Woomera Manager, (N5, Case 22, p145).
- 109 DIMIA, Letter to Inquiry, 26 June 2003.
- 110 DIMIA, Response to Second Draft Report, 27 January 2004.
- 111 Protection visa applications of unauthorised arrivals, percentage of girls: 1999-2000: 33 per cent; 2000-2001: 37 per cent; 2001-2002: 42 per cent. DIMIA, Letter to Inquiry, 26 June 2003, Attachment.
- 112 DIMIA, Letter to Inquiry, 26 June 2003, Attachment; DIMIA, Response to Draft Report, 27 January 2004.
- 113 DIMIA, Response to Draft Report, 27 January 2004.
- 114 Minister for Immigration and Multicultural and Indigenous Affairs, Media Centre, 'Background Paper on Unauthorised Arrivals'.
- 115 These languages, religions and ethnic groups may not necessarily reflect the languages, religions and ethnic groups of the children's countries of origin or of asylum seekers generally. The table is about detained asylum-seeker children in Australia.
- 116 Inquiry, Confidential interview with a former detainee, Sydney, March 2003.
- 117 Between 1 July 1999 and 22 August 2001, 135 boats arrived, 98 of which carried children on board. See DIMIA Fact Sheet 74a.
- 118 Geoscience Australia, at <http://www.ga.gov.au/>, viewed 10 July 2003.
- 119 Inquiry, Focus group, Melbourne, May 2002.
- 120 NSW Commission for Children and Young People, Submission 258, p17.
- 121 Inquiry, Focus group, Melbourne, May 2002.
- 122 The child is not referring to an entry interview, but rather, basic information gathering. According to the Department, the scenario describes the stage at which Australian officials would still be making early assessments of any urgent medical cases and the overall basic needs of the group. DIMIA, Response to Draft Report, 19 May 2003.
- 123 Inquiry, Focus group, Melbourne, May 2002.
- 124 Inquiry, Confidential interview with former detainee, Sydney, 2003.
- 125 YAC and QPASST, Submission 84, p5.
- 126 Inquiry, Focus group, Melbourne, May 2002.
- 127 Inquiry, Focus group, Brisbane, August 2002.
- 128 Inquiry, Focus group, Melbourne, May 2002.
- 129 Uniting Church in Australia, Submission 151, p12.
- 130 Inquiry, Focus group, Perth, June 2002.
- 131 Inquiry, Interview with detainee, Villawood, August 2002.
- 132 Inquiry, Interview with detainee, Baxter, December 2002.
- 133 Inquiry, Interview with detainee, Baxter, December 2002.
- 134 Inquiry, Interview with detainee, Woomera, June 2002.
- 135 Inquiry, Focus group, Adelaide, July 2002.
- 136 Inquiry, Focus group, Brisbane, August 2002.
- 137 Inquiry, Focus group, Perth, June 2002.
- 138 Inquiry, Focus group, Melbourne, May 2002.
- 139 NSW Commission for Children and Young People, Submission 258, p78.

# Chapter 4

## Australia's Human Rights Obligations

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## 4. Australia's Human Rights Obligations

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The purpose of this chapter is to explain the relevance of international human rights law to children in Australia's immigration detention centres and to provide a quick reference point on the fundamental human rights principles that have influenced the approach of this Inquiry. This chapter also explains the role of United Nations (UN) guidelines in the Inquiry's analysis of Australia's human rights treaty obligations.

More specifically, the Inquiry addresses the following questions:

- 4.1 Does international human rights law threaten Australia's sovereignty?
- 4.2 How does international law become part of Australian law?
- 4.3 What are the rights of children in immigration detention in Australia?
- 4.4 What tools assist in the interpretation of treaty obligations?

A more detailed analysis of the human rights principles relevant to children in immigration detention can be found in the topic-specific chapters in the remainder of this report.

### 4.1 Does international human rights law threaten Australia's sovereignty?

Public debate in recent years has increasingly linked the concept of border protection with the arrival of asylum seekers to Australian shores. The Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) has stated on many occasions, in the context of unauthorised boat arrivals, that as a sovereign country Australia has the right to defend the integrity of its borders.<sup>1</sup> Australian courts have also affirmed the right of Australia to determine who does and does not enter and remain in Australia.<sup>2</sup> It is clear that Australia has the right to establish, administer and enforce its immigration policy and maintain national security. Border protection will inevitably be a part of these objectives.

The modern concept of sovereignty, however, is not absolute. Sovereignty does not mean that nations can do whatever they want, whenever they want, to whomever they want. This would inevitably lead to a breakdown in international cooperation. Australia, as a sovereign nation, has recognised the need to respect certain obligations and rights if it wants to maintain its position among the community of nations.

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Australia has chosen to participate in the international system of law and enter into agreements – treaties – with other sovereign States. It has thereby agreed to be bound by the international scheme of rights and responsibilities that governs the way in which sovereign States act. As the Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA) states:

In signing up to and ratifying treaties, States may accept qualifications on the exercise of their sovereign powers. This is a sovereign act of the State itself.<sup>3</sup>

The Department of Foreign Affairs and Trade (DFAT) reiterates this point in its Information Kit on treaties:

Ratification of international treaties does not involve a handing over of sovereignty to an international body. Treaties may define the scope of a State's action, and treaties which Australia ratifies may influence the way in which Australia behaves, internationally and domestically. Implicit, however, in any Australian decision to ratify a treaty is a judgment that any limitations on the range of possible actions which may result are outweighed by the benefits which flow from the existence of a widely endorsed international agreement.<sup>4</sup>

For the purposes of this Inquiry the most important of the various international rules to which Australia has agreed to be bound are those contained in the *Convention on the Rights of the Child* (CRC) which imposes obligations on Australia to give all children, including asylum-seeking children, special treatment. Also relevant to the Inquiry are some of the rights contained in the *International Covenant on Civil and Political Rights* (ICCPR).

Further, the Inquiry refers to the 1951 *Convention relating to the Status of Refugees* as amended by the 1967 *Protocol relating to the Status of Refugees* (the Refugee Convention), which specifically requires Australia to apply domestic laws that establish border integrity in such a way that persons fleeing persecution for specific reasons will be protected.<sup>5</sup> Article 22 of the CRC makes the Refugee Convention immediately relevant to a consideration of the human rights of children in detention because it requires that a child who is seeking refugee status receive appropriate protection and humanitarian assistance in the enjoyment of the rights contained in the CRC and in other international human rights or humanitarian instruments to which Australia is a party.

By ratifying the CRC, Refugee Convention and other treaties, Australia has explicitly agreed to ensure that new laws be enacted or existing laws be applied in a manner that gives proper expression to its treaty obligations. Such an act of national will is a positive expression of Australia's independence and an affirmative exercise of sovereignty.

As one leading commentator has stated:

Refugee law is a politically pragmatic means of reconciling the generalized commitment of states to self-interested control over immigration to the reality of coerced migration. Since the early part of this century, governments have

recognized that if they are to maintain control over immigration in general terms, they must accommodate demands for entry based on particular urgency. To fail to do so is to risk the destruction to those broader policies of control, since laws and institutional arrangements are no match for the desperate creativity of persons in flight from serious harm. By catering for a subset of those who seek freedom of international movement, refugee law legitimates and sustains the viability of the protectionist norm.<sup>6</sup>

Therefore, sovereignty, border protection and human rights can operate as complementary, rather than opposing, concepts. Australia, as a sovereign State, has the right to protect its borders as well as having undertaken a responsibility to achieve this in a manner that accords with human rights and humanitarian treaties. Furthermore, Australia, as a sovereign State guided by the rule of law, has committed to ensuring that those rights and responsibilities are integrated into the practices of the domestic legislature, executive and courts.

### **4.2 How does international law become part of Australian law?**

Australia, as a party to the CRC, the ICCPR and the Refugee Convention, has voluntarily committed to comply with their provisions in good faith and to take the necessary steps to give effect to those treaties under domestic law.<sup>7</sup> The Department has rightly acknowledged that 'Australia has a duty to respect and apply its international human rights obligations to all individuals within its jurisdiction'.<sup>8</sup>

Under Australian law a treaty only becomes a 'direct source of individual rights and obligations' when it is directly incorporated by legislation.<sup>9</sup> This is because under Australia's Constitution the making and ratification of treaties is a function of the Commonwealth Executive, whereas the making and alteration of Commonwealth laws is a function of the Commonwealth Parliament. The Executive would be usurping the role of Parliament if the treaties it made and ratified automatically became sources of new rights and obligations.

While the CRC, ICCPR and the Refugee Convention have not been directly incorporated into Australian law in their entirety, certain provisions of those treaties are reflected in domestic legislation. For instance, the *Migration Act 1958* (Cth) (Migration Act) makes reference to the protection obligations under the Refugee Convention in defining the criteria for a 'protection visa' under that Act.<sup>10</sup> Other domestic legislation, much of it State legislation, can be said to mirror the intent of international conventions without referring directly to them. For instance, all States have child protection laws which reflect the obligation to protect children from abuse in article 19 of the CRC, but do not necessarily refer specifically to the CRC.<sup>11</sup> The provisions of the *Family Law Act 1975* (Cth) relating to children also mirror rights and principles established by the CRC.

The Commonwealth Parliament has also enacted the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act) which specifically empowers this Commission to examine Commonwealth legislation and the acts and practices of the Commonwealth in order to determine their consistency with 'human rights'.

## A last resort?

'Human rights' is defined by the legislation to include the CRC and the ICCPR. However, this legislation falls short of direct incorporation.<sup>12</sup>

Nevertheless, even when treaties have not been directly incorporated by legislation, they are an indirect source of rights. In particular, treaties ratified by Australia have relevance in the common law of Australia which is enforced by courts.

The High Court of Australia's decision in 1995, in *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh*, confirmed that legislative provisions should be interpreted by courts in a manner that ensures, as far as possible, that they are consistent with the provisions of Australia's international obligations:

It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute...

But the fact that the Convention [on the Rights of the Child] has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, *prima facie*, intends to give effect to Australia's obligations under international law.<sup>13</sup>

The High Court also held that ratification of a treaty raised a legitimate expectation that an executive decision-maker will act consistently with its terms:

... ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration". It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.<sup>14</sup>

### 4.3 What are the rights of children in immigration detention in Australia?

The CRC is a comprehensive treaty, which incorporates most of the provisions of the ICCPR and the *International Covenant on Economic Social and Cultural Rights* (ICESCR), and adapts them to the needs of children. It also protects children from non-discrimination on the basis of sex, race, disability and other grounds, thereby reflecting provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the *Declaration on the Rights of Disabled Persons*

amongst others. The CRC also introduces specific provisions that relate only to children.

There are only two United Nations members who have not ratified the CRC – the USA and Somalia – making it the most widely ratified convention in the history of the UN.<sup>15</sup> It is the most relevant instrument for children in immigration detention and is therefore the primary reference point for this Inquiry.

The CRC applies to all children within Australia's jurisdiction. A 'child' is defined to include any person under 18 years of age.<sup>16</sup>

Almost all of the provisions of the CRC are discussed at some point throughout the report. However, the following key principles have guided the Inquiry's examination of Australia's treatment of children in immigration detention:

1. the best interests of the child must be a primary consideration in all actions concerning children (article 3(1))
2. detention must be a measure of last resort and for the shortest appropriate period of time; children must not be deprived of liberty unlawfully or arbitrarily (article 37(b))<sup>17</sup>
3. children in detention have the right to be treated with humanity and respect for the inherent dignity of the person (article 37(a), (c))<sup>18</sup>
4. children have the right to enjoy, to the maximum extent possible, development and recovery from past trauma (articles 6(2), 39)
5. asylum-seeking and refugee children are entitled to appropriate protection and assistance (article 22(1))<sup>19</sup>

These five themes and their impact on the Inquiry's analysis are discussed below.

Other important aspects of the CRC which are considered in separate chapters in this report include the right to:

- protection from all forms of physical or mental violence (article 19)
- the highest attainable standard of physical and mental health (article 24)<sup>20</sup>
- special care for children with disabilities (article 23)
- education (articles 28 and 29)<sup>21</sup>
- rest, recreation and play (article 31)<sup>22</sup>
- special assistance for children who have been separated from their parents (article 20)<sup>23</sup>
- practise culture, language and religion (article 30)<sup>24</sup>

The Inquiry also addresses the issue of non-discrimination in various places throughout the report (article 2).<sup>25</sup>

### 4.3.1 The best interests of the child as a primary consideration

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

*Convention on the Rights of the Child, article 3(1)*

The words of article 3(1) make it very clear that the 'best interests' principle is a fundamental principle of the CRC.<sup>26</sup> The principle expressly requires Australia's Parliament, Executive (including private institutions acting on their behalf, as in the case of Australasian Correctional Management Pty Limited (ACM)) and judiciary to ensure that the best interests of the child are a primary consideration in *all actions* concerning children.

While there is no one definition of what will be in the best interests of each and every child, a child's ability to enjoy all of his or her rights in a given environment is a good indication of whether the child's best interests are being met.<sup>27</sup>

Furthermore, while the CRC does not explicitly define 'best interests' it is clear that in the case of actions and decisions affecting a child, it is the best interests of that individual child which must be taken into account rather than children generally.

The Inquiry addresses two issues in the context of mandatory detention.

First, whether the best interests of the child was and is a primary consideration in the introduction and maintenance of the current mandatory detention laws. In answering this question the Inquiry considers whether the specific rights of children can be met within the terms of those laws.

Second, whether in the administration of those laws, the Department has made the best interests of the child a primary consideration in all actions affecting children. The Inquiry therefore considers the choices that the Department has made within the detention environment regarding education, health care and other issues impacting on children.

The Inquiry is mindful that the CRC does not require the best interests of the child to be the sole or paramount consideration in all decision-making. However, as the United Nations Children's Fund (UNICEF) states:

The child's interests...must be the subject of active consideration. It needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration.<sup>28</sup>

This approach was reflected by members of the High Court of Australia in the *Teoh* case:

A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it.<sup>29</sup>

Thus for a consideration of the best interests of a child or children to be meaningful, an attempt must be made to identify the interests of children and the ways in which they are, or may be, different to those of adults. Furthermore the detention framework must permit individualised decisions and the administering authorities must address their minds to the specific circumstances of each child. It is therefore not consistent with article 3(1) to treat child detainees as simply a subset of detainees generally as this would ignore the special needs and vulnerabilities of children.

The 'best interests' principle is reiterated in article 9(1) of the CRC which states that children should never be separated from their parents against their will except when 'necessary for the best interests of the child'. The interaction between the 'best interests' principle, family unity and immigration detention is discussed specifically in Chapter 6 on Australia's Detention Policy and more generally throughout the report. However, the Preamble to the CRC provides the reference point by recognising that:

[T]he child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.

### **4.3.2 Detention of children as a measure of last resort and for the shortest appropriate period of time**

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

*Convention on the Rights of the Child, article 37(b)*

The protection of individual liberty is one of the most fundamental human rights protections under international law. The CRC goes further than the general prohibition on arbitrary and unlawful detention in article 9(1) of the ICCPR, by adding that detention of children should be a 'measure of *last resort* and for the *shortest appropriate period* of time'.

While there is no set definition of the 'shortest appropriate period', when read with the 'last resort' principle it is clear that the Commonwealth must consider any less restrictive alternatives that may be available to an individual child in deciding whether and/or for how long a child is detained. Detention of children should only occur in exceptional cases.<sup>30</sup> If, after considering the available alternatives, detention is considered to be appropriate in the specific circumstances then it should be as short as possible.

This principle is clearly of primary relevance to an inquiry into immigration detention of children and Chapter 6 on Australia's Detention Policy directly examines whether Australia's detention policy and practices comply with article 37(b) (and article 9(1) of the ICCPR). The Inquiry also examines any links between a breach of article 37(b) and the enjoyment of other rights under the CRC. In particular, the Inquiry

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examines the impact that long-term detention may have on a child's ability to enjoy other specific rights in the CRC (protection from violence, physical and mental health, education, recreation, culture and so on).

### 4.3.3 The right to be treated with humanity and respect

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment...

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his or her age...

*Convention on the Rights of the Child, article 37(a),(c)*

The CRC applies to children the fundamental protections against torture and inhuman treatment while in detention, originally expressed in articles 7 and 10 of the ICCPR.

Generally speaking, the prohibition on torture seeks to prevent physical or mental mistreatment whereas the right to be treated with dignity imposes a positive duty to ensure a humane environment. The difference between the two protections can, however, be a matter of degree.

As this Inquiry has been more concerned with systemic issues than individual complaints, the Inquiry has not conducted an examination into whether there have been any specific acts of cruel, inhuman or degrading punishment of children under article 37(a). Any such allegations are more suited to an investigation under the Human Rights and Equal Opportunity Commission's complaints function.<sup>31</sup>

However, the Inquiry has considered whether the detention environment as a whole takes into account the age and development of children in a manner which succeeds in ensuring that they are treated with humanity and respect for their inherent dignity.

Since the overall conditions of detention are an accumulation of a variety of different circumstances, the individual chapters of this report generally do not come to any conclusions about whether there has been a breach of article 37(c). Rather, the summary of findings in each chapter highlights the aspects of that particular issue (for example, security, physical and mental health, education, recreation) which, when taken together with other issues, might contribute to a breach. The overall finding regarding article 37(c) is set out in Chapter 17, Major Findings and Recommendations.

#### 4.3.4 The right to survival, development and recovery

States Parties shall ensure to the maximum extent possible the survival and development of the child.

*Convention on the Rights of the Child, article 6(2)*

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

*Convention on the Rights of the Child, article 39*

The principle of survival and development is an extension of the right to be treated with dignity and respect, in that it imposes a general obligation to ensure an environment for children that fosters their positive development to 'the maximum extent possible' – whether or not children are in detention.

The right to survival and development refers not only to a child's physical survival and healthy development, but also to a child's mental and emotional development. As the Committee on the Rights of the Child has stated, what is important is:

to create an environment conducive to ensuring to the maximum extent possible the survival and development of the child, including physical, mental, spiritual, moral, psychological and social development...and to prepare the child for an individual life in a free society.<sup>32</sup>

The obligation on Australia to promote physical and psychological recovery from past trauma in a healthy environment has special relevance to children in immigration detention in Australia since many are asylum seekers who have come from situations of armed conflict, or who have otherwise been victims of abuse, torture or cruel treatment. The principle of survival and development should therefore be read with article 39 which requires that the healing of child victims take place in an environment appropriate to their 'recovery and reintegration' into society.

As with the 'best interests' principle, the Inquiry examines specific rights in light of the more general principle that children should live in a nurturing environment that fosters, to the maximum extent possible, development, recovery and social integration. The Inquiry first asks whether the policy of mandatory detention of children sufficiently allows for the provision of a nurturing environment. Second, it examines whether initiatives have been taken within the context of that detention policy to provide the appropriate environment and opportunities for development and recovery.

Many of the obligations under the CRC are relevant to these questions. For example, protection from violence, the highest attainable standard of physical and mental health, special care for children with disabilities, education, recreation and the right to a full cultural life are all factors that create a nurturing environment. In some chapters it is possible to determine whether the circumstances giving rise to the

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breach of a specific right also cause a breach of articles 6(2) and 39. In others the Inquiry notes that specific concerns may not themselves breach articles 6 and 39 but may be factors which contribute to a breach, considering circumstances overall, of those articles.

### 4.3.5 Special protections for asylum-seeking and refugee children

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

*Convention on the Rights of the Child, article 22(1)*

This article acknowledges the special vulnerability of refugee and asylum-seeking children. Since most children in Australia's immigration detention centres are, upon entry, seeking asylum, this principle is of special importance to the Inquiry.

Article 22(1) aims to ensure that these children get the assistance they need so that they are in a position to enjoy all the rights that other children enjoy. What measures are 'appropriate' to ensure the enjoyment of the child's rights are likely to differ from, or be additional to, the measures which may be in place for other children who do not confront the disadvantages faced by children who are refugees or seeking asylum. The Inquiry therefore examines whether extra measures need to be taken by the Department in order to overcome the difficulties faced by asylum-seeking children in detention. For example, there may need to be special education, specific physical and mental health care, cultural provisions, special attention to girls' needs and so on.

Article 22(1) of the CRC requires Australia to make appropriate efforts to ensure that children enjoy their rights not just under the CRC, but also under other treaties which Australia has ratified. The most important of these in the context of this Inquiry is the Refugee Convention. The most relevant provisions of the Refugee Convention for the purposes of this Inquiry are the definition of a refugee (article 1(A)(2)), the principle of non-refoulement (article 33), the prohibition on imposing penalties on persons on account of their illegal entry and the prohibition of restricting the movement of refugees 'other than those which are necessary' (article 31). Each of these concepts is outlined below.

#### (a) Who is a refugee?

A refugee is defined in article 1(A)(2) of the Refugee Convention to be someone who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is

outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The process of identifying a child as a refugee is discussed in some detail in Chapter 7 on Refugee Status Determination.

### **(b) What is non-refoulement?**

The principle of non-refoulement protects persons from being forced to go back to a country where they risk facing persecution.

Refugees, by definition, have a well-founded fear of persecution in the event they are returned to their country of nationality or habitual residence.<sup>33</sup> Refugees are therefore protected by the principle of non-refoulement. However, protection from return (refoulement) can also apply to persons who may not have a fear of persecution for the reasons set out under the Refugee Convention, but who do face a 'real risk' of a violation of their rights under the CRC and the ICCPR.<sup>34</sup> For example a child may be protected from being returned to a country where he or she faces a real risk of being killed.

### **(c) What does the Refugee Convention say about detention of asylum seekers?**

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

*Refugee Convention, article 31*

The Refugee Convention recognises that where persons are in fear for their life or freedom they may be forced to enter a country of refuge unlawfully. It therefore prohibits nations from penalising refugees 'on account of their illegal entry' where they are 'coming directly from a territory where their life or freedom was threatened'. Penalties may include prosecution and fines as well as punitive measures such as detention.<sup>35</sup>

The Refugee Convention also states that detention should only occur where 'necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission to another country' (article 31(2)). The United

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Nations High Commissioner for Refugees (UNHCR) has issued guidelines on how to interpret these provisions in the light of the CRC and has stated that:

Children seeking asylum should not be kept in detention. This is particularly important in the case of unaccompanied children.<sup>36</sup>

These guidelines are discussed further in section 4.4.2 below.

While article 31 is clearly of relevance to the issue of immigration detention, in the Inquiry's view the protection of liberty in article 37(b) of the CRC provides stronger protection to children than article 31 of the Refugee Convention. On that basis, the Inquiry has focussed its analysis on article 37(b).

### 4.4 What tools assist in the interpretation of treaty obligations?

A treaty should be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'.<sup>37</sup> Some of the minimum standards required by international treaties are quite clear from the words of the treaty itself and the CRC is more specific than many other instruments. However, where there is some ambiguity as to the minimum requirements for complying with an international obligation, there is a substantial body of international jurisprudence to assist in the interpretation.

The Department has highlighted to the Inquiry that there is a 'margin of appreciation' which 'allows States to determine the best means by which to implement their international legal obligations given their particular circumstances'.<sup>38</sup> It is uncontroversial to suggest that nations must be able to determine *the manner* in which they implement their international legal obligations taking into account the circumstances of that nation. However, it is important to note that a 'margin of appreciation' concept does not permit nations to determine *the meaning* of those obligations in order to suit their particular circumstances.<sup>39</sup> This is particularly the case when dealing with fundamental rights like the right to liberty.<sup>40</sup>

In construing the provisions of an international human rights instrument, Australian courts give weight to the views of specialist human rights bodies established to supervise implementation of treaties and international law. The High Court of Australia and the Federal Court of Australia have often referred to the international body of law to assist in their interpretation of international rights and obligations as they apply to Australia.<sup>41</sup>

In August 2000, the Minister for Foreign Affairs, the Attorney-General and the Minister for Immigration questioned the appropriateness of UN treaty committees to provide authoritative interpretations of the treaties they were designed to monitor.<sup>42</sup> This reluctance to defer to the international treaty bodies regarding interpretation of international law is reiterated in the Department's submission to the Inquiry. The Department, while acknowledging that it 'has regard to [international] principles and guidelines in formulating immigration detention policy and procedures', also

states that it 'does not accept, and it does not follow, that non-binding pronouncements by international treaty bodies conclusively represent the correct interpretation of a treaty obligation'.<sup>43</sup> The Department goes on to state that it is possible to 'take a different view to legislative and policy responses' without affecting its ability to comply with international legal obligations.<sup>44</sup>

While the instruments of the UN treaty and charter bodies do not represent the only interpretation of international obligations, they do represent the most persuasive interpretation of what should be done to ensure compliance with the CRC, the ICCPR and the Refugee Convention. They do not impose new obligations, but the guidelines and standards which are adopted by UN charter bodies, like the General Assembly, represent international consensus on what principles should govern the detention and treatment of children generally. The findings and general comments issued by treaty bodies are written by a Committee composed of experts from a wide range of countries charged with the specific purpose of interpreting and applying the provisions of the treaty and are thus highly significant.

The following sections set out the key interpretive instruments for international human rights law treaties. Together these instruments help explain the benchmarks to be applied when considering Australia's compliance with its treaty obligations. Specific provisions of these instruments are referred to throughout this report.

### **4.4.1 Treaty committees and UN principles, rules and standards**

Treaty committees are specifically set up within the provisions of a treaty to monitor compliance. Thus, when Australia ratified the CRC and the ICCPR it agreed to be subject to the monitoring of the Committee on the Rights of the Child and Human Rights Committee respectively.

The Committee on the Rights of the Child is established by article 43 of the CRC to monitor and supervise implementation and adherence to the CRC through examining the periodic reports of States every five years and issuing Concluding Observations on State reports.<sup>45</sup> The Committee also issues General Comments which interpret the meaning of specific provisions of the treaty.

The Committee on the Rights of the Child has indicated, in its general guidelines for periodic reports, that parties to the CRC should utilise UN guidelines to interpret the meaning of the treaty's provisions. For example, the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (1990) (the JDL Rules) are a particularly useful tool for interpreting the meaning of article 37 of the CRC.<sup>46</sup>

Like the Committee on the Rights of the Child, the UN Human Rights Committee reviews periodic reports submitted by States and issues findings and General Comments that interpret the provisions of the ICCPR. Both the Committee on the Rights of the Child and the Human Rights Committee have examined the detention of asylum seekers in Australia in response to those periodic reports and have expressed concern about the practice.<sup>47</sup>

Australia has also ratified the Optional Protocol to the ICCPR thereby agreeing that the Human Rights Committee can adjudicate claims of individuals who believe

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their rights have been violated. The findings of the Human Rights Committee in relation to these complaints are, according to courts and leading commentators, of 'considerable persuasive authority'<sup>48</sup> or 'highly influential, if not authoritative'<sup>49</sup> in relation to Australia's international legal obligations.

The Human Rights Committee has directly considered whether Australia's immigration detention system complies with the ICCPR in several cases including, *A v Australia*,<sup>50</sup> *Baban v Australia*,<sup>51</sup> *C v Australia*<sup>52</sup> and *Bakhtiyari v Australia*.<sup>53</sup> In each of those cases the Human Rights Committee found that Australia had breached the ICCPR. These findings are discussed further in Chapter 6 on Australia's Detention Policy.

The Human Rights Committee has also stated that the *United Nations Standard Minimum Rules for the Treatment of Prisoners* (the Standard Minimum Rules) and the *United Nations Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment* (the Body of Principles) represent minimum requirements for compliance with article 10 of the ICCPR which, like article 37(c) of the CRC, requires that persons in detention be treated humanely.<sup>54</sup> In other words, those principles elaborate the standards which the international community considers to be the minimum acceptable treatment of persons deprived of their liberty.<sup>55</sup>

The UN Working Group on Arbitrary Detention, a body of the Commission on Human Rights (a UN charter body), has devoted its attention to the detention of asylum seekers since 1997.<sup>56</sup> It is regarded as one of the most authoritative bodies concerning arbitrary detention. The Working Group noted several concerns regarding Australia's immigration detention practices in an October 2002 report.<sup>57</sup> The Australian Government rejected the report in December 2002.<sup>58</sup>

### 4.4.2 UNHCR guidelines

Although the Refugee Convention does not itself set up a monitoring body, the Executive Committee of the High Commissioner for Refugees, created by the UN General Assembly in 1957, issues conclusions that are regarded as persuasive interpretations of that Convention. Further, the United Nations High Commissioner for Refugees (UNHCR) is the intergovernmental body with responsibility to provide international protection to refugees and to find long-term solutions to their problems.<sup>59</sup> Since Australia is a party to the Refugee Convention, it is obliged under article 35 to cooperate with UNHCR.<sup>60</sup>

UNHCR has developed several guidelines and handbooks to guide States on how to apply the Refugee Convention. According to advice received by the Inquiry from UNHCR in Australia, these are standards that are usually considered to be minimum requirements.

UNHCR guidelines entitled *Refugee Children: Guidelines on Protection and Care* (1994) (UNHCR Guidelines on Refugee Children), are recognised internationally as appropriate standards for the protection and assistance of refugee and asylum-

seeking children. The Committee on the Rights of the Child has reaffirmed the importance of the UNHCR Guidelines on Refugee Children, noting that they were 'fully inspired by the Convention and shaped in the light of its general principles'.<sup>61</sup>

The *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (1997) (UNHCR UAM Guidelines) and the *Statement of Good Practice* of the Separated Children in Europe Programme (2000) (which was a joint effort of UNHCR and Save the Children) are specifically directed to protecting children who have been separated from their family. They include special measures designed to address the increased vulnerability of children who do not have the support of their parents. They are also a persuasive interpretation of how the Refugee Convention applies to all children and clearly refer to the provisions of the CRC.

The *UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (1999) (UNHCR Detention Guidelines) were first issued by UNHCR in 1995 to provide guidance to States on the limits to detention and were then revised in 1999 to reflect developments in human rights law, especially with respect to arbitrary detention. According to the Executive Committee of UNHCR, '[t]hey set out minimum standards for what might be considered acceptable state practice'.<sup>62</sup> In its submission to the Inquiry the Department acknowledges the importance of these guidelines and states that its practices are consistent with them.<sup>63</sup>

Similarly, the Department states that its practices are consistent with the UNHCR *ExCom Conclusion No 44* regarding detention. The UNHCR Executive Committee has stated that all persons detained should be treated in conformity with internationally accepted norms and standards including the Body of Principles, the JDL Rules, and the Standard Minimum Rules. In the Executive Committee's view:

These rules represent a consensus among states on how the basic principles should be respected. Asylum-seekers have a right, as all other individuals, to be treated in accordance with these standards.<sup>64</sup>

Finally, UNHCR has produced a *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR Procedures Handbook), which provides a 'practical guide' for those who are required to determine whether or not a person is a refugee.<sup>65</sup>

### 4.4.3 UNICEF Implementation Handbook

The CRC recognises the special competence of the United Nations Children's Fund (UNICEF) and other United Nations organs 'to provide expert advice on the implementation of the CRC in areas falling within the scope of their respective mandates' (article 45). UNICEF has produced a guide to the implementation of the various provisions of the CRC, the *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF Implementation Handbook), which helps explain the CRC's provisions. The Inquiry has made reference to this handbook extensively throughout this report.

## 4.5 Summary

Sovereignty brings with it rights and obligations. While Australia has the right to protect its borders, it also has the obligation to ensure that border protection occurs in a manner consistent with the human rights obligations that Australia has agreed to uphold. In the context of this Inquiry, those obligations are primarily set out in the CRC.

While the CRC has not been fully incorporated into Australian law, the Department acknowledges that Australia has a duty to respect and apply its international human rights obligations contained within the CRC and other treaties to which Australia is a party.

The key principles of the CRC discussed throughout this report include:

- ensuring that the best interests of the child are a primary consideration in all decisions concerning children
- detention as a measure of last resort and for the shortest appropriate period
- humane and respectful treatment while in detention
- survival, development and recovery from past trauma
- special protections for asylum-seeking and refugee children.

These principles influence the way the Inquiry has approached its examination of more specific rights, like the right to protection from violence (Chapter 8), the right to the highest attainable standard of mental and physical health (Chapters 9 and 10), the right to special care for children with disabilities (Chapter 11), the right to education and recreation (Chapters 12 and 13), the right to special assistance for unaccompanied children (Chapter 14) and the right to practise religion and culture (Chapter 15).

The findings and comments of UN treaty bodies, together with UN guidelines and principles, assist in interpreting what minimum standards are required to ensure compliance with all those rights.

Together, these treaties and interpretive tools create the framework within which Australia must work to maintain its status as a responsible member of the international community and ensure that children within its jurisdiction enjoy their basic human rights.

## Endnotes

- 1 DIMIA, Fact Sheet 70, Border Control, at <http://www.immi.gov.au/facts/70border.htm>, viewed 23 November 2003; Minister for Immigration and Multicultural and Indigenous Affairs and Minister for Foreign Affairs, *Government Rejects UN Report on Arbitrary Detention*, Joint Media Release, Parliament House, Canberra, 13 December 2002, at [http://www.minister.immi.gov.au/media\\_releases/ruddock\\_media02/r02107.htm](http://www.minister.immi.gov.au/media_releases/ruddock_media02/r02107.htm), viewed 2 December 2003.
- 2 See for example *Chu Kheng Lim v Minister of Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29; *Ruddock v Vadarlis* (2001) FCA 1328 at [193].
- 3 DIMIA, Response to Draft Report, 4 July 2003.
- 4 Department of Foreign Affairs and Trade, *Australia and International Treaty Making Information Kit*, at <http://www.austlii.edu.au/au/other/dfat/infokit.html#QnA>, viewed 23 November 2003.
- 5 See generally J Hathaway, *The Law of Refugee Status*, Butterworths, Toronto, 1991, pp1-2, 31-32, 231-233.
- 6 Hathaway, p231.
- 7 *Vienna Convention on the Law of Treaties*, article 26.
- 8 DIMIA, Submission 185, p15. See also DIMIA, Submission 185, p2 and DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p23.
- 9 *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J.
- 10 Migration Act, s36(2)(a).
- 11 See Chapter 8 on Safety for further discussion of article 19 of the CRC.
- 12 HREOC Act, s3. In its comments on the report of the United Nations Working Group on Arbitrary Detention, the Australian Government has pointed out that the scheduling of the ICCPR to the HREOC Act does not mean that it has general effect in Australian law. However, it states that 'as a signatory to all of the UN's core human rights instruments, the Government takes its international obligations, including its human rights obligations, very seriously'. See Minister for Immigration and Multicultural and Indigenous Affairs and Minister for Foreign Affairs, *Government rejects UN Report on Arbitrary Detention*, Joint Media Release, Parliament House, Canberra, 13 December 2002.
- 13 (1995) 183 CLR 273 at 287 (footnotes omitted).
- 14 (1995) 183 CLR 273 at 291 (footnotes omitted). Recent comments by members of the High Court have suggested that the 'legitimate expectation' principle outlined in *Teoh* may be the subject of reconsideration by the High Court in future (*Re Minister for Immigration and Multicultural Affairs: Ex parte Lam* [2003] HCA 6). However, the principle is still binding law in Australia. Note, in particular, that there have been three attempts to introduce legislation that overrules the 'legitimate expectation' principle – *Administrative Decisions (Effect of International Instruments) Bill* 1995, *Administrative Decisions (Effect of International Instruments) Bill* 1997, *Administrative Decisions (Effect of International Instruments) Bill* 1999. However, none of those bills were passed. The Executive also attempted to overturn this principle in 1995 by issuing a statement which asserted 'that entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty...'; Minister for Foreign Affairs and Attorney-General, *International Treaties and the High Court Decision in Teoh*, Joint Statement, 10 May 1995. A statement in similar terms was released by the Attorney-General of South Australia on 8 June 1995. See generally S Roberts, 'Minister for Immigration and Ethnic Affairs v Ah Hin Teoh: The High Court Decision and the Government's Reaction to it', *Australian Journal of Human Rights*, vol 2, 1995, p135. These statements have been found to be of no effect by the courts; see, for example, *Department of Immigration and Ethnic Affairs v Ram* (1996) 69 FCR 431; *Browne v Minister for Immigration and Multicultural Affairs* (1998) 566 FCA; *Tien v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 80.
- 15 192 countries have ratified the treaty. The USA and Somalia have signed but not ratified the CRC. See UNICEF, 'Convention on the Rights of the Child', at <http://www.unicef.org/crc/crc.htm>, viewed 26 November 2003.
- 16 CRC, article 1.
- 17 See also ICCPR, article 9.
- 18 See also ICCPR, articles 7 and 10.
- 19 See also Refugee Convention, articles 1A, 31 and 33.
- 20 See also ICESCR, article 12; CEDAW, article 12.

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- 21 See also ICESCR, article 13.
- 22 See also ICESCR, article 7.
- 23 See also ICESCR, article 10.
- 24 See also ICESCR, article 15; ICCPR, article 18.
- 25 See also CEDAW, CERD, the *Declaration on Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, the *Declaration on the Rights of Disabled Persons* and the *UN Declaration on the Rights of Mentally Retarded Persons*.
- 26 As UNICEF notes, the concept of 'best interests' of children has been the subject of more academic analysis than any other provision of the Convention; see UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF Implementation Handbook), United Nations Publications, Geneva, 2002, p41.
- 27 UNICEF Implementation Handbook, 2002, p246.
- 28 UNICEF Implementation Handbook, 2002, p43. See also *Family Law Act 1975* (Cth), s65E, which requires courts to 'regard the best interests of the child as the paramount consideration' when making parenting orders.
- 29 *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 292 per Mason CJ and Deane J.
- 30 UNICEF Implementation Handbook, 2002, p550; UNHCR, *UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 1999, guideline 3.
- 31 Note, however, that Chapter 9 on Mental Health discusses this article in a more general sense.
- 32 Committee on the Rights of the Child, *General guidelines regarding the form and contents of periodic reports to be submitted by States Parties under article 44, paragraph 1(b) of the Convention* (Guidelines for Periodic Reports), 11 October 1996, cited in UNICEF Implementation Handbook, 2002, p677.
- 33 Note, however, that a refugee may be excluded from the protection of non-refoulement in the limited circumstances set out in article 33(2) of the Refugee Convention.
- 34 See further, HREOC, Submission to the Senate Select Committee on Ministerial Discretion in Migration Matters, 7 August 2003, available at [http://www.hreoc.gov.au/human\\_rights/migration\\_matters.html](http://www.hreoc.gov.au/human_rights/migration_matters.html). See *Kindler v Canada* (470/91); *Ng v Canada* (469/91); *Cox v Canada* (539/93); *T.T. v Australia*, Communication No. 706/96, UN Doc CCPR/C/61/D/706/1996, in the jurisprudence of the Human Rights Committee (HRC). See also HRC, *General Comment 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment* (Article 7), para 9. Note that in the case of *T.T. v Australia*, the submission made by the Australian Government was that the obligation of a State party in relation to future violations of human rights by another State arises only in cases involving a potential violation of the 'most fundamental human rights'.
- 35 DIMIA, 'Article 31: Refugees Unlawfully in the Country of Refuge', UNHCR Global Consultations on International Protection of Refugees, at <http://www.immi.gov.au/refugee/publications/convention2002/index.htm>, viewed 26 November 2003.
- 36 UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, Geneva, 1997, para 7.6.
- 37 *Vienna Convention on the Law of Treaties*, article 31(1).
- 38 DIMIA, Response to Draft Report, 4 July 2003. See also, DIMIA, Submission 185, p15.
- 39 In the context of the ICCPR, for example, Joseph et al note that such a doctrine 'dilutes human rights protection' and argue that it would be 'unwise to apply such a doctrine under the ICCPR': see S Joseph et al, *The International Covenant on Civil and Political Rights*, Clarendon Press, Oxford, 2000, p394 for a full discussion. See also E Evatt, 'The Impact of International Human Rights on Domestic Law' in G Huscroft and R Rishworth, (eds) *Litigating Rights: Perspectives from Domestic and International Law*, Hart Publishing, Oxford, 2002, pp281-303 at 295.
- 40 See, for example, jurisprudence in the United Kingdom dealing with this issue: *Amirthanathan, R (on the application of) v Secretary of State for the Home Department* [2003] EWHC 1107 (Admin) at [54]; *The Queen v Secretary of State for the Home Department ex parte Khawaja* [1984] AC 74 per Lord Scarman at 108-111.
- 41 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 per Brennan J at 42; *Dietrich v The Queen* (1992) 177 CLR 292 per Mason CJ and McHugh J at 305-307; *Johnson v Johnson* (2000) 201 CLR 488 per Kirby J at [38]; *Commonwealth v Bradley* (1999) 95 FCR 218 per Black CJ at [35]; *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 174 ALR 585 per Gleeson CJ at [5]. See also H Burmester, 'National Sovereignty, Independence and the Impact of Treaties and International Standards', *Sydney Law Review*, vol 17, 1995, p145.

- 42 Minister for Foreign Affairs, Attorney-General and Minister for Immigration and Multicultural Affairs, *Improving the Effectiveness of United Nations Committees*, Joint Media Release, Parliament House, Canberra, 29 August 2000, at [http://www.dfat.gov.au/media/releases/foreign/2000/fa097\\_2000.html](http://www.dfat.gov.au/media/releases/foreign/2000/fa097_2000.html), viewed 26 November 2003.
- 43 DIMIA, Submission 185, p18.
- 44 DIMIA, Submission 185, p19; DIMIA, Response to Draft Report, 4 July 2003.
- 45 Office of the High Commissioner for Human Rights, Fact Sheet No.10 (Rev.1), *The Rights of the Child*, at <http://www.unhchr.ch/html/menu6/2/fs10.htm>, viewed 26 November 2003.
- 46 Committee on the Rights of the Child, *Guidelines for Periodic Reports*, 1996, para 138. See also HRC, *General Comment 8: Right to liberty and security of persons* (Art. 9), 30 July 1982; UNICEF Implementation Handbook, 2002, p543.
- 47 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, UN Doc CRC/C/15/Add.79, 10 Oct 1997, para 20; HRC, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A55/40, paras 498-528, 24 July 2000.
- 48 *Nicholls v Registrar Court of Appeal* [1998] 2 NZLR 385 at 404 per Eichelbaum CJ. Examples of references to the jurisprudence of human rights treaty bodies by Australian courts include: *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 per Brennan J (with whom Mason CJ and McHugh J agreed); *Dietrich v The Queen* (1992) 177 CLR 292 at 305-307 per Mason CJ and McHugh J and *Johnson v Johnson* (2000) 201 CLR 488 per Kirby J at [38]. See also R Rishworth, 'The Rule of International Law' in Huscroft and Rishworth, 2002, p275.
- 49 Evatt, p295. See also Joseph, p14.
- 50 HRC, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993, 30 April 1997.
- 51 HRC, *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001, 18 September 2003.
- 52 HRC, *C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999, 13 November 2002.
- 53 HRC, *Bakhtiyari v Australia*, Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002, 6 November 2003.
- 54 HRC, *General Comment 21: Replaces general comment 9 concerning humane treatment of persons deprived of liberty (Article 10)*, 10 April 1992, para 5.
- 55 The Department does not accept this interpretation by the HRC. See DIMIA, Response to Draft Report, 4 July 2003.
- 56 Standing Committee of the Executive Committee of UNHCR, *Detention of Asylum-Seekers and Refugees: The Framework, The Problem and Recommended Practice*, EC/49/SC/CRP.13, 4 June 1999, para 8.
- 57 UN Economic and Social Council, *Civil and Political Rights, including the question of torture and detention: Report of the Working Group on Arbitrary Detention: Visit to Australia*, E/CN.4/2003/8/Add.2, 24 October 2002.
- 58 Minister for Immigration and Multicultural and Indigenous Affairs and Minister for Foreign Affairs, *Government Rejects UN Report on Arbitrary Detention*, Joint Media Release, Parliament House, Canberra, 13 December 2002.
- 59 Statute of the Office of UNHCR, article 1.
- 60 See also article 11 of the 1967 Protocol to the Convention. Both Resolution 428 (V) of the UN General Assembly and the Statute of UNHCR, which was annexed thereto, called for cooperation between governments and the High Commissioner's Office in the performance of the High Commissioner's functions.
- 61 Committee on the Rights of the Child, *Report on the seventh session*, UN Doc CRC/C/34, (1994) p61. See also UNICEF Implementation Handbook, 2002, p282.
- 62 Standing Committee of the Executive Committee of UNHCR of 4 June 1999, *Detention of Asylum-Seekers and Refugees: The Framework, The Problem and Recommended Practice*, EC/49/SC/CRP.13, para 12.
- 63 DIMIA, Submission 185, p16.
- 64 Standing Committee of the Executive Committee of UNHCR of 4 June 1999, *Detention of Asylum-Seekers and Refugees: The Framework, The Problem and recommended Practice*, EC/49/SC/CRP.13, para 11.
- 65 *Chan v Minister for Immigration* (1989) 169 CLR 392.



# Chapter 5

## Mechanisms to Protect the Human Rights of Children in Immigration Detention

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## 5. Mechanisms to Protect the Human Rights of Children in Immigration Detention

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Australia is responsible for ensuring that all children in its jurisdiction can enjoy all applicable human rights, including those in the *Convention on the Rights of the Child* (CRC), *International Covenant on Civil and Political Rights* (ICCPR) and Refugee Convention. That responsibility may be executed through legislation, executive action and the judicial system. Subject to the Australian Constitution, some of those functions may be fulfilled by State legislatures, executive bodies, courts or private entities. However, the ultimate responsibility for compliance with Australia's human rights obligations will always lie with the Commonwealth of Australia.

In the context of immigration detention, the *Migration Act 1958* (Cth) (the Migration Act) delineates the framework for Australia's immigration detention policy, the Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA) is responsible for executing that policy and the Federal Courts are responsible for review. However, the Migration Act must operate in concert with State legislation regarding child welfare, amongst other legislation, and the Department should therefore cooperate with State child welfare bodies, education authorities and other State agencies. Furthermore, for the period covered by the Inquiry, the Department contracted out some of its functions to Australasian Correctional Management Pty Limited (ACM), a private detention services provider.

Chapter 4 on Australia's Human Rights Obligations briefly described the relevant rights of children in immigration detention. This chapter sets out the functions of, and interaction between, each of the bodies participating in the protection of those human rights. It sets out the framework within which this Inquiry has examined whether the acts, practices and enactments of the Commonwealth satisfy Australia's human rights obligations towards children in immigration detention.

In particular, the following questions are discussed:

- 5.1 How are children's rights protected by domestic legislation?
- 5.2 How are children's rights protected by domestic courts and the Human Rights and Equal Opportunity Commission?
- 5.3 How are children's rights protected by the Department?
- 5.4 How are children's rights protected by State authorities?

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There is a summary of the Inquiry's findings regarding this framework at the end of the chapter.

### 5.1 How are children's rights protected by domestic legislation?

The most proactive mechanism for ensuring the protection of children's human rights under Australian law is to enact legislation that directly incorporates the rights and obligations embodied by international law. Incorporation by legislation not only makes the rights and obligations explicit, it also provides a mechanism for the implementation of those rights by triggering the adjudication and enforcement powers of the courts.

Incorporation of international human rights into domestic legislation may be done either by directly adopting the international instruments themselves or by ensuring that the substance of those provisions are reflected in domestic legislation.

Whether the legislation will be Commonwealth legislation or State and Territory legislation is primarily guided by the requirements of the Australian Constitution.

The Migration Act is the primary piece of legislation governing the immigration detention of children. It provides for the mandatory detention of all unlawful non-citizen children and families until they are granted a valid visa or removed. The *Migration Regulations 1994* set out the classes of visas that are available to detainees. The *Immigration (Guardianship of Children) Act (Cth)* (IGOC Act) is the legal mechanism by which guardianship of certain unaccompanied children is conferred on the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) and is therefore also relevant to children in immigration detention.

The Commonwealth also relies on State legislation to fulfil some of Australia's human rights obligations. As the Department states in its submission:

Various pieces of State legislation also have effect in the detention environment, to the extent that this legislation is not inconsistent with Commonwealth legislation. State legislation that can affect children in detention is, broadly, that relating to health, education, welfare and criminal law.<sup>1</sup>

To the extent that State legislation operates to protect the rights of children in immigration detention, the Commonwealth must ensure that those laws are effectively applied. Accordingly, the Inquiry examines the operation of Commonwealth and State legislation throughout this report in order to determine whether those instruments properly protect the rights of children in immigration detention.

## **5.2 How are children's rights protected by domestic courts and the Human Rights and Equal Opportunity Commission?**

Courts are the only institution in Australia with the power to enforce rights and obligations. Courts are therefore the primary mechanism by which children in immigration detention can seek a remedy for breach of their rights under the CRC, ICCPR and Refugee Convention.

Courts should also examine and interpret the meaning of legislation in a manner which accords with Australia's obligations under international law, where the meaning of the legislation is otherwise ambiguous.<sup>2</sup>

In the context of immigration detention, courts currently have the responsibility to review (a) the legality of decisions made by the Department to detain and release children under the Migration Act and (b) the Department's decisions in relation to the grant of visas. In recent years, however, respective Commonwealth governments have sought to strictly limit the jurisdiction of the courts in both these areas. This is discussed further in Chapter 6 on Australia's Detention Policy and Chapter 7 on Refugee Status Determination.

The absence of Commonwealth legislation setting out the minimum rights of children in immigration detention (as compared to State legislation which sets out the rights of convicted prisoners)<sup>3</sup> means that the courts have limited scope to review the conditions of detention. As a result, Federal Courts are rarely in a position to provide remedies for any failure to provide children in immigration detention their rights under the CRC.<sup>4</sup>

Finally, while the Commonwealth Parliament has specifically legislated to give the Human Rights and Equal Opportunity Commission (the Commission) the role of monitoring compliance with the CRC and ICCPR, the Parliament did not vest this Commission with the power to enforce recommendations made by the Commission. Thus even when the Commission identifies a breach of rights, it is not in a position to enforce a remedy.

## **5.3 How are children's rights protected by the Department?**

As noted earlier, under the Australian Constitution it is the Commonwealth Executive that has the responsibility for administering Commonwealth legislation and implementing any human rights obligations. In the context of immigration detention, it is primarily through the executive acts and practices of the Department that the Commonwealth must satisfy its obligations to children in immigration detention. The following sections examine the mechanisms by which the Department has attempted to fulfil that responsibility.

### 5.3.1 A short history of the provision of immigration detention services

From 1991, when the Port Hedland Immigration Reception and Processing Centre opened, until the end of 1997, custodial services in immigration facilities were provided by Australian Protective Services (APS), a Commonwealth security agency. In the 1996-97 Commonwealth Budget, the Government decided to terminate the arrangements that tied the Department to APS and put the guarding services out to tender. Later, the Government decided to put the full detention function out to a public tender process. On 27 February 1998, the Department signed a contract with Australasian Correctional Services Pty Limited (ACS) to deliver all services at the immigration detention facilities. Those services were provided by the operational arm of ACS, ACM.<sup>5</sup>



Sign outside Woomera indicating ACM and the Department, June 2002.

The services contract with ACM was originally for three years, with options to renew. It was extended a first time for a further year and then again to cover the period until the winner of the new tender process commenced its services in 2003.

On 25 May 2001, the Department announced a new tender process and on 5 December 2001 it released an exposure draft of the request for tender. On 22 December 2002, the Department selected Group 4 Global Solutions Pty Limited (Group 4) as the preferred tenderer. The contract with Group 4 was signed on 27 August 2003.

This report addresses the period during which ACM was the detention services provider.

### **5.3.2 Who was responsible for the protection of children's rights – the Department or ACM?**

The Department's entry into a detention services contract with ACM meant that between 1998 and 2003, the responsibility for the day-to-day operations of detention centres lay with ACM. The detention services contract required ACM to provide accommodation, maintenance, security, catering, health care, education and recreation, amongst other services. The Department had the responsibility to monitor ACM's contractual performance in order to ensure that it was delivering the nominated services. The Department was also responsible for the physical infrastructure of the centres, the intake and release of detainees and the visa processing.

Most importantly, it was the Department, not ACM, which was responsible for ensuring the protection of children's human rights while in immigration detention. The Department describes the way it executed its responsibility as follows:

While retaining ultimate responsibility for all detainees, the Department, exercises its duty of care commitments through the engagement of a Services Provider within the framework of relevant legislation, comprehensive contractual obligations, the Immigration Detention Standards and associated performance measures.<sup>6</sup>

It is important to stress that the Commonwealth could not satisfy its human rights obligations simply by hiring ACM. If ACM did not provide the services which met the standards required by international law the Department could not 'blame' ACM for a breach of a child's human rights. Thus, no matter what a detention services contract says or how ACM or any other entity performs, it is ultimately the Department's responsibility to ensure that all children are enjoying all their rights.

Furthermore, as the detaining authority, the Department acknowledges that it has extra responsibilities regarding children and families who have been deprived of their liberty:

While in detention, the ability of individuals to control their own environment is restricted ... this places particular responsibilities on the Commonwealth with regard to duty of care ...<sup>7</sup>

The substance of the Department's duty of care towards children in immigration detention is defined by the rights of children under the CRC, Refugee Convention and ICCPR rather than the contract with ACM. It was therefore possible that ACM was meeting its contractual duty of care without the Department meeting its duty to children in immigration detention.<sup>8</sup> In such circumstances the Department had an obligation to independently provide services that fell within, or outside, ACM's contractual obligations.

The following section examines the overlap between the contractual obligations of ACM and the human rights obligations of the Department.

### 5.3.3 Did the Immigration Detention Standards adequately reflect the Commonwealth's human rights obligations?

In the absence of legislative guidance on the services to be provided to children in immigration detention the Department was left to develop its own rules. According to the Department, the 'first ever attempt' to create a set of standards was in 1998 when it entered the contract with ACM.<sup>9</sup> The detention services contract, 'replaced previous fragmented service delivery arrangements and for the first time detention service requirements were formalised into a set of principles and standards'.<sup>10</sup> These standards were embodied in the Immigration Detention Standards (IDS) scheduled to the contract between ACM and the Department.<sup>11</sup>

It is of concern to the Inquiry that despite the introduction of mandatory detention in 1992, neither the legislature nor the Department had put any serious effort into establishing comprehensive procedures and standards until 1998. While the Department did not concede that those 1998 standards were inadequate, it readily asserted that the revised IDS scheduled to the 2002 tender documents represent great improvements.<sup>12</sup> However, during the period covered by the Inquiry, only the original IDS were in force and the Inquiry has not, therefore, considered the revised IDS in any detail.

The Department acknowledges that the IDS were the highest contractual expression of its understanding of what ACM had to do so that the Department could be assured that the Commonwealth was complying with its international obligations:

...taken in their entirety they [the IDS] represent an acknowledgment on our part and a requirement as part of the contract to be alert to the sorts of issues that are encompassed in our international obligations.<sup>13</sup>

The 'Principles Underlying Care and Security' in the IDS also stated that 'Australia's international obligations inform the approach to delivery of the detention function'.<sup>14</sup>

As the following chapters will explore in further detail, the IDS included, amongst other things, general requirements for the provision of clothing, food, health care, security, education and recreation to all detainees. However, the only provisions of the IDS that referred to special measures for children were included in the section in 'Individual Care Needs'. They are extracted in full as follows:

#### *9.2 Unaccompanied Minors*

9.2.1 Unaccompanied minors are detained under conditions which protect them from harmful influences and which take account of the needs of their particular age and gender.

#### *9.3 Infants and Young Children*

9.3.1 The special needs of babies and young children are met.

#### *9.4 Children*

9.4.1 Social and educational programs appropriate to the child's age and abilities are available to all children in detention.

9.4.2 Detainees are responsible for the safety and care of their child(ren) living in detention.

9.4.3 Where necessary, help and guidance in parenting skills is provided by appropriately qualified personnel.

### *9.5 Expectant Mothers and Infants in Detention*

9.5.1 Expectant mothers have access to necessary ante-natal and post natal services.

9.5.2 Arrangements are made, wherever practicable, for children to be born in a hospital outside the detention facility. If a child is born in a detention facility this is not recorded on their birth certificate.

9.5.3 Where a nursing infant is with its mother in detention, provision is made for the child to be cared for by the detainee.<sup>15</sup>

The Inquiry is somewhat concerned about the brevity and generality of these provisions. When it was put to the Department that these standards were inadequate as a statement of the standard of care owed to children in detention the Department replied that:

the fact that there may not be specific words or specific references in these standards doesn't...take away from the general point that I'm making which is that taken in their entirety they represent an acknowledgement on our part and a requirement as part of the contract to be alert to the sorts of issues that are encompassed in our international obligations.<sup>16</sup>

The Department also stated that the standards 'draw people's attention' to Australia's international obligations,<sup>17</sup> and emphasised that the IDS 'need to be read more broadly with the overarching principles and with other elements of the contract'.<sup>18</sup>

However, the Inquiry finds that the IDS failed to provide sufficient guidance to ACM as to what needed to be done to satisfy the standard of care owed to children according to the CRC, even when read with the remainder of the contract. The IDS did not mention the CRC nor incorporate the fundamental principles applying to children in immigration detention. For instance, the principle that the best interests of the child must be a primary consideration in all decisions affecting children is absent.

While the fact that the applicable IDS did not fully represent Australia's obligations towards children does not in itself amount to a breach of those obligations, it does mean that the Department could not fully rely on ACM to fulfil the obligations that the Department had towards children. In other words, even full compliance with the IDS by ACM may not have amounted to an acquittal of the Department's duty of care towards children.

### **5.3.4 How did the Department monitor the protection of children's rights?**

For the Department to be satisfied that ACM was fulfilling its contractual obligations, it had to closely monitor its activities, ensure remedies for any breaches of the contract that affected the treatment of children and make up for any differences between ACM's performance and the Department's obligations.

The Department describes its monitoring objectives thus:

Effective contract management is an essential element in ensuring services in immigration detention are appropriate, effective and responsive. The Department places considerable emphasis on ensuring the contract is carefully monitored and, as required, evaluated and reviewed ...<sup>19</sup>

The IDS provided for monitoring and reporting as follows:

13.1 DIMIA has full access to all relevant data to ensure that monitoring against these standards can take place.

13.2 The Contractor ensures that adequate reporting against the standards is provided on a regular and agreed basis.

13.3 An incident or occurrence which threatens or disrupts security and good order, or the health, safety or welfare of detainees is reported fully, in writing, to the DIMIA Facility Manager immediately and in writing within 24 hours.

13.4 The Contractor ensures that it responds within agreed time frames to requests for information so as to enable DIMIA to meet Departmental and Government briefing requirements.

The Department's monitoring mechanisms appear to have varied greatly over time although it has been difficult to pinpoint the dates on which various initiatives were introduced. The Department describes the changes as follows:

Management of the contract evolved as the environment changed. For example, when we were operating only four centres, communication and service monitoring was through individual contact with Centre Managers, incident reports made by the services provider and quarterly reports submitted by DIMA Managers. Over time as the number of detainees in centres and the complexity of the program increased these management strategies were augmented by increased reporting and analysis and continuing development of policy and procedures. Written reporting mechanisms increasingly became important particularly in monitoring performance.<sup>20</sup>

The Department lists monitoring mechanisms, including weekly teleconferences between the Department and ACM staff, ongoing analysis of incident reports, onsite monitoring by departmental managers, regular visits to detention centres by central office staff and audit reports on specific issues.<sup>21</sup>

Some of these activities were documented and others were not. The Secretary of the Department explained the absence of documentation on the basis that the day-to-day operation of the detention facilities meant that 'the bulk of communication remained oral'. He continued:

The focus was on responding to the individual circumstances of detainees and tailoring response to their needs. At the same time, increasing emphasis was placed on written documentation of actions, principally through the mechanism of incident reporting.<sup>22</sup>

The Inquiry is not in a position to examine the effectiveness of those monitoring mechanisms that have not been recorded. Accordingly, in this chapter, the Inquiry has focused on those formal contract management systems that appear to have been the primary mechanisms by which the Department documented ACM's general contractual performance. The relevant records were produced by the Department to the Inquiry, pursuant to Notices, and explored in some detail during the oral hearings with the Department.<sup>23</sup> Those monitoring systems are grouped as follows:

- (a) General reporting by Department Managers of immigration detention facilities
- (b) Incident reporting by ACM to the Department.

The monitoring of specific initiatives related to children is discussed in greater detail throughout this report.<sup>24</sup>

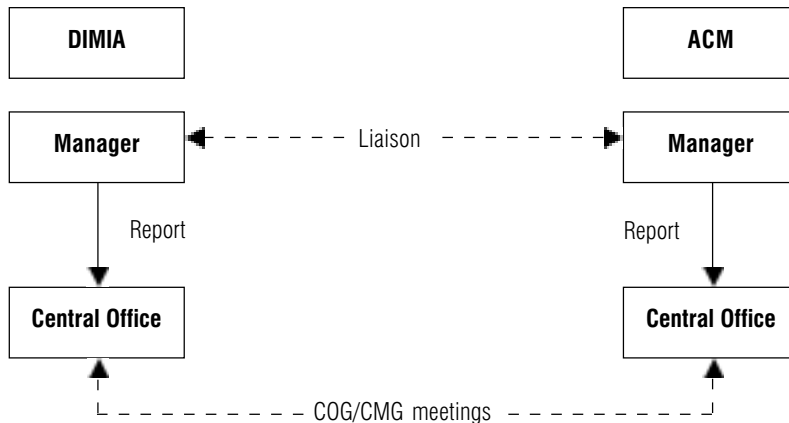
### **(a) General reporting**

All immigration facilities have had a resident Department Manager and from mid-2001 most facilities also had at least one Deputy Manager and other administrative staff. The Department described the role of the Manager and Deputy Manager as follows:

These staff were responsible for two main areas. First, overseeing ACM service delivery and contract performance through day-to-day involvement in the centre as well as ongoing monitoring and reporting. Second, co-ordinating and supporting those aspects of service delivery that remained the responsibility of the Department, that is any issue related to the person's immigration status, application processing and so forth.<sup>25</sup>

The general reporting system employed by the Department Managers and ACM Managers is represented by the diagram on the following page.

## A last resort?



From March 2000, the Department Managers were required to provide quarterly reports to the Department's Central Office in Canberra. By October 2001, these reports were provided on a monthly basis by the Managers of most facilities. The purpose of these reports was to assess ACM's performance against the IDS.

ACM had a similar process of monthly reporting to its headquarters in Sydney although those reports were focussed on ACM's corporate 'Key Performance Indicators' rather than the IDS. Both sets of reports were intended to provide information to their respective headquarters, primarily to inform discussions at Contract Operations Group (COG) meetings.

The 'monthly COG meetings focussed on the regular and routine consideration of operational issues, such as incidents and other issues of concern'.<sup>26</sup> The COG meetings were held irregularly until January 2001 when monthly meetings commenced.<sup>27</sup>

From April 2001, a Contract Management Group (CMG) also met, on a quarterly basis. The CMG meeting:

is held between high level members of the Department and [ACM]. The CMG focuses on higher level contract management issues, quarterly performance assessments,<sup>28</sup> and issues that remain unresolved from COG meetings.<sup>29</sup>

It is the Inquiry's view that the reports by Department Managers represented the most important monitoring document between the Department's representative on the ground and Central Office regarding ACM's compliance with the IDS. In turn they were an important record of the Department's view as to whether ACM was fulfilling its human rights obligations towards children on its behalf.

However, there was no standard format for these reports, although each report was structured around the IDS. Furthermore, with the possible exception of Port Hedland detention centre, they were all very brief. Many of the Woomera reports were two or three pages, even for months where there was substantial unrest.

During the hearings the Department explained that:

the reports are integral to the overall framework of the monitoring and knowing what's going on in the centres but they're not the only or on their own the most important source of information.<sup>30</sup>

The Department emphasised that there was also daily phone contact between the Department and ACM and weekly teleconferences between the Department Managers and Central Office. However, most of this contact was not documented, and the Inquiry is therefore not in a position to assess the extent to which the care of children was addressed at those meetings.<sup>31</sup>

It is the Inquiry's impression that the low levels of written detail required from Department Managers may have reflected the fact that the Central Office in Canberra placed little weight on their opinion. The Department challenges this conclusion and states that it relied on its Managers' reports as a 'key tool'.<sup>32</sup> However, several times during the Inquiry hearing of December 2002, the judgments of the Managers were relegated to being 'the view of the particular officer' rather than the view of the Department as a whole.<sup>33</sup> One of those examples related to a dispute over who would pay for the care of a child with a serious disability:

MR WIGNEY (INQUIRY COUNSEL): That long answer, I suggest, entirely glosses over the real state of affairs, at least according to the author of this email who [is the Department Manager at Curtin IRPC] ..., that relations between ACM and the Department in relation to the cost of the care of this child had reached such a point that ACM, to use the words in this document, 'had threatened to dump the child on DIMIA's doorstep'. Now, that was the suggestion, wasn't it?

MS McPAUL (DIMIA ASSISTANT SECRETARY): That is a view expressed by a particular DIMIA officer on that given day. I have no personal basis to suggest that that is actually the case.<sup>34</sup>

These Department officers were the persons, according to the Department, who were charged with monitoring what was happening on the ground in detention facilities. If the Department did not trust the judgments of those Managers, it is unclear why they entrusted them with a monitoring role.

Nevertheless, it may be that one reason that the Department did not rely on the assessments of its Department Managers was because those persons did not have specific expertise on the issues that arise in immigration detention. In particular, in most cases they had no experience in child welfare and therefore may not have been in a position to assess whether children were being properly looked after.

INQUIRY COUNSEL: Upon the whole they tended to be bureaucrats, and I don't use that in a pejorative sense, they were administrators who'd come up, worked their way up through the Department, is that right?

MS GODWIN (DIMIA DEPUTY SECRETARY): Well, they would be officers from within the Department generally, yes.

## A last resort?

INQUIRY COUNSEL: So they didn't have any particular training or experience in education, health or mental health or those sorts of things?

DIMIA DEPUTY SECRETARY: Not specifically, no.<sup>35</sup>

The Department could not fully explain how a person without specific expertise could identify problems relating to the provision of these services. During the hearing the Inquiry used the issue of education to explore this issue:

INQUIRY COUNSEL: Staying on the example of education another difficulty, I would suggest to you in terms of the DIMIA Manager or Deputy Manager adequately monitoring the provision by ACM of educational services is that the DIMIA Manager was not himself or herself qualified or experienced in the provision of educational services on the whole, that's correct isn't it?

DIMIA DEPUTY SECRETARY: It is correct but it's equally one of the reasons why, and again I think this is something we talked about in our submission, where we've tried to broaden out our monitoring capacity. Certainly initially the focus of monitoring was on the DIMIA Manager and that remains a core element of our ongoing monitoring but we have broadened out that monitoring capacity over time to try to pick up some of the points you're alluding to.

INQUIRY COUNSEL: How is a DIMIA Manager who is not experienced in the provision of education services to determine whether the provision of services by ACM was adequate or inadequate based on this standard?

DIMIA DEPUTY SECRETARY: Well, using the standards as a guide that the needs of children and various other sort of things need to be met by observation, by consultation with Central Office about whether something was broadly appropriate or not. So, it's not just a question of whether the local manager assesses or monitors or forms a view that it's appropriate, there would be a process raising issues or identifying things that they themselves were concerned about, consultation about whether it was something that was a matter for concern more generally or whether it could be addressed locally, it was an iterative process if I can put it that way.<sup>36</sup>

The absence of clear performance standards in the IDS would, in the Inquiry's view, have made the task of identifying problems in the provision of education, health care and other fundamental rights that much harder for the Department's Managers. The Department stated that the generality of the IDS applicable to ACM just meant that the Managers had to take account of the individual circumstances. However, this leads the Inquiry straight back to the concern that it was extremely difficult for a Manager without any specific child welfare expertise to have properly identified and assessed the individual circumstances.

INQUIRY COUNSEL: Well, let me put it bluntly to you, I suppose, the lack of specificity and the generality of the provision in relation to education in the existing detention standards makes and made it almost impossible to properly monitor the services that were being provided by ACM during the relevant period. Do you agree with that?

DIMIA DEPUTY SECRETARY: I don't think it made it impossible to monitor but the focus would have been on were the services appropriate to the needs

at a given point in time or a given set of circumstances. So if the assessment was that in all of the circumstances that was appropriate then that would have been the focus of the monitoring. I guess in some respects what this does is give the person monitoring it some specific things to look for but it doesn't mean under the current arrangements that you wouldn't be looking for whether, you know, as I say, taking account of the particular needs and particular circumstances at a particular time.<sup>37</sup>

The Department did refer to certain measures that they have introduced to assist Department Managers, such as:

- a training program for staff in detention centres
- the Department Managers' Handbook and
- 'regular formal phone hook-ups with Centre Managers to go through particular issues, particular requirements, questions and so forth'.<sup>38</sup>

The Department provided the outline of the training program it referred to, which was held in Canberra from 4-13 March 2002. That training overview included a component on the IDS but did not include any specific modules on what is meant by appropriate education, health care and recreation for children. It did refer specifically to the mandatory reporting requirements for suspected child abuse. It is unclear whether the March 2002 training session was the only one that has occurred.

The Department Managers' Handbook was also provided to the Inquiry and includes advice on a range of issues, such as 'Pregnancies and Confinement' and Memorandums of Understanding (MOUs) relating to tracing and child welfare. The index to that document includes chapters on education, unaccompanied minors and torture/trauma victims. Unfortunately, the Department had not, and has not yet written those child-specific chapters, so the Handbook was of no practical assistance on several of the issues that were most relevant to children.

The Department also referred to the Migration Act, Migration Regulations and its Migration Series Instructions (MSI) as important resources for its Department Managers.<sup>39</sup> However, while the Migration Act and Regulations may have provided guidance for immigration processing, they provided no guidance on the level of services that should have been provided to children in immigration detention. Furthermore, the first MSI that specifically related to children was issued only on 2 September 2002.<sup>40</sup> This MSI related to unaccompanied children and by 2 September 2002 there were only 13 unaccompanied children in detention, 12 of whom were in alternative places of detention. The MSI would have been more useful had it been issued in July 2001 when there were 121 unaccompanied children in detention. The Department explains this delay on the basis that:

The documentation is ... often finalised after the arrangements are established and, in fact, is enhanced by the practical issues that arise during its earlier implementation.<sup>41</sup>

## A last resort?

While the phone hook-ups referred to by the Department may have been effective in practice, the Inquiry has been unable to assess the usefulness of that mechanism in the absence of documentation. However, as set out more fully in Chapter 14 on Unaccompanied Children, the Department did document 'Unaccompanied Minor Teleconferences'. These fortnightly meetings commenced soon after the announcement of this Inquiry, in December 2001. They appear to have been established to better monitor the needs of unaccompanied children by providing Central Office an opportunity to review the management plans created by ACM, and address any issues that may have confronted the Department Managers and Deputy Managers, as delegated guardians of the Minister. Those meetings later included discussion of children who were not unaccompanied children. This initiative was a step in the right direction in terms of ensuring that children were enjoying their rights, although there is some question as to their effectiveness, as discussed in Chapter 14 on Unaccompanied Children.

Given the difficulties facing the Department Managers it is perhaps unsurprising that their monthly reports varied in quality and detail. The Department explained that 'it may well be that a Centre Manager would view themselves as having already raised issues through the teleconference and therefore not needing to repeat them in their written report'.<sup>42</sup> However, since those teleconferences were not minuted, it is the Inquiry's view that it would therefore have been appropriate to document any concerns regarding the care of children in the Manager reports. This would have facilitated closer monitoring and analysis of compliance with children's rights.

In summary, the general reporting system appears to have provided a general indication of some of the systemic problems in the delivery of services for children. However, it was not a reliable measure of whether the IDS requirements were being met or children were enjoying their rights under the CRC.

The weight to be placed on the Department Managers' reports was complicated by the fact that the Department simultaneously defended the ability of its Managers to fulfil a monitoring role and appeared to doubt their judgment. A combination of unclear requirements and performance measures in the IDS, and lack of expertise specific to the needs of children certainly raises concerns as to the ability of Department Managers to accurately monitor performance by ACM and compliance with human rights. It is unclear why the Department asked senior officials to perform this function without providing them with the specific training and guidance that would have made that monitoring more useful to the Central Office.

### **(b) Incident reporting**

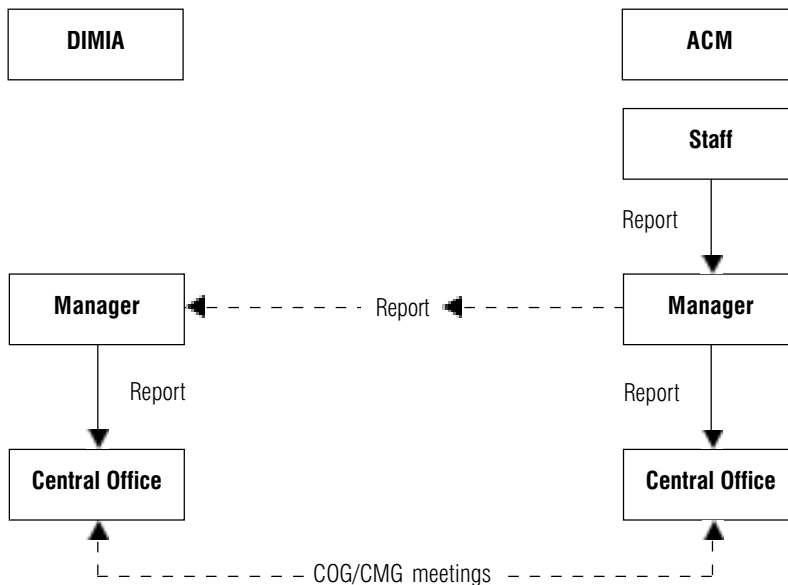
Unlike the general reporting system which was internal to the Department, the incident reporting system involved an information flow from ACM to the Department. The Department's submission states that the 'Services Provider is required to keep the Department fully informed of all aspects of service delivery through the provision of incident reports'.<sup>43</sup> Provision of incident reports was also one of the monitoring mechanisms specifically provided for in the IDS.

The IDS defined three types of incident that had to be reported to the Department:

- incident: variation from the ordinary day to day routine of a facility which threatens, or has the potential to threaten the good order of the facility...
- minor incident/disturbance: an incident or event which affects, but to a lesser degree than a major incident, the good order and security of the facility...
- major incident/disturbance: an incident or event which seriously affects the good order and security of the facility.

Each of the definitions listed examples and while none specifically mentioned children, they encompassed events involving children. For example, children were involved in medical emergencies, hunger strikes, self-harm and riots.

The diagram below represents the incident reporting system, with the qualification that in some instances information came directly from ACM staff or the ACM Manager to the Department Central Office, by-passing the Department's Manager.<sup>44</sup>



The Department states that it did a monthly analysis of the incident reports in order to identify systemic issues.<sup>45</sup> The Department provided the Inquiry with examples of semi-annual (rather than monthly) trend analyses,<sup>46</sup> which noted where minors were involved in actual and attempted assault and self-harm. However, the Inquiry discovered that not all incident reports involving children were systematically tagged for special attention in the Department's record-keeping systems.

This became clear after the Inquiry issued a Notice on 18 July 2002 to the Department requiring the production of a range of incident reports that involved children.<sup>47</sup> In order to take account of the fact that the Department had only introduced an electronic database in 2001, the Notice was restricted to periods after that time.

## A last resort?

However, the Department requested an extension of time on the basis that it could not be sure that all incidents involving children had been identified by the electronic system and it would therefore need to go through every child's individual paper file. This was because incidents involving both children and adults were not usually flagged and detention centres had 'some flexibility in classifying an incident'.<sup>48</sup>

The Inquiry accordingly finds that, at least in early 2001 when the numbers of children in detention were very high, this document management system failed to place special priority on tracking incidents involving children.

Moreover, the Department itself has noted in its Manager reports that there were recurring problems regarding the quality and timeliness of incident reporting. Almost every Manager's report from mid-2001 until September 2002 for both Port Hedland and Woomera detention facilities raised inadequate reporting by ACM as an issue.<sup>49</sup> It was put to the Department that this revealed a systematic problem in relation to incident reporting that had not been properly resolved. The Department replied that on the contrary it proved that it was an important issue that they paid attention to:

Individual incident reports not provided on time or not being sufficiently comprehensive or where we've had to go back and ask for further information, those are all things that can happen and all things that we would discuss with the service provider because, as I say, we regard it as an important issue. So, as I say, the fact that it appears in numbers of Manager's reports I think simply points to the fact that this is something we have paid particular attention to.<sup>50</sup>

Problems with incident reporting were also highlighted in the Flood Report into immigration detention procedures in February 2001.<sup>51</sup> The Commonwealth Ombudsman has also made a number of suggestions to the Department about improving the incident reporting system in the context of investigation of complaints.

Given that many incidents involve threatened or actual violence, from the Inquiry's perspective, it is difficult to see how the Department could be confident that children were being protected in the manner to which they are entitled if the system that it relied on for information was, in Department's full knowledge, consistently faulty. The Department rejects this assertion on the basis that there were a range of other monitoring mechanisms.<sup>52</sup> The Inquiry's view of the quality of those other mechanisms is discussed above, and throughout this report.

### **5.3.5 What mechanisms were in place to prevent and remedy breaches of children's rights?**

The Department has acknowledged that there were weaknesses in the ability of the monitoring system to predict and prevent serious harm to children. The Department also acknowledges that its monitoring systems failed to predict the occurrence of certain events:

INQUIRY COUNSEL: And would you agree with this general proposition that in the past at least the Department has not been able to adequately

anticipate problems in these facilities before they arise, at least through these reports and monitoring system?

DIMIA DEPUTY SECRETARY: Well, I'm certainly aware of numbers of problems that have arisen that we didn't predict before they arose. Whether it's correct to say that it's not possible or that we were not able to in every situation I don't think – that's not, as a proposition, something I'd agree to. I think there are examples where we've sort of identified things that might happen and tried to take action and indeed the service provider has as well tried to take action to manage or ameliorate or prevent those things happening. So, as I say, I'd agree that there are times when it hasn't been possible but I think there are times when we've also identified things and looked to resolving them.<sup>53</sup>

When the monitoring system did identify current or ongoing problems it was incumbent on the Department to remedy those issues immediately to avoid continuing breaches of the CRC. The contract between the Department and ACM provided for quarterly Performance Linked Fee Reports which reviewed ACM's performance against the IDS. The Department could add or deduct merit points which were then translated into a financial reward or penalty.

ACM provided copies of the Performance Linked Fee Reports from March 2000 – December 2001. As at 16 September 2002, the Department had not yet provided ACM with the Performance Linked Fee Reports for the first, second or third quarters of 2002. It is difficult to see how these reports can be an effective mechanism to protect children in detention if they were over six months behind.

In any event, the contractual relationship between ACM and the Department is only of concern to this Inquiry to the extent that the Department relied upon ACM to acquit its human rights responsibilities to children. The Inquiry takes the view that where a breach was identified, the Department's first priority should have been to ensure that circumstances were rectified so that children could enjoy their rights. If ACM failed to meet its contractual obligations the Department could and should have imposed contractual penalties. However, ongoing contractual disputes did not excuse the Department from immediately addressing situations resulting in the breach of children's rights.

For example, as is discussed in Chapter 12 on Education, in mid-2001 at Maribyrnong IDC, the Department Manager expressed serious concern about the level of education being provided to two children detained at the centre.<sup>54</sup>

In the July 2001 report, the Department Manager stated that the children were not 'receiving educational programs appropriate to their age and abilities'<sup>55</sup> since their arrival at Maribyrnong in March 2001. The Manager further reported that despite the fact that the Department had arranged for the children to attend a school in Victoria, 'ACM declined to enrol the children on the basis that the cost was too great'.<sup>56</sup> The Department has asserted that while discussions regarding payment were going on the children could access the ACM education programs.<sup>57</sup> However, it is clear that the Department Manager did not believe that the internal schooling was adequate to meet the children's needs.

## A last resort?

Even ignoring the fact that it took from March to July 2001 for the Department Manager to report her concerns about education, it is unacceptable that the Department did not ensure that the children were receiving adequate schooling while the issue of payment was being settled. One of the children in question was released in September 2001 without having attended an external school.

International human rights law is blind to contractual disputes. However, it appears that the contract itself also failed to identify this episode as a serious problem as there were no financial penalties imposed for this event in the Performance Linked Fee Reports.

The Department urged the Inquiry to be mindful of 'the very real challenges that faced the Department when large numbers of unauthorised boat arrivals came to Australia'.<sup>58</sup> While the Inquiry understands that there may have been pressures on the Department, they were pressures that might have been foreseen given the ten-year history of mandatory immigration detention. Furthermore, growing numbers of detainees did not excuse the Department from implementing measures that ensured performance of the human rights obligations owed to children while in detention. It is difficult to see how the Department could have been sure of compliance in the absence of close monitoring and documentation.

## 5.4 How are children's rights protected by State authorities?

Immigration detention facilities are Commonwealth property and children in immigration detention are the primary responsibility of the Commonwealth. While the Department has sought to rely on State authorities for the provision of some services to children over the last three years, the Department rightfully acknowledges that, 'the involvement of relevant authorities in no way diminishes the Department's duty of care responsibilities' towards children.<sup>59</sup> The Department also states that 'these services strengthen the Commonwealth's ability to meet its responsibilities, particularly in the case of children in detention, by ensuring that decisions made in the facilities take account of all relevant information and advice from experts in that field'.<sup>60</sup>

Nevertheless, the relationship between the Department and State authorities has been somewhat haphazard. On the one hand, the Department states that '[c]ooperative and collaborative relationships with relevant State/Territory authorities are essential to the effective and accountable management of detention facilities'.<sup>61</sup> On the other hand, the Department appears to have been extremely slow to enter into memoranda of understanding that would have facilitated the provision of State-based services to children in immigration detention.

For instance, the Department acknowledges that 'State child welfare authorities have a legislative responsibility to ensure the safety and well-being of children is protected and, as required, provide expert advice and assistance'.<sup>62</sup> However, the Department only commenced discussing Memoranda of Understanding (MOUs) with State authorities in early 2001, following the recommendations of the Flood Report.<sup>63</sup>

While the Department has stated that the MOUs simply represent the 'formal representation of the cooperative and collaborative working arrangements', rather than the commencement of those relationships, the Flood Report made it clear that there were significant problems in those informal relationships.<sup>64</sup> In any event, the MOU that was eventually signed by the Department and the South Australian Department of Human Services (DHS) made it clear that DHS acts in an advisory capacity only, with the result that the Department has the discretion to disregard the advice of State authorities when it is given.

For example, DHS gave the following evidence:

MS McNEIL (DHS): ... Immediate safety recommendations are implemented on most occasions. It is the broader recommendations which include external people with expertise such as STTARS [Survivors of Torture and Trauma Assistance and Rehabilitation Service] being involved to provide counselling, the broader assessments and mental health involvement of external agencies, programming around recreation activities, vocational education, employment and training within the centre for both adults and young people to, I guess, fill their days. Again broader recommendations around parenting support and education, broader recommendations about transition into the community planning such as: this is how you apply for a job; this is how you find where a car is in the newspaper if you need to purchase one on your release; life skills ...

MR HUNYOR (INQUIRY COUNSEL ASSISTING): So if the broader recommendations that you have been giving to ... DIMIA had been followed, your evidence is that the incidence of child abuse and alleged child abuse would have decreased significantly?

DHS: Definitely.<sup>65</sup>

This issue is discussed in greater detail in Chapter 8 on Safety and Chapter 9 on Mental Health.

### **5.5 Summary of findings on mechanisms to protect the human rights of children in immigration detention**

Australia is required under the CRC to protect children's rights through all three arms of government: the courts, legislature and the executive.

Australia's Federal Parliament has provided for a system of mandatory immigration detention through the enactment of certain provisions of the Migration Act, Migration Regulations and the IGOC Act. The Inquiry examines those provisions throughout this report in order to assess whether they comply with the CRC and ICCPR.

The role of courts to (a) review whether the Commonwealth's administration of that legislation complies with the rights of children in detention, and (b) provide children with a remedy for any such breach is limited by a combination of two factors: first, the legislature's consistent efforts to restrict the circumstances in which review of the legality of detention may occur; second, the absence of specific legislation setting out the minimum standards of treatment for children in immigration detention.

## A last resort?

Similarly, this Commission's ability to enforce human rights obligations is limited. The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) does not give the Commission the power to enforce remedies upon finding breach of human rights under the CRC or ICCPR.

The Department, on behalf of the Commonwealth Executive, has the primary responsibility for ensuring that the requirement under the Migration Act to detain all unlawful non-citizens is administered in accordance with the CRC. The Department, in turn, has hired a private services provider, ACM, to assist in fulfilling those obligations.

The Department's contractual arrangements with ACM to provide services to children in immigration detention between 1998 and 2003 forms a fundamental part of the framework examined by the Inquiry. However, the Department was ultimately responsible for ensuring that ACM's performance under the contract did not breach the rights of children. Thus, in the event that the terms or performance of the contract were inadequate to ensure the protection of the rights of children, it was the responsibility of the Department, rather than ACM, to rectify the situation. It was therefore extremely important that the Department had monitoring systems focussed on identifying, preventing and remedying any breaches of children's rights under the CRC regarding children in immigration detention.

The Inquiry finds that the contractual expression of ACM's responsibility towards detainees – the IDS – did not fully encapsulate the Department's obligations towards children under the CRC. Therefore, while the contractual framework was not inconsistent with Australia's human rights obligations *per se*, in many cases even compliance with the contract may have been insufficient to satisfy the Commonwealth's human rights obligations to children.

However, even if the IDS sufficiently embodied children's rights under the CRC, the monitoring documents available to the Inquiry suggest that the neither the general nor the incident reporting mechanisms in place were a reliable measure of compliance with those contractual obligations. For example the Department Manager reports over the period of the Inquiry lacked detail and inadequately focussed on the care provided to children. There were also recurring problems regarding the quality and timeliness of incident reports. It follows that the primary written reporting mechanisms did not place the Department in a good position to identify breaches of contract or any gaps between contractual compliance and compliance with the CRC.

The Department states that much of the monitoring occurred by phone. The Inquiry is not in a position to assess the quality of that monitoring because it was not documented. The Inquiry notes, however, that given the importance of ensuring the appropriate protection of children, such monitoring mechanisms should have been more comprehensively recorded.

The Department states that it also relied on State child welfare authorities to assist in protecting the rights of children. The interactions between State authorities and the Commonwealth are more fully addressed throughout this report. However, the

Inquiry notes that formal arrangements with State authorities are still being negotiated in a variety of areas.

The following chapters examine how children's specific rights under the CRC were protected in practice taking into account the laws, executive practices and contractual arrangements described in this chapter.

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### Endnotes

- 1 DIMIA, Submission 185, p13.
- 2 *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J.
- 3 Kids in Detention Story, Submission 196, Law Section, pp35-37.
- 4 In the first civil court case pursued by ex-detainees, on 27 October 2003 Shayan Badraie and his parents filed proceedings in the NSW Supreme Court against the Australian Government, seeking damages for alleged physical and psychological injury arising from his immigration detention. Shayan's treatment in detention is discussed as a case study at the end of Chapter 8 on Safety.
- 5 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p40.
- 6 DIMIA, Submission 185, p21. See also DIMIA, Submission 185, p33 which acknowledges the Commonwealth's 'duty of care for each and every person in immigration detention and, beyond the individual, for ensuring the safety and welfare of all detainees in a detention facility'.
- 7 DIMIA, Submission 185, p33.
- 8 The Department disagrees that any gap might exist. DIMIA, Response to Draft Report, 19 May 2003.
- 9 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p50.
- 10 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p5.
- 11 The IDS were developed in consultation with the Commonwealth Ombudsman's office. See DIMIA, Submission 185, p34.
- 12 See generally DIMIA, Transcript of Evidence, Sydney, 2 December 2002, pp48-52.
- 13 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p51.
- 14 See also DIMIA, Submission 185, p3.
- 15 IDS, 1998, paras 9.2, 9.3, 9.4, 9.5, [www.immi.gov.au/detention/det\\_standards.htm](http://www.immi.gov.au/detention/det_standards.htm).
- 16 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p51.
- 17 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p50.
- 18 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p49. The Deputy Secretary of the Department also stated that the revised IDS, which will become part of the new contract, seek to be more precise in 'bringing together the various elements that I regard at the moment as being spread through various aspects' of the current contract. DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p50.
- 19 DIMIA, Submission 185, p36.
- 20 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p6. See further Chapter 14 on Unaccompanied Children which discusses the introduction of various monitoring mechanisms.
- 21 DIMIA, Submission 185, p37; DIMIA, Monitoring and Audits of Detention Service Delivery Conducted July 2001-July 2002, August 2002, (N1, Q2, F3).
- 22 DIMIA, Letter to Inquiry, 23 August 2002, p2.
- 23 On 18 July 2002, the Inquiry required the production of all reports 'created by or on behalf of the Department's Manager of the relevant Detention Centre regarding performance review and monitoring of ACM, for each Detention Centre in the period 1 January 2000 – 30 June 2002'. It then issued a subsequent Notice on 24 October 2002 to provide all reports until September 2002. The Inquiry also issued a Notice requiring the production of certain incident reports (N1, N3, N4).
- 24 See Chapter 14 on Unaccompanied Children regarding the Unaccompanied Minor Teleconferences.
- 25 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p6.
- 26 DIMIA, Submission 185, p37. See also DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p59.
- 27 DIMIA, Letter to Inquiry, 9 August 2002, Attachment 1.
- 28 These assessments are also called 'Performance Linked Fee Reports'.

## A last resort?

- 29 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p69.
- 30 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, pp66-67.
- 31 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, pp66-70.
- 32 DIMIA, Response to Draft Report, 19 May 2003.
- 33 DIMIA, Transcript of Evidence, Sydney, 5 December 2002, p16; DIMIA, Transcript of Evidence, Sydney, 4 December 2002, p67 and p86.
- 34 DIMIA, Transcript of Evidence, Sydney, 5 December 2002, p63.
- 35 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p54.
- 36 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p47. See also DIMIA, Response to Draft Report, 19 May 2003.
- 37 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, pp44-45.
- 38 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p54.
- 39 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p55.
- 40 DIMIA, Migration Series Instruction 357, Procedures for unaccompanied wards in immigration detention facilities, 2 September 2002.
- 41 DIMIA, Response to Draft Report, 19 May 2003. See further Chapter 6 on Australia's Detention Policy and Chapter 14 on Unaccompanied Children regarding the implementation of measures to assist unaccompanied children.
- 42 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p66.
- 43 DIMIA, Submission 185, p37.
- 44 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, pp58-59.
- 45 DIMIA, Submission 185, p37.
- 46 DIMIA, Letter to Inquiry, 29 January 2003, Attachment A. The question on notice during the Inquiry's hearings asks for copies of all trend analyses. Transcript of Evidence, Sydney, 2 December 2002, p61.
- 47 See further Chapter 2 on Methodology.
- 48 DIMIA, Response to Draft Report, 19 May 2003.
- 49 DIMIA Port Hedland, Manager Reports, July to September 2001, October 2001, November 2001, March 2002, April 2002, June 2002, May 2002, (N1, Q3a, F5), July 2002, September 2002, (N4, Q1, F1); DIMIA Woomera, Manager Reports, August 2001, September 2001, November 2001, December 2001, January 2002, February 2002, March 2002, April 2002, June 2002, (N1, Q3a, F5), July 2002, August 2002, September 2002, (N4, Q1, F1).
- 50 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p64.
- 51 Philip Flood AO, Report of Inquiry into Immigration Detention Procedures (Flood Report), February 2001, pp26, 42. The Flood inquiry was an independent inquiry set up by the Minister for Immigration and Multicultural Affairs to examine and report to the government on detention procedures, in particular the procedures followed concerning an allegation of sexual abuse of a 12-year-old boy at Woomera in March 2000. In that case Flood found that the formal provision of an incident report to the DIMA Central Office was not followed in respect of a medical report by a nurse. One of Flood's recommendations was that the Department should introduce more systematic procedures for the assessment of incident reports and take steps to address the current variation in the quality and substance of matters being reported across immigration detention centres and the coverage of follow-up action.
- 52 DIMIA, Response to Draft Report, 19 May 2003.
- 53 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, pp78-79.
- 54 See section 12.5.4 in Chapter 12 on Education.
- 55 DIMIA Maribyrnong, Manager Report, July 2001, (N1, Q3a, F5).
- 56 DIMIA Maribyrnong, Manager Report, July 2001, (N1, Q3a, F5).
- 57 DIMIA Deputy Secretary, Comments on Transcript of December 2002 Hearing, 19 March 2003.
- 58 DIMIA, Response to Draft Report, 19 May 2003.
- 59 DIMIA, Submission 185, p50.
- 60 DIMIA, Submission 185, p50.
- 61 DIMIA, Submission 185, p50.
- 62 DIMIA, Submission 185, p50.
- 63 DIMIA, Submission 185, p91.
- 64 DIMIA, Submission 185, p92; Flood Report, February 2001, pp36-37.
- 65 DHS, Transcript of Evidence, Adelaide, 1 July 2002, pp81-83.

# Chapter 6

## Australia's Immigration Detention Policy and Practice

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## 6. Australia's Immigration Detention Policy and Practice

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Australian law requires the detention of all non-citizens who are in Australia without a valid visa (unlawful non-citizens). This means that immigration officials have no choice but to detain persons who arrive without a visa (unauthorised arrivals), or persons who arrive with a visa and subsequently become unlawful because their visa has expired or been cancelled (authorised arrivals). Australian law makes no distinction between the detention of adults and children.

This Inquiry accepts that mandatory detention for a strictly limited period designed to obtain basic information about health, identity, security and basic information that supports a visa claim, may form a legitimate part of a system of immigration controls, as long as the detention is subject to effective review by a court.<sup>1</sup>

Mandatory detention in Australia, however, goes well beyond this. When children arrive in Australia without a visa and are seeking asylum, they are required to stay in detention well beyond the period of time it takes to gather basic information about an asylum claim, health, identity or security issues. Both adults and children must stay in detention until their asylum claim has been finalised or a bridging visa has been issued. The consequence is that these children are often detained for months and sometimes for years, many of them in detention centres in remote areas of Australia. Under the *Migration Act 1958* (Cth) (the Migration Act) there is no time limit on this detention and only very limited review by the courts is available. It is this long-term, indeterminate and effectively unreviewable mandatory detention of children that is the key concern of this Inquiry.

The Inquiry recognises that there are children in immigration detention who are not asylum seekers – usually children who have overstayed their visa. Those children tend to spend a much shorter period of time in detention because they are detained to facilitate deportation. Furthermore from 1999 to 2002, children overstaying their visa constituted under 5 per cent, on average, of children in immigration detention. These children have the same rights in detention as children seeking asylum. Therefore, while the primary focus of the Inquiry is on children who are unauthorised arrivals seeking asylum, the rights discussed in this and following chapters should be understood also to apply to children who are detained for having overstayed their visa.

## A last resort?

This chapter addresses the following questions regarding Australia's detention policy and practice:

- 6.1 What are the human rights relevant to the detention of children?
- 6.2 What is the history of mandatory detention in Australia?
- 6.3 When are children detained?
- 6.4 Where are children detained?
- 6.5 Is detention in the 'best interests of the child'?
- 6.6 Are children detained as 'a measure of last resort'?
- 6.7 Are children detained for the 'shortest appropriate period of time'?
- 6.8 Can courts provide effect review of the legality of detention?
- 6.9 Is the detention of children 'unlawful' and 'arbitrary'?

There is a summary of the Inquiry's progressive findings on these issues and two case studies at the end of the chapter.

### 6.1 What are the human rights relevant to the detention of children?

United Nations instruments have defined what is meant by 'detention' as follows:

Deprivation of liberty means any form of detention or imprisonment or the placement of a person in another public or private custodial setting from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.

*United Nations Rules for the Protection of Juveniles  
Deprived of their Liberty, rule 11(b)*<sup>2</sup>

UNHCR considers detention as: confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.

*UNHCR Revised Guidelines on Applicable Criteria and  
Standards relating to the Detention of Asylum Seekers,  
guideline 1*<sup>3</sup>

The 1998 Human Rights and Equal Opportunity Commission (the Commission) report on immigration detention, *Those who've come across the seas*, examined Australia's detention policy as it applied at that time to adults and children, and found that it was inconsistent with and contrary to human rights.<sup>4</sup> This Inquiry applies much of the reasoning used in that report, but focuses specifically on whether Australia's detention policy contravenes the rights set out in the *Convention on the Rights of the Child* (CRC), which are much more specific and demanding than those contained in the *International Covenant on Civil and Political Rights* (ICCPR).<sup>5</sup>

Article 37(b) and (d) of the CRC provide that:

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;...

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Thus article 37 of the CRC contains four key elements relating to the human rights of children:

- detention of a child must be a measure of **last resort**
- any detention of a child must be for the **shortest appropriate period of time**
- every detained child has the **right to challenge the legality** of his or her detention before a court or other competent, independent and impartial authority, and to a prompt decision on any such action
- no child should be detained **unlawfully or arbitrarily**.

The international law regarding each of these issues is discussed in more detail in sections 6.6, 6.7, 6.8 and 6.9 respectively. However, at this stage the Inquiry notes that the provisions of article 37 of the CRC are generally reiterated in several of the United Nations High Commissioner for Refugees (UNHCR) guidelines on refugee children<sup>6</sup> and the provisions of article 37(b) are repeated throughout relevant UN standards on children. For example, the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the JDL Rules) states that detention 'should be used as a last resort' and 'be limited to exceptional cases'.<sup>7</sup> The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), which also provide some guidance regarding the treatment of children who are not charged with a crime, state that any detention should be brief<sup>8</sup> and that it should only occur where the child has committed 'a serious act involving violence'.<sup>9</sup>

The UN Committee on the Rights of the Child raised the placement of children in immigration detention centres as one of its 'Principal Subjects of Concern' in its concluding observations on Australia's periodic reports.<sup>10</sup> The UN Human Rights Committee has also found, on several occasions, that Australia's immigration detention system breaches human rights.<sup>11</sup>

There is a substantial divergence between views of the Inquiry and the Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA) regarding the correct interpretation of article 37(b) of the CRC.<sup>12</sup> Those differences

## A last resort?

can be summarised as follows: whereas the Inquiry is strongly of the view that international human rights law requires the rights of each individual to be considered and protected, the Commonwealth asserts that international law permits the application of public policy measures to a group of people as long as that general policy is 'legitimate, non-punitive and proportionate'.

The effect of the Commonwealth's position is that the mandatory detention of children who are unlawful non-citizens would not breach article 37 of the CRC because there are 'legitimate, non-punitive and proportionate' reasons behind the policy which requires their detention. The Inquiry rejects this proposition, because it is not supported as a matter of international law. A proper application of article 37 requires a case-by-case assessment of whether the detention of each and every child is justified in the individual circumstances. While the execution of legitimate policy goals may be one of the circumstances to consider in such an assessment, it will not be the sole or determinative factor in assessing whether the detention of an individual child accords with the right to liberty under international law. The Inquiry's interpretation is consistent with the views of the UN Human Rights Committee (see section 6.9 below).

Article 3(1) of the CRC requires Australia to ensure that the best interests of the child are a primary consideration 'in all actions concerning children'. In order to comply with article 3(1), the Commonwealth – relevantly here the Parliament, the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) and the Department – must specifically address its attention to the impact of detention on children, and make their best interests a primary consideration in deciding what laws will regulate immigration in Australia and how those laws should be administered.

As discussed further in Chapter 4 on Australia's Human Rights Obligations, in order to comply with article 3(1), laws in relation to immigration detention must permit – and the Executive must make – individualised decisions regarding the best interests of each child. Such individualised decisions should relate not only to the question of whether or not a child needs to be detained, but also to the circumstances and manner in which that detention is to take place.

As discussed throughout this report, there are a variety of factors that make up what may or may not be in the best interests of the child. This chapter concentrates on two factors – the liberty of the child and the protection of family unity (see especially article 9(1), CRC).

Also of relevance is the requirement that asylum-seeking children receive the appropriate assistance to enjoy their rights under the CRC (article 22(1)). Furthermore, special attention and assistance must be provided to unaccompanied children to ensure that they can enjoy their right to liberty and that their best interests are a primary consideration (article 20, CRC).

Finally, several submissions to the Inquiry have argued that article 31 of the Refugee Convention – which prohibits the imposition of penalties on certain asylum seekers who arrive without a visa – is also relevant to a discussion of Australia's detention

policy. While the Inquiry is of the view that the Refugee Convention is relevant to immigration detention, it has focussed its analysis on the CRC in this chapter on the basis that the protections under article 37(b) of the CRC are stronger than those in the Refugee Convention.<sup>13</sup>

## 6.2 What is the history of mandatory detention in Australia?

Prior to 1992, Australian law *permitted* the detention of certain persons who were in Australia without a valid visa but did not *require* it.<sup>14</sup> The introduction of mandatory detention laws in 1992 was a reaction to the arrival of 438 Vietnamese, Cambodian and Chinese 'boat people' to Australia's shores between November 1989 and January 1992.<sup>15</sup> Concerns about another 'influx' spurred bipartisan support for increasingly tough measures on persons who arrived in Australia without a visa.

The 1992 legislation both required mandatory detention of certain 'designated persons' and prevented any judicial review of detention by specifically providing that 'a Court is not to order the release from custody of a designated person'.<sup>16</sup> However, the legislation did impose a 273-day time limit on detention.<sup>17</sup>

Another increase in boat arrivals and asylum applications in 1993 and 1994<sup>18</sup> resulted in the Parliament broadening the application of mandatory detention to all persons who either arrived without a visa or who were in Australia on an expired or cancelled visa.<sup>19</sup>

The 1994 legislation also removed the 273-day time limit on detention and instead provided that an unlawful non-citizen could only be released from detention on the grant of a visa, removal or deportation from Australia. The 1994 amendments also introduced a non-compellable discretion in the Minister to issue bridging visas which would allow for the release of persons who were otherwise mandatorily detained. The limitations on judicial review of detention that were introduced in 1992 remained.

In 1999, the Australian Government introduced legislation that increased penalties for 'people smuggling' offences and that prevented this Commission from sending letters informing detainees of their right to legal assistance. However, that legislation did not alter the mandatory detention provisions regarding unlawful non-citizens.<sup>20</sup>

The next major change to the mandatory detention policy occurred in September 2001 when a raft of amending legislation was enacted in reaction to what has become known as 'the Tampa crisis'<sup>21</sup> and in pursuit of the so-called 'Pacific Solution'.<sup>22</sup> Amongst the series of changes that were introduced by this legislation was the designation of Christmas Island, Ashmore and Cartier Islands and the Cocos (Keeling) Islands as 'excised offshore places'. The legislation enables the transfer of persons who are intercepted at sea or who land on any of those excised offshore places, to processing centres on Nauru or Manus Island in Papua New Guinea. The legislation also prohibits those persons from making a protection visa application, other than at the discretion of the Minister. See further section 6.4.4 on the 'Pacific Solution'.

### 6.3 When are children detained?

As set out above, the effect of the Migration Act is to require an immigration officer to detain all 'unlawful non-citizens' present in Australia.<sup>23</sup> Those detained may only be released if granted a visa or removed from Australia.<sup>24</sup> Asylum seekers must stay in detention until either a bridging visa or protection visa has been granted, or they are removed from Australia. This can take weeks, months or years.

There are no special considerations regarding the initial detention of unlawful non-citizen children as opposed to adults. While the *Migration Regulations 1994* (Migration Regulations) do contemplate the early release of children by the grant of a bridging visa, between 1999 to 2002 they were issued to only one unaccompanied child, one mother and her two children (leaving the father in detention) and one whole family who arrived unlawfully by boat. This is discussed further in section 6.7.4 below.

Since September 2001, any family or unaccompanied child who has landed, or is seeking to land, on Christmas Island, Ashmore and Cartier Islands or Cocos (Keeling) Islands, or any other place determined to be an 'excised offshore place', without a visa *may* be detained as 'excised offshore persons'. The reason this is a discretionary rather than a mandatory requirement appears to be to facilitate the transfer of excised offshore persons to Nauru and Manus Island.<sup>25</sup> The Department has stated that the 'discretion to detain is likely to be exercised unless such persons are moved to an offshore processing place'.<sup>26</sup> Thus, in practice, 'excised offshore persons' are detained either on Christmas Island, Nauru or Manus Island in Papua New Guinea.<sup>27</sup> Almost all of those persons are also asylum seekers and they will remain in detention at least until their refugee status processing is complete.

Some children and families arrive in Australia on one type of visa, for instance a tourist visa, and then apply for protection as a refugee (authorised arrivals). If a family or child seeks asylum while the original visa is valid, the Department will usually issue a bridging visa pending the outcome of their application so that the person is not detained. If a family or child seeks asylum after the original visa has expired then they may be subject to mandatory detention. However, in practice these persons are almost always granted a bridging visa immediately upon lodging a protection visa claim and therefore 'released' within hours of being detained. In most cases they are not taken to a detention facility at all.<sup>28</sup>

Other reasons a child must be detained include overstaying the period of a visa or cancellation of a visa due to breach of conditions. Those children will generally be eligible for bridging visas that will restore their lawfulness and avoid detention.<sup>29</sup>

### 6.4 Where are children detained?

The vast majority of unauthorised arrival children and families detained under Australia's mandatory detention laws have been held in secure immigration detention facilities like Woomera, Port Hedland, Curtin and Baxter which are described in some detail in Chapter 3, *Setting the Scene*.<sup>30</sup> Accordingly, the majority of the Inquiry's report focuses on examining whether the conditions within those facilities comply with the CRC.

However, the Migration Act permits the Minister to approve any place to be a place of 'immigration detention'. The Secretary of the Department must also direct a person to 'accompany and restrain' the detainee for the purposes of immigration detention.<sup>31</sup> That person need not be an officer of the Department or Australasian Correctional Management Pty Limited (ACM).

Prior to 2001, the Minister's power to declare a place of 'immigration detention' was generally used to facilitate the provision of certain services outside immigration detention centres. For instance, a motel may have been declared a place of detention to allow for temporary accommodation, a hospital may have been declared to allow medical treatment of a detainee, or a school may have been declared to allow certain children to attend outside schools.<sup>32</sup>

In August 2001, the Minister exercised those powers to establish a Residential Housing Project (RHP) near the Woomera detention centre. Further, in January and February 2002, the Minister declared several homes in Adelaide to be places of detention for unaccompanied children in foster care (home-based detention). The Department describes the aim of these 'innovative approaches to alternative detention arrangements' to be to 'respond to the needs of particular groups such as women and children and unaccompanied minors'.

The Inquiry agrees that these initiatives represent a positive step forward regarding the conditions in which women and children are detained. However, it must be remembered that these places are not alternatives *to* detention, but rather alternative *forms* of detention. The Department retains full control and responsibility for everything that happens to children in these places.

The following sections discuss:

- 6.4.1 The Woomera Residential Housing Project
- 6.4.2 Home-based detention
- 6.4.3 Findings regarding alternative places of detention
- 6.4.4 'Pacific Solution' detention facilities

### **6.4.1 The Woomera Residential Housing Project**

The Woomera RHP is a more friendly detention facility set up for a small number of mothers and children among the detainee population. It was opened on a trial basis on 7 August 2001. The Department stated that:

The trial was intended to look at ways in which alternative detention arrangements could be made which would provide a more 'normal' existence for children with their mother or guardian, whilst still abiding by the terms of the Migration Act 1958.<sup>33</sup>

When established, the Woomera housing project consisted of a cluster of three houses to accommodate detainees and a fourth house for ACM staff and communal activities. Originally, at full capacity the housing project could accommodate 25 women and children. The project was expanded in 2003 to a capacity of 30-40 detainees, depending on family composition.

## A last resort?

The houses are located in the Woomera township, a short distance away from the Woomera detention centre. Each of the three original houses has three bedrooms and a communal lounge area and kitchen. The Inquiry has not visited the expanded project but understands that the houses have a similar configuration. In the centre of the houses is a grassed area and garden which is tended by the detainees. Unlike in the Woomera detention centre, the detainees are given a budget to spend on food (\$7 per person per day), do their shopping in the local supermarket and cook for themselves. This is an attempt to provide more autonomy to mothers.



View of communal garden and an accommodation unit at the Woomera Residential Housing Project, June 2002.

Prior to the closure of Woomera detention centre in September 2002, children in the housing project attended the same education and recreation activities provided for the children in the detention centre. In addition, they participated in additional excursions such as food shopping trips.

The housing project has a calmer, quieter atmosphere and is more attractive than the detention centre. There is no razor wire or palisade fencing surrounding the cluster of houses, although there is an infrared detection system. Detainees are not free to leave the area without being accompanied by an ACM guard and cannot leave their houses to go to any of the communal areas after 11pm.

The Department opened a housing project in Port Hedland in September 2003 and in Port Augusta, near Baxter, in November 2003.<sup>34</sup>

**(a) Who can be detained at the Woomera Residential Housing Project?**

Participation in the Woomera RHP is voluntary but not all who want to live there are eligible, nor can all eligible detainees be accommodated. As at 12 December 2003, two children were housed there. 81 children have been accommodated there since the project began.<sup>35</sup>

Detainees who wished to be transferred to the Woomera RHP had to submit an application form which was considered by a panel consisting of the ACM Centre Manager and Health/Welfare Manager, the Department's Manager and a resident of the Woomera township.<sup>36</sup>

All detainees had to be volunteers and either:

- women accompanied by children (excluding boys aged 13 and over) who have an immediate family member at the Woomera (or Baxter) facility, or
- unaccompanied female minors, or unaccompanied boys under 13, or
- unaccompanied women with or without children.

They must also have passed initial health checks, pose no known management risk and agree to the conditions of participation including:

- not to leave the boundary of the property without an officer
- to be sensitive to the needs and wishes of other participants
- to behave in a responsible manner.<sup>37</sup>

As indicated above, fathers and boys aged 13 years or over, were ineligible to live at the housing project – although there were visiting rights. This rule was changed in September 2003 so that boys aged between 13 and 17 were permitted to live there. Both the old and new eligibility rules meant that women and children from two-parent families were separated from their husbands and fathers and some were separated from sons and brothers.

During the first year of the housing project, only detainees who were awaiting their primary refugee decisions were permitted to participate (although, when a family lodged a merits appeal at the Refugee Review Tribunal after they had already been transferred to the housing project, they were usually permitted to stay). It appears that the reason for this criterion was that persons in the primary phase were regarded as a lower flight risk than those in appeal stages. However, the result of the policy was that those who had been in the detention facility for the longest were ineligible to participate. As the Department's Woomera Manager noted in February 2002:

this style accommodation benefits greatest those who are likely to be spending lengthy periods in detention – and [I] would support an approach being made to the minister or his office if that is required to attempt to achieve that end.<sup>38</sup>

## A last resort?

The Department did make changes to the criteria so that by the second year of the project, women and children (other than boys aged 13 and over) could move there at any time during their refugee status determination process, including during any appeal to courts. The fact that there were no actual or attempted escapes during the first phase of the project may have contributed to the change in policy.<sup>39</sup>

Another change in the policy, in July 2002, was to permit the housing project selection committee to include:

a small number of women and children who do not meet the eligibility criteria but have compelling circumstances. This includes special needs cases and those who are vulnerable or at risk and who could otherwise not be accommodated appropriately in an immigration facility.<sup>40</sup>

Migration Series Instruction (MSI) 371 on Alternative Places of Detention, issued by the Department in December 2002, opens the door to early transfer to housing projects, stating that '[e]very effort should be made to enable the placement of women and children in a RHP as soon as possible. All decisions should be made as expeditiously as possible'.<sup>41</sup>

### **(b) Why were fathers and boys aged 13 and over excluded from the housing project?**

In its Fact Sheet on the Woomera housing project, the Department stated that '[f]or cultural and practical reasons males over 12 years could not be appropriately accommodated in the Project'.<sup>42</sup>

During the hearings in December 2002, the Inquiry sought to clarify what the Department meant by the 'cultural and practical reasons' for excluding teenage boys and men.

MR WIGNEY (INQUIRY COUNSEL): ... The first point that you raised as being a reasonable rationale or principle behind not having fathers at the Woomera housing project was that it was necessary to provide culturally appropriate living arrangements, and I think that is a phrase that is used in the DIMIA submissions as well. What do you mean by 'culturally appropriate living arrangements'? Do you suggest that in some cultures it is not normal for fathers to reside with their families?

MS McPAUL (DIMIA ASS SEC (UNAUTH ARRIVALS)): I think what I was trying to refer to is the expectation that members of one family would be able to live in a culturally appropriate environment without any suggestion that there would be inappropriate interaction with males who are not of that part of that family group. So I'm not suggesting that it is inappropriate for family members to be together, rather that families need to be certain that whatever living arrangements are in place for them will be something that they are comfortable with personally.<sup>43</sup>

Additional comments provided by the Department on this issue emphasise that consultations with detainees indicated that some women might choose not to participate if other women's husbands and sons were present:

for cultural reasons having males involved was expected to significantly influence the decisions of females who might otherwise wish to participate.<sup>44</sup>

On the face of it this would appear to be a reasonable consideration. However, in the view of the Inquiry, it is important to examine this rationale against the background that within the Woomera detention centre itself, several families – including fathers and teenage boys – would share one 'donga' (demountable) in which the families were separated by a curtain only. The Department was pressed at the hearing to explain the distinction between the 'cultural appropriateness' of housing full families together in the Woomera detention centre and the housing project. The Department ultimately came back to the point that this was a project designed to encourage 'voluntary participation' of women and children and therefore the comparison was invalid.<sup>45</sup> This still does not explain why there was no effort to improve conditions for families where there were fathers and boys over 12.

The Department suggested that the capacity of the housing project meant that they could not provide separate facilities for older male detainees:

The overall capacity of Residential Housing Projects are relatively small, compared to the number of people in immigration detention. The need to provide separate facilities for males would further reduce the number of participants overall who could take part in the arrangements.<sup>46</sup>

However, once again, this does not explain why the Department did not seek to increase the 'overall capacity' to accommodate this concern. Furthermore, it does not explain why the same 'cultural factors' did not require similar separation of families with teenage boys and men inside the Woomera detention centre.

It appears to the Inquiry that another possible reason for the Department's exclusion of teenage boys and men, was that they may be more likely to escape than women and children:

DIMIA ASS SEC (UNAUTH ARRIVALS): Commissioner, there are a number of factors that are also taken into account in the context of the housing project itself. As you may know, it is a low security environment, you've been there yourself and you've observed that. It is surrounded by just a normal colorbond kind of fence. So in making the operational decisions about who might participate in that project there are a number of different factors that we would take into account. As I said, participation in the project was voluntary so we needed to be able to encourage women and children to come forward to participate. Secondly, I guess, we also needed to have regard to the security aspects of all members of the family and I think it would be – my understanding is that it is more likely that women and children would be adequately accommodated in that less secure environment than some other family members that they may also have with them.

## A last resort?

DR OZDOWSKI: So when you talk about security aspects you are implying that there is a risk of absconding of men?

DIMIA ASS SEC (UNAUTH ARRIVALS): That is one of the considerations.<sup>47</sup>

The risk of escape is clearly a legitimate concern in principle. However, it is the Inquiry's view that this concern had already been addressed by the existing eligibility criteria which requires that any participant – mother, daughter or young boy – be assessed to be a low management risk. In the event that any child or parent was assessed as a high flight risk it may have been reasonable to exclude that individual, however this possibility does not explain the general exclusion of all men.

Finally, the Department stated that 'the trial was intended for women and children – therefore, there is no issue of why men and boys were excluded when they were not considered to fall within the intended scope of the project'. Such circular reasoning does not explain why the project was only intended for women and children (to the exclusion of men) in the first place.

Since 2 December 2002, the criteria has permitted boys up to 17-years-old to participate in the project (but not fathers or adult brothers).<sup>48</sup>

### **(c) What is the impact of the separation from husbands and fathers?**

A father of children who were living in the Woomera housing project had the following to say about the impact of separation:

Children need their father and they need to be all together, like mentally and spiritually we are all sick. Also, they have separated me from the rest of my family and now I am alone in the donga here and my depression has been more and this has had a negative effect on my whole family.<sup>49</sup>

Independent examinations by the Department, the UN, this Commission, child welfare specialists and doctors of the Woomera housing project have all noted that although the environment in the housing project was an improvement on the Woomera detention facility, the separation of mothers and children from their husbands and fathers constituted a serious problem.

The Department commissioned an evaluation of the Woomera housing project in March 2002. That report found that 'participants have clearly benefited from the living conditions provided and it has been possible to maintain security with residents living in the town environment'.<sup>50</sup> The report notes that '[t]he residents and their husbands were unanimous in their views that living in the Project was a great deal better than living in the IRPC [Immigration Reception and Processing Centre]'.<sup>51</sup> It also found that the 'physical separation of family members (with adult male family members remaining in the IRPC) has not been a barrier to detainees wishing to participate in the Project. However, the separation remains the major concern of families'.<sup>52</sup>

In September 2002, the Inquiry joined with this Commission's Sex Discrimination Commissioner to investigate whether the housing project warranted the extension of an exemption from the operation of the *Sex Discrimination Act 1984* (Cth). The exemption would protect the Department from complaints that there was discrimination against men by excluding them from participation. The then President of the Commission found that the improved environment for women and children meant that 'the continuation of the project is worthwhile and that the exemption to ensure the Project may operate without challenge under the Act is appropriate'.<sup>53</sup> However, she also found that:

[I]n view of the distress caused to families as a result of separation of family members and the impact separation has on the development and wellbeing of the family unit the Commission strongly urges DIMIA to further pursue the broadening of access by husbands/fathers to their wives/children at the Project, including giving serious consideration to the provision of dedicated family accommodation at the Project.<sup>54</sup>

By the time the Department sought an extension of the exemption in August 2003, the criteria had been expanded to include teenage boys but not fathers.<sup>55</sup>

In July 2002, the United Nations Special Representative for the High Commissioner on Human Rights found that:

Families in detention are sometimes separated (e.g. in the Woomera family housing project, where wife and children are living in Woomera town, while the husband is detained in the centre), which, instead of providing adequate care to families, in fact appears to introduce another element of distress. While the efforts of the Government to provide alternate and more humane places of detention... have to be recognized, it appears questionable whether the separation of families is advisable, even if the participation in the family housing project is completely voluntary.<sup>56</sup>

The doctor treating patients from the housing project told the Inquiry that, when detainees first went to the housing project, they were content with the change in environment but that a year later the parents had great difficulty coping with the separation:

It is not difficult to predict that when you remove the husband or father from a family which is battling to cope in the face of mental illness and pressure that the mental health of the family will not improve and will likely deteriorate. Without stating the obvious, families do better with a caring mother and father together in the same household.<sup>57</sup>

Further, the South Australian Department of Human Services (DHS)<sup>58</sup> report on Woomera in April 2002 commended the Department's efforts to transfer young children to more family-friendly quarters but recommended that:

Families must be kept together at all times, which includes their stay in detention as well as being released together.<sup>59</sup>

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### Impact of the Woomera Housing Project on a family

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In July 2002, a child psychiatrist assessed the condition of a family that had been in detention since December 2000:

It is extremely important for this family to remain together. There is a high risk that if the children were separated from their parents, or the mother and children separated from [the father], that this would increase the risk of suicide of one of the family members.

This family should be immediately removed from the detention context. Until this is possible, they should be moved to live in the Woomera housing project'.<sup>60</sup>

When not offered the option of release, this family chose to be housed in the housing project at the sacrifice of separation. At the end of October 2002 ACM health staff wrote that:

It is obvious that [the mother] is struggling to come to terms with her continued separation from her husband and the continued mental illness amongst her children.<sup>61</sup>

The family were released from detention in August 2003.

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The Department states that the problem of separation was resolved by family visits to the Woomera detention centre:

Although male members of the family over 12 years of age are not eligible to participate, the integrity of the family unit [is maintained] by ensuring participants regularly visit family remaining in the Woomera IRPC. These visits are made once or twice a week.<sup>62</sup>

However, several detainees at the housing project complained to Inquiry staff that these visits were much less frequent than they would like. ACM policy allows daily visits; however, there are differing views on how often those visits occurred in practice. Detainees suggested the visits were less frequent and ACM confirmed that detainees 'were unable to visit the Woomera IRPC on demand and at short notice, however that was usually due to the availability of transport'. However, ACM also highlighted that detainees were often taken to the detention centre for medical and legal appointments as well as for recreational activities.<sup>63</sup>

In any event, the visiting scheme was little consolation to the fathers left in the facility for the majority of time. The Inquiry received evidence of a serious decline in the mental health of fathers after being separated from their family. One father deteriorated so seriously that his wife and son decided to go back to the detention centre to support him.

Another problem with the visiting scheme was that some children felt so traumatised by returning to the facility that they did not want to go there and visit:

I want my dad to go to the housing because I don't want to go back to the centre.<sup>64</sup>

I don't like [to go] back to [the] centre. I remember all of my bad times. I can't [go] back to centre.<sup>65</sup>

The Department stated that in April 2002 it had begun to 'trial visits by fathers to the Project site'.<sup>66</sup> While there was one visit on 28 April 2002, the next visit by fathers did not take place until September 2002, shortly before the Inquiry's visit.<sup>67</sup> A mother in the housing project said:

People like you come, then they organise some programs or plans for them. For example, for long time before that, [the children] were saying we want our father to come over and visit but it wasn't allowed but then, [name removed] came this Saturday and they were allowed to come from 12 till 4. They came over and then they said 'That's it', that was finished, that was only one time so, because they knew you were coming.<sup>68</sup>

A child detained in the housing project reported in September 2002 that her father had only come to visit her once:

Before they can't come to visit. Only one week ago they let men come.<sup>69</sup>

With the closure of the Woomera detention centre in April 2003, fathers were then detained more than 170 km away at Baxter. The Department told the Inquiry that there were regular visits including a mid-week day visit by fathers and older boys from Baxter to the Woomera housing project. There were also weekend visits of the mothers and children from the housing project to Baxter. Family members could stay overnight in the Baxter facility.<sup>70</sup> As these arrangements only started in 2003, the Inquiry has not spoken to detainees about the implementation and impact of these arrangements.

The Department emphasises that detainees' transfer to housing projects is voluntary and therefore the splitting of the family is a choice that parents can make for themselves. However, it is of concern to the Inquiry that parents are forced into the position of choosing between the family being together and allowing their children to live in a more hospitable environment than a secure detention centre. This so-called choice is contrary to the spirit of the CRC which provides both that the detention be a matter of last resort and that the family stay together. It is also inconsistent with the Department's argument that it is in the best interests of children to be detained with their parents, as discussed below.

### (d) What other problems do children face in the housing project?

It appeared to the Inquiry that while women and children were initially extremely relieved to be able to leave Woomera detention centre and happy about the improved environment, as time went on the 'freedoms' of the Woomera housing project seemed less and less significant. For instance, while many of the women were pleased to be able to do their own shopping and cooking, some felt insulted that they did not have control over what they could buy:

They won't give you, you know free like that you can enjoy from your shopping. Now any time since I am [at the housing project], any time I would go to shopping I come back upset with a headache because just they make it bitter for us, like there's discussing about everything.<sup>71</sup>

The independent report that the Department commissioned in March 2002 addressed these tensions and recommended the following:

Guidance, not heavy handed direction, is what is required. Not the sort of action recounted to me by a local Woomera resident who was in a checkout queue and said she was greatly embarrassed for a Project resident when a staff member loudly went through her shopping and took out all items which she decided the resident could not have.<sup>72</sup>

Several of the women who spoke to the Inquiry also highlighted that having several families sharing a three-bedroom house created serious friction. This was exacerbated by the already fragile mental state of most of the mothers. The doctor for housing project detainees presented the problem as follows:

It is not hard to understand that when you place a number of families all of which are suffering from mental illness into the same accommodation it is almost certain that the abnormal social dynamics which will develop will lead to problems.<sup>73</sup>

Another problem raised by both detainee mothers and health staff was that often one mentally ill mother ended up looking after the child of another mentally ill mother. While there appears to have been some desire to help one another, the lack of special support for these arrangements caused substantial tensions between families living in the same house.

One mother interviewed at Baxter detention centre told Inquiry staff that:

If the Whyalla housing project [proposed for Baxter] is like Woomera then it is no good. You can't put three families in a house with 1 toilet, 1 oven etc. You need a house for every family.<sup>74</sup>

Another family described the impact that the crowded housing had on the ability of the children to learn:

At that house there are three rooms and it's been allocated for three families and then [the children] need to study, they need to study other lessons or English but it's difficult, it's impossible because of the house, the house is

full of people. And then there is only one wardrobe, they have their clothing there...the boy's stuff, my stuff and also [the children's] books, and if they need something, like a book or something they have to take out everything so that they can get what they want. And that's why they always cry, all the time they're crying.<sup>75</sup>

#### **6.4.2 Home-based detention**

Home-based detention refers to a system whereby members of the community are designated as persons authorised to 'detain' children and their families. As the Department explains it:

[P]ersons who have duties in relation to unlawful non-citizens outside Immigration Detention Facilities (IDFs), such as foster carers accommodating unlawful non-citizen children in places approved as alternative places of detention, will be designated as persons who may 'hold' a detainee 'on behalf of an officer'. ... there is no conflict between the need for detainees to be 'held' on one hand, and the ability to place detainees with special needs in 'alternative' places of detention on the other.<sup>76</sup>

January 2002 – two months after this Inquiry was announced – was the first time that the Department actively pursued the option of home-based places of detention for unaccompanied children.<sup>77</sup> Several homes and schools in Adelaide were declared as alternative places of detention ('declared places') and several foster carers and school principals were directed to accompany and restrain detainee children ('directed persons').

The effect of this initiative was that by the end of April 2002, 17 of the unaccompanied children who were still detained in Woomera and Curtin at that time had been transferred to places in the community, went to schools in Adelaide and otherwise moved around Adelaide as long as they remained in declared places or in the presence of directed persons. Later in the year a further two unaccompanied children were transferred from Woomera detention centre to home-based detention.

As at 28 November 2003, there were five unaccompanied children in detention centres (two in Villawood and three on Christmas Island) and ten unaccompanied children in home-based places of detention. A child detained with relatives who were not his parents, was transferred into the care of family in the community in 2003, after two and half years in detention centres. At least four children detained with their parents were also placed in home-based detention (without their parents) – one in August 2001 and three siblings in November 2003. Only two whole families were transferred to home-based detention between 1999 and 2003.<sup>78</sup>

##### **(a) Recent history of foster carer homes being used as alternative places of detention**

The arrangements for the transfer of just under 20 unaccompanied children to foster carer homes as places of detention over 2002 commenced 'at the time of the tensions

## A last resort?

in Woomera IRPC in January 2002...in order to protect them from incidents of self-harm and hunger strikes'.<sup>79</sup> Case Study 3 in Chapter 14 on Unaccompanied Children sets out the circumstances of the unaccompanied children involved in the hunger strikes and lip-sewing in some detail. The documents provided by the Department indicate that the sequence of events immediately leading up to these arrangements was as follows.

On 14 January 2002, the Deputy Manager of Woomera wrote to Family and Youth Services (FAYS, within DHS) requesting assistance regarding one 12-year-old and two 14 to 15-year-old unaccompanied children in Woomera who were becoming 'increasingly despondent'. The Deputy Manager states:

I would like to look into the possibility of having these minors alternatively housed, outside the detention centre environment. This may not be possible, as a delegate of the Minister would have to consider the issuing of a bridging visa before any of the minors could be released from detention. However, I would like to ask your assurance in assessing the needs of these children – and looking into whether or not appropriate families could be located for any or all of them – with a view to making a recommendation concerning possible bridging visa issue. This has been done from this centre once before that I am aware of.<sup>80</sup>

On 16 January 2002, hunger strikes began in Woomera in response to the Minister's announcement that all processing of applications by Afghan asylum seekers would be halted. The hunger strikes were accompanied by acts of self-harm. FAYS was called in to assess children participating in these events.<sup>81</sup>

On 24 January 2002, the Executive Director of FAYS wrote to the Acting First Assistant Secretary of the Department providing the name and address of the foster carers who would look after the children mentioned in the 14 January letter. The children were not issued with bridging visas but rather transferred to foster carer homes which had been declared places of detention.

On 26 January 2002, the Executive Director of FAYS wrote to the Department stating that another three unaccompanied minors who were self-harming should be 'removed as a matter of urgency from the Detention Centre'.<sup>82</sup> One child was assessed as 'highly depressed with an inability to focus his energies on anything other than dying via starvation and dehydration'. On 27 January 2002 FAYS wrote to the Department with foster carers and addresses for these children.<sup>83</sup>

On 29 January 2002, the Executive Director of FAYS wrote to the Department regarding the remaining unaccompanied children in Woomera:

The Department of Human Services remains seriously concerned regarding all minors in Woomera. They have stated that they are intending to 'group suicide' and whilst this statement can be regarded as an attempt to pressure the Commonwealth government to release them from detention the risk of suicide remains high. This is particularly so given the hopelessness

expressed by them and the tendency to reinforce one another's behaviour. The Department strongly recommends that these young people be placed outside of the Woomera Detention Centre.<sup>84</sup>

The assessment report in relation to those children attributes their behaviour to 'exposure to recent self harm behaviours and the movement out of Woomera of other [unaccompanied children]'.<sup>85</sup>

By 7 February 2002, nine more unaccompanied children had been moved to foster carer homes in Adelaide which had been declared as alternative places of detention.<sup>86</sup> But there were still several unaccompanied children in detention about whom FAYS reiterated its recommendation that they 'be placed outside the Woomera Detention Centre to ensure their safety'.<sup>87</sup> The next day foster home placements were found for these children.<sup>88</sup>

The South Australian authorities also made several recommendations for the removal of children with their parents from Woomera into the community. None of these children were transferred to home-based alternative places of detention.

The Department should be commended for acting so quickly to remove unaccompanied children from Woomera during the chaotic period of January 2002. However, the Department's action during this time raises several questions:

- What is the nature of the alternative detention arrangements with South Australia?
- Why were children not transferred to home-based detention prior to January 2002?
- Why were only unaccompanied children removed from the facility to home-based detention?
- Have these arrangements been used anywhere other than South Australia?

**(b) What is the nature of the home-based alternative detention arrangements made with South Australian child welfare authorities?**

Unaccompanied children transferred to home-based detention can live in a home and go to a community school like other children, except that they must be 'held by or on behalf of an officer'. Should they want to go anywhere that is not a declared place of detention, they must be accompanied by an officer or other person who is approved by the Department (a directed person).<sup>89</sup> The Department may decide to return children in home-based detention to a detention centre at any time.

The Department retains ultimate control and responsibility for the children's care and whereabouts. However, the Department has entered negotiations with DHS to clarify the relative roles and responsibilities between the Department and DHS.

## A last resort?

The first version of the draft agreement with DHS regarding alternative detention arrangements was exchanged on 24 January 2002. As at 28 November 2003 there was still no signed agreement.<sup>90</sup> However, the Department provided the Inquiry with a draft agreement that appears to have been drafted in July 2002 and noted that negotiations were still going on regarding costs, arrangements for education, reporting arrangements and indemnity.

Under the July 2002 draft agreement, the Department 'maintains ultimate duty of care for all detainee minors' and is 'responsible for any compliance action which is required should a detainee minor abscond'.<sup>91</sup> In any event, since the Minister is the guardian of the unaccompanied children, he or she will retain those special responsibilities as will any Departmental delegates, including Managers of the detention centres.<sup>92</sup>

DHS is responsible for the safety, care and development needs of detainee minors and must use its 'best endeavours to ensure that the detainee minors are available for the purposes of immigration processing and/or removal or repatriation as requested by DIMIA'.<sup>93</sup> Furthermore, as the State authorities also have delegated powers of guardianship with respect to unaccompanied children, those special powers may also be exercised.<sup>94</sup>

However, it is the responsibility of 'directed persons', who will usually be DHS staff, teachers and foster carers, to 'remain with the child during any time they are outside an approved place of detention', for example, if there is a school excursion.<sup>95</sup>

If it appears to a directed person that the child may try to disappear, 'the directed persons are expected to use their powers of persuasion, conflict resolution and negotiation to attempt to gain the detainee minor's cooperation',<sup>96</sup> but are not expected to use force.<sup>97</sup> In any event, none of the children transferred to foster care detention over 2002 have either attempted to, or actually, disappeared.

### **(c) How quickly can unaccompanied children be transferred to home-based places of alternative detention?**

The Department emphasises that it must conduct a 'responsible and considered assessment of alternative arrangements' and that these assessments can take time.<sup>98</sup> In particular, the Deputy Secretary highlights difficulties in finding people who are prepared to ensure that the children will be 'available for processing and removal'.<sup>99</sup>

However, as set out above, the series of events in January 2002 demonstrate that transfer to foster homes can be arranged literally overnight in times of crisis, as is the case in the broader community when child welfare agencies routinely place a child at risk into care at a moment's notice. It is therefore unclear to the Inquiry why it took such dramatic displays of despair to arrange for the placements.

Some of the children who were transferred from Woomera to Adelaide during January and February had been held in Woomera for more than eight months and all had

been in detention for over four months.<sup>100</sup> The eight months preceding January included several riots, demonstrations, fires and substantial numbers of self-harm attempts to which children were exposed and in which some children participated.<sup>101</sup> Therefore, if the Department was generally concerned 'to protect unaccompanied children from incidents of self-harm and hunger strikes' it seems that action to remove them from the detention centres would have been warranted prior to January 2002.<sup>102</sup>

In any event, the South Australian child welfare authority clearly links the levels of despair and depression of children with detention in Woomera. Given that the Minister and his or her delegates have a special responsibility to ensure the best interests of the child are a primary consideration while in their care, the Inquiry regards it as inadequate that the Department did not routinely and immediately transfer unaccompanied children to home-based detention.

The Department offers the explanation that prior to January 2002, it considered that:

taking into account all the circumstances, it was in the minors best interests to be appropriately cared for in a detention facility, ensure their availability for priority processing and initiate family tracing action through the Australian Red Cross.<sup>103</sup>

However, the Inquiry is not satisfied that the best interests of these children were adequately considered prior to their placement in home-based detention. The Migration Series Instructions (MSI) tabled by the Department on 3 December 2002 suggests that there may be some changes in the future. For example, MSI 370 states that:

It would be usually in the best interests of an unaccompanied ward to be transferred out of a detention facility.<sup>104</sup>

#### **(d) Why only unaccompanied children?**

On 24 October 2002, the Inquiry issued a Notice on the Department to produce information and documents regarding transfer into alternative places of detention of both unaccompanied children and children with their families. Since the response of the Department did not include any material with respect to the placement of entire families in the community, the Inquiry concluded that there were no formal arrangements. The Inquiry addressed the question to the Department again during the hearings with the Department in December 2002 and the Deputy Secretary provided information about one discrete family.

INQUIRY COUNSEL: ... Is the Department aware, or has there been any case, where an entire family has been put in a similar sort of foster arrangement, I suppose, when the Department has received advice from a State authority to the effect that (a) it's in the interests of the family to be released from detention, and (b) it's in their interests for the family as a whole to be released? Has there been any case where an entire family has been put into a similar sort of foster care arrangement?

## A last resort?

MS GODWIN (DIMIA DEPUTY SECRETARY): I think from my memory there is a family in an alternative place of detention, not strictly speaking a foster placement as such, but where an organisation has agreed to take responsibility for their ongoing care and also to make sure that they're available for immigration processes, whether that's application or removal. But I return to the point that I made before. I'm also aware of another situation where we were attempting to establish that and there were considerable difficulties identifying a place that was both able to provide – or an organisation able to accept responsibility for – the provision of care and support and willing to take responsibility for having them available for immigration processing.

Now, it's certainly been the case that over the years numbers of community organisations have come forward saying, you know, that they're prepared to provide support in these situations but it has most often been the case that when what they're actually committing to is explored, they regard it as outside their ambit of responsibility to agree to co-operate in having people available for removal and I understand their point here. They say that's not their responsibility, but if they are not prepared to take that responsibility, then it falls to the Government to find ways of meeting that obligation in the most appropriate way that it could be done.<sup>105</sup>

It appears therefore that the Department viewed community detention for families as a possibility in principle, but rarely in practice. The Inquiry understands that there are many pressures on community groups which may mean that they are not willing to take on the role of 'detaining' children and their parents as required by the Migration Act, especially in the absence of additional funding. However, the Inquiry also understands that an increasing number of individuals and groups are willing to take on such a task. In any event, during the Inquiry's visits to detention facilities, staff met several detainee families with close family in the Australian community who were apparently willing to take responsibility for them. In at least one case a child's parent was in the community.

The Inquiry has not received specific evidence as to whether the reason the Department has not routinely transferred children in detention centres to the supervision of a family member living in the community – and almost never to a welfare organisation – is, as the Department suggests, because family members are unwilling to take the responsibility of ensuring availability for removal. However, the information before the Inquiry suggests that this is not an option that was actively explored over the period of the Inquiry. The December 2002 MSI issued on Alternative Places of Detention supports this conclusion in that it considers the possibility of transferring detainee families to the custody of community groups, but not relatives.

The reluctance to more actively pursue the opportunities available under the Migration Act to transfer families from closed detention facilities to alternative places of detention, is particularly troubling in the light of the frequent recommendations by the South Australian authorities that families be released from detention. For instance,

in the case of Woomera in January 2002, the South Australian authorities wrote to the Department with respect to several families stating that:<sup>106</sup>

It is the view of [DHS] that none of the notified children can be assessed as safe whilst they remain in the current situation and that for any adequate assessment to occur the children and their families should be removed from the Centre and thoroughly and professionally assessed.<sup>107</sup>

**(e) Are there home-based alternative detention arrangements outside South Australia?**

In a Notice issued to the Department on 24 October 2002 (Notice 4), the Inquiry required information regarding all arrangements or agreements that existed between the Department and any State agencies or non-government bodies relating to the provision of and funding or payment for the transfer of children to alternative places of detention. The Department's response was that alternative detention occurred on a case-by-case basis but that:

a broader, more formal operational framework is in place between DIMIA and the South Australian Department of Human Services (DHS) regarding the placement of some detainee minors in alternative detention arrangements in the community. These arrangements are reflected in a draft Agreement between the department and DHS.<sup>108</sup>

The Department did not notify the Inquiry of any arrangements with States other than South Australia nor provide any explanation as to why 'formal arrangements' had not been entered into in any other State. However, documents provided by the Department to the Inquiry indicate that two of the unaccompanied children placed in alternative detention in Adelaide had been transferred from the Curtin facility in Western Australia.

The Department also provided details of arrangements that have been made for one family to be 'held' by a community group in Victoria.

### **6.4.3 Findings regarding alternative places of detention**

The recent efforts by the Department to improve the conditions of detention for women and children are to be commended. These efforts demonstrate that there is scope within the Migration Act to ensure detention is more appropriate to the needs and interests of children. Indeed, that scope has been there since at least 1994.<sup>109</sup>

The transfer of almost 20 unaccompanied children to foster care detention in the community is a clear advance in the physical conditions of detention when compared to facilities like Woomera and Curtin. Psychologists report an improvement in the mental health of children when they leave the closed detention environment. Children

## A last resort?

in home-based detention told the Inquiry that they were pleased to be living in Adelaide and meeting Australian children:

I am quite good now, because I go to school and I don't have much pressure like I had before.<sup>110</sup>

However, the Inquiry is concerned that this initiative only commenced in January 2002, after most of the unaccompanied children who had been in detention centres between 1999 and 2001 had already been released. Many of those unaccompanied children had spent long periods in detention and would have benefited from speedy transfer into the community.<sup>111</sup> Further, the children who were transferred in January 2002 had suffered for some time in the detention centres (see further Case Study 3 in Chapter 14 on Unaccompanied Children).

Furthermore, over the period of the Inquiry, the concept of home-based detention in the community was applied to only one whole family. One more family was transferred into community detention in September 2003.<sup>112</sup>

The Department appears to be of the view that residential housing projects provide a good solution to the difficulties facing families in detention and has frequently declared the success of this initiative. For instance, in foreshadowing the closure of the Woomera detention centre, the Minister stated that:

The very successful Woomera Residential Housing Project (RHP) will remain open and all residents will be offered the opportunity to stay in the Project or move to Baxter with their partners.<sup>113</sup>

However, the evidence provided to the Inquiry does not support such a definitive conclusion about the success of the Woomera housing project. The Inquiry recognises that the housing project provides an improved physical environment and a closer approximation to family-style living than in detention centres. Children in the housing project are not exposed to riots and other disturbances taking place in the detention centre and have easier access to excursions into the community. However, closer examination reveals that the continuing restrictions on liberty have diminished the positive impact of the project on women and children. In the words of two children who were living in the housing project:

CHILD 1: The [detention] centre has its own problems and the housing project has also its own problems. Like I think both are equal. Just here is like ... the shape is different –

CHILD 2: Yeah, there also just the shape and the look is like better there and maybe we cook but still we have some problems that is equal with the [detention] centre.<sup>114</sup>

The most dramatic restriction regarding the lives of participants in the housing project is the condition that fathers stay in the detention centre. This condition exacerbates the already fragile mental state of families and has not been adequately justified by the Department. While there is no compulsion on two-parent families to volunteer for the project, the Inquiry is of the view that asking families to choose between a less harsh environment for their children and separation from their father

is unfair. While this condition does not impact on single mother families, they have also found it difficult to conduct 'normal' parenting in the housing project.

The doctor providing care to detainees at Woomera wrote to the Department in October 2002 setting out his concern that:

at the current rate of deterioration of the families housed [at the housing project] ... it will not be long before the project must be considered a failure and alternatives found for the detention of those held there.<sup>115</sup>

The housing project highlights one of the recurring themes of the Inquiry, namely that despite efforts by the Department to improve conditions of detention, it is the detention *per se* – the deprivation of liberty and autonomy – that is more often than not a primary cause of distress for children and their parents (see further Chapter 9 on Mental Health). This is not a new discovery and explains why the CRC imposes such strict limitations on the circumstances under which children may be detained – in particular that it be a measure of last resort and for the shortest appropriate period of time (as required by article 37(b) of the CRC).

Section 6.5 examines whether the failure to ensure the prompt transfer of children to alternative places of detention in the community suggests a failure to make the best interests of the child a primary consideration. Sections 6.6.3 and 6.7.7 assess whether the transfer of children to residential housing projects and home-based detention have any impact on Australia's compliance with the right to be detained as a matter of last resort and for the shortest appropriate period of time.

#### **6.4.4 'Pacific Solution' detention facilities**

Since late 2001 the number of children in Australia's detention facilities has been gradually declining. One of the reasons for this reduction lies in the fact that, since September 2001, most children attempting to make the journey to Australia by boat have been transferred by the Australian Navy to detention facilities in Papua New Guinea or Nauru. In other words, child asylum seekers heading for Australia on boats are not usually detained in Australia but in third countries.<sup>116</sup> This transfer of asylum seekers is the primary feature of the Government's 'Pacific Solution' strategy.

Under international law, Australia continues to be responsible for any foreseeable breach of the human rights of the children that it forcibly relocates to third countries.<sup>117</sup> Therefore, Australia is responsible for any breaches of human rights that it can foresee will occur with respect to the children that the Australian authorities transfer to Nauru and Papua New Guinea. This includes the decision to detain and the length of detention of children in those countries.

The Department appears to agree with this proposition with respect to asylum seekers who enter Australia's waters:

Australia's protection obligations extend to refugees who have entered Australia's jurisdiction by entering its territorial seas. The Pacific strategy in no way detracts from these obligations.<sup>118</sup>

## A last resort?

The Inquiry sought assistance from the Department to facilitate visits to the detention facilities in Nauru and Papua New Guinea. However, the Department has taken the view that while Australia has some responsibility for the rights of children detained in Nauru and Papua New Guinea, this Inquiry's jurisdiction does not extend to inspecting those facilities and interviewing those children. The Inquiry does not accept this view. However, without the cooperation of the Department it has not been possible for the Inquiry to properly assess the conditions in those centres.<sup>119</sup>

Accordingly, while the Inquiry has received some submissions regarding detention in Nauru and Papua New Guinea, the Inquiry has been unable to collect any primary evidence on the conditions in the facilities and the impact that they have on child detainees. The Inquiry is not, therefore, in a position to comment in any detail on whether the conditions in those facilities meet standards required by the CRC.

Nevertheless, the Inquiry is in a position to comment on how the 'Pacific Solution' legislation impacts on Australia's obligation to ensure that these children are detained as a matter of last resort and for the shortest appropriate period of time. Therefore, throughout this chapter, the Inquiry has briefly assessed whether detention in Nauru and Papua New Guinea pursuant to the Migration Act, might breach article 37(b) of the CRC.

Furthermore, in Chapter 16 on Temporary Protection Visas, the Inquiry comments on the impact of detention in 'Pacific Solution' countries on family unity.

## 6.5 Is detention in the 'best interests of the child'?

The principle of detention as a last resort and for the shortest appropriate period in article 37(b) amounts to recognition by the international community that the deprivation of liberty is rarely in the best interests of the child. Indeed, many studies have considered the impact of institutionalisation on children and conclude that the social and psychological effects can be long term and serious.<sup>120</sup>

In making a decision to detain children, the Commonwealth is obliged to consider the following issues, with the best interests of each child as a primary consideration:

- Should a child be detained?
- For how long should a child be detained?
- Where should a child be detained?

As discussed throughout this chapter, the Commonwealth legislature has made a universal decision in relation to questions of whether or not a child should be detained. The Migration Act requires all children who arrive in Australia without a visa to be detained, no matter what their individual circumstances. This blanket approach raises immediate concerns regarding the 'best interests' principle because it prevents the best interests of each child being considered in the 'decision' to detain – indeed, it prevents any decision at all. The Department has recognised that its first opportunity to actively consider the best interests of the child is only after the child is detained:

In the context of administering the Migration Act, when making any decisions regarding the best interests of the child, departmental officers must consider those interests in the context that the child is required by law to be detained.<sup>121</sup>

Regarding the length of detention, the Department states that the availability of bridging visas in the Migration Regulations properly takes into account the best interests of the child. Section 6.7.4 below suggests that highly restricted use of this mechanism makes it difficult to accept that the best interests of the child were a primary consideration in either developing or applying the bridging visa rules to children in detention.

There are two key decisions to be made in relation to the location of detention. First, whether the child should be detained in a detention centre or an alternative place of detention (for example home-based detention or residential housing projects)? Second, if detention is to be in a detention centre, which one? These questions are closely related to a further decision, namely the conditions under which children should be detained. Some of the factors to take into account in these decisions include the ability of children to gain appropriate access to:

- migration application assistance (see Chapter 7)
- health and mental health services (see Chapters 9 and 10)
- disability services (see Chapter 11)
- education and recreational opportunities (see Chapters 12 and 13)
- cultural and religious communities (see Chapter 15).

Certain detention centres also create serious risks of exposing children to physical violence (see Chapter 8 on Safety).

In some cases decisions concerning in which detention centre to place a child can have implications for the unity of a family, as set out below.

### **6.5.1 How does the 'best interests' principle apply to children detained with their family?**

There is little debate that it is in the best interests of the child, in most circumstances, to live with his or her parents. The question is what impact that has on decisions made within the context of the mandatory detention system.

#### **(a) The 'best interests' principle and the decision to detain a family**

The Australian Government and the Department have stated on several occasions that the principle of family unity in article 9 of the CRC means that it is usually in the best interests of the child to be detained because their parents must be detained:

The Government recognises it would be preferable if children and their families did not need to be detained. However where detention is required by law because they are unauthorised arrivals, or have breached visa conditions, it is the Government's considered view that it is in the best interests of child for them to remain with their parents, family or fellow country people.<sup>122</sup>

## A last resort?

The Inquiry rejects this argument. It is flawed for a number of reasons.

First, the decision to detain children does not arise from a consideration of their best interests following the detention of their parents. Children are detained for the same reason and at the same time as their parents. They are detained on arrival because they are unlawful non-citizens. There is no consideration of children's best interests before they are detained.

Second, the argument implies that there is no choice but to detain parents. This is obviously incorrect. The Commonwealth has made a decision to detain all unlawful non-citizens, including children and their parents. If the Government believes that it 'would be preferable if children and their families did not need to be detained', they may propose changes to the legislation that permit that preferred position. They have not done so.

Third, a proper consideration of the best interests of the child does not seek to trade off rights against each other when they are, in fact, compatible. The above argument suggests that the right of a child only to be detained as a last resort is to be traded for the right to family unity in the name of his or her best interests. The Inquiry rejects such an approach. Instead, the best interests of the child are met by allowing the child to remain with their parents *and* be at liberty. Such a result can be achieved by the Commonwealth if it chooses to provide such an option under the law. It has chosen not to do so.

During the public hearings many witnesses were asked to respond to the Minister's assertion that it is usually in the best interests of children who are with their parents to remain in detention in order to keep the family unit together. The following are some of the responses to that proposition:

No one can seriously argue that it is in the best interests of the child to detain children. The government attempts to argue that it is in their best interest because of the family unity. Now, we agree that family unity is vital and an integral right under the Convention. However, it can't be used as a justification to detain children. It must be read in totality, this Convention, not in isolated bits. The Convention really can't be used, in fact is misused, if we justify a position of one evil versus another. It is not a choice between detaining children with their family or releasing children and separating them from their family. Children and their families need to be released from detention.

*UNICEF Australia*<sup>123</sup>

DR OZDOWSKI: Could I ask you, there is a picture of this dilemma in terms of policy because the Minister is saying that he is showing the best interests of the child by keeping the whole family in detention rather than allowing separation and letting children out or letting mothers and children out. How do you see ...

DR POWRIE: Well, from a child developmental point of view there is no dilemma. A child's development is best supported within a healthy family context where parents are free to care for their child in their culture and supported in a way in which they see fit as parents.

*Australian Association for Infant Mental Health*<sup>124</sup>

DR OZDOWSKI: The Minister is often saying that he cannot release children because it is in the best interests of children to stay with their parents, and the parents have got to stay in detention.

MR MANNE: Yes. Yes, well, one of the fundamental issues in relation to the best interests of the child is also not being exposed to an environment which could cause them harm. I don't need to speak or to lecture you on the problems that we face in detention at the moment, but clearly there is a culture of where self-harm has become a norm in detention, where there have clearly been lots of other problems, problems which are caused again in our view by the system that we have.

The best interests of the child, whether with a family or unaccompanied, in our view cannot be to remain in an environment as problematic as that. And indeed, our other view would be that in relation to – and I would like to provide the Commission with some further written materials on this – but if the presumption was that children ought not be, as a presumption detained, surely the principles of family unity would require that if a child is not to be detained because it is harmful, then also families of those children ought to be released with those children. That would be our basic position.

*Refugee and Immigration Legal Centre*<sup>125</sup>

**(b) The 'best interests' principle and the decision regarding location of detention**

The Department states on the one hand that it is concerned to keep the family together, and on the other hand it makes separation of two-parent families a condition of transfer to a residential housing project (see further section 6.4.1 above). It is the view of the Inquiry that the exclusion of fathers from the housing project minimises the positive impact that the creation of the Woomera housing project may have had on compliance with the 'best interests' principle.

Furthermore, evidence before the Inquiry indicates that the Department has not made a child's best interests and family unity a priority when deciding in which detention centre to detain children. The Inquiry heard several examples of children who had a parent or close family members living significant distances from the detention centre where they were located. Refugee parents in the community cannot generally access their families in detention in remote centres as the distance and cost is too great.<sup>126</sup>

For example, in 2001, an unaccompanied Iraqi boy was detained at Port Hedland while his mother and siblings were living in Melbourne on refugee protection visas. The Department considered transferring him to Maribyrnong to be closer to his family. The decision hinged on whether the child could be 'managed' at Maribyrnong, rather than the imperative of being close to his family:

Follow-up with regard to [the child] and determine whether a transfer to Maribyrnong IDC is possible so that he can be close to his family who are living in Melbourne after being released on TPVs. This depends on whether he can be managed effectively at [Maribyrnong] and other operational considerations.<sup>127</sup>

## A last resort?

Children of another family at Woomera in 2002 had not seen their father for three years since fleeing Iraq.<sup>128</sup> He was living in Sydney while they were detained at Woomera. They had telephone contact with him, but the boys were clearly bitter about 'the protracted separation from their father and the futility and irrelevance of their existence in a Detention Centre environment'.<sup>129</sup> The boys were lacerating their arms and drinking shampoo.<sup>130</sup>

The Department gave the following general explanation for its refusal to transfer families between detention centres for family unity reasons:

Transfers are administratively and logistically challenging and costly. In considering any move to a different place of detention, relevant factors include the available places of detention, infrastructure and support services, capacity to meet visa processing and reception requirements, and management of diverse detainee populations.

Detainees may sometimes seek a transfer on the basis of having family or friends in areas close to other detention facilities (such as Villawood IDC). It is not administratively practical, cost effective or equitable to move detainees for that reason alone. Such issues, however, may sometimes be relevant in consideration of management options for detainees with particular needs that cannot be adequately addressed in another facility.<sup>131</sup>

In the Inquiry's view, this response illustrates that neither the best interests of the child nor the principle of family unity were primary considerations in the Department's decision process regarding the location of children.

A third example of children who have been separated from their father by being detained in Woomera, involves a family of five children aged 3, 7, 9, 10 and 12 on arrival. The children were detained with their mother in Woomera. The father had come to Australia earlier, but at the time of arrival the mother did not know his whereabouts. Within three months the children had learned that their father was alive and living in Sydney on a temporary protection visa. However, it appears that the children's father only learned of his family's presence in Australia, by coincidence, a year after their arrival.

Case Study 1 at the end of this chapter outlines the sequence of events regarding this family and the impact that detention in Woomera, far from their father, had on the children. It highlights the range of options which could have been pursued by the Department or the Minister to ensure the best interests of the child and family unity at various stages.

### **6.5.2 How does the 'best interests' principle apply to unaccompanied children in detention?**

Unaccompanied children require additional protection and assistance under article 20 of the CRC. The United Nations High Commissioner for Refugees (UNHCR) states that children seeking asylum should not be detained and this 'is particularly important in the case of unaccompanied children'.<sup>132</sup> The UNHCR guidelines, which

apply the CRC to the situation of asylum seekers, also recommend the appointment of an independent guardian or adviser to ensure that 'the interests of the child are safeguarded'.<sup>133</sup> This is in recognition of the fact that children who are without their family need extra help to enjoy the same level of rights as children with their families, including someone to advocate that they be detained as a matter of last resort and for the shortest appropriate period of time.

Australian law seeks to provide this assistance by appointing the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) as the guardian pursuant to the *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act). The Minister, in turn, has delegated his powers to the Department's Managers and Deputy Managers in each of the detention facilities as well as to State and Territory child protection authorities.<sup>134</sup> The Federal Court of Australia states, and the Department readily accepts, that as guardian, the Minister and his or her delegates are required to act in the best interests of the children who are their wards.<sup>135</sup>

Australia's detention laws do not make any distinction between the detention of unaccompanied children and any other child or adult. Thus all unaccompanied children arriving in Australia without a visa must be detained.

Regarding the length of detention, section 6.7.4 notes that over the period of the Inquiry, only one unaccompanied child was released from detention on a bridging visa. Section 6.7.5 notes that, over the period of the Inquiry, there was no specific priority for processing the visa claims made by children.

However, as set out above in section 6.4.2, from January 2002 almost 20 unaccompanied children were transferred from detention centres to home-based detention. The placement of these children in home-based foster care represented a clear step forward in applying the 'best interests' principle to unaccompanied children.

The Department's efforts to make the best interests of unaccompanied children a primary consideration regarding their care in detention centres is discussed in detail in Chapter 14 on Unaccompanied Children and throughout this report.

By December 2002 the Department formally acknowledged that the best interests of unaccompanied children would usually require that they not be in detention facilities. This statement was embodied in MSI 370 called 'Procedures for Unaccompanied Wards in Immigration Detention Facilities'. MSI 370 replaced MSI 357, which was issued in September 2002. The change between September and December represents a fundamental development in the Department's approach to the best interests of unaccompanied children.

MSI 357 issued in September 2002 stated:

13.2.1 It is in the best interests of an unaccompanied ward that his or her immigration status be resolved in the shortest possible time after the conclusion of review of a refusal decision so that he or she is either released from detention on a visa or removed from Australia as soon as practicable.

## A last resort?

Thus MSI 357 recognised that it would be in the best interests of unaccompanied children to be released from detention quickly, but only after a refugee claim has been refused at the primary stage (which can take many months). The MSI went on to provide that, in the meantime, if the Department Manager believed that the unaccompanied child's needs 'cannot be appropriately provided for', the Manager should investigate the possibility of transferring the child to a place of detention other than an immigration detention centre. The MSI then set out the steps that the Manager needed to go through to establish that their needs could not be provided for.

Three months later, in MSI 370, the Department replaced paragraph 13.2.1 (above) with the following:

13.2.1 It would be usually in the best interests of an unaccompanied ward to be transferred out of a detention facility.

13.2.2 This can be facilitated by pursuing alternative detention arrangements or, if the child is eligible, granting them a bridging visa.<sup>136</sup>

Thus, by December 2002 – ten years after the introduction of mandatory detention – the Department began to assume that satisfying the best interests of unaccompanied children usually requires their release or transfer from detention facilities.

However, the Department continues to suggest that that it may be in the best interests of some unaccompanied children to remain in detention. For example, the Department has stated that it may be in a child's best interests to remain in the company of persons they have made friends with:

INQUIRY COUNSEL: Well, let me ask you this, does the Department say that in detaining each and every one of the unaccompanied minors at the Woomera Detention Centre over the past three years or so the Department took into account as its primary consideration the child's best interests?

DIMIA DEPUTY SECRETARY: Well, that's our overall position. But clearly, as Mr Walker said, there are a range of other considerations. Best interests of the child, as we understand it, is required to be a primary consideration but not the only consideration and there were a variety of other circumstances and considerations that needed to be taken into account including, for example, the groups with which people have turned up. People often wanted to stay together as a group even though one of that group was an unaccompanied minor.<sup>137</sup>

The Inquiry is not convinced that this is a good reason for an unaccompanied child to remain in detention and, to the best of the Inquiry's information, there has been no instance of a State child welfare authority recommending that a child stay in detention so that he or she can remain with his friends.

The Department also suggested that the release of unaccompanied children into the Australian community may expose them to people smuggling rings in Australia:

Account must be taken of factors such as ... the possibility of falling into the hands of people smugglers who traffic in children (as has been documented in overseas countries such as Canada).<sup>138</sup>

The Inquiry does not accept that this is an issue of real concern in Australia for unaccompanied minors for whom the Minister remains the guardian. There is no evidence to suggest that these children are at serious risk of 'falling into the hands of people smugglers'.

The Department states that between 3 December 2002 and 16 May 2003, 25 unaccompanied minors were assessed against MSI 370. Eight children were transferred to alternative places of detention, one was granted a bridging visa, nine turned 18 (or were re-assessed as being over 18), three were removed from Australia and four were assessed to be a high risk of absconding and therefore remained in detention facilities.<sup>139</sup>

It is important to note that while these MSIs represent a positive development in the Department's approach to unaccompanied children, they do not represent any change in thinking regarding the detention of children with families.

### **6.5.3 What do children think about being in detention centres?**

Many of the submissions to the Inquiry report the views of children who have spent time in detention centres.<sup>140</sup> Those submissions and the children interviewed by Inquiry staff in focus groups and in detention facilities give a clear picture of what children thought about detention:

A feeling of darkness came on me in the detention centre, and all my hope disappeared. My world has been dark ever since.<sup>141</sup>

It was like a desert ... It felt like we were in a cage. We could not go anywhere with all the fences and that stuff ... It was like jail as there was no care ... [M]any of the people were angry because of the time they were in detention. The children were crying. My father is so angry and I don't know why ... It was a bad experience. There were no times when we were happy there ... We were at war in Afghanistan because of the Taliban and we thought we have come to another war here. In the detention centre, always soldiers all around us. Oh my God, can the Taliban get us again? ... It was so hot, so very hot and lots of flies and we needed a fan.<sup>142</sup>

The whole condition in the camp is really, really bad, people are really stressed. Those people they are there for a long time they get really agitated. They used to come to [dining room] for example...a guy sits there for a while and then he gets really upset, mentally sick and he just pulls the chair and throws it away and causes lots of fight and scaredness between people – young people, children – because the restaurant it (is) for everybody, everybody is there.<sup>143</sup>

## A last resort?



Drawings on a school desk at Port Hedland, June 2002.

Three Afghan unaccompanied children who had spent some time in detention before being recognised as refugees and released into the community have the following views about detention:

I think there should not be any detention for children at least. All these Afghans that are spending months or years in detention, they have not done anything wrong, they are not criminals and they should listen to them. But there should not be any detention for children. They should be free.<sup>144</sup>

I actually experienced lots of negative things in there. For the time that I was there, I remember that there were young children who were living with adults, always having nightmares and I could see and I could hear them screaming at night time and once I saw with my own eyes that someone had broken a window and with that glass cut himself. And I have also witnessed someone who cut himself with a blade.<sup>145</sup>

I experienced a lot of violent people, experiencing negative things, especially when they put us with people who actually spend one year or one and a half years there. They are the people who experienced lots of negative things who have lost their mental power and they always talk about the negative things that they experience. For example, in my case, even though I spent only three months in that detention centre, I was in contact with a man who spent actually one and a half years of his time in Australia detention centre and he asked me he said 'you're a new person, you are a new arrival so you don't know what you will be going through' and then he was telling me about all the negative things that he will do and that made me even more heartbroken and even more scared and afraid and I just remember that

another fellow, he had to go and visit a friend who is in mental hospital because he spent quite a long time in detention centre and he lost his mind and he ended up in hospital.<sup>146</sup>

An Australian teenage girl who made friends with children in detention describes their experience as follows:

... the people that I talk to in the detention centres have told me of their experiences. They believe that the worst thing about detention is the psychological trauma of waking up and not knowing why exactly you are there, how long you are going to be there for, and what is going to happen if you are eventually given a TPV or sent back; so that is the worst.

Also, boredom, not having formal schooling so therefore spending all day thinking about what has happened to you and what can happen to you. Being called by numbers makes them dehumanised, makes them feel like animals, not like individuals, not like people – that, again, one of the worst things. Also, being surrounded by depression – constantly depression makes them also depressed. By seeing older people give up it shows them that the only way is to give up.<sup>147</sup>

#### **6.5.4 What do State child welfare authorities say about keeping children in detention centres?**

Child protection authorities in States that have immigration detention centres have said, on various occasions, that the detention environment has a seriously detrimental impact on children. While many of these comments have been made in the context of assessments of particular children and families, some have also been of general application. The South Australian authorities have been the most vocal about the impact of detention on children.

DHS states that 'in the reports that have gone up to DIMIA it has been made clear that our view is that all children are at risk'.<sup>148</sup> Two of the individual assessments conducted by DHS of children in Woomera in February 2002 state that:

The detention environment is not suitable for impressionable adolescents and in this instance it is strongly compounding their sense of persecution. Ideally children such as [names removed] should not be in detention.<sup>149</sup>

Ideally a family with children should not be confined in a detention centre.<sup>150</sup>

DHS sent the Department an assessment report regarding Woomera dated 12 April 2002 which states at the outset that:

[DHS] maintains its previously stated position that it is not in the best interests of the child to be detained in detention centres ...<sup>151</sup>

Detention is often represented as a 'place' and as such a passive concept, however such a concept greatly underplays the impact of such facilities on the physical, psychological and emotional wellbeing of children, young people and their families.<sup>152</sup>

## A last resort?

A report conducted by the South Australian Child and Adolescent Mental Health Services (CAMHS) summarising the situation of families in Woomera from January to July 2002 states:

While each family has particular issues and difficulties, an overwhelming feature of the assessments was the clear evidence of the detrimental effects of the detention environment on the children both directly, (including inadequate developmental opportunities, exposure to violence and adult despair and removal of hope for their futures), and indirectly, as a consequence of parental mental illness.<sup>153</sup>

In August 2002, DHS recommended:

That no child should be kept in the Woomera centre as it is an environment that fails to provide care and protection.<sup>154</sup>

Furthermore, in a recent independent assessment of child protection in South Australia (the Layton Report), the chapter on Children in Detention states that:

Whether it be indirect or direct, the combined effect of the circumstances of immigration detention of children in detention centres is incompatible with them being in a situation which is in their best interests, instead the detention centre environment is positively detrimental to their well being.<sup>155</sup>

In assessing the mental health of unaccompanied children in Port Hedland and Curtin detention facilities, the Western Australian Department for Community Development states that:

The best interests of children include that their development should, wherever possible, occur in a family environment within their own community.<sup>156</sup>

The Department is of the view that the recommendation of the Western Australian authority is not incompatible with the provision of care to children in a detention facility. The Department has also expressed concern about the accuracy of the DHS report of 12 April 2002 and the Layton Report.<sup>157</sup> However, in neither case have the authors of the reports altered the content in response to the Department's complaints, indicating that they stand by their original assessments. The Inquiry accepts their assessments, which are supported by the overwhelming weight of evidence.

### **6.5.5 What do community groups say about keeping children in detention centres?**

While the Government has asserted that public opinion supports Australia's detention policy generally, the Inquiry is not aware of any evidence suggesting support for the detention of children.<sup>158</sup> Of the 346 submissions received by the Inquiry, none argue that the detention of children is desirable – including the Department's submission.

Many of the written and oral submissions received by the Inquiry from human rights organisations, children's organisations and mental health experts argued that

detention could never be in the best interests of the child. The following are just three examples of the many comments to this effect:<sup>159</sup>

It is self evident in the material below on psychological and social wellbeing that *if* the primary consideration were the best interests of the child, none of the children in these interviews would have been placed in detention.

*Asylum Seekers Centre*<sup>160</sup>

Unsurprisingly, medical and child welfare experts have concluded that holding child asylum seekers and their parents in immigration detention is contrary to the child's best interests.

*Kids in Detention Story*<sup>161</sup>

In short, our submission is that the current arrangements for detention of children in Australia fall conspicuously and depressingly short of meeting our international obligations to act in the best interests of the child, which is clearly the guiding principle on this issue. The relevant rights set out in international laws and guidelines recognise the distinct vulnerability, and the need for protection and care of children. The current arrangements for detention of children in Australia in many respects do not meet those basic requirements...

*Refugee and Immigration Legal Centre*<sup>162</sup>

If appropriate arrangements are made for the care of unaccompanied children in the community, it is difficult to imagine that it would not be in their best interests to be released from detention at an early stage. As the Refugee and Immigration Legal Centre stated:

[O]ur experience in terms of the release of children from detention shows that there are no reasons whatsoever why it cannot be facilitated. In our experience, we have not noted any circumstance where it has not been in the best interests of the child to be released, and we are working very closely with agencies with expertise in terms of care and welfare of children once released, including Hotham Mission.<sup>163</sup>

### **6.5.6 Findings regarding the best interests of the child**

The Inquiry agrees with the Department's statement that 'determining what is in the best interests of the child will involve a consideration of the relevant circumstances of the individual child in light of the rights established by the [CRC]'.<sup>164</sup> However, Australia's mandatory detention policy does not currently permit such an assessment because it requires the detention of *all* persons arriving in Australia without a visa, no matter what their individual circumstances. The law makes no distinction between whether a person is an adult or child, nor whether a child is accompanied or unaccompanied by his or her parents.

There is a preponderance of evidence suggesting that institutionalisation is generally bad for children. State child welfare authorities, community groups and children who have been in detention all talk about the detrimental impact of the deprivation

## A last resort?

of liberty generally and detention in Australia's immigration detention centres in particular. The evidence recounted throughout this report confirms that detention has a negative impact on children in a variety of areas.

In the Inquiry's view, the clear evidence that detention can have a detrimental impact on the well-being of children suggests that the best interests of the child have not been a primary consideration in the introduction and maintenance of laws that require the detention of children irrespective of their circumstances. This is an issue considered further in Chapter 17, Major Findings and Recommendations.

Further, if the best interests of the child were a primary consideration in creating and applying the detention laws then those laws would permit the result that *neither children nor their parents* would be held in immigration detention except as a measure of last resort and for the shortest appropriate period. Thus the oft-stated premise that the best interests of the child require that children be detained because their parents must be detained, is the perverse result of inappropriate detention laws.

However, those laws do permit the Department to make decisions regarding the location in which children are detained. In the Inquiry's view the Department has, on certain occasions, failed to make the best interests of the child a primary consideration when making some of these decisions. For example, decisions as to which detention centre a child should be detained in do not appear to have given sufficient priority to the fact that a child may have a parent or relative in the community near one particular detention facility.

Further, the delay in making arrangements for the regular transfer of unaccompanied children into home-based detention, and the failure to make such arrangements for children accompanied by their parents, suggests a failure to give adequate weight to the best interests of the child when determining where to detain children (see further section 6.4.3 above).

The Inquiry is not of the view that the Woomera housing project provides the same quality alternative location both because the restrictions on movement remain and because the rules of participation require fathers to remain in the detention centre separate from the rest of their family (see further section 6.4.3). However, even that initiative took until 2001 to introduce. The housing projects in Port Augusta and Port Hedland only opened in 2003.

Finally, while the development of MSI 370 in December 2002 demonstrates that the Department has put policies in place to ensure that the best interests of unaccompanied children are a primary consideration in future decisions relating to their location and care, the delay in formalising this policy is of great concern.

Issues relating to the best interests of the child and the length of detention are discussed in section 6.7 below.

The issue of the best interests of the child is discussed further in Chapter 17, Major Findings and Recommendations.

## 6.6 Are children detained as 'a measure of last resort'?

### 6.6.1 What does detention as 'a measure of last resort' mean?

The protection of personal freedom is one of the most fundamental human rights protections. While there are strict rules about the circumstances under which any person may be deprived of his or her liberty, international law regards the detention of children as an especially drastic measure – a matter of last resort.

The principle that detention of children should be a last resort (article 37(b)) read with the 'best interests' principle (article 3(1)), means that Australia is required to explore all alternatives to detention prior to detaining a child, irrespective of their immigration status, and with the best interests of the child as a primary consideration.

Therefore, Australia, as a party to the CRC, has the obligation to ensure that detaining a child is not the first or only option available to respond to a particular policy or legal problem.

The UN Committee on the Rights of the Child has emphasised the importance of finding alternatives to the detention of children.<sup>165</sup> The UNHCR sets out various alternatives in its Detention Guidelines including release subject to reporting, residency requirements or the provision of a surety. The UNHCR Detention Guidelines also state that 'minors who are asylum seekers should *not* be detained' and that 'all appropriate alternatives to detention should be considered in the case of children accompanying their parents'.<sup>166</sup>

Both the UNHCR Detention Guidelines and the *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (UNHCR UAM Guidelines) outline the alternative care arrangements that must be provided for unaccompanied children:

Unaccompanied minors should not, as a general rule, be detained. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision. Residential homes or foster care placements may provide the necessary facilities to ensure their proper development, (both physical and mental), is catered for while longer term solutions are being considered.<sup>167</sup>

The Department appears to be of the view that the principle of detention as a last resort under the CRC will be satisfied if legislators have considered other policy alternatives prior to enacting mandatory detention legislation:

...the Government of the day was fully cognisant of the principles of 'the best interests of the child' and 'detention as a last resort' when it established the mandatory detention regime. Mandatory detention was and is seen as *the legislative last resort* in the context of Australia's universal visa regime [emphasis added].<sup>168</sup>

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The Inquiry does not accept that the mandatory detention of children is necessary to achieve legitimate policy goals. The Commonwealth's failure to conceive of a means of achieving its policy objectives without the detention of children does not automatically make it a 'last resort' under the CRC.<sup>169</sup>

The basic premise of international human rights law is the protection of the rights of each and every individual. The CRC requires an assessment of whether or not it is necessary to detain a particular child. As discussed below, the mandatory detention regime, by definition, denies the opportunity for any such assessment.

### 6.6.2 Does the Migration Act permit detention of children as a last resort?

I do note that there has been more of a practical tendency to release unaccompanied minors in recent times from detention and there are very few, if any, remaining in detention now, but nevertheless, what remains in Australia is a system which not only mandatorily detains adults, but children. It is absolutely and abundantly clear in international law and policy that detention should only be used as a last resort for children. Our experience in this country is that is not the case, the presumption has been to detain...

*Refugee and Immigration Legal Centre*<sup>170</sup>

Detention as a last resort does not mean that Australia can never detain children; it means that Australia has the obligation to consider whether there are alternatives to detention, taking into account the circumstances of each individual case. One of the difficulties in the Australian legislation is that it does not permit an individual assessment as to whether detention is necessary in the case of adults or children.

Section 189 of the Migration Act is clear that all unlawful non-citizens arriving anywhere other than an 'excised offshore place' must be detained.<sup>171</sup> The Department has *no option but to detain* every person arriving without a visa.

Several submissions to the Inquiry argue that Australia's mandatory detention laws necessarily mean that detention is not a last resort for children.<sup>172</sup>

The detention of child asylum seekers under this system is not 'a measure of last resort' and is not 'for the shortest appropriate period of time'. On the contrary it is the first and only resort and for an indefinite period of time. It therefore violates this provision of the Convention.

*NSW Commission for Children and Young People*<sup>173</sup>

I think the *Convention on the Rights of the Child* is very clear: article 37 in terms of detention being a last resort quite clearly shows that if it is mandatory it cannot be a last resort.

*Amnesty International*<sup>174</sup>

The blanket application of mandatory provisions to detain children who arrive in Australia without a visa means that, as a matter of logic, detention is the first resort under Australian law.

### **6.6.3 What impact do alternative places of detention have on the 'last resort' principle?**

As explained earlier in this chapter, although the Migration Act does not permit any discretion as to *whether* to detain unauthorised arrival children, it does permit some discretion as to *where* to detain. This means that children and their parents could, theoretically, be detained in any place in Australia – including homes in the community.

While the transfer of children to home-based places of detention may lessen the seriousness of a breach of the principle of detention as a measure of last resort, it cannot nullify it.

The Inquiry also notes that, over the period of the Inquiry, children accompanied by their parents have not enjoyed the possibility of detention in the Australian community with their family, other than in one exceptional case. While the Woomera housing project offered a more child-friendly environment than the Woomera detention centre, it failed to mitigate the breach of detention as a last resort because the fundamental aspects of detention remain – all aspects of life in the project were controlled by ACM or the Department. Indeed, one of the most important aspects of a child's life, family unity, was directly inhibited by the ineligibility of fathers and, until 2 December 2002, boys aged over 12 to participate in the project. The same restrictions on fathers apply to the Port Hedland and Port Augusta Residential Housing Projects.

### **6.6.4 What is the impact of the 'Pacific Solution' on the 'last resort' principle?**

As explained earlier in this chapter, since September 2001, when a family or unaccompanied child is intercepted by the Australian Navy, or lands on Christmas Island, Ashmore and Cartier Islands or Cocos (Keeling) Islands without a visa, detention is strictly speaking discretionary. However, as a practical matter the children have either been detained on Christmas Island, or transferred to detention facilities in Nauru or Manus Island in Papua New Guinea. The Inquiry is unaware of any instances where these children have been presented any option other than detention in one of these three facilities. Therefore, there is no evidence of detention being anything other than the 'first resort'.

### **6.6.5 Findings regarding detention as a 'last resort'**

Detention is the first, and only, option available to children on arrival in Australia if they have no visa. The laws do not provide a presumption against detention of children nor do they permit a case-by-case assessment of the need to detain in the individual circumstances of the child.

While the Migration Act does not allow for any discretion by the Department as to *whether* to detain a child, it does permit some discretion as to *where* to detain

## A last resort?

children. This may have some impact on the seriousness of any breach of the 'last resort' principle. The Inquiry acknowledges that the Department has made efforts to implement alternatives to detention by transferring most unaccompanied children to home-based detention since January 2002, and some mothers and children to the Woomera housing project since August 2001. The issuing of MSIs 370 and 371 in December 2002 relating to unaccompanied children and alternative places of detention suggests an improved approach by the Department within the framework of mandatory detention in the future.

However, the Inquiry notes that these initiatives are recent developments and in the case of the Woomera housing project some of the more problematic aspects of detention, namely control over day-to-day decisions of a family, remain.

In any event, the Inquiry re-emphasises that home-based detention and the Residential Housing Project are alternative *forms of* detention rather than *alternatives to* detention, and it is the latter that is required by the 'last resort' principle of the CRC.

### **6.7 Are children detained for the 'shortest appropriate period of time'?**

The sections below address the following questions related to the length of detention:

- 6.7.1 What does 'shortest appropriate period of time' mean?
- 6.7.2 How long have children been in immigration detention?
- 6.7.3 What limits are there on the length of time in detention?
- 6.7.4 How quickly are bridging visas given to children?
- 6.7.5 How quickly are protection visas given to children?
- 6.7.6 How quickly are children removed from Australia?
- 6.7.7 What impact do alternative places of detention have on the time children are detained?
- 6.7.8 What impact does the 'Pacific Solution' have on the shortest appropriate period?

#### **6.7.1 What does detention for the 'shortest appropriate period of time' mean?**

The CRC states that, in the event that a child is detained, that detention must be for the 'shortest appropriate period of time'. Although it does not set out the precise permissible length of detention, when read with the provision that detention must be a last resort, there is a positive obligation to investigate the possibility of non-custodial options as soon as possible after a child has been detained. In the context of Australian immigration law this means that the Commonwealth must ensure that children detained pursuant to Australia's mandatory detention laws are released as soon as possible.

The Department has urged the Inquiry to interpret the 'shortest appropriate period' (and other elements of article 37) in the context of the purposes of immigration detention which are:

to ensure the universal visa requirement is observed, and that unlawful non-citizens are available for visa processing, and removal if necessary. The shortest appropriate period of time of immigration detention is the shortest period in which the legitimate purposes of detention can be met – that is, until the detainee is granted a visa or removed from Australia. This is precisely the requirement specified by s196 of the Migration Act for release from detention.<sup>175</sup>

However, this interpretation misunderstands the fundamental obligations in the CRC to actively assess the continuing need to detain a child in the individual circumstances of the case. The fact that the Commonwealth Parliament has enacted legislation with a specific purpose does not mean that detention for that purpose is automatically legitimate or proportionate. It may be that those purposes can be achieved in the absence of detention. It may also be that those purposes are insufficient to justify detention under international law. These issues are discussed in greater detail in the context of 'unlawful' and 'arbitrary' detention later in this chapter.

This section examines whether, despite the mandatory detention provisions of the Migration Act, children can be in principle, and have been in practice, detained for the shortest appropriate period of time. It sets out the period of time for which children have been detained, the mechanisms currently available for release from detention and the manner in which they have been administered by the Department.

## **6.7.2 How long have children been in immigration detention?**

As Chapter 3, Setting the Scene, sets out, since 1999, children have been detained for increasingly longer periods. At the beginning of 2003, the average detention period for a detained child in an Australian detention centre was one year, three months and 17 days.<sup>176</sup> By the end of 2003 that figure had increased to one year, eight months and 11 days.<sup>177</sup> However, some children have been in detention for more than three years and one child was in immigration detention for five years, five months and 20 days.<sup>178</sup>

### Snapshot of the length of detention for children as at 1 July 1999 – 1 July 2003

Date	Percentage of children detained for:						
	< 6 weeks	1.5-3 months	3-6 months	6-12 months	12-24 months	24-36 months	> 36 months
1 July 1999	30.7%	8.1%	24.2%	30.7%	1.6%	1.6%	3.2%
1 July 2000	9.3%	8.8%	29.6%	48.3%	3.7%	0.2%	0.2%
1 July 2001	26.5%	26.6%	28.8%	12.0%	5.0%	0.8%	0.3%
1 July 2002	5.2%	1.2%	1.2%	22.7%	59.9%	8.1%	1.7%
1 July 2003	6.3%	2.1%	7.7%	9.1%	11.2%	60.1%	3.5%

Source: DIMIA, Response to Second Draft Report, 27 January 2004.

Thus, as at 1 July 2000, 82 per cent of children had been in detention for more than three months. As at 1 July 2002, 94 per cent of children had been in detention for more than three months, and 70 per cent had been detained for more than a year. A year later, on 1 July 2003, 75 per cent of children had been detained for more than one year and 64 per cent had been detained for more than two years. The figures are better for 1 July 1999 and 2001; however, it is clear that even at best, large percentages of children are detained for periods greater than six weeks.

While the percentages are useful to obtain a snapshot of the proportion of children detained for long periods of time, it must be remembered that human rights are individual rights, therefore even if only one child is detained beyond the 'shortest appropriate period' that would be a concern to the Inquiry and a breach of international law. The Inquiry met many children during its detention centre visits over 2002 who were still in detention in 2003. The following is just a small sample of those families.

An Iraqi family with four children aged 4, 9, 13 and 15 years on arrival, were detained for **3 years and 2 months** in Curtin, then Port Hedland and then Villawood. They were removed from Australia in February 2003.

An Iranian boy aged 12 years, whose father had died and whose mother is overseas arrived with two other relatives. He was in detention in Woomera and then Villawood for **2 years and 6 months**. He had relatives who were Australian citizens and offered to support him in the community. He was released into their care under alternative detention arrangements in June 2003.

An Afghan family with four sons aged 4, 11, 14 and 17 years and a daughter aged 9 on arrival, had been in detention in Woomera and then Baxter for **2 years and 10 months** as at November 2003.

An Iraqi father and a Palestinian mother arrived with their 2-year-old son and had been detained for **2 years and 7 months** as at November 2003. The mother has had two more children while in detention. These two children have spent their **entire life in detention**. The family have been detained in the Woomera and Baxter detention centres. They were also detained in an Adelaide hospital for two months to allow for mental health treatment of the mother and in a motel for two months to allow for recuperation. In November 2003, the three children were transferred into home-based detention with a foster carer and both parents were transferred to a psychiatric hospital.

An Iranian family with three children aged 11, 13 and 21 had been detained in Woomera for **2 years and 7 months** as at November 2003. In the second half of 2002, all but the father and son-in-law gradually moved to the Woomera housing project. The eldest daughter, who was not a dependent, was also in Woomera, until she was found to be a refugee and released with her husband and baby at the end of 2002.

### **6.7.3 What limits are there on the length of time children are detained?**

Several submissions to the Inquiry state that the length of detention for children is indeterminate because there is no fixed maximum period of detention, nor any regular review of the continuing need for detention.<sup>179</sup>

The Minister and the Department refute this claim on the basis that the length of detention is determined by the occurrence of certain specific events, namely the grant of a visa or removal.<sup>180</sup> The visa may be a substantive visa such as a refugee protection visa, or a bridging visa which may be given while an application for a substantive visa is being processed.

The Department's argument is, however, unconvincing. While the grant of a visa or removal from Australia are specific events which influence the length of detention, there are no laws defining the period within which those events must occur. Applied to unauthorised arrival asylum seekers in detention, this means that children are detained for the period which it takes to process their refugee protection visa applications, including the time for any appeals, unless they are granted a bridging visa first. If the processing is completed and an asylum seeker who arrives on the Australian mainland is successful, he or she will be granted a visa and released into the Australian community. If the asylum seeker is unsuccessful then detention will continue until the children and their families are removed from Australia. As a matter of practice there are no finite limits on the period of time for which a child may be detained and to that extent the length of detention is unpredictable and therefore indeterminate. Statistics also show the length of time in detention varies between applicants, reinforcing the unpredictability of the time in detention. Certainly, from a child's point of view there is no definite end:

The worst thing was not knowing what will happen, or when you will get out.<sup>181</sup>

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The absence of time limits in the legislation does not mean that the length of detention of children cannot be minimised. Clearly, the faster a visa is granted – be it a protection visa or a bridging visa – the shorter the period in detention.

The Department rightly states that it is constrained by the legislation and therefore, to the extent that this Inquiry is examining the acts and practices of the Commonwealth, it is important to consider what efforts have been made by the Department to ensure that children either (a) obtain a bridging visa as soon as possible; (b) obtain a protection visa as soon as possible; or (c) are removed as soon as possible having been unsuccessful in their protection claims. However, the Inquiry has also considered the extent to which the legislation itself limits the Department's ability to ensure that children be detained for the shortest possible period of time.

### 6.7.4 How quickly are bridging visas given to children?

MR WALKER (DIMIA ASS SEC (VISAS)): ... our desire is, in particular with children, that they be in detention for the shortest possible time. That's also our goal in relation to any person who is in immigration detention, but we are working within the framework of ... processing visa applications and, where people meet visa criteria, and in particular protection visa criteria, that they are released as soon as possible. However, that doesn't get round the situation that, essentially, where they don't have an entitlement to remain in Australia, there are difficulties with grants of bridging visas.<sup>182</sup>

Bridging visas are the most obvious tool for releasing children who are otherwise mandatorily detained. The primary purpose of a bridging visa is to convert an unlawful non-citizen into a lawful non-citizen while a substantive visa application is being processed, in other words act as a 'bridge'. The faster a bridging visa is granted, the sooner children can be released from detention. As is discussed in some detail below, this mechanism has almost never been used to secure the release of unauthorised arrival children, whether accompanied or unaccompanied by their families. By contrast, they are routinely issued to non-citizen children who arrive with a visa and become unlawful in some other way (for instance overstaying their visa).

#### (a) What bridging visas are available to children in detention?

In a February 1994 report entitled *Asylum, Border Control and Detention*, the Commonwealth Parliament Joint Standing Committee on Migration<sup>183</sup> made recommendations that the Minister at the time 'give particular consideration to the release of those persons who particularly are vulnerable to any effects of long-term detention, namely those persons with a special need based on age, health or previous experiences of torture and trauma'.<sup>184</sup> As a result, the Parliament introduced section 72 of the Migration Act<sup>185</sup> and Regulation 2.20(7) and (9) of the Migration Regulations,<sup>186</sup> amongst others, which set out circumstances in which children in detention might be eligible to apply for a Bridging Visa E 051.

According to the Department, it was not Parliament's intention to facilitate the release of children when it created Bridging Visa E 051, rather:

Parliament clearly intended that bridging visas would be considered only in exceptional circumstances and only until such time as their application for a visa was finally determined.<sup>187</sup>

This may explain the highly limited circumstances in which a child may be granted a bridging visa. It also immediately raises concerns about the seriousness with which the Parliament has considered its obligations to ensure that detention of children be for the shortest appropriate period of time.

An application for a bridging visa can only be made by an 'eligible non-citizen' as defined by section 72 of the Migration Act. A child asylum seeker in detention will only be an 'eligible non-citizen' if he or she falls under one of the following categories:

- *Best interests of the child*: A child who arrives without a visa and applies for a protection visa can apply for a bridging visa if the protection visa has not been finally determined, or he or she has applied for judicial review, and a child welfare authority has certified that release is in the best interests of the child. The Minister must also be satisfied that arrangements have been made with an Australian citizen or permanent resident for the care and welfare of the child and those arrangements are in the best interests of the child (reg 2.20(7)); or
- *Special needs*: Any person – adult or child – who arrives without a visa and applies for a protection visa can apply for a bridging visa if the protection visa has not been finally determined, or he or she has applied for judicial review, and a doctor appointed by the Department certifies that the person has a special need based on health or experience of torture/trauma and that release is required for care. The Minister must be satisfied that adequate arrangements have been made for their support in the community (reg 2.20(9)); or
- *Delayed primary decision*: Any person – adult or child – who arrives without a visa and applies for a protection visa can apply for a bridging visa if six months has passed since lodging the protection visa application and no primary decision has been made. The Minister must decide a bridging visa would be in the public interest in such circumstances (s 72(2)).

The Inquiry focuses on the first two of these grounds as the decreased processing times means that children will rarely qualify for the 'delayed primary decision' visa.

As the party responsible for ensuring that the best interests of the child are protected, it is the Department's responsibility to initiate assessments by (a) the State child welfare authority for a 'best interests' certification, or (b) a Department-appointed doctor for a 'special needs' certification, in order to ensure the maximum opportunity of being considered an 'eligible non-citizen'. This duty is especially high in the case of unaccompanied children of whom the Minister is the guardian.

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However, being an 'eligible non-citizen' does not automatically qualify a child for a bridging visa; it just allows the child to make a valid application. The child must also meet the relevant health requirements and sign an undertaking that he or she will leave Australia within 28 days of withdrawing or being refused a protection visa application.<sup>188</sup>

Moreover, even if all of these conditions have been met, it is entirely within the Minister's discretion as to whether a bridging visa will be granted.<sup>189</sup> In other words, the Minister cannot be compelled to grant a bridging visa.

If the child and his or her family are granted a bridging visa at some point, they may be required to report to immigration authorities at set intervals and residency requirements may be imposed (much like bail or parole).

### **(b) When are bridging visas granted to children with families?**

According to the Department, over the period of the Inquiry only one bridging visa was granted to members of an entire family that arrived in Australia without a visa.<sup>190</sup>

The best interests ground for a bridging visa does not permit the release of persons 18 or over even when they are the parents of children who would otherwise qualify for a bridging visa. MSI 131 entitled 'Bridging E Visa – subclass 051' states, in relation to the best interests ground, that:

- 7.4.2 Where a child is in detention with his or her parents, it can be assumed that the child's best interests are served by being with their parents, except in cases of neglect or abuse. Accordingly, unless specifically requested to do so by the child's parents or the child, contact need not be made with the relevant Child Welfare Authority [to have the child assessed for a bridging visa]. Where there exists any evidence of neglect or abuse, the relevant Child Welfare Authority should be contacted immediately.

The other option is the 'special needs' bridging visa. However, for an entire family to be released pursuant to the special needs ground, a doctor approved by the Department would need to certify that each member of the family could not be properly cared for in the detention environment.

MSI 131 states that:

- 7.7.1 Upon notification that a person is seeking a Bridging E visa and may come within reg 2.20(9), immediate contact should be made with an Australian Government Medical Officer to have the person examined by an appropriate medical specialist. The medical specialist should be asked to provide an opinion on the applicant in relation to reg 2.20(9)(c):
  - Who has a special need (based on health or previous experience of torture or trauma) in respect of which a medical specialist appointed by Immigration has *certified that the non-citizen cannot properly be cared for in a detention environment.*

The Department is required to appoint an authorised medical specialist even where a medical assessment has already been submitted by the applicant.

While a request to be considered for a special needs bridging visa 'would normally be initiated by the detainee or their representative, it should be initiated by the IDC or IRPC manager where s/he considers it appropriate'.<sup>191</sup> In other words it is within the power of the Manager to initiate a bridging visa application on behalf of one or more members of a family that he or she believes cannot be properly catered for in detention by reason of health or previous torture or trauma.

The Inquiry has received a great deal of evidence from the Department that suggests that State child welfare authorities and medical practitioners – in South Australia and Western Australia in particular – were of the view that many families could not be properly cared for in the detention environment. When the Department was asked why such families were not released on 'special needs' bridging visas, the initial response was that the bridging visa regulations prevented the Department from issuing visas when the record of declining mental health came from external doctors who were not appointed by the Department:

DR OZDOWSKI: Do I understand you correctly that under the current legislation when you see a family disintegrating as this one in the detention condition where everyone is getting psychologically and psychiatrically ill, you can't do anything?

DIMIA ASS SEC (VISAS): I am not saying that, Commissioner. What I am saying is that we have to work within the statutory framework. There are provisions but you can't just automatically, on the basis of a specific assessment from somebody who has not been appointed by Immigration, release that person.<sup>192</sup>

However, this response fails to recognise that the Department has a duty to proactively seek ways of ensuring that children are detained for the shortest appropriate period of time and that all decisions have children's best interests as a primary consideration. This means that, at the very least, the Department must initiate bridging visa health assessments as soon as there is any indication of health, torture or trauma issues, in order to maximise the possibility of obtaining a 'special needs' bridging visa and prevent further harm.

The Inquiry is also concerned that ACM or Departmental doctors who regularly examine children in immigration detention are not Department-approved doctors for the purposes of bridging visa assessments. It would seem logical to have the doctors who know the children and the detention environment best, make such recommendations. This would clearly speed up the process of any assessments – especially in the light of the remoteness of the facilities and the consequential financial and time barriers in sending out doctors for assessments. However, on the evidence before the Inquiry, ACM and local doctors are not authorised to make the 'special needs' assessments. The Department explains this situation on the basis that it 'assists in protecting the trust relationship between detention centre staff and detainees'.<sup>193</sup> Presumably it is the Department's view that the ACM doctor-

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patient relationship may be damaged in the event of an unfavourable assessment. However, in light of the importance of minimising the time in detention and advantages of having assessments performed by those doctors, the Inquiry does not regard this to be a compelling justification.

Two examples of the failure to release families from detention, in the face of a constant stream of documents describing serious mental health problems in children and their parents, were explored with the Department during the December 2002 hearings of the Inquiry. These cases are described in some detail in Case Study 1 and Case Study 2 at the end of Chapter 9 on Mental Health.

In summary, Case Study 1 in Chapter 9 describes an asylum-seeking family with one son who arrived in Australia in April 2001 when the child was 10-years-old. Recommendations for the family's release were made by FAYS in June 2002; a senior psychiatrist from the Women's and Children's Hospital in July 2002; the Head of the Department of Psychological Medicine at the Women's and Children's Hospital Adelaide in August 2002; DHS in August 2002; the ACM psychologist in October 2002; CAMHS in January 2003; and a psychiatrist from the Women's and Children's Hospital in February 2003 and again in May 2003. The Department Deputy Manager requested a medical assessment of the family's eligibility for a bridging visa in May 2002. The Inquiry did not receive any further evidence regarding the consideration of a bridging visa application. This family was still in detention in December 2003.

Case Study 2 in Chapter 9 describes the experience of a family consisting of a father, mother and three children, who were aged 2, 13 and 16 when they arrived in Australia on 31 December 2000. Recommendations for this family's release from detention were first made in a psychiatric report in February 2002. In May 2002, the ACM psychologist reported that the family could not be managed in the detention environment, and a CAMHS assessment reports that the family cannot be treated in the detention environment. In July 2002 a psychiatrist from the Women's and Children's Hospital Adelaide recommends their immediate removal from detention. The Department Deputy Manager requested that the family be medically assessed for eligibility for a bridging visa in May 2002. The family received notification of their ineligibility within three days, and the Inquiry did not receive a report of the medical assessment or any evidence of consideration of the family's eligibility for a bridging visa. The family were recognised to be refugees and released from detention on temporary protection visas in August 2003.

While the delayed release of families like these is partially due to the highly restrictive terms of the bridging visa regulations, the case studies also demonstrate a failure by the Department to actively pursue the relevant medical assessments throughout the period of detention.

The Department told the Inquiry that another reason why very few 'special needs' bridging visas were granted was because the Minister had to be satisfied that there were appropriate care arrangements in the community and that was sometimes difficult to find.<sup>194</sup> However, it is the Inquiry's view that in the event that a Department-

approved health expert has certified that the needs of children and their parents cannot be met in that environment, the Department has an active responsibility to seek out appropriate care arrangements, especially where children are involved.<sup>195</sup>

**(c) When are bridging visas granted to unaccompanied children?**

The Minister, as the guardian of unaccompanied children, and his or her delegates have a special duty to ensure that unaccompanied children are in detention for the shortest appropriate period of time. The best interests ground for a bridging visa would appear to be a highly appropriate mechanism for the release of unaccompanied children who are, by definition, under 18 and without family.

The Department's Migration Series Instructions appear to recognise this special duty of care. In relation to the best interests ground for a bridging visa, MSI 131 regarding Bridging Visa E 051 (issued in 1996), MSI 357 (issued in September 2002) and MSI 370 (issued in December 2002), all state that the Manager *must initiate contact* with the relevant State authority for assessment as soon as it is clear that an unaccompanied child is an unauthorised arrival asylum seeker whose application is not finally determined.

MSI 357 and 370 recognise that the Minister, as guardian of unaccompanied children, and his or her delegates have a special duty to ensure their best interests and that includes that they should 'periodically assess'<sup>196</sup> an unaccompanied child's eligibility to apply for a bridging visa. The MSIs also state that the Manager must assist in the assessment by providing information regarding the unaccompanied child's circumstances in immigration detention, including any difficulties that the child has had. The Manager must also ask the State authority whether an appropriate carer can be arranged on release. If the child is found to be an eligible non-citizen as a result of these efforts, the Manager must arrange for an application to be made for the bridging visa and a decision should be made within 28 days.<sup>197</sup>

Regarding the special needs ground for a bridging visa, where the Department Manager suspects that an unaccompanied child may have a special health, torture and trauma need, as many children who flee their home country are likely to have, 'immediate contact should be made with an Australian Government Medical Officer' to have the child assessed, even if the child has already been assessed by another doctor. The Department Manager should provide the doctor with the child's medical files to assist in the assessment. If a special need is diagnosed the doctor must assess whether the child can be properly cared for in detention. The Manager must also contact the child welfare authority to try and arrange appropriate care in the community. If the Department's doctor finds that the child should be released, the Manager should arrange for the child to make a bridging visa application.

Unfortunately the detailed instructions to Managers in MSI 357 and 370 were only created after almost all unaccompanied children were transferred out of facilities. This timing may explain the fact that only one unaccompanied child asylum seeker in detention was granted a bridging visa in the period 1999-2002.<sup>198</sup>

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The Department states that the reason for this delay lies in the Department's 'focus ... on ensuring unaccompanied minors were quickly processed while ensuring their needs were being appropriately met within a detention facility'.<sup>199</sup> However, the Inquiry is not convinced by this explanation. A focus on one type of visa processing does not preclude the consideration of another – this is especially the case in light of the fact that a bridging visa could result in faster release than a protection visa.

An examination of the efforts made by the Department prior to September 2002 indicates several other possible explanations for this outcome, including:

- failure of the guardian to initiate and pursue bridging visa applications
- failure of the State authorities to assess best interests
- failure to find alternative care arrangements
- inherent conflict of interest between the Minister (and his or her delegates) as guardian and the Minister as bridging visa decision-maker.

Each of these issues is addressed in turn.

### (i) **Department's duty to initiate bridging visa applications for unaccompanied children**

It is unrealistic to expect that an unaccompanied child would know the existence of, or how to apply for, a bridging visa. It would therefore be expected that the Minister, as the guardian of unaccompanied children, would ensure that steps are taken to assess whether unaccompanied children might qualify for release on a bridging visa at the earliest available opportunity. This is reinforced by the MSIs discussed above.

During the hearings the Department indicated that the adviser appointed to unaccompanied children for the purposes of a protection visa application (IAAAS adviser)<sup>200</sup> would be in a position to make a bridging visa application on behalf of the unaccompanied children.<sup>201</sup> However, the suggestion that an IAAAS provider should apply for a bridging visa for the unaccompanied child is unpersuasive for two reasons.

Firstly, the contract between the Department and the IAAAS providers does not include payment for the adviser to make applications for bridging visas.

Secondly, evidence from one of the IAAAS providers, the Refugee Advice and Casework Service (RACS), indicates that only the Department is in a position to initiate an assessment of the child by the State authority for the purposes of a bridging visa:

MS RYAN (RACS): Can I just add something on the IAAAS' contract, there is no, the contract doesn't provide for any representation as to bridging visas. So as a migration agent and a solicitor you can provide that advice to your client but there is certainly no capacity under that contract to be funded to represent someone to get a bridging visa.

MS LESNIE (INQUIRY SECRETARY): So is it fair to say that as an IAAAS adviser you are not paid to follow through on a bridging visa and that furthermore in order to succeed in a bridging visa it requires the Department of Immigration itself to follow through the process? So they have to ask the relevant State authorities to provide the information that would then make the application successful?

MS McADAM (RACS): Yes, as a migration adviser I mean RACS does get involved and initiates some bridging visa applications but all we can do is ask DIMIA to start the process because the PAMs [Procedure Advice Manuals] – the procedures DIMIA follows – [say] that they have to initiate [the NSW child welfare authority] to come in generally.<sup>202</sup>

Therefore, in relation to the best interests ground for a bridging visa this would mean that the Department Managers should seek an assessment from the relevant State welfare authority as soon as possible. The Inquiry did not receive any evidence that this did in fact occur.

The Department states that 'it will and does respond to requests for an assessment by State child welfare authorities,'<sup>203</sup> but has not provided evidence that it initiated 'best interests' bridging visa assessments in relation to unaccompanied children. During the hearings the Inquiry gave the Department the opportunity to directly address this issue:

INQUIRY COUNSEL: ...the Commission has neither seen nor heard any evidence or seen any documents that have been produced to it which suggests that DIMIA Managers or Deputy Managers acted in this way – that is, approaching State or welfare authorities to have a child assessed in relation to paragraph (d) of that sub-regulation – when they made protection visa applications in detention facilities?

MS GREAVES (DIMIA ASS SEC (DETENTION)): Yes, that is probably correct.<sup>204</sup>

The Department also stated that where an unaccompanied minor raised particular concerns it 'would have moved to raise that issue'.<sup>205</sup> However, the evidence before the Inquiry confirms that the Department had not made any positive moves to obtain 'best interests' assessments until January 2002. As discussed in section 6.4.2(a), the Deputy Manager of Woomera approached the South Australian authorities on 14 January 2002 with a view to releasing three unaccompanied children on bridging visas. These children had been detained since June and August 2001. It appears that this was the first occasion on which any such assessment was considered for these children. It followed their entering into a 'suicide pact'.

On 14 February 2002, the Department wrote to the Western Australian Department of Community Development (DCD) seeking an assessment of 'the current emotional status' of all unaccompanied children at Port Hedland and Curtin detention facilities and 'how this is impacted by being placed in a detention centre'. It also requested that 'if the situation cannot be managed with the detention centre... advice on where the individuals concerned might be placed'.<sup>206</sup> The assessment recommends that all young people be released. Many of those children had been in detention for more than six months.

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The Department has stated that DCD's recommendations of release were beyond the scope of the Migration Act and that is why the children were not released.<sup>207</sup> While the Inquiry acknowledges that the narrow terms of the bridging visa regulations make it difficult for children to obtain release on this basis, the evidence before the Inquiry suggests that the Department made no serious effort to investigate whether a visa might be available to these unaccompanied children.

As the delegated guardian for unaccompanied children, the Department Manager of the relevant detention centre has the responsibility to conscientiously seek further assessments of a child with a view to making a further bridging visa application after a period in detention. This is particularly the case if, for example, there were reports from doctors or child welfare authorities that the mental health of the child had deteriorated. The fact that only one bridging visa was granted to an unaccompanied minor despite the high number of recommendations that unaccompanied children be released, suggests that this did not occur in practice. The MSI issued in December 2002 is more explicit about the obligation to pursue bridging visas and may bring better results in the future.

In any event, the Department suggested that the absence of a certificate from the child welfare authority was not the only reason that children had not received bridging visas. For instance:

There is also a requirement that they give an undertaking in terms satisfactory to the Minister that they will make arrangements and depart 28 days after the expiry of their judicial review application in the Federal Court.<sup>208</sup>

The Department is correct that the bridging visa regulations require these additional elements to be taken into account. However, this response fails to recognise that the certification of best interests (or assessment of a special need by a Department-approved doctor) is a threshold element of becoming an 'eligible non-citizen'. Moreover, as the Minister is the guardian for unaccompanied children the undertaking should not pose a problem in those cases.

### (ii) State child welfare authority's duty to assess unaccompanied children for bridging visas

During the hearings the Inquiry explored an example where a bridging visa application for an unaccompanied child was made with a protection visa application and rejected the following day because the child was not an 'eligible non-citizen' under the Migration Act. The reason for this refusal was clear; there was no time for the child to be assessed by a child welfare authority. The Inquiry asked the Department how the State authorities could be expected to provide an assessment within 24 hours to satisfy the best interests ground for a bridging visa. The Department suggested that the State authorities did not need to wait for a request, but could initiate an assessment themselves:

INQUIRY COUNSEL: Well, it's hardly likely whether in the space of a day – because the bridging visa application was dealt with the next day – it's hardly likely that there would have been enough time for a State welfare authority to be contacted to be asked to certify whether or not the release from detention of that person was in the best interests of the non-citizen. That's right, isn't it?

DIMIA ASS SEC (VISAS): That might be the case, but the fact is that an application was attempted to be made that was invalid at that time.

INQUIRY COUNSEL: But it's invalid because there was no system in place whereby State authorities were contacted to even turn their mind to whether it was in the best interests of the child or not to remain in detention. So as a practical matter, bridging visas could never be granted in these circumstances.

DIMIA ASS SEC (VISAS): Well, they could never be granted until that certification was provided and also the Minister was satisfied in relation to arrangements that had been made between the non-citizen and an Australian citizen, Australian permanent resident, or eligible New Zealand citizen, for the care and welfare of the non-citizen, and those arrangements were in the best interests of the non-citizen.

INQUIRY COUNSEL: It could never be issued unless and until the Department finally decided, for whatever reason, that they might approach the State welfare bodies to even raise the issue with them. That's the situation, isn't it?

DIMIA ASS SEC (VISAS): There's nothing stopping the State welfare authorities exercising their own responsibilities and powers under State legislation.<sup>209</sup>

As delegates of the Minister, the State welfare authorities may have an obligation to initiate applications. However, this has not occurred in practice for three reasons.

Firstly, a delegation issued in September 2002 clarified that State authorities could only exercise their powers once the children were transferred to home-based detention or released from detention on a bridging visa or protection visa.<sup>210</sup> This accords with the view of the State authorities themselves<sup>211</sup> as well as that of the Department:

INQUIRY COUNSEL: ...as a practical matter I think the State authorities tended to regard their role as really limited to one that kicked in when the children were released from immigration detention. Is that accurate?

DIMIA DEPUTY SECRETARY: I think as a matter of practice, yes.<sup>212</sup>

Secondly, the Memorandum of Understanding between the Department and DHS relating to Child Protection Notifications and Child Welfare Issues pertaining to children in immigration detention in South Australia<sup>213</sup> seems to require that the States wait to be asked by the Department to make an assessment about a child's best interests and that the request be cleared by the Department's head office in Canberra:

The agencies agree that *on request from DIMIA*, DHS will provide advice and assessments on appropriate care arrangements for unaccompanied minors in immigration detention in South Australia. A request for such service will be made by the DIMIA Manager of the relevant immigration detention facility in South Australia, *after consultation with the DIMIA Director, Detention Operations*. [emphasis added]<sup>214</sup>

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Thirdly, if the State authorities are not aware of the existence of unaccompanied children in detention they will not be in a position to exercise that responsibility. It appears that there was no system in place to ensure that such notification occurred.<sup>215</sup> This is especially true of children in separation detention who have limited contact with the outside world (including State authorities and legal advisers):<sup>216</sup>

DIMIA ASS SEC (VISAS): There's nothing stopping the State welfare authorities exercising their own responsibilities and powers under State legislation.

INQUIRY COUNSEL: Well, that might be right as a legal matter, but it's an absurdity to suggest that these State bodies are just, off their own bat, perhaps in the absence of any information whatsoever, they're going to start issuing certificates about the best interests or otherwise of children...

DR OZDOWSKI: Can I ask you did you have another provision which would ensure that State authorities are automatically advised about arrival of every unaccompanied minor into the detention centre?

DIMIA ASS SEC (UNAUTH ARRIVALS): I thought I'd indicated earlier, Commissioner, that we were moving, over the course of last year, to try and put that in place. And I think in Western Australia it started early last year. But before that I don't think so.<sup>217</sup>

These factors taken together indicate that as a practical matter State authorities would only conduct an assessment when specifically requested to do so and these requests were not routinely made when a child arrived in a detention facility. It appears to the Inquiry that the Department waited until it had identified serious problems like hunger strikes or self-harming behaviour prior to contacting the authorities, which was often many months, if not years, after the child had been detained.

### (iii) Difficulties in finding alternative care arrangements for unaccompanied children

As the guardian, rather than decision maker on the bridging visa, the Minister must satisfy himself or herself that the best interests of unaccompanied children are properly looked after. Given the Inquiry's findings regarding the impact of the detention environment on children generally, this requires, at the very least, an investigation as to whether the children can be appropriately cared for in the community. Such an investigation would also maximise the possibility that the conditions of the bridging visa are met. As the Minister has delegated guardianship to State and Territory child welfare authorities, whose day-to-day work is the care of children in the community, there is a ready avenue to assist in finding adequate alternative care arrangements in the community.

The Department rightly points out that the provision of services for unaccompanied children is a complex task that may place considerable strain on State child protection authorities.<sup>218</sup> However, at least with respect to South Australia, it appears that there is a willingness to take on that responsibility and in such a context it is disappointing that more bridging visas have not been pursued.

From the evidence available to the Inquiry, it is unclear what happened in South Australia before 6 December 2001, when an agreement was signed. It is also unclear what happens in other States. However, the Memorandum of Understanding regarding child protection indicates that identification of alternative care arrangements does not pose a serious barrier to meeting the criteria for a bridging visa. South Australia has used its established child protection apparatus as well as the existing support systems for unaccompanied humanitarian minors to facilitate the care of unaccompanied children in alternative detention. Moreover, under the agreement it has accepted an obligation to 'ensure appropriate arrangements are in place for the care and accommodation' of unaccompanied children in the event that 'DIMIA makes a determination that it would be in the best interests of the unaccompanied minor to be released from immigration detention'.<sup>219</sup>

#### (iv) Conflict of interest issues

Some submissions to the Inquiry argue that there is a conflict of interest in the process of applying for bridging visas for unaccompanied children. On the one hand, the Department Manager as delegated guardian must take steps to ensure that an unaccompanied child can qualify as an 'eligible non-citizen' for the purposes of applying for a bridging visa. On the other hand, this requires the Manager to certify that the detention facility that he or she is managing cannot adequately care for the child.<sup>220</sup>

The Federal Court of Australia has recognised and accepted that there may be a conflict between the role of the Minister as guardian of unaccompanied children under the IGOA Act and his or her role in administering the Migration Act. The Court stated:

For example, the Minister may have a policy of detaining all asylum seekers (or all persons falling within a particular class of asylum seekers) pending final determination of their claims to be recognised as refugees. Yet a person acting independently of the Minister might see grounds, in the particular case, for the grant of a bridging visa permitting release of the child from detention during that period.<sup>221</sup>

The Department asserts that the Deputy Managers at the centres do not have any role in determining a bridging visa application and therefore there is no conflict (although conceded that this may have happened in the past).<sup>222</sup> MSI 357 and MSI 370 state that, in order to protect against conflict of interest, the Department Managers and Deputy Managers should not decide whether an unaccompanied child is an eligible non-citizen, nor whether they should be granted a bridging visa. Rather, another officer in the Detention Operations Section of the Department in Canberra should be asked to make the decision. However, it does appear that the obligation is on the Manager to initiate the process – for instance by requesting the State authority to certify as to best interests.

The Department argues that the child's migration agent can fulfil the role of pursuing refugee claims; however, they are not required (or funded under the IAAAS contract)<sup>223</sup> to pursue bridging visa applications. This leaves unaccompanied

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children in the invidious position of either seeking assistance from their 'gaoler' to obtain their quick release or say nothing at all.

The importance of the independence of the guardian is discussed further in Chapter 14 on Unaccompanied Children.

### 6.7.5 How quickly are protection visas given to children?

In its opening remarks during the hearing, the Department's Deputy Secretary spoke about the importance of speedy processing of applications in order to reduce the length of time children spend in detention:

A number of submissions have raised concerns about the length of time people spend in detention. While talking of processing, people often include not only the primary process for which the Department is responsible but also merits and judicial review. These processes are outside the mandate and therefore the control of the Department. Nevertheless the speed of primary processing is clearly the key issue. The faster the detainees can have their applications processed the sooner they can be given a decision about their situation. Either they will be granted a visa and released or they will be refused. Either way their situation will be clear.

To this end a very significant focus of the Department is to have applications for protection visas processed as quickly as possible, consistent with the need to maintain the integrity of the process and of the individual decisions. In 2000 in response to the sustained trend in unauthorised boat arrivals the Department established a boats taskforce to address the need for streamlined processing and increased numbers of protection visa decision makers. Significant numbers of staff were taken off line and trained to make protection visa decisions. The Department introduced front end loading of health and character checks to reduce processing times.

By mid 2001 the time taken for the Department to process protection visa applications for 80 per cent of applicants had decreased from an average of seven and a half months to twelve and a half weeks. This improvement in processing visas was achieved in the twelve month period when around 4400 temporary protection visas were granted. By the end of 2001 the significant reduction in processing times meant there was greater throughput in detention facilities. Many detainees were in facilities for a short period and then released into the community on a visa.<sup>224</sup>

As Chapter 7 on Refugee Status Determination describes, the Department's efforts in streamlining the processing have led to improvements generally but there is no additional priority given to the applications of children. Furthermore the Department has not been entirely successful in meeting its own targets. For example, in 2001-2002 only 47 per cent of cases were completed within the target 42 days.

The Inquiry is aware of several families who have waited several months for a primary decision, and many more months for a merits review. They may then wait many more months or years for judicial review. Furthermore, many children and families have been detained in separation detention for substantial periods, prior to making the protection visa application.<sup>225</sup>

Case Study 2 at the end of this chapter demonstrates the substantial variance in the length of time that children may be in detention prior to receiving a primary decision. The examples also demonstrate that detention may be prolonged because children and their parents remain detained while either they, or the Minister, exercise the right to appeal.

The Department states that appeal processes – both the merits review and courts – are beyond the scope of its influence and therefore it can do nothing about the length of detention if detainees choose to pursue their right to review. While it is true that the Department may not have any power regarding the time taken to pursue appeals, it is important to remember that pursuing appeals is an exercise of the fundamental right of due process. The problem is not that children and their parents pursue those rights, but that they are detained during this pursuit. A senior barrister giving evidence to the Inquiry expressed the following view:

Now one of the Minister's defences of the length of detention is that, well, these people challenge the system and they keep challenging all the way through to the Courts. It is really hard to understand why an exercise of your lawful rights should justify substantial times in detention.<sup>226</sup>

It must also be noted that there have been several examples where detainees have won their appeal in the Federal Courts but the Minister has appealed that decision.<sup>227</sup> The Minister has also appealed successful outcomes in the Refugee Review Tribunal. In other words, the Minister has also exercised his right to appeal and therefore has knowingly extended the length of detention for some detainees.

The Commonwealth as a whole has a responsibility to ensure that detention is for the shortest appropriate period and therefore to the extent that it is known that due process takes time, it should make provisions for release during that period.

### **6.7.6 How quickly are children removed from Australia?**

The Department repeatedly states the length of detention is in the hands of the detainee him or herself as they can choose to leave at any time:

For many detainees including parents the choice to bring their detention and that of their children to an end is in their hands. The further detainees are through the review and appeal process the more their detention and that of their children is extended by their own decisions. Agreeing to return to their home country and co-operating with removal arrangements will bring their detention to an end.<sup>228</sup>

The Department states that it does not remove persons who have a current claim whether at the primary, merits review or judicial review stages, in order to ensure that it meets its obligation to protect from refoulement.<sup>229</sup> Following the same logic, it is inappropriate to place the 'blame' of continuing detention on those asylum seekers who believe they need protection from non-refoulement and pursue all avenues available to them to prove that claim. The problem is rather that the Migration Act requires that children and their parents are detained throughout the process that determines that right. Nevertheless, the Department is correct to say that once

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an asylum seeker has exhausted all avenues of due process the period of detention may be reduced by voluntarily leaving Australia.

Even when a person does want to return, the Department may face difficulties in facilitating that departure. This situation was the subject of a recent Federal Court case which found that continuing detention was not justified when there was no reasonable prospect of being removed to Palestine.<sup>230</sup> Several persons have been released from detention as a result of this decision.

Further, the legislative provisions that seek to prevent 'forum shopping' by asylum seekers, mean that some asylum seekers who are found to be refugees will not be granted a protection visa in Australia when they can seek the protection of a country other than their own. The consequence of this policy is that sometimes detainees must seek visas to countries that are not their country of nationality in order to leave Australia. It has happened that those visas are denied and therefore removal is not practicable.

Practical difficulties in effecting return have also occurred with respect to Afghanistan, Iraq and Iran, amongst others. For instance, the UNHCR requested that all returns to Afghanistan be halted over winter 2002-2003. However, the Department states that procedures are being put in place to facilitate smoother return procedures to Afghanistan and Iran, including the offer of financial assistance and the establishment of a memorandum of understanding with the Iranian Government.<sup>231</sup>

Another problem arises regarding some persons who have been in detention so long that their mental health has declined to the extent that they are 'unfit to travel'. This was one of the cases explored in the Inquiry's public hearings with the Department. However, the Department did not consider this factor to be a barrier to removal:

INQUIRY COUNSEL: Second-last paragraph [of a facsimile from the DIMIA Woomera Manager]:

*I am inclined to think that this family is effectively 'unfit to travel' and that removal from Australia, even with their cooperation, would be very difficult to effect.*

Now, this is from the Department Manager herself, right?

DIMIA ASS SEC (UNAUTH ARRIVALS): That is what is stated here, yes.

INQUIRY COUNSEL: So [removal] is really not an option, is it?

DIMIA ASS SEC (UNAUTH ARRIVALS): No, I disagree. I think, notwithstanding the fact that it may be difficult to effect, it is still our obligation under the Act, as I have mentioned, to take whatever steps is possible to make that be an outcome.

Finally, it is important to note that while parents may be in a position to 'bring their detention to an end' by choosing to return to their country of origin during the refugee determination process, this is not a choice that an unaccompanied child

can be expected to make. The Minister, as the person responsible for immigration policy generally, as well as detention within that policy, is likely to encourage return. But the Minister as guardian may be required to make a different decision. In the Inquiry's view, the fact that the Minister is the child's guardian for such a decision raises serious conflict of interest issues, which may result in the best interests of an unaccompanied child not being protected.

Although the Department denies that there is any conflict of interest, it has also informed the Inquiry that no unaccompanied child has been returned from detention to their country of origin.<sup>232</sup>

### **6.7.7 What impact do alternative places of detention have on the time children are detained?**

The Department has argued that increased use of alternative places of detention has reduced the time in detention. As discussed above, while alternative places of detention may substantially improve conditions of detention it does not amount to release from detention.

Nevertheless, transfer of unaccompanied children to foster homes will mitigate a breach of the 'shortest appropriate period' principle if it occurs shortly after arrival in Australia. Transfer to the Woomera housing project is of lesser effect due to the greater restrictions associated with that initiative.

### **6.7.8 What is the impact of the 'Pacific Solution' on the 'shortest appropriate period'?**

As part of the 'Pacific Solution' package of legislation, the Government introduced a measure that denied all people who were intercepted in Australian waters or who arrived at Christmas Island, the Ashmore and Cartier Islands or the Cocos (Keeling) Islands (excised offshore persons) from applying for a protection visa as part of their asylum claim. This has a serious impact on the length of time for which the children in Nauru, Papua New Guinea or Christmas Island may be detained.

As described above, children who arrive on the Australian mainland without a visa, and are detained in Australian detention facilities, will be released from detention on a temporary protection visa once found to be refugees.<sup>233</sup> However, children who are excised offshore persons and are detained on Christmas Island or transferred to detention facilities in Nauru or Papua New Guinea, have no entitlement to a visa even once they are found to be refugees. In other words, even after the processing has finished and the children have been recognised as refugees, there is no automatic trigger for release from detention. They have no rights to a bridging visa, nor to transfer to an alternative place of detention.<sup>234</sup> The children must therefore wait in detention until a country offers them resettlement. While it can be argued that asylum-seeking children in camps in Pakistan, for example, also face a similar

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hiatus after they have been found to be refugees, the difference is that the waiting period does not occur in a detention environment.

The Minister *may* grant children in Nauru or Papua New Guinea a visa, if he or she 'is satisfied that there are compelling reasons for giving special consideration to granting...a temporary visa'.<sup>235</sup> However, if the Minister decides not to grant a visa, it appears that the children may be doubly disadvantaged because they are not only excluded from obtaining an Australian protection visa, but the fact that they have entered Australian territory and have been processed by Australian officials may make it more difficult to qualify for resettlement in countries other than Australia. This would prolong the time in detention even further. UNHCR testified that this is particularly problematic for children detained on Nauru, who have families already in Australia:

INQUIRY SECRETARY: ...Did I hear you correctly that if Australia denied a visa to the separated families, no other country would take them?

MR GABAUDAN (UNHCR): Well, I think so because when we present cases, we have to explain why we go through a certain country, so we look at association with this country first. Family is the first one and previous involvement of the person with the country, whether as a student, etcetera, would be the second reason. So countries will always give priorities in their re-settlement intake to people who have had this association, then they would look at other cases, but I would see it very difficult for any other country to say: 'why shouldn't I take a woman with children to another place, for example, when the husband is in Australia?' They would not see this as a logical investment of their resources...<sup>236</sup>

The Inquiry has some concern that the distinction between the availability of visas to secure release of children who are detained in Australia's mainland detention facilities and those detained in Nauru and Papua New Guinea may be discriminatory and therefore contrary to article 2 of the CRC. Where the only difference between these children is the place of arrival, it is troubling that children who make it to Australia's mainland are entitled to a visa and release from detention once they are found to be refugees, while the children who are intercepted in Australian waters, or who arrive at an 'excised offshore place', have no automatic visa entitlement and must remain in detention facilities in Nauru and Papua New Guinea until they can be resettled.

However, the Inquiry's most serious concern is the impact that the legislation has on the length of time for which children are detained. Children transferred by Australian authorities to Nauru and Papua New Guinea must wait in detention, after being found to be a refugee, to see if Australia or another country decides to grant a visa. This heightens the risk that children will be detained in Nauru or Papua New Guinea for even longer periods of time than children spend in detention facilities on mainland Australia. This seriously increases the prospect of a breach of the principle that children be detained for the shortest appropriate period of time in article 37(b) of the CRC.

### 6.7.9 Findings regarding detention for the 'shortest appropriate period of time'

The Inquiry finds that Australia's detention laws and the application of those laws by the Department fail to ensure that children who arrive in Australia without a visa are detained for the shortest appropriate period of time. This is the result of a combination of factors:

- The Migration Act requires detention of all unlawful non-citizens until they are granted a visa or removed from Australia. There is no certainty as to when this will occur, nor a maximum time limit.
- There are only two visas available to asylum-seeking children who arrive in Australia without a visa: a protection visa or a bridging visa.
- Protection visas can take weeks, months or years to be fully processed.
- Bridging visa regulations are overly restrictive.
- The Department has failed to actively pursue bridging visas within the regulations.
- Removal is not always easy to facilitate.

The Inquiry is of the view that, ideally, the primary processing, merits review and court appeal processes regarding the grant of protection visas to children in detention should all occur more quickly. However, the real problem is that children must remain in detention while those processes are going on rather than the speed at which it is occurring.

The only mechanism to bring about release of children during processing is by granting a bridging visa. However, bridging visa regulations applying to unauthorised arrivals are narrowly drawn and therefore operate as a significant barrier to speedy release from detention, in particular regarding entire families. Nevertheless, the Department has the obligation to promptly and actively pursue the opportunities that are available as soon as possible.

Many unaccompanied children spent many months, and some more than a year, in detention in centres such as Woomera, Curtin and Port Hedland prior to being released. This was avoidable even within the limited framework within which the Department was operating. The failure to pursue 'best interests' bridging visas despite overwhelming evidence that the detention environment was causing serious harm to the psychological well-being of unaccompanied children suggests that the best interests of these children was not a primary consideration for the Department or the Minister as their legal guardian. It also amounts to a breach of the principle that detention be for the shortest appropriate period of time. The new MSIs issued in September and December 2002 indicate that a more active approach to bridging visas for unaccompanied children will be taken in future.

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Those families that have failed in their claim for asylum are subject to removal from Australia. The Inquiry acknowledges that the process of arranging for removal can take some time, even when the family does want to leave Australia. Once again, the problem is that the legislation requires that unauthorised arrival children and their parents remain in detention while these processes are taking place, irrespective of the individual circumstances of the family.

Thus while the Government has frequently expressed concern that unlawful non-citizens be available for processing and removal, it has failed to establish mechanisms that require routine assessment as to whether detention is necessary to achieve this goal in the case of individual children and their families. Under Australia's laws it is irrelevant whether a child does or does not pose a danger to the community or will or will not disappear while this process is taking place. The result is a system that has failed to ensure that children are detained for the shortest appropriate period of time.

Finally, while the Inquiry has no primary evidence as to the length of time for which children are detained in Nauru or Papua New Guinea, the Inquiry is concerned that the result of the 'Pacific Solution' legislation is that children who have been transferred to those countries by Australia may be detained well after being recognised as refugees. This is likely to result in even longer periods of detention than those experienced by children in Australia's mainland facilities. This would result in a breach of article 37(b) by Australia, in that prolonged detention is a foreseeable outcome that arises as a direct consequence of the transfer process.

## 6.8 Can courts provide effective review of the legality of detention?

### 6.8.1 What does it mean to 'challenge the legality of detention'?

Judicial review of all forms of detention is a fundamental element in the protection of children from an inappropriate exercise of power. The right to prompt access to courts to challenge the legality of detention is set out in article 37(d) of the CRC and mirrors article 9(4) of the ICCPR which has been considered in some detail by the UN Human Rights Committee. The CRC also provides children with the right to 'prompt access to legal and other appropriate assistance' for the purposes of such review.<sup>237</sup>

The right to prompt review of the legality of detention is not limited to a review of 'lawfulness' (whether the detention is according to law) but also of 'arbitrariness' (including whether detention is a necessary and proportionate means of achieving a legitimate aim).<sup>238</sup> The review must be 'real' in that it provides effective protection against unjustified or inappropriate deprivation of liberty in the particular circumstances. In *A v Australia*, the Human Rights Committee (the UN expert body for the ICCPR) stated that:

[C]ourt review of the lawfulness of detention under article 9(4), which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute

differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release 'if the detention is not lawful', article 9, paragraph 4, required that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant.<sup>239</sup>

This principle has been reaffirmed by the Human Rights Committee in three subsequent matters involving Australia.<sup>240</sup> The Human Rights Committee has thus made it clear that the purpose of independent review is to provide access to an independent body that can assess whether, in an individual case, detention is necessary or appropriate both at the outset and as time goes on. This is especially important when persons in detention are not told the exact period for which they will be detained.

However, the Government disagrees with the Human Rights Committee's interpretation of the ICCPR saying that since the detention is lawful under Australian law it cannot be arbitrary:

The Government is of the view that the obligation on States imposed by Article 9.4 is to provide for lawfulness of detention under Australian domestic law. There is nothing apparent in the terms of the [ICCPR] that established that 'lawful' was intended to mean 'lawful at international law' or 'non-arbitrary'.<sup>241</sup>

The Inquiry strongly disagrees with this interpretation of international law. If the Government's view were correct there would be no protection for individuals against a country that created domestically constitutional laws resulting in arbitrary detention.

For example, a country might enact legislation providing that 'all blue-eyed children must be detained' *and* permit children to legally challenge whether they did in fact have blue eyes. Applying the Government's argument, since the children could challenge whether or not they had blue eyes under domestic law, that detention would comply with article 9(4) of the ICCPR. International human rights law clearly did not intend to permit such a result and it is for this reason that the UN Human Rights Committee, the UN Working Group on Arbitrary Detention and the UN High Commissioner for Human Rights Special Rapporteur, amongst others, are all of the view that the right to review of the legality of detention must include review of the arbitrariness of detention under international law.

### **6.8.2 How can a child obtain legal review of detention under Australian law?**

In its submission to the Inquiry the Department states that:

Under Australian law, immigration detainees have the capacity to take proceedings before a court to determine the legality of their detention. This means that children in detention can legally challenge their detention in a court of law, and have the same rights to challenge as all other detainees.<sup>242</sup>

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The Inquiry asked many of the witnesses with legal qualifications who appeared at the hearings of the Inquiry, to explain the meaning of the Department's statement in practice. All responded that, while there may be some ability to challenge detention in theory, such legal challenge is ineffective to protect the rights of children under the CRC. For example, a representative from the International Commission of Jurists (ICJ) said:

[I]t is a view of the ICJ that the legislation which has been in place now for almost if not ten years, effectively, provides no effective means of judicial review of the detention other than to determine whether or not a person is a designated person who would then be eligible for detention. Apart from that very limited and narrow area, it is the view of the ICJ that there is no effective ability to seek judicial review of the detention and as a consequence the detention process in Australia is arbitrary and to that extent the ICJ would adopt the views of the human rights committee in [*A v Australia*] with regard to the detention system and the eligibility for judicial review.<sup>243</sup>

There are essentially two ways in which the lawfulness of detention can be challenged in Australia. One is on the basis that the detention is not lawful within the terms of the Migration Act. The Migration Act is very explicit in preventing 'release, *even by a court*, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa' (emphasis added).<sup>244</sup> However, this does not prevent that person from being released if he or she is not in fact an unlawful non-citizen or has already been granted a visa and therefore should be released.

The second basis for challenging the legality of detention is that it does not come within the constitutional limitations of the power to detain under the Migration Act. The High Court in *Lim v The Minister for Immigration* stated that mandatory detention laws were valid:

if the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered.<sup>245</sup>

If the detention is beyond those purposes it will be punitive rather than administrative in nature and therefore unconstitutional. This is because under the Constitution a person can only be legally imprisoned for a punitive purpose by a court – not the executive arm of government.

However, neither of these avenues of appeal is the type envisaged by the CRC which anticipates something like the bail procedures applicable in Australian criminal jurisdictions. In Australian criminal law and procedure, there are strict and detailed State laws which generally impose a presumption against detaining a child suspected of a crime while their case is being determined. For example, in New South Wales, if a child is suspected of a crime he or she will generally be issued with a summons to appear before a court, rather than be arrested and detained.<sup>246</sup> However, if a child is arrested and detained, the child must appear 'as soon as practicable' before a court in order to consider the need for continuing detention.<sup>247</sup>

In contrast, a child who has committed no crime at all, but who arrives in Australia without a visa, essentially needs to mount a constitutional challenge in the High Court before the legality of his or her detention can be reviewed. This can take months, if not years.

The Department has recommended that the Inquiry refrain from making comparisons with the criminal justice system on the grounds that immigration detention, unlike criminal detention, involves considerations of family unity such that the best interests of child may mean that children may need to be detained.<sup>248</sup> The Inquiry is very concerned that the Department would use the principle of family unity to justify the proposition that children who have committed no crime should enjoy any lesser right to independent and individual review of the need to detain than those who have committed a crime. As discussed earlier in this chapter (see section 6.5.1), it is a misinterpretation of the CRC to use the principle of family unity to 'trump' the principles embedded in article 37 – including the right to prompt review of detention. Moreover, this argument does not explain why unaccompanied children do not enjoy the right to prompt independent review of detention.

The Inquiry therefore rejects the Department's assertion that Australia is complying with the international law requirement for review of the legality of detention. That assertion is based on a misinterpretation of those obligations. Judicial review should be 'real and not merely formal'<sup>249</sup> and Australian law fails to provide a routine opportunity to children in immigration detention to challenge the arbitrariness (as a matter of international law) of their detention. For example, they are not in a position to attempt to satisfy a court that they will make themselves available for processing and removal (should their protection visa applications be unsuccessful).

This view is echoed by the UN Human Rights Committee in *Baban v Australia*, which found that the judicial review available to a father and son in Villawood detention centre did not amount to the review required by the ICCPR:

The Committee ... notes that in the present case the author was unable to challenge his continued detention in court. Judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant. Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.<sup>250</sup>

The UN's Special Representative who considered Australian mandatory detention laws during his visit in May 2002 made similar observations:

While the challenge before the court is in theory possible – persons in immigration detention do have the ability to challenge the lawfulness of their detention under domestic law – the simple fact that the Act stipulates that all unlawful non-citizens must be detained, restricts the courts from reviewing the decision to detain.<sup>251</sup>

## A last resort?

The Inquiry notes that the UN Human Rights Committee in *Bakhtiyari v Australia*<sup>252</sup> states that a court's ability to order a child's release if considered in his or her best interests constitutes adequate reviewability for the purposes of article 9(4) of the ICCPR, which is in similar terms to article 37(d). In the circumstances of that case, the release of the particular children on an interim basis by the Family Court was considered by the Committee to be sufficient to avoid a continuing breach of the ICCPR. It does not follow, however, that the reviewability of decisions under Australian law generally complies with article 37(d), as the statements above demonstrate.

The Department cites the recent Federal Court case of *Al Masri* and the Family Court case in *B & B v Minister for Immigration and Multicultural and Indigenous Affairs*,<sup>253</sup> both of which have found detention to be unlawful in certain circumstances, to demonstrate that legal review of detention is 'real'. Other cases have also been brought to the Family Court as discussed in section 6.9.

First, however, it should be noted that in the case of *Al Masri*, the complainant had been in detention for 11 months prior to making the complaint, and in the case of *B & B* the children had been in detention for 19 months prior to making the complaint. Thus while it is true that detainees ultimately have access to courts, that access is far from prompt and the process of review is long and contentious. This is in stark contrast to the prompt and routine bail procedures available to children who are accused of a crime, which is representative of what is intended by article 37(d) of the CRC.

Second, the Commonwealth does not accept the result in either of those cases. As at November 2003 the High Court of Australia adjourned its decision in the appeal regarding *B & B*.<sup>254</sup> In the event that the High Court allows the Minister's appeal and finds that the Family Court of Australia lacks the jurisdiction to order the release of children from detention, the Department's argument will no longer apply.

However, even in the event that the High Court finds that the Family Court has jurisdiction to make orders for the release of children in the manner contemplated in *B & B*, it does not follow that this will enable prompt and ongoing review of the need to detain. The position will need to be carefully considered when the decision of the High Court is known, to determine whether or not the review available is adequate to satisfy the CRC.

Furthermore, it is important to note that the cases seem to suggest that the Family Court would not, in any case, have the jurisdiction to order the release of a child's parents. Thus the Court will be placed in the invidious position of having to choose between the ongoing detention of children and separation of children from their parents. This is clearly not what is intended by the 'best interests' principle in article 3(1) of the CRC, as discussed in section 6.5.

### 6.8.3 Findings regarding reviewability of detention

While recent cases in the Federal Court of Australia and the Family Court of Australia demonstrate the possibility of judicial review of the legality of detention, they also demonstrate the exceptional nature of such review and highlight the absence of prompt and routine access to courts to conduct such a process. Thus while children in detention can challenge the legality of detention in theory, the Inquiry finds that throughout the period examined by the Inquiry, Australian law failed to provide effective avenues for the prompt and routine review of the need to detain in the first instance, and whether continuing detention is appropriate.

The Inquiry notes that the outcome in the case of *B & B* before the High Court may impact upon the question of whether or not there is a sufficient right for a child to challenge the legality of their detention in accordance with article 37(d). The Inquiry, however, remains concerned that any review be prompt and that it fully consider whether or not the ongoing detention of an individual child is necessary. The Inquiry further notes that unless the Family Court has the power to promptly release children with their parents, then Australian laws will still contravene the 'best interests' principle, as discussed in section 6.5.

The Inquiry observes that the absence of effective judicial review of detention for children arriving in Australia without a visa throughout the period of the Inquiry is in stark contrast to the legal protections that are available to children who are accused of committing crimes.

## 6.9 Is the detention of children 'unlawful' and 'arbitrary'?

Article 37(b) of the CRC provides that 'no child shall be deprived of his or her liberty unlawfully or arbitrarily'. This provision mirrors article 9(1) of the ICCPR.<sup>255</sup> Therefore, the jurisprudence of the UN Human Rights Committee is highly influential, if not authoritative, in relation to Australia's legal obligations.<sup>256</sup>

All of the factors discussed in the previous sections of this chapter are relevant to a determination as to whether the detention of unauthorised arrival children under the Migration Act is arbitrary and unlawful under international law.

### 6.9.1 Is mandatory detention of children 'unlawful'?

According to the UN Human Rights Committee, detention will be 'unlawful' unless it is in accordance with established procedures in law.<sup>257</sup>

The initial detention of children who arrive in Australia without a visa is not unlawful because it is prescribed in the Migration Act. However, as previously mentioned, the High Court of Australia has found that mandatory detention under the Migration Act is only lawful for as long as the detention is 'reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered'.<sup>258</sup> If the immigration detention goes beyond those purposes it will be considered punitive and therefore unlawful under Australia's Constitution.

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In the *Al Masri* case, the Full Court of the Federal Court of Australia found that otherwise lawful detention may become unlawful if removal is not reasonably practicable in the reasonably foreseeable future.<sup>259</sup>

Thus, depending on the circumstances of the case, detention may be unlawful if it is not reasonably necessary for removal, punitive in nature, or if the removal itself is not reasonably practicable.

Whether or not the length and conditions of detention are factors that might affect the lawfulness of immigration detention in Australian law is being considered by the High Court of Australia in *SHDB v Godwin* (A253/2003), *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (A254/2003) and *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (A255/2003). The Commission made submissions in those cases. The High Court of Australia reserved its decision in these matters on 13 November 2003.

The High Court also heard a challenge to the constitutionality of Australia's immigration detention laws, as they applied to children, on 3 February 2004. That decision was also reserved. The Commission's submissions in that case can be found on its web site.<sup>260</sup>

### 6.9.2 Is mandatory detention of children 'arbitrary'?

Detention according to domestic laws (i.e. 'lawful' detention) might still be 'arbitrary' under international law.

International law states that detention will be arbitrary because of elements of injustice, inappropriateness, unreasonableness or indeterminacy or if it is 'not necessary in all the circumstances of the case' or not a proportionate means to achieving a legitimate aim.<sup>261</sup> Furthermore, even if the initial detention is not arbitrary, a subsequent period of detention may become arbitrary, for example, because of the length of the detention or because the detention ceases to be a proportionate response.<sup>262</sup>

The Department appears to acknowledge this definition of arbitrariness:

The Australian government recognises that an essential adjunct to its justification of detention as a reasonable and necessary measure is that detention must be lawful, just, reviewable and predictable and meet Australia's obligations with respect to conditions of detention.<sup>263</sup>

However, there appears to be a substantial divergence in the interpretation of this principle, so far as it concerns unauthorised arrivals. Therefore it is relevant to examine what the justification is for detention of unauthorised arrivals in Australian law; whether those reasons are valid under international law; and whether detention is a necessary and proportionate response to achieving any legitimate goals, taking into account the circumstances of the individual case.

According to UNHCR, which has applied the jurisprudence of the ICCPR and the CRC to the Refugee Convention, detention of child asylum seekers will never be reasonable, necessary, proportionate or appropriate.

The UNHCR Detention Guidelines state unequivocally that 'minors who are asylum seekers should *not* be detained'.<sup>264</sup> This is reiterated in the UNHCR *Refugee Children: Guidelines on Protection and Care*, and the UNHCR UAM Guidelines, which go one step further by stating the principle of not detaining asylum seeker children 'is particularly important in the case of unaccompanied children'.<sup>265</sup> This accords with the basic principle in the CRC that detention be a matter of last resort.

However, UNHCR does set out some grounds in which detention of adults who arrive without documentation may be 'exceptionally resorted to':

The position of asylum seekers differs fundamentally from that of ordinary immigrants in that they may not be in a position to comply with the legal formalities for entry. This element, as well as the fact that asylum seekers have often had traumatic experiences, should be taken into account. In UNHCR's view, detention of asylum seekers may be *exceptionally resorted to*, if prescribed by national law, for the following reasons, which are set out in Excom Conclusion No.44:

- (a) to verify identity;
- (b) to determine the elements on which the claim to refugee status or asylum is based;
- (c) to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents, or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or
- (d) to protect national security or public order. [emphasis added]<sup>266</sup>

The Government's reasons for detention mirror the UNHCR criteria in many aspects although it makes no distinction between children and adults. The Commonwealth Executive has said the reasons for mandatory detention of unauthorised arrivals include to:

- determine the identity of persons
- conduct health checks
- conduct security checks
- ensure availability for processing claims
- ensure availability for removal from Australia in the event of an unsuccessful claim
- prevent persons from entering the community until their claims have been assessed
- maintain the integrity of the universal visa system.<sup>267</sup>

Each of these reasons is addressed in turn.

### (a) Detention of children to conduct identity, health and security checks

It is the Inquiry's view that while detention for the purposes of conducting identity, health and security checks are, *prima facie*, legitimate reasons for detention under international law, the failure to provide individual assessment mechanisms to determine whether detention is necessary to achieve those purposes is highly problematic. UNHCR is of a similar view:

Australia's policy of mandatory detention does not fall within the exceptions provided for in Excom Conclusion No.44 because it fails to take account whether:

- a) the asylum seeker's identity is already established;
- b) the asylum seeker possessed valid documents, or if without documents, had no intention to mislead, or has cooperated with the authorities;
- c) the elements on which the claim for refugee status is based have already been determined; and
- d) there is no evidence that the asylum seeker has criminal antecedents and/or affiliations which are likely to pose a risk to national security or public order.<sup>268</sup>

In other words, in the view of UNHCR, it is insufficient to merely mirror the criteria set out in Excom Conclusion No.44, there has to be a case-by-case assessment as to whether an asylum seeker arriving without papers must be detained to satisfy that criteria. This view was also expressed by Amnesty International during the public hearings:

The problem with the Australian system is that it is not made on an individual basis, they have not shown why a particular individual needs to be detained and this is with regards to this Inquiry why it is so important. Why would a five year old child or a four year old child or a seven year old child or an eleven year old child pose a health risk or a risk of absconding or whatever...<sup>269</sup>

### (b) Detention of children to ensure availability for processing and removal

Similar logic can be applied to the Department's goal of ensuring availability for processing claims, and for removal from Australia in the event of an unsuccessful claim. They are, *prima facie*, legitimate goals but detention for those purposes should only occur if, in the individual case, there appears to be a real risk that they will not otherwise be available for those purposes. In other words, there must be no other way to achieve those goals, taking into account the specific circumstances of each unaccompanied child or family.

The Department links detention to ensure availability for processing and removal (as well as detention in order to protect the integrity of the visa system – see section (c) below) with the concept of sovereignty:

...consistent with the fundamental legal principle, accepted in Australian and international law, that as a matter of national sovereignty, the State determines which non-citizens are either admitted or permitted to remain and the conditions under which they may be removed.<sup>270</sup>

There is no doubt that Australia is entitled to determine who may enter and remain in Australia. However, the relevant question is whether detention is necessary to achieve that goal. The Department has argued that 'absconding will occur unless unauthorised arrivals are mandatorily detained'.

However, despite repeated requests, the Inquiry has been unable to obtain from the Department any evidence that children and families, as opposed to adults generally, are a special flight risk. The Department has acknowledged, however, that the likelihood of absconding is lower at the beginning of the refugee status determination process than at the end.<sup>271</sup>

In any event, even if there were evidence that unauthorised children and families were generally a flight risk, it would be inappropriate and disproportionate to detain all families on that basis. Instead, each family should be assessed as to whether they, in their particular circumstances, are a flight risk.

In the absence of any individual assessment of unauthorised arrivals and any evidence that all children and families will always abscond, the Inquiry is not satisfied that detention of all unauthorised arrival children and families is necessary to ensure availability for processing and removal. As Amnesty International states:

We don't object to detention absolutely but rather the onus is on the State to justify or demonstrate the necessity for that detention.<sup>272</sup>

A comparison with the criminal justice system is useful in this regard. While it is clear that all children who are arrested and accused of committing a crime are a flight risk in theory, not all children will be a flight risk in the particular circumstances of the case. It is for this reason that courts conduct a prompt assessment of whether the child may be released on bail pending a court hearing. The Migration Act does not permit any such opportunity for unauthorised arrival children and their parents.

The Department has argued that the removal process provides some access to individual assessment:

Australia processes people for removal on a case-by-case basis and achieves removals in a wide variety of circumstances.<sup>273</sup>

However, this is clearly not the type of individual assessment envisaged by international law as a means to ensure that detention is not arbitrary. While speedy removal of individuals who have completed their refugee status determination process may serve to reduce the time in detention, it is not an assessment of whether detention is necessary in the first place, nor of the necessity or appropriateness of continuing detention to achieve those purposes.

The Human Rights Committee decision in *Baban v Australia* suggests that detention for immigration purposes without reasonable prospect of removal will constitute arbitrary detention in breach of article 9(1) of the ICCPR, even if it does not constitute

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unlawful detention under Australian law. That decision highlights the need for individual justification of detention prior to the removal stage:

In the present case, the author and his son were held in immigration detention for almost two years without individual justification and without any chance of substantive judicial review of the continued compatibility of their detention with the Covenant.<sup>274</sup>

### (c) **Detention of children to protect the integrity of the visa system and deterrence**

Many groups have submitted that the real reason for Australia's detention policy is to deter unauthorised arrivals from seeking asylum in Australia. This rationale has been linked to the Government's desire to protect the integrity of its visa system and the concept of border protection. UNHCR is clear that detention of asylum seekers 'as part of a policy to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law'.<sup>275</sup>

During the Inquiry hearings the Department denied that deterrence was the purpose of detention but conceded that it may be the effect:

INQUIRY COUNSEL: On various occasions we hear politicians referring to the detention regime as a deterrent to – trying to deter boat people from coming to Australia, you say that's not the Department's position?

DIMIA DEPUTY SECRETARY: Well, they may make those sorts of comments and it may have that incidental – that may be an incidental outcome, if you like, but the purpose for detention, the reason we have detention is to have people available for processing and for removal should they be found not to have a lawful reason to remain.<sup>276</sup>

As the Department recognises, the Minister for Immigration has been quoted to refer to the deterrent purpose of detention:

...detention arrangements...have been a very important mechanism for ensuring that people are available for processing and available for removal, and thereby a very important deterrent in preventing people from getting into boats ...<sup>277</sup>

Furthermore, in a paper prepared for the UNHCR Global Consultations process, the Department stated that:

Deterrence is not the central or dominant objective or reason for the mandatory detention provisions. However, to the extent that mandatory detention is perceived internationally to indicate Australia's determined and effective pursuit of the...objectives [of ensuring illegal entrants do not enter the Australian community until processed, availability for removal and maintaining the integrity of the migration program], some level of deterrence would be an understandable outcome among potential illegal entrants who lack *bona fide* claims to asylum...<sup>278</sup>

In November 2003, the new Minister for Immigration stated:

No one wants to see that [women and children are detained], but no one wants to send a green light to smugglers, either.<sup>279</sup>

Some have argued that the very high rate of success of child asylum seekers who arrive without a visa (an average of over 92 per cent) means that most children end up in the community as lawful immigrants in any case and therefore detention appears to be more a question of punishing people who come 'uninvited' rather than controlling illegitimate refugees.<sup>280</sup>

If the reason for detention of children and their parents is to send a message of deterrence, this would contravene article 31 of the Refugee Convention – which prohibits penalties on asylum seekers by virtue of their illegal entry. While concepts of punishment and deterrence are distinct, any deterrent effect of detention can only arise from its punitive character: it is the fear of, or desire to avoid, such punishment that acts as a deterrent. To the extent that detention is being used as a deterrent, this would also support the argument that detention was punitive under Australian law, which may make it unconstitutional.

**(d) Detention of children to prevent them from entering the community until their claims have been assessed**

The Department's goal of preventing persons from entering the community until their claims have been assessed goes beyond the legitimate purposes for detention as set out by UNHCR. While detention for the purpose of determining the elements of an asylum claim may be justified, UNHCR states that individuals should only be detained, if necessary, to undergo a preliminary interview not, as is the case in Australian law, for the entire duration of a prolonged asylum procedure.<sup>281</sup> In other words detention will only be justified if necessary to obtain 'essential facts from the asylum seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim'.<sup>282</sup>

**(e) Length and conditions of detention**

Section 6.7 above on the 'shortest appropriate period' demonstrates that some children have been detained for extremely long periods in the absence of any assessment of the need to detain in the individual circumstances of their case. The detention that may not have been arbitrary at the outset may well have become arbitrary with time.

Thus, while the length of detention *per se* will not be determinative of whether detention will be arbitrary, it is relevant to the requirement that detention be necessary and proportionate to the goals.<sup>283</sup>

The conditions of detention may also affect an assessment as to whether detention is a disproportionate response to the goals and therefore arbitrary. The worse the conditions of detention, the more likely that the detention will be disproportionate to

## A last resort?

the goal. Therefore, if unaccompanied children were immediately transferred to home-based detention on arrival, where the conditions are likely to be better, the detention is less likely to be arbitrary.

While the Inquiry cannot reach the conclusion that the length and conditions of detention will result in detention being arbitrary in every case, the evidence revealed in the following chapters demonstrates that detention in any of the immigration detention facilities has had seriously negative effects on the mental health and education of children, amongst other things. Therefore detention in immigration facilities for all but the briefest periods will weigh heavily against any findings that detention of unauthorised arrival children will be a proportionate response to the fact that they have arrived without a visa.

In the case of *Baban v Australia*, which involved a father and child who were detained for two years before they escaped, the Human Rights Committee found that Australia:

has failed to demonstrate that those reasons justified the author's continued detention in the light of the passage of time and intervening circumstances such as the hardship of prolonged detention for his son or the fact that during the period under review the State Party apparently did not remove Iraqis from Australia. ...In particular, the State Party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State Party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions.<sup>284</sup>

As mentioned in section 6.9.1, as at November 2003 this issue was before the High Court of Australia awaiting decision.

### 6.9.3 Findings regarding 'unlawful' and 'arbitrary' detention

The Inquiry does not dispute that detention for the purposes of essential health, security and identity checks may be justified under international law. It may also be legitimate to detain children to record the elements of a refugee claim and ensure availability for processing and removal. However, international law imposes a presumption against any detention of children for even those purposes. Furthermore, detention must be proportionate and just, not only at the outset but throughout the period of detention of children. This requires a mechanism to assess whether detention is necessary and proportionate to achieving legitimate goals in the individual circumstances of the case. The length and conditions of detention are relevant to this consideration.

The Inquiry does not accept that protecting the integrity of the visa process, sending a message of deterrence or preventing asylum seekers from entering the community are purposes sufficient to justify the mandatory detention of all unauthorised arrival children.

The Department consistently states that the current detention policy:

represents an appropriate balance between pursuing legitimate public policy objectives and considering the interests of those adversely affected.<sup>285</sup>

However, the key to ensuring that the detention of each child is a proportionate response to public policy objectives, even where they are legitimate, is to build in a process that allows Departmental decision-makers to decide whether, in the individual case, detention is necessary.

That process does not exist in the current system.

In the 1998 report, *Those who've come across the seas*, this Commission found the following:

- The mandatory detention regime under the Migration Act places Australia in breach of its obligations under ICCPR article 9(1) and [CRC] article 37(b). The ICCPR and [CRC] require Australia to respect the right to liberty and to ensure that no-one is subjected to arbitrary detention. If detention is necessary in exceptional circumstances then it must be a proportionate means to achieve a legitimate aim and it must be for a minimal period. The detention regime under the Migration Act does not meet these requirements. Under current practice the detention of unauthorised arrivals is not an exceptional step but the norm. Vulnerable groups such as children are detained for lengthy periods under the policy. In some instances, individuals detained under the Migration Act provisions have been held for more than five years. This is arbitrary detention and cannot be justified on any grounds.
- The Migration Act does not permit the individual circumstance of detention of non-citizens to be taken into consideration by courts. It does not permit the reasonableness and appropriateness of detaining an individual to be determined by the courts. Australia is therefore in breach of its obligations under ICCPR article 9(4) and [CRC] article 37(d) which require that a court be empowered, if appropriate, to order release from detention.
- To the extent that the policy of mandatory detention is designed to deter future asylum seekers, it is contrary to the principles of international protection and in breach of ICCPR article 9(1), [CRC] articles 22(1) and 37(b) and human rights under the HREOC Act.<sup>286</sup>

There have been no relevant changes to legislation since the making of those findings. The Inquiry adopts them in full.

### 6.10 Summary of findings regarding detention of children

The Inquiry finds that sections 189 and 196 of the Migration Act, the Migration Regulations regarding Bridging Visa E 051, and the application of those laws by the Minister and the Department, place the Commonwealth in breach of the following fundamental principles in the CRC and ICCPR:

- children should only be detained as a measure of last resort (article 37(b), CRC)
- children should only be detained for the shortest appropriate period of time (article 37(b), CRC)
- children should not be arbitrarily detained (article 37(b), CRC; article 9(1) ICCPR)
- children are entitled to prompt and effective review of the legality of detention (article 37(d), CRC; article 9(4) ICCPR)
- unaccompanied children are entitled to special protection (article 20(1), CRC)
- the best interests of the child must be a primary consideration in all actions concerning children (article 3(1), CRC)

There is no doubt that Australia, as a sovereign nation, has the right to control its borders. However, as explained in Chapter 4 on Australia's Human Rights Obligations, sovereignty does not confer an entitlement to achieve immigration control by whatever means. Policy concerns related to border protection are no excuse for a failure to pay attention to the special entitlements of children under the CRC. One of the most important provisions in the CRC relates to the strict control over when a child may be detained.

The Inquiry finds that the mandatory detention legislation introduced and maintained by the Australian Parliament fails to ensure that the detention of unauthorised arrival children is a measure of last resort because it makes the detention of all children and adults who arrive without a visa the first and only option. There are no special considerations for unaccompanied children. This constitutes a breach of articles 37(b) and 20(1) of the CRC.

The mandatory detention laws also fail to ensure that the detention of unauthorised arrival children is for the shortest appropriate period of time because it requires all children to be detained until they are granted a visa or removed from Australia, no matter what their individual circumstances or how long that process takes. The bridging visa regulations are so narrowly drawn for unauthorised arrivals as to be an almost useless mechanism for the release of children and their parents while they are waiting to be fully processed or removed from Australia. Some children have been detained for years as a result of these laws. This constitutes a breach of article 37(b) of the CRC.

The immigration detention laws also fail to protect children from arbitrary detention because they provide no opportunity for a case-by-case assessment of whether the detention of each child who arrives in Australia without a visa is a necessary or

proportionate response to the Government's legitimate policy goals. For example, the mandatory detention provisions of the Migration Act ignore the possibility that an unaccompanied child or family poses no health, security or flight risk – they must be detained regardless of the circumstances. Furthermore, the policy goals of protecting the integrity of the visa process, sending a message of deterrence or preventing asylum seekers from entering the community are not legitimate reasons for the mandatory detention of children under international human rights law. The laws therefore breach of article 37(b) of the CRC and article 9(1) of the ICCPR.

The terms of the legislation also prevent courts from conducting prompt, ongoing and effective review of the legality of detention. Recent cases in the Federal Court of Australia and the Family Court of Australia demonstrate the exceptional nature of judicial review of immigration detention. This is in stark contrast to the routine bail proceedings used in the criminal justice system. The laws therefore breach article 37(d) of the CRC and article 9(4) of the ICCPR. The decision of the High Court of Australia in *B & B*, and other matters before it, will need to be carefully considered to determine whether or not, in the future, children will enjoy the right to challenge their detention in a manner consistent with article 37(d).

As explained fully in section 6.5.1, the Inquiry rejects the view that the 'best interests' principle means that children must be detained, because their parents must be detained. This argument is the perverse result of inappropriate detention laws.

Given the impact of detention on children, as highlighted in this chapter and discussed throughout this report, all of the above factors suggest that the Commonwealth has not made the best interests of children a primary consideration when introducing and maintaining Australia's mandatory detention legislation. Chapter 17, Major Findings and Recommendations, sets out the Inquiry's findings regarding the best interests of the child in more detail.

While the terms of the mandatory detention laws are strict and narrow, they do give the Minister and the Department discretion regarding the location and manner of detention. Since 1994, the Minister has had the power to declare any place in the community a place of 'detention'. In the Inquiry's view, if the best interests of the child were a primary consideration in decisions relating to the location of detainees, the Minister and the Department would have developed, at an early stage, policies and procedures to ensure that children and their parents be transferred to alternative places of detention in the community as quickly as possible. This option was not actively pursued until January 2002, when children became involved in hunger strikes, lip-sewing and suicide pacts. Since that time almost 20 unaccompanied children have been transferred to home-based detention, with great positive impact on those children. However, all of those unaccompanied children had been in detention for many months prior to this transfer and most had reached great levels of distress by that time. Furthermore, most of the 285 unaccompanied children in detention between 1999 and 2002 were not offered this opportunity. Only one family was transferred to a place of detention in the community during the period of the Inquiry.

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The laws also provide the Minister and the Department with an opportunity, and responsibility, to pursue bridging visas within the Migration Regulations, particularly with respect to unaccompanied children. However, only one of the 285 unaccompanied children in detention was released on a bridging visa between 1999 and 2002.

The Inquiry therefore finds that the Minister and the Department failed to vigorously pursue the options available to bring about the prompt transfer or release of children from detention centres. Therefore the manner in which the Minister and the Department applied the detention laws failed to ensure that the detention of children be for the shortest appropriate period of time and to provide unaccompanied children the special assistance that they needed to enjoy that right.

These same circumstances also suggest a failure to make the best interests of the child a primary consideration in decisions relating to the length and location of detention as discussed further in Chapter 17, Major Findings and Recommendations.

The Inquiry acknowledges that in December 2002 the Department issued Migration Series Instructions directing its officers to more vigorously pursue bridging visas and placement into home-based detention in the future. However, a year later only one more whole family and a small number of accompanied children (without their parents) had been placed in home-based detention.<sup>287</sup>

The Woomera RHP offers some improvements on the environment in detention centres, but falls far short of release or alternative detention in the community. Mothers and children are still locked within a housing compound, albeit that it is a friendlier environment than a detention centre. Two-parent families who want their children to benefit from that improved environment must agree to the father remaining in the detention centre. Fathers will only see their children during visits. When the Woomera RHP was first trialled in August 2001 (also a considerable time after families started arriving in detention centres), boys aged 13 years and over were also excluded from the project. The rules excluding teenage boys were removed in December 2002. By the end of 2003 two more housing projects had opened – one in Port Hedland and one in Port Augusta. The rule excluding fathers remains.

Finally, the Inquiry notes that the fact that detainees may have family members living in the community appears to have had little influence on decisions regarding in which detention centre a child might be detained. Given the connection between family unity and the best interests of the child, this raises the question as to whether the best interests of the child were a primary consideration in such decisions.

Thus both Australia's detention laws and their administration by the Minister and the Department results in a breach by the Commonwealth of articles 3(1), 20(1), 37(b) and 37(d) of the CRC as well as articles 9(1) and 9(4) of the ICCPR.

## 6.11 Case studies

### 6.11.1 Case Study 1: The impact of detention on the best interests of the child and family unity

Five children aged 3, 7, 9, 10 and 12 arrived in Australia with their mother in January 2001. They were taken to Woomera straight away. They did not know where their father was.

In April 2001, the ACM psychologist at Woomera noted that the children are 'sad and withdrawing from activities' are 'missing their father especially now they have been told that he is in Australia and in Sydney'.<sup>288</sup> The psychologist recommended that assistance be sought in locating their father.<sup>289</sup> The Inquiry has no evidence of efforts made to bring the family in contact with each other at that time – either by phone or physically.

In January 2002, the father discovered that his family were in Woomera, when he recognised a family member in a news broadcast on television.

In April 2002, a year after the children had learnt that their father was in Sydney, one of the boys' medical reports stated:

Children's father is in Sydney. Child at 12 years is unable to make sense of incarceration and separation from father. Cried and expressed need for father.<sup>290</sup>

The same month, the South Australian child welfare authority reported:

Isolation from kin – the father of this family was released almost two years ago on a three year temporary visa. He lives in Sydney and has only visited Woomera infrequently. When he has visited it was for three hours with an officer present. The mother reports the children are happy to see their father. The mother wants the children to be released to live with their father.<sup>291</sup>

In July 2002, 18 months after their arrival, the Department wrote to the Minister for Immigration about the family's management and placement options.<sup>292</sup> The Department stated that the focus of the current arrangements was on 'ensuring that adequate psychological and emotional support is being given to all members of the family in Woomera IRPC'.<sup>293</sup> The Department presented to the Minister the pros and cons of six further options, with much reference to the problem of separating the children from one or both parents. The following is a summary of the options presented in the memo:

#### 1. Alternative Detention Locations

(a) *Transfer to the Residential Housing Project (RHP) in Woomera.*

Pros: The family would be in a different environment away from the centre; closer attention could be provided to the family given the higher staff/resident ratio; and the mother would be able to play a greater role in caring for her family's day to day needs.

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Cons: The family meet the selection criteria for the RHP, however, the boys are now known to be an escape risk and would therefore require careful assessment; [mother] would have to leave her brother in the centre; should [father's] visa be cancelled and he [be] returned to detention, the family would still be separated.

### *(b) Transfer to Villawood IDC*

Pros: If the family were moved to Villawood they would be close to where [the father is living]; there may be access to outside schooling.

Cons: A small but very difficult case load has built up at the Villawood IDC; the centre also has a large compliance case load; Villawood is now the largest centre (population); media focus on the family would be easier to maintain at this centre.

### *(c) Transfer to Baxter IDF*

The Department is anticipating transferring the family to the new Baxter facility.

Pros: This is a new centre with greater amenities, closer to a metropolitan area and therefore closer for [the father] to visit; there may be prospects for access to external schooling.

Cons: Movement to Baxter does not remove the children from a detention environment; and early resolution of access to external schooling is unlikely; the family remains separated.

## **2. Alternative Detention Arrangements in the Community**

Arrangements could be made for some or all of the children to reside with their father or with an independent person (or be placed through a State authority).

Pros: The children would be reunited with their father; the children would be out of a detention environment.

Cons: Moving some or all of the children to live with their father does not solve the problem of a split family; if the children were housed with someone other than their father, the children are in the potentially worse situation of being split from both parents; [the father] has indicated in the media that he would be physically unable to care for the children on his own; should [the father's] visa be cancelled and the children were in his care, a decision would have to be made about their return to a detention centre.

## **3. Bridging Visa E (051)**

It is not clear at this stage if the family is eligible for a BVE (051) as the matter before the full bench of the High Court does not necessarily constitute an application before the Department. However, this option has the same pros and cons as option (b), with the addition that all costs associated with the children would need to be provided by a community group or individual.

Should BVE (051) be granted to some or all of the children, or all family members, we assume they would reside with [the father]. However, he could not provide the assurance of support as this must be provided by an Australian permanent resident. Also, the children would be ineligible for Medicare.

#### 4. Ministerial Intervention s417

You could consider the family for your intervention under section 417 of the Migration Act. Should you decide to intervene in their case, the following three options are available: granting the family a temporary protection visa; or granting the family another type of substantive visa; or granting bridging visas to some or all family members.<sup>294</sup>

After this time the mother and girls were offered a place in the Woomera RHP. However, they initially refused on the grounds that it would mean leaving the two older boys behind and they wished to remain as intact a family unit as possible.<sup>295</sup>

In late 2002, the children's father was detained at Villawood.<sup>296</sup> The Department did not transfer the mother and children to Villawood, presumably for the reasons given in option (1) above. The children were eventually reunited with their father in early 2003 when they were all transferred to Baxter.<sup>297</sup> Subsequently the mother and daughters were again offered and agreed to be transferred to Woomera RHP in June 2003, while the father and sons remained at Baxter. The Department informed the Inquiry that the father and sons visited Woomera RHP on weekends and the mother and daughters visited Baxter in the week.<sup>298</sup>

Following legal action in the Family Court of Australia, the children were released into the care of a family in the community in August 2003. Both parents were adamant that the negative impact of detention on their children was such that they preferred that their children be at liberty than with them in Baxter. For some of the time that the children were in Adelaide, their mother was hospitalised close by for the birth of her sixth child. The father remained in Baxter. As at November 2003, the question of the detention of these children was before the High Court of Australia.<sup>299</sup>

The impact of detention on the mental health of the children in this family is discussed in section 9.4.2, regarding depression and post traumatic stress disorder, in Chapter 9 on Mental Health.

#### 6.11.2 Case Study 2: Impact of visa processing on the length of detention

The following examples demonstrate the difficulty of ensuring that detention is for the shortest appropriate period when there is a requirement that children and their parents remain in detention until the completion of the refugee status determination process.

While some asylum claims are processed within weeks, others can take years. The following examples illustrate a variety of reasons for which the processing can take a long time. Sometimes it takes time to lodge a claim, sometimes the primary processing and merits review at the Refugee Review Tribunal takes a while. Other times appeals by asylum seekers or the Minister to the courts prolong the process. The examples also demonstrate that the fact that the processing takes some time does not necessarily mean that those asylum seekers are not genuine.

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### **Example 1: Two unaccompanied siblings aged 10 and 14 detained at Woomera for one year prior to receiving positive primary decision**

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June 2001	Arrive in Australia
November 2001	Lodge a protection visa application
June 2002	Received a temporary protection visa and released from detention

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### **Example 2: Family with six children aged 1, 2 (twins), 3, 4 and 9 detained at Woomera for one year prior to receiving positive decision at RRT**

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*9 months in detention prior to receiving negative primary decision. Mother and children found to be refugees 3 months later. Father remains in detention at Baxter.*

August 2001	Arrive in Australia
September 2001	Lodge protection visa application
May 2002	Receive negative primary decision
August 2002	Refugee Review Tribunal reversed primary decision Mother and children released from detention on temporary protection visas

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### **Example 3: Family with one child aged 10 on arrival still finalising process after 32 months in detention**

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*5 months in detention prior to receiving negative primary decision.*

April 2001	Arrive in Australia
July 2001	Lodge protection visa application
September 2001	Receive a negative primary decision
February 2002	Refugee Review Tribunal upholds primary decision
August 2002	Federal Court denies appeal
December 2003	Family remains in detention awaiting Full Federal Court judgment

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### **Example 4: Single mother and 8-year-old daughter still finalising process after 33 months in detention**

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*3 months in detention prior to receiving negative primary decision.*

March 2001	Arrive in Australia
April 2001	Apply for protection visa
June 2001	Receive negative primary decision
October 2001	Refugee Review Tribunal upholds primary decision
February 2002	Federal Court hearing

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May 2002	Federal Court denies appeal
November 2002	Full Federal Court hearing
December 2002	Full Federal Court denies appeal
December 2003	Mother and daughter remain in detention awaiting High Court appeal

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**Example 5: Single mother and 7-year-old son detained at Woomera for 30 months prior to being found to be refugees**

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April 2001	Arrives in Australia
August 2001	Apply for protection visa
September 2001	Receive negative primary decision
December 2001	Refugee Review Tribunal upholds primary decision
August 2002	Federal Court allows appeal and remits case to the RRT Minister appeals this decision
June 2003	Full Federal Court allows appeal and remits case to the RRT
August 2003	Refugee Review Tribunal finds that the mother and son are refugees They are released from detention on temporary protection visas

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**Example 6: Single mother with two sons aged 4 and 12 still finalising process after 32 months in detention**

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*Minister has appealed Full Federal Court decision in the family's favour to the High Court of Australia.*

April 2001	Arrive in Australia
July 2001	Apply for protection visas
September 2001	Receive negative primary decision
March 2002	Receive negative RRT decision
August 2002	Federal Court find that the RRT had made an error in law, but also finds that the decision is not reviewable, so dismisses appeal
June 2003	Full Federal Court allows appeal and remits case to the RRT Minister appeals to the High Court
December 2003	Family remain in detention

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### Endnotes

- 1 See further Chapter 17, Major Findings and Recommendations.
- 2 This definition has been adopted by the Committee on the Rights of the Child, *General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties Under Article 44, Paragraph 1(b), of the Convention*, 11 October 1996, Part VIII B(2), UN Doc CRC/C/58, para 138.
- 3 UNHCR, *UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* (UNHCR Detention Guidelines), Geneva, 1999.
- 4 See HREOC, *Those who've come across the seas*, 1998. The Australian Government does not accept the reasoning and findings of this report.
- 5 See especially articles 9(1) and 9(4) of the ICCPR regarding arbitrary arrest and detention.
- 6 See particularly the UNHCR Detention Guidelines.
- 7 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, Geneva, 1990, rules 1 and 2. Rule 2 provides '[d]eprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release'.
- 8 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), Geneva, 1985, rule 17.1(b) provides that 'Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum'.
- 9 The Beijing Rules, rule 17.1(c), provides that 'Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response'.
- 10 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, UN Doc CRC/C/15/Add.79, 10 Oct 1997, para 20. See similar concerns expressed by the Committee with regard to the detention of child asylum seekers in Austria: *Concluding Observations of the Committee on the Rights of the Child: Austria*, UN Doc CRC/C/15/Add.98, 7 May 1999, para 27.
- 11 See further sections 6.8 and 6.9 below.
- 12 See Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), Response to Draft Report, 4 July 2003.
- 13 See further Chapter 4 on Australia's Human Rights Obligations, especially section 4.3.5.
- 14 For some useful summaries regarding Australia's immigration and detention policy see Justice AM North and P Decle, 'Courts and Immigration Detention: The Australian Experience', Address to the Conference of the International Association of Refugee Law Judges, Wellington, New Zealand, October 2002; D McMaster, *Asylum Seekers: Australia's Response to Refugees*, Melbourne University Press, Melbourne, 2001, ch3; A Schloenhardt, 'Australia and the Boat-People: 25 Years of Unauthorised Arrivals', *University of New South Wales Law Journal*, vol 23, no3, 2000, p33; US Committee for Refugees, 'Sea Change: Australia's New Approach to Asylum Seekers', February 2002.
- 15 North and Decle, p10.
- 16 *Migration Act 1958* (Cth), s183 (Migration Act).
- 17 *Migration Amendment Act 1992* (Cth), s54Q(2)(b).
- 18 Schloenhardt, p48.
- 19 *Migration Reform Act 1992* (Cth); *Migration Laws Amendment Act 1993* (Cth). Section 2 of the *Migration Reform Act 1992* (Cth) provides that the main provisions of the Act commence on 1 November 1993. Section 2 of the *Migration Laws Amendment Act 1993* (Cth) provides that certain amendments contained in the *Migration Reform Act 1992* (Cth) commence on 1 September 1994.
- 20 *Migration Legislation Amendment Act (No 1) 1999* (Cth).
- 21 For descriptions of the Tampa crisis see, amongst others, North and Decle; Schloenhardt; US Committee for Refugees, 2002; M Crock and B Saul, *Future Seekers: Refugees and the Law in Australia*, The Federation Press, Sydney, 2002, pp35-37.
- 22 *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth), *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth).
- 23 Migration Act, s189.
- 24 Migration Act, s196(1).
- 25 Migration Act, s198A.

- 26 Minister for Immigration and Multicultural and Indigenous Affairs, 'Unauthorised Arrivals and Detention – Information Paper', February 2002.
- 27 The Department asserts that these persons are not in immigration detention as defined by the Migration Act, s5. DIMIA, Response to Draft Report, 4 July 2003. However, while they may not be in detention as defined by the Migration Act, they are forcibly taken to Nauru and Papua New Guinea by Australian authorities and they are not free to leave the 'offshore processing centres' while their claims for asylum are being assessed. Under these circumstances such people are being detained within the ordinary meaning of that term.
- 28 The Department states that the rationale for this difference in treatment is that persons who have arrived with a visa have already been 'immigration cleared' prior to their arrival in Australia. However, this does not explain the relative difficulty in obtaining a bridging visa on completion of the relevant health, security and identity checks.
- 29 Note, however, that when the Inquiry visited the Villawood IDC in August 2002 there were eight children in detention who were not asylum seekers. One of those children had been detained for more than four months (since her birth). As at November 2003, this baby was still detained at Villawood.
- 30 Migration Act, s273.
- 31 See the definition of 'immigration detention' in the Migration Act, s5.
- 32 DIMIA, Submission 185, pp53, 181, 188, 192.
- 33 DIMIA, Deputy Secretary, Comments on Transcript of December 2002 Hearing, 19 March 2003. See also DIMIA, Submission 185, p51.
- 34 As those facilities opened after the period examined by the Inquiry they are not discussed in any detail. To the best of the Inquiry's knowledge they operate on much the same principle as the Woomera RHP, except that some of the eligibility rules had changed by the time they opened. Detainee boys under the age of 18 may now apply for transfer to the housing projects.
- 35 DIMIA, Response to Draft Report, 4 July 2003; DIMIA, Response to Second Draft Report, 17 December 2003.
- 36 DIMIA, Report on the Evaluation of the Trial of Alternative Detention Arrangements for Women and Children in Woomera, 8 March 2002, para 3.3.5.
- 37 DIMIA, Report on the Evaluation of the Trial of Alternative Detention Arrangements for Women and Children in Woomera, 8 March 2002, para 3.3.4; DIMIA, Application to Participate in Alternate Detention Arrangements in Woomera, (N4, Q5, F4).
- 38 DIMIA Woomera Manager, Email to DIMIA Central Office, 21 February 2002, (N5, Case 28, p14).
- 39 DIMIA, Report on the Evaluation of the Trial of Alternative Detention Arrangements for Women and Children in Woomera, 8 March 2002, para 3.4.3.
- 40 DIMIA Assistant Secretary, Letter, to ACM Managing Director, 25 July 2002, (N4, Q5, F4).
- 41 DIMIA, Migration Series Instruction 371, Alternative Places of Detention (MSI 371), 2 December 2002, para 5.2.3.
- 42 DIMIA, Fact Sheet 83, The Woomera Alternative Detention Arrangements for Women and Children Project, at [www.immi.gov.au/facts/83woomera.htm](http://www.immi.gov.au/facts/83woomera.htm), viewed 20 August 2003, 17 November 2003. This Fact Sheet was updated on 6 November 2003 with no mention of detainee age requirements or restrictions.
- 43 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, pp10-11.
- 44 DIMIA Deputy Secretary, Comments on Transcript of December 2002 Hearing, 19 March 2003, p2.
- 45 DIMIA Deputy Secretary, Comments on Transcript of December 2002 Hearing, 19 March 2003, p2.
- 46 DIMIA Deputy Secretary, Comments on Transcript of December 2002 Hearing, 19 March 2003, p2.
- 47 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p10.
- 48 DIMIA, Response to Second Draft Report, 17 December 2003.
- 49 Inquiry, Interview with detainee, Woomera, September 2002.
- 50 DIMIA, Report on the Evaluation of the Trial of Alternative Detention Arrangements for Women and Children in Woomera, 8 March 2002, para 1.1.1.
- 51 DIMIA, Report on the Evaluation of the Trial of Alternative Detention Arrangements for Women and Children in Woomera, 8 March 2002, para 3.8.3.
- 52 DIMIA, Report on the Evaluation of the Trial of Alternative Detention Arrangements for Women and Children in Woomera, 8 March 2002, para 1.1.6.
- 53 HREOC, Notice of Grant of Temporary Exemption, 14 October 2002, para 5.1.
- 54 HREOC, Notice of Grant of Temporary Exemption, 14 October 2002, para 5.6.
- 55 HREOC granted an extension to the exemption and reiterated the concerns regarding the separation of family. HREOC, Notice of Grant of Temporary Exemption, 19 September 2003, para 5.7.

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- 56 Justice P N Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, Mission to Australia, 24 May to 2 June 2002, *Human Rights and Immigration Detention in Australia*, para 49.
- 57 Confidential Submission 291.
- 58 The Department of Human Services (DHS) is responsible for child protection and child welfare in South Australia. Family and Youth Services (FAYS) is the section of DHS that manages these responsibilities.
- 59 DHS, Woomera Detention Centre Assessment Report, 12 April 2002, Submission 181a, p3.
- 60 Child and Family Psychiatrist, Department of Psychological Medicine, Women's and Children's Hospital Adelaide, Psychiatric Report, 3 July 2002, (N3, F13).
- 61 Confidential Submission 291.
- 62 DIMIA, Submission 185, p51.
- 63 ACM, Response to Draft Report, 19 May 2003.
- 64 Inquiry, Interview with detainees, Woomera RHP, September 2002.
- 65 Inquiry, Interview with detainees, Woomera RHP, September 2002.
- 66 DIMIA, Submission 185, p51.
- 67 ACM, Response to Draft Report, 19 May 2003.
- 68 Inquiry, Interview with detainees, Woomera RHP, September 2002.
- 69 Inquiry, Interview with detainees, Woomera RHP, September 2002.
- 70 DIMIA, Response to Draft Report, 4 July 2003.
- 71 Inquiry, Interview with detainees, Woomera RHP, September 2002.
- 72 DIMIA, Report on the Evaluation of the Trial of Alternative Detention Arrangements for Women and Children in Woomera, 8 March 2002, para 5.2.9.
- 73 Confidential Submission 291.
- 74 Inquiry, Interview with detainees, Baxter, December 2002.
- 75 Inquiry, Interview with detainees, Woomera RHP, September 2002.
- 76 DIMIA, Letter to Inquiry, 13 December 2002, Attachment A.
- 77 One unaccompanied child was released into foster care in late 2001; however, this was on a bridging visa. See Case Study 1 in Chapter 14 on Unaccompanied Children.
- 78 DIMIA, Response to Second Draft Report, 17 December 2003; DIMIA, Response to Second Draft Report, Email to Inquiry, 12 January 2004.
- 79 DIMIA, Submission 185, p96.
- 80 DIMIA Woomera Deputy Manager, Email, to FAYS, 14 January 2002, (N2, Q7, F6).
- 81 See further Case Study 3 in Chapter 14 on Unaccompanied Children.
- 82 DHS, Executive Director, FAYS, Letter, to DIMIA, Acting First Assistant Secretary, 26 January 2002, (N2, Q7, F6).
- 83 DHS, Executive Director, FAYS, Letter, to DIMIA, Acting First Assistant Secretary, 27 January 2002, (N2, Q7, F6).
- 84 DHS, Executive Director, FAYS, Letter, to DIMIA, Acting First Assistant Secretary, 29 January 2002, (N2, Q7, F6).
- 85 DHS, Executive Director, FAYS, Letter, to DIMIA, Acting First Assistant Secretary, 29 January 2002, (N2, Q7, F6).
- 86 DHS, FAYS, Unaccompanied Humanitarian Minors Program, Specific Placements List, 7 February 2002, (N2, Q7, F6).
- 87 DHS, Acting Regional Director Country, FAYS, Letter, to DIMIA Central Office, 7 February 2002, (N2, Q7, F6).
- 88 DHS, FAYS, Unaccompanied Minors [table of placements], 8 February 2002, (N2, Q7, F6).
- 89 Migration Act, s5.
- 90 DIMIA, Response to Second Draft Report, 17 December 2003.
- 91 *Draft Agreement between the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) and the South Australian Department of Human Services (DHS) relating to the care of some detainee minors* (Draft Agreement between DIMIA and DHS relating to the care of some detainee minors), July 2002, para 2.1, (N4, Q6, F5).
- 92 Draft Agreement between DIMIA and DHS relating to the care of some detainee minors, paras 10.1, 10.4, (N4, Q6, F5).
- 93 Draft Agreement between DIMIA and DHS relating to the care of some detainee minors, para 2.1, (N4, Q6, F5).
- 94 Draft Agreement between DIMIA and DHS relating to the care of some detainee minors, paras 10.2-10.4, (N4, Q6, F5).

- 95 Draft Agreement between DIMIA and DHS relating to the care of some detainee minors, para 7.1, (N4, Q6, F5).
- 96 Draft Agreement between DIMIA and DHS relating to the care of some detainee minors, para 7.3, (N4, Q6, F5).
- 97 Draft Agreement between DIMIA and DHS relating to the care of some detainee minors, para 8.1, (N4, Q6, F5).
- 98 DIMIA, Submission 185, p99; DIMIA, Transcript of Evidence, Sydney, 2 December 2002, pp29-30.
- 99 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, pp93, 97.
- 100 DIMIA, Unaccompanied Minor Teleconference Minutes, 17 January 2002. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 101 See further Chapter 8 on Safety.
- 102 DIMIA, Submission 185, p96.
- 103 DIMIA, Response to Draft Report, 4 July 2003.
- 104 DIMIA, Migration Series Instruction 370, Procedures for Unaccompanied Wards in Immigration Detention Facilities (MSI 370), 2 December 2002, para 13.2.1. See further the discussion in the following section on the best interests of the child.
- 105 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, pp96-97.
- 106 See further Chapter 9 on Mental Health.
- 107 DHS, Executive Director, FAYS, Letter, to DIMIA, Acting First Assistant Secretary, 24 January 2002, (N2, Q7, F6).
- 108 DIMIA, Information Required, (N4, Q6, F5).
- 109 *Migration Legislation Amendment Act 1994*, (amendment to the definition of 'immigration detention').
- 110 Inquiry, Interview with unaccompanied boy in alternative detention, Adelaide, July 2002.
- 111 See further Chapter 3, Setting the Scene, for statistics regarding unaccompanied children.
- 112 DIMIA, Response to Second Draft Report, Email to Inquiry, 12 January 2004.
- 113 Minister for Immigration and Multicultural and Indigenous Affairs, *Woomera IRPC to close*, Media Release, Parliament House, Canberra, 12 March 2003.
- 114 Inquiry, Interview with detainees, Woomera RHP, June 2002.
- 115 Confidential Submission 291.
- 116 The Vietnamese asylum seekers who arrived by boat in July 2003 were taken to Christmas Island rather than Nauru or Papua New Guinea. This was due to the fact that they first entered Australia's migration zone at Port Hedland, so they had to be processed under Australian law. See Minister for Immigration and Multicultural and Indigenous Affairs, *Processing Arrangements for Boat Arrivals Clarified*, Media Release, Parliament House, Canberra, 4 July 2003.
- 117 See the decisions of the Human Rights Committee (HRC) in *GT v Australia*, Communication No 706/1996, UN Doc CCPR/C/61/D/706/1996, 4 December 1997; *C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999, 13 November 2002; *Kindler v Canada*, Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991, 18 November 1993; *Ng v Canada*, Communication No. 469/1991, UN Doc CCPR/C/49/D/469/1991, 7 January 1994; *Cox v Canada*, Communication No. 539/1993, UN Doc CCPR/C/52/D/539/1993, 9 December 1994.
- 118 DIMIA, Submission 185, p177.
- 119 See further Chapter 2 on Methodology.
- 120 See for example, HREOC, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997; Senate Community Affairs References Committee, *Inquiry into Child Migration*, August 2001. See further Chapter 9 on Mental Health.
- 121 DIMIA, Response to Draft Report, 4 July 2003. See also DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p103.
- 122 Minister for Immigration and Multicultural and Indigenous Affairs, Border Protection: Children in Detention, 29 April 2002, at [www.minister.immi.gov.au/borders/detention/children\\_detention.htm](http://www.minister.immi.gov.au/borders/detention/children_detention.htm), viewed 24 November 2003. See also DIMIA, Submission 185, p16.
- 123 UNICEF Australia, Transcript of Evidence, Sydney, 15 July 2002, p98.
- 124 AAIMH, Transcript of Evidence, Adelaide, 1 July 2002, p29.
- 125 RILC, Transcript of Evidence, Melbourne, 30 May 2002, p31.
- 126 The Association of Major Charitable Organisations, Transcript of Evidence, Adelaide, 2 July 2002, p7.
- 127 DIMIA Port Hedland, Unaccompanied Minor Meeting Minutes, 29 November 2001. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 128 DHS, FAYS Assessment Report, 22 February 2002, (N2, Q7, F6).
- 129 DHS, FAYS Assessment Report, 22 February 2002, (N2, Q7, F6).

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- 130 DHS, FAYS Assessment Report, 22 February 2002, (N2, Q7, F6).
- 131 DIMIA, Deputy Secretary, Comments on Transcript of December 2002 Hearing, 19 March 2003.
- 132 UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (UNHCR UAM Guidelines), Geneva, 1997, para 7.6.
- 133 UNHCR UAM Guidelines, para 5.7.
- 134 See further Chapter 14 on Unaccompanied Children.
- 135 *X v Minister for Immigration & Multicultural Affairs* (1999) 92 FCR 524 and *X v Minister for Immigration & Multicultural Affairs* [2000] FCA 704; DIMIA, Submission 185, p43; Migration Series Instruction 357, Procedures for Unaccompanied Wards in Immigration Detention Facilities (MSI 357), 2 September 2002, paras 2.2.3-2.2.5; MSI 370, paras 2.2.3-2.2.5.
- 136 The preambular paragraphs to MSI 370 also state that transfer to an alternative place of detention or release on a bridging visa should occur 'as soon as possible'.
- 137 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p25.
- 138 DIMIA, Response to Draft Report, 4 July 2003.
- 139 DIMIA, Response to Draft Report, 4 July 2003.
- 140 See, for example, the following submissions to the Inquiry: Coalition for Justice for Refugees, Submission 73; ChilOut, Submission 120; National Legal Aid, Submission 171; Kids in Detention Story, Submission 196; Western Young People's Independent Network and Catholic Commission for Justice Development and Peace Melbourne, Submission 199.
- 141 Youth Advocacy Centre and Queensland Program of Assistance to Survivors of Torture and Trauma, Submission 84, p29.
- 142 NSW Commission for Children and Young People, Submission 258, p18.
- 143 Uniting Care Burnside, Submission 172, p8.
- 144 NSW Commission for Children and Young People, Submission 258, p75.
- 145 Inquiry, Focus group, Melbourne, May 2002.
- 146 Inquiry, Focus group, Melbourne, May 2002.
- 147 Amnesty International Schools Network, Transcript of Evidence, Brisbane, 5 August 2002, p59.
- 148 DHS, Transcript of Evidence, Adelaide, 1 July 2002, p78.
- 149 DHS, FAYS Assessment Report, 22 February 2002, (N2, Q7, F6).
- 150 DHS, FAYS Assessment Report, 22 February 2002, (N2, Q7, F6).
- 151 DHS, Woomera Detention Centre Assessment Report, 12 April 2002, Submission 181a, p3.
- 152 DHS, Woomera Detention Centre Assessment Report, 12 April 2002, Submission 181a, p6.
- 153 Child and Adolescent Psychiatrist, Department of Psychological Medicine, Women's and Children's Hospital, Adelaide, Summary of Children and Families in Woomera Referred to and Assessed by Child and Adolescent Mental Health Services January to July 2002, 2 August 2002, (N5, Case 22, p15).
- 154 DHS, Social Work Assessment Report on the Circumstances of Children in the Woomera Immigration & Processing Centre, 21 August 2002, (N5, Case 18, p75).
- 155 R Layton QC, *Our Best Investment: A State Plan to Protect and Advance the Interests of Children* (the Layton Report), Government of South Australia, 2003, ch 22, p9.
- 156 DCD, Assessment of Unaccompanied Minors – Port Hedland and Curtin Detention Centres, 19 March 2002.
- 157 DIMIA, Response to Draft Report, 4 July 2003.
- 158 In an opinion poll conducted in June 2003, 73 per cent of persons polled answered 'Yes' to the question 'Should children be released now?', *Sydney Morning Herald*, 19 June 2003.
- 159 See also, for example, Western Young People's Independent Network and Catholic Commission for Justice Development and Peace Melbourne, Submission 199, p4; Save the Children Australia, Submission 108, p14.
- 160 Asylum Seekers Centre, Submission 114, p6.
- 161 Kids in Detention Story, Submission 196, Law Section, p20.
- 162 RILC, Transcript of Evidence, Melbourne, 30 May 2002, p21.
- 163 RILC, Transcript of Evidence, Melbourne, 30 May 2002, p31.
- 164 DIMIA, Submission 185, p16.
- 165 See for example, Committee on the Rights of the Child, *Concluding Observations on the Committee on the Rights of the Child: Austria*, UN Doc CRC/C/15/Add.98, 7 May 1999, para 27; Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Canada*, UN Doc CRC/C/15/Add.37, 20 June 1995, para 24; and Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child : Sweden*, UN Doc CRC/C/15/Add.2, 18 February 1993, para 12.

- 166 UNHCR Detention Guidelines, guidelines 4 and 6 (emphasis retained). See also UNHCR, *Refugee Children: Guidelines on Protection and Care*, Geneva, 1994, ch 7, IV: 'Strong efforts must be made to have [children and their families] released from detention and placed in other accommodation'.
- 167 UNHCR Detention Guidelines, guideline 6. See also UNHCR UAM Guidelines.
- 168 DIMIA, Response to Draft Report, 4 July 2003.
- 169 See further section 6.9.3.
- 170 RILC, Transcript of Evidence, Melbourne, 30 May 2002, pp30-31.
- 171 With respect to persons who arrive at an 'excised offshore place', it is not mandatory to detain in Australia. However, if those persons are not detained in Australia they will be transferred to Nauru or Manus Island and detained (albeit not under the Migration Act) there. Therefore, the effect is the same.
- 172 See also, for example, International Commission of Jurists, Submission 128, pp7-8; Refugee Council of Australia, Submission 107, pp1-2; Australian Human Rights Centre, Submission 160, p11.
- 173 NSW Commission for Children and Young People, Submission 258, p8.
- 174 Amnesty International, Transcript of Evidence, Sydney, 15 July 2002, p72.
- 175 DIMIA, Response to Draft Report, 4 July 2003.
- 176 Question 1210 (4), Commonwealth House of Representatives Hansard, 5 February 2003, pp11062-3.
- 177 DIMIA, Response to Second Draft Report, 27 January 2004. The exact figure provided is 619 days.
- 178 Question 1210 (3), Commonwealth House of Representatives Hansard, 5 February 2003, pp11062-3.
- 179 See for example, Amnesty International, Submission 194, pp5-6; International Commission of Jurists, Submission 128; Law Society of NSW, Submission 204.
- 180 Migration Act, s196.
- 181 Inquiry, Focus group, Perth, June 2002.
- 182 DIMIA, Transcript of Evidence, Sydney, 4 December 2002, p17.
- 183 Joint Standing Committee on Migration (JSCM), *Asylum, Border Control and Detention*, February 1994. The JSCM at the time was chaired by Senator Jim McKiernan and included Senator Jim Short, Senator Christabel Chamarette, Senator Barney Cooney, Laurie Ferguson MP, Clyde Holding MP, Philip Ruddock MP, Ian Sinclair MP, Kathy Sullivan MP, and Harry Woods MP.
- 184 JSCM, *Asylum, Border Control and Detention*, para 4.181(12).
- 185 *Migration Legislation Amendment Act (No. 5) 1995* (Cth).
- 186 *Migration Regulations (Amendment) Statutory Rules 1994* (Migration Regulations), No. 280.
- 187 DIMIA, Response to Draft Report, 4 July 2003.
- 188 Migration Regulations, Schedule 2, cl 051.1-051.2.
- 189 Migration Act, s73.
- 190 DIMIA, Letter to Inquiry, 13 December 2002, Question on Notice 8, 3 December 2002.
- 191 Migration Series Instruction 131, Bridging E Visa – Subclass 051 – Legislation and Guidelines (MSI 131), 3 May 1996, para 7.7.3.
- 192 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p42.
- 193 DIMIA, Response to Draft Report, 4 July 2003.
- 194 DIMIA, Response to Draft Report, 4 July 2003 referring to DIMIA, Transcript of Evidence, Sydney, 3 December 2003, p99.
- 195 MSI 131, para 7.7.4 notes that 'the extent to which the Department will be responsible for pursuing adequate care arrangements on the person's behalf will vary from case to case'.
- 196 MSI 370, para 13.6.2; MSI 357, para 13.3.2.
- 197 MSI 370, paras 13.7.1-13.7.18; MSI 357, paras 13.4.1-13.4.18.
- 198 DIMIA, Email to Inquiry, 1 April 2003.
- 199 DIMIA, Response to Draft Report, 4 July 2003.
- 200 See further Chapter 7 on Refugee Status Determination.
- 201 DIMIA, Transcript of Evidence, Sydney, 4 December 2002, p15.
- 202 RACS, Transcript of Evidence, Sydney, 15 July 2002, p24.
- 203 DIMIA, Response to Draft Report, 4 July 2003.
- 204 DIMIA, Transcript of Evidence, Sydney, Sydney, 4 December 2002, p8.
- 205 DIMIA, Transcript of Evidence, Sydney, Sydney, 4 December 2002, p8.
- 206 DIMIA, Assistant Secretary, Unauthorised Arrivals and Detention Services Branch, Letter, to Acting General Director, Department for Community Development and Family and Children's Services, 14 February 2002.
- 207 DIMIA, Response to Draft Report, 4 July 2003.
- 208 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p81.
- 209 DIMIA, Transcript of Evidence, Sydney, 4 December 2002, pp11-12.

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- 210 See further Chapter 14 on Unaccompanied Children.
- 211 DHS, Submission 181, p37; Western Australian Government, Submission 223, p1; Western Australian Government, Transcript of Evidence, Perth, 10 June 2002, pp32-33; Department of Human Services Victoria, Submission 200, pp9, 18.
- 212 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p104.
- 213 *Memorandum of Understanding (MOU) between the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) and the South Australian Department of Human Services (DHS) relating to Child Protection Notifications and Child Welfare Issues pertaining to children in immigration detention in South Australia* (DHS MOU), 6 December 2001.
- 214 DHS MOU, 6 December 2001, para 11.2.
- 215 Department of Human Services Victoria, Submission 200, p9 states that it 'has no active role with regard to unaccompanied minors prior to release'. The Department of Human Services explained that the reason for this was that they were not notified of the presence of unaccompanied children in detention.
- 216 See further Chapter 7 on Refugee Status Determination.
- 217 DIMIA, Transcript of Evidence, Sydney, 4 December 2002, p12. See also *Jaffari v Minister for Immigration & Multicultural Affairs* [2001] FCA 1516 at [9]. Furthermore, the Department states that it endeavoured to establish regular channels of communication with relevant authorities but those arrangements 'varied from State to State, depending on the particular interests of the State child welfare authority'. DIMIA, Response to Draft Report, 4 July 2003.
- 218 DIMIA, Response to Draft Report, 4 July 2003.
- 219 DHS MOU, 6 December 2001, para 11.3.
- 220 Southern Communities Advocacy Legal and Education Service, Submission 176, p13.
- 221 See *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524 at [13].
- 222 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p39.
- 223 See further Chapter 7 on Refugee Status Determination.
- 224 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p9.
- 225 See further Chapter 7 on Refugee Status Determination.
- 226 Julian Burnside QC, Kids in Detention Story, Transcript of Evidence, Melbourne, 30 May 2002, p55.
- 227 See for example, *Minister for Immigration & Multicultural & Indigenous Affairs v VFAD of 2002* [2002] FCAFC 390; *Minister for Immigration & Multicultural Affairs v SBAA* [2002] FCAFC 195; *Minister for Immigration & Multicultural Affairs v Applicant M* [2002] FCAFC 253; *Minister for Immigration & Multicultural Affairs v Applicant S* [2002] FCAFC 244; *Minister for Immigration & Multicultural Affairs v N989/01* [2002] FCAFC 237.
- 228 DIMIA Transcript of Evidence, Sydney, 2 December 2002, p10.
- 229 DIMIA, Response to Draft Report, 4 July 2003.
- 230 *Al Masri v the Minister for Immigration Multicultural and Indigenous Affairs* [2002] FCA 1009.
- 231 DIMIA, Response to Draft Report, 4 July 2003.
- 232 DIMIA, Response to Draft Report, 4 July 2003.
- 233 It is possible that security checks may delay release. See further Chapter 7 on Refugee Status Determination.
- 234 Bridging visas are only available when there is the possibility of the grant of a substantive visa and therefore the removal of the right to make a protection visa application also cuts off the right to a bridging visa. See Regulation 2.20 of the Migration Regulations.
- 235 Migration Regulations, Schedule 2, cl 451.222, 447.222. The 'Pacific Solution' legislation introduced two new visas that are available to detainees in Nauru and Papua New Guinea, at the personal discretion of the Minister. The 447 secondary movement offshore visa is available to 'excised offshore persons' and the 451 secondary movement relocation visa is available to persons intercepted in international waters by the Australian Navy and sent to Nauru or Papua New Guinea.
- 236 UNHCR, Transcript of Evidence, Sydney, 17 July 2002, p27.
- 237 Although not explicit, the right to legal representation is also covered by the ICCPR. See HRC, *Berry v Jamaica*, Communication No. 330/1988, UN Doc CCPR/C/50/D/330/1988, 14 April 1994. The Committee accepted the complainant's allegation 'which remains unchallenged, that throughout this period [detention of two and a half months], he had no access to legal representation'. In addition to violating article 9(3) of the ICCPR, the Committee concluded: 'that the author's right under article 9, paragraph 4, was also violated, since he was not, in due time, afforded the opportunity to obtain, on his own initiative, a decision by a court on the lawfulness of his detention', para 11.1.

- 238 See S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights, Cases, Materials and Commentary*, Oxford University Press, 2000, p241. See further the following section on unlawful and arbitrary detention.
- 239 HRC, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993, 30 April 1997, para 9.5.
- 240 HRC, *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001, 18 September 2003, para 7.2; HRC, *C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999, 13 November 2002, para 8.2; HRC, *Bakhtiyari v Australia* Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002, 6 November 2003, para 9.4.
- 241 DIMIA, Response to Draft Report, 4 July 2003.
- 242 DIMIA, Submission 185, p8.
- 243 International Commission of Jurists and Legal Aid NSW, Transcript of Evidence, 15 July 2002, Sydney, p4. See also, for example, Julian Burnside QC, Kids in Detention Story, Transcript of Evidence, Melbourne, 30 May 2002, pp50-51.
- 244 Migration Act, s 196(3). For case law see *NAMU v Secretary, Department of Immigration* [2002] FCA 907; *VFAD v Minister for Immigration & Multicultural Affairs* [2002] FCA 1062; *VHAF v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1243; *VJAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1253.
- 245 *Chu Kheng Lim v Minister of Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33.
- 246 *Children (Criminal Proceedings) Act 1987* (NSW), s8 which states that criminal proceedings should not be commenced against a child otherwise than by way of a court attendance notice unless the crime is a serious indictable offence; there is reason to believe that the child will not comply with the summons; or the child is violent.
- 247 *Children (Criminal Proceedings) Act 1987* (NSW), s9. See also, for example, *Children and Young Persons Act 1989* (Vic), s 129(1), which requires that a child must be brought before the court within 24 hours after arrest. See further Kids in Detention Story, Submission 196, Law Section, pp37-38.
- 248 DIMIA, Response to Draft Report, 4 July 2003.
- 249 HRC, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993, 30 April 1997, para 9.5.
- 250 HRC, *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001, 18 September 2003, para 7.2.
- 251 Justice P. N. Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, Mission to Australia 24 May to 2 June 2002, *Human Rights and Immigration Detention in Australia*, para 48.
- 252 Communication No. 1069/2002, UN Doc CCPR/C/79/D/1069/2002.
- 253 [2003] FamCA 451 (19 June 2003).
- 254 *MIMIA v B & B* (A246/2003).
- 255 ICCPR, article 9(1), provides that: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'.
- 255 See further Chapter 4 on Australia's Human Rights Obligations.
- 257 HRC, *General Comment 8*, which provides: 'Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para 1), information of the reasons must be given (para 2) and court control of the detention must be available (para 4) as well as compensation in the case of a breach (para 5)', HRC, *General Comment 8: Right to liberty and security of persons (Art. 9)*, 30 June 1982, para 4.
- 258 *Chu Kheng Lim v Minister of Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33.
- 259 *Minister for Immigration Multicultural and Indigenous Affairs v Al Masri*, [2003] FCAFC 70. The correctness of the decision in *Al Masri* will be considered by the High Court of Australia in *SHDB v Godwin* (A253/2003) and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (A254/2003). Those matters were heard together on 12 and 13 November 2003 (with the matter of *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (A255/2003)). The Court reserved its decision in each matter.
- 260 See: [www.humanrights.gov.au/legal/intervention/sakhi.html](http://www.humanrights.gov.au/legal/intervention/sakhi.html).

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- 261 HRC, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993, 30 April 1997, para 9.2. The HRC found that Australia's mandatory detention of asylum seekers is not against international law *per se*, but that the failure to ensure periodic review of whether the detention continued to be appropriate caused the detention to be arbitrary and therefore a breach of international law, paras 9.3-9.4.
- 262 HRC, *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988, 15 August 1990, paras 5.6-5.8; HRC, *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995, 11 November 1999, para 6.3; HRC, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993, 30 April 1997; HRC, *Concluding Observations of the Human Rights Committee: Switzerland*, UN Doc CCPR/C/79/Add.70, 8 November 1996, para 15.
- 263 DIMIA, Response to Draft Report, 4 July 2003.
- 264 UNHCR Detention Guidelines, guideline 6 (emphasis in original). The guidelines come to this position by applying articles 2, 3, 9, 22 and 37 of the CRC. See also UNHCR, Submission 153, para 15.
- 265 UNHCR UAM Guidelines, para 7.6.
- 266 UNHCR, Submission 153, para 2.
- 267 See for example DIMIA, Submission 185, p8; DIMIA, Transcript of Evidence, 2 December 2002, p20; Minister for Immigration, Multicultural and Indigenous Affairs, 'Unauthorised Arrivals and Detention – Information Paper', February 2002; DIMIA, Comments on the Report of the Working Group on Arbitrary Detention, pp6-7, at <http://www.minister.immi.gov.au/borders/index.htm>, viewed 22 November 2003.
- 268 UNHCR, Submission 153, para 4.
- 269 Amnesty International, Transcript of Evidence, Sydney, 15 July 2002, p75.
- 270 DIMIA, Fact Sheet 75, Processing Unlawful Boat Arrivals, at [www.immi.gov.au/facts/75processing.htm](http://www.immi.gov.au/facts/75processing.htm), viewed 20 August 2003.
- 271 DIMIA, Transcript of Evidence, Sydney, 5 December 2002, p93.
- 272 Amnesty International, Transcript of Evidence, Sydney, 15 July 2002, pp74-75.
- 273 DIMIA, Response to Draft Report, 4 July 2003.
- 274 HRC, *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001, 18 September 2003, paras 4.12 and 7.2. See also HRC, *Jalloh v The Netherlands*, Communication No 794/1998, 15 April 2002, para 8.2 and *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, UN Doc. CCPR/CO/73/UK, 6 December 2001, para 16. See further *Zadydas v Davis* 533 US 678 (2001), 'Opinions adopted by the Working Group on Arbitrary Detention', E/CN.4/2001/14/Add.1 9 November 2000 at page 38 (opinion no. 33/1999) and 42 (opinion no. 34/1999). As to reference to this body, note *Commonwealth v Hamilton* (2000) 108 FCR 378 per Katz J at 388, and *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 per Gummow J at 117 and *Commonwealth v Bradley* (1999) 95 FCR 218 per Black CJ at 237.
- 275 UNHCR Detention Guidelines, guideline 3, Exceptional Grounds for Detention.
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- 298 DIMIA, Response to Draft Report, 10 July 2003.
- 299 *MIMIA v B & B* (A246/2003).



# Chapter 7

## Refugee Status Determination for Children in Immigration Detention

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## 7. Refugee Status Determination for Children in Immigration Detention

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The United Nations High Commissioner for Refugees (UNHCR) estimates that around half of the 50 million displaced persons in the world are children. Around 10 million of these children are under the care of UNHCR. Approximately 100,000 separated children roam Western Europe.<sup>1</sup> During 1999 alone, more than 20,000 separated children applied for asylum in Western Europe, North America or Australia.<sup>2</sup> Of those 20,000 unaccompanied children, 46 travelled to Australia to seek asylum. In the same year a further 202 children sought asylum in Australia with their families.<sup>3</sup>

Thus, while some of the children who arrive in Australia without a visa are unaccompanied and must pursue their refugee status alone, others arrive with their family and often rely on the claims made by their parents, although they are also entitled to make separate claims. Either way, according to international law, the refugee status determination process must take account of children's special needs.

Almost all children in Australia's immigration detention centres are asylum seekers who are detained because they have arrived in Australia without a valid visa. If recognised to be refugees, they will be issued with a temporary protection visa and released from detention. If they are not recognised as refugees they must stay in detention until they are removed from Australia.

The manner in which children's claims for asylum are processed is important for a number of reasons. First, the length of time a child spends in detention is directly related to the length of time it takes to process an application for a protection visa.<sup>4</sup> Second, if the refugee status determination process lacks integrity or fails to take into account the special needs of a child, this may result in a child being returned to a country where they face a real risk of persecution, as well as their continued detention while awaiting deportation, potentially for extremely long periods of time. Third, the manner in which the visa process is conducted can add to the distress felt by children in detention.

The Inquiry has therefore examined the refugee status determination process on mainland Australia in order to assess whether it takes account of the special rights

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and needs of children in detention. In particular, this chapter addresses the following questions:

- 7.1 What are children's rights regarding refugee status determination?
- 7.2 How does the refugee status determination system work in mainland detention facilities?
- 7.3 Is there priority processing for children in detention?
- 7.4 Is there appropriate legal assistance for children in detention?
- 7.5 Is there a child-friendly environment and assessment process for children in detention?
- 7.6 Are special substantive considerations applied to children's asylum claims?
- 7.7 What special measures are taken to assess claims by unaccompanied children in detention?
- 7.8 What is the refugee status determination process for 'offshore entry persons'?

There is a summary of the Inquiry's findings at the end of the chapter.

### **7.1 What are children's rights regarding refugee status determination?**

Article 22(1) of the *Convention on the Rights of the Child* (CRC) requires Australia to take appropriate measures to ensure that asylum-seeking children enjoy their rights under the CRC and the Refugee Convention:<sup>5</sup>

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

The protection of refugee children from being returned to the country in which they face persecution (non-refoulement) under the Refugee Convention is one of the fundamental rights of children which Australia has agreed to respect.<sup>6</sup> It will also be a breach of the rights of children if they are returned to a country in which there is a real risk of having their rights under the CRC breached.<sup>7</sup> Australia is therefore required to ensure that there is an effective process to ensure that these rights of children are protected.

Article 22 must be applied in the light of the non-discrimination principle contained in article 2 of the CRC. In the context of refugee status determination, the principle of non-discrimination means that children in detention are entitled to enjoy the same quality of refugee processing as children applying for asylum in the community. However, the impact of the deprivation of liberty may mean that children in detention require additional assistance to enjoy the same quality of process.

The 'best interests' principle in article 3(1) requires decision makers to make a child's best interests a primary consideration in their determinations. Further, article 20(1) of the CRC requires that additional assistance be given to unaccompanied children throughout the refugee status determination process to help them overcome the disadvantages of being separated from their parents.

Finally, article 37(b) of the CRC requires that detention be for the shortest appropriate period of time. Since the length of detention for children seeking asylum is invariably linked to the time it takes to process a child's claim, processing must be prompt for children in detention.<sup>8</sup>

While the Refugee Convention does not specify how refugee status is to be determined, the Department of Immigration and Indigenous and Multicultural Affairs (the Department or DIMIA) has acknowledged that it is 'difficult to see how a State can in good faith give effect to [the principle of non-refoulement] without providing asylum seekers access to a fair and effective status determination procedure'.<sup>9</sup> The right to procedural fairness is further reinforced by article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) which may be applicable to the refugee status determination process for children.<sup>10</sup>

As the primary body responsible for the protection of refugees, UNHCR has issued several guidelines that are intended to assist States regarding the minimum standards for executing a fair refugee status determination procedure. They reflect the provisions of the CRC, Refugee Convention and ICCPR.

In its submission to the Inquiry, the Department states that it conforms to those instruments, including the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR Procedures Handbook) and the UNHCR *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (UNHCR UAM Guidelines).<sup>11</sup>

While the UNHCR UAM Guidelines were specifically created to take into account the special vulnerabilities of unaccompanied minors, they are for the most part, of general application and therefore relevant to all children. The UNHCR publication entitled *Refugee Children: Guidelines on Protection and Care* (UNHCR Guidelines on Refugee Children) also provides guidance on the protection that should be given to refugee children and the process of determining whether children are refugees.

Together, these UNHCR guidelines state that children are entitled to, amongst others, the following safeguards during the refugee status determination process:

1. determination of status by 'a competent authority, fully qualified in asylum and refugee matters'<sup>12</sup> and formal review of a negative refugee status determination by a fair and independent tribunal<sup>13</sup>
2. priority processing for children and their families (especially where the consequence of a slow process is continuing detention)<sup>14</sup>
3. legal assistance from the moment of arrival throughout the entire refugee status determination process<sup>15</sup>

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4. child-friendly procedures<sup>16</sup>
5. liberal application of the benefit of the doubt in assessing credibility and facts<sup>17</sup>
6. the appointment of a guardian or adviser to assist unaccompanied children through the process.<sup>18</sup>

These six issues are discussed in turn throughout the remainder of this chapter.

The guidelines also state that it is desirable for all interviews with unaccompanied children be conducted by trained and qualified persons with knowledge of the psychological, emotional and physical development and behaviour of children. Where possible, such experts should have the same cultural background and mother tongue as the child.<sup>19</sup> As far as possible, interpreters should also be skilled and trained in refugee and children's issues.<sup>20</sup> It is also important that the decision-makers on unaccompanied children's asylum claims have an understanding of the history, culture and background of the child.<sup>21</sup>

Children 'old enough to understand what is meant by status determination' should be informed of the process, their current status, what decisions have been made and the possible consequences, to reduce anxiety and ensure that poor expectations do not lead to the child falsifying information.<sup>22</sup>

## 7.2 How does the refugee status determination system work in mainland detention facilities?

The integrity and fairness of the process of determining whether or not a child in detention is a refugee is of fundamental importance. This section examines whether Australia's refugee status determination process, as it applies to children in immigration detention, is conducted by the appropriate authorities and allows for appropriate review of a negative refugee status determination. The Inquiry has attempted to identify those aspects of the process that are particularly problematic for children in immigration detention and examine whether the process adequately caters for those difficulties.

Under international law, the detention of unauthorised arrival children and their families throughout the refugee application process imposes special duties on the Department. The primary responsibility is to expedite the process because, under Australia's detention laws, children are detained until the application has been finally determined. However, the exclusion of children and their families from the general community removes the power of choice and control from the asylum seekers and the Department is obliged to take account of this impediment. Although the Department has primary responsibility for the refugee application process, the Inquiry notes that the Department must operate within the confines of legislation which sets out the process of refugee status determination, including asylum seeker access to the appeals process and migration assistance. Australasian Correctional Management Pty Limited (ACM) does not have responsibility for the process of refugee status determination, although it is required to ensure that there are reasonable facilities for detainee contact with legal representatives.

In its submission to the Inquiry the Department describes the refugee status determination process to include the following stages:

1. Entry interview, screening and separation detention
2. Primary assessment of a protection visa application
3. Merits review
4. Judicial review
5. Ministerial intervention.

### **7.2.1 The entry interview, screening and separation detention**

When a child or adult arrives in Australia by boat, without a visa, they will have a biodata interview which records basic details. They will then be taken to an immigration detention centre. Once at the immigration detention facility, the Department commences an entry interview, sometimes referred to as the 'screening interview'. When a child is unaccompanied, that interview will be with the child alone. Children are not generally interviewed when they make an asylum claim with their parents.

Information provided at this entry interview is crucial in determining the Department's view of whether children and their families are seeking to engage Australia's protection obligations or not. If the child or family is 'screened-out' they will be expected to return to their country of origin and will usually stay in separation detention until they are removed or deported. If 'screened-in' they may proceed to the primary processing stage and are moved to the main detention compounds.

The Department describes the screening interview as a fairly simple process:

It is one where, as I say, people are invited to simply tell their story. That can often be a time consuming interview, sometimes several hours, so it is not one where we are attempting to limit people's opportunity, quite the reverse – give them as much opportunity as possible to explain what their circumstances are.<sup>23</sup>

Under the *Migration Act 1958* (Cth) (Migration Act), Department officers are not required to provide visa assistance, such as providing a visa application form, unless the detainee specifically requests it.<sup>24</sup> Further, unless the detainee specifically requests a particular private lawyer, legal assistance is not provided. There is no requirement to inform children and their parents of their right to a lawyer if they want one. It is not until a detainee is 'screened-in' to the protection process that the Department assigns the detainee government-funded migration assistance through the Immigration Advice and Application Assistance Scheme (IAAAS).<sup>25</sup>

These provisions of the Migration Act are of particular concern when applied to unaccompanied children who may not be aware of the need to request asylum specifically.

Furthermore, it would be dangerous to underestimate the pressures faced by children in detention and their parents during this process. Often these interviews occur shortly after arrival and transfer to an immigration detention facility. The Refugee

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Advice and Casework Service (RACS) expressed concern that the stresses on children and their parents during these interviews mean that 'children may be not able to express their fears or situation completely'.<sup>26</sup> Child asylum seekers in detention confirm the reality of these concerns:

Most people come from small villages in Afghanistan – they are not ready for the interviews when they first arrive – they are almost dizzy, and still can't walk properly on the land because they had been on a small boat for anywhere between 10 and 30 days.

Then the people try so hard to prepare for the interviews – I think that they should be allowed a time at least to ready themselves, and should be given an information session about what the interviews mean and why they are done etc.<sup>27</sup>

The Department states that the interviews occur in a 'non-threatening setting'.<sup>28</sup> However, entry interviews for unauthorised arrivals generally take place in 'separation detention', an area that is fenced off from the rest of a detention centre. The ACM Policy on 'Separation Detention', developed in accordance with the Department's requirements, makes clear that the primary purpose of separation detention is to prevent communication with the outside world. Other than sending an initial letter to an overseas address to confirm safe arrival, detainees in separation detention are not permitted to make or receive outside calls, nor access incoming or outgoing mail or faxes.<sup>29</sup> Furthermore there is no access to live television, radio, newspapers or magazines.<sup>30</sup>

Three children describe separation detention as follows:

Before the interview we were kept away from other detainees who were interviewed before. We were not allowed to talk to other detainees. It was like a separate camp within the camp. We had to put on ID cards at all times, 24 hours a day. We had TV only once every three weeks, only movies, no news or other programs, no papers. Only in the last two weeks of our stay were we able to borrow newspapers.<sup>31</sup>

Closed camp was first and was very restrictive – even talking to people outside the camp was restricted – the case officer was the only person I was allowed to talk to.<sup>32</sup>

In the closed camp, we could play outside for between 15 and 20 min, then we had to go back inside.<sup>33</sup>

The Department's rationale for separation detention is to ensure the 'integrity of Australia's visa determination process' by providing the Department 'with the assurance that any claims by unlawful non-citizens to remain in Australia are put forward by detainees without the embellishment or coaching of others'.<sup>34</sup> This argument somewhat contradicts another assertion by the Department, namely that unauthorised arrival asylum seekers are coached by people smugglers. If people smugglers coached the asylum seekers in what to say, it would not matter whether or not they were separated from other detainees on arrival because they would already have the relevant information.

This approach to determining whether children and their families who are unauthorised arrivals are entitled to access Australia's protection process is contrary to the spirit of the UNHCR guidelines. These guidelines highlight that it may be difficult for children to express their views and that, therefore, interviews should take place in a child-friendly environment.<sup>35</sup>

Furthermore, it marks a significant difference between the assessment of child asylum seekers in the community and children in detention. Children in the community can make an application for protection after the benefit of consulting a range of people, including lawyers, who may assist them in making the best possible claim for their circumstances. If the presence of such people does not affect the integrity of the process for child asylum seekers in the community, it is unclear why their advice would affect the integrity of the process for children in separation detention. In fact, as lawyers from RACS point out:

having access to lawyers at that [entry] point would add to the integrity of the process. You have asylum seekers knowing what their rights are and knowing that Australia can offer them protection from the persecution that they may be suffering in their country.<sup>36</sup>

The Department states that if the child is 'screened-out' of the process at the entry interview, it is still possible to be 'screened-in' later on if the child asks to apply for a protection visa.<sup>37</sup> It gave oral evidence to the effect that screening-in sometimes occurs after additional concerns are raised by the detainee:

there have been instances where those individuals have subsequently, through communications with staff in the Centre, elaborated on their earlier interviews and, in those circumstances, if they have raised something that expresses a concern, then they have been offered assistance of an IAAAS provider and subsequently made visa applications.<sup>38</sup>

Further, during its visits to the detention facilities, the Inquiry became aware of persons who had spent substantial time in separation detention because of initial difficulties in persuading the Department of their claims and were later permitted to make a protection application.

One family told the Inquiry that they had spent seven months in separation detention in Port Hedland prior to being screened-in. They alleged that they had tried to get the attention of Departmental staff in order to discuss their case further and obtain a lawyer, to no avail. Finally one of the daughters broke a window to get the Department's attention.<sup>39</sup> Shortly thereafter they lodged a visa application.

RACS describes the process as somewhat haphazard:

There certainly [are] instances of self screening-in and that's where a detainee manages to come back into the screening process after a while and that's been done by people throwing application forms over fences to lawyers when they go up to detention in other matters ...<sup>40</sup>

Thus the Inquiry has two concerns about the 'screening-in' process for children and their families. The first is the effective unavailability of legal assistance while in

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separation detention. The second is the lack of a requirement to ensure that children are aware of the process for applying for protection. These features create a concern that there are persons who are being deported despite being genuine refugees. This concern was expressed by the Senate Legal and Constitutional References Committee in its 2000 report entitled *A Sanctuary Under Review*.<sup>41</sup> The Senate cited an example of Sri Lankan asylum seekers who were initially rejected but who were found to be refugees after the intervention of lawyers.<sup>42</sup> The Inquiry has heard of similar stories involving children. The following example describes the case of two unaccompanied siblings who were initially screened-out, but were eventually granted refugee status after a year in detention:

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### Unaccompanied children and the screening process

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June 2001	Unaccompanied children aged 10 and 14 arrive in Australia. They are taken to Woomera. They are screened out in a large group of Afghan detainees.  [They] are orphans. Their mother died some time ago and their father was taken by the Taliban. They believe he is dead. They had been living with their grandparents who feared for the children's lives and their futures and decided to get the children to safety. <sup>43</sup>
September 2001	Department staff raise the possibility of reviewing the children's 'screening-out' in light of changes in Afghanistan. <sup>44</sup>
October 2001	The children are referred to an IAAAS migration agent for assistance in making a protection application.  When they arrived in Australia they had one interview with DIMIA. After this, each morning this girl would dress carefully, take her chair outside the donga and wait to be called for another interview like all the other people. But she and her brother were never called. They had been screened out. They hadn't said the magic words [of asylum] ... These two children waited every day for almost six months, then miraculously they were back in the system. <sup>45</sup>
November 2001	The IAAAS providers lodge a protection visa application for the children. The Department conducts a primary interview.
January 2002	The children are transferred to the Woomera Residential Housing Project for six days and then to foster care as an alternative place of detention.
June 2002	Primary decision-maker finds them to be refugees and they are granted temporary protection visas.

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## 7.2.2 Primary assessment

Once children and their families in detention make a protection visa application, the Department commences primary assessment of their cases. Usually children will be included in the application of their parents, however unaccompanied children may make their own application and children within a family are also entitled to make separate applications.<sup>46</sup>

A protection visa application for persons in Australia starts the process of determining whether or not a person is a refugee to whom Australia owes 'protection obligations'.<sup>47</sup> Under the Migration Act whether a person is considered a refugee under Australian law is determined by whether or not a person is a refugee under the Refugee Convention.<sup>48</sup>

The primary assessment process is carried out by Department officers. The Department's case managers interview detainees at the detention facility with an interpreter if needed. The Inquiry heard from children who had formerly been in detention that there were often problems in obtaining appropriate interpreters during the Department interviews. Some children claimed that some of their friends were rejected because they had been wrongly translated:

At Curtin, many people were rejected because of the interpreter. They were wrongly translated. There is no Hazara interpreter. It is so hard to explain.

I had a problem with my interpreter. I had the wrong interpreter for my language.<sup>49</sup>

There do not appear to be any set procedures as to whether children are interviewed at the primary assessment stage if they are named as dependents on their parent's application.<sup>50</sup> Department case managers decide on a case-by-case basis who they wish to interview, which can include those who have no protection claims in their own right. However, where children make their own application the case manager will need to interview the child in a child-friendly manner and apply the appropriate criteria.

The Department states that '[a]ssessment processes accord with natural justice requirements and applicants have the opportunity to comment on information or inference from other sources that are adverse to their case'.<sup>51</sup> Furthermore, 'a case manager will disclose information adverse to the applicant if the information is relevant and significant to the decision'.<sup>52</sup> However, RACS notes in its submission that:

DIMIA refuses to provide copies of the tape or transcripts of these [screening] interviews through the Freedom of Information process. (In the past DIMIA has provided the record of such interviews through the Freedom of Information process and therefore some analysis of these interviews is possible).<sup>53</sup>

The Department states that 'the Freedom of Information process is not an element of the natural justice safeguards for visa decision-making'.<sup>54</sup>

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This is a particular concern because any discrepancy between information provided in the original screening interview and subsequent interviews may be used to undermine the credibility of an applicant.<sup>55</sup> The likelihood of discrepancies increases as children have no lawyer to assist them in the screening process (see further section 7.4):

When we first arrived at Woomera, we had no lawyer for the first and second interview. But at the third interview [the Department] said, 'you didn't tell me that before'.<sup>56</sup>

### 7.2.3 Merits review

If detainee children and their families receive a negative decision from the primary decision maker they can appeal to the Refugee Review Tribunal (RRT). The goal of the RRT is to provide 'a mechanism of review that is fair, just, economic, informal and quick'.<sup>57</sup>

The Department's case officer must provide asylum seekers with a copy of the written primary decision record and inform them of their right of appeal.<sup>58</sup> The government-funded migration agents, IAAAS, are also contractually obliged to ensure that the primary decision and appeal rights are fully explained to children and their families. The IAAAS providers must arrange for, and meet the costs of, translating and interpreting. However, the Inquiry received evidence that the primary decisions were written in English and interpreters were not always available to translate the result. For example, one unaccompanied child reported the following occurring to a friend:

When he was rejected there was no lawyers available. There was no translator available and the reason for rejection he had to answer. He does not know English, so he has to go round round and find someone [another detainee] if he can write a letter for him. Now, what is the quality of the education of that person?<sup>59</sup>

In the case of persons held in immigration detention, the application for review must be made within seven days of notification of the primary decision.

Detainees are entitled to IAAAS assistance to prepare for an appeal to the RRT, but there is no requirement that the IAAAS provider attend the hearing. While the applicant can be assisted by another person at the hearing, such as a friend, a migration agent or a lawyer, there is no absolute right for that person to present arguments or address the RRT.<sup>60</sup>

Children may apply for review in their own right, whether or not they are originally included in their parent's application. Furthermore, the RRT is entitled to question children even when they remain on their parent's application.<sup>61</sup>

Only one RRT member hears a case and there is no possibility of a review by a larger bench. RRT members need not have legal qualifications.

The RRT member examines the facts supporting the protection claim afresh and is not restricted to the facts found by the primary decision maker. If the RRT Member does not think that they can make a decision in favour of the applicant on the basis of the information provided by the applicant and the Department, the RRT will invite the applicant to attend a hearing. However, given the remoteness of the detention facilities, many hearings are held by video-conference. Sometimes the RRT is sitting in one State, the legal adviser in another State and the detainee applicant in a third State.

The RRT is required to inform the applicant of any material specific to the applicant that it intends to use against him or her.<sup>62</sup> However, there is no obligation to disclose or to invite a response in relation to general material that may be used against the applicant.<sup>63</sup> Furthermore, there is no requirement that the material be translated so there may be substantial difficulties in communicating the material to detainees.<sup>64</sup>

All unsuccessful applicants must pay \$1,000 to the Commonwealth within seven days of receiving a negative decision from the RRT.<sup>65</sup> This can be particularly difficult for children and families in immigration detention as they have had little opportunity to earn money while in detention. If all members of one family make separate applications each applicant will have to pay the \$1,000 – whether or not they are children.<sup>66</sup> It is generally understood that the Department does not pursue payment of these fees where it is anticipated that the person has no capacity to pay the fee, however non-payment of the debt can affect eligibility for visas at a later time.

The Department regards the RRT decision as the end of the refugee status determination process. However, an asylum seeker still has a limited right of appeal to a court and can also make an application for an exercise of Ministerial discretion.

### **7.2.4 Judicial review**

Judicial review of administrative decisions is one of the fundamental tenets of the rule of law. The High Court of Australia stated that:

Judicial review is neither more nor less than the enforcement of the rule of law over executive actions; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.<sup>67</sup>

In the context of claims for refugee status, judicial review is the safety-valve that ensures the protection of a child's right to non-refoulement by ensuring that all visa decisions made by the Department and the RRT are made according to law. Therefore, while judicial review of visa decisions is not a process that allows review of the merits of a decision, it is a process that ensures that certain minimum standards of administrative decision making have been observed.

Since 1992, successive Australian governments have enacted legislation designed to curtail the power of the courts to review migration decisions.<sup>68</sup> The most recent of those attempts was contained in the so-called 'Pacific Solution' package of

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legislation, discussed later in this chapter. According to the Department's Fact Sheets, the purpose of the *Migration Legislation Amendment (Judicial Review) Act 2001* was to give 'effect to the Government's long-standing policy commitment to restrict access to judicial review in migration matters in all but exceptional circumstances'.<sup>69</sup>

The legislation introduced a 'privative clause' (section 474 of the Migration Act) which sought to 'give decision-makers wider lawful operation for their decisions' which means that 'the basis on which those decisions can be challenged in the Federal Court, the Federal Magistrates Court and the High Court is narrower than before'.<sup>70</sup>

The constitutional validity of the privative clause was challenged in the High Court in the case of *Plaintiff S157/2002 v Commonwealth of Australia*. While the High Court found that the clause was valid, it also found that the clause could not be read in the way that the Commonwealth sought to apply it. The Commonwealth argued that the privative clause would protect most forms of administrative error from judicial review, even decisions that may have been procedurally unfair, as long as the decision-maker was acting in good faith. In finding that the privative clause could not be construed to have that effect, Chief Justice Gleeson made the following comments:

Decisions-makers, judicial or administrative, may be found to have acted unfairly even though their good faith is not in question. People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness. If Parliament intends to provide that decisions of the [RRT], although reached by an unfair procedure, are valid and binding, and that the law does not require fairness on the part of the [RRT] in order for its decisions to be effective under the [Migration] Act, then s 474 does not suffice to manifest such an intention.<sup>71</sup>

There is no time limit for lodging an appeal with respect to most judicially-reviewable decisions.<sup>72</sup>

### 7.2.5 Ministerial discretion to grant a visa

When the RRT makes a negative finding the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) has a non-compellable discretion to substitute a more favorable decision under s417 of the Migration Act. This discretion is especially important in the case of children and families who may not be refugees according to terms of the Refugee Convention, but who may still have a genuine fear of returning to their home country or other reasons for staying in Australia on the basis of humanitarian considerations.

Although the Minister has unrestricted discretion to make this decision, Migration Series Instruction (MSI) 225 provides some guidelines as to when this discretion should be exercised. Relevant criteria include the age of a person, the health and psychological state of the person and 'the length of time the person has been present in Australia (including time spent in detention)'.<sup>73</sup>

MSI 225 also includes consideration of 'circumstances that may bring Australia's obligations as a signatory to the Convention on the Rights of the Child ... into consideration'.<sup>74</sup> This is referring to the protection of children from non-refoulement where there is a real risk that their rights under the CRC would be breached if they returned to their home country.

The Department states that:

In cases where a person has been found not to be owed protection by a review tribunal, and is subject to removal, they are assessed [with a view to a possible exercise of the Minister's power under s 417] against other relevant treaties, including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights ... and the Convention on the Rights of the Child.<sup>75</sup>

Cases can be referred to the Minister by Departmental officers, the RRT, the asylum seekers themselves or any other person.

The Inquiry knows of only two cases during the period of time covered by the Inquiry, in 1999, where the Minister has exercised this discretion in the case of children and families in detention.<sup>76</sup> Furthermore, the Inquiry understands that people who have had their applications for a protection visa rejected are not routinely asked to provide any further information which may be relevant to their rights under these other treaties, making any consideration that may occur unsatisfactory. This raises the risk that children may be returned to their country in contravention to the CRC.

### **7.2.6 Findings regarding the refugee status determination process**

While Australia's refugee status determination procedures do provide a formal process for the determination of refugee status and review of negative decisions, the application of that process to children in immigration detention raises several concerns.

First, the isolation imposed by separation detention creates an intimidating environment that reduces the ability of a child and his or her family to make out the best case possible for engaging Australia's protection obligations. This concern is exacerbated by the fact that the legislation does not require the Department to inform child asylum seekers in detention that they can request asylum and legal assistance. As a result, there is a risk that children, especially unaccompanied children, may be 'screened-out', and removed from Australia, even though they may have a valid claim for protection. If 'screened-out' at the initial entry interview, the possibility of re-engagement through review of the screening decision appears to be a matter of chance. This situation is markedly different to the process enjoyed by asylum-seeking children in the community who can make their case in their own time, and are able to consult a range of people, including lawyers, who may assist them to make a claim.

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Second, the Inquiry is concerned that child asylum seekers and their representatives are unable to access transcripts of their screening interview, as any information provided in this interview may have serious implications for the progress of their claim. The Inquiry is also concerned that inadequate interpreter services during the primary assessment process may impact on the quality of the claim.

Third, the Inquiry is of the view that the merits review stage is especially intimidating for an unaccompanied child. The remoteness of some of the detention facilities mean that children will usually only be involved in the process through a video monitor. The impersonal nature of video communication combined with possible language difficulties and the failure of the IAAAS contract to require a child's migration agent or lawyer to attend the hearing makes this a very difficult process for unaccompanied children in particular. It reduces the likelihood of a child being able to put forward his or her best evidence. Unaccompanied children, and any other child making a separate claim, also face the prospect of paying \$1000 if unsuccessful at this stage.

However, it is the successive governments' deliberate attempts to curtail the right to judicial review that is especially troubling. Courts are an independent body intended to protect the rule of law. Instead of embracing the checks and balances that courts provide to executive decision-making, governments appear to have regarded the courts as an unreasonable restraint of the Department's power to decide the fate of asylum seekers. Recent decisions of the High Court of Australia appear to have partially restored the availability of judicial review.

### 7.3 Is there priority processing for children in detention?

Since the length of detention for child asylum seekers is directly related to the time it takes to process a protection visa application (and effect removal), the speed of processing the claims of children is of paramount importance for children in immigration detention if Australia is to meet key obligations under the CRC. UNHCR principles also provide that asylum applications by children should be given priority and decisions on primary applications and appeals should be reached promptly and fairly.<sup>77</sup>

#### 7.3.1 How fast is the primary processing for children in detention?

After we had been here for two months we had an interview, after another three months we had another interview the same as the first. I understood from what I was told by a DIMA representative, that the first interview has been lost somehow and we were required to repeat it. Another three months later we were called for an interview with the Case Officer. We thought then that we would be released but we heard nothing for another seven months.<sup>78</sup>

The Department states that 'minors in detention are given the highest processing priority'.<sup>79</sup> There is some evidence that unaccompanied child asylum seekers are given priority in processing. During the period of time covered by the Inquiry, the Department's Protection Visa Procedures Manual, which forms part of the internal Procedures Advice Manual, provided that amongst all applications unaccompanied

children were fifth in the priority list after detention cases, torture/trauma cases, Asylum Seeker Assistance cases and reporting cases.<sup>80</sup> The Department also provided some statistical evidence to indicate that, during 1999-2001 at least, unaccompanied children were granted protection visas more quickly than accompanied children.<sup>81</sup> However, the Inquiry did not receive evidence to indicate that unaccompanied children *in detention*, as opposed to unaccompanied children generally, enjoy an accelerated refugee status determination process within the 'detention' group during the period of time covered by the Inquiry.

Further, the Department did not produce any statistical evidence or a written policy suggesting that accompanied children in detention are given priority amongst the 'detention' group.

While it appears that the Department has a target of finalising applications from persons in detention within 42 days of lodgment, there is no distinction between the target for applications made by adults, families with children or unaccompanied children.

Further, the Department appears to have some difficulty in meeting its own targets. In 1999-2000, 68.7 per cent of applications from asylum seekers in detention were finalised within the 42-day target,<sup>82</sup> in 2000-01 only 40 per cent of applications met the target,<sup>83</sup> and in 2001-02 only 47 per cent of the cases were completed within 42 days.<sup>84</sup>

The Department informed the Inquiry that by mid-2001 the time taken for the Department to process protection visa applications had decreased from an average of seven and a half months to twelve and a half weeks for 80 percent of applicants. It appears that this refers to all applicants as opposed to persons making applications from detention.<sup>85</sup>

The Inquiry welcomes the Department's efforts to reduce processing times. However, it should be kept in mind that the primary processing of applications does not represent the total time spent in detention, as it does not include the time taken to screen-in (time spent in separation detention), nor does it include time taken for merits and judicial review. Children may still spend months in detention waiting for what they consider to be a 'final' outcome of being processed.<sup>86</sup>

The evidence received by the Inquiry suggests that, even if there was a policy to prioritise the claims of children in detention, it was not applied in a uniform manner. A lawyer representing children in Western Australia described it as 'a bit of a lottery':

PROFESSOR THOMAS (INQUIRY): So can you comment on why some cases are quick and some cases long? Because there have been cases that are much shorter. What is the factor that makes a case short and a case very long?

MS le SUEUR: I often describe the whole process to people as a bit of a lottery. If you are lucky, you will get a good lawyer and if you are lucky you get a good case officer. And if you are lucky everything goes okay. If you are not lucky and you do not have a good lawyer and you do not have a good case officer, then you know it is fairly much down hill from there.<sup>87</sup>

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A former detainee child was of a similar view:

In my dealings with DIMA I did not trust them at all – the number of visas that were issued in the beginning was quite high, then it became more difficult to obtain a visa. Then occasionally if objections were made, some people would be released. It felt like a lottery and I couldn't see the method in the decisions.<sup>88</sup>

In the example set out below, it took two months before a protection application was made and more than seven months for the Department to decide that an unaccompanied child did not have a valid protection claim. The example also highlights the protracted length of time taken by the courts to consider his appeal (this is discussed further below). The child was waiting in the Port Hedland detention centre throughout this period.

Processing timetable for an unaccompanied child in Port Hedland

May 2000	Arrives as a stowaway in Geelong; interviewed immediately by the Department. Applies for a protection visa with the assistance of an IAAAS lawyer.
July 2000	Interviewed by Department for primary assessment.
February 2001	Department rejects the protection visa application. Appeal to RRT lodged.
March 2001	RRT hearing.
April 2001	RRT rejects the appeal. Application to Federal Court lodged.
August 2001	Single Judge of the Federal Court dismisses the appeal. Appeal lodged to Full Court.
June 2002	Full Court dismisses appeal.
July 2002	Applies for special leave to appeal in the High Court.
August 2002	Withdraws application to the High Court.

The Department has subsequently informed the Inquiry that from 14 April 2003 the Protection Visa Procedures Manual order of priority processing, lists minors in detention as the highest priority for processing.<sup>89</sup>

7.3.2 How fast is the merits review at the RRT?

As set out above, appeals from a primary decision to the RRT must be lodged by detainees within seven days of receipt. The RRT states in its submission to the Inquiry that:

All applications involving persons in detention are streamed for priority processing. On receipt of an application showing the applicants location as a detention centre, the RRT's case management system electronic record, which is created for each new application is immediately flagged. The hard

copy file cover is also given a marking to draw attention to the fact that it is a priority case. If there are children in detention an additional cover marking is placed on it.<sup>90</sup>

It is unclear what the 'additional cover marking' consists of, but it seems that, in principle at least, there is some attempt to ensure that processing of appeals for children in detention are given some priority. In the written and oral evidence submitted to the Inquiry, the RRT stated that cases involving children in detention took an average of 67.7 days in 1999-2000, 92.4 days in 2000-2001 and 75.1 days in 2001-2002.<sup>91</sup> The RRT testified that in the past financial year 73 per cent of the cases were completed within 70 days and the longest period of time taken would have been around 100 days, although this was an estimate only.<sup>92</sup>

### **7.3.3 How fast is judicial review?**

There is no evidence before the Inquiry to suggest that the courts prioritise judicial review of decisions relating to children in detention. On the contrary, it appears that the Federal Court has generally taken some time to process review decisions, as demonstrated in the case described above.

### **7.3.4 What is the impact of security checks on processing time?**

The Department stated that in 2000 it introduced 'front end loading', or early commencement, of health and character checks to reduce processing times.<sup>93</sup> However, despite efforts, it appears that security checks can extend a child's stay in detention considerably:

And why I was two months after [being found to be a refugee] was because there is one organisation called ASIO [Australian Security and Intelligence Organisation]. It is for the spy and terrorist. [I was detained at Woomera] for two months after my case officer accepted me. I'm two months, I was accepted as refugee, before I didn't know I am refugee! And I thought about ASIO and how they can think that a person under eighteen years old, who didn't see anything in his life, came to Australia to be a terrorist? And they are doing ASIO on us? Maybe the old people, maybe they were in prison and they could be, an example. But how could we be terrorists? We stayed two or three months after we were accepted, because of waiting for the ASIO! Unbelievable!<sup>94</sup>

It appears that there is no outer limit on the time allowed for the conduct of such checks although the Department does have the right to waive security checks in certain circumstances.<sup>95</sup> The Inquiry has not received any evidence from the Department indicating that a child has ever failed a security check. Indeed it would seem unlikely that any child would have sufficient records to conduct such a check. It is therefore disappointing that the Department has not waived the need to conduct security checks in the case of children who have received a positive determination, but who are waiting in detention pending the outcome of such checks.

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The time taken to undertake security checks also affects detainees who are successful at the RRT. The Inquiry received evidence from several children and families who were waiting for many months in detention after having been found to meet the definition of refugee by the RRT.<sup>96</sup>

So after I got accepted from the RRT Court, they said okay now you can go...and the problem now I have accepted five months ago, five months and still they are not releasing me, they are telling me, you have a police check. And what is it? I am not a terrorist, not criminal, what is this police check to keep me? So now she is on a hunger strike and she's not eating few days and it's making very hard for everyone...

They should do the police check the first minute we come to Australia so that they know, like they give us Reject or do anything. But now we have given addresses and the name of the doctor we used to go, everything. School, everything. So if they go on the Internet even they can find the criminal records, okay but like, how long does it take till it gets like, they didn't even do the police check the first minute we got the Accept. They didn't do it. Two months after we got Accept, they did the police check, now this is five months we are here, then what is the paper that they have given Accept?... And then they tell us, You have got Accept so you should not ask about your Visa all the time. We say, 'no' but you know because we have finished our patience, it's like that you have crossed all of the ocean with all of the sharks and everything and now you are at beach but they don't let you to go on the beach.<sup>97</sup>

The Inquiry also received evidence regarding an unaccompanied child, who was detained in Curtin IRPC during 2001. He remained in detention for nearly five months after his case was successful at the RRT while security checks were being carried out.

Processing timetable for an unaccompanied child in Curtin

January 2001	Unaccompanied child aged 15, arrives in Australia by boat. He is taken to Curtin detention centre.
March 2001	Receives notification from the Department that his primary application for a protection visa has been rejected.
July 2001	Receives notification that he has succeeded at the RRT.
August 2001	Signs a statutory declaration stating that he had 'never been convicted of a crime or any offence in any country'.
Dec 2001	Released from detention.

### 7.3.5 Findings regarding priority processing for children in detention

The Inquiry commends the Department for introducing general initiatives to speed up the processing of primary applications. However, from the statistics and Departmental policies available to the Inquiry, there is no evidence that children enjoyed any extra priority within the general pool of applications made by persons in immigration detention within the period covered by this Inquiry. The Inquiry notes that in April 2003, the Department amended the Protection Visa Procedures Manual to make minors in detention the highest priority for processing. Unfortunately, this occurred after all primary processing had been completed for children in detention at that time.

The RRT has also recently introduced policies intended to expedite the processing of claims from children in detention. However, the effectiveness of these policies has yet to be proven. Appeals to the courts can also take many months.

Despite measures to expedite security checks, the conduct of such checks has sometimes extended the detention of children for months. Although the Inquiry recognises the importance, and the difficulties, of conducting security checks, it is unconvinced that every child who makes an asylum claim needs to remain in detention while these security checks are carried out, especially when they have received positive determination of their status.

Failure to expedite any or all of these processes results in the prolonged detention of unaccompanied children and children with their families. It also extends the period of uncertainty that children face as to their future.

## 7.4 Is there appropriate legal assistance for children in detention?

In recognition of the importance of the protection of the right to non-refoulement, the UNHCR UAM Guidelines require the provision of legal assistance throughout the entire refugee status determination process. UN rules and principles relating to the rights of children and adults in detention also designate legal assistance as a fundamental procedural right for those deprived of their liberty.

### 7.4.1 When is legal assistance available?

The Department asserts that all detainees can ask for a legal aid or a private lawyer at any stage. However, the Migration Act specifically provides that there is no obligation for the Department to notify detainees that they have the right to obtain legal advice. Further, as described in section 7.2.1 above, there is no obligation to provide visa application assistance during the initial screening process.<sup>98</sup> A 1998 Human Rights and Equal Opportunity Commission (the Commission) report on unauthorised arrivals, *Those who've come across the seas*, recommended that, as a minimum, detainees should be informed of their right to legal assistance.<sup>99</sup> However, the Department has consistently rejected any argument that they have a responsibility to inform new arrivals of their rights.<sup>100</sup> Furthermore, legislation was

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enacted to prevent the Commission from initiating contact with detainees to inform them of these rights.<sup>101</sup>

In any event, it is difficult to imagine how a child in separation detention – with no phones or access to the community – could identify a lawyer for the screening interview, especially a lawyer willing to provide advice at no cost. This situation contrasts sharply to that of asylum seekers in the community who can be directed to community legal organisations or can seek the assistance of friends and family to identify and pay a lawyer.

Nevertheless, all children and families in detention are provided with government-funded assistance under IAAAS during primary processing and merits review at the RRT. IAAAS providers are registered migration agents. While some migration agents are lawyers, they need not be. The provision of migration application assistance is an appropriate and essential way of counteracting some of the disadvantages that come from being detained in remote detention facilities – namely a lack of access to a community of lawyers and migration agents.

Under the contract with the Department, the IAAAS providers must consult with asylum seekers prior to lodging the protection application; prepare and lodge that application; respond to requests for further information and keep the applicant up to date on the progress of their claim. They must also explain the primary decision and any review opportunities.<sup>102</sup> They are not obliged to attend the RRT hearing but are permitted to do so.<sup>103</sup>

There is no government-funded assistance during the screening or judicial review stages of the application process. There is also no government-funded assistance for the purpose of making a bridging visa application or an application for the exercise of Ministerial discretion. However, in some cases IAAAS providers do give assistance on a pro bono basis.

### 7.4.2 What are some of the problems with the IAAAS service?

Many of the problems regarding the legal assistance provided to children and families in detention relate to the remoteness of some of the facilities themselves and the failure to take into account the special needs of detained children. They are also related to the disempowerment that comes with the deprivation of liberty.

#### (a) Does it matter that migration agents are not provided at all stages of processing?

As described above, the screening process is the point at which a child will either gain access to Australia's protection procedures or be removed from the country. It seems that the Department's decision not to provide legal assistance at this stage is a combination of the fact that: (a) the Department is trying to 'protect the integrity of the process'; and (b) the Department has judged this to be a time when

'people are invited to simply tell their story'.<sup>104</sup> However, RACS, an IAAAS provider, states that the lack of legal assistance during the screening process can result in the removal of children who are entitled to refugee protection:

[I]n Woomera IRPC there have been young people who have made claims that they are from a particular persecuted ethnic group in Afghanistan, 13-14 years old without relatives in Australia, and have been 'screened-out' or not received legal assistance for at least a four to five month period.<sup>105</sup>

The difficulties that children face in telling a story that will support an asylum claim are exacerbated by the isolation of separation detention. RACS rightly argues that the integrity of the process can only be improved by the presence of a lawyer who can advise children of their rights. This is especially important in the context of the detention environment. A child interviewed by the Inquiry put it thus:

When you were gaol, you know what your right is, you can get a lawyer. When you are in detention centre, you don't know what your right is, you have to wait for them to [decide] your right to stay, to provide you a lawyer, you have to wait. You have very less facilities.<sup>106</sup>

It is no less important to have the assistance of a lawyer at the judicial review stages. By definition, judicial review occurs in courts and therefore the need for a lawyer is paramount. It appears to the Inquiry that the refusal to provide free legal assistance at this stage is commensurate with the spirit of the legislative amendments designed to discourage detainees from accessing judicial review. However, if true, this position fails to recognise the fact that legal advisers may be in a position to advise clients when particular cases, or aspects of it, are fruitless and therefore the presence of a lawyer may improve rather than disrupt the process.<sup>107</sup> It should also be noted that the Migration Act and Migration Regulations are long and complex, and bringing proceedings for judicial review represents a formidable hurdle, particularly to people who do not speak English and are not familiar with Australian legal processes. It is especially difficult for children.

The Department states that detainees can apply for general community legal aid (as opposed to IAAAS assistance). However, this is only possible at the judicial review stage, not at the screening stage, and even then on an extremely limited basis. In any event, the Inquiry has not seen any evidence of serious efforts to inform detainees of the availability of legal aid in the detention centres and the legal aid agencies do not have the funding to travel to the remote centres.

### **(b) Do migration agents have sufficient time to give proper advice to children in detention?**

The IAAAS contract, which sets out the standards expected of the IAAAS providers, states that 'when attending [remote detention facilities], a minimum of three interview consultations per day must be undertaken'.<sup>108</sup> This means that the time permitted with each child asylum seeker in detention is strictly limited.

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The pressures placed on IAAAS providers during these application interviews were described by RACS during the Sydney hearings, as follows:

MS RYAN (RACS): We were given a list of people that we need to process and we have to process three of those per day and often the people on that list will only be the father, when there is another four people or five people involved in that family application, so three of those per day. We could probably compare that with someone that we assist in the community where it might take us 5 or 6 hours to prepare such an application, or longer. Certainly when we do our referrals at the local detention centre, Villawood, where we don't have that time pressure we'd spend a good part of the day out there. But certainly in remote detention task forces we have to process three per day....

MRS SULLIVAN (INQUIRY): I'm trying to get a sense of how you feel as a professional in the service you're providing.

MS McADAM (RACS): I mean we have experiences where we will do our utmost to provide the best service we can. So we will go to a place like Woomera and we'll stay there 'til after midnight to make sure we get the clients' claims as comprehensively as we can and we can explain the whole process to them as properly as we can. So we work within the restraints but they're not ideal. The tender process is extremely competitive. We think that our centre provides a very good service and that it is important for us to continue to be an IAAAS provider because we're not in there for profit but it is a competitive tendering process.<sup>109</sup>

These time limits are particularly problematic when one of the three interviews involves an application made by a large family. In such circumstances it seems that the IAAAS provider rarely has the opportunity to interview the children and therefore may not be in a position to assess whether they should make a separate application.

Difficulties also arise with respect to unaccompanied children who require special care and attention:

An unaccompanied Hazara teenage boy from Afghanistan told SCALES [Southern Communities Advocacy Legal and Education Service – a Western Australian IAAAS Provider] that when he arrived he was approximately 16 years old. He showed us a statement prepared by his legal representative that was two pages long. He says that he had more to tell his lawyer but she told him not to as he had told her enough and that as long as 'he was a Hazara and from Afghanistan that was all they needed to show' and she had other people to see that day.<sup>110</sup>

### (c) Do migration agents gain sufficient access to children in detention?

Several IAAAS providers gave evidence that the location of the remote detention facilities made it almost impossible to see their clients more than once, given the funds available under the contract.

Some legal advisers have testified that there is good access by fax and phone to their clients. However, many detainees complained to the Inquiry that there were sometimes delays in receiving faxes from their lawyers, and sometimes detainees were charged fees for faxing that they could not afford.

In any event, it is clear that, especially with children, it is much more effective to have face-to-face interviews. The Coordinator of the Refugee and Immigration Legal Centre (RILC) stated that:

We experience considerable problems in terms of access to our clients who are at Port Hedland or Curtin Detention Centre because of the tyranny of distance, if I could call it that... I am not at liberty unfortunately to discuss the contract between the Department of Immigration and our organisation, but to say that it would be out of the question for us to be flying up with any regularity to Curtin or Port Hedland because our centre would have to close down within a few weeks given the costs involved...

So in terms of access, our access is generally by phone and by fax, and our access, I have to say, is pretty good. Our experience is that the Department of Immigration in both of those detention centres does all that it can to facilitate access and I have had situations where I have needed to speak to a client, an unaccompanied minor, very quickly, and that has been facilitated, you know, within a matter of 10 or 15 minutes. So I don't believe, certainly for our organisation, that access is restricted in any way other than through again a highly undesirable system whereby people are detained in remote areas of Australia... I should also add to that that my experience of getting instructions from a child face-to-face as opposed to the phone are vastly different experiences. The quality of instructions face-to-face is vastly superior to getting them over the phone.<sup>111</sup>

RILC also highlighted problems in communicating confidentially with clients in detention by fax:

What I could say and what our organisation has raised as a concern a number of times is that in our view it is entirely inappropriate for facsimile communications between client and adviser, whether a child or an adult, to be coming through the same place, that is the Department of Immigration fax line, and being passed by the Department of Immigration to the client. In our view, we would strongly advocate that there be an independent body set up in detention, a communications centre with an entirely run by entirely independent people to handle that situation, given the sensitive nature of information that is passing between client and adviser.

I will give you one example of why that may be particularly important. If, as is becoming, you know, conspicuously apparent, there are serious situations going on in detention such as self-harm issues, such as potential breach of people's human rights or violations of their rights, the situation where the only way they can communicate by fax is by giving the Department of Immigration a copy of the complaint and then it being put on the fax machine, is not likely to allow people full and free access to communicate with the outside world.<sup>112</sup>

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The Southern Communities Advocacy Legal and Education Service (SCALES) submission highlights similar problems:

Due to the nature of the contract and the remote location IAAAS operators, who provide assistance in remote areas, will often only see their client face to face on a limited number of occasions: at the initial application stage; the DIMIA interview and post DIMIA interview. They then leave and return to the eastern states.

Any further queries regarding the processing of applications must be done by telephone or letter. Given the lack of English skills the only practical way to communicate is via telephone with the use of an interpreter. Detention facilities make private rooms available for telephone calls, but the nature of a pre-booked call with an interpreter allows little room for a broad discussion. Time differences between Western Australia and the eastern states where most IAAAS contractors have their offices also compound communication difficulties.

If a decision by the DIMIA is negative an advisor must go over the reasons for the decision and prepare any further rebuttal evidence over the telephone. Again this is very difficult and inappropriate in dealing with young people and children, it makes trying to establish any rapport and pick up non-verbal cues impossible.<sup>113</sup>

### **(d) Can migration agents get proper instructions from children?**

In addition to the problems caused by the remoteness of some of the detention facilities, some children may have difficulties giving lawyers instructions within the time limits and constraints of detention in remote facilities.

A lawyer for child asylum seekers in Port Hedland told the Inquiry that:

Now there is no way you can take adequate instructions from a young person if that is the amount of time that you allow [3 interviews per day]. In my experience, you know, when I am taking instructions from a young person, I go the first day, I ask questions, I talk to them, I establish some sort of rapport with them. Then I have to come back another time and every time that I see them, because they start to trust me, and because they start to know who I am, you find out more stuff.<sup>114</sup>

### **(e) Is there any quality control regarding the advice given by migration agents?**

The IAAAS contract for provision of services in detention does not specifically mention children at all. It does not require providers to have any experience or training regarding techniques for interviewing children, or the special considerations and investigations that might be made in relation to asylum claims by children (these issues are discussed further below).<sup>115</sup> A lack of experience with children's asylum claims combined with the pressures of time, may result in a failure of IAAAS providers to identify and pursue asylum claims that are specifically related to the situation of children.

During interviews between detainee families and the Inquiry staff, it became clear that many children and parents were very unhappy with the quality of their legal

assistance. They often did not know the name of their lawyer and had little contact with them. They complained of not being informed of the progress of their case. For example, the Inquiry was informed of RRT and court hearings taking place without the knowledge of the applicant.

One example is described in the Commission's legal submissions in the cases of *Odhiambo v MIMA* and *Martizi v MIMA*, concerning two unaccompanied children:

In relation to the application for review to the RRT, from the Minister's refusal of his visa application, it appears that the Appellants had available to them legal assistance of the same general category as is provided to all persons in detention pursuant to the Immigration Advice and Application Assistance Scheme. ... Mr Odhiambo describes the assistance he received from the solicitors in paragraphs 7-9 of his affidavit. The Appellant, Peter Martizi, saw a person whose name was not known to him, but whom he describes as a lawyer from [law firm name deleted], at Port Hedland. The lawyer apparently attended the interview and thereafter did not trouble to contact his client. The lawyer did not assist to fill out an application to the RRT, although he appears to have been allocated a lawyer from the same firm of solicitors for the purpose of the hearing. The lawyer apparently attended the RRT hearing by video conference, but did not speak. He had no further contact from the lawyer.<sup>116</sup>

A lawyer assisting unaccompanied children described the situation in more general terms:

I mean, the boys often don't know who their lawyer is. The boys have told me stories about how they would go to the RRT hearing or the hearing with the case officer and there is a whole bunch of people and the television and they will say and they don't know which one is the case officer and which one is their lawyer.<sup>117</sup>

The IAAAS contract provides for a complaint mechanism. The IAAAS provider is contractually required to give the applicant a Client Information Sheet (CIS) prepared by the Department and to explain the contents, including information about the complaints process, with the assistance of an interpreter where necessary. The applicant is required to acknowledge in writing their understanding of the CIS.<sup>118</sup> Complaints in relation to an IAAAS provider are investigated by either the Department or Migration Agent Registration Authority. However, the existence of a complaints mechanism does not appear to be something that is known to child detainees:

Unaccompanied child: Yeah, I had a lawyer but I did try, I did try but it doesn't work and I did one hunger strike, no eating, no drink for 2 days. After 2 days they come to me and ask from me, What happened? Why you don't eat or why you don't drink? I said, I have been here for a long time for 4 months, why no lawyer told me what happened in my case? Why the case officer don't tell me what happened in my case. I should know and...

Inquiry Officer: Okay, so you were waiting then for 4 months, and then once you went on hunger strike they listened to you?

Unaccompanied child: Yeah. And the day that I got my visa, also my lawyer sent to me a letter and my lawyer wrote, 'You have a problem with your case officer'. It was very funny. I get visa, what's this?!<sup>119</sup>

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Another unaccompanied child reported:

I have a friend who received a rejection and he found out afterwards that there was a 28 day appeal period – these rights were not explained to him at the time by anyone, so he did not know what he had to do after the initial rejection.<sup>120</sup>

The Department has informed the Inquiry that since 1999 it has received ‘only a small number of complaints, all of which have been fully investigated and found to be without substance’.<sup>121</sup> While it may be that the low numbers mean that detainees have no complaints, given the complaints heard by the Inquiry in confidential interviews, it seems more likely that detainees either do not know how, or are too scared, to complain.

### 7.4.3 Findings regarding legal assistance for the refugee status process

The provision of legal assistance to children is a vital component of ensuring that child asylum seekers are protected in accordance with article 22(1) of the CRC. The Inquiry commends the Department for providing free migration application assistance for all asylum seekers in detention on the Australian mainland during the primary processing and merits review stages. However, the Inquiry has considerable concerns about the quality and scope of the legal assistance provided to children, as well as the absence of assistance at the screening and judicial review stages.

The time limits imposed on IAAAS providers are insufficient to interview all members of a family, and children in particular. This problem is compounded by the remoteness of some of the detention facilities which means that IAAAS providers get very little face-to-face contact with child clients. This appears to have resulted in a shortfall in the quality of advice provided to unaccompanied children in particular, with the possible result that children who are owed protection obligations are inappropriately returned.

The failure to provide either legal or migration application assistance to children in detention during the entry interview stage is of even greater concern. The Migration Act does not require the Department to advise a child of their right to request such assistance. Ignoring the difficulties of paying for a lawyer, a child is unlikely to understand that he or she has such a right in the absence of notification. The isolation of children in separation detention and the absence of advice at this crucial stage in the refugee status determination process raise a serious risk that a child who is owed protection from non-refoulement may be screened-out and returned. This risk is especially high in the case of unaccompanied children.

The Inquiry also considers it to be undesirable that children are denied free legal assistance at the judicial review stage. However, the Inquiry recognises that several children have been able to obtain pro bono assistance and have therefore had their rights protected.

The Inquiry notes that, at the time of writing this report, the IAAAS is being evaluated by an External Reference Group, as part of the requirement that government

programs be evaluated every five years. The Department informs the Inquiry that many of the issues raised in this report are covered by this evaluation.<sup>122</sup>

## **7.5 Is there a child-friendly environment and assessment process for children in detention?**

### **7.5.1 How should interviews be conducted?**

UNHCR guidelines state that interviews with children should be conducted in a child-friendly manner and the interviewer should have training that allows them to take into account the special situation of children and unaccompanied children.<sup>123</sup> This is especially important when interviewing children in detention as the detention environment itself places additional strains on children.

The Department asserts that all interviews with children at the screening stage are:

conducted in a non-threatening setting and the children are asked open-ended questions which enable them to say anything they wish in support of their claims.<sup>124</sup>



View from interview room at Port Hedland, June 2002.

Open-ended questions do not necessarily make it easier for children to present their case because they do not understand what they need to show.<sup>125</sup>

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At the primary assessment stage the Department states that:

interviews are conducted in a non-adversarial and sensitive manner, appropriate to the age of the child. Department case officers are culturally sensitive and interpreters are used at all times ... The interview allows a child to discuss freely the elements and details of his or her claim.<sup>126</sup>

However, unlike the United States and Canada, which have issued specific guidelines to decision-makers that adopt and expand on the UNHCR guidelines,<sup>127</sup> the Department has not issued any special instructions to its officers as to how to interview and assess children's claims. This makes it difficult for the Inquiry to assess the assertions made by the Department and be satisfied that procedures are appropriate for children.

### 7.5.2 What training and guidance is given to Department officers?

How can I tell my whole 17 years in just one hour? And there's like a psychologist or might be an officer, and he has to ask the questions. How can you? How can you? A guy [DIMIA interviewer] who hadn't had any education and different background and asking 'Why did you come?' I left my family; I didn't come to have a holiday. And they say, 'Why didn't you bring your documents?' I flew! [fled] I had nothing you know. If I brought my passport and everything, why come here, why would I have flown? If I had a lot of time, why should I have come here? Why shouldn't I have gone to Europe? Or maybe land in America. Why should I come as a...you know, we didn't eat for one week on the way, might have been more. The little children were crying. Do you think they would come happily, to take this way [route]? No way.<sup>128</sup>

The Inquiry was concerned to obtain primary evidence from the Department that supported its claims that interviews of children in detention were conducted in a child-friendly manner and therefore issued the Department with a Notice requiring all relevant documents.<sup>129</sup>

In response to that Notice the Department provided Case Managers Induction Course materials dated March 2000. A document entitled 'Interviewing Skills' appears to be part of this Induction Course and contains a half page discussion about children. The text suggests that:

It may be useful to interview both children and the elderly in the presence of a supportive family member or friend to help them feel relaxed and sometimes clarify things for them. ... Obviously you wouldn't be expecting the same level of detail from a child as an adult and you would need to take a softer approach and more of asking the child questions. Simple clear questioning.<sup>130</sup>

The Department also provided copies of training materials used in the two-day Charles Sturt University Investigative Interview Training in July 2001. However, it appears that this training course was a one-off event. In any case the only training

session that seems to directly address interviewing children lasted a total of 90 minutes.

Furthermore, the Department provided an extract of the Onshore Protection Interim Procedures Advice dated 21 December 2001 which relates to the 'Handling of Sensitive Cases'. The procedures set out in that document did not relate to the way children should be handled but rather in identifying cases 'that could be expected to arouse media interest, affect foreign relations or otherwise be cases on which the Minister or Executive may require briefing'. In any event, it is only unaccompanied children under the age of ten that are automatically included on the 'Sensitive Case Register'.

Finally, the Department provided copies of the UNHCR Procedures Handbook and the UNHCR UAM Guidelines but has not indicated how they are to be used by the Department's case managers other than that they are 'a practical guide to assist signatory countries in assessing claims for refugee status'.<sup>131</sup>

The materials provided by the Department do not reveal any detail on what skills should be employed by interviewing officers nor is there any indication of which officers get this training, how often the training is refreshed or whether there are special officers for children and unaccompanied children.

The Department has not incorporated guidelines in its Protection Visa Procedures Manual on the way to interview and assess children in the same way that it has provided detailed guidelines regarding victims of torture and trauma<sup>132</sup> and guidelines on the interviewing of women.<sup>133</sup> Furthermore, the contract with IAAAS providers does not require any expertise in interviewing children. The failure to incorporate these guidelines contrasts greatly with the detailed guidelines produced by the immigration authorities in the United States and Canada.

### **7.5.3 Are interviews being conducted in a child-friendly manner in detention?**

The fact that the interviews are taking place within the detention environment itself weighs against the Department's assertion that interviews are in a 'non-threatening' setting. This is especially the case in the context of the screening interview which takes place in separation detention.

The mother of a child told Inquiry staff how her family had a primary interview three days after her child had been injured. He had been crying for three nights in pain:

Try to imagine, child in our hand...and we were so tired because not being about to sleep properly then we went into the interview room and the case officer. I could not express what I had gone through because of the tiredness, [my husband] couldn't either and the interpreter didn't care that our situation is like this. At least explain it to the case officer!<sup>134</sup>

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The IAAAS providers who gave evidence to the Inquiry all stated that they did not believe that children were interviewed by the Department any differently than adults, assuming that they were interviewed at all.<sup>135</sup>

[T]here appears to be no difference in the questions or the style of questioning for unaccompanied or for minors as opposed to adults, they are the same form, the same questions, the same setup and to say that asking open ended questions advantages an asylum seeker, it doesn't, it just leaves them as lost as they would be.<sup>136</sup>

The only primary evidence that the Inquiry received that interviews were being conducted in a child-friendly manner was in an email between Department officers regarding the asylum interview for an eight-year-old unaccompanied child.<sup>137</sup> The email states that the case manager 'is an experienced refugee interviewer as well as a trained social worker and psychologist. I have full confidence that she will conduct the interview in a sensitive and non-threatening manner'.<sup>138</sup> Although this may have been the case in this instance, there is no evidence that child-friendly processes were generally adhered to or mandated.

The Refugee Review Tribunal issued a 'Procedural Guide for Members' in October 2001 which has a section on 'Minors as Applicants'. In August 2002, the RRT also issued 'Guidelines on Children Giving Evidence'.<sup>139</sup> Both these documents provide some guidance on treating minors in a child-friendly manner. However, it should be kept in mind that many children in immigration detention appear by video-link, due to the remoteness of the facilities, and this imposes additional hurdles in communicating with children.

### **7.5.4 Findings regarding child-friendly procedures for refugee processing of children in detention**

It is disappointing that the Department has not issued guidelines along the lines of those in the United States and Canada, which provide specific guidance on which Department officers should conduct entry and primary interviews. In the absence of these guidelines and any primary evidence suggesting that there are specially trained officers to interview children, the Inquiry finds that measures to ensure child-friendly interviews have not been a priority for the Department. While this is an issue that is relevant to all child asylum seekers, it is of particular concern regarding children in immigration detention as they face additional stresses by virtue of their detention.

## 7.6 Are special substantive considerations applied to children's asylum claims?

### 7.6.1 What should officers take into account when assessing a child's claim?

When assessing the claims of any child there are substantive as well as procedural considerations to take into account. International guidelines set out the following considerations:<sup>140</sup>

- the age and maturity of the children
- the possibility that children may manifest their fears differently to adults
- the likelihood that they will have limited knowledge of the conditions in their country of origin
- the child-specific forms of human rights violations that may amount to persecution, such as the trafficking of children for sexual exploitation
- in the event that the child is unaccompanied, the situation of the child's family in the country of origin.

Essentially, this means that although the Refugee Convention definition of refugee makes no distinction between adults and children, in assessing the claims of children it may be necessary to employ a more lenient approach regarding credibility and the burden of proof. All decisions should be made on a case-by-case examination of the unique combination of factors,<sup>141</sup> and there should be a liberal application of the benefit of the doubt.<sup>142</sup>

SCALES, an IAAAS provider, summarised:

There are different factors that should be taken into account when assessing, for example, a well-founded fear of persecution. A young person or a child may not be able to articulate as clearly as an adult their fears of persecution and be as specific as often the Department of Immigration seem to want people to be, in terms of laying out their particular claims for persecution.<sup>143</sup>

SCALES highlights that children in detention, unlike children in the community, are deprived of the benefit of independent assistance of psychologists and counsellors who can assist in interpreting the behaviour of children during interviews and that this can be crucial in the decision-maker's assessment of children.<sup>144</sup>

The SCALES submission goes on to point out that:

Recent amendments contained in *Migration Legislation Amendment Act (No. 6) 2001* mean that in determining claims the decision maker must be satisfied that the Convention reason is the *essential and significant reason* for the persecution.

In considering the asylum claim of a child who has filed a separate asylum application, the nexus requirement may be particularly difficult to determine

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because a child may express fear or have experienced harm without understanding the persecutor's intent. A child's incomplete understanding of the situation does not necessarily mean that a nexus between the harm and a protected ground does not exist.<sup>145</sup>

In its submission to the Inquiry the Department states that:

Claims from minors, as for other applicants, are assessed on a case by case basis. In assessing claims the case officer will consider the age, degree of maturity and cultural background of the child and the capacity of the child to recall past events and to communicate his or her experiences. Where the child is not able to articulate a subjective fear of persecution the case officer will consider objective factors such as the circumstances of a child's departure from his or her country of origin and information about his or her country.<sup>146</sup>

The Inquiry received evidence that the determination process for the eight-year-old unaccompanied child, mentioned in section 7.5.3 above, took into account his age and maturity. In an email to the case manager, a senior Department official reported that the case manager should:

rely on the evidence and claims provided by the minor and information known to the officer which might suggest a person not holding a subjective fear would in fact hold such a fear if they were capable of doing so.

If taking all matters – including material known to the case manager – into account, the conclusion is that the fear is well founded, this element of the test would be met. This could occur even if the child is considered too young to fully comprehend the significance of the objective danger facing him if returned. But in the case of a child clearly stating a fear the decision maker might conclude that this be taken at face value as indicating a subjective fear.

The bottom line is that we should not let the (young) age of a person stand in the way of providing protection where, all things considered, we consider that there is a well founded fear of persecution for a Convention ground.<sup>147</sup>

The Department has also provided a description of the interview process for two unaccompanied children which appears to take into account some of the issues raised in the international guidelines. For example, consideration was given to country information relevant to the children's claims, even though they had not specifically articulated these claims.<sup>148</sup>

Unfortunately, the Department has not provided any other persuasive primary evidence to support its statement that it takes into account the specific characteristics of the child in determining applications. It appears to rely on the training documents described in section 7.5.2 above and the fact that all case officers 'are provided with a copy of the Convention and the UNHCR Handbook'.<sup>149</sup> It is not clear to what use that document is put, nor are there any guidelines in the Department's Protection Visa Procedures Manual setting out the different considerations that should be taken into account when coming to a decision in the case of a child asylum seeker.

In addition, the pro forma version of the contract with IAAAS providers, which requires contractors to conform to 'industry standards and guidelines specified in Item D of the Schedule',<sup>150</sup> omits to mention children or make reference to any special care or time that should be taken with respect to applications by children. IAAAS providers have testified that expertise in providing advice to children is not required of them.<sup>151</sup> This is borne out by the fact that there is no mention of children in the contract.

The RRT's 'Guidelines on Children giving Evidence' do not refer to any special considerations for children in detention, but they do spell out the difficulties a child may have in clearly expressing the information necessary to support an asylum claim and asks that RRT members take this into account. As these guidelines were only issued in August 2002, the Inquiry is unable to assess the impact of these new guidelines.

However, the decision recorded in the case of Peter Martizi, an unaccompanied teenager, makes it clear that children have not routinely enjoyed a liberal application of the benefit of the doubt as required by the UNHCR guidelines.<sup>152</sup> In that case the Department's primary decision record states that the decision-maker is 'unconvinced of the applicant's overall credibility'.<sup>153</sup> The decision-maker cites several cases which he took into account when coming to this conclusion but none of them related to special considerations regarding children, nor does he refer to the UNHCR Procedures Handbook or UNHCR UAM Guidelines. Similarly the RRT decision makes no reference to any special considerations taken into account because Martizi was an unaccompanied child.

### **7.6.2 Findings regarding special considerations applied to children's asylum claims**

As the Inquiry has not conducted a detailed analysis of all decision records regarding children, it cannot conclude that decision-makers have systematically ignored the UNHCR guidelines regarding the assessment of claims made by children. However, the evidence before the Inquiry leads it to believe that these special considerations are not embedded into the refugee status determination system. Again, the Inquiry notes that the Department's procedure manuals are in stark contrast to the American and Canadian models which specify how decision-makers should assess asylum claims made by children.<sup>154</sup>

### **7.7 What special measures are taken to assess claims by unaccompanied children in detention?**

Unaccompanied children are children who have arrived in Australia without their parents or close relatives. The CRC, UNHCR, the Australian legislature and courts, the Department and ACM all recognise the special vulnerability of unaccompanied children and youth who are asylum seekers and the need to take special care to ensure that all their rights are enjoyed. Chapter 14 on Unaccompanied Children

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deals with those provisions in some detail. In this section the Inquiry looks specifically at the role of the guardian of unaccompanied children – the Minister and his or her delegates – in the context of the refugee status determination process.

### 7.7.1 Why should unaccompanied children receive different treatment?

The refugee status determination process is difficult for all children. However, when children are with their parents, they have the benefit of guidance from family. Unaccompanied children have nobody who they can trust to help them make what can be the most important decisions of their lives. In recognition of these added difficulties, article 20 of the CRC requires States to provide ‘special protection and assistance’ to unaccompanied children. UNHCR has applied this principle in the context of the refugee status determination process in its UNHCR UAM Guidelines.

The most important distinction between the application of these provisions to unaccompanied children, as opposed to all other children, is the need for an adviser or guardian. In other words, international law recognises the need to make sure that there is someone who can take the place of a child’s parents in order to promote their best interests. All of the UNHCR guidelines on children and refugee status determination set out this requirement:

Not being legally independent, an asylum-seeking child should be represented by an adult who is familiar with the child’s background and who would promote his/her interests. Access should also be given to a qualified legal representative.<sup>155</sup>

### 7.7.2 Does the Minister as guardian fulfil the special needs of unaccompanied children?

The Department acknowledges that the Minister, and Department officials as delegates of the Minister, have a special duty of care towards unaccompanied children in detention. It also claims that it ‘fully complies with the refugee determination procedures’ set out in the UNHCR UAM Guidelines.<sup>156</sup>

However, despite these acknowledgments, the Department has taken the position that the guardian has no role in supporting unaccompanied children throughout the refugee status determination process, other than to ensure that they receive an IAAAS provider like everyone else in detention.

MR WIGNEY (INQUIRY COUNSEL): ...what role, if any, does either the Minister himself or his delegates play in the refugee status determination period when children are in immigration detention as unaccompanied minors.

MS GODWIN (DIMIA DEPUTY SECRETARY): Well, a number of officers in the Department hold a number of delegations but the officers who specifically hold the delegation from the Minister under the IGOC Act do not play any role at all in the determination of refugee status and that is deliberate. That is to ensure that that process happens separate from their sort of on-going management in detention.<sup>157</sup>

Thus, it would appear that the reason that the Department has taken this position relates to the inherent conflict of interest facing the Minister. As guardian, the Minister is obliged to pursue the best interests of the child. As visa decision-maker, the Minister may need to make visa decisions that are contrary to a child's best interests. The Full Federal Court of Australia in *Odhiambo v Minister for Immigration* summarises the problem as follows:

... as the person administering the *Migration Act*, the Minister has an interest in resisting challenges to decisions of delegates and decisions of the Tribunal that uphold delegates' decisions. That interest is directly opposed to the interest of an asylum seeker in setting aside a decision unfavourable to him or her and obtaining reconsideration of the application for a protection visa.<sup>158</sup>

The Department cites another Federal Court case, *Jaffari v Minister for Immigration*, where French J noted that the Minister 'is not their guardian for the purpose of advancing applications for [protection] visas or initiating review of decisions made under such applications'.<sup>159</sup> That case also states that an unaccompanied child can make a protection visa application without the signature of the guardian, as long as a migration agent has been appointed. This smoothes the way for the process to proceed in the absence of the Minister or his or her delegates.

However, the Department appears to interpret these cases to mean that it need do no more than ensure that an unaccompanied child has a migration agent, like every other person. This response fails to recognise the Minister's overarching duty to give unaccompanied children special assistance to ensure that their best interests are protected. The Inquiry's view is that rather than resolving the conflict by leaving unaccompanied children in immigration detention to virtually fend for themselves through the refugee status determination process, the Minister should ensure the appointment of an independent adviser to take his or her place – someone who is not from the Department and who can actively pursue the child's best interests. As the Minister has delegated his authority as guardian to State child welfare authorities, in some circumstances, it is unclear why the Department has not appointed those persons to support children through the refugee status determination process. This is particularly curious given that those authorities are the effective guardians for unaccompanied children who are not in detention. However, the appointment of community groups, as is done in the United Kingdom,<sup>160</sup> may also serve the purpose.

Alternatively, the law should be changed to allow for the appointment of a different Commonwealth Minister as the guardian – for instance the Minister for Family and Community Services.

### **7.7.3 Does the appointment of a migration agent fulfil the special needs of unaccompanied children?**

The Department states that the allocation of an IAAAS provider to unaccompanied children in detention satisfies its obligations towards unaccompanied children. Evidence submitted to the Inquiry suggests that this is not the case.

## A last resort?

Firstly, the Department has failed to recognise that unaccompanied children do not get any legal assistance at the screening, judicial review or ministerial discretion stages unless they specifically request and pay for one. It is unrealistic to expect unaccompanied children to be in a position to make such a choice or provide such payment.

The failure to have legal and other independent assistance during the screening process not only raises the risk of children being excluded from refugee protection, but can have an effect on the time in detention and the place of detention for children (separation detention). Ultimately it has a serious impact on the best interests of the child generally. An eight-year-old boy, discussed in the table below and mentioned in previous sections of this chapter, was detained for three months before his primary interview because he did not present any claims in the screening interview.

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### Assessment process for an eight-year-old unaccompanied child

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June 2001	Eight-year-old unaccompanied child arrives in Australia by boat.
July 2001	Detained at Woomera IRPC. The child has no legal assistance and is screened-out. The Department officer reports that:  This boy did not present any claims during the Entry process, only minimal discussion and reasons for travelling were collected. I was the screening officer and did not request further information at that time as we had hoped to find an early resolution on the whereabouts of his parents, unfortunately this was not possible. <sup>161</sup>  Child is ineligible for the Woomera Housing Project or a bridging visa because he has not lodged a protection visa application.
September 2001	Child is screened-in and obtains a lawyer. Primary interview conducted. Child now eligible to move to the Woomera Residential Housing Project.
November 2001	Child is released from detention on a bridging visa.
June 2002	Child found to be a refugee and granted a temporary protection visa.

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The difficulties faced by unaccompanied children in obtaining legal assistance for judicial review proceedings is illustrated by another advocate who describes how she became involved in a Federal Court case involving two unaccompanied teenagers:

I knew the two boys because of my involvement with the detention centre in Port Hedland and one day one of the boys rang me up and said 'Oh Marg I'm coming to Perth next week' and he was saying like 'could I come and visit him in the detention centre' and I said 'That is nice, why are you coming to Perth'? And he said 'I have got full Federal Court'. And I said 'Oh have you got a lawyer?' 'No'. And so they were unaware of what they needed that they did not even realise that they had to have a lawyer or they kind of knew that would have been nice but they did not have one so they were coming down to tell their story anyway.<sup>162</sup>

Furthermore, the Department's reliance on IAAAS providers to satisfy its responsibility to unaccompanied children also fails to recognise the distinction between the role of a lawyer and the role of a guardian. The role of a lawyer is to provide advice that will inform a decision. The role of the guardian is to weigh up the alternatives available to an unaccompanied child and proactively pursue the best interests of the child, as a parent would, in coming to decisions. The absence of a guardian for unaccompanied children in detention through the refugee status determination process leaves all the decisions up to the child. The need to make decisions starts at the screening process – which requires the child to specifically request and pay for a lawyer if he or she wants one – and continues through to choices about whether or not to pursue review options.<sup>163</sup>

The Inquiry heard from IAAAS providers that not having an independent adult assist the unaccompanied child through the refugee status determination process means that it is not possible to properly act for the child. RILC in Melbourne gave evidence that:

[a practical problem] that is faced by advisers is that in doing so there is no person who has a truly independent role accompanying the child, being there to assist with the preparation of the application.

Consequently this:

means that, at the end of the day, quite simply, sitting in the one room is an interpreter, a legal adviser, and a child, on what are, you know, quite – put simply – what are life and death matters that are being given instructions on.<sup>164</sup>

RILC went on to say that:

in not having that independent person it is not possible to fully get instructions and fully provide advice. Particularly if the unaccompanied minor is someone – is a child who doesn't fully comprehend the consequences of what is happening, or what they are actually saying.<sup>165</sup>

### **7.7.4 Does anyone else assist unaccompanied children?**

The Department's submission states that 'it is common practice for a neutral adult to attend Protection Visa interviews to provide emotional support for vulnerable young unaccompanied minors'.<sup>166</sup> The Department's Protection Visa Procedures Manual also stipulates that a friend or relative can provide moral support in an interview.<sup>167</sup> Furthermore, the Interviewing Skills training manual says that:

It is okay for applicants to bring along family members or friends to interview. However if you agree to let them come into the interview you must ensure that

- you mention their presence during interview on the tapes
- make it clear to them at the start of the interview that they cannot answer any of the questions on behalf of the applicant or interrupt the interview process in anyway. If they do so you will have to ask them to leave the interview and wait outside.<sup>168</sup>

## A last resort?

It is unclear whether this adult is also permitted to be present in the screening process where a child might be in separation detention.<sup>169</sup> In any event, there is no specific suggestion or requirement that a friend or adviser be present during interviews involving unaccompanied children, nor any recognition that unaccompanied children – who are likely to be in the most need of moral support – have no family and do not necessarily have friends, at least at the outset.

While there is some evidence that ACM child welfare staff were permitted to sit in on the Department's primary processing interviews,<sup>170</sup> there is no suggestion that there was a system for ensuring that unaccompanied children had someone they trusted sitting with them. IAAAS providers did not report the presence of a third person, nor did children who were interviewed by the Inquiry in focus groups.

### **7.7.5 Findings regarding special measures for unaccompanied children**

The Inquiry is extremely concerned that unaccompanied children are generally left to fend for themselves throughout the refugee status determination process. The Inquiry does not regard the appointment of an IAAAS provider sufficient to satisfy Australia's obligation to provide special assistance to unaccompanied children. Even if it were sufficient, IAAAS providers are not available during the screening or judicial review stages of the process.

The fact that the Minister and Departmental delegates may have an inherent conflict of interest does not excuse the lack of support. On the contrary, the conflict introduces a heightened responsibility to appoint an independent person who can properly take into consideration the best interests of the child.

## **7.8 What is the refugee status determination process for 'offshore entry persons'?**

Since 1999 there have been significant legislative changes which mean that the type of protection visa children will be issued can vary greatly, depending on how and where a child has arrived in Australia.<sup>171</sup> The introduction of the so-called 'Pacific Solution' and the concept of 'excised offshore places' has also lead to distinctions in the refugee status determination processes available to children and the ability of Australia to protect child refugees from being returned to their countries.<sup>172</sup>

### **7.8.1 How is the refugee status determination process different for children arriving in 'excised offshore places'?**

Children and their families who arrive on 'excised offshore places' like Christmas Island and Ashmore Reef without a visa (offshore entry persons) have been detained on Christmas Island or transferred to detention facilities in Nauru or Papua New Guinea. They cannot make a valid application for a protection visa unless the Minister decides that it is in the public interest for them to do so.

Nevertheless, once a child seeking asylum comes under Australia's jurisdiction, article 22 of the CRC states that Australia has the obligation to ensure that refugee children are protected from refoulement. Furthermore, article 2 of the CRC requires that all children be in a position to enjoy their right to protection in a non-discriminatory manner.

The Department acknowledges that it has continuing obligations to persons who arrive at 'excised offshore places' and therefore assists in the processing of those persons.<sup>173</sup> However, the refugee status determination process enjoyed by 'excised offshore persons' is quite different to that experienced by children who arrive on the Australian mainland without a valid visa.

The Department describes the process used on Christmas Island, Nauru and Manus Island as a Refugee Status Assessment (RSA). The RSA is conducted by Department officials and is based on the UNHCR procedures rather than the Department's normal refugee status process described above.<sup>174</sup>

The primary differences between the RSA and the process on mainland Australia lies in the process for review for a negative decision and the absence of government-funded legal assistance for children at any stage of the process.<sup>175</sup>

A child who is not found to be a refugee by the RSA process cannot access the RRT but can request an internal review of the decision by a Department officer who is more senior than the one who made the primary decision.<sup>176</sup> There are no further review levels after the senior officer has found that a person is not a refugee. Those children who are rejected by the RSA process must stay in detention on Christmas Island, Nauru or Papua New Guinea until returned to their country of origin. Those children who are found to be a refugee must also wait in the detention facilities until a country, which may include Australia, decides to accept them as temporary or permanent residents.

The Department states that it is unnecessary to 'offer...legal assistance to offshore entry persons or persons in a declared country'<sup>177</sup> because 'the assessment process has been designed to operate without the need for any professional or legal advice for the asylum seekers'.<sup>178</sup> The Department has given no indication as to what aspects of the RSA process have been changed such that children would have any less need for legal assistance on Christmas Island, Papua New Guinea or Nauru than they would in an Australian detention centre.

The Department also states that the absence of legal assistance is 'in line with the approach taken by the UNHCR'.<sup>179</sup> While it may be the case that UNHCR does not provide legal assistance to the children it processes, it is important to reiterate that the principle of non-discrimination in the CRC means that a child arriving in Sydney is entitled to the same level of protection from refoulement as a child arriving on Christmas Island. To the extent that the absence of legal assistance on Christmas Island or Nauru results in a lower quality assessment process than on mainland Australia, it will jeopardise Australia's ability to guarantee that all children who are owed protection by Australia will enjoy that right.

### **7.8.2 What is the impact of the ‘Pacific Solution’ on non-refoulement?**

The Inquiry is also concerned about the impact that the forcible transfer of children to detention facilities in third countries may have on Australia’s ability to protect refugee children from refoulement. The so-called ‘Pacific Solution’ creates a system in which Australia’s non-refoulement obligations are ‘passed on’ to third countries. In other words, Australia places itself in a position which relies on Nauru and Papua New Guinea to comply with the non-refoulement obligations that are in fact owed by Australia to child asylum seekers.

The relocation of children to detention facilities in Nauru is particularly problematic as Nauru has not ratified the Refugee Convention and is therefore not itself bound by the principle of non-refoulement. It is therefore conceivable that Nauru could refoule a child refugee without being in breach itself, but which would result in Australia’s obligations being breached. It is unclear to the Inquiry why the Government would wish to place itself in such a precarious arrangement.

Although Papua New Guinea is a party to the Refugee Convention, it has made several important reservations upon ratification which restricts the extent to which it agrees to be bound by the Convention.<sup>180</sup>

Therefore, while the Inquiry has no evidence that the protection from refoulement has been breached in the case of any one or more children, the transfer of control over the removal of children to Nauru and Papua New Guinea, greatly increases the risk that such a breach might occur.

### **7.8.3 Findings regarding processing and protection of ‘excised offshore persons’**

Although the Inquiry has not been in a position to collect detailed information regarding the processing of children on Nauru and Papua New Guinea, the absence of legal assistance and the removal of the availability of review by the RRT and Australian courts is a matter of some concern to the Inquiry. The principle of non-discrimination in the CRC means that a child arriving in Sydney is entitled to the same level of protection from refoulement as a child arriving on Christmas Island yet the latter group is transferred to Pacific Islands where the processes are inferior. To satisfy the obligation of non-refoulement to all asylum-seeking children in Australia’s jurisdiction, there must be a full and fair refugee status determination process that can properly identify whether children need that protection. Furthermore, Australia must be in a position to guarantee that children who are found to be refugees are protected from return.

## 7.9 Summary of findings on refugee status determination for children in detention

The Inquiry finds that Australia's refugee status determination process, as it applies to children, breaches articles 2(1), 3(1), 20(1) and 22(1). Since Australia's laws require detention throughout the processing period, the time it takes to conduct that processing has contributed to a breach of article 37(b) of the CRC.

These breaches are the result of a failure to incorporate appropriate safeguards to protect the rights of children in detention into Australia's refugee status determination process. The weaknesses are especially serious in the context of unaccompanied children seeking asylum. The Inquiry has not drawn any conclusions about Australia's refugee status determination system generally.

The Department's practice of placing new arrivals in separation detention creates an intimidating environment for unaccompanied children and families to tell their story in a manner which might engage Australia's protection obligations. The Migration Act does not require Department officials to notify children or their parents of their right to request asylum nor to request a lawyer and, as a matter of practice, such advice is not provided to children or their parents unless it is specifically requested. If a family or unaccompanied child *does* specifically request a lawyer, they must pay for that assistance. The restriction on phone calls to the Australian community within separation detention limits the ability to identify a lawyer and seek assistance from friends and family. These conditions are markedly different to those enjoyed by children seeking asylum in the Australian community who can freely access friends, family and lawyers throughout the screening phase.

Regarding primary processing of refugee claims, the Inquiry is concerned that records of interview made during the screening process may be used against asylum seekers but are not provided to their migration agents. The Inquiry is also concerned that there have been some problems in obtaining appropriate interpreting assistance during the primary interviews.

The Department has not issued any guidelines to assist primary decision-makers in creating a child-friendly environment, as exists in the USA and Canada, nor has it designated specially trained officers to conduct interviews with children. Further, there is no evidence that Departmental decision-makers were required to turn their minds to special considerations when assessing the substance of children's asylum claims.

The merits review stage at the RRT can also be very intimidating for children in detention. While the RRT has issued guidelines to assist RRT members in creating a child-friendly environment in the Tribunal, the remoteness of many of Australia's detention facilities has meant that frequently these proceedings have taken place by video-link, which may add to difficulties in communication. Migration agents are not required to attend these hearings and, if they do, they are often in another State of Australia, attending by video-link. Applicants face the prospect of paying a \$1000 fee if they are unsuccessful.

## A last resort?

The Inquiry is particularly concerned about the attempts, through Commonwealth legislation, to restrict access to judicial review of decisions made in relation to visa applications. It is important to keep in mind that visa decisions are an exercise of Executive power, just like any other administrative act. While recent High Court decisions have softened the effect of the legislation, it is troubling that Parliament has attempted to curtail the power of the courts to review the legality of an administrative decision that can be a matter of life and death for an asylum seeker. The Inquiry is concerned that by attempting to deny the review of decisions there is an increased chance of the system failing to protect those children to whom Australia has protection obligations.

The Inquiry commends the Department for the provision of free migration application assistance to all asylum seekers in detention during the primary processing and merits review stages. This is an appropriate measure aimed at overcoming the restricted access of detainees to legal assistance. However, the Inquiry finds that the quality of migration application or legal assistance provided to children during the primary decision and merits review stage is compromised by the difficulties arising from the location of some of Australia's detention facilities. Furthermore, the time restrictions imposed on legal advisers through the IAAAS contract ignore the additional hurdles in obtaining information and instructions from children. The Inquiry is also concerned that migration and legal assistance is not provided to children at either the screening stage or judicial review stages. The low levels of legal and other assistance given to children in detention are especially concerning in light of the Department's failure to ensure that its decision-makers employ child-friendly procedures and special substantive considerations in assessing a child's claim.

Taken together, all of these factors lead the Inquiry to find that the process for refugee status determination as it applies to children has not been developed or implemented with the best interests of children as a primary consideration. There has been a failure to ensure that the system is responsive to the needs of children and the difficulties they face in such processes. This results in a breach of article 3(1) of the CRC.

Furthermore, the failure to adequately accommodate the needs of, and recognise the difficulties faced by, children raises the risk that the refugee status determination system will fail and that a child will be returned to a place where he or she faces persecution, contrary to the right to non-refoulement under article 33 of the Refugee Convention. This results in a breach of article 22(1) of the CRC.

The separation detention of children restricts access to legal assistance and other advice in a way that does not apply to children in the community. Children who arrive on Australia's 'excised offshore places' also experience inferior access to legal assistance and review procedures compared to those who arrive on Australia's mainland. This amounts not only to a breach of article 22(1) but a breach of the right to non-discrimination in article 2(1), which requires that all children to whom Australia owes protection enjoy the same level of rights.

The Inquiry is further concerned about the detention of children throughout the full processing of a visa decision, given the length of time that process can take. There

have been delays at all stages of the process – the lodging of an application, primary processing, merits review, judicial review and security checks. The consequence is that children have been detained for longer than the ‘shortest appropriate period of time’ as required by article 37(b) of the CRC.<sup>181</sup> This creates additional stresses on children regarding their refugee claim. The Inquiry acknowledges efforts by the Department to generally reduce the time it takes to reach a primary decision. However, there is no evidence that either accompanied or unaccompanied children in detention were given a special priority. The Inquiry acknowledges that in April 2003 the Department issued guidelines directing that children be given priority processing. The RRT also issued policies intended to expedite the processing of children in detention in 2002.

However, the Inquiry is most concerned about the absence of adequate protections for unaccompanied children who are seeking asylum from within detention centres. These children are not provided with an independent adviser who can support, advocate and assist them throughout a potentially long, intimidating and confusing refugee status determination process. There is a conflict of interest in having the Minister, or delegated Departmental officer, as both guardian and visa-decision maker. This places a heightened responsibility on the Department to ensure independent advice is provided to these children. The appointment of an IAAAS provider fails to fulfil that obligation for two reasons. First, IAAAS assistance is not available at the screening or judicial review stages. Second, migration agents are employed to *act* on instructions, not *give* them. Without independent support and advice there is no assurance that an unaccompanied child’s best interests will be appropriately considered and the prospect of refolement is heightened. This is a breach of article 20(1) of the CRC.

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### Endnotes

- 1 UNHCR, *Refugees*, 2001, vol 122, no1, p7.
- 2 UNHCR, *Refugees*, 2001, vol 122, no1, p11.
- 3 Question 127 (2), Commonwealth House of Representatives Hansard, 28 May 2002, p2538.
- 4 See further Chapter 6 on Australia’s Detention Policy.
- 5 See further Chapter 4 on Australia’s Human Rights Obligations.
- 6 Refugee Convention, articles 1A, 33.
- 7 See section 4.3.5 in Chapter 4 on Australia’s Human Rights Obligations.
- 8 See further Chapter 6 on Australia’s Detention Policy.
- 9 DIMIA, ‘Article 31 – Refugees Unlawfully in the Country of Refuge: An Australian Perspective’, A paper prepared as a contribution to the UNHCR’s Expert Roundtable Series, 2002, p130.
- 10 Note that there is some dispute as to whether article 14 of the ICCPR ordinarily applies to the refugee status determination process. For discussion see Michael Alexander, ‘Refugee Status Determination Conducted by UNHCR’, *International Journal of Refugee Law*, vol 11, no 2, 1999, p251.
- 11 DIMIA, Submission 185, p171.
- 12 UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (UNHCR UAM Guidelines), Geneva, 1997, para 8.2.
- 13 UNHCR UAM Guidelines, para 8.2. See also article 14 of the ICCPR as interpreted by the UN Human Rights Committee, General Comment 13, 1984, paras 1, 17.
- 14 UNHCR UAM Guidelines, paras 8.1 and 8.5; CRC, article 37(b), (d).
- 15 UNHCR UAM Guidelines, para 8.3; UNHCR, *Refugee Children: Guidelines on Protection and Care* (UNHCR Guidelines on Refugee Children), Geneva, 1994, ch 8; Save the Children and UNHCR,

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- Separated Children in Europe Programme, *Statement of Good Practice*, para C.11.2. See also the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, Geneva, 1990, rule 18; United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, Geneva, 1955, rule 93; United Nations, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Geneva, 1988, principles 13, 17, 18.
- 16 UNHCR UAM Guidelines, para 8.4.
  - 17 See UNHCR Guidelines on Refugee Children, ch 8; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR Procedures Handbook), Geneva, 1992, paras 203-204; UNHCR UAM Guidelines, paras 8.6-8.10.
  - 18 UNHCR Guidelines on Refugee Children, ch 8; UNHCR UAM Guidelines, para 8.3.
  - 19 UNHCR UAM Guidelines, para 5.12. See also para 8.4.
  - 20 UNHCR UAM Guidelines, para 5.13.
  - 21 UNHCR UAM Guidelines, para 8.10.
  - 22 UNHCR Guidelines on Refugee Children, ch 8.
  - 23 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p111.
  - 24 *Migration Act 1958* (Cth) (Migration Act), ss193 and 256.
  - 25 IAAAS migration agents may or may not be lawyers. See a description of this scheme in section 7.4 on legal assistance below.
  - 26 RACS, Submission 236, p2.
  - 27 Former detainee child, Youth Advocacy Centre and Queensland Program of Assistance to Survivors of Torture and Trauma (YAC and QPASTT), Submission 84, p12.
  - 28 DIMIA, Submission 185, p172.
  - 29 ACM, Policy 2.7, Separation Detention, Issue 2, 5 February 2002, para 5.4.
  - 30 ACM, Policy 2.7, para 5.6.
  - 31 Inquiry, Focus group, Melbourne, Iraqi refugee boy, ex-Woomera, May 2002.
  - 32 YAC and QPASTT, Submission 84, p6.
  - 33 YAC and QPASTT, Submission 84, p6.
  - 34 ACM, Policy 2.7, para 1.2-1.3.
  - 35 See UNHCR Guidelines on Refugee Children, ch 8. The standard of proof – benefit of the doubt – is outlined in UNHCR's Procedures Handbook, paras 203-204.
  - 36 RACS, Transcript of Evidence, Sydney, 15 July 2002, p30.
  - 37 DIMIA, Response to Draft Report, 19 May 2003.
  - 38 DIMIA, Transcript of Evidence, Sydney, 4 December 2002, p3.
  - 39 ACM, Port Hedland, Incident Report 13/01, 15 January 2001, (N5, Case 7).
  - 40 RACS, Transcript of Evidence, Sydney, 15 July 2002, p26.
  - 41 See also HREOC, *Those who've come across the seas*, 1998, pp28-31.
  - 42 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review*, June 2002, p117, para 4.29.
  - 43 Confidential Submission 263.
  - 44 DIMIA, Internal email, Re. Unaccompanied child in Woomera IRPC, 25 September 2001, (N5, Case 13). The email states that there are two unaccompanied children in Woomera whose cases may need to be reviewed in light of changes in Afghanistan. In its response to the draft of this report, the Department states that the children provided new information that prima facie may have engaged Australia's protection obligations. DIMIA, Response to Draft Report, 19 May 2003.
  - 45 Confidential Submission 263.
  - 46 DIMIA, Submission 185, p173.
  - 47 Migration Act, s36(2)(a).
  - 48 DIMIA, Submission 185, pp173, 175. Note that the *Migration Legislation Amendment Act (No 6) 2001* (Cth) introduced s91R of the Migration Act to specify how the concept of 'persecution' in the Refugee Convention definition should be interpreted. There is some debate about whether that interpretation is in accordance with international law. While this issue is of concern to the Inquiry, it is beyond its scope to consider in any detail.
  - 49 Inquiry, Focus group, Perth, 12 June 2002. The children also said that sometimes interpreters deliberately gave wrong translations due to the conflict between Hazara and other Afghan ethnic groups. The Department has pointed out that there is provision for detainees to lodge formal complaints against interpreters, which are then investigated. It states that no complaints against interpreters have been substantiated. DIMIA, Response to Draft Report, 19 May 2003.
  - 50 See for example *Al Raied v Minister for Immigration and Multicultural Affairs* [2001] FCA 313 at [39], cited in Southern Communities Advocacy Legal & Education Service (SCALES), Submission 176, p25.

- 51 DIMIA, Submission 185, p173.
- 52 DIMIA, Response to Draft Report, 19 May 2003.
- 53 RACS, Submission 236, p2.
- 54 DIMIA, Response to Draft Report, 19 May 2003.
- 55 RACS, Transcript of Evidence, Sydney, 15 July 2002, p25.
- 56 Inquiry, Focus group, Adelaide, July 2002.
- 57 Migration Act, s420(1).
- 58 DIMIA, Submission 185, p175.
- 59 Inquiry, Focus group, Brisbane, August 2002.
- 60 Refugee Review Tribunal (RRT), A Brief Guide To Its Role and Procedures, p7. RRT, Submission 17a.
- 61 RRT, Submission 17a; RRT, Submission 17, p2.
- 62 Migration Act, s424A; RRT, Transcript of Evidence, Sydney, 16 July 2002, p62.
- 63 Migration Act, s424A(3).
- 64 RRT, Transcript of Evidence, Sydney, 16 July 2002, p63.
- 65 Those ultimately found to be refugees and those granted a visa following the exercise by the Minister of his public interest power under section 417 of the Migration Act do not pay the fee.
- 66 RRT, A Brief Guide To Its Role and Procedures, p5. RRT, Submission 17a.
- 67 *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70, per Brennan J.
- 68 See The Hon Justice Ronald Sackville, 'Judicial review of Migration Decisions: An Institution in Peril?', *University of NSW Law Journal*, vol 23, no 3, p190; S Harris, 'Another Salvo Across the Bow: Migration Legislation Amendment Bill (No 2) 2000 (Cth)', *University of NSW Law Journal*, vol 23, no 3, p190. See also M Crock and B Saul, *Future Seekers: Refugees and the Law in Australia*, Federation Press, 2002, pp58-62.
- 69 DIMIA, Fact Sheet 71, New Measures to Strengthen Border Control, at [www.immi.gov.au/facts/71border\\_1.htm](http://www.immi.gov.au/facts/71border_1.htm), viewed 10 December 2003 (note that the legislation is incorrectly dated as a 1998 act).
- 70 See DIMIA, Information Resources, Migration Legislation, Regulations, Judicial Review at [www.immi.gov.au/legislation/judicial\\_review.htm](http://www.immi.gov.au/legislation/judicial_review.htm), viewed 11 December 2003. See also DIMIA, Migration Series Instruction 348, Judicial Review of Migration Act Decisions, 22 January 2002.
- 71 *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2 at [37] per Gleeson CJ, 4 February 2003.
- 72 DIMIA argues that, following the High Court decisions in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* [2003] HCA 1 and *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2 of 4 February 2003, there are still some restrictions. DIMIA states that 'it appears that the 35 day time limit on appealing to the High Court is applicable to privative clause decisions and not applicable if a decision involves jurisdictional error'. DIMIA, Response to Draft Report, 19 May 2003.
- 73 DIMIA, Migration Series Instruction 225, Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345, 351, 391, 417, 454 of the Migration Act 1958 (MSI 225), 4 May 1999, para 4.2.10.
- 74 DIMIA, MSI 225, para 4.2.3.
- 75 DIMIA, Submission 185, p175.
- 76 However, more recently in August 2003 it was reported that the Minister had exercised his discretion to release on temporary protection visas two Iranian families. 'Ruddock grants family visa', *The Australian*, 16 August 2003, p4 and 'Ruddock's officers free families', *The Age*, 16 August 2003, p6.
- 77 UNHCR UAM Guidelines, paras 8.1 and 8.5; Separated Children in Europe Programme, *Statement of Good Practice*, para C.11.3.
- 78 Confidential Submission 263. DIMIA points out that it is unaware of any case where the interview information has been lost and that case managers may seek to re-interview an applicant to seek further information or clarification of details provided. DIMIA, Response to Draft Report, 19 May 2003.
- 79 DIMIA, Submission 185, p173.
- 80 DIMIA, Procedures Advice Manual 3, Protection Visa Procedure Manual, para 2.4.
- 81 DIMIA, Letter to Inquiry, 17 July 2003, Attachment D. The data provided by the Department includes both authorised and unauthorised arrivals.
- 82 DIMIA, Annual Report 1999-00, Outcome One Performance Tables, Output 1.2.2 Protection Visas (Onshore).
- 83 DIMIA, Annual Report 2000-01, Outcome One Performance Tables, Output 1.2.2 Protection Visas (Onshore).

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- 84 DIMIA, Annual Report 2001-02, Outcome One Performance Tables, Output 1.2.2 Protection Visas (Onshore).
- 85 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p9. There appears to be some inconsistency in figures on processing times. Minister for Immigration and Multicultural and Indigenous Affairs, *Improvements in Immigration Detention*, Media Release, 9 July 2001 stated that 80 per cent of asylum seekers received primary decisions within 15 weeks, not 12 and half weeks as stated above.
- 86 Further, if the outcome of primary applications and subsequent appeal processes is negative, children may remain in detention for many more months awaiting removal from Australia. The entire process, from initial arrival through to a grant of visa or removal can therefore take longer than the processing times. Chapter 3, Setting the Scene, indicates that as at 1 October 2003, the majority of children had been detained for over one year.
- 87 Marg le Sueur, Transcript of Evidence, Perth, 10 May 2002, p19.
- 88 YAC and QPASTT, Submission 84, p15.
- 89 DIMIA, Response to Draft Report, 19 May 2003.
- 90 RRT, Submission 17, p2.
- 91 RRT, Submission 17a, pp1-2.
- 92 RRT, Transcript of Evidence, 16 July 2002, Sydney, pp55-56.
- 93 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p9. See also Joint Standing Committee on Foreign Affairs, Defence and Trade, *A Report on Visits to Immigration Detention Centres*, June 2001, para 5.19.
- 94 Inquiry, Interview with an Afghan unaccompanied child, Melbourne, May 2002.
- 95 See DIMIA, Migration Series Instruction 339, Temporary protection visa processing: additional advice relating to penal clearances and waivers, 8 October 2001.
- 96 Inquiry, Focus Groups in Adelaide and Brisbane. This issue was also raised with the Human Rights Commissioner during his visits to detention centres in 2001. HREOC, *A report on visits to immigration detention facilities by the Human Rights Commissioner 2001*, August 2002, p20.
- 97 Inquiry, Interview with teenage refugee, 2002.
- 98 Migration Act ss193(2) and 256. However, there is no statutory prohibition on the Department to advise people of their right to legal advice. See HREOC, *Immigration Detention – Human Rights Commissioner’s 1998-99 Review*, p31, at [http://www.humanrights.gov.au/human\\_rights/asylum\\_seekers/index.html#idc\\_review](http://www.humanrights.gov.au/human_rights/asylum_seekers/index.html#idc_review).
- 99 HREOC, *Those who’ve come across the seas*, 1998, pp224-225.
- 100 See *Government Response to the Human Rights and Equal Opportunity Commission 1998 Report into Those who’ve come across the seas: the Detention of unauthorised arrivals* (undated). In that response the Department stated that ‘DIMIA has been advised by the Attorney-General’s Department that Australia’s international obligations extend to providing detainees with access to legal assistance at the detainee’s request. Section 256 gives effect to this obligation’, p44.
- 101 *Migration Legislation Amendment Act (No. 1) 1999* amending s193 of the Migration Act.
- 102 DIMIA, Submission 185, pp172-173.
- 103 Note that the IAAAS contract states that the providers must attend the merits review if it is an adversarial process. However, as the RRT is set up as an inquisitorial process, in effect IAAAS providers are not required to attend RRT hearings. IAAAS Contract, Schedule, Part D, Standards and Best Practice, (N1, Q7, F8).
- 104 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p111.
- 105 RACS, Submission 236, p3.
- 106 Inquiry, Interview with teenage refugee boy, Brisbane, August 2002.
- 107 This issue was examined by the Senate Legal and Constitutional References Committee in the June 2000 report, *A Sanctuary Under Review*. It recommended that (1) a body such as the Australian Law Reform Commission undertake a comprehensive study of the causes of appeals to courts in refugee matters and whether increases in legal assistance would serve to reduce the numbers of unmeritorious claims (Recommendation 3.6) and (2) the Government amend the legal aid guidelines to enable the Legal Aid Commissions to provide limited legal advice to help applicants consider the value of an appeal (Recommendation 3.7), pp106-107.
- 108 IAAAS Contract, Schedule, Part D, Standards and Best Practice, (N1, Q7, F8).
- 109 RACS, Transcript of Evidence, Sydney, 15 July 2002, pp27-28. See also SCALES, Submission 176, pp26-27.
- 110 SCALES, Submission 176, p27.

- 111 RILC, Transcript of Evidence, Melbourne, 30 May 2002, pp27-28.
- 112 RILC, Transcript of Evidence, Melbourne, 30 May 2002, p28.
- 113 SCALES, Submission 176, pp28-29.
- 114 Marg le Sueur, Transcript of Evidence, Perth, 10 June 2002, p15. See also RILC, Transcript of Evidence, Melbourne, 30 May 2002, pp22-23.
- 115 DIMIA informed the Inquiry in May 2003 that the issue of special considerations in relation to children was being considered in the context of an evaluation of IAAAS. DIMIA, Response to Draft Report, 19 May 2003.
- 116 Cited in SCALES, Submission 176, p28.
- 117 Marg le Sueur, Transcript of Evidence, Perth, 10 June 2002, p16.
- 118 DIMIA, Response to Draft Report, 19 May 2003.
- 119 Inquiry, Focus group, Adelaide, July 2002.
- 120 YAC and QPASTT, Submission 84, p14.
- 121 DIMIA, Response to Draft Report, 19 May 2003.
- 122 DIMIA, Response to Draft Report, 19 May 2003.
- 123 UNHCR UAM Guidelines, paras 8.4 and 8.10; UNHCR Guidelines on Refugee Children, ch 8; Separated Children in Europe Programme, *Statement of Good Practice*, para C.11.5.
- 124 DIMIA, Submission 185, p172.
- 125 Amnesty International, Transcript of Evidence, Sydney, 15 July 2002, p82.
- 126 DIMIA, Submission 185, p174.
- 127 US Immigration and Naturalization Service, 'Guidelines for Children's Asylum Claims' 1998; Canada Immigration and Refugee Board, 'Children Refugee Claimants: Procedural and Evidentiary Issues', Ottawa, Canada, September 30, 1996.
- 128 Inquiry, Focus group with unaccompanied children, Adelaide, July 2002.
- 129 Inquiry, Notice to Produce 1, 18 July 2002.
- 130 DIMIA, Interviewing Skills, undated, (N1, Q7, F8).
- 131 DIMIA, List of documents relating to input on onshore protection visa processes for minors, (N1, Q7, F8).
- 132 DIMIA, Procedures Advice Manual 3, Protection Visa Procedures Manual, para 4.6.
- 133 SCALES, Submission 176, p30.
- 134 Inquiry, Interview with detainee, 2002.
- 135 SCALES, Submission 176, p27; RACS, Transcript of Evidence, Sydney, 15 July, p28.
- 136 RACS, Transcript of Evidence, Sydney, 15 July 2002 pp25-26.
- 137 In its response to the draft of this report, the Department also described the process of interviewing two unaccompanied children mentioned in the next section. DIMIA, Response to Draft Report, 19 May 2003.
- 138 DIMIA, Internal email, 10 September 2001, (N5, Case 13, p145).
- 139 RRT, Guidelines on Children Giving Evidence, at <http://www.rrt.gov.au/publications.htm#procedure>, viewed 11 December 2003.
- 140 UNHCR Procedures Handbook, paras 213-219; UNHCR UAM Guidelines, section 8; Separated Children in Europe Programme, *Statement of Good Practice*, para C.11.6.
- 141 UNHCR UAM Guidelines, para 8.10.
- 142 UNHCR Procedures Handbook, para 219; UNHCR Guidelines on Refugee Children, ch 8.
- 143 SCALES, Transcript of Evidence, Perth, 10 July 2002, p12.
- 144 SCALES, Submission 176, pp30-31. See also RILC, Transcript of Evidence, Melbourne, 30 May 2002, p25.
- 145 SCALES, Submission 176, p33.
- 146 DIMIA, Submission 185, p174.
- 147 DIMIA, Internal Email, 31 October 2001, (N5, Case 13, p29).
- 148 DIMIA, Response to Draft Report, 19 May 2003.
- 149 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p114.
- 150 IAAAS Contract, cl 2.1, (N1, Q7, F8).
- 151 RACS, Transcript of Evidence, Sydney, 15 July 2002, p30.
- 152 See table in section 7.3.1, entitled 'Processing timetable for unaccompanied child in Port Hedland'.
- 153 See *Martizi v Minister for Immigration and Multicultural Affairs* [2001] FCA 1112.
- 154 US Immigration and Naturalization Service, 'Guidelines for Children's Asylum Claims', 1998; Canada Immigration and Refugee Board, 'Children Refugee Claimants: Procedural and Evidentiary Issues', Ottawa, Canada, 30 September 1996.

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- 155 UNHCR UAM Guidelines, para 8.3. See also UNHCR Guidelines on Refugee Children, ch 8; UNHCR Procedures Handbook, para 214.
- 156 DIMIA, Submission 185, p171.
- 157 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p106.
- 158 *Odhiambo v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 194 at [91]. The Court also stated that the applicants had received qualified and independent assistance in their applications for protection visas and that 'it is difficult to see how the extent or quality of legal assistance would have been any greater if it had been commissioned by an independent guardian of these applicants' at para 95.
- 159 DIMIA, Submission 185, p174.
- 160 UK Home Office, Immigration and Nationality Directorate, Unaccompanied Asylum Seeking Children Information Note, at <http://www.ind.homeoffice.gov.uk/default.asp?pageid=3164>, viewed 23 November 2003.
- 161 DIMIA, Internal email, 10 September 2001, (N5, Case 13, p145).
- 162 Marg le Sueur, Transcript of Evidence, Perth, 10 June 2002, p14. See also section 7.6.1 for a discussion of this case.
- 163 See further DIMIA, Transcript of Evidence, Sydney, 4 December 2002, pp4-5.
- 164 RILC, Transcript of Evidence, Melbourne, 30 May 2002, pp22-23.
- 165 RILC, Transcript of Evidence, Melbourne, 30 May 2002, p23.
- 166 DIMIA, Submission 185, p174.
- 167 DIMIA, Procedures Advice Manual 3, Protection Visa Procedures Manual, para 4.5.27.
- 168 DIMIA, Interviewing Skills, undated, (N1, Q7, F8).
- 169 DIMIA, Submission 185, p174; DIMIA, Procedures Advice Manual 3, Protection Visa Procedures Manual, paras 4.5.6, 4.5.10.
- 170 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 12 June 2001, (N2, Q5, Supp 1).
- 171 See further Chapter 16 on Temporary Protection Visas.
- 172 See Chapter 6 on Australia's Detention Policy for further discussion of the 'Pacific Solution'.
- 173 DIMIA, Fact Sheet 81, Australia's Excised Offshore Places, at [www.immi.gov.au/facts/81excised.htm](http://www.immi.gov.au/facts/81excised.htm), viewed 10 December 2003.
- 174 Note, however, that for those persons who arrived in Nauru via the Tampa or Aceng it is UNHCR rather than Department officials who processed them. See UNHCR, Transcript of Evidence, Sydney, 17 July 2002, p20.
- 175 The Second Reading Speech of the Minister for Immigration in support of the Migration Legislation Amendment (Further Border Protection) Bill 2002 makes it clear that the intention is to exclude boat arrivals from the Australian refugee processes: 'Without the amendments made by this bill, should that vessel (that is one organized by people smugglers) or any other attempt to come either through the Torres Strait or to outlying islands of Australia, it would be possible for these unlawful arrivals to gain access to Australia's extensive visa application processes and the accompanying very liberal interpretation of the Refugees Convention'. Commonwealth House of Representatives Hansard, 20 June 2002, p4018.
- 176 DIMIA, Submission 185, p179.
- 177 DIMIA, Submission 185, p178.
- 178 DIMIA, Submission 185, p178.
- 179 DIMIA, Submission 185, p178.
- 180 Papua New Guinea made reservations to articles 17(1), 21, 22(1), 26, 31, 32 and 34 of the Refugee Convention.
- 181 See further Chapter 6 on Australia's Detention Policy.

# Chapter 8

## Safety of Children in Immigration Detention

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## 8. Safety of Children in Immigration Detention

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*Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding...*

*Convention on the Rights of the Child, Preamble*

The Commonwealth, through the Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA), has a responsibility to ensure the safety and security of all people in immigration detention, with a special responsibility for children due to their vulnerability.

The Inquiry received evidence that the safety of children in detention was threatened by exposure to riots, demonstrations, acts of self-harm and assaults that occurred within detention centres. Furthermore, sometimes the measures designed to address these security concerns compromised the physical and psychological well-being of children. The use of tear gas and water cannons were obvious examples of measures taken in the name of safety and security but which had the effect of making children feel unsafe and frightened. These are not threats to which children in the community are likely to be exposed.

This chapter focuses on the heightened risk of physical and mental harm to children when they are held in immigration detention centres and evaluates the effectiveness of the measures taken to protect children within that context. It also considers whether the safety of children can ever be fully protected within the constraints of the detention centre environment.

The psychological impact of detention is developed further in Chapter 9 on Mental Health. The following questions are addressed in this chapter:

- 8.1 What are children's rights regarding safety in immigration detention?
- 8.2 What policies were in place to ensure the safety of children in detention?
- 8.3 What exposure have children had to riots, violence and self-harm in detention centres?
- 8.4 What exposure have children had to 'security' measures used in detention centres?
- 8.5 What exposure have children had to direct physical assault in detention centres?

At the end of the chapter there is a summary of the Inquiry's findings and a case study which describes a six-year-old Iraqi boy's exposure to violence at Woomera and Villawood.

### 8.1 What are children's rights regarding safety in immigration detention?

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

*Convention on the Rights of the Child, article 19*

The *Convention on the Rights of the Child* (CRC) takes the obligation to protect children from all forms of mental and physical violence extremely seriously. It sets a high threshold for compliance by requiring Australia to take '*all appropriate legislative, administrative, social and educational measures*' to ensure that children are protected from all types of violence, abuse or neglect caused by a child's parent or any other person who is caring for the child. In the detention environment this means that the Department and Australasian Correctional Management Pty Limited (ACM) must take positive steps to ensure that children are protected from physical or mental violence, abuse or neglect in detention, irrespective of its source.

Article 3(2) requires Australia to ensure that all children who are in detention centres receive 'such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents'. Furthermore, article 3(3) provides that:

States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

This means that the Department has the obligation to ensure that there are standards in place so as to provide, to the maximum extent possible, an environment where children can feel safe and are protected from exposure to any violence.

Since asylum seekers and refugees are often fleeing situations of violence, they may be especially vulnerable, particularly in a psychological sense, to the impact of violence in detention. Article 19 must therefore be read with articles 6(2), 22(1) and 39 of the CRC which together require that appropriate measures be taken to

ensure that refugee and asylum-seeking children grow up in an environment which fosters, to the maximum extent possible, development and rehabilitation from past trauma. Thus the requirement to protect children from violence extends beyond preventing direct abuse.

Further, in recognition of the special vulnerabilities of women and girls to violence, the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) obliges Australia to pursue positive measures to eliminate all forms of violence against women and girls, including physical, mental or sexual harm and suffering, threats of such acts, coercion and other deprivations of liberty.<sup>1</sup>

The CRC also requires that detainee children are treated with humanity and respect for the inherent dignity of the child:

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so.

*Convention on the Rights of the Child, article 37(c)*

Although Australia has made a reservation to the requirement that children in any detention facility (including prisons) must be separated from adults, the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) has recognised the importance of separating families in immigration detention from other adults (see section 8.5.1 below).<sup>2</sup> Separation of women and child detainees from men is also a practice recommended by the United Nations High Commissioner for Refugees Guidelines on Detention which provide that 'where women asylum seekers are detained they should be accommodated separately from male asylum seekers, unless these are close family relatives,'<sup>3</sup> and where children are detained they should be separate from adults except where they are in a family group.<sup>4</sup>

The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the JDL Rules) provide some guidance as to how children might be protected from violence within a detention environment. The JDL Rules acknowledge an inherent conflict between maintaining a secure detention facility while also creating an environment within which children feel safe and can develop and grow. For example, the JDL Rules recommend that any surveillance during sleeping hours should be aimed at protecting children and should be 'unobtrusive'.<sup>5</sup> The use of force and other 'control methods' regarding children should only be used in exceptional circumstances, under the order of the director of the facility and subject to higher review.<sup>6</sup>

The JDL Rules also provide that the conditions of detention should 'ensure their protection from harmful influences and risk situations'.<sup>7</sup> All staff in the detention facility 'should respect and protect the human dignity and fundamental human rights of all juveniles'. In particular:

All personnel should ensure the full protection of the physical and mental health of juveniles, including protection from physical, sexual and emotional

## A last resort?

abuse and exploitation, and should take immediate action to secure medical attention whenever required.<sup>8</sup>

Article 3(1) of the CRC requires Australia to ensure that the best interests of the child are a primary consideration in all actions concerning children, including those that might impact on a child's physical or psychological safety. When article 19(1) is read with article 3(1) it is clear that it is inadequate to simply consider how children can best be protected within a detention centre (although such consideration is clearly vital). A consideration of the best interests of the child necessarily includes an assessment of whether a child's safety can ever be properly protected within a detention environment. If not, appropriate legislative or administrative measures should be taken.

## 8.2 What policies were in place to ensure the safety of children in detention?

### 8.2.1 Department policy regarding safety and security

The Department acknowledges the obligation to protect children from harm while they are in immigration detention:

The Department and Services Provider make every effort to prevent undesirable or harmful actions occurring in immigration detention facilities, and to ensure that children are not exposed to them.<sup>9</sup>

Throughout the period of the Inquiry, the primary mechanism through which the Department established standards governing safety and security in detention, was the Immigration Detention Standards (IDS). The IDS imposed contractual obligations on ACM.

#### (a) Immigration Detention Standards on security

The IDS require that '[d]etainees, staff and visitors are safe and feel secure in the facility',<sup>10</sup> and that '[t]he security of buildings, contents and people within the facility is safeguarded'.<sup>11</sup>

The IDS also require that detainees be prevented from accessing any implement that could be used as a weapon.<sup>12</sup> These standards apply equally to children and adults. Staff are required to:

monitor tensions within detention facilities and take action to manage behaviour to forestall the development of disturbances or personal disputes between detainees. If these occur, they are dealt with swiftly and fairly to restore security to all in the facility.<sup>13</sup>

The standards also set out the means of discipline which are permissible within the facilities. They state that:

Prolonged solitary confinement for security reasons, punishment by placement in a dark cell, reduction of diet, sensory deprivation and all cruel, inhumane or degrading punishments are not used.<sup>14</sup>

While prolonged solitary confinement is not allowed, short term isolation appears to be contemplated as the standards state that if a detainee is placed in 'solitary confinement for security reasons, a qualified medical officer visits daily and ensures that the continued separation is not having a deleterious effect on physical or mental health'.<sup>15</sup> While there is no specific prohibition on solitary confinement of children, both the Department and ACM deny that children were confined for punishment reasons (see below section 8.4.6).

The IDS contain requirements governing the use of force, which may only be used as 'a last resort', and instruments of restraint (like handcuffs), the use of which is limited.<sup>16</sup>

All of these standards apply equally to adults and children; however, the IDS also state that 'detainees are responsible for the safety and care of their child(ren) living in detention'.<sup>17</sup>

Neither the IDS (nor the Handbook – see below) contain specific statements regarding special measures to ensure the safety and security of children, nor do they specify whether or not solitary confinement and other behaviour management strategies can be employed with children. The Department states that the broad application of the IDS and State child protection laws, taken in the context of the primary responsibility of parents to protect their children, adequately safeguards the interests of children.<sup>18</sup> This chapter explores whether or not that is the case in practice.

## **(b) Department Managers' Handbook**

The Department has also created a handbook to guide Departmental Managers of detention facilities (the Handbook). The Handbook elaborates on the IDS and reflects corresponding provisions of the *Migration Act 1958* (Cth) (Migration Act). The Handbook states that:

As officers under the Migration Act, DIMIA staff are also empowered to use reasonable force in certain circumstances but it is expected that the need for this in [detention centres] would be rare given the Services Provider's role and responsibilities.

In the immigration detention context, the Migration Act and Regulations provide the power to use reasonable force to:

- take a person into immigration detention;
- keep a person in immigration detention;
- cause a person to be kept in immigration detention. This includes preventing a detainee from escaping from detention;
- conduct a search of a detainee;
- identify a detainee; and
- provide non-consensual medical treatment to a detainee in a detention centre in specific circumstances.<sup>19</sup>

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Department Managers have the final say on the use of force:

It is the DIMIA Manager's responsibility to monitor any use of force undertaken by the Services Provider to ensure consistency with the Migration Act and the IDS.<sup>20</sup>

The Handbook also states that:

Instruments of restraint and chemical agents, including flexi-cuffs and tear gas, are forms of force and must be used only in accordance with the principles relating to the use of reasonable force. They must never be applied as a punishment.<sup>21</sup>

The Handbook also outlines the search powers within immigration detention facilities.

### (c) **Monitoring of security practices**

As discussed in Chapter 5 on Mechanisms to Protect Human Rights, one of the primary mechanisms by which the Department monitors safety and security of detainees is through the provision of incident reports, which are required by the IDS. Briefly, the IDS require that:

Any incident or occurrence which threatens or disrupts security and good order, or the health, safety or welfare of detainees is reported fully, in writing, to the DIMIA Facility Manager immediately and in writing within 24 hours.<sup>22</sup>

Chapter 5 describes the incident reporting system and discusses some of its weaknesses, including problems with the quality and timeliness of reporting by ACM.

## **8.2.2 ACM policy regarding safety and security**

ACM has developed a range of policies to implement the security and safety requirements of the IDS, one of which is specific to the protection of children. The Child Protection Policy, first introduced at Woomera in February 2001, sets out the procedures to be followed when it is believed that:

- (a) the child has or is likely to suffer physical or psychological injury;
- or
- (b) the child's physical or psychological development is in jeopardy.<sup>23</sup>

The general child protection policy for all centres, introduced in August 2001, states that:

All ACM staff will comply with the Children's Protection Act of the State or Territory in which the Centre is located. Children and young people have the right to be emotionally and physically safe at all times.

The policy specifies that ACM staff must notify the relevant State child protection agency of any suspected child abuse<sup>24</sup> and that assaults involving children must be reported to both police and the relevant State children protection agency.<sup>25</sup> ACM

policies also require that State agencies be notified in the event that a child goes on hunger strike.<sup>26</sup>

While the Child Protection Policy is the only security policy that focuses on children, there are some others that incorporate special measures for child detainees. For example:

- 'Pat searching' of children is restricted to 'the most exceptional circumstances, and based on sound reasoning'.<sup>27</sup> If a child is searched in this way, another person must be present at all times.
- Detainees under the age of 10 must not be strip searched, and a Magistrate's order is required before a strip search is conducted of a 'minor who is at least 10 but under 18 years of age'.<sup>28</sup>
- ACM must 'not use handcuffs to restrain females, children or intellectually disabled unless special circumstances exist' when escorting a detainee to a place outside the detention centre (such as to the Refugee Review Tribunal, court, hospital, airport, prison or police cells).<sup>29</sup>

However, the majority of ACM's security policies do not specifically differentiate between the treatment of adults and children. Some of the areas covered by those policies include:

- Use of tear gas which 'should only be used as a last resort in circumstances where there is a real threat to life and limb'.<sup>30</sup> Clear warnings must be given to detainees prior to the use of tear gas, and clear instructions to those not wanting to participate any further in 'unlawful behaviour'.
- Emergency management.<sup>31</sup>
- Searches of detainees' rooms.<sup>32</sup>
- Detainee head counts, which require staff to 'physically sight the detainee. If the detainee is covered with bedding staff must pull back the sheet/blanket so the detainee can be identified'.<sup>33</sup>
- Behaviour management through isolation or transfer of a detainee who breaches the detainee code of conduct.<sup>34</sup>
- 'Management separation' which allows for the separation of detainees.<sup>35</sup>
- The use of force and restraints (other than for external escorts).<sup>36</sup>
- Management of detainees who are at risk of self-harm or abuse. This policy sets out the operation of the High Risk Assessment Team (HRAT) – an observation system.<sup>37</sup> The policy contains a list of risk indicators, and signs to observe in determining whether a detainee is at risk of self-harm.<sup>38</sup> The HRAT process is also used to keep a watch on detainees who are vulnerable to abuse.

There is no policy on the use of water cannons.

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ACM states that these policies represent best practice and ‘transcend the differentiation between adult and child’:

ACM policies on riots and security do not make special provision for children because they do not need to. These policies aim to protect all detainees regardless of age or sex, from acts of violence from other detainees and address any measures that may be necessary to prevent the escalation of incidents.<sup>39</sup>

ACM also stated that while its policies regarding riots and security do not make special provision for children, they do incorporate ‘fundamental principles of (a) preservation of life and property ... and (b) proportionality’.<sup>40</sup>

While the Inquiry acknowledges that the security policies covered children in principle, in the Inquiry’s view, there should have been specific instructions to take special measures to protect children during violent disturbances. This is discussed further in sections 8.3 and 8.4.

### 8.2.3 State child protection agencies

All Australian States and Territories have child protection legislation and authorities charged with implementing that legislation.<sup>41</sup> Broadly speaking, child protection authorities deal with the protection of children from abuse and neglect. For example, in the community, a child protection authority may be called in to remove a child from a dangerous situation at home in the event of suspected assault or neglectful treatment at the hand of a child’s carer.

The Department recognises that State child protection authorities have special expertise in child welfare and relies on them for advice on how to manage and protect children in detention.<sup>42</sup> In the detention context, conditions of neglect which may require the intervention of a child welfare agency can include the conditions in the detention centre itself. Chapter 9 on Mental Health addresses the role of State authorities in responding to the impact of that environment generally.

The detention environment also places children at heightened risk of becoming the victims of, or exposed to, specific acts of violence. The following sections focus on the role of child protection authorities in protecting children from specific instances of abuse or neglect.

Whether or not the State authority can properly fulfil their protection role depends on three factors:

- (a) appropriate reporting procedures
- (b) access to detention facilities to investigate any notifications
- (c) the power to implement its recommendations.

This chapter primarily discusses the South Australian child protection authority. In South Australia, the Department of Human Services (DHS) is responsible for child protection and child welfare. Family and Youth Services (FAYS) is the section of DHS that manages these responsibilities.

In Western Australia the Department for Community Development (DCD) is responsible for child protection.

**(a) Reporting of child abuse to child protection agencies**

Effective interaction between the Department, ACM and State child protection agencies starts with appropriate reporting procedures. In NSW, SA and Victoria, State parliaments have enacted mandatory reporting obligations for incidents of suspected child abuse or mistreatment for various classes of professionals.<sup>43</sup> In Western Australia, there are no such mandatory reporting provisions, but any person *may* report their concerns to the Department of Community Development.<sup>44</sup>

The February 2001 Flood Report investigated the incidence of and procedures for dealing with child abuse in immigration detention between 1 December 1999 and 30 November 2000. The Flood Report expressed concern about ACM's delay in developing a policy that clearly set out the reporting responsibilities of staff under State child protection laws:

The new Child Protection Policy [for Woomera] is a thorough yet very overdue document which clearly outlines the responsibilities of staff under the *Child Protection Act* (SA). I remain unsatisfied that this policy has still not been implemented and that similar documents have not been developed for the other centres and I recommend that ACM address this issue immediately. The sexual assault policy also does not adequately address issues such as the needs of victims of sexual assault after they have been examined and returned to the centre.<sup>45</sup>

The Woomera Department Manager's report for the January 2001 quarter also indicated a lack of clarity in reporting procedures:

I was amazed by an allegation of child abuse, which was supposedly advised to me on a day I was testifying in Court in Adelaide. It was not notified to [the State child protection authority] in a timely manner....A strong message is needed that this issue is a legal requirement and [DIMIA] nationally views it in the strongest possible terms.<sup>46</sup>

Furthermore, DHS expressed concern that, prior to early 2001 when negotiations began regarding a Memorandum of Understanding (MOU) with the Department on the issue of reporting, ACM staff believed that they were restricted from reporting child abuse and neglect because of confidentiality clauses in their employment contracts:

Staff employed at detention centres are required to sign a contract of employment that includes a confidentiality clause. Prior to the drafting of the South Australian MOU with DIMIA there was some tension in determining whether staff employed understood their obligations to make notifications under State law. Mandated notifier training is now [as at May 2002] provided to all staff at the detention centre and this has provided greater clarity about roles and responsibilities in relation to child protection notification.<sup>47</sup>

Submissions from the Alliance of Professionals Concerned about the Health of Asylum Seekers and their Children, and Australian Lawyers for Human Rights, also

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raised this conflict.<sup>48</sup> However, two doctors on short term contracts at Woomera gave evidence that they had not been asked to sign any confidentiality agreement and that it would not have changed the way they administered health care in any case.<sup>49</sup>

Another source of confusion may have been that, prior to the introduction of the Woomera Child Protection Policy in February 2001, staff were under the impression that they had to report their concerns to ACM management rather than to the child protection authorities directly.<sup>50</sup> For example, a former ACM nurse who worked on three six week contracts between August 2000 and February 2001 at Woomera testified that:

During my first two contracts with ACM, medical staff were instructed that they were not allowed to report child protection concerns directly to FAYS, but that we should report to management who would then notify FAYS. This requirement was detailed in the ACM policy manual. This policy was changed in early 2001 following the expression of concern from medical staff. Medical staff were then allowed to notify FAYS, and subsequently notify the ACM centre manager that they had done so.

In January 2001 I notified ACM management of an alleged instance of sexual assault of an unaccompanied minor. This incident was investigated by the South Australian police and FAYS were notified by ACM staff.<sup>51</sup>

The introduction of the Child Protection Policy for Woomera in February 2001, and the general protection policy in August 2001, appear to have gone a long way toward clarifying the reporting procedures.<sup>52</sup> While the Flood Report expressed concern about the level of training accompanying these policies it appears that there were substantial improvements in the level of reporting over 2001.<sup>53</sup> For example, the South Australian child protection authority stated that as at May 2002:

[T]he mandate of notification responsibilities of staff at Woomera has become commonplace. All the arguments that we came across in 2000 are now null and void and it is now part of ACM policy and they have altered their contracts [and had] stuff around the confidentiality clause changed to make it very clear and as I understand there's actually repercussions for ACM staff for not notifying.<sup>54</sup>

A former ACM Activities Officer who worked at Woomera from May 2000 to January 2002 also stated that:

Staff were made aware of the mandatory reporting requirement in relation to suspicion of child abuse or neglect. I was not aware of any matters that should have been reported to FAYS that were not reported.<sup>55</sup>

The Inquiry welcomes the improvements in the reporting procedures and practice regarding child abuse notification. However, given the presence of children in immigration detention since at least 1992, the Inquiry is concerned that a matter of such obvious importance was not specifically anticipated by the Department at a much earlier stage.

**(b) Access to detention centres to investigate notifications**

State child protection staff do not appear to have encountered problems in accessing detention centres to investigate child protection notifications. The Department explains that the *Commonwealth Places (Application of Laws) Act 1970* empowers State authorities to enter immigration detention facilities to investigate specific allegations of child abuse. Therefore the only discussion between the State authorities and the Department would have related to arrangements as to a suitable time.<sup>56</sup>

DHS and DCD confirm that they have been granted access to detention facilities to conduct child abuse investigations and any necessary follow-up visits.<sup>57</sup> However, DCD also stated that it was made clear to them that access is in the control of the Department:

We have not had an instance in relation to child maltreatment where we have had any problems with access into the detention centre at this point. But we are always very clear, and it is always made very clear and we are very aware as well, that it is not something that we have a right of open access to. It has to be on the basis of getting permission from DIMIA.<sup>58</sup>

**(c) Responsibility and powers of State child protection agencies in detention centres**

While State child protection authorities have the power to enter a detention centre to investigate a child abuse notification, they have no power to enforce their recommendations as the Department retains ultimate authority in detention centres.

The nature of Australia's federal legal system is that Commonwealth legislation will prevail over State legislation.<sup>59</sup> In the context of child protection in immigration detention centres this means that the Migration Act, which requires that children remain in detention, will prevail over State child protection legislation which otherwise grants power to child protection authorities to recommend that a child be removed from detention. The Flood Report noted this problem in February 2001 and recommended that:

a Memorandum of Understanding (MOU) between [the Department] and each of the state authorities be established to clarify the roles and responsibilities of each party in cases where the state authorities make strong recommendations that a child be removed from a centre.<sup>60</sup>

In December 2001, the Department entered a Memorandum of Understanding relating to Child Protection Notifications and Child Welfare Issues (the 2001 MOU) with DHS which aims to:

Ensure appropriate notification and referral of all cases of possible child abuse or neglect which occur at places of immigration detention in South Australia.<sup>61</sup>

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The 2001 MOU emphasised that although DHS has the responsibility to investigate child abuse allegations it has no authority to implement those recommendations of its own accord:

DHS has a legal responsibility to investigate child protection concerns for children in immigration detention in South Australia. However, any interventions undertaken to secure the care and protection of detainees must be actioned by DIMIA. DIMIA will consider carefully DHS recommendations to ensure that the best interests of the child are protected.<sup>62</sup>

The Department has also observed that neither State courts nor State government officials have any jurisdiction to order the release of a child from immigration detention:

A State government or court cannot order the release of a child detainee from immigration detention pursuant to State child welfare legislation. Any State child welfare legislation which purported to authorise a State Minister or official, or a court, to order the release of a child, would be inconsistent with the provisions of the *Migration Act* 1958 (Migration Act) which clearly require the keeping in immigration detention of all unlawful non-citizens, including children.<sup>63</sup>

DHS outlines the following powers of the South Australian *Children's Protection Act*, which would normally be used to protect children in the community, but 'are directly inconsistent with the detention requirements of the Migration Act and therefore cannot be applied':

- The power of the [South Australian] Minister to enter into a voluntary custody agreement with the guardians of the child;
- The power to remove a child from a place ...;
- The authority of the Youth Court to grant custody of a child to the [SA] Minister ...;
- The authority of the Youth Court to direct a person who resides with a child to cease or refrain from residing in the same premises as the child...;
- The ability of an employee of the [DHS] to take a child to such persons or places as the Chief Executive Officer may authorise ...;
- Orders the Youth Court may make granting Custody or Guardianship of the child to the [SA] Minister on a long term basis and associated ancillary orders.<sup>64</sup>

Negotiations of MOUs with Western Australia, Victoria and New South Wales agencies are still underway; however, it appears that those agreements will work with similar limitations. The Western Australian Government has already expressed concern about its lack of authority to implement recommendations:

The Western Australian Government welcomes the progress being made on the MOU relating to child protection. It is concerned, however, about the discrepancy between DCD's statutory responsibility for child protection and its lack of authority within detention centres.<sup>65</sup>

Some of the practical difficulties that arise as a result of the unenforceability of the State child protection authority recommendations for removal of children are illustrated in the case study at the end of this chapter. This issue is discussed in further detail in Chapter 9 on Mental Health.

### 8.2.4 Federal and State police

The *Australian Federal Police Act 1979* (Cth) provides that investigations of criminal matters on Commonwealth land are a matter of agreement between the State and Federal Commissioners of Police.<sup>66</sup> A February 2001 report commissioned by the Department regarding the breakouts in Woomera, Port Hedland and Curtin detention facilities in mid 2000, commented on the need to clarify the 'jurisdiction, responsibilities, roles, resource capabilities and protocols' regarding each of the relevant authorities, including State police.<sup>67</sup> The February 2001 Flood Report also urged the Department to enter memoranda of understanding that:

clearly and unambiguously articulate[s] the role of the state police in any incidents at Commonwealth detention facilities which may require police involvement.<sup>68</sup>

To the Inquiry's knowledge no such agreement has been reached with any State police authority. However, staff from DHS note that in South Australia it is the role of the State police to investigate abuse by anyone other than the family and it is the role of the Federal Police to investigate any allegations against ACM or Department staff.<sup>69</sup>

## 8.3 What exposure have children had to riots, violence and self-harm in detention centres?

Immigration detention centres have been the site of a number of major disturbances including demonstrations, hunger strikes, attempted and actual self-harm, riots and fires. It is clear to the Inquiry that the detention of children within this environment has meant that they have been exposed to a level of violence and distress that is unlikely to have occurred in the community.

In early 2003 a psychiatric study regarding children detained in a remote centre noted the impact on children of the exposure to violence:

All families described traumatic experiences in detention, such as witnessing riots, detainees fighting each other, fire breakouts, detainees self-harming, and witnessing suicide attempts. It should be noted that the researchers could not verify independently allegations made by asylum seekers particularly those directed at detention officers. ... The children particularly reported being distressed by witnessing the frequent acts of self-harm and suicide by other detainees. All of the children witnessed the same act of self-harm by an adult detainee who repeatedly mutilated himself with a razor in the main compound of the detention centre. Children also described having witnessed detainees who had slashed their wrists, jumped from buildings, resulting in broken legs, and detainees attempting to strangle or hang

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themselves with electric cords. At times, children witnessed their parents suicide attempts, or saw their parents hit with batons by officers. A number also witnessed their friends and siblings harm themselves. ... A number of families reported enforced periods of separation from each other during detention (7 families), often when a parent was taken to solitary confinement either as punishment or in response to self-harm attempts.<sup>70</sup>

The submission from the Conference of Leaders of Religious Institutes includes a discussion with mothers who describe how frightening it was for children at Maribyrnong to be near a riot:

There was a riot of sorts and several men damaged equipment such as computers, televisions and other furniture. This happened at night and was accompanied by a great deal of noise ... The mothers [told] me later, how afraid the children and they had been, as they were locked up [in] their own area just next to the area where it was all happening (in the same building). They were powerless to reassure the children that they were safe as they really were very afraid themselves, not knowing what was really happening, whether the place would be burned down, if the violence would escalate and overflow into their area.<sup>71</sup>

Dr Annie Sparrow, who was employed at Woomera for four weeks, two of which were in January 2002, described the surrounding violence as follows:

children are exposed to the acts of violence, as it were, that occur between the guards and the detainees or by the adult detainees or even the children, of self-mutilation or self-harm or violent behaviour when the adults would climb on to a building and threaten to throw themselves off or actually injure themselves on wire ... And again, that is not conducive to any child's mental health where ever they are.<sup>72</sup>

Some of the self-harm incidents that children witnessed were quite dramatic. For example, children have seen their male relatives throwing themselves on razor wire, causing multiple lacerations to their bodies. A former ACM staff member described an incident where one group of children witnessed self-harm by another group of children:

I was in a room at [Woomera detention centre] with about 30 or 40 children watching a video when a group of about 10-15 unaccompanied minors formed in a group outside. They had taken their shirts off and proceeded to slash their chests with razor blades. They were all covered in blood. A number of the children saw this and some went outside to where this was taking place.<sup>73</sup>

One of the disturbing consequences of being exposed to violent behaviour is that children are drawn into it – themselves participating in acts of self-harm and violence, thereby seriously risking their safety and well-being and compromising their psychological health. Such behaviour has included children sewing their own lips together.

### 8.3.1 Chronology of riots and other major disturbances

The Department's incident trend analysis gives some indication of the prevalence of major incidents (an incident that 'seriously affects the good order and security of the detention centre') in detention centres.<sup>74</sup> For example, between July and December 2001 there were 688 major incidents involving 1149 detainees across all detention centres.<sup>75</sup> Of those incidents, 321 were alleged, actual or attempted assaults (19 of which involved children, 9 of which involved alleged detainee assaults on staff), 174 were self-harm incidents (25 of which involved children) and about 30 per cent involved 'contraband, damage to property, disturbances, escapes and protests'.<sup>76</sup> Seventy-four per cent of all the major incidents in that period occurred in the Curtin, Port Hedland and Woomera centres, where the largest number of children have been detained for the longest periods of time.

From January to June 2002, there were 760 major incidents involving 3030 detainees across all detention centres.<sup>77</sup> There were 116 alleged, attempted or actual assaults (16 of which involved children, 13 of which involved alleged detainee assaults on staff), 248 self-harm incidents (25 of which involved children) and 52 per cent of incidents involved 'contraband, damage to property, disturbances, escapes and protests'.<sup>78</sup> Almost 80 per cent of all incidents occurred in Curtin, Port Hedland and Woomera.

The following table, sourced primarily from media reports, sets out a rough chronology of the major disturbances in the three most problematic centres between July 1999 and December 2002.

Some of the disturbances listed below were over fairly quickly, for instance riots rarely lasted more than a day. Others, like protests and hunger strikes, could last weeks. Some disturbances involved all compounds in the centre and others were restricted to one or two compounds. The approximate numbers of detainees involved in the incidents are included where the media or other sources have reported them.<sup>79</sup>

The chronology is intended to give some sense of the environment in which the majority of children in immigration detention were living, rather than to provide a comprehensive description of each and every occurrence in the detention centres.

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### Chronology of major disturbances

Date	Woomera	Curtin	Port Hedland
July 1999	[Not open]	[Not open]	Riot and escapes.
Aug 1999	[Not open]	[Not open]	Protests.
Mar 2000	Demonstrations.		
June 2000	Two days of protests. Approx 480 detainees walk into town.		
Aug 2000	Three days of riots and fires. Tear gas and water cannons used. 60-80 detainees involved.		
Nov 2000	Hunger strike by more than 30 detainees. Some forcibly fed in hospital.		
Jan 2001		Riot involving approx 300 detainees.	Riot involving approx 180 detainees, hunger strike.
Mar 2001			Riot.
April 2001		Riots and fires, tear gas used, approx 200 detainees involved.	
May 2001		Riot.	Riot, hunger strike, tear gas used.
June 2001	Riot and confrontation between ACM and approx 150 detainees. Injuries on both sides. Water cannon used.	Riot.	
Aug 2001	Riot, fires, tear gas, self-harm. Centre on riot alert for more than a week.		

## Chronology of major disturbances

Date	Woomera	Curtin	Port Hedland
Sept 2001	Protest outside. Water cannons and tear gas used on detainees inside.		
Nov 2001	Riot and extensive fires. Approx 250 detainees involved.		
Dec 2001	Three separate riots, each with fires. Tear gas and water cannons used.		
Jan 2002	Hunger strikes, lip-sewing, including seven children.	Hunger strikes, lip-sewing.	Hunger strikes, lip-sewing.
Mar-Apr 2002	Riots over the Easter period. Approx 50 escapes including mother and three children.	Riots and fires. Approx 150 detainees involved. Tear gas used. Family compound created after these riots.	Riot involving approx 150 detainees.
June 2002	Hunger strikes, including 13 children. Escapes, including three children.		
July 2002			Riots and fires.
Dec 2002	Extensive fires.	[Not open]	One fire.

The following sections describe just a few of these events.

### 8.3.2 Major disturbances at Woomera

Woomera opened in November 1999. Woomera has been the site of more riots and unrest than any other centre, as the above chronology shows. While the number of physical injuries sustained by children during these disturbances was few, the psychological impact they left on children was substantial.

In such a relatively small environment, children are inevitably exposed to whatever crises, riots or violence occur. One father said of children at Woomera: 'they know everything – who cut themselves, who try to hang themselves'.<sup>80</sup>

The two major disturbances about which the Inquiry has the most evidence are those that occurred in January and April 2002. However, when the Inquiry spoke to families in January 2002, it became clear that other events, such as the fires in November 2001 and December 2001, had a negative impact on the children who had witnessed them. There were 359 and 322 children detained in Woomera in November and December 2001 respectively.<sup>81</sup>

For example, an 11-year-old child told an ACM psychologist in December 2001 that he had cut his arms and legs with a razor blade because he was tired and because he had been in the centre a year and all his friends had left.<sup>82</sup>

Another family told the Inquiry that they were housed in a donga (demountable sleeping quarters) beside one of the buildings that was burned in November 2001. During the fires, the children, two young girls, had to remove their belongings from the room because they thought that they would be destroyed by fire. Detainees, including children were left inside the compounds with the fire while it burned. The two girls stood outside their donga and watched nearby buildings burn. The parents said that the girls still asked about the fire and one shook with fright at night time.

One of the girls saw the hunger strikers and witnessed a man jumping onto razor wire. She saw his bloodied body afterwards. The girl's parents say that she asks about this man all the time and that their children ask them 'why don't they eat?' and 'why is this happening?' They have no answers for them.<sup>83</sup>

#### (a) Woomera – January 2002

In January 2002, when there were 281 children detained at Woomera,<sup>84</sup> there was a major hunger strike and protest, which included lip-sewing, involving a large number of detainees. Seven children were involved in the lip-sewing. Many other children were living amongst and observing the ongoing protests.

##### (i) Hunger strike

The hunger strikes began in response to the Department halting the processing of visa applications by Afghan asylum seekers.

The ACM Manager reported that Woomera had been relatively calm until 11 January 2002, when the Refugee Review Tribunal reportedly refused to grant a visa to an Afghan applicant on the grounds that the Taliban was no longer in power in

Afghanistan. While there were a few incidents in the following days, the hunger strike proper began on 16 January 2002.

When Inquiry officers visited Woomera between 25 and 29 January 2002, they observed:

- hunger strikers, including a man being removed by stretcher from the Main Compound;
- people with lips sewn together;
- the aftermath of a man jumping onto razor wire;
- demonstrations (people climbing onto the top of dongas and calling out for freedom, people dragging mattresses and bedding into the compounds);
- an extremely distressed woman screaming hysterically for an extended period, apparently after a dispute with an ACM officer;
- actual and threatened self-harm; and
- smashing of windows.

All of these events took place in full view of children, apart from the smashing of windows, which they may have heard.



Hunger strike at Woomera, January 2002.

The Inquiry observed generally that the centre had an atmosphere of despair that affected every aspect of life. It was an atmosphere into which children were inevitably drawn.

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At the time of the Inquiry's visit, there were hunger strikers in all of the compounds, with most based in the Main Compound. Hunger strikers had removed the bedding from their dongas and were lying on mattresses around internal perimeter fences of the compounds, using blankets fastened to fences as a form of shelter. In the Main Compound, women who were hunger striking congregated under a set of children's play equipment. The hunger strikers were being monitored by health staff to identify when medical attention was necessary.

Children were moving freely around the hunger strikers, even playing alongside them. A staff member employed at Woomera for 12 months at the time recalls:

I found the mass hunger strike extremely disturbing, people dragged their mattresses out into the open, and some people had stitched lips. I called it 'The Field of Mattresses', because put simply that is what it was. Bodies littered the ground in all compounds, I remember feeling the strangeness of the situation one day as I was making my way to the medical centre, just inches away from my feet through the wire, people lay lifeless on mattresses in the searing desert heat. Management had lost control of the centre.

It was a few days into the 'Field of Mattresses' about 10.00am when I entered the main compound [of Woomera detention centre] with a colleague ... to open a recreation building. We decided to check on a group of about 20 women who had joined the hunger strike, and had based themselves in the playground. What we found was an appalling tragedy.

A group of at least a dozen women, predominantly Afghanis, some Iranians and Iraqi women. This in itself was unusual as the groups do not often mix, this indicated to me the seriousness of the situation, and was a clear show of unity and support for each other.

The playground floor was littered with mattresses, some women laying, others sitting, some children bouncing on mattresses. I recognised most of the children as long term minors. [My colleague] and I asked each mother and child if the children were drinking and eating. The mothers and children confirmed the children were eating. A young woman I attended had a crawling baby with her; the baby appeared confused and dishevelled and tried to get the mother's attention by crawling all over her. I looked directly into the mother's face and noticed she was disoriented and appeared confused. When questioned she nodded she had not been eating, I asked her twice if she was feeding her baby she nodded yes and held her breast, indicating she had been breast feeding the child which other women present confirmed. The young mother's eyes were blank, unfocussed and held no life.<sup>85</sup>

ACM reports show that on 20 January 2002, there were 37 children on hunger strike.<sup>86</sup> Fifteen unaccompanied children had commenced the hunger strike the day before.<sup>87</sup> By 22 January, the total number had decreased to 31 children<sup>88</sup> and eight unaccompanied children (possibly some of the other children as well) were on a 'partial' hunger strike:

Detention manager reported that even though all UAM's are reported to be on hunger strike, they are drinking eight cups of water each per day with sugar in it.<sup>89</sup>

Two unaccompanied children swallowed shampoo and disinfectant respectively during this time.<sup>90</sup> FAYS were updated on the progress of these children on a daily basis.<sup>91</sup> Medical incident reports confirm that children of concern were being checked.

There have been suggestions that parents encouraged their children to go on hunger strike. Detainees interviewed at Woomera responded as follows:

I totally disagree because this is not fact. This man [a hunger striker], his children if not eat he will get angry with them. ... This is very misunderstood because the outside Australian public say they make children [do it] but this is really unfair to guys like that. When the woman, children and the father and mother is very depressed and these children themselves are still the same, they are not happy to eat and those people who stitch their lips – this is the boys' decision, believe me that's the boys'. As you see yesterday they started to remove the stitch.<sup>92</sup>

The claim [that children are being coerced into hunger striking and lip-stitching] is totally baseless. ... We are human beings, we don't use our children. We are ready to sacrifice ourselves for the sake of our children.<sup>93</sup>

The Department highlighted a case where a father refused to allow his hunger-striking son to be taken to the medical centre. However, this objection was short lived and the detainee delegates worked with ACM staff to make sure that all children could be treated.<sup>94</sup>

The Department also highlights that families who were not on hunger strike were given an opportunity to move to another compound and several took up that offer.<sup>95</sup> ACM, on the other hand, highlights that 'design limitations' make it very difficult to shelter children from being exposed to such activity, given that 'behaviour of this type was not predicted at the time the facility was designed'.<sup>96</sup>

Nevertheless, ACM detention staff tried to move the unaccompanied children from the compound where the primary hunger strike was taking place 'and put them all together so that they could all look after each other'.<sup>97</sup> Unfortunately, as set out above, this does not appear to have prevented unaccompanied children from participating in the hunger strike. However, two unaccompanied siblings were taken out of the centre altogether, to the Woomera Housing Project. They had expressed some fear of being attacked by residents unless they stopped eating.<sup>98</sup>

The Inquiry accepts that there are practical difficulties in sheltering children from the protests conducted by other detainees within the closed environment. This highlights the risks of keeping children in immigration detention.

## (ii) Lip-sewing

Seven boys went beyond hunger striking and participated in the protests by sewing up their lips. Three were twelve-years-old (one of whom was an unaccompanied child), two were 14-years-old, one 15-years-old and another 16-years-old.<sup>99</sup> Four of the children had been detained for 12 months at the time they sewed their lips, and three for 6 months.

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When ACM staff discovered that the children had sewn their lips together they were placed on two-hourly observations and offered food, water and medical attention.<sup>100</sup> Staff also notified FAYS, the South Australian Police and Glenside Psychiatric Hospital.

All children had their stitches removed within a day of putting them in, either at Woomera Hospital or the on-site medical centre. The records indicate two of the children stitched their lips a second time, and a third child may also have done so. All the children who sewed their lips were also participating in the hunger strike, even though in some cases it was possible to eat with the stitches in.

The mother of two of the boys who sewed their lips was also on hunger strike. The eldest son stitched his mouth twice, slashed the word 'freedom' down one arm and slashed his other arm and torso. This family was closely observed throughout the hunger strike.<sup>101</sup> One staff member in particular recounts her observations and efforts:

As I moved around the group I came to [the mother], an Afghani woman well known to myself and several of my colleagues. I had worked extensively with her five children aged 14 years to 5 years. I had filed numerous reports and referrals on the family, particularly the oldest child. ...

I was not surprised to see [the mother] joining the protest as she and her children had at that stage, been held in detention for over 12 months. I was alarmed at [her] condition. She lay on a mattress too weak to sit up; I knelt beside her, the other women told me she had not eaten for days. [Her] lips were stitched from corner to corner (this is a sight I will never forget), her eyes also held no life. I placed my hand on hers and cried, when I looked up all present were crying including [my colleague]. ...

I returned to the office to collect some recreation items for [the oldest son, in hospital] and left immediately for the Woomera hospital. As I crossed the Administration compound to exit the centre, I looked into the main compound and noticed [the mother] being physically supported by her [younger son] making their way back towards their room. It was [a] pitiful sight, the boy's head was hung low bearing the weight of his mother, who was barely able to move one foot in front of the other.

At the hospital a nurse who had been caring for [the boy] spoke to me for about ten minutes. She informed me [that the brothers] had both presented earlier in the week with stitched lips and had been brought to the hospital to have the stitches removed. She also told me that [the younger boy] was extremely distressed by the situation.

When I saw [the older boy] he was visibly happy to see me. He smiled, he was clean and well groomed. He told me he liked the hospital and it was better than the camp. [He] was very happy with his brother's 'Salaam' message. I gave the boy the pencils, paper and picture books I had brought for him, then we talked about his artistic talent and how he could use the picture books to copy some drawings.

[His] happiness at my visit was in stark contrast to what I saw, his lips were unstitched but he had slash marks on both his outer forearms, the scars from his previous slashing not long healed. The word freedom had been cut

into the length of one of his inner forearms, when I questioned him about this he just shrugged his shoulders and said nothing and became quiet.<sup>102</sup>

The Inquiry investigated allegations that adults were involved in the sewing of children's lips. Former staff, including doctors, psychologists, nurses and recreation officers, were questioned at hearings,<sup>103</sup> as were child protection authorities and current detention staff at Woomera. All were of the view that there was no evidence to support the suggestion that adults were involved in sewing children's lips. For example, the Department's Manager at Woomera told the Inquiry that there was no evidence that parents had sewed their children's lips, and that the children had admitted that they did it themselves. The ACM Health Services Coordinator also said that the children had acted independently.

During the Inquiry's public hearing, a senior Departmental officer said, 'it is my understanding that we were subsequently advised that there was no evidence either to confirm or deny' that parents were involved in sewing the lips of their children.<sup>104</sup>

A refugee mother who had been detained at Woomera in January 2002 told the Inquiry:

No, the families didn't encourage the children to do that, but only the children did that by themselves. They used to gather and shout, 'Freedom!' and still our children, up until now at home, they will still call, 'Freedom! Freedom!'<sup>105</sup>

A FAYS report of 24 January 2002 notes several children stating that they sewed their lips themselves.<sup>106</sup> They stressed, however, that Woomera was a coercive environment for all people detained there and that children were vulnerable because of this environment. Moreover, children may have been copying the behaviour of the adults around them. FAYS also noted their concern that where the parents were 'becoming decidedly weaker they are unable to protect and supervise their children'.<sup>107</sup>

The ACM psychologist at Woomera from October 2000 to December 2001, Harold Bilboe, made similar observations with respect to lip-sewing incidents that had occurred on a previous occasion:

Amongst the self-harm that occurred while I was at [Woomera], there was lip stitching amongst adolescents. There was no evidence of which I was aware to suggest the involvement of parents or adults in the stitching of children's lips. The only time I heard of these allegations of the involvement of adults in stitching the lips of children was from the Minister for Immigration.<sup>108</sup>

Another psychologist who worked in Woomera at this time told the Inquiry that she believed that a child may have had assistance in sewing his lips, but that the child's mother would have been unlikely to have provided this assistance herself:

I don't think she would do it to him but I think he would have had help because it is such a difficult thing to do and I think if any child – I mean, he is so emboldened now that he would want it done ... I'm sure he would have been assisted but he would have asked or demanded it to be done to him, that boy. Now, with others I don't know, but I don't think they could do it.<sup>109</sup>

## A last resort?

This witness said that she could not say with any certainty that this child had been assisted.

Dr Jon Jureidini, a psychiatrist who has worked with children in immigration detention, told the Inquiry that he had never heard of parents encouraging their children to self-harm:

I have no experience either first hand or in literature of parents deliberately encouraging their children to self-harm. I certainly think that parents can play a role in a number of other ways. First, that as individual adults self-harming themselves is providing that model for children, wittingly or unwittingly. Also the incapacity of parents to provide ordinary safety and protection for their children which is not a criticism of the parents themselves but symptomatic of the fact that they are overwhelmed in that environment.<sup>110</sup>

The Western Australian Government also confirmed that parents had no involvement in lip-sewing by children at Port Hedland:

We recently had a referral in relation to self-harm, where there was an allegation that parents were involved. The outcome of our assessment, and the children themselves, who were young people, were very clear, that they made the decisions themselves, their parents were not involved in that decision.<sup>111</sup>

### **(b) Woomera – Easter 2002**

Extensive riots occurred at Woomera during Easter 2002. The disturbance was precipitated by a protest outside the centre and resulted in the escape of approximately 50 detainees.<sup>112</sup>

The Department and ACM knew that an Easter protest was being planned by people opposed to the mandatory detention of asylum seekers back in January 2002.<sup>113</sup> On 25 March 2002, a meeting between ACM, the Department, the South Australian Police, the Federal Police, the Woomera Area Administrator and Woomera Hospital, amongst others, was convened in order to discuss a strategy to deal with the protests. ACM planned to have extra staff on site, and the South Australian and Federal police had arranged for staff to be present. ACM Centre Emergency Response Teams (CERT) began training for the protest and compounds were searched to try and remove objects that could be used as weapons.<sup>114</sup> A barbeque was arranged for detainees in all compounds as a 'diversionary' tactic, but was cancelled when detainees indicated that they would not participate.<sup>115</sup>

The ACM incident reports indicate that approximately 800 protesters participated in demonstrations outside the Woomera fences. The protests started on 29 March 2002 and ended on 1 April 2002. Amongst other occurrences, detainees climbed on the rooves of dongas, waved banners and shouted chants of freedom. Some children climbed onto rooves with their parents, although they were quickly convinced to come down from the roof.<sup>116</sup> Some detainees threatened to set themselves on fire if detention staff did not leave the compounds.<sup>117</sup> Internal and external fences were brought down and some detainees used the dismantled fencing, bricks and

rocks as weapons. Tear gas was deployed on four different occasions when staff felt threatened by detainees.<sup>118</sup> Water cannons were also used to subdue detainees and stop escapes.<sup>119</sup> There were also some instances in which ACM officers used pieces of fencing and rocks as weapons in exchanges with detainees, a practice not condoned by ACM management. The disturbances continued through the day and night. Seventeen staff and 14 detainees were treated for minor injuries.<sup>120</sup>

Father Frank Brennan was visiting Woomera at the time of the riots. He described what he saw and heard on Good Friday night, 29 March 2002:

Inside [Woomera], during the riot and breakout, I spent two hours with men, women and children who had come from church and who were unable to return to their accommodation and unable to find sanctuary in an alternative compound because they were threatened by another detainee disturbed by their religious practices. That detainee was finally apprehended by half a dozen ACM officers in full riot gear backed by a water cannon truck which had been moved into position. Meanwhile two other detainees were on the roof threatening self-harm exacerbating a situation of mass hysteria. Children in my midst were highly traumatized. One child remonstrated with his mother saying he should attack an ACM officer because that is the only way that you get a visa!<sup>121</sup>

ACM incident reports confirm Father Brennan's report that the Christian detainees could not be moved to a quieter compound because of threats from others.<sup>122</sup> However, the incident reports do not mention any alternative measures taken to shelter Christian or other children from these violent events.

Video evidence of the Easter riots at Woomera reveal that while some children were actively participating in the riots, others were highly distressed by what was going on around them. For example, a girl separated from her family was taped standing outside the sterile zone and screaming continuously. The tape also shows children being hosed:

Children, from approx 8-10 years old, can be seen mixing with adult detainees in the sterile zone and collecting objects. Detainees approach ACM detention officers again, and 4 boys can be seen at the front. Their ages seem to range from about 7 to 14 years. ACM detention officers use a water hose on the detainees to move them back. Water pressure is not high.<sup>123</sup>

There is no suggestion in ACM's incident reports that any children were injured in the riots. However, the Inquiry heard an allegation that a child was hit with a baton. That allegation was brought to the attention of the police. The police found that as the alleged offenders could not be identified there was insufficient evidence to continue its investigation. The mother of the child also lodged a human rights complaint with the Human Rights and Equal Opportunity Commission (the Commission). The Commission's Complaints Handling Unit heard evidence regarding this allegation, and allegations regarding the manner in which tear gas was used while children were present, in a public hearing on 9 and 10 July 2003. The Commission found a breach of human rights in relation to this complaint. The Commission's report was tabled in Parliament in March 2004.<sup>124</sup>

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The psychological impact of this overall disturbance on children became very clear to the Inquiry. Nearly all families interviewed at Woomera in June 2002 also told the Inquiry that searches and headcounts during the riots had frightened their children:

That night, say 4 o'clock am they came. I thought it was a head count, they woke the, they wanted to wake them up and just count them. ... And they woke [my three year old] up and he, he started to scream you know wildly. ... Like a sheep they put us all, all of us in the Mess and they closed the door.<sup>125</sup>

The father of a young girl told the Inquiry:

At Easter there were guards in riot gear and at midnight they went barging into the dongas abusing people verbally and shaking their batons. This has caused [my daughter] to have bad dreams. The Easter experience was enough trauma for a lifetime.<sup>126</sup>

A teenage girl recalled the event as follows:

4.00 am and then after the checking we showed them our I.D. card and it was 6.00 am and then we came back you know to our room. Yes it was 6.00 am you know. They searched our room you know, they broke a lot of things and they broke the flower pot off a rose and it was just like a – you felt there was an earthquake in the room. And even they just pulled on the curtain because they look, it seems to me they were very angry.<sup>127</sup>

The Department's Manager at Woomera made some general comments regarding the riots in his report of March 2002, but did not specifically mention the involvement or impact on children. He reported the event as follows:

A number of complaints about use of gas and allegations of assault made following action to regain control of the compounds following the demonstration on Good Friday – these are being followed up.<sup>128</sup>

In the April 2002 Manager's report there was discussion of an incident relating to one child.<sup>129</sup>

### 8.3.3 Major disturbances at Curtin

Although there were several major disturbances at Curtin during the three years it was open, the Inquiry received the most information about a riot that occurred during April 2002, when 43 children were detained there.<sup>130</sup>

There had been some unrest in the centre for the 10 days preceding these riots, including damage to property and self-harm. The incident report concerning this riot describes the genesis of the violence on the evening of 19 April 2002, as follows:

At approximately 19.14hrs two detainees who were previously identified having committing offences over the last week, were asked to move to India compound. In case they refused the mess was secured, and a team of CERT equipped officers entered the mess via the rear door. [The two

detainees] were asked to move they refused and so were held by the officers. The two detainees resisted and other detainees began obstructing the officers.

Officers then removed [one of the detainees] to the rear of the mess however [the other detainee] had armed himself with a broken fluoro tube and threatened [the officer who] then protected himself and disarmed [the detainee] by hitting [him] with his baton on the left thigh and right forearm. During this time a large number of detainees began throwing projectiles at the CERT team in the mess at the same time a relief CERT team than [sic] had entered the compound to assist in the extraction of detainees was also attacked by detainees throwing projectiles.<sup>131</sup>

The violence spread throughout the centre and by the next morning the dining hall, kitchen, food store rooms, recreation and welfare areas and computer rooms had been severely damaged.<sup>132</sup> Looting and vandalism was occurring. Two 'pressure pack tear gas dispensers' were discharged accidentally when projectiles hit them and five tear gas dispensers and one gas grenade were let off when officers felt under threat.<sup>133</sup>

The next day eight family groups, nine single men, one single female, eight female children and eight male children moved to the Echo Compound which was quiet. Approximately 50 other single male detainees requested to move the following day.<sup>134</sup> On 21 April ACM reports that other families were given the opportunity to move. It was ACM's view that some refused because they had been involved in the looting and were hiding contraband.<sup>135</sup> A boy with cerebral palsy was moved to the local hospital on the evening of 19 April to keep him safe from the unrest.<sup>136</sup>

Over the next couple of days small fires were being lit, without extensive damage, and detention staff were negotiating with detainees to hand in their makeshift weapons. By 24 April the centre began returning to a more normal routine.<sup>137</sup>

The Inquiry interviewed 13 family groups when it visited Curtin in June 2003, ten of whom mentioned the impact of the April riots and two of whom spoke about the impact of riots generally. One parent who was in the mess hall described the following sequence of events:

All of a sudden they closed three entry doors or gates to the canteen and about 20 people, all huge, and wearing uniform and wearing glasses and everything came in and the situation was really frightening and intimidating.<sup>138</sup>

Another detainee reported that she had tried to protect three young children who were in the mess with her:

There were three some younger children in the canteen and I remember that I grabbed three younger girls and I put them on my lap and I was just trying to comfort them because they were really frightened and they were screaming. One of these children who was in my arms screamed and screamed so much that then she couldn't control herself and she wet herself.<sup>139</sup>

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All ten families who discussed the April riot spoke of the problems their children had after this disturbance, for example nightmares, and bed-wetting. One mother said that:

Basically that incident really psychologically affected my daughter and after that she is telling me to go back and prepare ourselves to be killed by people in there so she says that she prefers to go back and die than stay here in this country. We took refuge in this country because of the injustice that we have in our own country but now we see that the situation in here is even worse. ... The fact and reality is not what they told you, although I don't know what they've told you about this incident. Please believe us we are not terrorists, we're not criminals in here. We have just come here to save our lives.<sup>140</sup>

A father told the Inquiry why the violence in the centre made him afraid for his children:

Unfortunately it's a very dangerous situation for our children because when the violence is starting and the people are starting to do the bad things around the camp our children are involved in it. They are in the middle even if they are not doing anything and it is very dangerous for their life. They might, you know, might get killed or they might get danger accident because they are in the middle of the crisis. They cannot separate themselves.<sup>141</sup>

Both ACM and the Department deny that children were in the mess hall when the April riots broke out. It is unnecessary to come to any concluded view on this issue as it is clear to the Inquiry that children were caught amongst, and negatively impacted by, the general violence that occurred throughout the four day disturbance.

Following the April riot, families were offered accommodation in a compound away from single men. The Department Manager reports:

A positive is that families, and a few single males who were in fear, were offered a move into a secure compound, Echo. The families that took up the offer appear to feel very safe and are very happy being away from single males and those they view as trouble makers.<sup>142</sup>

### 8.3.4 Efforts to protect children during riots

As the above descriptions demonstrate, children are at increased risk of physical and emotional damage by virtue of their detention in an environment in which such violent events occur. While the most obvious measure to reduce or eliminate such risks to children is to remove them from that environment altogether, it is nevertheless important to examine what measures were taken to protect children while in detention.

The Department's contract with ACM places the primary responsibility of maintaining security in the detention centres on ACM. ACM, however, told the Inquiry of several constraints on its ability to fulfil that function.

First, ACM states that a number of factors which impacted upon security were beyond its control. ACM argues that it was largely powerless to prevent riots because

they were, 'without exception', detainee protests against the government's immigration policy and ACM did not have the relevant 'negotiating currency' of visas.<sup>143</sup> ACM also suggests that protesters outside detention centres and media attention had a role to play in encouraging disturbances.<sup>144</sup> ACM further claims that reluctance by the Australian Federal Police to investigate and prosecute detainees who were involved in violence contributed to a sense of impunity.<sup>145</sup> A February 2001 consultant's report examining the breakouts in Woomera, Port Hedland and Curtin in mid-2000 also suggests that:

The cumulative effect of delays in the visa determination process, the basic living conditions, the inhospitable environment and the influence of agitators was a high degree of unrest amongst the detainee population.<sup>146</sup>

Second, ACM states that the 'infrastructure' and 'design limitations' of Woomera and Curtin in particular, limited its ability to contain major demonstrations and protect children from the violence.<sup>147</sup> The February 2001 consultant's report on security measures confirms that the infrastructure made it difficult to contain major disturbances, although does not seem to specifically address the impact on children.<sup>148</sup>

Third, both ACM and the Department suggest that the reasons some children were exposed to violence was that parents failed to execute their 'duty of care' towards their children.

It is outside the scope of the Inquiry to investigate the causes of the riots and the Inquiry therefore makes no findings as to whether or not they could have been prevented.<sup>149</sup> However, the second and third points are discussed in further detail below.

**(a) Procedures to shield children from violence during riots in detention centres**

The Inquiry accepts that when children are detained within a closed environment, the options available to shelter children from those events are necessarily limited. The question is, however, what steps were taken to minimise the impact of riots on children within that context.

The Department suggests that all parents are encouraged to protect their children and that 'all detainees who volunteer are moved from the danger and relocated to safe areas within the centre to ensure their safety and protection during a disturbance'.<sup>150</sup> However, the evidence before the Inquiry suggests that it was not always possible for families to move to a safe area.

There is some evidence indicating that when there was some prior warning of disturbances, or when the disturbances stretched out over some time, families were offered the opportunity to move from what were likely to be the most troublesome compounds. However, sometimes a 'lock-down' procedure was used during a crisis in order to try and contain the violence. One of the consequences of this procedure was that sometimes children were trapped within the melee.

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The South Australian child protection authority comments on the impact of the 'lock-down' procedure on the safety of children during critical incidents in Woomera:

Whenever there is a disturbance of some kind in the compound, the initial response appears to be that ACM staff withdraw until a designated officer attends to manage the incident. Staff will remove themselves from the compound in question and all free movement around the centre (external to the buildings) is prohibited. Detainees in other compounds cannot leave that area until the situation is resolved.

This management plan effectively locks the detainees into the compound with 'the problem' – that is, persons not involved in the incident are left to manage their own safety. This response leaves children exposed to the sight and/or sound of the incident, be it a distressed adult or destruction of property or a riot.

The aim of this form of management appears to be to defuse the incident and protect staff from injury. The procedure, though, does not protect the children. If the parents fail to shield their children by removing them to a safer area, there is no mechanism by which the centre will step in and do this. The duty of care to the children is, in effect, non-existent in such situations.<sup>151</sup>

A former ACM Operations Manager also spoke of problems that arose during a 'lock-down' despite the efforts of ACM staff to protect children:

I was very concerned about children's safety when there were riots and disturbances. When there was a riot, the centre was locked down and kids were in the thick of it. It was difficult to get children out because parents often did not want to be separated from them. Staff, particularly nurses, tried their best to keep children safe.<sup>152</sup>

A former Activities Officer at Woomera (2000-2002) explained that there were only certain points in time when children could be removed from the violence. She also stated that there was no written policy regarding the removal of children during disturbances:

DR OZDOWSKI: I understand there is some kind of procedure by ACM that if riots do happen, children and women are to be taken into safe places. Do you know about the existence of such a procedure?

MS TORBET: I know that it happens once the CERT team, like the response team, has gone in to whatever riot it is. It doesn't happen, you know, during the riot. It doesn't happen during...

DR OZDOWSKI: So during the riot there is no attempt made ... to separate children and families from...

MS TORBET: Not while I was there, there wasn't. They would, you know, deal with the disturbance and then deal with the women and children.

DR OZDOWSKI: Did you see any document which would indicate that this kind of procedure is in place?

MS TORBET: No.<sup>153</sup>

The Human Rights Commissioner also put it to an ACM psychologist who was at Woomera from October 2000 to December 2001, that it was a policy in detention centres to remove children from the scene of any disturbance. He responded as follows:

I have seen women and children standing at the gate asking to be removed while the gate is locked. I find that an amazing statement, I am sorry. ... Because in the middle of a riot or demonstration, apart from going in with a full-on CERT team, water cannons, batons and tear gas, it would be impossible. The only thing that we encouraged people to do, and women and children to do, was to retreat back to their own rooms and to shut the door and stay there. On occasions I have walked in with senior officers and escorted families out, specific families.<sup>154</sup>

Lyn Bender, a psychologist employed at Woomera during March and April 2002, was also of the view that there were insufficient measures to ensure children were removed from violent situations:

... when they expected riots prior to Easter, a week before that we were briefed by the officers and it was all about evacuation and it was all about protecting the records and packing up the medical centre and when I said, 'Well if you are expecting riots wouldn't it be a good idea to negotiate with people and to bring in negotiators', I was told, 'There is no point in that'. And then they went on to talk about what might happen.

There might be fires, there might be rocks thrown and so forth and the nurses had to get into this kind of riot gear – jungle greens we nicknamed them – and I said, 'Well, why don't you remove the children if you think there are going to be riots?', and they said, 'The children – we cannot separate the children from their families', and they also said, 'But the children are just as bad as the adults, they have been taught to throw rocks, they are the worst of all'. So, in my view, that was so utterly shocking. I was so shocked by that.<sup>155</sup>

Some detainees told the Inquiry that ACM officers did not do enough to protect the children. At Woomera, a detainee father said that ACM officers were powerless:

They can do nothing, the officer is powerless, and just watching the detainees, just they watch how they quarrel with each other. Any kind of problem that happens in here, the officers run away outside and lock up the gate and just watch from behind the fence.<sup>156</sup>

Even when families were able to move to a safer compound this was not always sufficient to protect children from the psychological impact of the disturbances. This was either because the disturbances had expanded into all compounds, or because children could still see and hear what was going on.

## **(b) Parental protection of children from violence**

As noted earlier, the Department states that '[p]arents of detainee children ... have a responsibility to keep their children from witnessing distressing behaviour by detainees'.<sup>157</sup> Both ACM and the Department suggest that parents had the

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opportunity to remain in their accommodation units or move compounds during disturbances and they are therefore responsible if the children participated in or witnessed riots.

The Inquiry accepts that parents have primary responsibility for their children in such circumstances. The Inquiry also acknowledges that some parents did participate in the demonstrations and may not, therefore, have removed children from the centre of violence. Furthermore, other parents may not have moved into different accommodation units when the opportunity was offered to them.

However, the ability of parents to protect their children in such situations must be put into context. First, the detention environment itself places parents in the situation of having to protect their children from types of violence that would not normally be encountered in the community. Second, there is evidence to suggest that a parent's ability to cope with these situations may be affected by mental health problems suffered by many parents with the detention environment (see further Chapter 9 on Mental Health). Third, the same physical limitations that constrain ACM's ability to protect children also restrict the options available to parents to protect their children.

Furthermore, at least some of the time, the decision not to move accommodation blocks appears to have been because parents were of the view that the distress in the centre was so pervasive that it would make little difference. For example, a former detainee told the Inquiry that it was unreasonable to blame parents for failing to protect their children because:

In terms of welfare issue for children in detention, it is important to return to the countless serious and distressing incidents to which the detained children are inevitably and constantly exposed. (Incidents such as hunger strikes, protests, suicidal and self-harm behaviour, forced deportations etc). It is unreasonable to blame the parents for not keeping their children away from witnessing such incidents as they (the parents) cannot practically restrict their children's movement within an already very restricted space, over a prolonged period of time.<sup>158</sup>

At Curtin another father spoke of his powerlessness to control what goes on around his children:

Unfortunately the environment is not very healthy because every day they are witnessing people who are going on top of the tree, who are suiciding or just cutting their body by blade or jumping, shouting, doing everything violent and they are witnessing and they think this is a game they have to participate on it. It's a very dangerous situation and we cannot have any control of it.

Unfortunately it's a very dangerous situation for our children because when the violence is starting and the people are starting to do the bad things around the camp our children are involved in it. They are in the middle even if they are not doing anything and it is very dangerous for their life. They might, you know, might get killed or they might get danger accident because they are in the middle of the crisis. They cannot separate themselves.<sup>159</sup>

There is also evidence suggesting that the chaos that comes with riots makes it difficult for parents to keep track of their children. The mother of a 12-year-old boy

reported that during the Easter 2002 riots she was very frightened because she could not find him. He had in fact walked alone towards the melee at the fence, and told social workers he had not feared for his safety:

[Mother] feared he would be hurt or run away through the broken fence. ... Mother very distressed but said she feels powerless to protect. Mother said she feels very guilty about the decision to bring [her children] to Australia and is responsible because they are now prisoners. She feels impotent as a parent and on a daily basis is distressed by the impact of her decision on her [children].<sup>160</sup>

Finally, it appears that some children were eager to take part in the demonstrations and there was not much parents or staff could do to prevent it. A young child at Curtin in January 2001 said that:

When the fighting started, sometimes the officers ran away and they brought more officers, and the people started to break the branches and hit each other, and they locked the people inside and they couldn't go out. My father was trying to put us back in our room but we wanted to see it. We could hear the noise and the crying. They didn't care who was in front of them, sometimes the children were in front of them [the people who were fighting].<sup>161</sup>

This highlights the problems that arise when children are kept in this environment. According to experts giving evidence to the Inquiry, it is not unusual for children to be attracted to 'exciting' events, especially where the detention environment may otherwise be lacking in stimulation:

There is a pervasiveness of self-destructive behaviour and it is all very well to say that parents should be able to keep their children away from that. The reality based on my observations is that in that environment it would be almost impossible to deprive children of the opportunity to see that kind of behaviour. Children are drawn to exciting things and if the most exciting thing that is happening is something negative and destructive they will be drawn to that just as surely as they are drawn towards positive exciting things that are available to them in our environment.<sup>162</sup>

### **8.3.5 Findings regarding exposure to riots, violence and self-harm**

The environment in immigration detention centres between 1999 and 2002 was extremely tense and sometimes erupted into violence. Woomera, Port Hedland and Curtin were the site of multiple demonstrations, riots, hunger strikes and violent acts of self-harm. Woomera was the worst of the three. Some of the disturbances were over within a day, others lasted weeks. Some disturbances involved all compounds in the centre and others were restricted to one or two compounds. Children were in these detention centres at all relevant times.

Irrespective of the causes of these disturbances, it is clear that it is bad for children to be locked in an environment where these types of events occur. Children exposed to such violence are at a heightened risk of psychological and physical harm. For some children such exposure was highly distressing.

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The risks associated with exposure to violence increase in the case of children who have been detained for long periods and have therefore been exposed to multiple disturbances. These children face a much greater risk of being exposed to violent events than they would if they were waiting for their visas in the community. This highlights one of the inherent dangers of mandatory detention of children and their parents.

An example of the risks associated with exposure to violence is found in the case study at the end of the chapter which describes the development of post traumatic stress syndrome in a six-year-old boy after he witnessed the self-harm of adult detainees.

The Inquiry acknowledges that the detention environment creates practical difficulties for detention staff and parents to protect children from seeing violence or self-harm attempts, especially if they occur relatively frequently. Once again, the limitations of the detention environment highlight the inappropriateness of detaining children there.

Nevertheless, the Department and ACM should have been aware that such events might occur within detention centres and that children would be present when they did. They should therefore have taken steps to ensure that there were clear written standards and policies directed to the special protection of children in the context of major riots, taking into account the physical limitations of the detention environment. The Inquiry finds that this did not occur.

For example, while the Inquiry accepts that the 'lock-down' procedure may have been generally appropriate in the midst of a violent riot, the result of this procedure was that some families were unable to remove themselves from situations that they wished to avoid. Clearer instructions to ACM staff regarding the priority of protecting children in such circumstances may have led to better results.

The Inquiry rejects any attempt to shift the blame for a failure to protect children onto parents. While the Inquiry acknowledges that children are the responsibility of parents, the physical limitations inhibiting the ability of ACM staff to protect children also applies to parents. In some cases the circumstances within the detention environment were such that parents were in no position to shield their children during the chaos nor hide children from the continuous self-harming activity.

Nevertheless, the Inquiry accepts that some parents were participants in riots, hunger strikes and demonstrations and that sometimes this meant that they did not want to move with their children from the compounds where the events were occurring. However, the Inquiry has found no evidence supporting allegations that parents encouraged their children to participate in self-harming activity. In particular, the Inquiry is satisfied that parents did not sew the lips of their children during the hunger strike in Woomera in January 2002.

The Inquiry has found, however, that children participated in riots and copied self-harm activities of their own accord. Experts have testified that such a reaction is not unusual when children are exposed to these types of events. Once again this highlights the inappropriateness of confining children within an environment that demonstrates and promotes such behaviour.

## 8.4 What exposure have children had to ‘security’ measures used in detention centres?

As noted above, there are times when maintaining safety and security in detention facilities is a very challenging task. Some detainees have been violent during demonstrations, arming themselves with makeshift weapons and threatening staff. The integrity of the detention facility’s fences have been threatened and, on occasions breached, and detention staff have had to determine a way to protect themselves and other detainees and prevent escapes. ACM detention staff, who had friendly interactions with detainees one day, may have become the subject of attack the following day. All these factors make for an artificial, tense and uncertain environment.

A February 2001 consultant’s report suggests that in the context of the Woomera breakout in June 2000:

DIMIA and consequently ACM were extremely sensitive to the use of force against detainees, because of the administrative nature of their detention and the fact that families including children made up the population.<sup>163</sup>

Most of the evidence before the Inquiry deals with events occurring between 2001 and 2002. As discussed below, that evidence suggests that neither the Department nor ACM had developed clear guidelines imposing a responsibility on staff to specifically address their minds to the best interests of children when responding to incidents within detention centres. The evidence also suggests that sometimes the measures designed to ensure security actually compromised the safety of children, both in terms of their physical safety and their psychological well-being.

### 8.4.1 Centre Emergency Response Teams (CERTs)

ACM has developed a strategy whereby a CERT – Centre Emergency Response Team – can be called to respond to a disturbance in a detention centre. There are three different categories of CERT. A ‘CERT 1’ is the lowest level of response and generally involves calling a few officers to prevent the escalation of smaller incidents. According to ACM most incidents in detention centres only involved a ‘CERT 1’.

‘CERT 3’ is the highest level of response and is called in the event of a ‘major emergency’ or ‘threat to centre security’.<sup>164</sup> In those situations staff dress in riot gear, consisting of dark padded suits, helmets, batons and shields. The Department and ACM state that only specially trained staff wear this gear and that it is for defensive purposes only.<sup>165</sup>

Dr Bernice Pfitzner was the ACM Doctor at Woomera from October 2000 to June 2001. She described the circumstances when a CERT might be called:

This is emergency calls when there was a sudden uprising of a group of detainees where they would maybe set something on fire, maybe start slashing themselves, maybe start hanging themselves, maybe start throwing stones at the guards, maybe start breaking windows those are the sort of things we call a CERT for. When these were called we would be on high alert

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and numerous detainees and ACM staff came in with cuts and bruises and broken bones and slashes *et cetera*. It is very painful for even me to recall and therefore it was very painful for ACM who had to go into the compound and bring these injured people out for our medical attention.<sup>166</sup>

As described above regarding the Easter 2002 riots in Woomera, many children told the Inquiry that they were frightened by the 'riot gear' worn during a CERT 3. For example, a mother told the Inquiry that:

Just after the riot we were all in the bed at 4.00, 4.00 am they came with that you know riot uniforms, with masks and the batons in their hands they came and just banging and some people they were in their bed ...<sup>167</sup>

This had a significant impact on her toddler:

It was with this uniform, the uniform was very frightening ... and we scared a lot and since that night, this child he wet himself at night and also he stutters. ... Even now sometimes you know he screams wildly in a very bad way.<sup>168</sup>

The creation of an emergency response team appears to be an appropriate security measure in principle and it is clearly legitimate for detention staff to be able to protect themselves from threats directed towards them. However, the Inquiry is concerned that the procedures and practice regarding the execution of this strategy ought to take into account the fact that children are likely to be present and may be psychologically or physically injured in the process.

### 8.4.2 Head counts

Head counts are another measure which may be necessary for maintaining a secure detention environment. However, the manner in which they have been conducted at certain times has had a negative impact on children.

Under normal conditions in the detention centres head counts of detainees were supposed to occur at least three times a day.<sup>169</sup> However, when the centre was in crisis, these would occur more regularly. As noted earlier, the JDL Rules require that head counts be conducted in a non-intrusive manner.

However, many detainees complained that the regular night-time headcounts were extremely frightening for children. Parents described increased security measures following escapes as highly intrusive, especially for young children:

Since some detainees escaped, the detention centre officers come into our room four (4) times a night to do a head check. They barge in and turn the lights on to see and count us. They are not mindful that a small child is sleeping. I cannot sleep in anticipation of these head counts.<sup>170</sup>

Another child told the Inquiry that:

We used to be scared at night. We didn't sleep much when the officers used to come in. They never knocked, they just burst in, and at 2am you can't go back to sleep so we used to stay up and play.<sup>171</sup>

Other children told the Inquiry that they were woken several times at night by ACM officers wanting to confirm their presence. For example, a child detained at Woomera in 2002 told the Inquiry that:

With an officer we cannot you know even put a step forward. Every, you know three times a night, like an animal, like a sheep they come and do a head count. They know our numbers but they come and wake us up and ask about our number. And when we are in the bed they come with torch and ask us, 'what is your number?'<sup>172</sup>

An unaccompanied refugee boy who was detained at Woomera in 2000 said:

When I was in Woomera two years ago, in our time it was like usually the officers were coming because of checking if we are in the camp, twice a night and some nights they were coming because some of us that we didn't go to eat, they were asking 'where were you, what were you doing' and usually, twice they were coming at night and in our time they were like coming and okay, 'where is, for example where is DET24' or something, and then okay, 'he's in this room, come, come out and I want to see you if you are the real one', in the middle of the night. You can't just like, say, 'it's me'. It's like 'WAKE UP AND SHOW YOURSELF!'<sup>173</sup>

Other children said they had to get out of bed to present themselves to the officers:

The rule was that the guards should check that the boys were there, but it was the opposite way, they said that each boy should come to them to tell them that they were there, and if they didn't they woke those kids up in the night, deliberately. Woke them up, got their card, got them outside and make them stand there and check their cards and then send them back.<sup>174</sup>

Unaccompanied refugee boys who were detained at Curtin described it as '10 or 12 times a night' and '100 times!'<sup>175</sup> While this is clearly an exaggeration, it demonstrates that children felt very disturbed by the night-time checks.

ACM states that it 'attempts to achieve a balance between fulfilling security requirements and minimising intrusiveness'. It also states that security monitors have criticised ACM for not using photo identification on a regular basis.<sup>176</sup> However, the Joint Standing Committee on Foreign Affairs, Defence and Trade noted in its report in June 2001 that while there may be, on occasions, a security requirement for such intrusive checks, this should not be normal practice. The Committee then recommended that visual checks of detainees, including waking them during the night to establish their identity, should cease except where special security concerns exist.<sup>177</sup> It appears that there have been improvements consistent with that recommendation over time, with security checks becoming less disruptive.

### 8.4.3 Tear gas

ACM have acknowledged that 'chemical agents have been used and that on some occasions children have been in the vicinity'.<sup>178</sup> It is the view of ACM that in some circumstances 'tear gas was the minimal reasonable force proportional to the presenting threat'.<sup>179</sup> The February 2001 consultant's report on security measures

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also suggests that the use of chemical agents is appropriate in controlling large scale disturbances in the detention facilities.<sup>180</sup>

The Inquiry does not dispute that situations may arise within detention centres such that tear gas becomes appropriate. However, the Inquiry is concerned that the ACM procedures which seek to regulate the use of tear gas make no specific mention of what should occur if children are present. There is no evidence that any special consideration is given to protecting children from exposure to tear gas.

ACM maintains that warnings were always given prior to the use of tear gas and that there was sufficient time for children to remove themselves from the scene. A child who was at Woomera in 2001 related a different experience to the Inquiry:

BOY: When they used the tear gas, they give you really sore eyes and everything.

INQUIRY: Before they fired the tear gas did they make an effort to take children and put them somewhere safe?

BOY: No they didn't.<sup>181</sup>

The lock-down procedures, the chaos that was likely to precede the legitimate use of tear gas and the difficulty of communicating clearly and widely in a language that the detainees understand in the midst of a disturbance make it unlikely that clear warnings were given in sufficient time to be able to move away from the scene.

The former ACM Operations Manager, employed at Woomera for a period of 16 months from early 2000 until July 2001, told the Inquiry that there was nothing in writing saying that children should be taken away and put into secure places during riots, but he issued instructions not to direct the gas at them:

DR OZDOWSKI: ...was it a policy of ACM that, if you have riots or whatever, you try to secure children?

MR CLIFTON: When I was there it wasn't. I remember when orders were given to use gas that I said gas should not be used because we have women and children. That was on a couple of occasions. It was overridden but I said to them, the staff that were dispensing gas, 'Don't aim it at women and children, you know, try and keep them safe'. Because children would be running around out of control, screaming. You know, it was very traumatic for them and to start throwing gas in as well...<sup>182</sup>

Refugee children who had been detained at Curtin and Woomera told the Inquiry of tear gas being used around them. For example:

BOY: In my time [Woomera, 2001] when people protested, instead of using force they use some sort of chemical gas which was actually affecting people.

INQUIRY: Tear gas?

BOY: Yes, it was tear gas. I believe that nowhere in the world such thing would happen. Not only to all those people that protested, not only to men, there were small children, ladies, man and woman altogether were using exactly the same treatment.<sup>183</sup>

Nearly every family interviewed by the Inquiry in June 2002 commented on the use of tear gas during Easter 2002 at Woomera. The following are only some of the many comments made by children or their parents:

At Easter time when the protest came and everything had finished, that night the guards with a special dress came inside the compound, with the batons, handcuffs and tear gas. They came up behind the fence, they put me exposed to tear gas and they sprayed the tear gas against my face and I was coughing, like I wanted to suffocate but they still they continued and sprayed the tear gas against me and they used another kind of gas too, they use to suffocate fire, dioxide carbon. [Young girl]

They started to spray the gas and they have two kinds of gas, one gas for suffocating the fire and another gas, it's tear gas. They started to spray the gas in the face of the people, against the people. At that time it wasn't important for them that you were holding or hugging your child. This man he has got his little kid, he was hugging his child, so they sprayed the gas against his face and his daughter. As you know, it's like a powder sitting on your face. When you wash your face, it gets worse, it starts to run and come in your eyes, that makes you worse, like a blind man for a while. [Mother]

The effect on the children of being in the riots is that they can't sleep. They hide whenever there is any shouting or any little problem. They were all affected by tear gas. They get afraid very easily now. They used the tear gas on them. [Father]

The Inquiry also interviewed a group of primary school children who had been at Woomera during the Easter riots.

CHILD: My eyes were running and I could not see anything.

INQUIRY: What was it like when the tear gas got in your eyes?

CHILD: It was like soap in my eyes and I went blind I could not see.

INQUIRY: How many times did you have tear gas in your eyes?

CHILD: Two times.

INQUIRY: Both at Easter or one other time?

CHILD: Both at Easter.

INTERPRETER: The children are saying that they were protecting themselves from it, you know covering their face. You cannot get it through their eyes but they did.

INQUIRY: So there were other children there also? Who also got tear gas in their eyes?

CHILD: I did.

INQUIRY: Was there anywhere that you could go to get away from the fighting or was that too difficult?

CHILD: There were no other places to hide.

INQUIRY: Could you go to your room, like to your family rooms? Would you be safe there?

CHILD: Everyone is outside. No one can ... they were all scared.<sup>184</sup>

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The Inquiry has insufficient evidence to support the claims of some children that tear gas was sprayed intentionally into their faces. However, it is clear that tear gas was used in the vicinity of children and that they were affected by it.

The evidence before the Inquiry demonstrates that children were frightened by the use of tear gas and the violence of the incidents of which the use of tear gas formed a part. There is clearly a fine balancing act between protecting the physical safety of children during riots and inflicting the physical and emotional impact of tear gas on children. This uncomfortable dilemma only serves to highlight the inherent dangers of locking children up in this environment. Nevertheless, within that context, it is incumbent on the Department to address that inherent tension by ensuring that there are specific procedures in place which require direct consideration of the likely impact of such gas on children prior to its use and measures which may be taken to avoid the exposure of children to tear gas. Neither the current ACM policy nor the IDS include such measures.

### 8.4.4 Water cannons

ACM and the Department dispute the use of the terminology 'water cannon', but accept that 'fire trucks with hoses have been used [in riots] on a small number of occasions'.<sup>185</sup> The Minister has also noted that the fire truck at Woomera was 'never purchased as a cannon for control of people'.<sup>186</sup>



Blue fire trucks sitting outside Woomera, June 2002.

The Inquiry accepts that the equipment used to deploy water onto people may have been purchased for fire safety purposes, but believes that the expression 'water cannon' is consistent with ordinary terminology and accurately describes the use of such equipment. Detainees and former ACM staff used the expression 'water cannon' in giving their evidence to the Inquiry. A Departmental press release in the context of the Woomera riots in December 2001 (when there were 322 children at the detention centre) stated that:<sup>187</sup>

Australasian Correctional Management (ACM) used water cannons to disperse a group attempting to breach fencing and a razor-wire barricade placed in the sterile zone [the area between the inner and outer fences].<sup>188</sup>

A registered nurse who worked at Woomera from early August 2000 until mid-February 2001 described what he was told could be the injuries arising from the use of a water cannon:

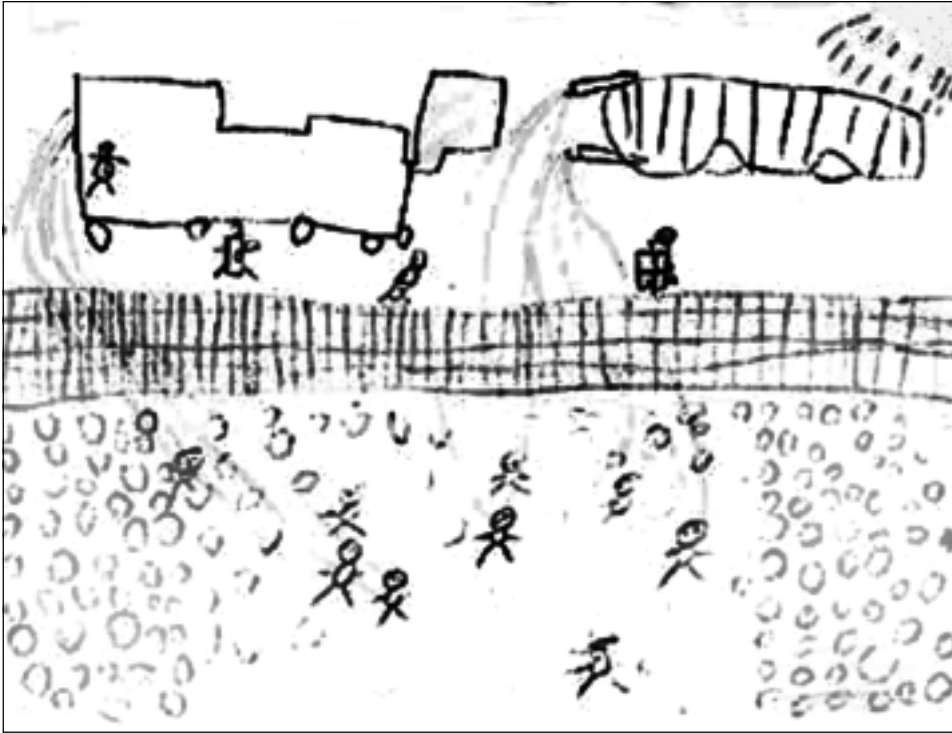
There were many, many, many, many, many guards in full riot battle dress around the perimeter and we were told that the use of the water cannon had been authorised, and they explained the types of injuries that the water cannon can inflict, where it will hit the skin and shear the skin off in great flaps.<sup>189</sup>

The Department states that children and parents had the opportunity to move from the compound; however, it is clear that, for whatever reason, many children were present when the water cannons were used. An ACM psychologist at Woomera from October 2000 to December 2001, Harold Bilboe, told the Inquiry:

I also saw a water cannon used 4-5 times on groups involving children during demonstrations. On one occasion when there was a riot in 2001, a water cannon drove through a fence while women and children were present.<sup>190</sup>

While the Inquiry has no evidence that children were physically injured by the water cannons, the psychological impact was readily apparent. The water cannons feature in pictures drawn by very young children.<sup>191</sup> Some of those pictures form submissions to the Inquiry and are placed on the Inquiry's web site.

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Drawing of water cannons at Woomera by a child in immigration detention.

Children who were at Woomera at the time described the water cannon to the Inquiry:

BOY 1: When one patrol car – you know the water? They used it.

INQUIRY: On children under 18?

BOY 1: All the people, even the kids too!

BOY 2: They care about nothing.

BOY 3: The water was too strong, so strong, yeah, you can't stop in front of the water.<sup>192</sup>

In his complaint to the Human Rights and Equal Opportunity Commission, Shayan Badraie's father said that a water cannon was directed at the Badraie's living quarters during riots at Woomera in early April and in late July 2000.<sup>193</sup> This case is discussed in more detail in the case study at the end of this chapter.



Drawing of children and water cannons by a child detained at Woomera.

#### 8.4.5 ‘Security’ compounds

At different points in time, the detention facilities used certain compounds to separate troublesome detainees from the rest of the population. In Woomera the compound was the Oscar Compound, earlier called Sierra Compound.

An unaccompanied detainee boy told the Inquiry of his experience leading up to his transfer to Oscar Compound at Woomera:

When I was in the camp last year [Woomera 2001] there was violence, the detainees were protesting, ACM came with shields, they had helmets, with everything, sticks they were hitting detainees, those involved with violence were arrested, it wasn't a handcuffs, it was plastic wire [flexicuffs]. They transferred those guys from the main camp to another camp. I think they sent them to Oscar. There is no mirror. I was shaving. I had a small piece of mirror like this. Officer came and said 'Give it to me!' Other guy said, 'don't give it, how can you shave?' I said I'm not going to give it. I took it and put in my donga. Someone was searching and he started abusing me and everything. Then six or seven of them came and searched all over the place. I was taken to Oscar. I said I will kill myself. They do something if you threaten, of course.<sup>194</sup>

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The Department stated that the Oscar Compound was sometimes used for families as a result of accommodation shortages rather than for behaviour management. It suggests that Oscar was put to this use in October 2001 and that efforts were made to ensure the safety and security of children in the compound during that time.<sup>195</sup>

ACM, on the other hand, states that families were only ever placed in that compound at the request of parents and that was usually when mothers wanted to join their husbands who had been detained there for behaviour management purposes.<sup>196</sup> Both the Department and ACM highlight that some women refused to leave the compound when offered the opportunity to do so. One reason for this refusal may have been because they wanted to stay with their husbands.

There is evidence before the Inquiry that children were living in the Oscar Compound prior to October 2001, contrary to what the Department suggests. For example, an ACM psychologist appeared to be concerned about the use of Oscar Compound for children in January 2001:

I am of the opinion that all families that are currently in Sierra Compound need to be reviewed, Re: Young persons being in an isolated environment, and precluded from contact with other children and educational/school attendance.<sup>197</sup>

There is also evidence that families were not there by choice, contrary to what ACM suggests. For example, Shayan Badraie, whose case is discussed at the end of this chapter, was also transferred to Sierra Compound on 20 January 2001, at the age of six. No reason was given for this transfer but:

Mr Badraie described Sierra Compound as a 'punishment area' and alleged that, apart from a three year old girl, Shayan was the only child in the compound.<sup>198</sup>

The Commission's findings in relation to Shayan's complaint state that an ACM nurse and counsellor recommended the following day that the family be taken out of the compound given the age and psychological history of the boy:

Shayan had always feared Sierra Compound, by reason of the fact that he understood that anyone who was sent there was 'bad'. The relocation has resulted in Shayan not eating or sleeping. Mr Badraie also stated that Shayan had spent the previous night crying.<sup>199</sup>

However, Shayan was not removed from Oscar Compound until 3 March 2001, when his family was transferred to Villawood.

Problems also arose when parents were moved to 'security' compounds and children were left behind. This seems to have occurred on certain occasions when families received a negative visa decision and staff were worried about the reaction by one or more parents. The Department states that it was not routine practice to transfer both parents to a 'security' compound on receipt of a negative outcome. However, the Inquiry is aware of at least one example where this occurred.<sup>200</sup>

It therefore appears to the Inquiry that, while these compounds may not have been used to punish or control children, there is sufficient evidence to suggest that children had, at different periods of time, been housed with high risk detainees. While this may have been with the consent of parents, it demonstrates the difficulties that arise when families are kept in a closed, tense and crowded environment. It also highlights the problems that occur when parents are faced with a choice between being separated or living in a 'security' compound together.

Thus difficulties arise both when children are detained in 'security' compounds and when children are excluded from those compounds when their parents become a behaviour management risk. This highlights the difficulties that arise within the detention environment and the inappropriateness of detaining children in that context.

The Inquiry also notes that some children suspected of being involved in disturbances at detention centres have been taken to juvenile detention centres, while others have been separated from their parents who have been transferred to State correctional centres.<sup>201</sup>

#### **8.4.6 Observation rooms**

The Inquiry heard allegations from community groups and detainees that single occupancy observation rooms were used to punish children.

ACM emphasise that placing persons in observations rooms 'is not a punitive process and used only in case of high lethality (sic) potential...' <sup>202</sup> The use of such rooms for the prevention of self-harm by children is discussed in section 9.5.3 in Chapter 9 on Mental Health.

The Department contemplates the use of single rooms for behaviour management:

The purpose of an observation room is not to place someone in solitary confinement, but rather to protect detainees who are considered a risk to themselves or to others on a short term basis.<sup>203</sup>

The evidence before the Inquiry is insufficient to conclude that the observation rooms in detention facilities were used as punishment for children. However, it is clear that children perceived the rooms as such. In focus groups, refugee children formerly detained at Port Hedland described their perceptions of 'K Block' to the Inquiry and said that they were very much afraid of the padded room. For example, one child formerly detained at Port Hedland said:

Once I accidentally saw the isolation room, and was very much afraid, and said I wish I never see this room again and ran away.<sup>204</sup>

#### **8.4.7 Findings regarding exposure to 'security' measures**

The Inquiry finds that security measures employed in the presence of children include: 'CERT 3' emergency response teams (with detention staff wearing riot gear including batons and shields), head counts (day and night), tear gas, water cannons and separated 'security' compounds.

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The Inquiry acknowledges that there is a fine balancing act between trying to protect the safety of children, particularly in the context of violent disturbances, and exposing them to further psychological or physical injury by using certain security response measures. This dilemma highlights the inherent dangers of detaining children within this environment in the first place.

However, within the context of mandatory detention of children it is the Inquiry's view that there was insufficient consideration of the impact of such measures on children prior to their use. Written policies regulating the use of security measures are silent on what additional steps need to be taken to cater for the particular vulnerabilities and needs of children. The policies did not require staff to make the best interests of children a primary consideration prior to using such measures.

Some children became extremely frightened in the presence of the 'CERT 3' teams, tear gas and water cannons, and the psychological impact seems to have lasted some time. Head counts were sometimes insensitively performed and served to increase the distress children felt at being detained.

The Inquiry is also concerned about the placement of children in special 'security' compounds, even if they themselves were not being punished, as it exposed children to higher risks of violence. However, the alternative of being separated from a parent for a period of time also has a negative impact on children. This highlights the serious nature of the compromises that come with the detention of children.

The evidence before the Inquiry does not support a finding that children were held in observation rooms for the purposes of punishment. However, it is clear that some children viewed the room as a form of punishment. Chapter 9 on Mental Health discusses the use of such rooms in the event of threatened self-harm.

## **8.5 What exposure have children had to direct physical assault in detention centres?**

The Inquiry heard several allegations of actual and threatened assaults on children occurring within the detention environment. Some allegations were in the context of major disturbances and others were more isolated incidents, although still influenced by the stressful environment. Much of that evidence was gathered in confidential interviews with detainees. It also came from community groups making submissions to the Inquiry, and former ACM staff.

Given that the focus of this Inquiry is on the systemic problems faced by children in immigration detention rather than on individual events, the Inquiry did not investigate the full factual background of specific assault allegations. Those investigations are better suited to the police, State child welfare authorities and the Commission's complaints function. One such allegation was investigated by the Commission's Complaints Handling Unit. That case concerns an alleged assault by an ACM staff member on a nine-year-old boy during the Easter riots (see further section 8.3.2(b)). The Commission's investigation into the case of six-year-old Shayan Badraie is described fully at the end of this chapter.

In any event, the unspecific nature of many of the assault allegations made it difficult to provide ACM and the Department with an adequate opportunity to respond to these allegations. As a result, it would be inappropriate to reproduce those allegations here.

However, while this Inquiry has not conducted investigations into individual allegations of assault, the combination of evidence from:

- current and former child detainees and their parents
- Department statistics
- ACM incident reports
- South Australian State child protection authority reports
- the 2001 Flood Report

clearly demonstrates that assaults on children in detention have occurred on some occasions. The Department has stated:

The Department acknowledges that assaults involving children, other detainees, their parents and ACM staff have occurred.<sup>205</sup>

Moreover, the evidence from children and parents demonstrates that there is an ongoing feeling of vulnerability and fear in parents and children about the possibility of assault within the detention environment.

As discussed in section 8.3.1 above, the Department's incident trend analysis reveals that 159 alleged, attempted or actual assaults occurred in detention facilities between July and December 2001,<sup>206</sup> 19 of which involved children.<sup>207</sup> From January to June 2002, 116 alleged, attempted or actual assaults occurred in detention facilities.<sup>208</sup> Sixteen of these assaults involved minors.<sup>209</sup>

The South Australian child protection authority also states that it investigated eight allegations of child abuse by a non-family member between 1 January and 31 July 2002.<sup>210</sup> In that same period the authority received 137 reports on children in the centre, 123 of which required investigation. The incidents related primarily to hunger strikes, harm or risk of harm to children due to parental depression, mental illness or stress, and actual or threatened self-harm by children.

The Flood Report also investigated 35 allegations of child abuse between 1 December 1999 and 30 November 2000.

### **8.5.1 Fear of assault in detention**

Families felt an increased vulnerability to assault in detention centres due to the fact that they were often accommodated alongside single men. In April 2002, the South Australian child protection agency noted that the mixed compounds caused a problem at Woomera.

The vulnerability of girls in particular to physical and sexual assault has been highlighted by some families. One father at Woomera said that he escorted his daughters to the toilets, 'as he fears for their safety. There has been an incident in

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the past where the eldest daughter was touched in a culturally inappropriate way by a male detainee'.<sup>211</sup>

Several fathers at Curtin also reported escorting their children and wives to the toilet at night time as they did not feel safe making the journey alone:

the problem is like one of my daughters, [says] 'Daddy, I want to go toilet', I take her to the toilet. ... And if my wife, if my wife wants to go toilet I still have to accompany her to the toilet night time.<sup>212</sup>

A single mother and three young daughters felt so badly harassed by male detainees at Woomera that they felt they had to keep their curtains shut. The South Australian child protection authority, who interviewed this family, recommended that:

In the short term, measures such as improving privacy for the family while in their accommodation is required, such as extra curtains on their windows... [men had looked in at them]. In addition [the teenage daughter] and her mother should be offered ongoing psychological support and efforts made to monitor the children and support the parent to ensure that their safety is ensured.<sup>213</sup>

The mother and daughters were eventually moved to the Woomera housing project.

However, the Inquiry notes that boys as well as girls may be at increased risk in mixed compounds.

Harold Bilboe, a psychologist employed at Woomera from October 2000 to December 2001, stated that:

Accommodation [at Woomera] was also inadequate and inappropriate for children. While I was employed [at Woomera], children and families were kept in compounds with large numbers of single adult males with no effective supervision. This exposed children to an unacceptably high risk of sexual and physical abuse.<sup>214</sup>

The Refugee and Immigration Legal Centre (RILC) also spoke of the dangers of placing children in compounds with single men:

[There are] extremely serious situations where children have been accompanied by adults have – including a young girl, were put into an environment in detention with a number of other males, adult males, a situation in which it is absolutely clear from the medical advice and assessments that have been obtained, that it has caused that young girl severe and ongoing psychological and medical trauma.<sup>215</sup>

In the aftermath of the August 2000 riots at Woomera, the Minister stated:

And in relation to [violent detainees] the issue now will have to be addressed as to whether or not those who may feel they've got nothing to lose need to be separately contained so that they don't expose others, particularly women and children, to risks. And that's an issue we'll be looking at.<sup>216</sup>

The Joint Standing Committee on Foreign Affairs, Defence and Trade recommended in June 2001 that, wherever possible, blocks within detention centres be designated for the exclusive use of families.<sup>217</sup> In response to this recommendation, 18 months later, the Government pointed out that Perth, Maribyrnong and Villawood all contain designated areas for women, children and family groups, and that 'courtesy fences' have been erected at Woomera to allow discrete areas to be assigned for special use by these groups.<sup>218</sup>

A former ACM Operations Manager at Woomera said it was not until the end of 2001 that there was separate accommodation for families.<sup>219</sup> During the Inquiry's visit to Woomera in January 2002, the Department's Manager said that women and children were 'balanced through the whole place' and that there was no separate accommodation for families. An ACM officer employed at Woomera at the time told the Inquiry:

A [girl in her early teens] lives in the detention centre with her [family]. When I last saw [her] in late January 2002 she had her wrists bandaged she had tried to kill herself because she could not cope with men pressuring her for sex. There is no women's and children's only compound at the detention centre, hence there was no escape from the threat of sexual abuse for [her]. I know this to be true, [she] told me herself. [Her] mother in tears and desperate told me how she and her daughter were subject to constant harassment because they were not accompanied by a man. Staff reported [her] situation to in-house and government authorities yet the girl remains at the Woomera Detention Centre.<sup>220</sup>

Women said they felt unsafe in the mess hall in Woomera as recently as June 2002:

We are not very safe. And some of the young women don't go to mess for food or eating because they are not relaxed, with too many single men.<sup>221</sup>

ACM told the Inquiry that:

Given the ethnic profile of detainees, the total number of detainees and the infrastructure limitations, the permutations for segregation could have been endless and impractical.<sup>222</sup>

The Inquiry acknowledges that existing infrastructure may well have placed limitations on the ability to separate families from single men. However, these practical difficulties are of little comfort to the parents and their children who are unable to lock out strange men, as they would otherwise do if they were in the community. They are difficulties that should have been foreseen by the Department as an inevitable consequence of the policy of mandatory detention which it was required to implement.

In July 2003, the Department stated that 'wherever possible family groups, women and children are accommodated separately from single men'.<sup>223</sup> However, Maribyrnong and the Baxter facility, which opened in September 2002, are still the only centres with exclusive family compounds. In Villawood, families are separated from single males but are accommodated with single women.

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The Inquiry also received evidence that families from the Sabian Mandaean religion felt physically threatened by some Muslim detainees. It has been alleged that Sabian Mandaean children in particular were sometimes subjected to bullying and harassment because of their religion. The Department and ACM state that they investigated all such allegations, but were unable to substantiate any of the claims.<sup>224</sup> The Department offered Sabian Mandaean families the opportunity to move to separate compounds on a number of occasions, but it was not until late 2002 that the Department offered this arrangement to the families at inception, having reserved a compound at Baxter there exclusively for them. This issue is discussed in more detail in Chapter 15 on Religion, Culture and Language.

### 8.5.2 Examples of alleged assault in detention

For the reasons outlined above, the Inquiry is not in a position to positively determine whether certain assaults did or did not occur. However, the information before the Inquiry demonstrates the difficulty of protecting children from assault within the detention environment and reinforces the Inquiry's view that detention is not a safe place for children.

#### (a) Alleged sexual assault by detainees

The Flood Report investigated in some detail the processes in place for handling sexual assault allegations between 1 December 1999 and 30 November 2000. Nine of the 35 cases of alleged child abuse examined in the Flood Report concerned allegations of sexual abuse by another detainee.<sup>225</sup> Flood found that:

allegations, instances or situations where there is a reasonable suspicion of child abuse in ...Curtin, Maribyrnong, Perth, Port Hedland and Villawood were handled in accordance with the procedures laid down by the Department ... and relevant Commonwealth and State legislation. However ... at Woomera ... a serious incident of possible child abuse and the broad question of policy on child abuse were not properly handled.<sup>226</sup>

The incident causing Flood the most concern related to allegations of sexual abuse of a 12-year-old boy in Woomera.

At the time of the Human Rights Commissioner's visit to Curtin in July 2000, the Commission was informed that charges were laid against two male detainees regarding sexual abuse of two children. The Department Manager reported that the incident had prompted management to institute education programs for detainees on matters relating to child sex offences under Australian law.

In Port Hedland, in October 2001, the Department Manager reported that, on two occasions, incidents of alleged child abuse 'were not followed by immediate removal of the alleged perpetrator from the compound'. While, 'in both cases the child was put under observation, the perpetrator was left to his own devices for several hours'.<sup>227</sup>

The South Australian child protection authority stated that between 1 January and 31 July 2002, there were very few sexual abuse notifications from Woomera.<sup>228</sup> The Inquiry received specific evidence regarding one of those alleged sexual assaults,

which concerned a 12-year-old boy. FAYS investigated the allegations and found that the child was at very high risk of further sexual abuse due to several factors:

- whilst [ACM] staff have him on 'close watch' this is not a viable safety measure for more than a very short term period; the ability of staff to protect [him] from opportunistic abuse is limited;
- [he] has no protective parent able to supervise and influence the child's behaviour ...;
- the centre management has not been able to separate [him] from the compound where the abuse has occurred. Therefore he is continuing to be exposed to high risk.<sup>229</sup>

Although the father and child could have moved compounds, it appears that the father refused because of his friendships with others in the compound. The boy himself 'did not wish to draw attention to himself'.<sup>230</sup> The ACM Intelligence officer stated that:

in reality there are just as many risks in the other compound. The change was not enforced due to the risk of destabilising the detainees and causing a riot if force were used to change compounds.<sup>231</sup>

However, the medical records note that the child was not offered effective protection within the centre in the light of the restricted ability of his parents to protect him. The Woomera GP said:

I have seen him on multiple occasions over the last year at the behest of his parents. He is suffering from bed wetting, stuttering, poor sleep, feelings of depression and prominent suicidal ideation. He has self-harmed by slashing and overdosing on medication on at least two occasions. He has taken part in at least one hunger strike. More recently he has been the victim of an alleged sexual assault by an adult detainee within the camp ... This situation has come about because [his] mother has been in hospital and his father has little motivation to look after him, and states that he cannot control him. In effect [the child] has been an unaccompanied minor in the sense that neither his father nor mother have been able to look after him or protect him. This has left him open to the actions of predators such as the man who has allegedly perpetrated this assault.<sup>232</sup>

FAYS recommended that the matter be reported to the South Australian police and that 'immediate arrangements be made to remove [the child] from the centre itself'.<sup>233</sup> In particular, FAYS suggested that the mother and child be placed in the Woomera housing project. The ACM psychologist also strongly urged that the child be removed from what she believed to be an unsafe environment and noted that:

In the broader community it is agreed that children should be removed from the environment in which the abuse occurred to a safe environment.<sup>234</sup>

The Department Manager expressed 'serious concerns about whether we are currently doing our best for this child' and suggested that an exception be made to the Woomera housing project eligibility rules to allow the mother, boy and his brother to move there.<sup>235</sup> The transfer to the housing project did occur six weeks later.<sup>236</sup>

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The police investigated the allegations and found that there was insufficient evidence to take the matter any further.<sup>237</sup> In the circumstances, the Inquiry does not draw any conclusions about whether or not the assaults took place. This example demonstrates, however, the restricted options available within the detention environment to keep children safe. The failure to move the child to a safer place is especially concerning given the consistent recommendations from FAYS, Department staff and ACM staff that the child be removed from the source of the violence, as would occur in the general community. The Inquiry notes that since this time the eligibility rules for the Woomera housing project have become more flexible.

A Western Australian case illustrates a more rapid response to sexual assault allegations. In Curtin, in January 2002, there were allegations of sexual assault of a five-year-old boy, and possibly two other very young children who were present, by adult male detainees who lived in the same compound as the children.<sup>238</sup>

ACM incident reports show that upon learning of the allegations, the children were put on hourly watch. ACM also offered to move the family to another compound. While the mother resisted the move, there were consistent efforts to ensure that the family had the opportunity to live in a different compound to the alleged perpetrators. The alleged perpetrators were moved out of the compound the same day and put under watch.

The Department, the Western Australian police and the child protection agency were all notified of the allegations and the WA police and Family and Community Services investigated the incident.<sup>239</sup> The police concluded that the allegations were unsubstantiated and the accused had no case to answer.<sup>240</sup>

### **(b) Alleged parental abuse**

The Department acknowledges that incidents of parental neglect and abuse have occurred in detention centres.<sup>241</sup> The Flood Report investigated five cases of alleged parental abuse in the period 1 December 1999 to 30 November 2000 and found that they were well handled by detention staff.<sup>242</sup> Between 1 January and 31 July 2002, DHS stated that at Woomera:

only 10 per cent [of notifications] would be in relation to physical abuse allegations of children at the hands of their parents.<sup>243</sup>

As set out below, one father was involved in several allegations of parental abuse. This example demonstrates the limitations in responding to such a situation within the detention environment, but it confirms the appropriateness of the response of the detention staff in that context. It also suggests that the detention environment may have been a factor leading to the abuse.

At Woomera in August 2001, the father was caring for his two-year-old son while his wife was in hospital waiting for the birth of their child. He was having great difficulty coping with his son and left him in the care of ACM staff on several occasions. After speaking to the ACM psychologist he apologised for his behaviour, asked for his son back and requested that he be moved to a maternity room with an ensuite to

make it easier to look after the child. He was moved to the maternity room and the centre's welfare officers arranged for the boy to attend kindergarten and for another detainee to look after the child to relieve some of the pressure.<sup>244</sup>

In November 2001, the same father was 'allegedly threatening to harm his child with a blade'. ACM medical staff examined the child and found no evidence of any harm but placed the child on watch.<sup>245</sup>

In January 2002, the father attempted to hang himself. He told detention staff that he was tired and upset because his three-year-old son could not go to school. The father was put on 2 minute watch and then went back to his family. When the officers came to take him to the 'Woomera Annex [a cell in Woomera police station] for his own safety and well-being' he allegedly grabbed his child and threatened to hurt him. Detention staff decided to leave him in the family donga but three officers stayed in the room with them. The situation then calmed down. FAYS and the South Australian police were notified and the family were placed on 2 minute observations.<sup>246</sup> Later, when the officers went to take the father to the Woomera Annex again, the mother allegedly threatened to harm herself with broken glass and detention officers were cut in the process of trying to remove the glass from her grip. She was referred to the psychologist.<sup>247</sup> ACM reports from late January and early February 2002 indicate that ACM staff were working with the family on parenting skills.<sup>248</sup>

The South Australian police charged the father regarding the threats to his son but he was permitted to return to his family and see his son under the supervision of ACM staff. FAYS also recommended that the father be able to visit his family.<sup>249</sup>

In July 2002, the parents went on hunger strike but agreed to feed their children. The parents apparently resisted having nurses check on the children. FAYS were notified and recommended that the children be removed from the family donga.<sup>250</sup>

The Inquiry is of the view that ACM staff did what they could to defuse the threats made by this father on his children. However, it is significant that the father's detention appears to have played at least some role in creating those tensions and ACM staff had no power to remove that aggravating factor. This more general issue is explored in greater detail in section 9.3 in Chapter 9 on Mental Health.

The Inquiry also received evidence concerning parental neglect and abuse in another family. Here there were concerns about a 16-month-old baby:

Father is withdrawing from his relationship from [the mother] and not taking any child care responsibility. He has become delusional. Both parents talking about being suicidal and leaving child behind.

Mother admitted to hitting the child around body and face although no injuries were sighted. Both parents have been observed to have uncontrolled anger.

[Mother] lives in a compound that is male orientated with only one other female. All males [including the father] threaten, intimidate and abuse [the mother] if the child cries.

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[Mother] has stated that she hits her daughter [name deleted] every day when she cries. It was reported that [the mother] has used sticky tape on [the child's] mouth to keep her quiet.<sup>251</sup>

The FAYS report on this family made the following assessment:

The child ... is totally dependent upon her parents and is, subsequently, very vulnerable to harm because of the depression and mental health issues of her parents. The family relationships are severely fractured and [the baby's] parents are 'negative' in their mood and behaviour. In other words, they see no hope for their future, their marriage, their life and the current environment for their child.

There are specific safety issues for [the baby] in this situation; there is a high risk of physical injury (from smacking whilst frustrated) and there is a chronic lack of emotional nurturing (whilst parents are pre-occupied with visa issues and their own mental health).<sup>252</sup>

FAYS recommended an urgent assessment of whether the baby should 'remain in the sole care of her mother and father'. It also recommended an urgent referral for psychiatric assessment of both parents 'in terms of the capacity of either of them to provide safe and nurturing parenting'.<sup>253</sup>

The Inquiry heard that this family received psychiatric care including parenting assistance. The mother and baby were transferred from the detention centre to the Woomera Residential Housing Project (RHP) in August 2002, which apparently improved their interaction.<sup>254</sup> At a case conference regarding the family on 10 September 2002, child protection and mental health specialists concurred that the mother and baby needed 'professional intervention in a residential facility'. Until this was able to be arranged the mother and baby were seen by the South Australian Child and Adolescent Mental Health Services (CAMHS) weekly and visited by a Parent Aide at Woomera RHP.<sup>255</sup> The mother and baby were transferred to a residential parenting program in a psychiatric hospital in Adelaide for three weeks during October 2002.<sup>256</sup>

The Inquiry also received evidence of isolated instances of parental abuse of children which appear to be directly connected to the detention environment. For example, a Woomera incident report of 6 July 2001 notes that a father struck his ten-year-old daughter around the head after she had been reprimanded by a guard for taking food outside of the mess. The father was removed from the compound overnight, informed that his behaviour would not be tolerated and 'given an official caution by the police and notified that if there was a repeated offence the matter would be taken further by the police'.<sup>257</sup> Meanwhile, medical staff requested ACM guards to, 'PLEASE try to arrange availability of food for children outside of usual feed times if at all possible' (emphasis in original).<sup>258</sup>

From the evidence before the Inquiry, it appears that ACM and the Department generally responded appropriately to situations of actual or threatened parental abuse or neglect. There is also evidence of individual officers doing their best to calm down tense situations. However, as set out in Chapter 9 on Mental Health, it is the Inquiry's view, based on evidence from mental health experts amongst others,

that the detention environment may be a causative factor in such incidents. This is not to condone parental abuse or neglect, but to recognise that this is another way in which the detention environment compromises children's welfare and safety.

### **(c) Alleged assault by ACM staff**

As set out above, the Inquiry has not been able to investigate in any detail allegations made by children and parents that ACM staff were sometimes involved in assaults on children. The evidence before the Inquiry does not support any finding of systemic assaults by ACM staff.

However, the Inquiry received quite detailed evidence regarding one alleged assault by ACM officers on an eleven-year-old Afghan unaccompanied boy at Woomera detained from June 2001 to January 2002 (when he was transferred to home-based detention). ACM medical records note that the boy was assaulted by ACM officers on 18 December 2001 as follows:

- Dragged by one officer
- Told he had hit officer in Mike [name of compound]
- Held arms by second
- Third hit with open hand across face on Right side
- Fell back against donga<sup>259</sup>

The medical records contain a drawing of the child's injuries, including bruising on his face and finger-marks on his neck and a graze over his cervical spine.<sup>260</sup> The medical records also say that the child had been sitting quietly when he was 'pulled out by one officer in group of three', and that he had an 'acute red welt on right cheek' and 'red welts on neck' and that he was 'acutely upset crying'.<sup>261</sup>

ACM detention officers reported that on the evening of 18 December 2001, the child had 'expressed his disapproval of being in the customs donga and had threatened to cause trouble if he was not returned to his accommodation in Mike compound'. Three ACM officers were asked to speak with the child. They said that they were with the child for no more than thirty seconds. However, the Detention Manager said he saw the child 'being "pinned" up against the wall in the customs donga'.<sup>262</sup> Another ACM officer also witnessed the incident and reported that disproportionate measures were taken.<sup>263</sup>

On 19 December 2001 the incident was reported to FAYS. ACM initiated an internal investigation the same day which was completed the following day.<sup>264</sup> By 20 December 2001 the Australian Federal Police (AFP) had been notified.<sup>265</sup>

The three officers were dismissed in March 2002 for gross misconduct but when officers appealed they were reinstated, despite ongoing investigations by the AFP.<sup>266</sup> All three worked until the end of their contracts.

In July 2002, the AFP charged all three officers with assault. None of the men could be found to appear before the Magistrates Court on 2 September 2002. On 25 November 2002, the Commonwealth Director of Public Prosecutions (DPP) withdrew the charges against two of the men and on 4 June 2003 the charges were withdrawn against the third man, who was living in New Zealand at the time.<sup>267</sup>

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The Department expressed serious concern about this incident and deducted 10 points from ACM in the Performance Linked Fee Report for the quarter ending 31 December 2001.<sup>268</sup>

### 8.5.3 Findings regarding physical assault

The evidence before the Inquiry does not support a finding that there was systemic assault of children within detention centres – either by adult detainees or ACM staff. However, it is clear to the Inquiry that some assaults did occur and that children and parents were fearful of the possibility of such assaults occurring. The tense environment in detention centres contributed to these fears. The absence of secure separate family accommodation facilities in Woomera, Curtin and Port Hedland – which prevented access by single adult males – exacerbated those fears, particularly in the case of girls. Maribyrnong and Baxter have separate secure compounds for families and Villawood has a separate compound for families and single women.

By August 2001, ACM had issued clear instructions to staff in all centres regarding reporting to State child protection authorities in the event of suspected child abuse. This appears to have resulted in generally appropriate reactions, particularly in the case of suspected parental abuse. However, in some cases there were delays caused by the detention environment itself. For example, the restrictive eligibility rules for the Woomera Residential Housing Project (which were later changed) delayed the transfer of a child at risk in the face of recommendations by State child welfare protection authorities, ACM and Departmental staff.

Furthermore, the declining mental health of parents sometimes restricted their ability to shield children from other adults. The Inquiry also notes that the detention environment itself poses a risk factor regarding parental abuse. This is discussed further in Chapter 9 on Mental Health.

## 8.6 Summary of findings regarding the safety of children in detention

The Inquiry finds that there has been a breach of articles 3(1), 3(2), 6(2), 19, 22(1) and 39 of the CRC.

The issues considered in this chapter provide a stark introduction to what is a recurring theme throughout this report, namely that the detention of children in immigration detention centres severely limits the ability of children to enjoy their rights under the CRC.

Australia has an obligation to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical and mental violence (article 19(1)). It also has an obligation to take all appropriate measures to ensure that the best interests of the child are a primary consideration in all actions that affect children (article 3(1)). The threshold for compliance is very high, in recognition of the fundamental importance of keeping children safe.

The evidence before the Inquiry clearly demonstrates that, between 1999 and 2002, the detention environment was not safe for children. Woomera, Port Hedland and Curtin have been the site of multiple demonstrations, riots, hunger strikes and violent acts of self-harm. The occurrence of such events exposed children to heightened risks of harm. The longer the children were held in such an environment the more likely they were to be exposed to those risks. The case study at the end of this chapter illustrates how serious the impact of the surrounding violence can be on a six-year-old boy.

The Inquiry recognises that the detention environment may pose practical difficulties in fully addressing the safety risks facing children. For example, the lock-down procedures designed to control the extent of violence can also have the effect of trapping children amongst the violence. However, the Inquiry is also of the view that the Department was or should have been aware of those difficulties and the obligations under articles 3(1) and 19(1) require the Department to take all appropriate measures to address and overcome those hurdles.

The Inquiry does not suggest that there be no security measures in detention facilities. However, the security standards, policies and procedures examined by the Inquiry were general in nature. They did not specifically take into account that children may be present nor did they highlight the priority that should be given to the protection of children in detention centres. The Inquiry finds the absence of such specificity meant that the best interests of the child were not a primary consideration in decisions made regarding the maintenance of security in detention centres.

As the Inquiry has observed, sometimes the security measures themselves added to the risk of physical harm for children and exacerbated the climate of fear to which children were exposed. In particular, the use of tear gas, water cannons and 'CERT 3' gear in the presence of children left a deep psychological impact. The headcounts were sometimes obtrusive and distressing for children. Furthermore, children were sometimes placed in special 'security' compounds, even if they were not themselves being punished, exposing them to greater risks of harm. However, the Inquiry does not find that children were placed in solitary observation rooms for punishment purposes (see further Chapter 9 on Mental Health).

While the Inquiry makes no findings as to the frequency of direct assaults on children in detention it is clear that some assaults did occur, and that there was a fear of assault among some detainees, especially girls and women. The intermingling of families and single men increased the vulnerability of children to assault by other detainees. The new Baxter facility addresses this problem; however, that facility only opened in late 2002. Children continue to be detained in mixed compounds in Port Hedland.

Due to the general nature of this Inquiry, it has not investigated allegations of assault by parents, other detainees or ACM staff in any detail. Nevertheless, on the evidence available in the limited number of examples cited in this chapter, it appears that ACM staff took appropriate steps to resolve and report suspected assaults. In particular, the Inquiry acknowledges the efforts of the Department and ACM to clarify

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the reporting procedures to State authorities regarding suspected abuse or assault. However, the Inquiry is disappointed that these procedures were only put into place in 2001, nearly 10 years after the introduction of mandatory detention.

Similarly, it is discouraging that as at November 2003, the Department still had not finalised Memoranda of Understanding clarifying the role of State and Federal police authorities, nor any State child welfare agency, other than the South Australian authorities, regarding children in detention centres.

The December 2001 MOU with the South Australian authorities makes it clear that while it has the power to enter a detention centre to investigate a child abuse notification, it does not have the power to enforce that recommendation. However, the Inquiry acknowledges that the Department has generally implemented the recommendations of State welfare authorities in the context of immediate safety concerns.<sup>269</sup>

The Inquiry does not accept that, in general, it was the fault of parents that children were exposed to violence in detention. In addition to the fact that parents had no choice about being in detention in the first place, the physical limitations faced by ACM staff were also faced by parents. In some cases the violence in detention centres was so widespread that it would have been impossible for parents to shield their children. However, the Inquiry does recognise that some parents took part in self-harm, riots and demonstrations. Furthermore, some children copied the behaviour of their parents or other adults around them. This demonstrates the inherent danger of detaining children and their parents in such an environment.

In summary, the detention of children in Australia's detention centres simultaneously increases the risk of harm and limits the options available to address those risks. The Inquiry therefore finds that the legislation requiring the long-term mandatory detention of children results in a breach of articles 3 and 19 of the CRC. The detention system as a whole demonstrates an inadequate consideration of the best interests of children (article 3(1)) and a failure to ensure that children who arrive in Australia seeking asylum are given the protection necessary for their well-being (article 3(2)) and afforded all appropriate measures to be protected from harm (article 19(1)).

The Department also failed to adequately consider the best interests of children (article 3(1)) in the development and implementation of policies and procedures related to security. The general nature of those policies and procedures failed to pay sufficient regard to the needs and vulnerabilities of children and accordingly, the Inquiry finds that the Department has not taken all appropriate measures to protect children from harm (article 19(1)), nor has it ensured children such care and protection as is necessary (article 3(2)).

These same factors demonstrate that detention centres were far from the nurturing environment necessary to ensure that a child seeking asylum could achieve the maximum possible development and recovery in accordance with articles 6(2), 39 and 22(1) of the CRC. The Inquiry therefore finds that the policy and laws requiring the mandatory detention of children breach those human rights.

The placement of children in compounds used for adult behaviour management, combined with the sometimes obtrusive surveillance techniques and the failure to take special measures to protect children from exposure to tear gas and water cannons should be taken into account when assessing whether the overall conditions of detention amounted to a breach of the right to be treated with humanity and respect (article 37(c)). The Inquiry discusses this issue further in Chapter 17, Major Findings and Recommendations.

Clearly, the longer children were held in detention centres the greater the risk to their physical and psychological well-being. Thus the most important step towards improving the safety and security of children who arrive in Australia without a visa is to ensure that they are detained as a matter of last resort and for the shortest appropriate period of time in accordance with article 37(b) of the CRC. Such a step requires the legislature to end the practice of mandatory detention in its current form.

## 8.7 Case Study: Shayan Badraie

This case highlights the negative impact that exposure to major disturbances and self-harm by others can have on children and their families.<sup>270</sup>

In 2002, the Human Rights and Equal Opportunity Commission investigated a complaint made by Mr Mohammed Badraie on behalf of his six-year-old son Shayan regarding his treatment by the Department. The Commission concluded that the Department had breached the CRC and made a number of recommendations to avoid similar practices in the future. The Commission also recommended that the Department pay compensation to the family and that the Minister apologise to them.<sup>271</sup> The Department did not accept the findings or recommendations.<sup>272</sup>

The facts before the Inquiry regarding this case are as follows.

### *March 2000*

Shayan, aged five, arrives in Australia by boat with his parents. The family is taken to Woomera detention centre.

### *June 2000 – November 2000*

There are several periods of unrest in Woomera in 2000. In June 2000 there are two days of protests with 480 detainees breaking out of Woomera and walking out into Woomera township. In August 2000 there are three days of riots and fires at Woomera, involving 60-80 detainees, in which tear gas and water cannons were used. In November 2000 there is a hunger strike by more than 30 detainees.

### *28 November 2000*

Shayan witnesses an adult detainee in a tree about to slash his chest with a shard of glass and jump.<sup>273</sup>

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### *December 2000*

On 6 December 2000, ACM medical records note that Shayan is experiencing nightmares, anxiety, not eating well and poor sleep.<sup>274</sup> On 8 December 2000, ACM medical records note a recommendation that the child be removed from Woomera in order to deal with his fears.<sup>275</sup> On 29 December 2000, the ACM counsellor notes that the child is experiencing bed-wetting; sleep disturbance, including waking at night crying and at times gripping his chest and saying 'they are going to kill us'; repeatedly drawing fences with himself and his family portrayed within them; social withdrawal; nail biting; and more aggressive behaviour at school.<sup>276</sup>

ACM informed the Inquiry that by 25 December 2000 ACM staff had made three strong recommendations to the Department that the child be moved from Woomera.<sup>277</sup>

### *January 2001*

On 3 January 2001, ACM medical records note that since witnessing the threatened suicide, Shayan had exhibited bed-wetting at night, nail-biting, aggression and less concentration at school, diminished appetite. The medical records indicate that the case was discussed on this day with a child psychiatrist from Adelaide who suggested monitoring the child and his parents and that a further teleconference could be held in the following week.<sup>278</sup>

The next day, Shayan witnesses an adult male detainee climb a tree and threaten to self-harm.<sup>279</sup> When Shayan was watching the man up the tree, the ACM nurse who was negotiating with the man went over to Shayan and asked him if he would leave:

I remember speaking to a couple of people at the time asking if they could take Shayan away because I did not think this would be good for his mental health.<sup>280</sup>

On 12 January 2001, Shayan is further upset by an incident involving his father and an ACM officer:

Mr Badraie reported that he and Shayan had witnessed an officer making "masturbating gestures". Mr Badraie felt that this was inappropriate in a context in which families were eating and threw an apple at the officer. Mr Badraie was allegedly told by the officer to "fuck off out of here". Mr Badraie further stated that, following that incident, Shayan had a restless night and a "significant increase in bedwetting".<sup>281</sup>

On 20 January 2001, the family is transferred to Sierra Compound (the security compound in Woomera). The next day, the ACM counsellor notes:

- Shayan has always had a fear of Sierra, due to his experience of Sierra in the past. He associates Sierra with 'bad people' and believes that anyone who is sent to Sierra is 'bad'. No doubt, he now believes this about himself as well. Since relocation, Shayan has not been eating, and, has not slept. According to [his father] Shayan spent most of last night crying, despite reassurances from his family that they were safe.

- Yesterday, Shayan allegedly witnessed his father having his arm placed tightly up his back (an action that was apparently contested by a 'supervisor'), and, his mother being told to 'shut up, shut up' by an Officer. This incident allegedly took place because the family were 'slow' to move from the main compound until their request for a large room, in Sierra, was met. Apparently, during this incident a number of Officers were radioed to the site, for assistance, something that was also distressing for the child.
- Shayan is now alone in Sierra, with no other children, a factor that is also contributing to his distress.<sup>282</sup>

The counsellor recommends the family be immediately relocated from Sierra Compound. The family were not moved from this compound until March 2001.

On 25 January 2001, the ACM psychologist notes the impact of witnessing the self-harm incident of 28 November 2000. The report diagnoses Shayan as suffering from post traumatic stress disorder (PTSD), and notes that he was further distressed by the move to Sierra Compound. The psychologist recommends that the family be moved to a more appropriate centre, such as Villawood, and that psychological services and counselling be provided.<sup>283</sup>

#### *February 2001*

ACM informed the Inquiry that on 7 February 2001 the Department responded to the recommendation that Shayan and his family be moved to Villawood with 'No action at this time'. FAYS are notified of concerns regarding the family.<sup>284</sup>

On 27 February 2001, the ACM psychologist (who had been working at Woomera since September 2000) sends an impact assessment report to the Department's Manager at Woomera stating:

DIMA requested a follow up review of this small boy, Shayan, following an incident of malicious damage and destructive behaviour by another adult detainee in the SIERRA Compound. ...

Shayan's medical/psychological history shows that he has been experiencing anxiety and distress related to being in the detention centre and the behaviours of adult detainees i.e.: Self-harm and destructive violence.

There has been continuing concern with regard to this young boy's level of anxiety, and the impact of events on him, resulting in reactive anxiety, distress, and impact on him and his emotional and psychological wellbeing. ...

Today, Shayan has again been exposed to inappropriate behaviours of adult detainees, resulting in him evidencing acute emotional distress and anxiety, as for example when Shayan was found hiding under his blanket crying and distressed. ...

The psychologist recommends that the family be relocated to a more appropriate detention centre.<sup>285</sup>

#### *March 2001*

On 3 March 2001, the family is transferred to Villawood.

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On 8 March 2001, ACM medical records indicate symptoms of post traumatic stress disorder.<sup>286</sup>

On 28 March 2001, a psychologist from the Westmead Children's Hospital assesses Shayan at Villawood. The report notes:

[Mr Badraie] stated that [he] has been concerned over Shayan's emotional state since an incident at Woomera five months ago, at which time Shayan saw a detainee cut himself in an apparent suicide attempt. Mr Badraie reported that immediately following this event, Shayan went to their room and sat curled up on the floor, shaking and crying. He said that Shayan would not sleep for more than short periods that night, and continued to cry and call out for his parents.

The psychologist concludes that Shayan remains at risk of suffering 'prolonged stress syndrome' while he remains at Villawood.<sup>287</sup>

ACM reports that soon after reaching Villawood, Shayan was diagnosed by both the Villawood psychologist and an independent psychologist and psychiatrist with PTSD.<sup>288</sup>

### *April 2001*

On 5 April 2001, Shayan's father takes him to the detention centre medical clinic, because he is distressed at witnessing a fight between detainees.<sup>289</sup>

On 30 April 2001, Shayan witnesses an adult male detainee who had attempted suicide, bleeding from a laceration to the wrist. Medical records indicate that following this event, Shayan would not leave his parents, hid under a blanket, wet himself, would not eat, would only drink small amounts of milk, would not speak, and could not sleep.

### *May 2001*

After three days of exhibiting these symptoms, Shayan is admitted to Westmead Hospital on 3 May 2001. In a 10 May 2001 report, staff of Westmead's Department of Psychological Medicine note the following:

- Shayan was assessed, on admission to Westmead, as being acutely traumatised and at risk of dehydration due to poor fluid intake;
- Shayan had PTSD which had developed in:  
"the context of the physically restraining environment of the detention centres, in which he has now resided for close to fourteen months, during which time he has been exposed to aversive events such as detainees going on hunger strike and self harming. They [Shayan's symptoms] are also perpetuated by the lack of predicability regarding his future and the inability of his parents to reassure him due to their own uncertainty, and furthermore the lack of a stable peer group in that other children move out of the detention centre while he stays behind.";
- there was a high risk of acute recurrence of symptoms unless his environmental circumstances changed;

- "In order for full recovery to occur Shayan would benefit from a more 'normal' living environment ; and continuing to live together with his family";
- the main contributor to Shayan's symptoms was his environmental stress; and
- if he was to remain in Villawood, a consistent peer group would enhance his sense of stability and it would be helpful to send him to a school where he could access such a peer group.<sup>290</sup>

The report notes that he should be protected 'as far as possible from the witnessing of further traumatic events'.<sup>291</sup>

Shayan is returned to Villawood on 9 May 2001. Medical records note that the day after Shayan returned from hospital he saw the man who had 'slashed up' and once again became withdrawn.<sup>292</sup>

#### *May to August 2001*

Shayan is readmitted to Westmead Hospital for a period of 8 weeks between 15 May and 12 July, when he is returned to Villawood.

On 18 May, the Head of the Department of Psychological Medicine from the Children's Hospital, Westmead, reports:

Shayan's readmission reinforces that his symptoms recur if he is returned to the environment that he has found traumatic. There are limited psychological interventions that we can provide that will over-ride the aversive stimulus. To prevent further morbidity, we are looking for the co-operation of the Villawood Detention Centre and the Department of Immigration to avoid returning him to an aversive environment and to find a means to provide a community placement with an appropriate peer group and educational setting.<sup>293</sup>

Shayan is admitted to hospital on a further six occasions for a period of a few days each.<sup>294</sup> Several of the admissions were for the purpose of rehydration. Medical staff consistently recommended that Shayan and his family be removed from the detention environment.

On 31 May 2001, a child psychiatrist writes to the Minister drawing a clear link between the child's illness and his experiences in detention:

Shayan is a seven year-old boy [who] has been diagnosed with acute [and] chronic Posttraumatic Stress Disorder (PTSD) as a result of traumatic experiences in his fourteen months in Woomera and Villawood Detention Centres ... this is his second admission [to hospital] for potentially life-threatening symptoms, such as refusal to eat or drink, as well as becoming withdrawn and mute. In the hospital setting, he recovers to some degree, illustrating the difficulty he has with residing in the Detention Centre per se, whilst retaining some features of chronic PTSD.

We are concerned about the risks of discharging Shayan back to Villawood Detention Centre. From the point of view of his psychological treatment, he should not be re-exposed to the emotionally traumatic environment that precipitated his acute deterioration.<sup>295</sup>

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ACM informed the Inquiry that Shayan was seen 70 times by the Villawood detention centre medical service and that between March and August 2001, ACM health staff and Westmead Hospital specialists wrote 13 letters setting out the seriousness of Shayan's case and urging the Minister and the Department to remove Shayan from the detention environment in order to prevent further harm.<sup>296</sup>

In June 2001, the Department and ACM begin talking to the Department of Community Services (DoCS) about the possibility of putting Shayan into the care of a foster family in Sydney. In July 2001, DoCS agree that foster care is the most appropriate response for Shayan. On 23 August 2001 Shayan is transferred into foster care detention in the community, without his parents or sister.

### *January to August 2002*

On 16 January 2002, Shayan, his mother and sister are released on bridging visas.

On 9 August 2002 the entire family are recognised as refugees, and live together in the Australian community on temporary protection visas.<sup>297</sup>

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## Endnotes

- 1 Article 2 of CEDAW requires States parties to 'condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women'. General Comment 19 states that the definition of discrimination in article 2 includes gender-based violence: Committee on the Elimination of Discrimination Against Women, 1992.
- 2 Note, however, that Parliament's Joint Standing Committee on Treaties recommended that Australia withdraw the reservation. See Report of Inquiry into the Status of the United Nations Convention on the Rights of the Child, August 1998, Recommendation 47, available at <http://www.aph.gov.au/house/committee/jsct/reports/report17/rept17contents.htm>, viewed 18 November 2003.
- 3 UNHCR, *UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* (UNHCR Detention Guidelines), Geneva, 1999, guideline 8.
- 4 UNHCR Detention Guidelines, guideline 10(ii).
- 5 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the JDL Rules), Geneva, 1990, rule 33.
- 6 The JDL Rules, rule 64.
- 7 The JDL Rules, rule 28.
- 8 The JDL Rules, rule 87(d).
- 9 DIMIA, Submission 185, p91.
- 10 Immigration Detention Standards (IDS), 1998, para 5.2, [www.immi.gov.au/detention/det\\_standards.htm](http://www.immi.gov.au/detention/det_standards.htm).
- 11 IDS, 1998, para 5.4.
- 12 IDS, 1998, para 7.2.2.
- 13 IDS, 1998, para 7.2.3.
- 14 IDS, 1998, para 7.8.3.
- 15 IDS, 1998, para 7.8.4.
- 16 IDS, 1998, sections 7.9, 7.10.
- 17 IDS, 1998, para 9.4.2. See also DIMIA, Submission 185, p91.
- 18 DIMIA, Response to Draft Report, 10 July 2003.
- 19 DIMIA, Managers' Handbook, Section 4.7.
- 20 DIMIA, Managers' Handbook, Section 4.7.
- 21 DIMIA, Managers' Handbook, Section 4.7.
- 22 IDS, 1998, para 13.3.

- 23 ACM Woomera Procedure 18.04, Children's Protection Policy, 1 February 2001. ACM, Response to Draft Report, 8 August 2003.
- 24 ACM, Policy 16.2, Children's Protection Policy, Issue 4, 12 August 2001, para 5.1.
- 25 ACM, Policy 10.16, Assault or other Criminal Behaviour, Issue 4, 12 August 2001, para 1.4.
- 26 ACM, Policy 6.9, Voluntary Starvation, Issue 3, 27 June 2002.
- 27 ACM, Policy 10.24, Pat Searching of Detainees, Issue 2, 23 April 2002, para 4.12. This also applies to elderly detainees.
- 28 ACM, Policy 10.25, Strip Searching of Detainees, Issue 1, 23 April 2002, para 4.15.
- 29 ACM, Policy 11.9, External Escorts, Issue 5, 31 May 2002, para 4.94.
- 30 ACM, Policy 10.15, Use of Tear Gas, Issue 6, 12 June 2002, para 3.1.
- 31 ACM, Policy 12.01, Emergency Management, Issue 5, 31 May 2002.
- 32 ACM, Policy 10.22, Centre Searching, Issue 5, 23 November 2001. ACM state that there is no logical differentiation between children and adults in the procedure for searching a detainee's room because all searches must be done in a professional and dignified manner. ACM, Response to Draft Report, 8 August 2003.
- 33 ACM, Policy 10.4, Detainee Counts, Issue 5, 26 March, 2002, para 4.6.
- 34 ACM, Policy 10.2, Detainee Behaviour (Code of Conduct), Issue 5, 14 May 2002, para 4.7.
- 35 ACM, Policy 20.02, Detainee Management Separation, Issue 6, 26 March 2002.
- 36 ACM, Policy 10.14, Use of Force and Restraints, Issue 5, 31 May 2002.
- 37 The operations of HRATs are discussed in further detail in Chapter 9 on Mental Health.
- 38 ACM, Policy 7.1, At Risk/Self Harm/ Suicide Management, Issue 5, 18 April 2002, paras 4.44-4.45. ACM states that since HRAT Management is developed on an individual basis this policy effectively requires that children's particular needs be considered.
- 39 ACM, Response to Draft Report, 8 August 2003.
- 40 ACM, Response to Draft Report, 8 August 2003, p5.
- 41 *Child Welfare Act 1947* (WA); *Children and Young Persons Act 1989* (Vic); *Children's Protection Act 1993* (SA); *Children and Young Persons (Care and Protection) Act 1998* (NSW).
- 42 DIMIA, Submission 185, p92.
- 43 Australian Lawyers for Human Rights, Submission 168, p13. See s27 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW); s11 of the *Children's Protection Act 1993* (SA); s64 of the *Children and Young Persons Act 1989* (Vic).
- 44 Australian Lawyers for Human Rights, Submission 168, p17.
- 45 Philip Flood, Report of Inquiry into Immigration Detention Procedures (Flood Report), February 2001, p26.
- 46 DIMIA Woomera, Manager Report, January-March 2001, (N1, Q4A, F5).
- 47 Department of Human Services (DHS), Submission 181, p39.
- 48 Alliance of Health Professionals, Transcript of Evidence, Melbourne, 31 May 2002, pp27-28. See also Australian Lawyers for Human Rights, Submission 168, p17.
- 49 Drs Sparrow and Carroll, Transcript of Evidence, Perth, 10 June 2002, p76.
- 50 ACM Policy 18.04, Children's Protection Policy, 1 February 2001; ACM, Response to Draft Report, 8 August 2001.
- 51 Mark Huxstep, Submission 248a, paras 39-40.
- 52 ACM, Policy 16.2.
- 53 Flood Report, February 2001, pp26-27.
- 54 DHS, Transcript of Evidence, Adelaide, 1 July 2002, p82.
- 55 Sharon Torbet, Submission 62a, para 31.
- 56 See especially ss 4(12) and 6 of the *Commonwealth Places (Application of Laws) Act 1970*. DIMIA, Letter to Inquiry, 22 November 2002, Attachment 2, Clarification regarding the application of State and Territory laws in immigration detention facilities; DIMIA, Response to Draft Report, 10 July 2003.
- 57 DHS, Transcript of Evidence, Adelaide, 1 July 2002, pp71-73.
- 58 Western Australian Government, Transcript of Evidence, Perth, 10 June 2002, p50. See also Western Australian Government, Submission 223, p5.
- 59 See section 109 of the Australian Constitution.
- 60 Flood Report, February 2001, p25.
- 61 Memorandum of Understanding (MOU) between the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) and the South Australian Department of Human Services (DHS) relating to Child Protection Notifications and Child Welfare Issues pertaining to children in immigration detention in South Australia, 6 December 2001.

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- 62 MOU between DIMIA and DHS relating to Child Protection Notifications and Child Welfare Issues pertaining to children in immigration detention in South Australia, 6 December 2001, para 4.2. See Minister for Immigration and Multicultural and Indigenous Affairs, Border Protection, Children in Detention, at [http://www.minister.immi.gov.au/borders/detention/hreoc\\_issues/children.htm](http://www.minister.immi.gov.au/borders/detention/hreoc_issues/children.htm), viewed 13 May 2003.
- 63 DIMIA, Letter to Inquiry, 22 November 2002, Attachment 2, Clarification regarding the application of State and Territory laws in immigration detention facilities.
- 64 DHS, Submission 181, p38.
- 65 Western Australian Government, Submission 223, p5.
- 66 DIMIA, Letter to Inquiry, 22 November 2002, Attachment 2, Clarification regarding the application of State and Territory laws in immigration detention facilities; DIMIA, Response to Draft Report, 10 July 2003.
- 67 DIMIA, Letter to Inquiry, 6 November 2003, Attachment, Knowledge Enterprises (Australia) Pty Ltd Report, February 2001, paras 6.5.17 re Woomera, 7.4.7 re Curtin, 8.4.6 re Port Hedland.
- 68 Flood Report, February 2001, pp25, 42.
- 69 DHS, Transcript of Evidence, Adelaide, 1 July 2002, p73.
- 70 Z Steel, S Momartin, C Bateman, A Hafshejani, D Silove, N Everson, JK Salehi, K Roy, M Dudley, L Newman, B Blick, S Mares, S Raman, Everett. 'Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia', in Z Steel, The politics of exclusion and denial: the mental health costs of Australia's refugee policy, Keynote address, 38th Congress Royal Australian and New Zealand College of Psychiatrists, Hobart, 12 -15 May, 2003, pp8-9.
- 71 Conference of Leaders of Religious Institutes, Submission 95, p9.
- 72 Dr Annie Sparrow, Transcript of Evidence, Perth, 10 June 2002, pp73-74.
- 73 Sharon Torbet, Submission 62a, para 39.
- 74 See definition of 'major incident/disturbance' in the IDS, 1998.
- 75 19 at Christmas Island, 8 at Cocos (Keeling) Islands, 193 at Curtin, 80 at Port Hedland, 235 at Woomera, 19 at Maribyrnong, 29 at Perth and 105 at Villawood. DIMIA, Letter to Inquiry, 13 December 2002, Attachment A, p2.
- 76 'Alleged, actual and attempted assaults' include events ranging from serious physical harm to 'one toddler biting another toddler'. ACM, Response to Draft Report, 8 August 2003.
- 77 8 at Christmas Island, 5 at Cocos (Keeling) Islands, 158 at Curtin, 104 at Port Hedland, 337 at Woomera, 41 at Maribyrnong, 22 at Perth and 85 at Villawood. DIMIA, Letter to Inquiry, 29 January 2003, Attachment A, p3.
- 78 DIMIA, Letter to Inquiry, 29 January 2003, Attachment A, pp6-14.
- 79 Neither the Department nor ACM disputed these statistics or sought to provide more accurate statistics about these incidents in their responses to the Draft Report.
- 80 Inquiry, Interview with detainee, Woomera, January 2002.
- 81 DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 82 ACM Woomera Psychologist, Report, Actual Self Harm, 4 December 2001, (N3, F4).
- 83 Inquiry, Interview with detainee parents, Woomera, January 2002.
- 84 DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 85 Sharon Torbet, Submission 62a, Annexure 1, p10.
- 86 ACM Woomera, Incident Report WMIRPC 049/02, Follow Up No.5, 20 January 2002, (N5, Case 16, p71).
- 87 ACM Woomera, Incident Report WMIRPC 049/02, Follow Up No.4, 19 January 2002, (N5, Case 16, p64).
- 88 ACM Woomera, Incident Report WMIRPC 049/02, Follow Up No.6, 22 January 2002, (N5, Case 16, p76).
- 89 DIMIA, Response to Draft Report, 10 July 2003, citing ACM Woomera, UAM Committee Meeting Minutes, 22 January 2003 (sic), (N2, Q5, F4).
- 90 ACM Woomera, UAM Committee Meeting Minutes, 22 January 2003 (sic), (N2, Q5, F4).
- 91 ACM Woomera, Incident Report WMIRPC 049/02, Follow Up No. 6, 22 January 2002, (N5, Case 16, p77).
- 92 Inquiry, Interview with detainee, Woomera, January 2002.
- 93 Inquiry, Interview with detainee father, Woomera, January 2002.
- 94 DIMIA, Response to Draft Report, 8 August 2003, citing ACM Woomera, Incident Report WMIRPC 054/02, 20 January 2002, (N5, Case 16).
- 95 DIMIA, Response to Draft Report, 10 July 2003; ACM Woomera, Incident Report WMIRPC 041/02, 16 January 2002; ACM Woomera, Incident Report WMIRPC 044/02, 16 January 2002. DIMIA, Letter to Inquiry, 17 July 2003, Attachment E.
- 96 ACM, Response to Draft Report, 8 August 2003.

- 97 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, Minutes, 22 January 2003 (sic), (N2, Q5, F4).
- 98 ACM Woomera, Incident Report, WMIRPC 051/02, 19 January 2002, (N5, Case 30, p171).
- 99 See ACM Woomera, Medical Records, 20 January 2002 (N3, F2); ACM Woomera, Incident Report WMIRPC 49/02 (Follow Up Incident Reports 1-7), 18-23 January 2002 (N5, Case 16, pp53-78); ACM Woomera Incident Report WMIRPC 054/02 (Follow Up Incident Reports 1-3), 20-22 January 2002 (N5, Case 16, pp79-90); ACM Woomera, Unaccompanied Minor (UAM) Committee Meeting Minutes, 22 January 2003 [sic], (N2, Q5 F4).
- 100 ACM Woomera, Incident Report WIRPC 49/01, Follow Up No.3, 19 January 2002, (N5, Case 16, p62).
- 101 ACM Woomera, Unaccompanied Minor (UAM) Committee Meeting Minutes, 22 January 2003 (sic), (N2, Q5, F4).
- 102 Sharon Torbet, Submission 62a, Annexure 1, pp11-12.
- 103 Two doctors, three psychologists, one program staff. Some of these former staff gave evidence in confidential hearings.
- 104 DIMIA, Transcript of Evidence, Sydney, 5 December 2002, p90.
- 105 Confidential, Transcript of Evidence, Adelaide, 2 July 2002, p82.
- 106 DHS, FAYS, Executive Director, Country and Disability Services, Letter, to DIMIA, Acting First Assistant Secretary, 24 January 2002, (N2, Q7, F6).
- 107 DHS, FAYS Senior Social Worker, Internal Memorandum, to A/Manager, Operations, Country, 22 January 2002, (N2, Q7, F6).
- 108 Harold Bilboe, Submission 268, paras 25-26.
- 109 Dr Marie O'Neill, Transcript of Evidence, Adelaide, 2 July 2002, p10.
- 110 Dr Jon Jureidini, Transcript of Evidence, Adelaide, 2 July 2002, p40. See also Australian Association for Infant Mental Health, Transcript of Evidence, Adelaide, 1 July 2002, p31.
- 111 Western Australian Government, Transcript of Evidence, Perth, 10 June 2002, p51.
- 112 For media reports on the event, see, for example, Lateline, 1 May 2002, at <http://www.abc.net.au/lateline/s545564.htm> and 7.30 Report, 1 July 2002, at <http://www.abc.net.au/7.30/s595924.htm>, viewed 20 November 2003.
- 113 ACM Woomera, Incident Report WMIRPC 10/02, 9 January 2002, (N5, Case 16, p8).
- 114 ACM Woomera, Incident Report WMIRPC 10/02, Follow Up No.2, 25 March 2002, (N5, Case 16, p16).
- 115 ACM Woomera, Incident Report WMIRPC 10/02, Follow Up No.3, 29 March 2002, (N5, Case 16, p19); ACM Response to Draft Report, 8 August 2003.
- 116 ACM Woomera, Incident Report WMIRPC 10/02, Follow Up No.3, 29 March 2002, (N5, Case 16, p19).
- 117 ACM Woomera, Incident Report WMIRPC 10/02, Follow Up No.5, 30 March 2002, (N5, Case 16, p25).
- 118 ACM Woomera, Incident Report WMIRPC 10/02, Follow Up No.8, 30 March 2002, (N5, Case 16, p35).
- 119 ACM Woomera, Incident Report WMIRPC 10/02, Follow Up No.4, 29 March 2002, (N5, Case 16, p23).
- 120 ACM Woomera, Incident Report WMIRPC 10/02, Follow Up No.6, 30 March 2002, (N5, Case 16, p29).
- 121 Fr Frank Brennan, Opening Statement, National Inquiry into Children in Immigration Detention, Hearing, Sydney, 16 July 2002.
- 122 ACM Woomera, Incident Report WMIRPC 10/02, Follow Up No.5, 30 March 2002, (N5, Case 16, p26).
- 123 DIMIA, Letter to Inquiry, 24 December 2002, Attachment C, Summary of video and surveillance tapes from Woomera Easter period 2002, p2.
- 124 See HREOC, *Report of an Inquiry into a complaint by MS KJ concerning events at Woomera Immigration Reception and Processing Centre between 29-30 March 2002*, Report No.27, 2004.
- 125 Inquiry, Interview with detainees, Woomera, June 2002.
- 126 Inquiry, Interview with detainees, Woomera, June 2002.
- 127 Inquiry, Interview with detainees, Woomera, June 2002.
- 128 DIMIA Woomera, Manager Report, March 2002, (N1, Q3a, F5).
- 129 DIMIA Woomera, Manager Report, April 2002, (N1, Q3a, F5). ACM stated that it conducted significant internal investigations concerning this incident. It has not provided the Inquiry with any evidence suggesting whether the issue of protection of children was considered.
- 130 Minister for Immigration and Multicultural and Indigenous Affairs, Disturbance at Curtin Detention Centre, WA, Media Release, Parliament House, Canberra, 20 April 2002. DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 131 ACM Curtin, Incident Report CNIRPC/149/2002, 19 April 2002. DIMIA, Letter to Inquiry, 22 September 2003, Attachment.
- 132 ACM Curtin, Incident Report CNIRPC/149/2002/b, 20 April 2002. DIMIA, Letter to Inquiry, 22 September 2003, Attachment.

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- 133 ACM Curtin, Incident Report CNIRPC/149/2002, 19 April 2002. DIMIA, Letter to Inquiry, 22 September 2003, Attachment.
- 134 ACM Curtin, Incident Report CNIRPC/149/2002/d, 20 April 2002. DIMIA, Letter to Inquiry, 22 September 2003, Attachment.
- 135 ACM Curtin, Incident Report CNIRPC/149/2002/e, 21 April 2002. DIMIA, Letter to Inquiry, 22 September 2003, Attachment.
- 136 DIMIA Curtin Deputy Manager, Facsimile to Department for Community Development, 22 April 2002, (N5, Case 2, p493).
- 137 ACM Curtin, Incident Report CNIRPC/149/2002/l, 24 April 2002. DIMIA, Letter to Inquiry, 22 September 2003, Attachment.
- 138 Inquiry, Interview with detainees, Curtin, June 2002.
- 139 Inquiry, Interview with detainees, Curtin, June 2002.
- 140 Inquiry, Interview with detainees, Curtin, June 2002.
- 141 Inquiry, Interview with detainees, Curtin, June 2002.
- 142 DIMIA Curtin, Manager Report, April 2002, (N1, Q3a, F5).
- 143 ACM, Preliminary Response to Draft Report, 31 July 2003; ACM, Response to Draft Report, 8 August 2003, pp26-27.
- 144 ACM, Preliminary Response to Draft Report, 31 July 2003; ACM, Response to Draft Report, 8 August 2003.
- 145 ACM, Preliminary Response to Draft Report, 31 July 2003, p7.
- 146 DIMIA, Letter to Inquiry, 6 November 2003, Attachment, Knowledge Enterprises (Australia) Pty Ltd Report, February 2001, para 6.3.16. See also paras 7.2.4-7.2.6 re Curtin and paras 8.2.4-8.2.6 re Port Hedland.
- 146 ACM, Response to Draft Report, 8 August 2003.
- 148 DIMIA, Letter to Inquiry, 6 November 2003, Attachment, Knowledge Enterprises (Australia) Pty Ltd Report, February 2001, paras 6.3.14, 8.2.12, 9.2.11. The Department has only provided the Inquiry with extracts of the report.
- 149 Note, however, that a former ACM Operations Manager at Woomera suggested that more could have been done to prevent certain riots. Allan Clifton, Transcript of Evidence, Adelaide, 2 July 2002, p4.
- 150 DIMIA, Response to Draft Report, 10 July 2003, p26.
- 151 DHS, Social Work Assessment Report on the Circumstances of Children in the Woomera Immigration & Processing Centre, 21 August 2002, p8. ACM argued that DHS does not have the expertise to comment on the management of critical incidents. ACM, Response to Draft Report, 8 August 2003. However, it is the Inquiry's view that the child protection expertise of DHS is sufficient qualification to make observations as to the safety of children in these circumstances.
- 152 Allan Clifton, Submission 251, para 21.
- 153 Sharon Torbet, Transcript of Evidence, Adelaide, 2 July 2002, p9.
- 154 Harold Bilboe, Transcript of Evidence, Sydney, 16 July 2002, p39.
- 155 Lyn Bender, Transcript of Evidence, Melbourne, 31 May 2003, p9.
- 156 Inquiry, Interview with detainees, Woomera, June 2002.
- 157 DIMIA, Submission 185, p91.
- 158 Confidential, Submission 61a, p1.
- 159 Inquiry, Interview with detainees, Curtin, June 2002.
- 160 DHS, Woomera Detention Centre Assessment Report, 12 April 2002, Submission 181a, pp14-15.
- 161 Inquiry, Focus group, Perth, June 2002.
- 162 Dr Jon Jureidini, Transcript of Evidence, Adelaide, 2 July 2002, pp38-39.
- 163 DIMIA, Letter to Inquiry, 6 November 2003, Attachment, Knowledge Enterprises (Australia) Pty Ltd Report, February 2001, para 6.3.21.
- 164 ACM, Policy 1.1, Glossary.
- 165 ACM, Response to Draft Report, 8 August 2003; DIMIA, Response to Draft Report, 10 July 2003.
- 166 Dr Bernice Pfitzner, Transcript of Evidence, Sydney, 16 July 2002, p7.
- 167 Inquiry, Interview with detainees, Woomera, June 2002.
- 168 Inquiry, Interview with detainees, Woomera, June 2002.
- 169 ACM, Policy 10.4, para 4.10.
- 170 Kids in Detention Story, Submission 196a.2, p3.
- 171 Child referring to Port Hedland. Inquiry, Focus group, Perth, June 2002.
- 172 Inquiry, Interview with detainees, Woomera, June 2002.
- 173 Inquiry, Focus group, Melbourne, May 2002. Detainee number changed.

- 174 Inquiry, Focus group, Perth, June 2002. See also New South Wales Commission for Children and Young People, Submission 258, pp21-22.
- 175 Inquiry, Focus group, Melbourne, May 2002.
- 176 ACM, Response to Draft Report, 8 August 2003.
- 177 Joint Standing Committee on Foreign Affairs, Defence and Trade, *A Report on Visits to Immigration Detention Centres*, June 2001, Recommendation 19, p102.
- 178 ACM, Preliminary Response to Draft Report, 31 July 2003.
- 179 ACM, Response to Draft Report, 8 August 2003.
- 180 DIMIA, Letter to Inquiry, 6 November 2003, Attachment, Knowledge Enterprises (Australia) Pty Ltd Report, February 2001, paras 6.3.22, 9.4.5.
- 181 Inquiry, Focus group, Melbourne, May 2002.
- 182 Allan Clifton, Transcript of Evidence, Adelaide, 2 July 2002, pp13-14.
- 183 Inquiry, Focus group, Melbourne, May 2002.
- 184 Inquiry, Focus group, Brisbane, August 2002.
- 185 DIMIA, Response to Draft Report, 10 July 2003; ACM, Response to Draft Report, 8 August 2003.
- 186 Minister for Immigration and Multicultural and Indigenous Affairs, Transcript of press conference, 29 August 2000.
- 187 DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 188 DIMIA, Disturbances Continue as Less Detainees Participate, Media Release, 20 December 2001, at [http://www.immi.gov.au/media\\_releases/media01/d01061.htm](http://www.immi.gov.au/media_releases/media01/d01061.htm), viewed 20 November 2003. See also DIMIA, 'Six Staff Injured as Damage Bill at Woomera Climbs to \$2 million', 21 December 2001, at [http://www.immi.gov.au/media\\_releases/media01/d01059.htm](http://www.immi.gov.au/media_releases/media01/d01059.htm), viewed 20 November 2003.
- 189 Mark Huxstep, Transcript of Evidence, Brisbane, 5 August 2002, p31.
- 190 Harold Bilboe, Submission 268, para 22.
- 191 See, for example, children's drawings at [http://www.chilout.org/gallery/childrens\\_art1.html](http://www.chilout.org/gallery/childrens_art1.html).
- 192 Inquiry, Focus group, Melbourne, May 2002.
- 193 See HREOC, *Report of an inquiry into a complaint by Mr Mohammed Badraie on behalf of his son Shayyan regarding acts or practices of the Commonwealth of Australia (the Department of Immigration, Multicultural and Indigenous Affairs)*, Report No. 25, 2002 (HREOC Report No. 25), section 9.3.
- 194 Inquiry, Focus group, Adelaide, July 2002.
- 195 DIMIA, Response to Draft Report, 10 July 2003.
- 196 ACM, Response to Draft Report, 8 August 2003.
- 197 ACM Woomera Psychologist, Memo, to DIMIA Woomera Manager, 25 January 2001, (N3, F16).
- 198 HREOC Report No. 25.
- 199 HREOC Report No. 25, section 9.7.
- 200 See Chapter 9 on Mental Health, Section 9.3.4(b), Example Four.
- 201 See further section 14.6 in Chapter 14 on Unaccompanied Children.
- 202 ACM, Response to Draft Report, 8 August 2003.
- 203 DIMIA, Response to Draft Report, 10 July 2003.
- 204 Inquiry, Focus group, Melbourne, May 2002.
- 205 DIMIA, Response to Draft Report, 10 July 2003.
- 206 DIMIA, Letter to Inquiry, 13 December 2002, Attachment A, p5.
- 207 DIMIA, Letter to Inquiry, 13 December 2002, Attachment A, p9.
- 208 DIMIA, Letter to Inquiry, 29 January 2003, Attachment A, p7.
- 209 DIMIA, Letter to Inquiry, 29 January 2003, Attachment A, p10.
- 210 DHS, Social Work Assessment Report on the Circumstances of Children in the Woomera Immigration & Processing Centre, 21 August 2002, p6.
- 211 DHS, Woomera Detention Centre Assessment Report, 12 April 2002, Submission 181a, p16. See also ACM Woomera Nurse, Memo, to ACM Centre Manager, 8 April 2001 (N3, F6), cited in DIMIA, Response to Draft Report, 10 July 2003.
- 212 Inquiry, Interview with detainees, Curtin, June 2002.
- 213 DHS, FAYS Report, 22 February 2002, (N2, Q7, F6).
- 214 Harold Bilboe, Submission 268, para 29. See also Harold Bilboe, Transcript of Evidence, Sydney, 16 July, p38.
- 215 RILC, Transcript of Evidence, Melbourne 30 May 2002, p31. See also NSW Commission for Children and Young People, Submission 258, pp22-23.
- 216 Minister for Immigration and Multicultural and Indigenous Affairs, Transcript of press conference, 29 August 2000.

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- 217 Joint Standing Committee on Foreign Affairs, Defence and Trade, *A Report on Visits to Immigration Detention Centres*, June 2001, Recommendation 13, p86.
- 218 Response to Recommendations of A Report on Visits to Immigration Detention Centres by the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade, Senate Hansard, 9 December 2002, pp7410-7448.
- 219 Allan Clifton, Submission 251, para 23.
- 220 Sharon Torbet, Submission 62, p3.
- 221 Inquiry, Interview with detainee mother, Woomera, June 2002.
- 222 ACM, Response to Draft Report, 8 August 2003.
- 223 DIMIA, Response to Draft Report, 10 July 2003.
- 224 DIMIA, Response to Draft Report, 10 July 2003.
- 225 Flood Report, February 2001, p23.
- 226 Flood Report, February 2001, p36.
- 227 DIMIA Port Hedland, Manager Report, October 2001, (N1, Q3a, F5).
- 228 DHS, Transcript of Evidence, 1 July 2002, p77.
- 229 DHS, FAYS, Woomera Child Protection Investigation: FAYS Assessment Report, 19 June 2002, (N2, Q7, F6).
- 230 DHS, FAYS, Woomera Child Protection Investigation: FAYS Assessment Report, 19 June 2002, (N2, Q7, F6).
- 231 DHS, FAYS, Woomera Child Protection Investigation: FAYS Assessment Report, 19 June 2002, (N2, Q7, F6).
- 232 Medical Practitioner, Woomera Hospital, Letter, to DIMIA Woomera Deputy Manager, 26 June 2002, (N5, Case 18, p33).
- 233 DHS, FAYS, Woomera Child Protection Investigation: FAYS Assessment Report, 19 June 2002, (N2, Q7, F6).
- 234 ACM Woomera Psychologist, Memo, to DIMIA Woomera Manager, 13 June 2002, (N5, Case 18, p69).
- 235 DIMIA Woomera Deputy Manager, Email to DIMIA Central Office, 25 June 2002, (N5, Case 18, p66).
- 236 ACM Woomera Detention Manager, Memo, to ACM Woomera Operations Manager, 9 October 2002, (N5, Case 18, p135).
- 237 ACM Woomera, Follow Up Incident Report 427b/02, 3 July 2002, (N3, F12).
- 238 ACM Curtin, Incident Report 20/2002, 19 January 2002, (N3, F14).
- 239 ACM Curtin, Incident Report 20/2002, 19 January 2002, (N3, F14).
- 240 ACM Curtin, Incident Follow-Up Report 20/2002, 30 January 2002, (N3, F14). Note that the Lebanese Muslims Association's submission to the Inquiry contained a different version of events; however, as much of the evidence used in that submission was hearsay, the Inquiry has preferred the more contemporaneous account in the ACM reports. Lebanese Muslims Association, Submission 123, pp6-8.
- 241 DIMIA, Response to Draft Report, 10 July 2003.
- 242 Flood Report, February 2001, pp23, 26.
- 243 DHS, Transcript of Evidence, 1 July 2002, p77.
- 244 ACM Woomera, Incident Report 415/01, 15 August 2001, (N3, F1); ACM Woomera, Officer Report, 10 August 2001, (N3, F19); ACM Woomera Activities Officer, Memo, to ACM Detention Manager, 17 August 2001, (N3, F19); ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting Minutes, 21 August 2001, (N2, Q5, F4).
- 245 ACM Woomera, Medical Records, 29 November 2001 (N3, F1); ACM Woomera, Medical Incident Report, 29 November 2001 (N3, F1).
- 246 ACM Woomera, Incident Report WMIRPC 023/02, 13 January 2002; ACM, Response to Draft Report, 8 August 2003; ACM Woomera, Medical Records, 13 January 2002 (N3, F1).
- 247 ACM Woomera, Follow-up Incident Report No.1, WMIRPC 023/02, 13 January 2002; ACM, Response to Draft Report, 8 August 2003. See also DHS, FAYS, Email to DIMIA Central Office, 15 January 2002 (N2, Q7, F6).
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# Chapter 9

## Mental Health of Children in Immigration Detention

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## 9. Mental Health of Children in Immigration Detention

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This chapter addresses the impact of the detention environment on the mental health of children and the measures taken to address their mental health needs. Consistent with the breadth of protection given to the welfare of children under the *Convention on the Rights of the Child* (CRC), the Inquiry uses the term mental health to describe the psychological well-being of children as well as diagnosed psychiatric illness.

During Inquiry visits to immigration detention facilities, large numbers of children and parents reported on the impact of detention on their psychological well-being. The Inquiry also interviewed former detainee children in focus groups in order to gain an understanding of the impact of detention on their psychological well-being. Many of those children and parents are quoted in this chapter.

As a result of these conversations the Inquiry requested primary records concerning certain children and families who have been held in immigration detention centres.<sup>1</sup> The Inquiry sought the fullest possible record regarding the mental health concerns and treatment for certain children in long-term detention. The primary records obtained through this process included Australasian Correctional Management Pty Limited (ACM) medical records, reports by external health consultants, incident reports, High Risk Assessment Team (HRAT) records, and reports from the State child welfare authorities and mental health agencies. Documents from the South Australian child welfare agency, the Department of Human Services (DHS), and Family and Youth Services (FAYS), the section of DHS that manages these responsibilities; and the South Australian Child and Adolescent Mental Health Services (CAMHS) were particularly useful. The case studies used in this chapter are based almost exclusively on those documents.

The Inquiry also received written submissions, oral testimony and research reports from mental health experts, including several senior psychiatrists and psychologists who gave evidence that the long-term detention of children could be expected to have a negative impact on the general psychological well-being of children. The primary records obtained by the Inquiry confirmed that detention did in fact have that effect on certain children. Some of the problems suffered by children in detention include anxiety, distress, bed-wetting, suicidal ideation and self-destructive behaviour including attempted and actual self-harm.

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Furthermore, the primary records revealed that in a smaller number of cases children had been diagnosed with specific psychiatric illnesses such as depression and post traumatic stress disorder (PTSD). The records showed that either the cause or the severity of these disorders could be linked to the children's ongoing detention. They also indicate that the quality of treatment they receive is affected by their detention.

The Inquiry does not argue that the children discussed throughout this chapter represent the experience of every child in detention. Indeed the Inquiry readily acknowledges that children who are detained for very short periods of time are less likely to have had the experiences described in this chapter. However the cases and situations described in this chapter demonstrate the connection between long-term detention and the declining psychological health of certain children and this alone is sufficient to find a breach of international law. Furthermore, it is important to keep in mind that, despite the length of this chapter, the text does not fully represent large quantities of evidence received by the Inquiry regarding the mental health of children.

This chapter addresses the following questions:

- 9.1 What are children's rights regarding mental health and development in immigration detention?
- 9.2 What policies were in place to prevent and treat the mental health problems of children in detention?
- 9.3 What factors contribute to the mental health and development problems of children in detention?
- 9.4 What was the nature and extent of mental health and development problems suffered by children in detention?
- 9.5 What measures were taken to prevent and treat mental health and development problems in detention?

At the end of the chapter there is a summary of the Inquiry's findings and three in depth case studies demonstrating the impact of detention on the mental health of these children.

### **9.1 What are children's rights regarding mental health and development in immigration detention?**

There are many rights in the CRC which together highlight Australia's obligation to protect the mental health of children.

Article 24(1) requires the Commonwealth to ensure that all children within Australia can enjoy 'the highest attainable standard' of physical and mental health that Australia can offer. The Commonwealth must also ensure that no child in Australia is deprived of access to the health care services necessary to achieve that standard.

States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and

rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

*Convention on the Rights of the Child, article 24(1)*

Article 22(1) highlights the obligation to provide appropriate assistance to refugee and asylum-seeking children to ensure that their special needs are addressed. In the context of mental health it is therefore important to address the likelihood that asylum-seeking children may have suffered from trauma in their past. As the United Nations High Commissioner for Refugees (UNHCR) publication, *Refugee Children: Guidelines on Protection and Care* (UNHCR Guidelines on Refugee Children), states:

Because of the possible damaging effects of trauma that refugee children may have experienced, some children will require specialized services or treatment.<sup>2</sup>

As discussed in Chapter 4 on Australia's Human Rights Obligations, article 39 of the CRC specifically sets out Australia's obligations when children are suffering from past torture and trauma:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

There are two important aspects to this article. First, Australia must take 'all appropriate measures' to promote psychological recovery – this applies both to the legislature and the executive. Second the recovery must take place in 'an environment which fosters the health, self-respect and dignity of the child'. In other words, the CRC recognises the extra vulnerability of children who have suffered some past trauma to harsh environments and therefore imposes a special obligation to ensure that children can live in a healthy, happy atmosphere.

Article 6(2) also requires Australia to 'ensure to *the maximum extent possible* the survival and development of the child'. The right to development includes not just physical growth but a child's mental and emotional development.<sup>3</sup>

Chapter 8 on Safety explains that children should be protected from physical and mental violence and abuse while in detention (article 19(1)). Furthermore, they must be treated with humanity and respect and not subjected to torture or other cruel, inhuman or degrading treatment or punishment (article 37(a),(c)).

Article 37(a) of the CRC is similar to article 7 of the *International Covenant on Civil and Political Rights* (ICCPR). In 2002 the UN Human Rights Committee found that the failure to release a man from detention when 'there was a conflict between [his] continued detention and his sanity' amounted to a breach of article 7 of the ICCPR:

the continued detention of [an adult male] when [Australia] was aware of [his] mental condition and failed to take the steps necessary to ameliorate

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the author's mental deterioration constituted a violation of his rights under article 7 of the [ICCPR].<sup>4</sup>

Article 3(2) requires that Australia ensures the child has 'such protection and care as is necessary for [a child's] well-being, taking into account the rights and duties of his or her parents'.

The UNHCR Guidelines on Refugee Children note the negative impact that refugee centres or camps can have on the mental health of children and their families:

The emotional development of children may be adversely affected by remaining for years in the artificial environment of a refugee centre or camp where normal life activities are impossible ... Children suffer from the negative effects of extended stays on the well-being of adult family members and the destructive effects on the family unit. Extended residence in a camp may lead to extremes of behaviour in children who may become either passive and submissive or aggressive and violent.<sup>5</sup>

The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the JDL Rules) also suggest that the mental well-being of children in the juvenile justice system may be best protected if imprisonment is used only as a last resort:

The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort.<sup>6</sup>

In other words, the JDL Rules note the connection between the principle of detention as a measure of last resort (CRC, article 37(b)) and the protection of the mental health of children.

The JDL Rules also provide some guidance as to how to protect and promote the mental health of those children who are detained. For example any mental health problems should be noted on admission to a detention facility.<sup>7</sup> Children should be provided facilities and services 'that meet all the requirements of health and human dignity'.<sup>8</sup> There should be programs and activities that are designed to foster their health and self-respect.<sup>9</sup> Medical officers should notify the detention authorities if a child's physical or mental health 'will be injuriously affected by continued detention, a hunger strike or any condition of detention'.<sup>10</sup> Moreover, there should be:

provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being.<sup>11</sup>

Article 3(1) of the CRC requires Australia's administrative and legislative bodies to take all appropriate measures to ensure the best interests of the child are a primary consideration in all actions that affect children. Given the connection between a child's mental health and his or her best interests, the Commonwealth legislature and executive should ensure that a child's mental health is a primary consideration in all decisions relating to the immigration detention of children.

## 9.2 What policies were in place to prevent and treat the mental health problems of children in detention?

As with the provision of other services, the Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA) recognises that it has 'a duty of care in relation to the health of all detainees in immigration detention'. It is important to note that with regard to mental health, ACM was contractually responsible for providing mental health services to detainees over the period of the Inquiry.<sup>12</sup> The Department was responsible for monitoring the provision of that service. ACM emphasised to the Inquiry their view that mental health problems amongst children and their families in detention are often caused by factors beyond their control, and that at times, 'services required to address a particular detainee need cannot be delivered due to locational, situational or other environmental circumstances'.<sup>13</sup>

### 9.2.1 Department policy on mental health and development

With respect to mental health, the Department states that:

There is a range of psychological services available on site or by referral to specialists. ...

Care needs are attended to by qualified, registered and appropriately trained health care professionals. The Services Provider seeks to employ, where possible, health professionals who have experience in the provision of health care to people who have suffered from torture and/or trauma.<sup>14</sup>

The contractual standards with which ACM had to comply regarding mental health services in immigration detention are contained in the Immigration Detention Standards (IDS).

As outlined in other chapters, the IDS require the provision of social, cultural, recreational and educational activities, important to the preservation of mental health.<sup>15</sup> They also require that '[e]ach detainee is treated with respect and dignity'.<sup>16</sup> The IDS underline the importance of ensuring that staff at immigration detention facilities can recognise and respond to mental illness:

Staff are trained to recognise and deal with the symptoms of depression and psychiatric disorders and to minimise the potential for detainees to do self harm.<sup>17</sup>

Furthermore, the IDS require that all staff have an 'appreciation of the anxiety and stress detainees may experience'<sup>18</sup> and that '[m]edical personnel have the capacity to recognize, assess and deal with detainees who have suffered torture or trauma'.<sup>19</sup>

The IDS require the assessment of detainees upon their arrival for mental health as well as for physical health needs:

The care needs of each new detainee are identified by qualified medical personnel as soon as possible after being taken into detention. The medical officer has regard not only to the detainee's physical and mental health but also the safety and welfare of other detainees, visitors and staff.<sup>20</sup>

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There are further requirements for the care of detainees who have been identified with a mental illness:

- Detainees in need of psychiatric treatment have access to such services.
- Arrangements are made to move detainees who are found to be severely mentally ill or insane to appropriate establishments for the mentally ill as soon as possible.<sup>21</sup>

This chapter will examine whether actions were taken by the Department to ensure the protection of the mental health of children and an adequate level of mental health services.

### 9.2.2 ACM policy on mental health and development

The ACM Health Services Operating Manual contains the principal policies regarding mental health services in detention. The Manual notes that ACM is responsible for:

- The management and provision of clinical services for detainees with acute psychiatric disabilities, or who are at psychiatric risk.
- Ensuring seriously mentally ill detainees are assessed by a psychiatric professional; and, when appropriate, referred to local psychiatric hospitals for consideration of admission to a secure hospital as a patient under the Mental Health Act.<sup>22</sup>

#### (a) Assessment on arrival by ACM

ACM policy requires that there is a health review of all detainees within 24 hours of their reception and that this review include a mental health evaluation.<sup>23</sup> The ACM policy regarding the management of detainees at risk of suicide or self-harm, also states that '[a]ll detainees are to be screened and assessed for risk of self-harm or suicide upon arrival at a Detention Centre'.<sup>24</sup>

#### (b) External referrals

The ACM policy regarding referral of a detainee to a psychiatric centre states that '[w]here a detainee exhibits behaviour or makes verbalisations suggestive of mental illness, staff or the detainee should seek the assistance of the health care staff'.<sup>25</sup> The policy goes on to state that based on the outcome of the assessment, ACM health staff should do one of the following:

- Refer the detainee for further diagnosis, evaluation and/or treatment.
- Place the detainee on the active outpatient case-load of the psychiatric facility or the psychiatric staff on-site.
- Determine that no mental disorder is present and inform the referring staff that no psychiatric treatment is indicated.<sup>26</sup>

**(c) Suicide prevention**

ACM also has a policy on suicide prevention, the purpose of which is to 'prevent suicidal gestures and attempts through surveillance and monitoring by health care and all other personnel'.<sup>27</sup> The policy notes the periods of time when detainees may be at risk, including after a negative decision regarding their application for a protection visa.<sup>28</sup> This policy requires that all staff members be trained to recognise potential suicide risk in detainees, that assessments should be conducted by a qualified health care professional, that procedures for monitoring a suicidal detainee should be specified, and that procedures for referral to mental health care providers should be specified.

**(d) High Risk Assessment Team (HRAT)**

One of the principal means through which detainees with serious mental health problems are managed within the detention environment is through the application of an At Risk Treatment Plan. This is generally referred to by ACM as the High Risk Assessment Team (HRAT).<sup>29</sup> The policy requires that detainees determined to be at risk should be closely observed until a Mental Health Status Screening can be conducted. They should then be quickly referred to the appropriate staff member within the centre.<sup>30</sup>

The At Risk Plans (ARP) are developed by Health Centre staff. They are signed by both the ACM Operations Manager and the ACM Detention Manager. Once a detainee is on an ARP, they are monitored by the HRAT. The HRAT should meet each weekday to review the ARP. Specifically, the review considers:

- level of risk
- placement of the detainee in particular accommodation
- level and conditions of observation to be provided
- need for follow up health care
- need to contact family and/or friends for special visitation.<sup>31</sup>

The level of risk determines how often a detainee will be observed. Detention officers are responsible for maintaining At Risk Watch Logs, with all logs sighted and signed by the Detention Supervisor. Modification of a detainee's ARP or authorisation for a detainee's removal from a plan is the responsibility of the HRAT.

The policy does not contain specific comments about the management of children deemed to be at risk.

**(e) Voluntary starvation**

The ACM policy on voluntary starvation (hunger strikes) outlines the procedures that should be followed when a detainee commences a hunger strike, including assessment within the Health Centre, reporting to the Operations Manager and the generation of incident reports.<sup>32</sup> Detainees on hunger strike are to be seen at least once every 24 hours by nursing staff, and at least once every three days by the medical officer in the centre.

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The policy contains a specific section on the management of children on hunger strike. It states:

There are occasions when either parents place their children on a hunger strike or children declare they are on voluntary starvation. The management of children in this situation is somewhat different to adults, as dependent on their age they will physically deteriorate more quickly than adults.<sup>33</sup>

The policy requires staff to notify State child welfare agencies. Parents must be informed that if the child welfare agency 'considers the child to be at risk they may be removed from the care of the parents'. The child must be seen by both nursing staff and the medical officer once every 24 hours.<sup>34</sup>

### 9.2.3 State authority involvement in the mental health of children

As noted above, ACM has a policy of referring detainees with serious mental illnesses to external psychiatric services. These services are usually run by State governments. Furthermore, notification of concerns regarding the mental health and welfare of children are also made to State child welfare authorities.

The Department states that it relies on State authorities for advice on these issues:

State child welfare authorities have expertise in child welfare matters, and are able to advise the Department of different ways in which a child can be managed within a detention facility. This can include assistance to the parents or recommendations in relation to particular developmental needs.<sup>35</sup>

As outlined in Chapter 8 on Safety, State laws operate in immigration detention facilities where they are not inconsistent with Commonwealth laws on detention. This means that while detainees may fall within a State's mental health laws, the State does not have the power to release the detainee from immigration detention. However, the Department states that:

In practice, where a detainee is found to be mentally incapable and in need of care in a psychiatric institution under State legislation, the Minister approves the psychiatric institution as a place of detention ... [which enables] ... the detainee to receive appropriate psychiatric care whilst remaining in detention at the psychiatric institution.<sup>36</sup>

The situation is slightly different where a child is not sufficiently ill to be 'declared' under mental health legislation, but where State welfare agencies recommend release for their general welfare. In these cases the Department states that:

In practice the advice of the State agencies is considered and, where possible, implemented by the Department. Where a recommendation is made which cannot be fully implemented (such as a recommendation for release from detention of a child and its parents, where the parents are not eligible for the grant of a visa) the Department consults with agencies to reach a legally possible and mutually acceptable outcome for the child.<sup>37</sup>

Therefore, while the Department states that it relies on State child welfare agencies for advice on the management of children, there is no legal obligation to actually follow that advice.

The State authorities' reliance on the Department to implement their recommendations marks a substantial difference to their ordinary powers to remove a child from an abusive or neglectful environment. DHS reported to the Inquiry:

So we can't utilise our legislation like we can with the rest of the community to go to the Youth Court of South Australia and get the Court to grant removal of a child.<sup>38</sup>

See further section 9.5.5 of this chapter for a discussion of the effectiveness of the involvement of State psychiatric services in the treatment of children in detention with mental illness.

### **9.3 What factors contribute to the mental health and development problems of children in detention?**

Children in detention live within an institutional context. It is important to consider both the general impact of institutional living, as well as specific factors that may affect children in immigration detention, when considering the impact of detention on the mental health of children.

The effects of institutionalisation generally on the mental health of children are well understood and documented. For example, *Bringing them home*, the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, referred extensively to studies showing the effects of institutionalisation.<sup>39</sup> Many other studies have also shown that institutionalised children are at a dramatically increased risk of serious mental and emotional disturbances.<sup>40</sup> For example, the report of the Inquiry into unaccompanied child migration to Australia during the twentieth century, *Lost Innocents: Righting the Record: Report on Child Migration* notes the adverse impact of institutionalisation on many of these children.<sup>41</sup> Furthermore, the Forde Commission of Inquiry into the Abuse of Children in Queensland Institutions found that incidents of 'unsafe, improper or unlawful treatment of children' had occurred within institutional care settings in that State.<sup>42</sup>

ACM acknowledges the general impact of institutionalisation, informing the Inquiry that its 'assertion that detention has an impact on detainees ... simply reflects the findings of at least three decades of research'.<sup>43</sup>

The Alliance of Health Professionals, which includes a majority of the medical colleges in Australia, suggested that:

Current practices of detention of infants and children are likely to have both immediate and longer-term effects on children's development, psychological and emotional health.<sup>44</sup>

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More specifically, evidence provided to the Inquiry by children and their families, detention centre medical staff, consultant psychiatrists as well as psychiatric studies on children in detention indicate that a range of factors contribute to the presence of psychological problems in children in immigration detention. Those factors include one or more of:

- torture and trauma prior to arrival in Australia
- the length of detention
- uncertainty as to the visa process and negative visa decisions
- the breakdown of many families within detention
- living in a closed environment
- children's perception that they are not safe within detention
- treatment of children by detention staff.

Each of these factors is discussed in turn in the following sections.

Other contributing factors are noted in a 2003 study (the 2003 Steel Report) of the mental health of detainee children. This report noted that all of the children interviewed (19 children from a remote detention centre) said that boredom, isolation, poor quality food, seeing people self-harm and seeing people attempt suicide were serious problems.<sup>45</sup> Inadequate recreation and educational opportunities also have an impact on the mental health of children, as discussed in Chapter 12 on Education and Chapter 13 on Recreation.

### 9.3.1 Torture and trauma prior to arrival in Australia

Since more than 90 per cent of children in immigration detention over the period of the Inquiry have been found to be refugees, it follows that many children in immigration detention are likely to have been affected by prior experiences of trauma.<sup>46</sup>

The Inquiry commissioned a literature review to consider factors affecting the psychological well-being of child and adolescent refugees and asylum seekers.<sup>47</sup> The paper concludes that:

research clearly demonstrates that refugee children and adolescents are vulnerable to the effects of pre-migration, most notably exposure to trauma. It is also apparent that particular groups in this population constitute higher psychological risk than others, namely those with extended trauma experience, unaccompanied or separated children and adolescents and those still in the process of seeking asylum.<sup>48</sup>

The Inquiry received evidence from a range of sources that children in immigration detention may have experienced significant trauma prior to their arrival in Australia. For example, the Australian Association for Infant Mental Health (AAIMH) reported that:

Refugee parents may have experienced torture, imprisonment, persecution and institutional violence by the political regimes of their country of origin, or

have witnessed a spouse or close family members undergoing such experiences.

Many families prior to detention in Australia have experienced long and perilous journeys and been in transit for months or years in refugee camps or in countries where they have had no citizenship rights, lived in very poor and overcrowded housing and where basic needs have been barely met. Children are conceived and born in such situations of deprivation, uncertainty and with minimal or no health care.<sup>49</sup>

The Inquiry also heard evidence that detainees were more likely than other asylum seekers to have had prior experiences of trauma:

Those who had suffered the most severe persecution are perversely at most risk of detention in Australia. This is not really surprising because these are the people most desperate to leave and hence the most likely to enter 'illegally'.<sup>50</sup>

The Department acknowledges that pre-arrival experiences have a significant impact on the mental health of child detainees:

Of course, some of these people have had a very difficult and perilous voyage to get to Australia and they may well have other predispositions or issues in their life well before any thought of coming to Australia which might also be impacting on their personal circumstances whilst here.<sup>51</sup>

However, the Inquiry also received evidence that pre-arrival experience does not exclusively account for the mental health problems of children in detention. In other words, detention itself also had a significant impact on the mental health of children, particularly for those held in detention for prolonged periods.

International experience with refugee children resettled to Western countries indicates that while some mental health conditions from prior trauma may persist, particularly post traumatic stress reactions, children generally display a pattern of recovery and adaptation on arrival and integration in their new home.<sup>52</sup>

This can be compared with a 2003 report regarding asylum seekers and their children in a remote Australian detention centre, which found that the impact of detention outweighed that of pre-migration experiences on the development of psychiatric illness:

Lifetime assessment of psychiatric morbidity indicated that there was little psychopathology amongst the children prior to arrival in Australia. One child who had witnessed severe domestic violence in Iran had multiple previous disorders. In contrast at the time of assessment, after having spent in excess of two years in detention, all children were diagnosed with at least one psychiatric disorder and most (16, 80%) were diagnosed with multiple disorders, representing a 10-fold increase in the total number of diagnoses identified.<sup>53</sup>

The Migrant and Workers Resource Centre (MWRC) from Queensland conducted a study of 40 former child detainees and found that '[t]he detention of asylum

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seekers upon their arrival in Australia has a deleterious psychological effect upon asylum seekers through maintaining or aggravating these pre-existing conditions'.<sup>54</sup>

Furthermore, a psychiatrist who has examined several children detained at Woomera stated that detention was the worst thing that had happened to a number of them:

People are resilient and given appropriate circumstances, people can recover from the most horrible traumas, but on average you would expect a significant proportion of these children to continue to suffer, throughout their life, the effects of the detention experience. Now, that is obviously not the only traumatic experience that many of these children have had, but it is certainly – a number of the families that I've been involved with discussions about, the trauma – the traumatic nature of the detention experience has out-stripped any previous trauma that the children have had. So it has got to the point where being in detention is the worst thing that has ever happened to these children.<sup>55</sup>

### 9.3.2 Length of detention

As explored in Chapter 6 on Australia's Detention Policy and Chapter 7 on Refugee Status Determination, the length of detention is determined by the legislative requirement that all children in Australia without a visa must be detained until they are granted a visa or removed from Australia. This process has, on some occasions, taken several years. Most of the children in detention in late 2003 had been detained for at least two years.<sup>56</sup>

The Department acknowledges that 'mental health issues [are] to do with being long-term in a detention environment'.<sup>57</sup> The impact of the length of detention is also noted in the Woomera Department Manager's report in May 2002, which states that there is a '[c]ontinued focus on a number of families whose reactions to long-term detention demand increasingly frequent health service and psychologist attention'.<sup>58</sup>

Although ACM emphasises that it has no control over the length of detention, it informed the Inquiry that 'the longer the period in detention the more likely the detainee is to need access to mental health services and support'.<sup>59</sup> ACM reported that it has:

[o]bserved a relationship between the behaviour of detainees, length of detention, critical immigration decision points and proximity to the exhaustion of visa consideration options (appeals etc).

A child formerly detained at Port Hedland told the Inquiry about the connection between declining mental health and ongoing detention:

There are children who have been there for a very long time – two to three years and they have actually done things that are very distressing, like they went up the trees and they wanted to throw themselves, trying to commit suicide. There were kids that actually stitched their mouths. Things that are so traumatic that we are now having nightmares on a daily basis with these things.<sup>60</sup>

Mental health experts provided the Inquiry with substantial evidence that children's mental health deteriorates the longer that they are detained. For example, the Victorian Foundation for the Survivors of Torture reported that:

Children who were in detention for longer periods had significantly higher scores on the stress assessment schedule as 'the effect of length of stay appears to result predominantly from increased exposure to traumatic events within the detention centres ... further exacerbated by feelings of isolation, detachment and loss of confidence that are apparent in children who have experienced high levels of trauma'.<sup>61</sup>

DHS in South Australia, and the MWRC in Queensland, provided similar evidence to the Inquiry.<sup>62</sup>

Several former ACM health staff at Woomera also observed the impact of the length of detention on mental health. For example, a doctor who worked at Woomera on two short term contracts told the Inquiry:

I can only say that the longer that they spent, the worse the effects that I saw. And that was in some way dependant on the age and the support, whether they were an unaccompanied minor or whether they simply still had the support of their parents, or even a parent. But in my experience at Woomera I would have to say that anyone who had been there longer than three months would be at grave risk, I believe, and did develop symptoms.<sup>63</sup>

A psychologist who worked at Woomera from September 2000 to January 2002 set out the various phases of detention:

Family roles break down significantly. We actually started time-lining the break down of individuals. We classify the first three months as being a state of euphoria, hope, dreams. The next three months, as they are going through all of their interviews and there is anxiety starting to build up. After six months we start to see a deterioration in the emotional and psychological well-being of individuals, a significant start in the increase of self-harm. Be it hunger strikes, emotional anxiety, psychological disturbances developing, increased requests for assistance for sleep, which is an indication of depression, medication for depression, more active involvement in disturbances and in self-harm. So, yes, I have seen people age on a daily basis. I have seen middle aged men become old men in months.<sup>64</sup>

### 9.3.3 Uncertainty and negative visa outcomes

The Department has suggested that mental health problems in long-term detainees is not related to the length of detention but to the fact that a visa has been refused:

the length of detention is almost always associated with refusal of visa applications ... this itself is likely to have an effect on the detainees' mental health.<sup>65</sup>

The connection between visa refusal, the length of detention and mental health issues demonstrates one of the more serious problems caused by the current detention system.<sup>66</sup>

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When in detention, a visa refusal has two consequences for children. First, it leads to uncertainty about their future in Australia. Second, it leads to certainty that the child will remain in detention. This combination of factors understandably places a great deal of stress on children and their parents. The combination also magnifies the impact that either one of these outcomes might have.

The interdependence of visa processing, the length of detention and mental health is noted by a doctor who worked at Woomera from October 2000 to June 2001:

I saw when they came in with the reputation of Australia having such a good human rights track record, they were quite sure that they would be processed quickly, that their application visa would be settled within six to 12 months at the most. When after three months I could see depression set in, and after six months I could see severe depression, anxiety, self-harm and even some detainees having psychotic episodes and in lay terms, it is going mad.<sup>67</sup>

A 2001 psychological report about detainees from Villawood also notes that the mental decline of detainees matches the stages of the visa process combined with the length of detention.<sup>68</sup> Each of the four successive stages is 'associated with increasing levels of distress and psychological disability':

*Non-symptomatic stage:* During the early months of detention, before the primary refugee determination decision, the detainee is shocked and dismayed at being detained, but these feelings are mitigated by an unwavering hope that confinement will be short-lived and that their claim will be upheld. ...

*Primary depressive stage:* This follows the receipt of a negative decision by DIMA and the realisation by detainees that they face a serious threat of forcible repatriation or detention for an indeterminate period, or both. The clinical presentation is consistent with a major depressive disorder, with the severity closely related to pre-existing risk factors, such as premigration exposure to trauma or personal predisposition to depression. ...

*Secondary depressive stage:* This typically follows the rejection of the asylum seeker's application by the Refugee Review Tribunal, the ultimate administrative level. The timing of this final rejection may vary, but generally occurs between six and eighteen months after first being detained. This stage is associated with a more severe level of psychomotor retardation and/or agitation. There is a marked narrowing of focus to issues of self-preservation and survival and an overwhelming feeling of impending doom. ...

*Tertiary depressive stage:* At this stage the detainee's mental state is dominated by hopelessness, passive acceptance and an overwhelming fear of being targeted or punished by the managing authorities. Affected detainees become self-obsessed and trapped in their predicament. ... The detainee's life can become dominated by paranoid tendencies, leaving them in a chronic state of fear and apprehension and a feeling that no one, including other detainees, can be trusted. ...<sup>69</sup>

The Inquiry heard that detainees become extremely preoccupied with their application for a visa. For example, a medical practitioner who worked at Woomera reported the impact of this process on the mental health of parents and their children:

The ongoing understandable obsession with the process of requiring a visa and the lack of transparency that was associated with that, that affects a parent's mental health profoundly and has enormous effects on the children's well-being.<sup>70</sup>

The link between visa uncertainty and mental health was dramatically displayed in January 2002. As set out in Chapter 8 on Safety, the Department's suspension of protection visa processing for asylum seekers from Afghanistan caused hunger strikes and lip-sewing.

The link between these issues is reinforced in an April 2002 DHS report on Woomera:

A general deterioration in detainee ability to cope with the uncertainty of life in the Centre has been noted over the past 4 months. This period has seen an escalation in protests, self-harm, and attempted and actual escapes. Identified factors contributing to the detainee condition:

- indeterminate length of incarceration
- cycles of raised hope Monday and Wednesday, followed by disappointment when they are not released on Tuesday and Thursday
- lack of understanding about the mechanisms/decision making process for visas
- rise in mythology about what might speed visas processing eg self harm ...

Continuous exposure to violence and self-harming behaviours is creating an unstable and unsafe environment in which psychological symptomatology such as suicidal ideation, disassociation, depression, restricted ranges of effect and anxiety are appearing in many of the children.

The mental health and personality of many of the children and young people is being severely impacted because parental guidance and authority is being undermined especially by the institutional nature of the facility.<sup>71</sup>

### 9.3.4 Breakdown of the family unit

The Inquiry heard extensive evidence of the breakdown of the family unit within the detention environment, in particular, from Woomera. All of the following comments concern families who have experienced lengthy periods of detention. Two of those families are discussed in detail in Case Studies 1 and 2 at the end of this chapter. Families who were detained for much shorter periods of time are less likely to experience family breakdown to such an extent.<sup>72</sup>

#### (a) The impact of detention on parenting generally

Experts generally agree that strong parenting is crucial to the development of children.<sup>73</sup> The AAIMH told the Inquiry that detention affects the attachment relationships between parents and their children:

attachment relationships are very much undermined by both the problems of parenting in detention but also doubly undermined by the high rates of mental health problems that parents experience as well.<sup>74</sup>

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They also informed the Inquiry that:

... detention has a pathogenic effect on parenting. The institutional experience of parents ... very much undermines their ability to care for their children. They cannot provide for children's emotional needs while they are in a situation of deprivation themselves.<sup>75</sup>

The head of the Department of Psychological Medicine at Adelaide Women's and Children's Hospital agrees that the detention environment has a direct and negative impact on parenting:

One of the systematic effects of detention in such a hostile environment is that ordinary people break down in their functioning, people who are competent to function as parents in a reasonably sympathetic or even an ordinarily hostile environment, in that very hostile environment lose the capacity to exercise their normal parental responsibilities. So effectively they are failing as parents.<sup>76</sup>

In April 2002, DHS highlighted that detention takes away the normal family environment where parents provide food, festivities, income and discipline:

Detention as a process impacts on the ability of people to live normal autonomous and self-directed lives. For families in detention there are ongoing tensions that arise in parenting when everything from discipline, cooking, and family gatherings are controlled by a range of prescribed processes and procedures ordered by artificial timelines. Within this environment parents are significantly deprived of their authority and their independence as family units. Their roles as breadwinner or primary carer is undermined by forced dependence on a system over which they have no control.<sup>77</sup>

DHS gave an example of a toddler's family who had been detained for more than seven months at the time:

Restricted parenting: Length of detention 224 days. The parents expressed concern over their lack of ability to enable the fulfillment of their parenting role, giving examples of their inability to prepare food and there not being adequate spaces for the child to play ... They reported they are often too tired or depressed to play or read to the child.<sup>78</sup>

ACM acknowledges the impact of the detention environment on traditional parenting, stating that:

some detainee parents may have experienced negative effects of institutionalisation, whereby the inherent structures lead to a sense of loss of control over one's environment and increased dependence on that structure.<sup>79</sup>

The Inquiry also heard that parents felt guilty and powerless; they had come to Australia to seek shelter for their children and instead put them in the hands of

detention authorities. For example, a psychologist who worked at Woomera told the Inquiry:

I saw parents age daily in detention as a result of the stress of detention. Over time many lost their ability to function effectively as parents and I saw family relationships break down. Parents felt guilt for what they thought they had done to their family in bringing them into this environment.<sup>80</sup>

In some of the families detained at Woomera the father's traditional role disappeared completely:

Mr Z was initially coherent and appropriate but became more and more angry and distressed as the interview progressed. At first firm with his son, he was at one point rough as he dragged him away from the door. His anger and despair about their situation and his guilt about bringing his family into the current situation were palpable. He feels unable to protect them, impotent and trapped, reduced to less than human himself and unable to fulfil his role as father and husband.<sup>81</sup>

## **(b) The impact of the declining mental health of parents on their children**

The Inquiry also received evidence that the declining mental health of parents in detention had a significant impact on children in detention. When the mental health problems of parents were so serious that they needed to be hospitalised, children ended up being separated from their parents for a period of time. This separation exacerbated the distress already felt by children.

The effect of depression on the capacity of parents to care for their children has been noted in many case files provided by the Department. Some parents, primarily mothers, have been hospitalised for major depression. Some have made numerous attempts at suicide. Others have become unable to interact properly with children or partners.

A child and family psychiatrist who assessed children detained at Woomera told the Inquiry of the long-term impact that the poor mental health of parents can have on their children:

I think there is a lot of literature which is very clear now on the impact on children of having parents with mental illness and these children are multiply disadvantaged because their parents are almost universally hopeless and despairing, sometimes so guilty about bringing their children to this environment that they feel like they should die and that their children would be better off without them.

She gave an example of a family where:

... the despair in the parents made it quite impossible for them to believe in themselves any longer as having anything to offer their children and so guilty that I think in some ways they did believe other people could offer them something better.<sup>82</sup>

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Parental depression often meant that they lost the interest and ability to keep a constant watch on their children. This exposed children to the risk of assault. In August 2002, DHS noted that:

Some staff have been critical of those parents who do not attempt to control their children's behaviour. However, other officers have said that many of these parents used to be more effective but are now (due to depression and lethargy) unable rather than unwilling to supervise their children in the compound.<sup>83</sup>

The longer that families are in detention, the further the capacity of parents to care for their children is compromised.<sup>84</sup>

### Example one

In September 2002, the Flinders Medical Centre documented the deterioration of a Woomera mother's ability to care for her child:

It also appeared to the interviewer that in terms of responding to and managing her children [the mother] was overwhelmed to the point where her personal and parenting resilience already eroded by the demands of long-term detention had little to draw on. [She] reported 'When I came here I was good' and, on at least two occasions [she] used the image of pressure building in her until it burst. In other words, she described the parenting opportunities afforded to her in detention as beyond her reach. ...

Given her circumstances it was not surprising that [the mother] struggled to remain emotionally available to her children in a manner that was responsive to their individual needs. This was evident in her depressed presentation, in what she said about her children and by observations regarding the manner in which she related with them. [She] appeared helpless to assist them in their distress and seemed to have learned that whatever she attempted in their regard was likely to worsen rather than assist their situation.<sup>85</sup>

### Example two

A second example concerns a family who arrived in Australia in April 2001. The parents, son (then aged 12) and daughter (then aged 10) were accompanied by an adult daughter with her husband and their ten-week-old baby girl.<sup>86</sup> A year later, on 11 April 2002, the mother was admitted to the Woomera detention centre medical clinic with anxiety and severe depression. The next day she was admitted to Woomera Hospital and remained there for five months.

A May 2002 psychiatric report regarding this family notes that both children are suffering from psychiatric illness, that the 13-year-old son 'meets criteria for major depressive disorder' and that the 11-year-old daughter 'meets criteria for major depression with significant anxiety symptoms'. The father reported his 'distress and guilt' at not being able to be a better parent:

The father was quite explicit in his acknowledgement that he is unable to be a father to his children at this time. He says that he is 'too old and tired', and too angry and frightened by what he describes as 'this killing place'. He could give no suggestions as to how he might make things better for his

children or be more supportive. That is, whilst he has an empathetic appreciation of how distressed his children are, he is unable to respond to their needs because of his own despair. He is aware that he is unable to offer his children adequate care and that he is not offering adequate parenting to his children at present and this adds to his distress and guilt.<sup>87</sup>

The report notes that the poor mental health of both parents and that the hospitalisation of the mother placed the children in the same position as unaccompanied children:

[I]n the present circumstances, and within the detention environment, neither parent is able to offer appropriate parenting to these children. ... Effectively [the children] are in the same position as unaccompanied minors. Indeed, in some respects they are worse off through having constant reminders of their parents inability to care for and protect them. They have effectively already lost their mother, due to the severity of her depression and her need for hospitalisation. Immigration authorities have recognised that it is inappropriate for unaccompanied minors to be in Woomera detention centre. On that basis alone, these children should be removed to a less traumatising environment, and, in order not to compound the trauma that they have already suffered, at least one primary caregiver should go with them.<sup>88</sup>

A chronology of the attempts at self-harm of the boy in this family is included in Case Study 3 at the end of this chapter. Following incidents of self-harm soon after his mother was hospitalised, the son was placed in the detention centre observation units and then was admitted to Woomera Hospital. The father accompanied his son to hospital, while the (then) 11-year-old daughter was left alone in their donga (sleeping quarters), on and off for ten days.

In May 2002, the head of the Department of Psychological Medicine at Adelaide's Women's and Children's Hospital concluded that both the children in this family had:

undergone a significant deterioration in functioning during their year at Woomera, most markedly since the intensification of their mother's dysfunction led to her hospitalisation in Woomera and separation from the rest of the family.<sup>89</sup>

### Example three

In a third example, detention contributed to the postnatal depression of a mother detained at Villawood and this, in turn, had a serious impact on the child who was born in detention. The mother was assessed by a psychiatrist in March 2002 who reported that:

[She] appears to be suffering from a severe agitated depression with associated panic attacks and phobic avoidance of [her daughter]. She has become profoundly anorexic and has ceased virtually all oral intake resulting in dehydration and hypotension. She also has signs of sepsis. The combination of major depression, physical compromise and infection is potentially life threatening and requires urgent treatment in a medical facility. She needs ongoing psychiatric care and management of her post-partum condition and relationship with [her child].<sup>90</sup>

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A doctor who assessed the mother in April 2002 recommended that:

Regardless of whether this family is to leave Australia or not, mother and infant should be discharged from hospital only when suitable care in the community has been arranged. They should not return to the detention centre.<sup>91</sup>

In May 2002, the NSW Guardianship Tribunal noted the connection between detention and her depressive symptoms:

[The mother] was experiencing some depressive symptoms prior to her delivery. Her daughter was born in detention and her symptoms were greatly exacerbated after delivery and with exposure to various stressors. ... [She] was reviewed by a number of doctors at Villawood prior to her admission to [hospital] ... [she] was emaciated and self-harming while in detention...

[The mother] has depressive and anxiety symptoms based on fear of detention and fear of return to Iran. This is a persisting condition and the symptoms place [her] at risk as well as placing her child at risk.<sup>92</sup>

A psychiatrist further noted that returning her from hospital to Villawood detention centre would exacerbate her symptoms:

If [the mother] was to return to Villawood she would be at grave risk of self harm. The response to provide intensive support to [the mother] in the detention centre environment would be to institute a suicide watch and surround her with more guards which would only serve to exacerbate her symptoms and distress. ...<sup>93</sup>

The psychiatrist said that he believed that the mother would attempt suicide on return to Villawood. He quoted a suicide note from 14 May 2002 in which she states: 'I am not able to live any more in that place, 'Detention Centre''.<sup>94</sup>

At the same time the mother reported the following:

[The mother] advised that it was very difficult for her to live in the detention centre and that she could not imagine being sent back there. She advised that for the whole year she was there, she had no appetite to eat and she cried all the time. She advised she cried at night when her husband and her baby were asleep and eventually, she would fall asleep exhausted only to have nightmares. She advised she was very worried about her baby whilst she was in the detention centre and she experienced problems overfeeding and underfeeding her baby. She was humiliated in having to ask visitors to bring clothes for her child.<sup>95</sup>

The mother's poor mental health and her temporary separation from her child when hospitalised both had a significant impact on the child. The Director of the Office of the NSW Public Guardian reported to the Inquiry:

there were questions as to whether there were very, very early signs of some concerns about the relationship between the mother and the child, basically, because the child had been separated and the child hadn't fully bonded to the mother.<sup>96</sup>

On 30 May 2002, the NSW Guardianship Tribunal concluded the following about the connection between detention, the mother's health and the impact it had on her parenting:

[The mother] is currently suffering from a mental illness in the form of a significant and chronic depression which is extremely exacerbated by the circumstances of her detention and the prospect of her having to return to reside in a detention centre. ... [She] has a mental illness creating a fragile mental condition whereby she is unable to adequately work through and separate the complex problems of detention, the care of her child and her plans for the future without serious effects on her mental health.

The evidence before the Tribunal on this occasion was that a return to a detention centre would almost certainly precipitate another episode of self-harm. Further, any reasonable steps that could be implemented to avoid another attempt at self-harm are only likely to exacerbate [the mother's] condition.<sup>97</sup>

#### Example four

In a fourth case, a family, composed of a father, mother and five young children and a baby, were detained at Woomera for 12 months. When their refugee application was rejected staff were concerned that the parents' distress might lead to some harm to the children.<sup>98</sup> Both parents were isolated (the father in Oscar Compound, the mother initially in the medical centre's observation room and then Oscar Compound) and their nine-year-old daughter was left to look after her five little brothers, under the observation of ACM officers with child care experience.<sup>99</sup>

Following the separation, ACM records indicate that supervised and limited contact between the mother and children was facilitated for the most part on a daily basis.<sup>100</sup> However, the separation itself and the manner in which the separation was managed appear to have caused distress to the nine-year-old girl.

According to the South Australian child welfare authority, who were visiting Woomera at the time, when the mother and father were taken by security staff to the medical centre there was no interpreter present to explain to the younger children what was going on.<sup>101</sup> ACM staff reported the end of the child's visit as follows:

[The girl] was informed of mother's detention in observation rooms of medical, when she returned from a day trip by officers. When she was brought to medical to see her mother she was crying profusely. Officers took the child to observations after she expressed fears of being locked in. Once in with her mother they were both crying and sobbing. As the distress levels rose it was decided to remove [the girl] from the observation room. This required four female officers and [the girl] was screaming and resisting.<sup>102</sup>

The Department asked FAYS if they would support contact between the children and their mother if it was properly supervised, and FAYS readily agreed:

DIMIA decided that just [the nine-year-old daughter] and mother could meet that afternoon and 'if they didn't get upset and refuse to part from each

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other' then further access would occur. FAYS advised [the DIMIA Deputy Manager] that the child would be upset during contact with the mother regardless (this was normal) and that the child would not part from mother if she didn't know when she would next see her...

Despite this advice – and [the DIMIA Deputy Manager's] verbal agreement at the time – subsequent information from the Psychologist indicated that conditions about 'behaviour' were placed upon this child before her first contact.<sup>103</sup>

ACM records also show that on another occasion the daughter was prevented from visiting her mother because of the child's 'bad behaviour'.<sup>104</sup>

The Department notes that the family were only separated for a short time and that it took a number of key steps to ensure the unity of the family. These included encouraging the daughter to attend school and encouraging positive behaviour by the mother. However, as FAYS concluded, 'the decisions and actions by staff in relation to this family caused significant trauma to these children'.<sup>105</sup>

The four examples set out above demonstrate that the impact of ongoing detention on parents also has an impact on the mental health of children. Sometimes the mental health problems of parents declined to the point that they were hospitalised, placed in observation rooms or separation compounds. In these cases the children were separated from one or more of their parents. While the Department and ACM sought to maintain some level of contact during these periods the separation appears to have created additional stress for children. The detention environment clearly contributed towards family breakdown and this had an impact on children.

### **(c) The connection between detention and children taking on adult roles**

As demonstrated above, after extended periods in detention, some parents are unable to continue actively looking after their children. This sometimes leads to children taking on the adult role.

Dr Louise Newman of the NSW Institute of Psychiatry describes this as inappropriate for children:

I think sadly we are seeing, particularly in the young children, almost a situation where the children try, developmentally inappropriately, to parent the parents. The children are sometimes dealing with immigration officials and guards in a direct way, making requests because sometimes the children have better English.

They take on emotionally an undue burden of responsibility and care. So we've seen that on numerous occasions with quite young children exhibiting what we would call a role reversal in their relationship with their parents ... Ultimately that's very harmful for children because they're sacrificing their own needs. So some pseudo mature behaviour in a lot of these children is quite common, children five, six, seven looking after younger siblings and other little children as best they can because sometimes parents are not able to do that themselves.<sup>106</sup>

A teenage Afghan girl told the Inquiry that:

My mum was sick always. She was very sad. Every night she was crying until one or two o'clock because we lost our father and she was crying. But now we are big and we look after her. My mum is always worried about the visa. Sometimes she has headaches.<sup>107</sup>

One mother told the Inquiry of how her toddler attempted to comfort her when she was distressed:

... my friend got a psychiatrist to come in from outside to do an assessment and they give me a report. And having the report, I realised how stressed [my child] was, because she's taking the role, when I'm like upset, she's taking the role of the mother, she's comforting me and that is not for a [little child].<sup>108</sup>

At Woomera, an ACM officer noted that the nine-year-old girl, described in the previous section on separation, was providing much of the care for her five younger brothers. She described the impact on the child as follows:

Resident [nine-year-old girl] is becoming increasing[ly] withdrawn, her attitude towards staff is becoming progressively more negative. She lacks a confidant[e] and has no effective outlet to express her emotions. She appears tired and depressed. She provides much of the fundamental child care needed for her 5 younger brothers and lacks the support she needs in order to effectively cope with such responsibility. It is my recommendation that these matters be reported to FAYS so that [she] may obtain the assistance she requires and be provided with an avenue of self expression external to ACM.<sup>109</sup>

In another family, an 11-year-old boy was preoccupied with caring for his parents:

[the child] told me ... that he wanted someone to look after him as he was caring for both his mother and father himself. He said that he stayed up all night by drinking coffee so that he could keep watch over them.<sup>110</sup>

ACM informed the Inquiry that it had been greatly concerned about the mental health of this family for over 12 months and that:

Following exhaustive external psychological and psychiatric assessment, professional opinion unanimously declared that little could be done to help this family whilst they remained in the detention environment.<sup>111</sup>

This family is discussed further in Case Study 1 at the end of this chapter.

### 9.3.5 Living in a closed environment

The environment in which a child lives is closely connected to their mental health. Children, parents, child protection authorities and psychiatrists all expressed concern to the Inquiry that the closed environment of the detention centre was detrimental to the mental health of children.

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Many children and parents described to the Inquiry the impact of being surrounded by fences and razor wire:

I felt so bad staying in a place surrounded by razor fence. I can't understand and I always asked 'Why did they take me here?' ... It was scary.<sup>112</sup>

A father in detention said that the continuous locking and unlocking of gates sent the children 'crazy':

You should also realise that what kind, what a situation is going on with us. From the gate you came here, until here how many doors they opened for you? Is it humanity that they have made that many doors? They open and close, open and close. It's made the children crazy – mentally they are affected. Every day they go to the gate, they open the gate and close the gate and just the noise of those chains and the locks can make them crazy.<sup>113</sup>

Although the Inquiry heard evidence about the impact of the prison-like environment from all centres, the most consistent comments were regarding the new Baxter facility. One father said:

It is like a prison here. There is a fear in us when we see the cameras everywhere and the doors are all electronically opened. They only gave us a room with a toilet inside, like an ensuite. We don't have anything to have a good time with. It is only a land with grass and all around us there are rooms that other people live in. We can only see the sky and the grass.<sup>114</sup>



Family compound at Baxter, December 2002.

The Inquiry also received evidence about the impact of security practices at Woomera. In April 2002, the South Australian child protection agency described the security environment at Woomera as follows:

Centre staff controls all contact with the outside world, and movements, social engagement, religious practice, access to health care, and recreation within the facility. The constraints of security procedures ... results in much of the day to day control of detainee behaviour including that of children and young people within the facility resting with centre staff.<sup>115</sup>

In August 2002, DHS found that security needs at Woomera took priority over the needs of children:

The children at Woomera are living within an environment that is controlled and regulated. Most of the people they see are in uniform, including medical staff. The day-to-day administration of the centre is not flexible enough to minister to the needs of the children in any consistent way. **Security needs take priority over everything else.** ...

The major concern about the circumstances of children in this environment is that their needs are only addressed when possible, rather than as a matter of priority. The issues of centre security and safety of staff always take precedence, as one would expect within a detention facility. There is no argument with this.

However, it then follows that children within such a facility will never have their educational, developmental and emotional needs adequately met unless security and staff safety needs are compromised. This is the insoluble dilemma when children are held in a detention system designed for adults. [emphasis in original]<sup>116</sup>

A 2001 psychological study on the impact of long-term detention also described the security environment at Villawood, as intimidating:

The physical environment at Villawood is intimidating in a number of respects. Each compound is surrounded by multiple layers of high fencing topped and grounded by razor wire. All visitors must pass through high security checkpoints. Within the detention centre, there are multiple daily musters and nightly head counts, which may occur at 2am and 5.30am. The public address system, which operates almost continuously from 7am to 9pm, is also disturbing.<sup>117</sup>

The security environment is discussed in further detail in Chapter 8 on Safety.

### 9.3.6 Safety

The Inquiry frequently heard that children are particularly affected by witnessing violence in the centres. Chapter 8 on Safety discusses the threats to the safety of children in detention, including the exposure to violence, riots and self-harm including hunger strikes. This section considers the impact of that exposure on children's mental health.

## A last resort?

The Inquiry heard expert evidence about the impact of trauma for children in detention. A psychiatrist who consulted and treated some children detained at Woomera told the Inquiry that witnessing violence can reactivate past trauma:

The other thing I would say is that one of the families that I spoke with in Woomera who are still in detention, it is not 5, 6 months, it is like 17, 18, you know, two years in detention. What had occurred for them was that witnessing the riots or the fires in Woomera and the experiences with the guards had actually reactivated for them experiences of war or trauma in their country of origin and they had believed, for example, that their parents were dying in the compound that was on fire and they felt unable to either get away from it or do anything. So there was a kind of exaggeration or re-activation of previous trauma.<sup>118</sup>

DHS described a child whose behaviour was severely affected by witnessing violence at Woomera:

Length of detention: 12 months. Parents expressed concern for their 3 year old. They believe that he is abnormal. They state that he is very active and has picked up bad habits from what he observes in his environment, including bad language, climbing and jumping, violence against himself and others and saying he wants to drink shampoo. They indicated they found him hard to control, which they attributed in part to the deprivation of normal parental responsibilities that occur in the centre. The child has begun wetting the bed again and sometimes screams in his sleep.<sup>119</sup>

Detainee parents also reported the impact of witnessing violence or severe disturbances on the psychological well-being of their children. The mother in a family detained at Port Hedland told the Inquiry:

The mental disturbance of our children happened since last May when the guards in uniform raided our home, our living quarters, and the children were asleep and when they woke up and realised that they have raided in, and with seeing that uniform, from then on they were very much disturbed.<sup>120</sup>

A father from another family detained at Port Hedland reported that his 'children are impacted upon by this violence. It causes mental impact on them, mental disturbances'.<sup>121</sup>

The mother of a family detained at Woomera reported that:

Because children are for a long time detained in here and all the time they see a bad view like suicide, guard, batons, tear gas, bad things, abusing, insulting, so it's made the mentality of them so worse than before.

My little child and particularly this one, in midnight they are suddenly woke up and see bad dreams all the time he is stick himself with me, all the time he is sleeping with me, he get my hand 24 hours a day. In mid-night he woke up, screaming, always frightened, something when happen inside the compound, he is really afraid like, a day before yesterday, he was really scared and he is really depressed and not comfortable in here.<sup>122</sup>

The Department stated that it:

is deeply concerned that children do on occasions witness violence. It makes every effort to prevent undesirable actions occurring and to ensure that children are not exposed to them.<sup>123</sup>

### **9.3.7 Treatment by detention staff**

The Inquiry received evidence that the manner in which children were treated by some detention staff caused distress to certain children. The evidence raises three specific factors:

- (a) disrespect shown to children by some detention staff
- (b) calling children by number rather than name
- (c) detention staff were not generally trained to work with children.

#### **(a) Treatment with respect**

Detention officers clearly fulfil a demanding role. ACM informed the Inquiry that:

The demands and behaviour of detainees can be extremely challenging, particularly when the reasons relate to detainee dissatisfaction with Government policy and Departmental decision-making.

ACM also reported that the majority of staff employed at Woomera were highly committed to assisting detainees, worked hard in difficult circumstances, and were often the target of detainee frustration with the processing of protection visa applications.<sup>124</sup>

A psychologist who worked at Woomera for seven months during 2001 told the Inquiry that:

From my observation, staff generally treated children appropriately. Sometimes they were stressed, but I regarded them as doing their best for the main part.<sup>125</sup>

The Flood Report also acknowledged the difficult task of detention officers and found that they were sometimes misunderstood by the Australian community:

The management of people in detention centres is an incredibly complex and important task. There are many dedicated Australians – nurses, doctors, detention officers, teachers, welfare counsellors, managers and public servants – helping in this process, often in remote localities, and sometimes encountering misunderstanding in the community for their part in administering policies determined by successive governments and laid down in relevant legislation. There needs to be greater public appreciation for the important and demanding work that they undertake.<sup>126</sup>

A detention officer gave the Inquiry an example of the unnatural dynamic created by the detention environment. The officer explained that during large disturbances the children who were their friends the day before were suddenly throwing stones

## A last resort?

at them. On the other hand, children would say that the officers that were their friends one day were standing opposite them in riot gear the next.

Thus, while the Inquiry accepts that most staff were doing their best to treat children appropriately, it is clear that there was sometimes a tense relationship between detainee and detainer.

A DHS report expressed concern regarding the attitude of some ACM staff towards children:

[T]he increased tension in the centre environment and the deterioration in the behaviour of some of the older children are factors that can deplete the ability of staff to maintain a balanced and compassionate attitude to the detainees in general and the 'difficult' children in particular. Some officers have managed to find this balance but others have not.

The general negativity about the detainees expressed by many officers would be an issue of major concern for management if it were occurring in, for example, a FAYS residential facility [for South Australian state wards].<sup>127</sup>

One mother from Woomera told the Inquiry in January 2002 that ACM officers frightened her children:

Very bad treatment, they treat very bad, they frighten them. If the kids play, officers shout at them very loudly.<sup>128</sup>

Another mother described the treatment as inhumane:

What I can say is that their behaviour and treatment of the children is not humane. Once he was hungry and I took him to ACM and said he was hungry. The ACM officer said, 'what can I do? If you want I can give my shoes for him to eat.'<sup>129</sup>

The community organisation ChilOut described ACM staff throwing food at children:

On occasion, when children were given fruit, guards would throw the fruit at them, as if the children were animals, rather than hand it to them. On one occasion a guard threw an apple to an adult detainee. The detainee threw it back again and a fight broke out. A group of children witnessed this event and began throwing food at the guard.<sup>130</sup>

Former detainee children provided another example regarding food:

Once a woman asked one of the boys to get her some milk for her small child. The boy went to an ACM officer who said, 'Sure you can have some milk', and tipped the whole bottle of milk out on the ground in front of him.<sup>131</sup>

The Inquiry also received evidence of ACM officers using obscene language when speaking to detainees. For example, the Port Hedland Department Manager's report for the final quarter of 2000 states that:

A number of allegations were received from several sources, including DIMA staff, that some ACM staff had used offensive language or were behaving in

a rude manner towards detainees. These matters were brought to the attention of ACM management for investigation and rectification.<sup>132</sup>

An unaccompanied refugee child detained at Port Hedland during 2001 told the Inquiry that he learned English swear-words from detention officers:

One of the officers was swearing at me all the time, she was an officer from our area, she was continuously insulting us – I cleaned there – so I learnt all the words, didn't know any before. She called me 'dickhead', 'little bastard' and 'pimp' a lot, even to my brother 21 years old, she swore at him too.<sup>133</sup>

The parents of three young boys at Woomera told the South Australian child welfare authority that:

[T]he boys have developed behaviours e.g. swearing, being aggressive to each other, which is inconsistent with the parents' values e.g. they say 'fuck' because (it is alleged) they have learnt from custodial staff.<sup>134</sup>

A nurse employed at Woomera for more than 18 months from 2000-2002 described the derogatory language used by some ACM detention officers as follows:

Behaviour which was quite common, in fact almost every time a guard opened their mouth to speak to a detainee or to speak about a detainee, they would use derogatory remarks toward them, including the women and children. This included using words like 'scum, wog/s, cunt, little cunt, slut, trash, vermin, asshole/s, boaties, rezzies'. Not every guard spoke this way to [or] about the detainees, but many did, and this included speaking to them like this to their face and also in front of them as if they didn't exist (in the 3rd person).<sup>135</sup>

This evidence is supported by the Flood Report that noted:

Credible witnesses have told me of derogatory remarks to detainees, humiliation of people in room searches and people sworn at in an abusive manner. I am satisfied on the basis of the credibility of these witnesses that these claims are valid. They apply to a small minority of detention officers.<sup>136</sup>

ACM admitted the possibility that:

a small percentage of staff, do from time to time, display behaviours that are professionally unacceptable or that are not in accordance with the code of conduct. Where ACM is aware of such behaviour appropriate disciplinary action is taken.

ACM further informed the Inquiry that it:

understands institutional environments and the corresponding potential impact for some staff. This does not excuse or condone the type of behaviour described. Nor does this prove that this conduct was systemic or condoned by ACM.<sup>137</sup>

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### (b) Calling children by number

The Inquiry received a great deal of evidence that children in detention have been called by number rather than name, and that this had a negative impact on them.

The *Government's Specific Responses to Flood Report Recommendations*, made in February 2001, stated that it was 'no longer practice in detention centres for ACM or DIMA staff to refer to detainees by registration numbers'.<sup>138</sup> However, during the Inquiry visit to Woomera in January 2002, the ACM Centre Manager advised, and the Inquiry observed, that all detainees at Woomera were referred to by number, not name.

A teacher who worked at Port Hedland in early 2001 told the Inquiry:

You know, there was a Christmas concert that was held in mid-December and I think some local church groups had donated some nice little presents for the children. And one officer stood up and started to call the children for their presents but called them by their numbers. And the ACM Centre Manager ... called this officer aside and said, 'Look we have visitors in the centre. You cannot call them by number. Call them by their names'. And the officer replied he didn't know what their names were. So the actual present giving ceremony was abandoned because they weren't aware of the names of the kids.<sup>139</sup>

Unaccompanied children formerly detained at Curtin said the use of numbers made them feel 'like animals' and 'like you have a cow tag or something on you'.<sup>140</sup> Another child told Inquiry officers that 'they have made me forget that I have a name'. An unaccompanied child stated that:

I often asked myself and so did the others 'why did we come here?' ... My parents would regret their decision. ... I feel like I did something wrong, like I was being punished. ... Sometimes I feel like the ACM staff treated us like animals. They don't know how much my mother loves me. ... They yell for us to line up, do this, do that. They call you by your number.<sup>141</sup>

The Inquiry acknowledges that given the wide variation in the spelling of detainees' names, often within the same document or file, the use of numbers may well be good record-keeping practice. One father told the Inquiry that numbers were the only way to ascertain that detainees got the correct medication, and that nurses working with names only had given medication to the wrong person.<sup>142</sup> However, it is a completely different matter when children, and the adults around them, are routinely addressed by a number rather than a name.

ACM acknowledged to the Inquiry that:

In some detention centres, a practice occurred of referring to detainees by number. When ACM Senior Management became aware of the practice, despite the explanation that this was the preferred address by some detainees or the practice resulted from an inability to correctly pronounce detainee names, directions were issued to cease the practice.<sup>143</sup>

The Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) acknowledged in April 2002 that children should not be called by name and referred to his direction that this should not occur.<sup>144</sup> During visits to immigration detention facilities later in 2002, the Inquiry observed that the practice of calling detainees by their numbers had ceased.

### **(c) Training on how to treat children**

The Inquiry was concerned to determine whether ACM staff were appropriately trained and qualified for working with children. Although some of the professional staff have child welfare qualifications, the majority of ACM staff are 'Detention Officers' (guards) without specific training or expertise in working with children.

A qualified youth worker, employed at Woomera from May 2000 to January 2002, told the Inquiry that:

No training in child management was made available to staff upon employment in the centre. Some staff, such as myself, had experience and qualifications in relation to working with children, but others did not. One hour of our induction dealt with mandatory reporting requirements in relation to child abuse and harm. I regarded this training as inadequate.<sup>145</sup>

Another ACM officer with child protection experience, employed at Woomera in 2000, said that:

Staff at [Woomera] were mostly from a prison background and not appropriately trained to care for children. They did not understand the developmental stages and psychosocial educational needs of children, or how best to talk with and manage them. It was apparent that many did not understand the cultures or experiences of these particular children and no training was given to help them deal with these issues.<sup>146</sup>

In August 2002, the Perth detention facility conducted a refresher course on 'Children in Detention'.<sup>147</sup> While this is a welcome development, it is hoped that the training will also occur in facilities where children are normally detained.

## **9.3.8 Findings regarding the factors leading to mental health and development problems for children in detention**

It is no secret that the institutionalisation of children increases the risk of mental health problems.<sup>148</sup> Evidence from current and former detainee children and their parents, former ACM medical staff, Department Manager reports, State child protection agencies, State mental health agencies, independent mental health experts, torture and trauma services and community groups involved with current and former detainees all confirm the detrimental impact that long-term detention of children has on their mental health.

While there are a number of factors that contribute to the mental health problems found in children in detention, all of those factors are either a direct result of, or exacerbated by, the long-term detention of children and their families.

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In no particular order of importance, some of the important factors that can contribute to the mental health and development problems of children in detention include:

- prior torture and trauma
- the length of detention
- uncertainty and negative visa outcomes
- breakdown of the family unit
- living in a closed security environment
- exposure to violence.

Pre-arrival experiences of torture and trauma can have a significant impact on the mental health of child detainees. However, mental health experts have found that at best long-term detention 'exacerbates' those conditions and at worst it 'out-strips' that past trauma.

The Department, ACM, mental health experts and children themselves agree that the longer the period of detention the more likely it is that children will have mental health issues.

Negative visa outcomes impact on the psychological well-being of children and their parents in two ways. First, it leads to uncertainty and disappointment about a family's future in Australia. Second, it leads to a longer time in detention. The combination of factors magnifies the impact of each.

Long-term detention also has a significant impact on the family unit. Case Studies 1 and 2 at the end of the chapter, and the examples discussed above, demonstrate how serious this problem can be. Detention not only takes away the normal family environment where parents have autonomy and control of the day-to-day life of a child, it can have a serious impact on the mental health of parents. These factors diminish the supportive role that parents would normally play for their children. In some cases this has led to role reversal, with children inappropriately taking on the supportive role. In other cases the poor mental health of one or more parents has resulted in hospitalisation, medical observation or security separation. This has led to separation of children from their parents. While efforts have been made to provide opportunities for contact, the separation has exacerbated the stresses already facing children.

A living environment whereby children are surrounded by fences, razor-wire, locking and unlocking gates and detention officers has also impacted on children as has the violence that sometimes erupted around them.

The Inquiry has not received evidence suggesting a systemic and direct link between the treatment of children by detention staff and mental health concerns – in particular, children – and therefore finds that this was not a primary cause of the mental health problems found in children in detention. Nevertheless, while detention officers worked in difficult conditions, and while most detention staff did their best to treat children appropriately, some did not treat children with the respect that they deserved. Several children and parents described the inappropriate language that they had learned

from detention officers. Until 2002, staff in some detention centres referred to children by number rather than name, which has a dehumanising effect on children. The Inquiry has not received evidence that detention staff received training regarding the treatment of children other than in August 2002 in the Perth detention facility (where no children are detained).

## **9.4 What was the nature and extent of the mental health and development problems suffered by children in detention?**

The Inquiry received evidence regarding the range of mental health problems suffered by children from a variety of sources, including individual psychiatric reports on children in detention, reports from State mental health agencies who treated children in detention and psychiatric studies regarding children in detention. All of these sources indicate that some children in detention have experienced significant mental health problems, particularly those children who have been detained for lengthy periods of time. Some of those problems were diagnosed mental illnesses and others were more general problems affecting the psychological well-being of children in detention. At the same time, the Inquiry acknowledges that many children, particularly those detained for shorter periods of time, did not suffer significant harm to their mental health.

The Inquiry has not attempted to draw precise conclusions regarding the statistical prevalence of mental illness caused by the detention experience. However, there have been several recent studies conducted by psychiatrists and psychologists in Australia which have examined the impact of detention on the mental health of sample groups of child detainees. The South Australian child protection and mental health authorities have conducted several assessments of children in Woomera over 2002. Those assessments suggest that the prediction of the Alliance of Mental Health Professionals regarding the adverse impact of detention on children's development, psychological and emotional health was correct (see section 9.3).

For example, a study of 33 detainees at the Villawood detention centre in 2001 describes the range of psychological disturbances experienced by children in detention as follows:

A wide range of psychological disturbances are commonly observed among children in the detention centre, including separation anxiety, disruptive conduct, nocturnal enuresis, sleep disturbances, nightmares and night terrors, sleepwalking, and impaired cognitive development. At the most severe end of the spectrum, a number of children have displayed profound symptoms of psychological distress, including mutism, stereotypic behaviours, and refusal to eat or drink.<sup>149</sup>

A more recent study of the mental health of children in detention was completed in early 2003 by health professionals from five institutions (the 2003 Steel Report). The study considered 20 children from the same ethnic background in a remote detention centre between 5 September 2002 and 13 February 2003. The average

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period in detention of these children was 28 months. The study found that all 20 children were suffering from psychiatric illness:

All but one child received a diagnosis of major depressive disorder and half were diagnosed with PTSD. The symptoms of posttraumatic stress disorder experienced by the children were almost exclusively related to experience of trauma in detention. Children described nightmares about being hit by officers, and many of the children (13, 65%) were described by their primary caregiver as having episodes where they would scream in their sleep or wake up shouting.

Half of the children manifested separation anxiety disorder, whilst the majority of other children experience persistent symptoms of separation anxiety but at a level that did not warrant a diagnosis of this disorder.

Over half of the children in the target age group for enuresis (5 to 12 years of age) suffered from the disorder, regularly wetting themselves three or more times a week. Almost half the children assessed had developed behaviour consistent with a diagnosis of oppositional defiant disorder. More than half of the children regularly expressed suicidal ideation, many thought it would be better if they were dead and made statements such as "there is no point in life, one must die, I wish I was not in this world." A quarter (5) had self-harmed either by slashing their wrists or banging their heads against walls (2).<sup>150</sup>

The authors of this report acknowledge the small sample group but note that this was 'an almost complete population of detained families (10 or 11 families) from one language group in a single detention facility'. They find a clear link between detention and mental health with the level of psychiatric illness in those children increasing tenfold over the period of detention.

The reliability of this study has been criticised by both the Department and ACM. The study itself recognises its strengths and weaknesses in coming to its findings and the Inquiry has taken these into account in assessing it.<sup>151</sup> The Inquiry notes, however, that the findings of the study are consistent with the findings and observations of a range of other experts about the impact of detention on asylum seekers. For example, a recent study from the United States finds that prolonged detention has a lasting negative mental health impacts on detainees.<sup>152</sup>

Other experts have also reported mental health problems in detainee children, particularly those who have been detained for lengthy periods of time. For example, the CAMHS summary report regarding 14 children and their families referred from Woomera, between January and July 2002, provides an overview of the kinds of mental health problems experienced by children in detention.<sup>153</sup> The summary

presents a disturbing picture of the mental health of certain children detained at Woomera during this period of time:

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### **Summary of Children and Families in Woomera IRPC Referred to and Assessed by Child and Adolescent Mental Health Services, January to July 2002**

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**Children under 5 years:** These 4 children aged 11 months, 2½ and 3, 3½ years have all spent at least half their lives in immigration detention. They present with various symptoms related to exposure to violence and chronic parental depression that include delay in expected milestones, particularly language and behavioural regulation (including continence). One has phobic symptoms related to exposure to riots in the centre.

**Children aged 7 to 17: 10 children (mean age 12.9 years):** A decision was made to include pre adolescent children in this section of the report because of their very similar presentations. **The severity of symptoms related to thoughts of, and actual self harm in preadolescent children is extremely unusual in other populations, and very concerning.**

1. All of these children expressed recurrent thoughts of self harm. At least 7 of the 10 children have acted on these impulses, cutting or hurting themselves, attempting to hang themselves, drinking poisons or refusing food for many days as a suicidal act. At the time of writing, self destructive behaviour amongst this group of children has escalated to daily cuttings, hanging attempts and provocation of conflict with ACM staff, which can in itself be understood as self destructive.

2. All were troubled by intrusive memories and thoughts of adults, including their parents, self harming. This included graphic witnessing of attempted hangings, slashings and self-poisoning. Most fulfilled criteria for a diagnosis of post traumatic stress disorder [PTSD]. Some also reported intrusive memories of traumatic events prior to arriving in Australia.

3. All reported a sense of futility and hopelessness, for some this was predominantly associated with anger, (including current acting out and provocation of ACM staff), for others despair and withdrawal. All were troubled by recurrent thoughts of death and dying. Those who have not yet self harmed reported feeling afraid they would be unable to stop themselves repeating the behaviour witnessed in the adults.

4. All had trouble sleeping, reported poor concentration, little motivation for school and overwhelming boredom. Most had lost weight. All fulfilled criteria for major depression with suicidal ideation. Several also have significant phobic or generalised anxiety symptoms. These are associated with anxiety about their parent's survival or traumatic experiences with ACM staff.

5. All reported anxiety about their parent's well being. All have parents who are significantly depressed and may have attempted, certainly expressed suicidal ideation. One has seen his father psychotic and dancing naked in the camp. Another mother cut herself and wrote on the wall in her blood. All parents have been assessed or treated for depression and PTSD (several had been psychotic).

6. Many of the children were being required to assume roles and responsibilities of adults because their parents were unable to do so because of their own ill health. An example is an 11 year old girl with several siblings under 5 who is doing most of the parenting for her siblings as mother and father are unable to do so. Another example is an 11 year old boy left to care for his 3½ [year old] brother during many weeks while their mother was in Woomera hospital with psychotic depression. They were notionally in the care of their estranged father. This boy was sexually assaulted and harassed by other men in the camp during this time. There were few options available to keep him safe while his mother remained unwell.

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7. All the parents expressed considerable guilt and despair about bringing their children into this traumatising and hopeless situation. Some of them express a wish to die in the belief their children may fare better without them. One believes god is calling her and her son to die...

**While each family has particular issues and difficulties, an overwhelming feature of the assessments was the clear evidence of the detrimental effects of the detention environment on the children both directly, (including inadequate developmental opportunities, exposure to violence and adult despair and removal of hope for their futures), and indirectly, as a consequence of parental mental illness.** [Emphasis in original]<sup>154</sup>

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A further psychiatric study considers 10 consecutive referrals to CAMHS between February and August 2002.<sup>155</sup> In this study, information obtained in a series of detailed clinical interviews undertaken by a range of experienced mental health professionals during 2002, was used to develop consensus diagnoses on each individual child and adult assessed. The study included ten families, including 16 adults and 20 children aged from 11 months to 17 years, and represented approximately half of the children detained in the centre at that time. Following is a summary of the study's main findings:

### **Children under five-years-old (ten children):**

- Five (50 per cent) presented with symptoms including delays in language and social development and emotional and behavioural dys-regulation.
- Three (30 per cent) showed marked disturbance in their behaviour and interaction with their parent or carer, indicating disturbances or distortion of attachment relationships.
- Over time a further three children in this age group were diagnosed with severe parent-child relationship problems, particularly oppositional behaviour and separation anxiety.

### **Children aged six to 17 years (ten children):**

- All fulfilled criteria for post traumatic stress disorder.
- All were troubled by experiences since detention in Australia. One also reported troubling thoughts about events on the boat to Australia as well as experiences in the detention centre.
- All reported trouble sleeping, poor concentration, little motivation for reading or study, a sense of futility and hopelessness and overwhelming boredom.
- All fulfilled criteria for major depression with suicidal ideation.
- Three (30 per cent) reported frequent nocturnal enuresis since being in the detention centre.
- All reported recurrent thoughts of self-harm. Eight (80 per cent) had acted on these impulses, including three pre-adolescent children.
- Seven (70 per cent) had symptoms of an anxiety disorder.
- Half (50 per cent) reported persistent severe somatic symptoms, particularly headaches and abdominal pain.

**Family impact – parental mental illness:**

All children had at least one parent with a major psychiatric illness. All had seen adults self harm, often their parents. In both sole parent families the parent had been hospitalised with a psychotic illness leaving children alone in the camp. During this period, four parents required psychiatric hospitalisation.

On the other hand, while ACM acknowledged that the 'assertion that detention has an impact on detainees ... simply reflects the findings of at least three decades of research,' it has also submitted that there was an 'extremely low' incidence of mental health problems regarding the 81 children in detention as at July 2003 (excluding the Woomera Residential Housing Project). ACM submitted that, having reviewed the medical records of all 81 children, only 6.2 per cent of children were suffering from depression, 1.2 per cent were suffering PTSD and 12.3 per cent were suffering developmental delay. ACM has asked the Inquiry to consider the review as 'the most accurate and compelling information available to the Inquiry'.<sup>156</sup>

There are, however, a number of problems with the claim made by ACM as to the incidence of mental health problems and the information upon which it is based. First, ACM's statistics focus on those children for whom there has been a medical diagnosis of 'developmental delay', 'clinical depression', or 'post traumatic stress disorder'. The CRC requires a broader consideration of mental health. For example, problems like anxiety, distress, bed-wetting, suicidal ideation and self-destructive behaviour, which are noted in the studies cited earlier, are relevant to an examination of whether children have enjoyed the highest attainable standard of health and the maximum possible opportunities for development.

Second, the primary records before the Inquiry suggest a higher incidence of mental health problems than is acknowledged in the information provided by ACM. The Inquiry has identified discrepancies in evidence regarding five children about whom the Inquiry has detailed records.<sup>157</sup> This raises concerns about the overall reliability of the ACM review.

Third, the figures relied upon by ACM did not include children in the Woomera Residential Housing Project (RHP). The documents before the Inquiry indicate that at least three children detained there in July 2003 had been diagnosed with depression.

The Inquiry also notes that, to the extent that the information presented by ACM may be said to reflect the incidence of mental health problems for children generally over the period of the Inquiry, that information is at odds with the weight of evidence provided to the Inquiry. For example, State mental health experts and ACM medical staff report higher numbers of children suffering from these disorders, as discussed below.

Considering the weight of evidence before the Inquiry, the Inquiry has concluded, on balance, that it should not rely upon ACM's assessment of the mental health of children in making a general conclusion as to the extent of mental health problems for children in detention.

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However, as stated earlier, the Inquiry has not sought to determine the exact statistical prevalence of mental health problems because, irrespective of the total numbers of children who have suffered mental health problems as a result of detention, human rights are designed to protect each and every individual. To the extent that the detention of any child prevents that child from enjoying the highest attainable standard of health or an environment that fosters their rehabilitation from past torture and trauma, there may be a breach of international law. Therefore, while the Inquiry is concerned by the studies suggesting relatively high numbers of children in detention with mental health problems, the exact figures are not important.

The evidence the Inquiry has received from mental health experts who have examined children in detention centres is set out below. That evidence suggests a strong link between detention and incidences of developmental delay, depression and PTSD.

There is also evidence suggesting that the Department understood the connection between prolonged detention and increasing mental health problems for children. For example, the May and June 2002 Department Manager reports from Woomera note that there is '[c]ontinued focus on a number of families whose reactions to long term detention demand increasingly frequent health service and psychologist attention'.<sup>158</sup> Each of these reports attaches a list of individuals with significant mental health needs.

Further, all incident reports are forwarded to the Department's head office and every kind of self-harm is classified as an 'incident' that should be reported by ACM to the Department. In addition, most correspondence with child welfare agencies and agencies like CAMHS was with the Department, thus the connections between the length of detention and mental health of children must have become increasingly obvious over 2002.

### 9.4.1 Developmental problems

The Australian Association for Infant Mental Health told the Inquiry that recent research demonstrates the crucial importance of a child's environment during their first few formative years.<sup>159</sup> Dr Louise Newman of the NSW Institute of Psychiatry described how the detention environment might contribute to developmental delay in young children:

These very young children are showing signs of developmental delay and very severe attachment problems and ... there is quite a significant body of research and scientific evidence which points out the very severe and complex developmental problems that can result from these sorts of early disturbances. There is also a body of literature which we have made reference to which points out how vulnerable children are to these sorts of very distressing experiences and the trauma they are experiencing particularly in terms of their neuro-biological development, their brain development and then again I think both these bodies of evidence point to the fact that we are going to have long term problems, potentially, for these children.

These are children who even if they are very young, are witnessing extremes of disturbed behaviour in adults. They frequently have parents who themselves are traumatised, distressed and despairing who are unable to parent effectively in the detention context. The developmental effects, I think, are added to by the depriving and harsh nature of the environments with very clearly inadequate opportunities for play, for exploration for learning and other crucial experiences that children need if they are to develop normally.<sup>160</sup>

DHS, whose staff visited Woomera and spoke to children on several occasions, also expressed concern about the impact of detention on development:

Children and young people have a range of developmental needs including physical activity, competence and achievement, self-definition, creative expression, positive social interactions, structures and clear limits, and meaningful participation. The ability to meet the developmental needs of children is greatly compromised in the artificial and restricted environment of a detention centre.<sup>161</sup>

A senior child psychiatrist who examined a family in Woomera in May 2002, made similar comments:

Before outlining my assessments of the children, I wish to comment on the detention centre environment, as it impacts on any of the 40 or so children currently resident there. Staff reported to me that children who are in the centre for long periods manifest a significant regression over the period of detention. In my opinion, many factors contribute to this regression, over and above the issues within individual families. These factors include: cognitively impoverished conditions, with little opportunity for play and legitimate academic pursuits; reduced availability (physical and emotional) of attachment figures; interference with normal family rituals of feeding and caring; lack of privacy; hostile and deprived physical environment with intimidating and ever-present security measures; dehumanising use of numbers rather than names (theoretically now banned, but highly prevalent during my visit); and exposure to violence (not only witnessing intermittent full scale riots, but also equally disturbing episodes such as men burying themselves and inviting their family to sit around and watch them die). It is hard to conceive of an environment more potentially toxic to child development.<sup>162</sup>

A doctor who worked at Woomera in both August 2001 and January 2002 gave an example of serious developmental delays in an infant:

There was a specific example that I can give you of an infant who had been born in detention in early March 2001. I saw him when he was six months, five/six months of age, in August. He was developmentally delayed then, I believe, in that he was not rolling, for example. Very little babble. But what struck me much more was on revisiting the centre in January, where this same infant had not yet learnt to crawl, could barely sit upright by himself, was still not babbling and showed features of quite significant developmental delay for a one-year-old.<sup>163</sup>

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The Inquiry also heard of developmental speech delay in child detainees, often directly related to the impact of the detention environment. For example, parents worried about babies crying because of the possibility of waking others when many families shared accommodation. One family with a young child told the Inquiry that:

My son is [a toddler] and his speech development is late because of the situation in the dongas ... we don't have privacy and every time he try to say something, at night especially I say ['don't'] because the people would wake up or they would swear ... if the child shout and this sort of things, so he's got a speech development [problem], in the [day], he doesn't talk much.<sup>164</sup>

In another example, a mother detained at Woomera told the Inquiry that her young son developed a speech impediment and started bed-wetting because of the trauma he felt after an intrusive headcount by officers in riot gear:

With the special clothes, when it's a search going and they have some special clothes wearing, they came at night-time yelling and screaming for them to wake up, with their batons. Then after that, our son has [started] stammering, and then at night-time he wets, you know, bed-wetting, and so from that time onwards I have to put nappy on him when he goes to bed.<sup>165</sup>

The following case study was described by DHS in April 2002.

### **CASE STUDY: Child development**

*Extract from the Department of Human Services Woomera Detention Centre Assessment Report, 12 April 2002*

Length of detention: 12 months. The parents reported concern about the development of their 3 year old child stating that his early childhood development was normal and that they were unconcerned about the child during the first one and half months in detention. After that time they became concerned about the child's behaviour as he became increasing[ly] exposed to violence and swearing. Observed behavioural changes included: swearing, aggression, fighting with peers, sleep refusal, night time waking and crying, destruction of toys, refusal of food.

The mother was separated from the child for over a month during her last confinement. This resulted in an escalation of his behavioural problems.

Parents report they have been to the medical centre on numerous occasions for their concerns but these have not been investigated. The child eats only small amounts of food at meal times. Parents are not permitted to take food from the dining mess to offer between meals. Rooms are searched for food. Parents state that they do not have access to play activities or suitable educational toys.

The parents report concern for the baby (8 months). To date the child has not received routine vaccinations (verified). The mother experiences delays in obtaining formula through the medical centre and baby food is not readily accessible. ...

Assessment Observations: ... On the basis of observations with this family there is concern for the mental health of the parents, the behavioural problems exhibited by the 3 year old, the listlessness and under stimulation

of the baby, and the diminished capacity of the parents to respond to the nurturing of either child. The parents are trying to manage under difficult circumstances. Both parents need to be able to respond [to] the total nurturing requirements of their children in better living facilities. They require access to games, toys and other resources that will promote their relationship with their children and stimulate the cognitive and general development of their children.<sup>166</sup>

In another case described in the same report, DHS makes observations about a family with a two-year-old and a baby:

Assessment observations: Both children's physical and developmental needs are not being adequately met in the centre. This is influenced by the environmental factors/restraints and lack of access to resources. The eldest child (2 years) developmental milestones appear to be on the border of age-appropriate. The baby is at risk of not meeting specific milestones in regard to gross motor development and speech due to lack of safe areas to explore and stimulation. The nutritional needs of the children are not being met, there is no adequate educational material on diet available and it is not possible for toddlers to have age appropriate small and frequent meals. This places both children at risk of poor growth and nutritional imbalance. Both children are at risk of cumulative harm in regards to normal growth and development because of the current environmental conditions and the lack of age-appropriate resources.<sup>167</sup>

This evidence indicates that the detention environment can have, and has had, a negative impact on children's development. This is a matter of concern to the Inquiry.

## 9.4.2 Depression and post traumatic stress disorder (PTSD)

The evidence provided to the Inquiry by State child welfare authorities who examined children in the centres, doctors employed in the centres and the 2003 Steel Report suggest greater numbers of children suffering from depression and PTSD than indicated by the figures cited for July 2003 by ACM. These experts consistently make a link between detention and the occurrence and severity of these illnesses – whether it be because detention triggered the illness, exacerbated the seriousness of the illness or inhibited the ability to appropriately treat the illness.

### (a) Detainee reports

Child detainees and their families repeatedly told the Inquiry of the impact of detention on their mental health, particularly leading to depression. While not all these detainees will be talking about 'clinical depression', the following quotes indicate the declining psychological well-being of children from their parents' point of view.

The father of children detained at Curtin said of his children that:

Also they have anxiety and they are under extreme depression because every day they just look at the security wire and getting frustration and also some of them like my children they get cutting their bodies by broken glass. They are just moving around the fence and shouting that we need the freedom.<sup>168</sup>

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Another father said that his son 'had suffered from the fact that they couldn't go outside, and he has developed some kind of depression'.<sup>169</sup> Yet another father reported that his daughter 'is suffering from depression, my daughter is chewing her teeth whilst asleep and also [passed] her urine while asleep'.<sup>170</sup>

A father detained at Woomera described how his son had to go on medication for depression:

FATHER: Doctor gave him anti-depressant medication for a while, to [my son], and it didn't work. Not only didn't help, it just makes, makes his eye and makes his vision getting worse somehow, it's more blinking now that he used to do before.

INQUIRY: So, what do you think the solution is?

SON: I need help.

INQUIRY: What kind of help do you need?

SON: I should go out.<sup>171</sup>

When the Inquiry visited Baxter in December 2002, a higher percentage of detainee children and their parents reported they were depressed than during any other Inquiry detention centre visit.<sup>172</sup> Almost all of these families had been in detention for well over a year. One mother described the state of her son as follows:

Actually my son is very depressed and is very nervous. We can't talk to him basically. He doesn't take shower, he doesn't brush his teeth, he smells very badly and when I tell him he tells me get out of here I don't want to talk to you. I can't talk to him, when I talk to him all my body shakes. I'm just worried he'll do something to himself. ...

For myself because of the stress I have all sorts of problems. I can't eat food, I only eat a bit of salad ... We will stay here until we die, we don't have anywhere else to go back. Our healthy family is now shattered, we are all sick.<sup>173</sup>

Another mother from Baxter said that both she and her daughter were depressed:

Myself and my daughter because we were depressed and [the psychologist] said he can't do any for us except freedom is our only solution. My daughter, she has nightmares, she bites her nails, she fights all the time with her sister and she's very nervous and very depressed.<sup>174</sup>

### (b) Expert mental health reports

The 2003 Steel Report regarding 20 children in a remote detention centre found that '[a]ll but one child received a diagnosis of major depressive disorder and half were diagnosed with PTSD'.<sup>175</sup>

This evidence is supported by the South Australian CAMHS report that finds, of the ten children aged between seven and 17 who were assessed between January and July 2002, '[m]ost fulfilled criteria for a diagnosis of post traumatic stress disorder' and '[a]ll fulfilled criteria for major depression with suicidal ideation'.<sup>176</sup>

Depression in children was also noted by medical staff from detention facilities. A nurse who worked at Woomera told the Inquiry that depression was particularly evident amongst children who had been in detention for an extended period of time:

My main observation is that the children are very, very much – very subdued, almost – they were almost at a state of emotional numbness. I found that just by walking through the camp, I often found that they would not even make a noise when they were playing and they just appeared ... developmentally retarded.<sup>177</sup>

A paediatric registrar who worked at Woomera in both August 2001 and January 2002 told the Inquiry that:

... in one day, on 10 January [2002], out of probably about 20 people that I saw, 14 of the children displayed symptoms of post traumatic stress disorder. These were a variety of children from only a few months of age to 16 years of age. Their symptoms include withdrawal, behavioural change and a common feature is bed wetting, which was very commonly seen in the camp.<sup>178</sup>

This doctor also noted that many parents were worried about their children's depression:

Many of the parents were concerned that they could not support their children or do anything about the problems of the withdrawn behaviour or the destructive behaviour or the nocturnal enuresis. And they found it particularly frustrating and worrying, of course, for their children that they were becoming very depressed.<sup>179</sup>

She told the Inquiry that treating depressed children was extremely difficult:

Under normal circumstances one would provide immediate access to counselling, as it were, to simply talk to children, to change an environment. If it is the environment causing the stress or the depression, one of the first things to do is to try and improve the environment or to support the environment under which the child must live, to support the parents. Sometimes children go on to medication, not often. We usually try and provide the optimal and maximal physical support in the environment.<sup>180</sup>

She said in some cases she took the extreme step of putting children on anti-depressant medication as this was the only option in the circumstances of the detention centre.<sup>181</sup>

A November 2002 report by an ACM psychologist noted depression and PTSD amongst children detained at Woomera continued to be a problem:

[Girl, aged 14 years]  
Diagnosis: [Girl] has persisting symptoms of major depression and posttraumatic stress disorder despite several months of treatment with therapy and appropriate medication. She is actively suicidal.

[Boy, aged 11 years]  
Diagnosis: [Boy] is completely dysfunctional for his age and experiences bouts of depression and uncontrollable rage. He is in the process of developing borderline conduct traits. High risk of suicide.

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[Girl, aged 17 years]

Diagnosis: [Girl] has symptoms of major depression and posttraumatic stress disorder. Despite appropriate medication her symptoms persist.

[Boy, aged 4 years]

Diagnosis: [Boy] has regressed and developed anxiety symptoms and enuresis. His speech may also be delayed. He has significant cognitive developmental problems and displays behaviour that is consistent with a diagnosis of Oppositional Defiance Disorder.

[Girl, aged 3 years]

This young girl has spent almost a third of her life in detention. Some of her nightmares may indicate the gradual development of post traumatic stress disorder from the inappropriate events that she may be witnessing.

[Boy, aged 14 years]

[Boy] meets criteria for major depressive disorder. [Boy] is in a very vulnerable phase of self development and in addition to the significant suicidal risk, there is a significant risk of a destructive erosion of his sense of self.

[Girl, aged 12 years]

[Girl] meets criteria for major depressive disorder with significant anxiety symptoms. Of more concern is the regressive, disintegrative behaviour and the development of significant emotional numbing. [Girl] is significantly impaired.<sup>182</sup>

Further examples of children suffering from depression and PTSD are described below and in Case Studies 1 and 2 at the end of this chapter.

### (c) Case examples of depression and post traumatic stress disorder

The following examples are just a few case examples of the several that could have been provided from the documents available to the Inquiry.

#### Example one

The first example is of a 13-year-old boy who is discussed in the South Australian Department of Human Services Woomera Detention Centre Report of April 2002. At that time the boy had been detained for 455 days:

Assessment observations: The 13 year old is very withdrawn and lethargic. Since entering Woomera he has been suicidal and very sad. He reports nightmares nightly, seeing himself dead, or unable to move with people carrying his body. He reports waking screaming and finds trouble falling to sleep. He reports a diminished appetite. He has little memory of past events and no hope for the future. He refuses to make new friends because he believes they will be released but not him. He engages in constructive day time activities but spends hours sitting staring vacantly. TSCC test score confirm he has a depressive disorder and probably Post Traumatic Stress Disorder.<sup>183</sup>

#### Example two

The second example is of 13 and 14-year-old brothers who had been in detention for 15 months in April 2002.

An ACM psychological report on the elder boy from December 2001 reported the following:

He is suffering deep depressive symptoms which are steadily increasing, along with the depression now infecting his family. He and his family have tried vainly to manage their distress, but it seems they are at a critical point which is more difficult to control than previously. [He] is a teen-age boy with needs of freedom and security, neither of which are available to him. He has clearly suffered traumatic periods in his life and aligns these early experiences with his present state, which he views as imprisonment.<sup>184</sup>

In April 2002, DHS made the following comments about this child who had, at that point, been in detention for 435 days:

ACM medical records confirm the mother and second eldest child have experienced depression. Both the eldest and second eldest child exhibit symptomatology consistent with post-traumatic stress disorder.

Assessment Observations: A DHS psychologist administered the TSCRA self measure for post-traumatic distress on the eldest child, the profile reflects a depressive disorder and in all likelihood is reflective of Post-Traumatic Stress Disorder. When administered on the second eldest child the responses produced elevated scores on the Anxiety Depression and Over Dissociation sub-scale. This is likely to be reflective of a depressive disorder. Both young men require psychotherapeutic follow-up. Both have attempted suicide on more than one occasion and self-harm.<sup>185</sup>

In September 2002, The Flinders Medical Centre reported that the 14-year-old:

... presented as an insightful, perceptive and burdened young person whose thoughts and feelings about his protracted detention in Woomera had become all encompassing. The overwhelming picture of himself conveyed ... was one of sadness, grief and a disbelief that he could be perceived as someone bad enough to be incarcerated for such an extensive period of time. Not surprisingly, [his] presentation and what he said about his thoughts and feelings including his disturbed sleeping patterns, his preoccupation with self-doubt and self-harm were consistent with the symptoms of depression. ...<sup>186</sup>

Regarding his younger brother:

[He] too, presented as an insightful young person similarly well able to convey the extent of his unhappiness. [He] was aware of the ongoing impact on him of continued detention and of witnessing and experiencing the despair and missocialising influence of other adult persons detained in Woomera Detention Centre. .... [He] too, remains in a situation that is destructive of his developmental capabilities and his physical safety cannot be secured while he remains in detention.<sup>187</sup>

### Example three

The third example is of a 13-year-old boy and his 11-year-old sister. A senior child psychiatrist examined the children in May 2002, after the children had spent more than a year in detention, and made the following diagnoses:

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[The brother] meets criteria for major depressive disorder. More importantly, he is an acute and serious suicide risk. [His] suicidal intent is closely related to whether or not he is in detention. This should not be dismissed as some form of emotional blackmail, but recognised as a realistic reaction to his appraisal of his predicament after many months in detention witnessing the progressive disintegration of his family, and the destruction of hopes for the future. ...

[The sister] meets criteria for major depression with significant anxiety symptoms. Of more concern is the regressive, disintegrative behaviour (as manifest by her paper tearing) and the development of significant emotional numbing (as manifest by her statement 'my heart has become hard'). Like her brother [the child] is significantly impaired and her psychological condition cannot be properly treated within the detention environment which is itself a major contributing factor.<sup>188</sup>

This boy's involvement in self-harm activity is explored in Case Study 3 at the end of this chapter.

### Example four

A comprehensive consideration of a case of PTSD in a detainee child is found in the case study regarding Shayan Badraie at the end of Chapter 8 on Safety. Shayan was detained at Woomera in March 2000. After he had witnessed an adult detainee threaten suicide in November 2000, he began exhibiting signs of PTSD. He and his family were transferred to Villawood in March 2001, where following further exposure to traumatic incidents, the child continued to exhibit signs of the disorder. He was hospitalised eight times between May and August 2001 when he was finally transferred into foster care detention in the community.

In 2002, the Human Rights and Equal Opportunity Commission (the Commission) investigated a complaint made by Mr Mohammed Badraie on behalf of Shayan regarding his treatment by the Department. The Commission concluded that the Department had breached the CRC. Full details of this case are contained in the case study at the end of Chapter 8.

### 9.4.3 Self-harm

The Inquiry was presented with numerous examples of self-harm by children in immigration detention centres, particularly amongst longer term detainee children since January 2002. Most of these children were also suffering from depression or PTSD. The extent of self-harm amongst these children is illustrated by CAMHS findings regarding children aged between seven and 17 who were detained in Woomera between January and July 2002:

All of these children expressed recurrent thoughts of self harm. At least 7 of the 10 children have acted on these impulses, cutting or hurting themselves, attempting to hang themselves, drinking poisons or refusing food for many days as a suicidal act.<sup>189</sup>

The Inquiry also heard that witnessing self-harm amongst other detainees has a significantly detrimental impact on children and in some cases contributed to their own attempts at self-harm.

This section describes (a) the impact on children of witnessing self-harm, and (b) the prevalence of self-harm amongst children, including several examples.

### **(a) Exposure of children to self-harm by others**

Children in immigration detention have been exposed to a large number of self-harm incidents. For example, a psychologist who worked at Woomera in early 2002 told the Inquiry:

The self harming was so prevalent and so pervasive that no child would have avoided seeing adults self harming. ... There was very visible self-harm, constant talk of it. The children for example when I arrived would have seen people in graves – when I first arrived there were people in dug graves with children seeing this. Some of the children – it was their parents or people they knew. They knew why the parents were doing this. They knew that the parents were talking about possibly dying. They were on a hunger strike. There was visible self harming on the razor wire. People were taken to the medical centre at regular intervals having slashed. People taken to hospital. There were attempted hangings that these children would have seen.<sup>190</sup>

Current and former child detainees reported witnessing self-harm. For example, children interviewed in Curtin in June 2002 described cutting:

One day somebody was cutting himself, cutting his chest around, abdominal, and near the Gulf gate, which is the main gate to main compound. All the children was looking.<sup>191</sup>

Refugee children formerly detained at Woomera also told the Inquiry of being exposed to self-harm. A 14-year-old boy said that he had witnessed someone cutting his stomach with a knife in the kitchen.<sup>192</sup> Another child said that during protests (with everyone shouting 'visa, visa' outside), a man cut his own throat in front of his wife and children inside the toilet block.<sup>193</sup> Refugee children formerly detained at Port Hedland described a man who threatened to jump off an electricity pole:

I saw a person who had been in Port Hedland for nearly three years, he climbed an electricity pole. He was there from the morning until night. He wanted to kill himself. He wanted to jump. The officers said you can't do this. He said 'why can't I go out?'. He didn't have any food or drink. He was crying. He wanted to jump and the officers put mattresses on the ground, and then they got a cherry-picker and got him down. He didn't want to go. He was fighting with them. I was watching this and I was crying. My sister still has dreams. She was five. I was scared.<sup>194</sup>

In April 2002 DHS reported that exposure to self-harm has serious mental health consequences:

For the children and young people in Woomera their continuous exposure to violence and self-harming behaviours is also creating an unstable and

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unsafe environment in which psychological symptomatology such as suicidal ideation, disassociation, depression, restricted ranges of effect and anxiety are appearing.<sup>195</sup>

A child detained at Curtin told the Inquiry of the stress caused by witnessing self-harm:

My world has become like upside down, because I have never seen things like this, I see people who bury themselves alive one day. I wake up in the morning, I see people have buried themselves, I see people go on the tree and just jump down just like that and I see people who cut themselves, I see officers hit woman and children with batons, or use tear gas. I just, it's too much for me, I don't know why and sometimes I wonder you know, it is very stressful to me.<sup>196</sup>

The mother of a young child detained in Woomera described how watching others self-harm became an integral part of her child's life:

He doesn't know the life, he has not seen the beauty of the life, [he has] only seen another fence. So when there is a noise outside and he keeps saying, 'Mummy, let's go outside and see who has slashed himself, let's go and see who has hanged himself'. And always he thinks that if there is any noise he thinks that someone has killed himself and sometimes, you know, when he use bad language, I tell him, 'no, don't use this word' and then he says that 'I'm going to get razor and slash myself'.<sup>197</sup>



Children in playground at Woomera with hunger strike in background, January 2002.

Doctors suggest that the prevalence of self-harm in immigration detention centres encouraged children to engage in self-harm themselves:

... children are very susceptible to the influence of adult behaviour around them and in a very confined community such as immigration detention, children are witnessing and are unable to be protected it seems from witnessing the despairing and often self-mutilating acts of other adults. When children are unable to be offered an alternative behavioural strategy or modelling for dealing with despairing feelings, hopelessness, anger, then often they will model on the kind of adult behaviour they see in a copycat kind of way.<sup>198</sup>

Detainees confirmed the 'copycat' theory. The mother of a young girl detained at Woomera told the Inquiry that:

... and when they see the self mutilation from everybody, all the time they talk about this and sometimes they do this, like, my daughter tells me if you are angry, if you are not rest, you can cut yourself with razors and sometimes, all the time they talk about drinking shampoo, drinking detergent or hanging.<sup>199</sup>

The mother of a teenage boy at Woomera suggested that witnessing self-harm had a similar suggestive impact on her son:

[My son is] seeing all things happening around and people committing suicide and sewing their lips together and not eating and the blood and all this violent acts. It doesn't help him at all and he feels frightened. In fact he said he would like to kill himself by taking some shampoo and I have to try to convince him to be patient.<sup>200</sup>

This perception was further reinforced by the father of children detained at Curtin:

Unfortunately the environment is not very healthy because every day they are witnessing people who are going on top of the tree, who are suiciding or just cutting their body by blade or jumping, shouting, doing everything violent and they are witnessing and they think this is a game they have to participate in it. It's a very dangerous situation and we cannot have any control of it.<sup>201</sup>

The Inquiry met a young boy at Curtin who explained his reason for 'cutting' himself:

I saw so many of those incidents which [is why] I got this urge to do it. I wanted to see what sort of pain is that or rather I wanted to experience the pain to see what sort of pain is that.<sup>202</sup>

Some children who had not yet self-harmed told the Inquiry that witnessing others self-harm made them fear for their own safety:

It's very hard for me to see that people have to come to that level that just for the sake of a visa, hurt themselves, or they're willing to climb the tree and hang themselves, I suffer, it is very painful for me. Sometimes I wonder that I might do one day this, I wonder about this. But I try not to because of the sake of my family.<sup>203</sup>

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(b) Prevalence of self-harm by children

The Department and ACM provided the Inquiry with extensive documentary evidence of children’s self-harm.

DHS told the Inquiry that the majority of the 137 notifications received between January and July 2002 regarding children detained at Woomera related to actual or attempted self-harm:

The majority of numbers have been around the self-harming behaviour which again either comes under physical abuse if the way in which the notification is received alleges that an adult person has inflicted the harm on the child during the activities such as the lip stitching times or the hunger strikes. Then under the neglect, it would be around parents not taking protective action, or it is alleged that parents are not taking protective action, in relation to young people and their suicide attempts or their own self-harming, slashing of skin and drinking shampoo and other self-harming activity. So they would be the majority of our notifications.<sup>204</sup>

A FAYS assessment report describes how versed children were in the various options for self-harming behaviour. This report concerns an investigation into a suicide pact made by 11 Afghan unaccompanied children:

When asked how they expressed they would do this the lawyer indicated they mentioned:

- throwing themselves into razor wire
- drinking shampoo or other products they could obtain (detergents/disinfectants)
- slicing skin with razor blades
- hanging themselves
- banging rocks into their skulls.<sup>205</sup>

An example of the various means by which children actually self-harmed is demonstrated in the protest at Woomera in January 2002 as set out below. Further discussion of these instances of self-harm can be found in Chapter 14 on Unaccompanied Children and Chapter 8 on Safety.

Snapshot of self-harm, Children at Woomera, 13 January to 29 January 2002

A very high level of self-harm was noted during an Inquiry visit to Woomera at the time of mass hunger strikes in January 2002. Commission officers saw evidence of self-harm on the bodies of children and young people in the compounds and on those interviewed. Children also spoke frequently about harming themselves and parents expressed distress about their children’s threats of self-harm.

Actual self-harm

Lip-sewing	7 children (two children sewed their lips twice)
Slashing of body	3 children (14-year-old boy who sewed his lips twice also slashed ‘Freedom’ into his forearm)

Ingestion of shampoo	2 children
Attempted hanging	1 child
Unspecified self-harm	2 children
<b>Threats of self-harm</b>	13 children <sup>206</sup>

Another illustration of the types and prevalence of self-harm amongst detainee children is provided in the following snapshot of children at Woomera in June 2002. The comments on each child are from two emails sent from the Acting District Manager of Port Augusta FAYS to the Department's Central Office in Canberra on 14 June 2002.<sup>207</sup>

**Snapshot of self-harm, Children at Woomera, 14 June 2002**

**1-year-old girl:** 'Parents on hunger strike 22/5, [baby] being fed by a 10-year-old cousin, child asked for help to feed [her]. Father stated God would look after the child or the child may have to go without. Mother tired. Father suicidal. Tier 1'.<sup>208</sup> 19/5 FAYS recommended 'that an urgent referral be made for Psychiatric Assessment of both mother and father, in terms of the capacity of either of them to provide safe and nurturing parenting'. Length of detention: 14 months.

**5-year-old girl and 7-year-old boy:** 'mother stated she is going on a hunger strike 28/5, and the children will not be fed. Statement related to whether or not the family are provided with a visa. Tier 2'.<sup>209</sup>

**9-year-old girl:** 'admitted to hospital after drinking a bottle of shampoo 29/5. Has witnessed self-harming by adults. Is providing the primary caregiver role for her five younger siblings. Father not interested and mother accepts the self-harm attempts by her daughter, sees her as the spokesperson for the family. Tier 2'. Length of detention: 10 months.

**11-year-old boy:** 'had superficial cuts to his left forearm 27/5, mother stating he cut himself with a razor. Mother had cut herself on 26/5. Tier 2'. '[He] was in the play area where he tied a sheet around his neck and then held a razor to his throat telling officers not to come nearer or he will slash. He also requested his father be cured by tonight or you will see something the compound has never seen before (father starving himself)'. Length of detention: 14 months.

**13-year-old boy:** 'attempted to hang himself 17/5, tied a bed sheet around his neck to some playground equipment. Kicked a chair away from himself when officer asked him what was wrong. Tier 2'. Length of detention: 14 months.

**Same 13-year-old boy and 11-year-old sister:** 'Both are serious suicide risks. Parents depressed and unable to care for them. Tier 2'. Length of detention: 14 months.

**14-year-old girl:** 'stated she is on hunger strike in protest for not receiving a visa, 29/5. Tier 2'. Length of detention: 10 months.

**17-year-old unaccompanied boy:** 'disclosed he had been sexually assaulted but would not name perpetrator. Later overdosed on hidden medication'. '[He] thinks of suicide all the time and has tried many times including trying to electrocute and hang himself. Feels hopeless, tired with life. General practice intake'.<sup>210</sup>

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A report conducted by DHS in August 2002 noted an increase in the prevalence of self-harm amongst children over the preceding months:

Reports of self-harm, threats of suicide and suicidal ideation amongst the children have been reasonably regular throughout this year but have escalated during recent months. Such reports are generated by the centre itself, after a critical incident, or by CAMHS [Child and Adolescent Mental Health Services] counsellors who have identified significant suicidal risks with specific children. Some children have had one incident of self-harming but there are a number of children where such behaviour has become regular.

Since January 2002 a total of **50 reports of self-harm** have been raised on **22 children**, ranging in age from 7 years to 17 years. These incidents included hanging attempts; self-harm by cutting arms or ingesting shampoo; and persistent depression and/or suicidal thoughts. The most frequent incidents occurred with children who are 10 and 12 years of age. Children aged 14 years are the next highest sub-category represented in this group.

**60% of these reports related to children aged 12 years or less.**<sup>211</sup>

In visits to detention centres in 2002, the Inquiry met several children who were involved in hunger strikes, or who had recently self-harmed. Children told the Inquiry that the hunger strike for them was connected to their length of detention. A girl detained at Woomera reported that:

I have been here for 1½ years, either eating or sleeping and nothing happens. We are not free, and if you eat nothing will happen.<sup>212</sup>

Case Study 3 at the end of this chapter provides detailed consideration of one child's involvement in self-harm. This case study shows that the child made repeated efforts to hang himself, drink shampoo, throw himself onto the razor wire and slash himself. The child also suffered from sleep disturbances and depression.

### 9.4.4 Long-term impact of the detention experience on children and the Australian community

The Inquiry received evidence of the potential long-term impact of mental health problems in children in detention after they have been released:

It is likely that current policies and practices around placement of children and young people who are asylum seekers in Detention Centres removes the protective factors necessary to recover from trauma, and to build resilience, and can place them at significant risk of lifelong distress and dysfunction.<sup>213</sup>

Psychiatrists told the Inquiry that the long-term mental health problems caused by detention are likely to be a significant cost to the Australian community:

These children and adolescents are likely to need, given the severity of the problems that they already have, long term mental health treatment. Ideally you would have a multi-disciplinary approach to managing these children and their families. On average children with post traumatic stress disorder

of this magnitude need treatment for at least 6 to 12 months. Some will need longer, particularly some of the very young children who have developmental problems.

They will also need things like remedial education and preferably group activities to look at improving their peer relationships and socialisation. Their parents will also need support. We're roughly talking about in terms of just the one to one treatment component on average across the disciplines about \$100 an hour. More when we add the extra components that are needed and I think we can do the calculations. It's a very significant health bill that we're looking at that the Australian community will need to fund.<sup>214</sup>

#### **9.4.5 Findings regarding the seriousness of mental health and development problems for children in detention**

The Inquiry finds that many children in detention have suffered from a range of mental health problems including anxiety, bed-wetting, nightmares, emotional numbing, hopelessness, disassociation, and suicidal ideation.

There is also evidence of a number of children suffering from developmental delay, depression and PTSD. While ACM has argued that at July 2003 the numbers of children diagnosed with these psychiatric illnesses was low, the weight of evidence received from former ACM medical staff, State child protection agencies, State mental health agencies and studies conducted by independent mental health experts involved with current and former detainee children leads the Inquiry to conclude that from January 2002, at least, the incidence of children suffering mental health problems was significant for long-term detainee children. It may be that the difference between the accounts lies partly in the categorisation or level of formalisation of the diagnoses. However, a proper consideration of a child's right to the highest attainable standard of health requires more than simply an assessment of whether or not a child has a formally diagnosed mental illness.

There has been a high level of self-harm amongst these same children. Children in detention for long periods have been surrounded by others who have attempted to commit suicide and some children have copied that behaviour. The methods used by children to self-harm have included:

- attempted hangings
- cutting and slashing their bodies
- swallowing shampoo or detergents
- lip-sewing
- hunger strikes.

While the primary records regarding children in Woomera and the recent studies conducted by mental health experts suggest that a considerable number of children suffered from significant mental health problems over 2002 in particular, the Inquiry has not sought to determine the precise numbers of children who have suffered from mental health problems. No matter what the statistical prevalence of mental illness, the Inquiry finds that the detention environment has had a negative impact

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on the psychological well-being of children. The longer they are in detention the higher the risk of harm.

Problems created or aggravated within detention centres can potentially have a long-term impact on children.

### **9.5 What measures were taken to prevent and treat mental health and development problems in detention?**

As discussed earlier, the Department has the ultimate duty of care with regard to the mental health of children in detention. ACM was responsible for providing a sufficient standard of mental health service to detainees. The Department was responsible for monitoring this service provision and taking action where it is insufficient.

The Inquiry acknowledges that the prevention and treatment of mental health conditions in detention is difficult, because many of the problems are caused by the detention environment itself or other factors that are outside the control of medical staff. This connection highlights the difficulty of protecting the best interests of children within the detention environment. It also emphasises the importance of ensuring that children are detained as a matter of last resort and for the shortest appropriate period.

However, this section examines the measures that have been taken to prevent and treat mental health problems in detention within that context, including the following:

- identification of mental health problems
- treatment of mental health problems of children in detention
- prevention of self-harm by children in detention
- referral to State mental health agencies
- implementation of recommendations regarding the mental health of children.

This section also considers the question of whether mental health conditions amongst children in detention can be treated in the detention environment.

#### **9.5.1 Identification of mental health problems**

The Department states that mental health screenings of children are conducted when they are taken into immigration detention, during the initial health screening provided to all detainees.<sup>215</sup> As noted earlier, ACM policy also required assessment of mental health within the initial health screening of detainees.<sup>216</sup> However, the Medical Assessment forms used for initial health screening of children, which were provided to the Inquiry by ACM, contained no section for comments regarding a child's mental health. This is in contrast to the form for adults, which had an attachment titled 'Mental Health Questionnaire/Observations'.

The Inquiry obtained complete medical records for 36 children from Curtin, Port Hedland, Woomera and Villawood. A review of these records indicates that while

initial health screenings were conducted for at least 26 of these children, specific mental health assessments were only carried out for two children. Both of these were unaccompanied children detained at Curtin, for whom the adult form, including the attachment regarding mental health, was completed.<sup>217</sup>

A mental health practitioner formerly employed at Woomera confirmed that generally the initial health screenings of children did not include a mental health component:

We were unable to do any [mental health] screening or routine checks. The only screening I did was of unaccompanied minors in my first visit. I would have liked to have screened all children on their arrival but could not. Children had medical screening and sometimes things would be picked up and referred to us by caseworkers and teachers and DIMIA, but this did not happen often.<sup>218</sup>

It therefore appears that assessments of children's mental health were not routinely conducted when the children arrived in detention, as required by the IDS and ACM policy and reported to have occurred by both the Department and ACM. Furthermore, there is no evidence of the Department monitoring compliance with these requirements.

The absence of initial assessments makes it difficult to determine whether the treatment of a child's mental health problems was appropriate to the child's needs from the moment of arrival in detention. It also weakens the Department's submission that the mental health problems of children can be solely attributed to pre-existing problems, as there appears to have been no systematic recording of what those pre-existing problems were.

## **9.5.2 Treatment of the mental health problems of children in detention**

The Inquiry received evidence that mental health staff working in detention made considerable efforts to respond to immediate mental health problems amongst detainees. However, there is also evidence indicating that at certain points in time there were insufficient mental health practitioners to deal with the problems that arose. The Inquiry has also heard that there were inadequate processes in referring children with mental health problems to specialist services. Furthermore, the Inquiry has seen no evidence of torture and trauma services for detainees.

### **(a) Numbers of mental health staff**

An adequate number of staff is critical to the provision of an appropriate standard of mental health care.

The Department informed the Inquiry that 'since the significant influx of unauthorised boat arrivals there have been instances where the detention services provider found it challenging to fill some mental health services vacancies'.<sup>219</sup> However, most of the evidence concerning insufficient mental health staff is from 2002, at which time there was a significant decrease in the overall number of people in immigration detention, including children, but an increase in the number of children who had been in detention for very long periods of time. For example, the number of children

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in detention on 1 July 2001 was 631, compared to 138 on 1 July 2002; however, the number of children who had been detained more than year in July 2001 was 32 compared to 92 in July 2002.<sup>220</sup>

Some of the evidence regarding insufficient staff numbers comes from the Department's own records indicating that it was monitoring the provision of mental health services. For example, the Department Manager from Curtin was concerned about the number of mental health staff in the centre in April 2002:

During April there [were] 1.5 psych nurses and one counsellor on site. Concerns were raised with ACM as to the insufficiency of these numbers given the pre and post riot atmosphere and the increasingly long term population.<sup>221</sup>

In April 2002, the Port Hedland Department Manager's report stated '[o]ngoing reductions in numbers of ACM staff, particularly in the mental health area, [are] an increasing problem'.<sup>222</sup> In May 2002 the Port Hedland Department Manager's report noted:

Absence of the Counsellor and, for most of the month, the psychologist, at a time of increased need for mental health services.<sup>223</sup>

In the Contract Operations Group meeting of 23 May 2002, the Department raised concerns about a general 'decrease in the level of service provision in the centres, particularly in relation to psychologists and counsellors'.<sup>224</sup>

The Inquiry received further evidence of insufficient numbers of mental health staff in detention from DHS, a doctor and a psychologist who had worked in detention centres and a consultant psychiatrist.

DHS reported in August 2002 that '[t]he provision of psychological and psychiatric services to children and adolescents is grossly inadequate for their short and long-term needs'.<sup>225</sup> DHS went on:

The provision of medical services does not have sufficient scope to provide for the acute and long term psychological and psychiatric needs of the detainees. This particularly applies to the needs of children and adolescents. Behaviours of self-harm are minimised; depression in very young children is rarely recognised. The local town doctor provides the primary medical service and this is an incredible drain upon one person.

The health service cannot provide sufficient monitoring of children and adolescents at risk of harm to prevent multiple episodes of slashing of arms, ingestion of tablets or shampoo and attempted hangings. This deficiency is as much a resource issue as a management issue.<sup>226</sup>

DHS also reported that there was inadequate access to child psychiatrists at Woomera given the high needs of the children there:

The lack of immediate access to direct psychiatric diagnosis and care is considered to be a major gap in the centre's health service. Similarly, the lack of a Child Psychiatrist is a prime concern, given the number of depressed and self-harming children present in the centre.<sup>227</sup>

A doctor who worked at Woomera in both August 2001 and January 2002 told the Inquiry that the low number of mental health staff meant children and parents could not be properly treated:

Both times I was working there; there were three psychologists, which was not felt adequate for the 900 detainees that were there in January. So the parents could not be supported. Likewise these psychologists could not support the children as they needed. There was no way of improving the environment at that time in terms of providing resources, providing recreational facilities where children can simply play, or draw.<sup>228</sup>

A psychologist who worked at Woomera from May to December 2001 reported that the demands of the adult population meant that during that time they generally had to leave the mental health care of children to 'the teachers, social worker and counsellor'.<sup>229</sup>

In a report regarding a young mother at Villawood in May 2002, a psychiatrist is noted as stating that:

... the clinical services available at Villawood Detention Centre are inadequate. She advised no specialist medical health arrangements are in place at the Centre. She advised that there were lots of people with untreated post traumatic stress disorders who are isolated and unsupported, presenting a very difficult and dangerous situation. [The doctor] advised there is no support for young parents in the detention centre and most of the children there are psychologically disturbed.<sup>230</sup>

The Department and ACM both stressed that children in detention received mental health services comparable to those provided to children living in the Australian community.<sup>231</sup> While this may have been the case at certain points in time, the evidence suggests that the provision of mental health staff was often inadequate and that they struggled to meet the heightened needs of children in detention.

In any event, it is important to remember that since children and their parents are deprived of their liberty they, unlike children living in the Australian community, have no opportunity to independently seek the medical services that they believe best cater to their needs. This places a higher burden on the Department to ensure that children are offered the health services that match their needs – and in the case of children in detention those needs may be greater than many children in the Australian community.

In addition, the evidence suggests that the detention environment itself is a major contributing factor and treatment within the detention centre is unlikely to be of great effect. This is discussed in section 9.5.4 below.

## **(b) Turnover of mental health staff**

Another issue affecting the quality of mental health care in immigration detention centres was the high rate of staff turnover, reported by the Port Hedland Department Manager in March 2002 and the Woomera Department Manager in April 2002. The Port Hedland Manager said that the movement of specialist staff between centres

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'is impacting adversely on the implementation and continuity of management plans for at risk individuals'.<sup>232</sup> The Woomera Department Manager states that 'I continue to have some concerns about the selection and temporary employment of some psychologists. There is little continuity in case work possible as most come for only a six week contract'.<sup>233</sup>

DHS also stated that the high turnover of staff in centres made it inappropriate for the staff to be involved in more detailed work with families:

as far as ongoing case management services, continuity, they have 6-week contracts and they are in and out and if you are actually talking about mental health issues, research and experience would tell you that there needs to be some consistency, there needs to be some continuity before those things can be addressed.<sup>234</sup>

A mother detained at Curtin said that 'the problem is every time they use a different person, a new person and as soon as I start to trust someone and talk about my problems, the next time there is a new person'.<sup>235</sup>

ACM informed the Inquiry that although there was significant staff turnover, continuity of care was achieved through the rigorous documentation of care, a team approach, clear case management and care plans and regular review.<sup>236</sup> ACM also told the Inquiry that it was difficult to predict the 'most useful staffing mix, given that the length of time that people would be held in detention was unable to be determined', but that as 'the need for provision of more intense mental health services [became] clearer, ACM responded appropriately by recruiting more staff'.<sup>237</sup>

### (c) Referral to specialist mental health services

Referral to State mental health services is extremely important for children in detention suffering from mental health problems. As noted earlier, ACM policy requires the referral of detainees with suspected psychiatric illness to specialist mental health services. ACM informed the Inquiry that they have always referred detainees 'to external specialists or to services where the provision to respond on site has been unavailable'.<sup>238</sup>

Concerns about the safety of children, including those with a mental illness, generally result in the notification of the State child welfare authority. This is discussed further in Chapter 8 on Safety.

The process for referring children to State mental health services seems to have followed a notification to the State child welfare authority. In an August 2002 report, DHS noted that this process could lead to delays in the treatment of children:

These recommendations [for psychiatric, developmental and family-functioning assessments by CAMHS] are processed by sending the FAYS report to DIMIA in Canberra which then forwards its own recommendations to the Woomera centre. The health service staff (usually the Psychologist) then activates whatever referrals have been approved.

This process results in undue delays in such referrals. Such delays place children (and parents) at increased risk of harm and there have been instances where further serious incidents have occurred before CAMHS was notified about the family.<sup>239</sup>

This report concluded that:

The process of approving and enacting referrals to external mental health services is cumbersome and slow. These delays place many children at an unacceptable level of risk in the interim. Once the external agency is involved, accessing counselling and treatment is problematic and affected by resources at the centre.<sup>240</sup>

The Department states that delay often rests with the State agency, however, the evidence indicates that the several steps involved in the referral process mean that there may have been a delay prior to the State agency receiving the referral.

For example, a child who was interviewed by DHS in March 2002, exhibiting signs of depression, appears to have suffered as a result of this process:

[The child's] threats of self-harm continued at which time FAYS recommended that he be referred to CAMHS for assessment. Before this was enacted, [the child] had moved from threatening to harm himself to actually cutting his wrists and arms. Whilst he did not do much physical harm to himself, this behaviour was very significant because the child's own father had made a number of attempts to hang and cut himself.

It was some weeks before CAMHS received the referral information following FAYS recommendations about this child.<sup>241</sup>

The mental health of this child and his family are further discussed in Case Study 1 at the end of this chapter.

The Inquiry also heard that there are some practical and logistical issues compromising the provision of service from State agencies. CAMHS identified the following issues of concern:

...

2. Practical difficulties in providing follow up, arranging appointments are regularly met by CAMHS staff in attempts to coordinate with ACM to see these families. These include lack of availability of transport for families to appointments in Pt Augusta and Whyalla or difficulties arranging for CAMHS staff to have access to families in Woomera, either at the IRPC or Woomera hospital.

3. Access to families is particularly reduced during periods of high stress or 'red or amber' alert in the IRPC, times when the children and families are most vulnerable and when children become involved inevitably in hunger strikes, violence and conflict between adults and staff in the centre.

4. Referrals occur on an ad hoc basis and as mentioned earlier, families may be referred and soon after withdrawn from referral by another member of ACM staff. No new referrals have been received in the last 4 weeks although

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negotiations have continued about access to assess those children previously referred and then withdrawn.<sup>242</sup>

ACM informed the Inquiry that there has been a practice of referring detainees to external specialist services since ACM was appointed as the service provider.<sup>243</sup> In relation to Woomera, CAMHS gave evidence that:

The first referral of a child or family from Woomera IRPC to CAMHS occurred in January 2002. No further referrals occurred until May 2002. Since then a further 9 families have been referred and assessed.<sup>244</sup>

The fact that the first referral to CAMHS occurred in January 2002 is probably a consequence of the most severe cases of mental illness amongst children detained at Woomera developing at that time amongst long-term detainee children.

Finally, there is no evidence that specialist torture and trauma services were offered to children in detention. In the case of NSW, the specialist agency, Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS), explained why they did not provide services within detention centres:

Before the end of 1998, STARTTS had some direct contact with people while they were in detention. We were sometimes asked to provide assessments of people in the Villawood Detention Centre, usually people in extreme distress or being held in the high security section. We also provided counselling to some detainees who came to our office accompanied by officers of the Australian Protective Service.

When a private company, Australasian Correctional Management (ACM), was contracted by the Commonwealth to run the detention system in November 1997, this arrangement ceased. The ACM refused to provide the escort service to our office, stating it was not part of their contract, and we refuse to provide counselling services in the counter-therapeutic environment of the detention centre for sound professional reasons ...<sup>245</sup>

It is surprising to the Inquiry that the services of specialist torture and trauma services were not employed to a greater extent, given that the Department and ACM both accept that it is likely that children in detention will have experienced significant trauma prior to their arrival in Australia.

### 9.5.3 Prevention of self-harm of children in detention

The Department states that both it and the services provider take the protection of children from self-harm very seriously. As noted earlier, ACM has informed the Inquiry of their view that they have 'no capacity to remove the stressors (visa processing) underlying the self-harming behaviour'.<sup>246</sup>

ACM stressed to the Inquiry that group self-harm:

is a protest against external factors which in this case, are immigration policy and processing. This is not suggesting that detainees are not experiencing some form of psychological distress, but rather that the source of the distress is issue (immigration) specific.<sup>247</sup>

ACM further states that:

ACM is limited in the ability to 'treat' and prevent the behaviour. Irrespective of the amount of psychological or psychiatric intervention provided by ACM, the stressor in these cases cannot be removed or alleviated by this intervention or any other intervention or action taken by ACM.<sup>248</sup>

Furthermore, ACM reported that 'the prime objective of ACM in these circumstances was to prevent any death or serious injury resulting from protest behaviour'.<sup>249</sup>

The Department identified the following strategies to respond to self-harm by children:

Strategies to prevent and manage self harm include:

- providing onsite clinical services;
- developing individual case management plans;
- expanding and/or modifying services and programs;
- placing identified 'at risk' children on HRAT [High Risk Assessment Team] monitoring;
- implementing Centre Emergency Response Team (CERT) processes; and
- holding weekly teleconferences between all DIMIA Managers and Central Office staff ...

If a child has self-harmed, the Services Provider conducts an intensive clinical and operational assessment of the incident to identify causal factors and prevention strategies that might be employed. The child is referred to appropriate health professionals and counselling staff, and may also be referred to child psychiatric services if this is clinically indicated.<sup>250</sup>

The Department further noted that strategies used by ACM to prevent self-harm include:

removing opportunities for self-harm; ensuring that detainees and parents in particular understand that there is no link between self-harm and the grant of a visa ... ; [and] preventing where possible children witnessing self-harm incidents and instances where children might learn about self-harming behaviours ... <sup>251</sup>

Although these strategies appear appropriate in principle, in practice they were not always effective to prevent further self-harm. For example:

- onsite clinical services were often inadequate and unable to meet the needs of children
- case management plans for all children in detention were only introduced at the end of 2001<sup>252</sup>
- teleconferences, while they do indicate discussion of individual children, do not indicate the development of extensive strategies to meet their needs.

While the systems may not always have been effective in preventing self-harm, they have been successful in preventing the death of any child by self-harm. Given

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the high risk factors, this is to be commended; however, international law requires more than the prevention of death.

Other than parental supervision, the two strategies that provided the closest observation of children 'at risk' are the High Risk Assessment Team and observation rooms, as discussed below.

### (a) High Risk Assessment Team (HRAT)

The Inquiry received extensive High Risk Assessment Team (HRAT) records, which indicate that close watch was kept on children who were suspected to be at risk. ACM suggested that the fact that there have been no suicides by detainees who were on HRAT demonstrates that it is effective in preventing self-harm.<sup>253</sup> The Department described the HRAT process as having the following functions:

Detainees who have self-harmed are required to be treated for their injuries immediately. After treatment, the detainee is subsequently referred to the High Risk Assessment Team for ongoing monitoring and follow-up. Complex cases, particularly those involving repeated self-harm incidents are managed intensively within the High Risk Assessment Team system and may also be reviewed by the detention service provider's head office health service managers.<sup>254</sup>

The Inquiry agrees with the Department's statement that the HRAT records show that:

a number of children who had threatened self-harm, or showed strong indicators that they were likely to self-harm, did not self-harm while under observation.

However, there are some instances, where the HRAT watch was not able to prevent further self-harm. See Case Study 3 at the end of this chapter which describes a child who continued to self-harm whilst on HRAT observations.

The HRAT process was focussed on surveillance as a technique of preventing self-harm. It involved detention officers rather than mental health professionals and did not extend to therapeutic care.

### (b) Observation rooms

Where the risks of self-harm are particularly high children have been placed in solitary observation rooms to allow closer watch.

The Inquiry heard of an unaccompanied Iraqi boy at Port Hedland who was placed alone in a padded room after threatening to cut himself with a piece of broken glass. The ACM psychologist there, who referred to the room as the 'Romper Room', reported:

Brought up to Medical after CERT called; [the boy] had piece of broken glass to throat and had superficial cuts to wrists. Presentation was unsettled, demanding and tantrum-like. Eye contact good, body posture restless, and voice raised. Reported that he engaged in self-harm and erratic behaviour

in order to get attention, and in particular in the hope of getting moved into the family block. Situation was explained regarding the consequences of his dangerous and impulsive behaviour, and how his subsequent beh[aviour] would determine his level of obs [2 minute, 15 minute, 30 minute, etc] and how quickly he would return to the compound. Was demanding and unaccepting (unreasonable) of this, and was consequently forcibly taken to the padded room and placed in suicide proof gown, as required by this present level of agitation and risk level. Placed on 15 min obs[ervations]. To be reviewed regularly by [Mental Health Team]. Visits encouraged after 18 hours, and will be used to encourage [the boy] to develop more settled and adaptive behaviour. Still surprisingly immature given age and background.<sup>255</sup>

After a review by the mental health nurse three days later, the boy was still in the 'suicide proof gown'. The nurse noted:

Explained to him again why he is in K Block and padded room, and that he needed to display positive non self threatening behaviour. He began to say he may as well be dead, but changed his demeanour once he realised that nothing would change the set procedure and that he would not be immediately returned to the compound. Explained to him first step is his own clothes, and normal room. If behaviour continues to stabilise then view to letting him return to compound. Discussed with Op[eration]s Manager – he will be given normal clothes and be moved into another room. Will review him again tomorrow.<sup>256</sup>

The medical reports on this child indicate that he spent eight days in the observation room (three days in the padded room and another five days in another observation room that 'was less austere').<sup>257</sup>

ACM states that the management of this case is 'consistent with the best practice of managing people in custody who are at high risk of suicide' and goes on to describe that:

- In an institutional environment the main objective when people present with such high risk behaviours is to keep them alive. It is the ultimate duty of care of the service provider.
- The treatment of the underlying motivator cannot be dealt with while such high risk behaviour is being demonstrated. The presenting behaviour must be managed to keep them alive as the first priority.
- In a secure setting this can only be achieved by removing all possible avenues and opportunities to kill themselves and provide the maximum opportunity to observe the person. This requires placement in the most sterile place possible to remove access to all kinds of objects of potential harm.
- In this case the detainee was threatening to cut his throat. He was not put in the room for punishment. He was put in the room as that was the only option to prevent him killing himself. This decision was made by clinically qualified professionals.
- The strategy worked and he remained alive, he did not commit further injury to himself and he was returned to the general detention centre community within eight days.<sup>258</sup>

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ACM's detailed response raises three important points. First, it is clear that having children in the 'institutional environment' of a detention centre limits the options available to treat children who are psychologically unwell. Second, the Inquiry is concerned that the fact that the boy stayed eight days in the observation room suggests that he may have been better off in a psychiatric hospital than in the 'institutional setting' of a detention centre. Third, the general nature of ACM's response suggests that the policies regarding the use of observation rooms did not include any special considerations regarding the possible impact of these strategies on children as opposed to adults.

The Department states that children are only taken to an observation unit if family members are 'involved in the decision making process'. It gives an example of an incident where a child was placed in an observation room in the medical centre. According to the incident report, the child's parents were 'notified of the child's placement in medical and did not raise any issues with this placement'.<sup>259</sup>

ACM also states that:

In the very few instances where a child has been placed under continuous medical observation, it has occurred with the full permission of the child's parents who usually remain with the child during their brief stay.<sup>260</sup>

However, the Inquiry is concerned that there are no specific guidelines requiring consent for such separations, and this may lead to children being isolated from parents against their will. There is evidence that on one occasion the Centre Manager gave permission for a boy to be placed in an observation room overnight without parental consent, even though he was accompanied by his parents.<sup>261</sup> While this may be an isolated incident, it indicates that, in the absence of clear procedures, there is a risk that ACM may make decisions to place children in observation without parental consent, resulting in involuntary separation from their parents.

### **(c) Parental care**

The Department has suggested that it is the parents' responsibility to protect children from self-harm. It also suggests that there is a belief amongst detainees that self-harm might affect visa outcomes and implies that if parents are of this belief it may encourage their children to self-harm:

Some detainees have expressed a view that self harming behaviour will positively influence the outcome of their application to stay in Australia. The Department continues to stress to all people, and parents in particular, that there is no link between self-harm and the grant of a visa and that to encourage this belief could place children at further risk of harm.<sup>262</sup>

The issue of parental responsibility is discussed further in section 8.3.4(b) in Chapter 8 on Safety.

### 9.5.4 Can mental health problems be treated in detention?

The Inquiry consistently heard from mental health experts that children and their families who are psychiatrically unwell cannot be treated within the detention environment because the environment is one of the major causes of the problems.

ACM has stated that:

Unfortunately, as need increases the impact of the mental health services become less effective. The issues producing the mental health problems cannot be removed.<sup>263</sup>

A psychologist who worked at Woomera told the Inquiry:

I was working in a no win environment because I couldn't change the environment. No matter how much I worked with the clients, I couldn't change the cause of the behaviour, the cause of their stress, it's like having a patient coming into the hospital with a nail through the hand and you are giving them Pethidine injections for pain but you don't remove the nail. That's exactly what is happening in Woomera. You've got people down there with nails through their hands, we're holding them, we're not treating the cause. So, the trauma, the torture, the infection is growing. We are not treating it, we're just containing it. Eventually when those people return to their homelands, if they don't get temporary visas, they are going to carry that with them.<sup>264</sup>

The Inquiry has received numerous psychiatric reports that stated that the only way to treat the mental illness of children in detention is to release them with their family.

For example, a psychiatric report regarding siblings aged 13 and 11 stated that neither child could be treated in the detention environment. Regarding the brother (see further Case Study 3), the report stated:

[His] psychological condition cannot be properly cared for within the detention environment. There is no psychiatric intervention that can be carried out within the current environment that is at all likely to be helpful to him. In particular, antidepressant medication offers no significant likelihood of enhancing his wellbeing while he and his family remain in the detention environment.<sup>265</sup>

Of the sister it stated:

[She] is significantly impaired and her psychological condition cannot be properly treated within the detention environment which itself is a major contributing factor. There is no medication, or other intervention, that offers significant likelihood of enhancing her wellbeing while she remains in the detention environment. Removal from the detention environment with other members of the family would confer significant benefit.<sup>266</sup>

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The report recommended that there was 'an urgent need for the children to be removed from the detention environment. The strong preference would be for them to be with at least one of their primary caregivers'. The report also stated that there:

is no place for mental health intervention with these children whilst they remain in the centre, the detention experience being the primary contributing factor to their current depression and suicidality...

In conclusion, any course of action other than their immediate removal from detention must be considered a serious disregard for the emotional wellbeing and physical safety of these children.<sup>267</sup>

These recommendations were not implemented. As at December 2003, these children were still in detention.

In November 2002, an ACM psychologist outlined the extent of psychiatric problems at Woomera in a letter to FAYS concerning seven children. She reported that six of these children demonstrated symptoms of either depression or PTSD. The letter concluded that:

These children cannot be treated in the detention environment. Helping the children is inseparable from the safety and well being of the parents who equally require appropriate mental health interactions and appropriate psychiatric care. These children continue to suffer severe mental health problems. This is a medical and psychiatric emergency.<sup>268</sup>

The DHS Mental Health Unit has also concluded that:

The over-arching issues raised by these cases and reports are:

- Increasing clinician concern that their recommendations are not being implemented by DIMIA.
- The ineffectiveness of community based treatment delivered at Woomera.
- No effective treatment programs can be put around people while they are in such a noxious environment...<sup>269</sup>

Thus the connection between continuing detention and continuing mental health problems, in the view of these experts, is close to inseparable.

Case Studies 1 and 2 at the end of this chapter provide further examples of the connection between detention and the declining mental health of families in Woomera.

### 9.5.5 Implementation of recommendations regarding the mental health of children

Recommendations for actions protecting the mental health of children may be made by ACM mental health staff, State child welfare agencies, State mental health services or independent mental health experts. In some cases these experts have suggested that children be removed from the detention environment.

While the Department relies on these authorities and experts for advice regarding children in detention, it is quite clear that the final decision regarding the implementation of these recommendations rests with the Department itself and not the mental health experts or the State child welfare authorities.

Broadly speaking, there are two categories of recommendations made by experts in relation to the mental health of children. The first category includes recommendations of measures that can be taken within the detention environment, including specific recommendations regarding the safety of children (for example, the movement of a family between compounds due to fears for a child's safety) and general recommendations about the detention environment (for example, increased access to education and recreation programs). The second category includes recommendations for the removal of children from the detention environment, usually due to the view that it is impossible to treat children effectively while they remain in detention.

The evidence before the Inquiry suggests that the recommendations regarding specific and immediate problems or threats within the detention context were often followed.<sup>270</sup> This issue is discussed further in Chapter 8 on Safety. However, DHS stated that their general recommendations seeking to improve the detention environment as a whole were not followed as frequently:

The lower rates [of implementation of recommendations] are the ones that are broader than immediate safety. Immediate safety recommendations are implemented on most occasions. It is the broader recommendations which include external people with expertise such as STTARS [Survivors of Torture and Trauma Assistance and Rehabilitation Service] being involved to provide counselling, the broader assessments and mental health involvement of external agencies, programming around recreation activities, vocational education, employment and training within the centre...<sup>271</sup>

Whether the Department acts on recommendations in the second category, for release from detention on mental health grounds, has depended entirely upon whether a child is unaccompanied, or detained with parents or other family members. Since January 2002, just under 20 unaccompanied children have been placed in the community in home-based places of alternative detention on the basis of mental health recommendations from State health authorities.<sup>272</sup>

However, recommendations to release or transfer children accompanied by their parents on mental health grounds were almost never acted upon. As explored in Chapter 6 on Australia's Detention Policy, the *Migration Act 1958* (Cth) and the Migration Regulations severely limit the circumstances in which children or their parents may be released from detention. Restrictive bridging visa regulations mean that whole families are rarely eligible. However, the Department has complete discretion regarding the transfer of families to alternative places of detention. Any residence may be approved by the Minister as an alternative place of detention. For example, the unaccompanied children released into alternative detention are living in foster care in homes that have been approved as an alternative place of detention. As discussed in Chapter 6 on Australia's Detention Policy, the Inquiry is

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of the view that the Department has not fully utilised this option for children with mental health problems.

On one occasion it appears that the Department became frustrated with the 'advocacy' role that some mental health specialists were taking. In response to receiving a copy of a July 2002 psychiatrist report recommending the immediate release from detention of the family that is considered in Case Study 2, the Department Deputy Manager made the following comments in an email to the Department's Central Office:

More importantly, this is a copy of a report made by CAMHS after a visit at the request of ACM Health. It seems clear to all here that CAMHS/the Women's and Children's Hospital have been asked to make an assessment, as specialists, to assist ACM Health with their diagnosis and treatment of the family, and for them to provide advice to DIMIA based on that assessment.

They have not been asked to carry out assessments in relation to visa options. Nonetheless they have forwarded a copy of their report, to this office, stating that the family cannot be treated in the detention environment. ...

While it is good for us to get this info – it seems that the Women's & Children's Hospital are in fact moving outside of what they have been asked to do/they are not following what ACM Health & [the Woomera GP] consider to be proper professional channels, and as a result appear to have their own agenda in relation to the IRPC.

This is an ongoing issue in any case, and is only passed on to you so that you have a sense of how some State Health services here seem to be advocating rather than treating/diagnosing.<sup>273</sup>

These comments indicate a reluctance to properly consider the recommendations of consultant psychiatrists to which detainees have been referred because the recommendations are for release from detention rather than for treatment within detention.

On the other hand, staff from State authorities felt frustrated that they could not implement recommendations that they believed were important for the mental health of children. State authorities have indicated to the Inquiry that the content of their recommendations were often shaped in light of the known limitations of the detention regime. In particular, staff felt constrained from making recommendations that children be removed. An independent report by Robyn Layton QC regarding the position of DHS under its Memorandum of Understanding with the Department stated that DHS is:

... placed in a situation of compromise in relation to the welfare of children if the Federal Minister as a matter of policy is not prepared to release the whole family into the community (which appears to be the case in practice up to date). In that case [DHS] is trying to weigh up and make recommendations on potential options all of which are likely to be detrimental to the best interests of the child, such as:

- that the child remain with his family in the detention centre, or

- that the child be taken away from both of his parents or other family in the detention centre and placed in alternative care; or
- that [DHS] try and negotiate a compromise such as release with the child's mother into community detention leaving the father in the detention centre.<sup>274</sup>

CAMHS summarised the frustrations faced by mental health agencies in making recommendations regarding the mental health of children in detention as follows:

In summary, assessment and in some cases follow up services are currently being provided to 9 families (14 children) in Woomera IRPC. Despite some attempts at intervention in the detention context little has improved, and some of the children show deterioration in their functioning. There is currently a very significant escalation in acting out and self harming behaviour by several of the younger adolescent children (11 – 14 year olds). They all remain at high risk of both immediate harm as well as the long term developmental consequences of ongoing time in detention. Recommendations and expert clinical advice has been provided but to date substantially ignored. Similarly it appears FAYS staff are limited in their ability to respond effectively to the child protection needs of children in this traumatising context, where there are not specific allegations against an individual(s). DIMIA ultimately has discretion about acting on recommendations from either Health or FAYS reports.<sup>275</sup>

However, over 2002, State agencies recommended the release of children from detention more regularly.

This may be due in part to the increasing seriousness of the mental health problems faced by long-term detainee children. The case studies at the end of this chapter give a full chronology of several children suffering from serious mental health issues and the repeated recommendations that were made for their removal from detention, by State authorities, ACM staff and consultant psychiatrists. The case studies show that these health professionals are all of the view that removal of these children with their families from the detention environment is the only effective way to treat their serious mental health problems.

Recommendations for the release of the family in Case Study 1 had not been followed as at the end of 2003. The children from the second family were released on a temporary protection visa after 32 months of detention. Recommendations for the release of the child in the third case study had also not been followed by the end of 2003, although he was placed in the Woomera RHP in January 2003 after 20 months of detention.

The Department informed the Inquiry that:

While the department acknowledges that not all recommendations to release children with mental health issues into the community have been followed, usually because they could not be implemented lawfully, the department advises that it has released several children from immigration detention facilities on mental health grounds.<sup>276</sup>

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However, apart from the unaccompanied minors who were released from January 2002, the Inquiry is aware of only two families who left detention centres on mental health grounds over the period of the Inquiry – one was released on bridging visas, the other was transferred to a place of alternative detention in the community.

The Department points to its efforts to establish the Woomera RHP, and the other housing projects that are under development as at September 2003. Since December 2002, 'all women and children likely to remain in detention for a not short period have been offered accommodation in alternative places of detention such as the Woomera RHP in the Woomera community'. The Department suggests that this has given detainee parents 'a very real opportunity to arrange for their children to leave the immigration detention facility, if they believe that this would truly benefit their child'.<sup>277</sup>

However, as discussed in Chapter 6 on Australia's Detention Policy, the Inquiry is of the view that because this form of alternative detention requires the separation of two-parent families this may not be the best alternative for families where children are suffering from mental illness. This is demonstrated in both Case Study 1 and Case Study 2. Even for one-parent families the housing projects do not offer the liberty that may be necessary for effective treatment.

Therefore, it appears to the Inquiry that there have been insufficient efforts by the Department to comply with the recommendations of mental health experts that children should be removed from the detention environment. This has resulted in children with serious mental health conditions remaining in the environment that is contributing to their problems.

### 9.5.6 Findings regarding the treatment of mental health problems

The overwhelming evidence from mental health professionals is that since the detention environment itself is one of the major causes of mental illness amongst children, they cannot be effectively treated while they remain in that environment. While the Inquiry acknowledges (although does not accept) the limitations imposed by bridging visa regulations, the Department has always had the option to transfer families out of detention centres into the community. Since January 2002, the Department has exercised this option in the case of approximately 20 unaccompanied children. However, this option has not been vigorously pursued in the case of children accompanied by their parents. The impact of this failure on some families is illustrated in Case Studies 1 and 2 at the end of this chapter.

For those families who remain in detention centres, the Department has an obligation to ensure that the children have access to the health services necessary to achieve the highest attainable standard of health. Evidence from current and former staff and detainees, Departmental and ACM documents, State mental health and child protection agencies and independent health experts, amongst others, suggests that this obligation has not been fulfilled.

Although general health screening occurred when children arrived in detention centres, there is no evidence that this process included screening for mental illness. The absence of routine and early identification of mental health problems is particularly concerning given the likelihood that children in detention might suffer from prior torture and trauma.

The Inquiry acknowledges that many individual staff members tried to provide the best care they could in the circumstances. However, there were insufficient mental health practitioners to deal with the heightened needs of detainees at various detention centres at different periods of time. The high turnover of mental health staff also impacted on the quality of the mental health care.

The process of referral to State mental health and child protection agencies has been slow and cumbersome. There was no prompt access to child psychiatrists. Specialist access to families was limited during some disturbances – the same time the children were at most risk.

No torture and trauma services were provided to children. According to the NSW specialist agency, STARTTS, this was because ACM refused to escort the patients to their office and they refused to treat the children in the ‘counter-therapeutic environment’ of Villawood.

The Inquiry finds that the strategies in place to address self-harm have been successful in preventing the death of any child by suicide. The HRAT observations also appear to have reduced the numbers of children who may have otherwise self-harmed. The Inquiry notes, however, that the strategies were more focussed on immediate prevention than long-term therapeutic care. For example, the HRAT observations were conducted by detention officers rather than mental health professionals. The Inquiry is also concerned there are no clear guidelines specifically addressing the use of observation rooms for children. In particular, there are no guidelines requiring the consent of parents.

## **9.6 Summary of findings regarding the mental health and development of children in detention**

The evidence before the Inquiry regarding the impact of detention on the mental health of children demonstrates a breach of articles 3(1), 3(2), 6(2), 22(1), 24(1), 37(a), 37(c) and 39 of the CRC.

The evidence before the Inquiry clearly demonstrates that Australia’s immigration detention centres can have a serious and detrimental impact on the mental health of children. A variety of factors contribute to mental health problems for children in detention. All of them are either the direct result of, or exacerbated by, long-term detention in Australia’s detention centres. The longer children are in detention the more likely it is that they will suffer mental harm.

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Many children in immigration detention arrive in Australia with pre-existing trauma. Upon arrival in a detention centre they face the stresses of living behind razor wire, locked gates and being under the constant supervision of detention officers. While most detention officers treated children well, some used offensive language around children and, until 2002, officers in some centres called children by number.

Negative visa decisions can create a great deal of anxiety in children and their parents, because such decisions create uncertainty as to their future in Australia and because the effect of the decision is that they will remain in detention. However, one of the most serious problems faced by children is the cumulative effect that the detention environment has on the family unit.

Detention inherently circumvents a normal family environment in which parents have control over the day-to-day decisions concerning their child's life. Parents, like their children, may arrive with vulnerabilities associated with experiences of trauma. The impact of the detention environment on the mental health of some parents carries over to the children who can no longer rely on their support. In some cases, this results in role-reversal with the children taking on a supportive role. In other cases, parents have been hospitalised, taken to medical observation rooms or placed in security compounds. Case Studies 1 and 2 at the end of this chapter demonstrate the serious impact of detention on two families.

All of these factors have caused many children in long-term detention to suffer from anxiety, distress, bed-wetting, suicidal ideation and self-destructive behaviour including attempted and actual self-harm. The methods used by children to self-harm have included attempted hanging, slashing, swallowing shampoo or detergents and lip-sewing. Case Study 3 chronicles the self-harm attempts of one 14-year-old boy in Woomera. Some children have also been diagnosed with specific psychiatric illnesses such as depression and PTSD. The longer children were detained the more likely it was that they displayed one or more of these problems. The impact on children can be long-term.

Mental health experts who examined these children state that the only effective way to address the mental health problems caused or exacerbated by detention is to remove them from that environment. Despite the consistent recommendations from independent mental health experts, ACM staff, State mental health authorities and child protection agencies, the Department almost never removed children accompanied by their parents (as opposed to unaccompanied children) from the detention environment on mental health grounds.<sup>278</sup>

The combination of laws that result in the mandatory detention of children and the failure of the Department to apply those laws in a manner that results in the prompt transfer of families to the community (either home-based detention or release on a special needs bridging visa – see further Chapter 6 on Australia's Detention Policy) result in a breach of the rights of children to enjoy the highest attainable standard of health (article 24(1)) and constitute a failure to ensure the development of children to the maximum extent possible (article 6(2)). These factors also amount to a failure to take all appropriate measures to promote the recovery and reintegration of children

who have been the victims of trauma in an environment which fosters their health, self-respect and dignity (article 39) and a further failure to take appropriate measures to ensure that children seeking refugee status have received appropriate protection and humanitarian assistance in their enjoyment of the rights in the CRC (article 22(1)).

The Inquiry finds that there was no reasonable justification for the continued detention of children over the clear (and in some cases repeated) recommendations of mental health experts that they be released immediately in the interests of their mental health. The Inquiry finds that the continued detention of children in these circumstances is a breach of their rights not to be subjected to cruel, inhuman or degrading treatment (article 37(a)).<sup>279</sup> It also amounts to a failure to treat such children with humanity and respect for the inherent dignity of children (article 37(c)) and a failure to take all appropriate legislative and administrative measures to ensure the protection and care of children necessary for their well-being (article 3(2)). These breaches are the result of both the inflexible nature of the laws under which the children were detained, and a failure by the Commonwealth to use existing mechanisms within the law to ensure removal from a detention centre when children were suffering mental harm.

Given the seriousness of the impact of continuing detention on children, these same failures suggest that the best interests of the child were not a primary consideration in the introduction and maintenance of the laws requiring the mandatory detention of children. Nor was it a primary consideration in the decisions of the Department in the administration of those laws. Accordingly, Australia's mandatory detention laws and the manner of their application by the Minister and the Department result in a breach of article 3(1) of the CRC.

The direct link between the continuing detention of children in Australian detention centres and the increased risk of mental harm makes it unsurprising that the efforts to provide mental health treatment have been relatively unsuccessful. However, the Department must seek to overcome that hurdle by ensuring that children in detention have access to the mental health care services necessary to ensure the highest attainable standard of health in accordance with article 24(1).

The Inquiry acknowledges the considerable efforts of individual staff members to provide the best care possible in the circumstances. However, the Inquiry finds that there was no routine assessment of the mental health problems facing children on arrival. There were insufficient numbers of mental health staff to deal with the problems emerging in children, and there was insufficient access to external mental health experts. No torture and trauma services were available to children who needed that specialist care.

The Inquiry finds that the observation systems in place to prevent self-harm were successful in preventing the death of children by suicide. However, there were no clear guidelines regarding the use of medical observation rooms for children. The Inquiry notes that the suicide prevention systems focussed on immediate prevention of harm rather than holistic therapeutic care.

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Therefore, while the Inquiry recognises the difficulties created by the detention environment in ensuring the highest attainable standard of health of children, it finds that the deficiencies in the manner in which the mental health needs of children were addressed amounts to a breach by the Commonwealth of article 24(1) of the CRC.

To the extent that compliance with the JDL Rules is a useful guide to assessing whether or not there has been compliance with article 37(c), it is relevant to note that those rules recommend that there be unobtrusive head counts and this was not the experience of some children in detention. The practice of calling children by number rather than name and the absence of specific guidelines regulating the use of solitary medical observation rooms for children also raises concerns about compliance with article 37(c). However the Inquiry makes no finding on these facts alone, rather it flags these as general considerations to be discussed further in Chapter 17, Major Findings and Recommendations.

In summary, the long-term detention of children in Australia's detention centres has a serious negative impact on a child's ability to enjoy their fundamental rights to recovery from past psychological trauma in a healthy environment, the maximum possible mental and emotional development and the highest attainable standard of health. This highlights the importance of ensuring that the detention of children is a measure of last resort and for the shortest appropriate period of time in accordance with article 37(b).

## 9.7 Case studies

### 9.7.1 Case Study 1: Declining mental health of a family in Woomera

This family consists of a father, mother, and a son who was born on 17 July 1990.

*20 April 2001*

Family arrive at Ashmore Islands. Transferred to Woomera.

*August 2001*

Mother and son accommodated in the Woomera RHP.

*May 2002*

FAYS are notified regarding this family after the father attempted to hang himself twice and the son threatened to self-harm. The assessment notes that the son was:

exhibiting clear signs of severe stress: his sleep-talking, nightmares and now sleep-walking indicate deep-seated trauma. The current stressors of detention and his parents' depression are clearly causing [the child] extreme distress ... his mental health will only deteriorate further without sensitive and effective long-term intervention.<sup>280</sup>

ACM psychiatric nurse notes that the boy's 'mental health and behaviours have deteriorated since his father has been depressed and suicidal. He has attempted to assume the role of head of the household in his father's absence'. The nurse

suggests that the family's problems would be answered by 'a positive response to their bridging visa application'.<sup>281</sup>

Department Manager at Woomera requests an independent medical assessment on whether the family has special needs 'that cannot be cared for [in detention], in order for further consideration to be taken by this Department as to whether they are eligible for bridging visas'.<sup>282</sup> The letter notes that 'ACM are indicating that this family may have conditions that cannot be cared for within a detention environment'. The Inquiry did not receive a report of this assessment, or evidence of consideration of a bridging visa application.

At the end of May the mother and son are returned to Woomera from the Woomera RHP.

#### *May 2002 – November 2002*

The son self-harms by cutting himself on at least eight occasions. He attempts to hang himself twice.

#### *June 2002*

A FAYS report from early June notes:

[The boy] is the only child in a family where both parents are severely depressed and unable to parent him. Consequently, [he] has taken on the role of 'the man of the family' and mother's 'protector'. ... This child has shown serious mood, sleep and behavioural deterioration this year. His self-harm 'gestures' have now escalated to self-harm incidents and he will continue with this behaviour. He is at ongoing risk of self-harm and his parents are unable to support and help him. In fact, he is currently the 'strong one' in the family – and he is only 11 years old.<sup>283</sup>

This report recommends that the child and at least one parent are released from detention on a bridging visa.

The Department requests that ACM provide further information about the psychological conditions and treatment of the family 'to assist in [its] assessment of management options for these detainees'.<sup>284</sup>

ACM psychologist expresses concern that the son is adopting the role of his father by trying to look after the family:

[He] is completely dysfunctional for his age and experiences bouts of depression and uncontrollable rage. Although [he] believes he is fulfilling the correct role in the family, the stresses for a young boy to represent the family under these circumstances is pushing him into extreme and dangerous behaviours.

The report goes on to note that:

The severe family breakdown paralleling the psychological breakdown of the father, plus the growing concerns regarding [the son's] role, needs to be addressed in an environment in which stronger psychological and community interventions can occur. [The boy] in particular, requires input

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which is more appropriate to a child his age which is outside of the role which he has acquired at the detention centre.<sup>285</sup>

*July 2002*

ACM forwards medical treatment plan to the Department, which makes the following recommendations regarding the family:

Nil improvement likely in current detention setting. Removal of child from negative environment. Alternative housing would assist in family bonding and reduce damage caused by exposure to self destructive behaviour and increase residents ability to cope and care for child.<sup>286</sup>

A senior psychiatrist and psychologist from the Department of Psychological Medicine, Women's and Children's Hospital, Adelaide notes that the son had not been attending school for the previous two months because he was looking after his parents, and that 'in the absence of ... basic developmental needs, he adopts a parental role as a way of defining himself'. The psychiatrist diagnoses the boy as follows:

[He] presents with a history of depressed mood in association with neurovegetative changes of insomnia, lethargy, anorexia and poor concentration. He describes feelings of hopelessness and helplessness and he is anhedonic. He has made multiple suicide attempts in the past and he is at significant risk of further suicide attempts.

These findings are consistent with an episode of major depressive disorder. There is also evidence of intrusive thoughts, recurrent nightmares, hyper vigilance and consistent of the diagnosis of Post Traumatic Stress Disorder [PTSD], secondary to traumatisation in the Detention Centre.

The psychiatrist recommends that:

[The son] and his family be removed from the Detention Centre as a matter of urgency. [The son's] emotional deprivation and PTSD cannot be treated in the detention context, because that environment is contributing to it. Continued detention increases the risk of self harming behaviour and increased traumatisation ... We do not believe that separating the family at this stage would be in their best interests.<sup>287</sup>

Another psychiatrist from the mental health service at the Royal Adelaide Hospital wrote to the ACM psychologist at Woomera:

They present as a highly dysfunctional family unit with serious individual psychopathology. I would anticipate that their prognosis is poor and that little can be done to help them whilst they remain in the detention situation.<sup>288</sup>

*August 2002*

Child is placed on a Behaviour Management Plan by ACM.<sup>289</sup> ACM psychologist reports that the child witnessed his father self-harm, that he was considered a child at risk and suggested that the mother and child be returned to the Woomera RHP. The psychologist notes the psychiatric report of 22 July 2002 that states that the family cannot be successfully treated in the detention environment.<sup>290</sup>

Head of the Department of Psychological Medicine at the Women's and Children's Hospital, Adelaide assesses family:

I know of no intervention that could be carried out in the detention centre that would benefit [the son] ... An all-of-family approach is urgently required, and this had not proven feasible in the detention centre. I therefore unreservedly concur with [the previous doctors'] recommendation of removal of the whole family from the detention centre.<sup>291</sup>

FAYS assessment report on children in Woomera notes the following regarding this child:

The child ... was interviewed by FAYS in March, 2002 but the lad was, at that stage, refusing to speak to any Psychologist or other medical professional. He was exhibiting significant signs of depression at the time.

[The child's] threats of self-harm continued at which time FAYS recommended that he be referred to CAMHS for assessment. Before this was enacted [he] had moved from threatening to harm himself to actually cutting his wrists and arms. Whilst he did not do much physical harm to himself, this behaviour was very significant because the child's own father had made a number of attempts to cut and hang himself.

It was some weeks before CAMHS received the referral information following FAYS recommendations about this child.<sup>292</sup>

Executive Director of the Department of Human Service's Social Justice & Country Division writes to senior officials at the Department's Central Office, enclosing all the experts' reports. She recommends that the family be removed from detention.<sup>293</sup> She also faxes to the Department a report from the DHS mental health unit that suggests that the child is at extreme risk of self-harm.<sup>294</sup>

### *October 2002*

In early October, FAYS were notified of alleged sexual harassment of the child. The family were offered accommodation in India Compound which they refused.<sup>295</sup>

FAYS describes the situation as critical and calls a teleconference with the Department, ACM and the GP at Woomera Hospital.<sup>296</sup> Meeting minutes state that self-harm incidents had risen so much in frequency that '[the son] now seems to be disassociated when he cuts himself'.<sup>297</sup> Furthermore, 'FAYS workers are of the opinion that this family cannot begin to improve as long as they are in any form of detention'.<sup>298</sup>

Department Manager at Woomera writes to senior officials in Central Office, enclosing all the experts' reports. She notes the following options for the family:

- The consensus appears to be that continued detention at Woomera IRPC will only serve to exacerbate their condition and that transfer to another Centre may assist with our management of the family but would not contribute to any real improvement in the family's health.

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- Access to a BVE [Bridging Visa E] may now have ceased following the outcome of the Federal Court appeal. I will need to check whether a FFC [Full Federal Court] appeal is likely, although it should be noted that this would only provide a small opportunity for BVE entitlements.
- Placement in alternative place of detention. Essentially this would need to be a psychiatric facility, or a community placement with extraordinary network of support. [The Woomera GP] cautioned about a placement in the community without very strong and close supervision given [the father's] condition.<sup>299</sup>

ACM Mental Health staff tell the Department Manager that they are 'gravely concerned' about the family:

It has become progressively difficult over the past several weeks to engage [the son] and his family in any form of communication. Mental Health staff are generally met with verbal abuse from [the son] and at times from his mother and father ... The Mental Health Team continue to attempt on a daily basis to assess [the son] but to no avail ... The ... family are most noticeably becoming more isolative.<sup>300</sup>

Department's Unaccompanied Minors and Children Teleconference notes that [the son] has self-harmed again, that the Department's Central Office (Detention Operations section) is 'looking into him and his family' and that 'he is also the subject of a FAYS report'.<sup>301</sup>

ACM psychologist writes a Memo to the Department Manager, marked 'Urgent', stating that:

Long term detention has had a devastating effect on [this] family. Not only have [the mother and father] experienced an emotional breakdown, their son's mental state has been significantly affected. [The son] is currently in an extremely fragile emotional state. This is likely to continue to influence many areas of his life including his ability to form relationships, his future risk of psychiatric morbidity and suicide.

Detention of this family at the Woomera Detention Centre is no longer an option. I strongly recommend that the ... family be given alternative accommodation, preferably community based and provided with ongoing psychiatric and psychological treatment and support. Anything less would be a failure in our duty of care.<sup>302</sup>

### *November 2002*

The Acting General Manager, ACM writes to the Department regarding this family. The letter states that 'health services staff are doing everything reasonably possible to provide a level of care and management of [the child] and his family however this does not appear to be having any positive impact'. The letter goes on to say:

ACM has also sought external assistance in the management of [this family]. Numerous reports have been written by FAYS and Consultant Health Professionals regarding this family and their ongoing care and management requirements. All external agency reports recommend that the family remain

together and receive ongoing treatment at least in another Detention Centre to Woomera, but preferably in an alternative place of detention.

ACM concludes that:

[h]ealth services staff are of the opinion that the deterioration of this family has reached a level where the options and management strategies available to ACM are insufficient to give a reasonable level of comfort that the risks can be adequately managed.<sup>303</sup>

The letter provides to DIMIA 18 items of correspondence or reports on the family.

ACM psychologist reports:

Diagnosis: [Boy] is completely dysfunctional for his age and experiences bouts of depression and uncontrollable rage. He is in the process of developing borderline conduct traits. High risk of suicide.<sup>304</sup>

*January 2003*

Family is moved to Baxter detention centre.

On 6 January 2003, CAMHS assessed this family, concluding of the child that:

[He] remains depressed with symptoms of PTSD. He remains at high risk of suicide and the centre is clearly unable to provide the appropriate supports to ensure his safety. I therefore recommend hospitalisation for urgent psychiatric review and intervention.<sup>305</sup>

*February 2003*

A psychiatrist from the Women's and Children's Hospital in Adelaide saw the family and reported on 13 February 2003 their significant distress at detention, including the following regarding [the child]:

When I asked if there was anything I could do to help him, he told me that I could bring a razor or knife so that he could cut himself more effectively than with the plastic knives that are available (showing me the many scars on his arm). He said that he could not find anything to distract him, that occasionally he played with the Play Station or watched television.<sup>306</sup>

This psychiatrist further reported his view that the most therapeutic option is that outlined in documents from 2002, which refer to treatment of the whole family once released from detention. Alternatively, he recommends treatment of the father and son in separate hospitals in Adelaide with the mother staying with the son.

*May 2003*

This psychiatrist made a further visit to Baxter in May 2003, when he consulted with ACM mental health staff who were unanimous in their agreement that the family cannot be treated in the detention environment. He noted further that:

Each member of this family suffers from severe psychiatric disturbance sufficient to warrant consideration of in-patient admission. We can find no

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evidence to change our opinion that [the child] should not be separated from his parents. Thus unless the family are removed from the detention environment they cannot be regarded as being able to benefit from any mental health intervention. As a result the continued position on DIMIA's behalf that part or all of the family needs to remain in detention has the direct effect of denying them any significant mental health intervention.<sup>307</sup>

*September 2003*

The Department informed the Inquiry that 'the Department of Human Services in South Australia will develop a comprehensive care plan for the family. The plan will expressly examine options for alternative detention arrangements in the community'.<sup>308</sup>

*December 2003*

Family still in detention.

### 9.7.2 Case Study 2: Declining mental health of a family in Woomera

This family consists of a father, mother and three children. The eldest daughter was born on 1 January 1984, the younger daughter on 1 January 1987 and the son on 1 January 1998.

*31 December 2000*

Family arrives at Ashmore Islands.

*5 January 2001*

Transfer to Woomera.

*February 2002*

Psychiatric report notes that:

- the son was significantly impacted by witnessing riots in December 2001
- the younger daughter was overtly depressed and expressed suicidal ideation
- the eldest daughter had 'masked depression'
- the father was overtly depressed and expressed suicidal ideation

Report recommends that the family should be released from detention, and receive ongoing psychiatric assessment and treatment:

The severity of depression, despair and suicidality in the father and both girls must be considered a psychiatric emergency. The youngest child is also traumatised by ongoing exposure to violence in the centre and affected by his parent's depression. This should not be further prolonged.<sup>309</sup>

The report recommends that if the family are to remain in detention that they should be moved to a less harsh and isolated centre where they can receive psychiatric

treatment, and that education and recreational opportunities should be provided for the children. Significantly, the report states that:

There is no point in [these] recommendations if the family remain at Woomera IRPC, an environment that is isolating and traumatic for them and where there is inadequate mental health treatment.<sup>310</sup>

*May 2002*

Letter from the doctor at the Woomera Hospital to the Department Manager recommends that the family be considered for the Woomera RHP:

Each family member is exhibiting some form of mental illness, however the level of illness amongst the two daughters is severe. The parents and two eldest daughters are exhibiting symptoms of major depression and anxiety disorder, and the youngest child is exhibiting behavioural disturbance and bed wetting behaviour.<sup>311</sup>

ACM psychologist reports to the Department Manager that the mother and two daughters were 'extremely distressed and presented as being deeply depressed and desperate'. Psychologist assesses that:

... the psychological needs of this family cannot be adequately managed within a detention environment.<sup>312</sup>

CAMHS assessment is provided to the Department Manager. This report finds that [the two daughters] are at risk of further self-harm and suicide and at significant risk of long-term mental health problems:

[The eldest daughter] exhibits symptoms of depression. Her expression of anxiety, despair and ongoing self-harming behaviour are major concerns. She said that she has attempted to harm herself on more than one occasion.

[The younger daughter] presents herself with the same clinical picture like her sister ... – exhibiting significant symptoms of depression, anxiety, suicidality, despair, disturbed sleep, headaches and emotional resistance.<sup>313</sup>

CAMHS also find that [the son] presents with high risk of developmental harm and trauma related harm and that both parents suffer with symptoms of depression, anxiety and suicidal ideation. CAMHS recommends that the whole family be urgently released from detention, specifically stating that:

CAMHS is of the opinion that it is not possible to treat post-traumatic stress, suicidality and depression within a detention centre environment.<sup>314</sup>

Department Deputy Manager writes to a medical practitioner, requesting an assessment of the family for the purposes of an application for a bridging visa.<sup>315</sup> Family notified of ineligibility to apply for a bridging visa three days later.<sup>316</sup> The Inquiry did not receive a report of the medical assessment – it seems unlikely to have occurred within three days.

## A last resort?

*July 2002*

Department Minute recommending the movement of the mother and children to the Woomera RHP sent to the First Assistant Secretary of the Department.<sup>317</sup>

Report by a psychiatrist from the Women's and Children's Hospital, Adelaide (provided to the Department Manager on 8 July 2002) concludes that none of the family is treatable within the detention environment.<sup>318</sup> The following diagnoses are made in the report:

[The son] has regressed and developed anxiety symptoms and enuresis since exposure to violence in Woomera some months ago. His speech may also be delayed. [He] is not able to be treated within the detention environment...

[The mother] has symptoms of major depression despite supportive family therapy and several months treatment with appropriate medication. She has persistent insomnia, anhedonia, weepiness and a sense of hopelessness. [She] is not able to be treated within the detention environment...

[The father] has persisting symptoms of major depression and post traumatic stress disorder, despite treatment with appropriate medication and family support therapy for several months. [He] is not able to be treated in the detention environment...

[The eldest daughter] has symptoms of major depression and post traumatic stress disorder. Her suicidality is currently expressed by her participation in the hunger strike. Despite appropriate treatment with medication and several sessions of supportive family therapy, her symptoms persist. [She] is not able to be adequately treated in the detention environment...

[The younger daughter] has persisting symptoms of major depression and post traumatic stress disorder despite several months treatment with family therapy and appropriate medication. She is actively suicidal and is currently expressing this by her participation in the hunger strike. She is not able to be treated in the detention environment.

Psychiatrist concludes that the situation of this family represents a 'medical and psychiatric emergency':

The illness of both parents and both teenagers and the developmental and behavioural difficulties displayed by [the son] cannot be adequately addressed in the detention environment. This is in part because the detention environment, with constant exposure to the despair and self destructive acts of other residents, is the source of significant trauma to all members of this family.

It is extremely important for this family to remain together. There is a high risk that if the children were separated from their parents, or the mother and children separated from [the father], that this would increase the risk of suicide of one of the family members.

The father told the psychiatrist that:

during the time he was arrested and tortured in Iran the military there had threatened to bring his children in and make them watch him being tortured. He said 'This is what is happening now in Australia'.

Psychiatrist recommends that the family should be immediately removed from the detention context. She states that until this is possible they should be moved to live in the Woomera RHP.<sup>319</sup>

The Department Deputy Manager questions the status of these reports in an email to Central Office, stating that:

[CAMHS] have not been asked to carry out assessments in relation to visa options. Nonetheless they have forwarded a copy of their report, to this office, stating that the family cannot be treated in the detention environment.<sup>320</sup>

*30 July 2002*

Mother and children are moved to the Woomera RHP.

*August 2002*

Paediatric report recommends son's removal from the detention environment:

I see this young man as having been exposed to a number of inappropriate adult behaviours. His static speech and language development and enuresis are most likely to come from post traumatic stress disorder. ... This young man needs continued skilled observation and his parents need to be in a situation in which they can provide him with security and protection from the traumas he has observed. ...

The ideal environment for this young man to settle would be a family home setting with appropriate social and other supports.<sup>321</sup>

*October 2002*

Mother is referred to a psychiatrist by the doctor at Woomera Hospital. The referral notes that:

In summary it has been observed by various clinicians that the members of this family are suffering from severe mental illness. It has been recommended to the Department of Immigration by CAMHS that the family be removed from the detention environment. The move to Woomera Housing Project has been unsuccessful at preventing further deterioration of this family and in particular [the mother]. Prescription of medication and provision of supportive psychotherapy have also failed to prevent deterioration.<sup>322</sup>

*November 2002*

By early November, the mother returned to the Woomera centre to be with her husband.

## A last resort?

ACM psychologist reports that all children have severe depression. One of the daughters is suicidal and the son has cognitive development problems. She reports that they cannot be treated in the detention environment.<sup>323</sup>

*August 2003*

Family released on a temporary protection visa after the intervention of the Minister.<sup>324</sup>

### 9.7.3 Case Study 3: History of self-harm by a 14-year-old boy in Woomera

This case study details the history of self-harm by a 14-year-old boy who was detained at Woomera on 26 April 2001 when he was 12-years-old.

*11 April 2002*

Child attempts to hang himself with a bed sheet on playground equipment. Taken to Woomera Base Hospital, returned immediately to Woomera. Placed on 2 minute observations and accommodated in an observation room at the medical centre. Father stays with him. FAYS notified.<sup>325</sup>

*12 April 2002*

Child's mother becomes very upset and is taken to Woomera Hospital for observations and assessment by psychologist. Says that she is on hunger strike.<sup>326</sup>

Child recorded as saying:

he wanted to kill himself because his mother doesn't eat and she cries all the time. 'If I go back to camp I have every intention of killing myself. I'll do it again and again'. Very tired of camp, getting up in the morning and seeing the fences and dirt. 'We came for support and it seems we're being tortured. It doesn't matter where you keep me, I'm going to hang myself'.<sup>327</sup>

'[Child] stated that he would continue to try to kill himself until he was successful as he could no longer tolerate detention. Placed in [medical] observation with permission of and in the company of father'.<sup>328</sup>

*13 April 2002*

Child says that he wants to leave the medical observation room and return to compound with his father. He says that he will not make any further 'attempts to hurt himself or threats of self-harm'. Returns to compound on 15 minute observations.<sup>329</sup>

*14 April 2002*

Child tells officers that he is going to hang himself. Child and his father return to the medical centre.<sup>330</sup>

*15 April 2002*

Child tells officer 'You have three choices, either you kill me, I kill myself, or give me a VISA'.<sup>331</sup>

*17 April 2002*

Child returns to the compound.<sup>332</sup>

*19 April 2002*

Child attempts to hang himself from playground equipment. Child taken to Woomera Hospital with his father.<sup>333</sup>

*21 April 2002*

Child returns to Woomera, on 15 minute observations.

*8 May 2002*

Child threatens self-harm:

He had threatened to self harm either by hanging or drinking shampoo. He was informed that his safety was in his control and that by hurting himself does not alter the situation. Due to previous impulsive behaviours decision made to place him on 30 min HRAT observations.<sup>334</sup>

*17 May 2002*

Child attempts to hang himself from playground equipment. Taken to Woomera Hospital and then returns to the compound. FAYS notified.<sup>335</sup>

*22 May 2002*

Officer reports the child said that:

today is his last day. Told me tonight will be the end, his last night alive.<sup>336</sup>

*30 May 2002*

Psychiatrist reports that:

For [this child] the matter is simple. If he remains in custody he wishes to die. He can no longer bear the razor wire and dirt. He worries about his mother's wellbeing and also about his father who he says is constantly worrying and angry. He has not been going to school, although there has recently been an opportunity to do so, because leaving the compound increases his distress on his return.

[He] has significant neurovegetative changes with sleep disturbance, loss of concentration, appetite, interest and energy. He may also have lost some weight. He is seriously suicidal, maintaining that he has plans to kill himself in the next few days. He would not elaborate, saying that he did not wish to give any hints which might lead to him being prevented from killing himself. He has no significant anxiety symptoms with his predominant affect being one of anger. He experiences hypnagogic auditory hallucinations in bed at night of voices telling him to kill himself. There were no other symptoms suggestive of psychosis.

[He] meets criteria for major depressive disorder. More importantly, he is an acute and serious suicide risk. [His] suicidal intent is closely related to whether or not he is in detention.<sup>337</sup>

*31 May 2002*

Child reported as being 'happy about visiting his mother [in hospital] on weekend, wanted phone call to mother but told he had one yesterday'.<sup>338</sup>

## A last resort?

*7 June 2002*

Child found in the razor wire. He says 'he can't go on anymore'.<sup>339</sup>

*8 June 2002*

Child found in the razor wire again.<sup>340</sup>

*14 June 2002*

Child climbs fence into the razor wire a third time. After about eight minutes he climbs down again.<sup>341</sup>

*24 June 2002*

Child on hunger strike.<sup>342</sup>

*30 June 2002*

Child makes superficial slashes on left forearm. 'Action generated by demand to see mother in hospital – previously refused – not due to depression or suicidal intent'. Incident report states that a visit to the mother is arranged as soon as possible.<sup>343</sup>

*8 July 2002*

Child on hunger strike.<sup>344</sup>

*13 July 2002*

Child found in razor wire.<sup>345</sup>

*26 July 2002*

Child attempts to hang himself.<sup>346</sup>

*29 July 2002*

Child smashes lights in dining area, slashes arm with fluorescent tube.<sup>347</sup> A FAYS report on this incident notes the following:

On 29 July 2002 [the child] was observed to be in an agitated state. On arriving at the mess [he] upturned tables and threw chairs around. He broke one of the lights and cut himself 5 times with the shards of tubing. [He] told medical staff that he did this because he was prevented from seeing his mother [who was in hospital] over the weekend. **Visits outside had been cancelled that weekend due to protester activity outside of the centre.** [He] had been advised of another time made to visit his mother but this did not prevent his distress [emphasis in original].<sup>348</sup>

*January 2003*

Child transferred to Woomera RHP.

*December 2003*

Child in detention at the Port Augusta RHP.

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- 4 *C v Australia*, Communication No 900/1999, 31 November 2002, UN Doc CCPR/C/76/D/900/1999, para 8.4.
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- 6 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the JDL Rules), Geneva, 1990, rule 1.
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- 8 The JDL Rules, rule 31.
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- 15 IDS, 1998, paras 4.1-4.5, [www.immi.gov.au/detention/det\\_standards.htm](http://www.immi.gov.au/detention/det_standards.htm).
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- 27 ACM, Health Services Operating Manual, Policy 4.3, Suicide Prevention, Issue 2, 9 May 2002, para 3.1, (N1, Q8, F9).
- 28 ACM, Health Services Operating Manual, Policy 4.3, Suicide Prevention, Issue 2, 9 May 2002, para 4.1, (N1, Q8, F9).
- 29 ACM, Policy 7.1, At Risk/Self Harm/Suicide Management, Issue 5, 18 April 2002; , Health Services Operating Manual, Policy 4.3, Suicide Prevention, Issue 2, 9 May 2002.
- 30 ACM, Policy 7.1, At Risk/Self Harm/Suicide Management, Issue 5, 18 April 2002, paras 4.5, 4.11.
- 31 ACM, Policy 7.1, At Risk/Self Harm/Suicide Management, Issue 5, 18 April 2002, para 4.21.
- 32 ACM, Policy 6.9, Voluntary Starvation, Issue 3, 27 June 2002.
- 33 ACM, Policy 6.9, Voluntary Starvation, Issue 3, 27 June 2002, Management of Children on Hunger Strike.
- 34 ACM, Policy 6.9, Voluntary Starvation, Issue 3, 27 June 2002, Management of Children on Hunger Strike.
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- 36 DIMIA, Letter to Inquiry, 22 November 2002, Attachment 2, Clarification regarding the application of State and Territory laws in immigration detention facilities.
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- 143 ACM, Response to Draft Report, 15 August 2003.
- 144 7:30 Report, ABC television, 10 April 2002, at <http://www.abc.net.au/7.30/s528366.htm>, viewed 19 December 2003. See also Lateline, ABC television, 6 June 2002, at <http://www.abc.net.au/lateline/s575825.htm>, viewed 19 December 2003.
- 145 Sharon Torbet, Submission 62a, para 11.
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- 147 ACM, Detention Services Monthly Report, August 2002, (ACM N4).
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- 149 Sultan and O'Sullivan, 2001.
- 150 Steel et al, 2003, pp10-11.
- 151 The study notes as a strength that 'the assessments were carried out using international validated psychiatric diagnostic instruments with ratings independently made by three same language

speaking psychologists all with previous experience of assessing refugee adults and children'. The study also acknowledges a number of limitations. For example, it notes that the retrospective reports on psychiatric disturbance prior to detention may have been affected by the passage of time; however, it also notes that the rates of premigration mental illness reported by the adults were similar to rates identified in other post-conflict populations. The study also notes that 'a number of the measures employed to assess detention symptoms and parenting capacity were developed specifically for this study and have not been independently validated'; however, the core measures used to assess for the presence of mental illness in children and adults were based on assessments using internationally validated diagnostic measures. The report does acknowledge the possibility that the respondents may have exaggerated reports of experiences and symptoms, but concludes that consistency in reports made by different families, as well as consistency in reports made by children and their parents interviewed separately suggest that this may be limited. In addition to the summary evidence provided to the Commission, the researchers forwarded detailed psychological reports relating to each of the families assessed for this study on a confidential basis. Those reports support the conclusions of the study.

- 152 Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, June 2003.
- 153 Child and Adolescent Psychiatrist, Department of Psychological Medicine, Women's and Children's Hospital, Adelaide, Summary of Children and Families in Woomera Referred to and Assessed by Child and Adolescent Mental Health Services, January to July 2002, p1, (N5, Case 22, pp10-22). Members from ten families who had been detained in Woomera for between 16 and 20 months were assessed. ACM informed the Inquiry that during these six months there was an average of 109 children detained at Woomera. ACM, Response to Draft Report, 15 August 2003.
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- 155 Dr Sarah Mares and Dr Jon Jureidini, 'Children and Families Referred from a Remote Immigration Detention Centre', paper presented at *Forgotten Rights – Responding to the Crisis of Asylum Seeker Health Care, A National Summit*, NSW Parliament House, 12 November 2003. This study probably includes some of the children in the table above as they were referred to CAMHS during the same period of time.
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- 161 DHS, Submission 181, p17.
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- 163 Dr Annie Sparrow, Transcript of Evidence, Perth, 10 June 2002, p64.
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- 169 Inquiry, Interview with detainee father, Curtin, June 2002.
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- 172 The Department noted that 'Baxter families are generally relatively long-term detainees whose initial applications for visas have been rejected'. DIMIA, Response to Draft Report, 10 July 2003.

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- 175 Steel et al, 2003, p10. See also Sultan and O'Sullivan, 2001, who found that of 33 adult detainees who had been detained over nine months, all but one had displayed symptoms of psychological distress at some time during their detention and that 85 per cent acknowledged chronic depressive symptoms, with 65 per cent having pronounced suicidal ideation.
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# Chapter 10

## Physical Health of Children in Immigration Detention

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## 10. Physical Health of Children in Immigration Detention

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The human right to health is not simply the right to health care. It is also a right to the underlying determinants of health, including food and nutrition, housing, access to safe drinking water and adequate sanitation, and a healthy environment.

*Special Rapporteur on the right to the enjoyment of the highest attainable standards of physical and mental health<sup>1</sup>*

Health is clearly an issue of great importance to children and their parents. The *Convention on the Rights of the Child* (CRC) appropriately places a high obligation on all nations to ensure that children can enjoy the ‘highest attainable standard of health’.

The overwhelming number of health issues about which the Inquiry received evidence related to psychological rather than physical problems (see further Chapter 9 on Mental Health). Furthermore, many of the physical problems identified were in fact a manifestation of the decline in children’s mental health – for instance self-harming actions.

However, it became apparent during the course of the Inquiry that, despite the efforts of individual staff members, the detention of children in remote facilities posed some barriers to ensuring the provision of the highest attainable standard of health for children detained in those facilities for long periods of time. Furthermore, an independent review of health services in detention over 2001 (the Bollen Report) noted several shortcomings in the system in place to provide health service to detainees.

This chapter therefore addresses the following questions:

- 10.1 What are children’s rights regarding physical health in immigration detention?
- 10.2 What policies were in place to ensure the physical health of children in detention?
- 10.3 Did children enjoy a healthy environment in detention?
- 10.4 What health care services were available to children in detention?

There is a summary of the Inquiry’s findings at the end of the chapter.

## 10.1 What are children's rights regarding physical health in immigration detention?

The CRC requires the Commonwealth to ensure that all children within Australia can enjoy 'the highest attainable standard' of health that Australia can offer. The Commonwealth must also ensure that no child in Australia is deprived of access to the health care services necessary to achieve that standard.

States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

*Convention on the Rights of the Child, article 24(1)*

The right to access the health care services available in Australia applies to all children whether or not they are in detention. However, unlike children and parents in the community, families in detention cannot decide where they live, have very limited ability to decide what they eat or wear, and have no ability to seek out their chosen doctor or hospital. There is therefore an obligation on the Commonwealth to take positive measures to ensure that children live in a healthy environment and have equality of access to the health care services available to other children in Australia with similar needs, because this is the 'highest attainable standard' in Australia.

Article 24(2) provides a non-exclusive list of how the 'highest attainable standard of health' may be achieved including the provision of primary health care, combating disease and malnutrition by providing adequate nutritious foods and clean drinking-water, and prenatal and postnatal health care for mothers. This is generally reflective of the core obligations of the right to health as set out by the United Nations Committee on Economic Social and Cultural Rights.<sup>2</sup> Article 25 of the CRC requires periodic review of the health care provided to children.

Article 39 also requires Australia 'to take all appropriate measures to promote physical recovery and reintegration....in an environment which fosters the health, self-respect and dignity of the child'.

The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the JDL Rules) generally reflect what should be done to protect the 'health and human dignity' (rule 31) for juveniles in detention. For example, rules 33-34 talk about the importance of ensuring appropriate sleeping accommodation and sanitary facilities and rules 36-37 set out the importance of appropriate clothing for the climate and suitable food. Rule 49 states that all children should receive 'adequate medical care, both preventative and remedial, including dental, ophthalmological and mental health care'. It also states that all medical care to children in detention should, where possible, 'be provided to juveniles through the appropriate health facilities and services of the community in which the detention facility is located'.

Rule 50 states that children should 'be examined by a physician immediately upon admission to a detention facility, for the purpose of recording any evidence of prior

ill-treatment and identifying any physical or mental condition requiring medical attention'. Rule 51 states that the medical service should seek 'to detect and should treat any physical or mental illness' and that there be 'immediate access to adequate medical facilities and equipment appropriate to the number and requirements of its residents'. Rule 51 also states that all children should be 'examined promptly by a medical officer' where there are health concerns and rule 52 states that medical officers should notify the detention authorities if a child's physical or mental health 'will be injuriously affected by continued detention, a hunger strike or any condition of detention'.

Compliance with these rules provides some guidance as to whether Australia is satisfying its obligation to provide 'the highest attainable standard of health' as well as the obligation to ensure respect for the inherent dignity of children in detention under article 37(c) of the CRC.<sup>3</sup>

Certain groups of children require special attention to their health needs due to their particular vulnerability. Article 22(1) of the CRC requires Australia to provide appropriate assistance to asylum-seeking and refugee children, to ensure that they can enjoy their right to 'the highest attainable standard of health'. They may also need additional assistance to enjoy their right to an environment that fosters the maximum possible development and recovery from past trauma (articles 6(2) and 39). For example, children in detention may require additional services to assess and treat, amongst other things, the effects of nutritional deprivation, exposure to diseases not commonly seen in Australia, injuries that may not have been treated properly, the effects of armed conflict, and extensive travel in unfavourable and stressful conditions. Some health issues likely to face child refugees are described by the United Nations High Commissioner for Refugees (UNHCR) in *Refugee Children: Guidelines on Protection and Care*.<sup>4</sup>

Further, international law emphasises the particular health rights of girls and women, due to the discrimination they often suffer in accessing nutrition and health care services, as well as their particular health needs. Compliance with article 12 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) requires Australia to take all appropriate measures to eliminate discrimination against women, including girls and adolescents, in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services. Special attention should be given to the health needs and rights of women belonging to vulnerable groups such as refugee women and children.<sup>5</sup> CEDAW also requires Australia to ensure women receive appropriate services in connection with pregnancy, confinement and the postnatal period, as well as adequate nutrition during pregnancy and lactation. As mentioned above, article 24 of the CRC also recognises the importance of ensuring that pregnant women receive adequate health care for the health of children.

Given the importance of health to children and their parents, Australia's obligation to ensure that the best interests of the child are a primary consideration (article 3(1), CRC) should include health considerations. Therefore in order to satisfy article 3(1), the Commonwealth legislature and executive should directly consider whether,

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and how, the long-term detention of children is capable of achieving the required level of health care, keeping in mind the remoteness of some of the facilities and the special health care needs of many asylum-seeking children.

### **10.2 What policies were in place to ensure the physical health of children in detention?**

Australia is responsible for ensuring that the health care needs of children in detention are met in compliance with our international obligations. This responsibility is primarily executed through the actions of the Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA). However, over the period of the Inquiry the Department contracted much of the day-to-day provision to Australasian Correctional Management Pty Limited (ACM).

#### **10.2.1 Department policy on health for children in detention**

The Department's submission recognises its duty of care in relation to the health of detainees and states that the duty is discharged by:

meeting obligations under relevant Commonwealth, State and Territory legislation and implementing Commonwealth and Departmental policies in relation to health care.<sup>6</sup>

The Immigration Detention Standards (IDS) incorporated into the contract with ACM suggest that the legislation being referred to includes the Commonwealth quarantine legislation and State public health legislation.<sup>7</sup> The Department may also be referring to State child welfare legislation,<sup>8</sup> and State standards for the provision of services in juvenile prisons.<sup>9</sup>

The Department also created a handbook to assist Departmental Managers of detention facilities (the Handbook) which elaborates on the IDS. The Handbook recognises that the health care facilities and services must be 'equivalent to the standard available to the wider Australian community'.<sup>10</sup> Moreover, the Department's submission acknowledges that the special needs of the detainee population, including any pre-existing illnesses, may require a higher level of services.<sup>11</sup>

The IDS and Handbook provide for:

- appropriate accommodation and cleanliness of amenities
- 'food of sufficient nutritional value, adequate for health and wellbeing and which is culturally appropriate' as well as special dietary food where needed
- the care needs of each new detainee to be identified by qualified medical personnel as soon as possible
- the use of accredited interpreters with detainees being used as interpreters only in 'very exceptional circumstances'
- detainees needing specialist treatment to be referred or transferred to hospitals

- regular monitoring of care and medication needs
- provision of dental care necessary for the preservation of dental health
- immunisation and disease control.<sup>12</sup>

There is no specific provision for the special paediatric needs of children in the Handbook or the IDS, except that the IDS provide generally that the special needs of babies and young children are met and that unaccompanied children be detained in conditions which take account of their needs.<sup>13</sup> However, the Handbook and the IDS both provide for the special health care needs of pregnant women, including the provision of an appropriate diet and baby equipment.<sup>14</sup>

**(a) Department monitoring of the health care provided to children**

The Handbook states that the Department Manager's role regarding health is:

to be aware of the standards of health care required, ... to monitor the Services Provider's activities and to ensure those standards are being met.<sup>15</sup>

In relation to unaccompanied children:

DIMIA Managers must ensure particularly that children are accessing and receiving appropriate health care. This includes having appropriate case management plans that specify any relevant health care needs for the child concerned.<sup>16</sup>

The Department contends that the monitoring of health care of detainees occurs through various general contract monitoring arrangements, including daily contact with centre managers, contract management meetings, incident reports and monthly update reports.

The weaknesses of the monitoring system generally, including the lack of expertise of Department officials in child welfare and the poor quality of incident reporting by ACM, are described in Chapter 5 on Mechanisms to Protect Human Rights. The quality of the case management care system for unaccompanied children is discussed in Chapter 14 on Unaccompanied Children.<sup>17</sup>

In addition to those systems described in Chapter 5, the Department also informed the Inquiry that an Expert Panel, which provides advice to the Department to support its contract monitoring and investigations, has expanded to include health professionals. The Inquiry has not received any information regarding the composition or operation of the Expert Panel.<sup>18</sup>

The South Australian Department of Human Services (DHS) has expressly addressed the nature of the IDS and the incident reporting system relating to health care, and suggested that those measures are insufficient to properly safeguard children:

The performance measures do not require essential primary health standards to be met but focus primarily on complaints or incidents. The absence of positive reporting based on standards for service delivery especially for those services that should apply to children and their families as basics ie hearing,

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eye, assessments of physical health status, psychological health and dental health and immunisation indicates the residual nature of the health and medical services that are provided compared with those available in the wider community. Many of the performance measures require substantiation but it is unclear what the process of substantiation entails.<sup>19</sup>

Despite some weaknesses in the Department's monitoring, it appears that the Department was aware of the need to improve the quality of health care provided in detention facilities. In 2001, the Department commissioned an independent review of ACM's provision of health services (the Bollen Report).<sup>20</sup> The Bollen Report, delivered to the Department in November 2001, noted substantial shortcomings in the provision of health care across the board and provided practical proposals for ensuring that the Department meets the standards of health care delivery. The Department has provided the Inquiry with updates, as at March 2002 and June 2002, of ACM's response to the Bollen Report's recommendations.<sup>21</sup> The findings and recommendations of the Bollen Report are referred to throughout this chapter.

### **(b) Payment arrangements between ACM and the Department regarding external health care**

Detainees do not have access to Medicare provisions, requiring ACM or the Department to make full payment for any health services including dental, optometric, hospitalisation and pharmaceuticals. The remote location of the detention facilities exacerbates the financial burden of the provision of health care in detention. The longer children and their parents are detained the higher the need to address serious health problems.

The Department Handbook, dated April 2002, states that:

the Services Provider is responsible for costs of health care within [detention facilities], at day care facilities, at hospital outpatients and for referral to specialists. DIMIA is responsible for costs when detainees are admitted to hospital.<sup>22</sup>

Yet in answer to the Inquiry's Notice to Produce evidence regarding the arrangements in place for the payment of external health care, the Department stated that:

In general, where health agencies or health service providers are engaged for the purposes of providing access to external medical specialists, hospital care or other external medical services required by children and their parents, they are engaged by Australasian Correction[al] Management (ACM) on a case by case basis.<sup>23</sup>

The lack of clarity may be explained by the fact that, over the period covered by the Inquiry, there was no generic arrangement on health care costs across the detention facilities.<sup>24</sup>

Rather, at Woomera and Curtin facilities, the Department met all costs of external hospitalisation including ambulances and care in hospital. The Bollen Report states that at the Curtin facility the Department also had financial responsibility for external health referrals, other than for dental and optometry care.<sup>25</sup>

However, at Baxter, Port Hedland, Maribyrnong, Villawood and Perth 'ACM is generally responsible for hospitalisation costs but can charge the department for hospitalisation costs above two hospital days per 1000 detainee days'.<sup>26</sup> It also appears that exceptional expenses such as the Royal Flying Doctor Service evacuations and major surgery were covered by the Department, for Port Hedland at least.<sup>27</sup>

The Department stated that:

all matters of medical judgement are the sole province of the responsible Medical Officer in accordance with the Services Provider's own procedural guidelines. No restrictions will be placed on any medical officer with respect to the practice of medicine.<sup>28</sup>

Recommendations for non-essential external health treatment are assessed on a case-by-case basis.

The possible impact of cost considerations on doctors seeking to refer detainees for external treatment is discussed in section 10.4.6.

### **10.2.2 ACM policy on health for children in detention**

The Department relied primarily on ACM to provide health services to children in immigration detention, in accordance with the IDS. ACM was responsible for employing health staff within detention and arranging access to services which could not be provided internally. However, the ongoing detention of children, the location of detention centres in remote areas, and the subsequent health implications, were not within ACM's control.

Although the Department's submission states that the health needs of child detainees were expressly referred to in many of the ACM Policies,<sup>29</sup> the only two examples identified by the Inquiry were the ACM Policy on immunisations<sup>30</sup> and the policy on provision of food, which required that infants and children be provided with diets appropriate to their needs.<sup>31</sup>

However, ACM developed operational policies regarding the health care for female detainees,<sup>32</sup> pregnancy,<sup>33</sup> general hygiene<sup>34</sup> and food services hygiene.<sup>35</sup> There was also a specific procedure on the provision of health care to those in the Woomera Housing Project.<sup>36</sup>

In November 2001, Woomera IRPC implemented a general procedure that sets out the importance of implementing, monitoring and reviewing the ACM Health Services Policies and Procedure Manual.<sup>37</sup> The creation of a comprehensive health plan appears to have been a response to one of the many recommendations of the Bollen Report. In June 2002, the ACM Senior Health Services Manager advised the Department of progress ACM had made in response to the Bollen Report, including that:

Each Centre's Health Services Coordinator (HSC)/Sole Practitioner (SP) was required to meet with their health staff and Centre management team and determine what they considered to be the priority areas for quality

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improvement in health service delivery and what strategies were required to achieve the improvements.<sup>38</sup>

### 10.2.3 State involvement in health care for children in detention

The Department and ACM inevitably needed to draw on the State health system for hospitalisation and external medical care. Detainees do not have access to Medicare so all services must be paid for by ACM or the Department. This required some cooperation at the operational level between ACM and the State health services.

It is somewhat surprising that there were no established or formalised procedures in existence regarding the access to and payment for external health services more generally.

For example, in December 2001, in the wake of the hunger strikes in Port Hedland and Curtin, arrangements were made between Fremantle Hospital in Perth and the Department whereby the hospital 'would accept transfers of those rare cases where the detainees' clinical status deteriorated to an extent that they require acute treatment in a metropolitan facility'.<sup>39</sup> The Department agreed to meet the costs of hospitalisation in this case.

The Department's submission indicates that it is in the process of negotiating more general agreements:

Where detainees need to access services provided by a State or Territory health service provider, [ACM] makes appropriate arrangements directly with that provider. The Department facilitates access to these services, by negotiating agreements with state government agencies, where necessary.

For example, at the request of the South Australian Department of Human Services (DHS), the Department has begun negotiations to develop a Memorandum of Understanding to formalise a framework for the provision of health services by DHS to immigration detainees in South Australia.<sup>40</sup>

In August 2003, ACM informed the Inquiry that an MOU is in place with DHS for Baxter. However, there are no other agreements in place.

The Department states, and ACM agrees, that '[g]enerally, the absence of a formal agreement has not adversely impacted on access to State facilities or payment for such access'.<sup>41</sup> However, the Inquiry is concerned that a lack of clarity over the process for referral and responsibility for payment has the potential to impact on the efficient provision of medical services.

## 10.3 Did children enjoy a healthy environment in detention?

I am primarily a paediatric doctor. I saw many of the children in [Woomera] as well as the other adults, of course my major concern is for the children and as they are the vulnerable ones, and really so many of their problems relate directly to the prolonged and indeterminate nature of their detention, which is a combination of the very harsh and isolated physical environment, the poor accommodation facilities and the lack of resources for primarily their mental health and the lack of resources for their leisure activities.<sup>42</sup>

The detention of children places the responsibility for provision of basic items such as food, shelter, clothing and hygiene into the hands of the Department. It requires the Department to ensure that the physical environment is such that children can live a healthy life. It appears that this was the initial focus of the Department:

The Department's initial focus in the circumstances [of an influx in arrivals] was to ensure that all unauthorised arrivals were provided with the necessities. Good quality food in adequate supply, comprehensive medical services, safe clean accommodation, adequate ablution facilities, clothing and footwear appropriate to the circumstances. The demand for a rapid response required the Department to focus on the practical aspects of managing detention.<sup>43</sup>

One of the questions considered by the Bollen review was whether there was a clear understanding amongst Department and ACM staff regarding the level of health care to be provided in the centres. The Bollen Report stated the following at the end of 2001:

The review identified differences in priorities amongst both ACM and DIMIA staff. Operational staff seemed to view health services as a necessary fulfilment of a contract rather than addressing a basic need. ACM management in most of the centres appeared to place most emphasis on security; DIMIA placed most emphasis on processing. Health care should be more than the provision of health services and must take into account issues of primary prevention including appropriate diet and extent of activity necessary to maintain health including mental health, and prevent illness including symptoms resulting from cultural as well as language misunderstanding.<sup>44</sup>

The following sections assess whether the Department and ACM have properly accounted for diet and other environmental factors that can promote good health for children in detention.

### 10.3.1 Food

It is well understood that the healthy development of a child relies heavily on a healthy diet.<sup>45</sup> The Department and ACM acknowledge that food is a particularly important issue in detention centres:

In an institutional setting, particularly one in which people have only limited control over their lives, normal routines, such as meal times become a major part of daily activities. Understandably, food can become a particular focus. It is important, therefore, that the food is not only of good quality and nutritional but also interesting and appealing.<sup>46</sup>



Kitchen at Woomera, June 2002.

### **(a) Nutritional value and quality of food**

The Inquiry received evidence that asylum-seeking children may suffer from pre-existing nutritional deficiencies which can affect the long-term health of children, and must be addressed as soon as possible.<sup>47</sup> There is a high possibility that children arrive with parasites and other stomach ailments that will affect their health and lead to nutritional deficiencies. The Department and ACM have a responsibility to identify and address pre-existing nutritional deficiencies in order to satisfy the right to health under the CRC.

In response to recommendations in the Bollen Report, ACM engaged a consultant nutritionist in mid-2002 to evaluate the food at Woomera with the specific objective of determining whether there was a connection between the types of food served at Woomera and the high incidence of complaints relating to gastric disorders.<sup>48</sup>

The nutritionist recommended that there be:

Initial nutritional health assessment for all detainees with special reference to:

1. Growth
2. Nutritional deficiencies
3. Problems associated with food intake and behaviour.<sup>49</sup>

In its response to the draft of this report in August 2003, ACM states that it put in place strategies to address the nutritionist's recommendations. These included

assessments of children's growth against growth charts at intervals appropriate to a child's age, which is used as an indicator of nutritional deficiency. ACM also states that any dips on the percentile growth rate result in referral to a paediatrician. The children's food intake and behaviour is also monitored by a nurse. However, it is unclear whether these measures were put into place at all centres, as a procedure from initial arrival. The Inquiry did not receive evidence that detailed individual assessments were conducted on children during the period of time covered by the Inquiry, which included growth charts and detailed information on nutritional deficiencies.

On the other hand, ACM also states that in June 2003 a team of six health workers from the SA Child and Youth Health Services attended Baxter to undertake individual assessments of the health status of children, including nutritional status.<sup>50</sup> Assessment details were kept in the children's individual 'blue books' as occurs in the outside community for babies. The Inquiry commends this initiative. However, it notes that these procedures do not appear to have been in place at all centres during the period of time covered by this Inquiry.

In terms of the food supplied by ACM, the ACM consultant nutritionist noted that as at May 2002, the basic nutritional components (ignoring any special nutritional needs) were available in meals served at Woomera.<sup>51</sup>

A paediatric registrar working at Woomera also commented to the Inquiry that:

I didn't see any cases of malnutrition at the centre. I did see cases of weight loss, which I think reflected the depression that these children were under, very poor weight gain. I think the diet is probably just about adequate in the short term.<sup>52</sup>

However, the ACM nutritionist also pointed out that the nutritional components of meals are not necessarily related to 'actual total food consumption' of detainees and the needs of individuals vary widely.<sup>53</sup> Hence the amount of food consumed may be linked to the quality of the food served.

One former ACM staff member suggested that the issue of food quality could have been linked to an inadequate budget allocation. He was of the view that when he was Operational Manager at Woomera and Centre Manager at Perth the allocated amount for food expenditure was never enough.<sup>54</sup> For example, he recalled that the budget for food in Perth detention centre when he was there was roughly four dollars per person per day, and had remained stable despite an increase in costs.<sup>55</sup> ACM disputes that cost-cutting resulted in low quality food.<sup>56</sup> Further, when the question of food budgets was put to ACM during the December hearings, ACM responded:

There is no average allocation for food or per diem as such in the operating budgets of the detention centres. The idea of an average allocation is an artificial concept used as a step in setting the indicative budget for food procurement each year. Broadly speaking, the food budget for each centre is derived by taking the dollar amount for each detainee expected to arrive at the centre and adapting that figure to suit anticipated future expenditure based on historical patterns of expenditure on food.<sup>57</sup>

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It does, however, appear that rough allocations were given for food expenditure, which differed in each centre. One of the ACM monthly reports provided to the Inquiry states that the cost of meals per detainee per day at Curtin in December 2001 was \$6.35.<sup>58</sup> The Inquiry also received evidence that detainees in the Woomera Housing Project were given seven dollars per person per day for food shopping, although that may be varied where 'smaller family units cannot avail themselves of the advantages of bulk buying'.<sup>59</sup> The Inquiry did not receive any other evidence linking allocated budget and food quality.

Nonetheless, it appears to the Inquiry that the quality of food varied over time and between centres. In Port Hedland during the January quarter of 2001, the Department Manager comments that the '[q]uality and range of food, and standards of cooking, is very good'.<sup>60</sup> However, from November 2001 to May 2002, the Department Manager at Curtin noted continuing complaints about the quality of the food provided to detainees.<sup>61</sup>

The issue of food quality at Curtin was raised in the June 2002 Contract Operations Group Meeting, with the Department noting serious dissatisfaction with poor food handling practices, including the preparation of meals several hours before they are eaten. 'Hot boxes' or 'insulated food storage systems' were used to keep the food warm,<sup>62</sup> a practice which encourages the growth of dangerous bacteria. ACM states that the hot boxes can safely store food for in excess of five hours.<sup>63</sup> However, in April 2001, the ACM Services and Assets Manager noted that the practice at Curtin of thawing frozen goods at warm temperatures raised the possibility of food borne infections, and that additional equipment was required to deal with this problem.<sup>64</sup> To the Inquiry's knowledge, this equipment was never purchased due to the imminent closure of Curtin.

During the Inquiry's visit to Baxter in mid-December 2002, the use of hot boxes was still current.<sup>65</sup> This was seen as part of a more flexible policy towards availability of food outside standard mealtimes.

In September 2001, at Woomera it was alleged that, 'food was twice found to be contaminated by fly larva'.<sup>66</sup> This observation accords with many comments from children who said they saw maggots in the meat.<sup>67</sup>

After we saw many times insects in the food, we changed all the cooks and we got the Iraqi and Afghani guys to cook for us.<sup>68</sup>

In response to this incident, ACM and the South Australian Department of Environmental Health investigated the quality of the kitchen hygiene and eventually started a spraying program to remove flies, installed air curtains at the mess doors, fly screens at the windows and air conditioning in the dining rooms.<sup>69</sup>

Visitors to Woomera also commented on the quality of the meat.

We had actually seen some of the food. It was meant to be meat. It was quite indescribable when we saw it.<sup>70</sup>

Some children also alleged that the food was old:

Sometimes when they bring the food in here and we are really hungry, there is stinky food in here that they offering to the people inside the compound and most of the time, we said, please change this food, this food is not eatable and very bad, and most times the food is rotten, the bread is mouldy as all the detainees said.<sup>71</sup>

The Department provided the Inquiry with examples of weekly menus from Baxter, Perth and Villawood centres in its response to the draft report, which reveal efforts to provide variety at lunches and dinner, although not breakfast, at these centres.<sup>72</sup> However, the Inquiry heard a number of people raise the issue of the monotony of diet at Curtin in particular for some of the period covered by the Inquiry.

The Curtin Department Manager raised the issue of the monotony of the menu in the early months of 2002:

A number of detainees requiring special needs, including vegetarians, and those on high protein diets received for a period of approximately five weeks ... the same meals for lunch and dinner. This consisted of steamed vegetables and steamed chicken.<sup>73</sup>

Similar comments were made by detainees:

The parents said the diet was monotonous, with the same type of food served up day after day. It consisted of rice, some sort of meat, lettuce, tomato and bread. Most days they could not tell what meat was being served up and they avoided eating it as they do not eat red meat, so they had no regular source of protein. They lost interest in their food and lost weight. In other circumstances, a meal might be something to look forward to, but they just went through the motions of eating before returning to their compartment.<sup>74</sup>

Many children also commented on the lack of variety of the food:

Always vegetables. Sometime chicken.

There was the same food always. Every day. They didn't change it.

There were lots of vegetables and chicken and rice.

Apples, every day.<sup>75</sup>

The food was nutritious maybe, but just nutritious. You had cornflakes and milk every morning and chicken and rice at lunch and dinner.<sup>76</sup>

The Curtin Manager reported that despite repeated requests by the cooks to ACM management, they were not provided with ingredients or cooking tools to provide a varied menu. Eventually the staff gave up asking.<sup>77</sup>

Inquiry staff ate the food provided to detainees during its visits to detention facilities and found it to be of acceptable quality. However, some detainees commented that the food improved immediately prior to the Inquiry visits.

Furthermore, it must be remembered that whereas a basic menu can be tolerated for a short period of time, after many months in detention the monotony of diet can

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add significantly to feelings of frustration and powerlessness. Hence, in detainee representative meetings, food and menus feature frequently in discussions with management.<sup>78</sup>

A further possible reason for some of the detainees' comments may be that the type of food being served was not always culturally appropriate. This is discussed in Chapter 15 on Religion, Culture and Language.

### **(b) Special meal arrangements for children**

The ACM Policy with respect to food states that 'infants and children shall be provided with diets appropriate to their needs'.<sup>79</sup> Moreover, ACM has stated that:

As a general principle, the nutritional needs of children are always taken into account by ACM when planning the menus for each centre. All menus are checked and approved annually by qualified dietitians.<sup>80</sup>

ACM also provided a list of the dietary arrangements made for children between 1999 and 2002. As discussed above, it appears that ACM made some efforts to provide nutritional meals three times a day. However, the Inquiry is concerned that the institutional environment of detention hinders the capacity to adopt a flexible approach to meal arrangements, which is needed especially for small children.

In response to the draft of this report, the Department states that 'in institutional settings, such as a hospital or boarding school, it is generally necessary to place some structure around mealtimes'.<sup>81</sup> The Inquiry understands that for the sake of efficiency within a detention environment it is necessary for ACM to organise set mealtimes. However, it is unusual for small children to be in an institutional setting for long periods of time. Every effort must be made to make life as normal as possible and to assist parents to address their children's dietary needs as they see appropriate.

ACM states that there are issues associated with the safe storage of perishables in Australia's warm climate and that there are logistical issues with the capacity of suppliers to make regular and reliable provision of large quantities of fresh supplies in remote areas.<sup>82</sup> These comments indicate that the remote location of the centres may also have added to the difficulties of providing special food for children.

As discussed by a child health specialist, grazing is normal behaviour for children:

One of the things we recognise in the mainstream community is that the children need to be offered a variety of tasty and nutritional foods, particularly for younger children who don't have the kind of adult appetite that we do. They are often best served by allowing to graze on food during the day, have healthy snacks in between meals so that their nutritional requirements are met and that is just a fact of good childcare and what we know about children's eating patterns, that they don't necessarily eat at set meal times, three meals a day, as might be offered in an institutional setting. They eat when they feel hungry and that depends a lot on the individual child and their level of activity.<sup>83</sup>

ACM states that it is 'ACM practice to give access to food outside of the regular three meal times to children and adolescents', and that 'toddler food, extra fruit and formula are routinely distributed on a daily basis to parents'.<sup>84</sup> Focus groups with children suggest that some facilities did provide milk, fruit and bread to young children between meal times. However, this does not appear to have been uniformly applied during the period of time covered by the Inquiry. For example, children in focus groups reported that:

In Port Hedland there was no difference in the food for adults and for children. They were using sometimes certain types of spices and things that even the adults could not eat, so the kids would not eat it. They would give them only one glass of milk, in the mess and if they did not drink it, that's it, they wouldn't give anything to take to the rooms.<sup>85</sup>

If you went for the food and you were late, you couldn't have any food. If you woke up late in the morning there was no breakfast ... There were no snacks between the meals.<sup>86</sup>

At Woomera, at least until early 2002, when parents wanted food for their young children that was different to that served to everyone else, they required a medical certificate. A paediatrician working at Woomera for two weeks in 2001 and again for two weeks in January 2002 stated that:

... I spent a great deal of time and I think [the other doctor] did as well, where we would simply write letters of recommendation for a child, especially the infants and anyone under the age of five, to have dietary supplementation in the form of fruit, yoghurt, snacks. I never experienced any success with any of these letters at all, in my experience.<sup>87</sup>

A nurse at Woomera in 2000 recounted a similar difficulty:

...there was one woman, for instance. She was asking if the child could perhaps have some soup to eat rather than – the child was five years old, could the child perhaps have some soup because the child does not like the food that is being provided there. Now, with requests like these, the parents would be sent to the medical centre. We were instructed not to allow the child to have such – the soup, unless there was a particular medical reason that would have prevented the child from eating other food.<sup>88</sup>

A nurse who worked at Woomera on three six-week contracts between August 2000 and February 2001 stated that:

Medical centre staff regularly heard complaints from detainees about the quality of the food that was provided at WIRPC. The food that was provided in my opinion was neither nutritionally adequate nor culturally appropriate. Detainees' requests for simple food items such as rice, yoghurt and lemons were ignored.

Detainees were only allowed 250ml of milk and one piece of fruit per day. This was not adequate for pregnant women, lactating mothers and children.

To overcome this, nurses would take milk to the medical centre and provide [it] to women and children.

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Medical centre staff regularly wrote letters requesting special meals for detainees, particularly women and children. The ACM centre manager, through the health manager directed us to stop writing letters requesting special meals.<sup>89</sup>

Another nurse at Woomera told the Inquiry about the father of a sick child who asked for extra bananas as it was all his son was interested in eating:

I recall that an officer and the kitchen manager, on several occasions said to me, and not infrequently in the presence of [the boy and his father] 'There are no bananas', 'They are in short supply', 'We won't be getting them in'. These comments were made even when bananas were in stock... Upon my taking this up further... the kitchen staff member said to me 'No bananas – they're too expensive to give out'.<sup>90</sup>

During the Inquiry's visit to Villawood in August 2002, one detainee alleged that she had to continually ask the cook for extra milk even though she had authority from the doctor for this item. However, evidence from children in the remote centres suggests that milk was usually available after hours.

Some parents stated that they went without some items in order to create another meal for their children, or to give the child the only food they wanted.<sup>91</sup>

Some of the problems discussed above appear to have been gradually addressed by the provision of fridges to store meals.

### (c) **Baby formula and food for infants**

Both ACM and the Department stated that baby formula was always available from the medical centres.<sup>92</sup>

While the situation may have improved in 2002, the Inquiry heard a number of complaints about the provision of baby formula at Woomera during 2000 and 2001 which seem to confirm that procedures have been less than perfect. For example:

When I first visited Woomera there were repeated complaints from people with young children that they couldn't get formula for their children. Letters were written asking for better care but they were constantly complaining that they couldn't get proper food for babies.<sup>93</sup>

A former ACM Operations Manager who was at Woomera for a period of 16 months from early 2000 until July 2001 reported:

I've seen mothers ask for milk for their babies and it's been poured out of a plastic two litre container, [for] new babies. They wouldn't have done it if [it was] their own wife ... [no formula milk was offered] when I was there, not that I saw anyway ... and I know that the medical staff were trying very hard to do something about it ... it's something that had never been thought of. I must say on that, and on the whole thing I guess, that, in my view, ACM went into this thing totally unprepared and probably not willing to really learn.<sup>94</sup>

One doctor who had worked at Woomera stated that she did not experience a problem in obtaining supplies of formula. However, she was of the view that 'there was no set procedure to make the order and it was done in a very ad hoc manner'.<sup>95</sup>

ACM also alleges that some detainees complained that the brand of formula was wrong because it was not what they were accustomed to, and then would refuse the product on this basis.<sup>96</sup> On the other hand, the Inquiry was told by one ex-detainee that 'sometimes they would make mistakes and get the wrong formula for our babies, which is for older babies, for older children'.<sup>97</sup>

Other evidence suggests that while baby formula may have been purchased by ACM, a poor distribution system meant that it was difficult for mothers to access baby formula when they needed it.

In relation to a family with two infants, DHS found:

The family is required to pick up formula day and night from the medical centre (detainees are not permitted to have glass bottles). The family doesn't have access to food and feel they cannot meet the babies immediate hunger needs. There is no fresh food available, the food is pre-packed.<sup>98</sup>

One detainee mother claims she requested a tin of formula for her room, as it was inconvenient to have to ask for formula for the baby in the middle of the night, for example, but she was refused.<sup>99</sup> She also claimed that she had difficulty convincing medical staff that she could not produce breast milk and was therefore denied formula:

I kept going back to them requesting some formula for my son but they would say, 'No, you have to breastfeed him'. I would continue saying, 'I don't have any milk' but they would insist on not giving me anything until, for one week, I was giving my child water and sugar for one week ...<sup>100</sup>

It is possible that this situation may have resulted from misunderstanding about lactation practices. ACM claims that it is common practice to support lactation by offering the baby drinks of water, rather than formula, which stops the baby dehydrating and encourages the baby to keep sucking. However, even if this is so, the mother's comments only highlight the problems and misunderstandings which can occur when mothers are forced to rely on detention staff for the daily provision of formula, rather than being free to nurture a baby according to their own wishes.

A nurse who worked at Woomera on three six-week contracts between August 2000 and February 2001 also expressed concerns about the manner in which baby formula was prepared at the time:

During my period of employment at WIRPC there was only one sink with only cold water in the Medical Centre. This led to unhygienic practice, for example the making up of formula milk for babies in the same sink where faeces were decanted into pots prior to being sent to pathology.

During my first two contracts at Woomera there were no sterilisation facilities in the Medical Centre. During my last contract there was a sterilisation machine, however, there was no instruction booklet, no indicators that sterilisation had been completed and no records kept of sterilisation procedures.<sup>101</sup>

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The Department informs the Inquiry that clear procedures on formula preparation have been in place for 'quite some time'.<sup>102</sup> It stated that:

health staff sterilise all the equipment required for the provision of infant formula. The formula is prepared in individual bottles according to the feeding requirements of the infant or infants at the IDF health centre. All the bottles are clearly labelled to avoid mis-identification. They are refrigerated at the health centre or in a similar convenient location in the centre and that parents or detention officers are able to collect the bottles from the health centre staff as required.<sup>103</sup>

However, it is unclear when such procedures were introduced at all centres.

### (d) Findings regarding food

The Inquiry recognises that there have been recent improvements with the decreasing numbers in detention and increasing participation of detainees in food preparation. However, the Inquiry finds that there was insufficient systemic attention paid to the special dietary needs of children throughout 1999-2002. The variable quality of the food made it unappetising, and sometimes unhealthy, for children and their parents, as did the monotony of the menu, especially over long periods of time in detention. The regimented meal times were unsuited to the needs of small children and for a substantial period of time the provision of baby formula at Woomera was uneven. Moreover, although it is commendable that ACM engaged a nutritionist to generally assess food at Woomera, there is no evidence that individual nutritional assessments of children were conducted over the period of time covered by the Inquiry, in order to ensure that any pre-existing nutritional deficiencies were being addressed on a case-by-case basis.

### 10.3.2 Physical surroundings and climate

The most obvious physical hazard to children in detention facilities arises from the violence to which children are exposed. This issue is discussed in Chapter 8 on Safety. However, the Inquiry also heard that the desert location of Curtin and Woomera in particular meant that children were exposed to a harsher physical environment than in city centres. Although the Inquiry notes that there have been gradual attempts to counter some of the harsh aspects of the surroundings and climate, for example by installing air conditioning, the location of these facilities is not ideally suited to maximising children's health.

One physical hazard frequently raised by children was that the absence of grass and the rocky surface meant that they often hurt themselves when they were playing soccer. An unaccompanied boy, detained at Woomera IRPC until early 2002, told the Inquiry that 'when we played we badly hurt ourselves because of the rocks. It was very difficult for us'.<sup>104</sup> This problem was exacerbated by the absence of closed sports shoes.<sup>105</sup>

There is no shoes for sports, so I love to play sport and when you were playing bare feet you were getting injured and there was no medication.<sup>106</sup>

Gradually some astro-turf was laid and soft-fall matting arranged under play equipment but the playing fields were still dirt.<sup>107</sup>

The Inquiry heard complaints from detainees about eye and skin infections caused by the glare, dirt, and dust storms.<sup>108</sup> An organisation in Western Australia noted that it was referring many former Woomera detainees to optometrists 'because of damage to their eyes, due to lack of shade in the detention centres'.<sup>109</sup>



Woomera compound (clotheslines in background), June 2002.

The extreme heat and cold of the desert climate also caused problems. A doctor working at Woomera stated that:

...a lot of the other problems were due to the location of [Woomera] which, as you know, is in the middle of a very isolated area in the middle of South Australia. When I was there it was during a very cold time and at nights the temperature often went below zero. And I would see many children brought in by their mothers with respiratory infections and then, at the same time as trying to treat them, the mothers would be asking me if I could write letters to the centre organisation to get heaters put into their rooms because they did not have any.<sup>110</sup>

National Legal Aid recounted a case study which suggested that there was inadequate heating in the accommodation.

The five family members were allocated a small cubicle about the size of a railway compartment, with bunk beds. Instead of a door there was a curtain that did not reach the ground and would cover an adult of average height

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from about the neck to the knees. There was therefore very little privacy or soundproofing. There were six such compartments in a small, enclosed area. Being winter, it was very cold. The building was poorly insulated and there was only one small heater between the six families. There were constant fights over who would have the heater near their compartment. To keep warm, families huddled together on their beds wrapped in blankets.<sup>111</sup>

On the other hand, the hot temperatures were also a problem. Reverse cycle air conditioners had been installed in a number of areas in the remote centres. However, as children are frequently outdoors, the heat continues to cause some problems. Children who had been detained in Curtin described the discomfort caused while queuing up to see a doctor:

If they were sick, they didn't take it seriously at all. They had to queue in the hot sun outside the clinic. On hot days some of the people who were sick got worse from standing in the hot sun.<sup>112</sup>

The heat also caused discomfort around meal times. One child described the process of queuing for food as follows:

I would like to say about the queues. Lunch was the most hard to bear, as it was 45, sometimes 55 degrees, and you were standing out there in the sun, with 1200 people trying to get in and be fed in a small kitchen. There was a queue inside, and a queue outside, and people, sometimes they had to stand up to eat. Sometimes we even ended up fighting with each other because somebody would break the queue and the guards wouldn't do anything about it.<sup>113</sup>

Medical staff interviewed during the Inquiry's visits reported that dehydration was a common problem and they spent much of their time encouraging children to drink more water.

Current and former detainees also spoke of the prevalence of insects:

In winter there was a lot of mosquitoes. Especially after 5pm, you can't stay out of your donga [demountable sleeping quarters]. We had lotions to repel the mosquitoes. The guards had sprays, which was much easier.<sup>114</sup>

Several children also mentioned the presence of poisonous snakes and scorpions.<sup>115</sup>

Once I had a very high fever at night and the doctor came to treat me. I had a scorpion bite.<sup>116</sup>

A specimen of a venomous brown snake caught by detainees in Woomera was shown to Inquiry staff.

The Department's practice of isolating new arrivals until they make an asylum claim in 'separation detention' poses additional hurdles.<sup>117</sup> Detainees in Port Hedland in particular referred to the absence of fresh air during the period of separation detention:

My husband and the little one, they were in a small room... They used to open up just the door for them only for 5 minutes... just to have fresh air and go back again, and they were very distressed both of them.<sup>118</sup>

For seven months we were held in a closed detention centre where we used to be taken out for half an hour for fresh air and viewing ....<sup>119</sup>

A case study provided in the submission from the Alliance of Health Professionals stated that:

Upon arrival in Australia in early 2000, the family was placed in a detention centre in a very small cell. The parents were allowed out for ten to fifteen minutes in the morning and in the afternoon.<sup>120</sup>

The impact of separation detention on children's right to recreation is discussed further in Chapter 13 on Recreation.

### **(a) Findings regarding physical surroundings and environment**

The location of, and physical conditions in, some centres bring inherent hazards to health. The extreme temperatures in the desert caused children great discomfort and the dust and glare appears to have caused several children eye irritations. On the other hand, children in separation detention appear to have had very limited access to the outside environment.

There were periods during which there was insufficient indoor heating and cooling. While similar issues exist for children in the community they, unlike detainee children, have some choice as to where to go for shelter from the heat and cold. Moreover, they are unlikely to be in the position of having to line up outside in order to eat their meals and see the doctor. The Inquiry notes that Curtin and Woomera, two centres with harsh physical environments, were decommissioned in September 2002 and April 2003 respectively.

### **10.3.3 Clothing**

The IDS require that, where detainees do not have adequate clothing and footwear, they are to be provided with such items suitable for the climate.<sup>121</sup> The Department informed the Inquiry that clothing and footwear was distributed on a needs basis through the purchase by ACM of second-hand clothing from charities and certain items of new clothing such as underwear and footwear. Detainees could also purchase clothing and, in some centres, detainees could choose to make extra clothing in sewing workshops. The Inquiry also received evidence that substantial clothing donations by community groups occur in some centres.<sup>122</sup>

Notwithstanding this variety of sources, the Inquiry received evidence that, at least during certain periods, the clothing given to children in detention was inadequate for their needs. The Coalition Assisting Refugees After Detention (CARAD), a community group in Western Australia which assisted families upon their release, reported the following:

[M]any people report that they have their own clothes taken away from them when they arrive in Australia and they are often only given the most minimal set of clothing and, you know, mothers turning to making bed sheets into clothing for children because they do not have enough clothes for the children to wear. Children on release arriving in Perth without shoes, for example; a

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family of 4 with one shopping bag of clothing for all 4 of them. One of the first things we have to do with CARAD is to provide all of the family with clothing because they simply do not have enough clothing and they have been in the habit of taking off one shirt, washing it overnight and putting it back on the next day because that is all they have to wear.<sup>123</sup>

Other community groups that visited children in various detention facilities stated that they often brought clothing for the children. Children also reported that:

[ACM] were not providing enough clothes in the camp. They would sell clothes, but there were a lot of people who didn't have money, so we would see lots of people with bare foot and they would have their feet wounded and hurt because they are barefooted.<sup>124</sup>

The Department Manager at Port Hedland first noted a shortage of clothing for women and children in October 2001.<sup>125</sup> In January 2002 the Manager reported that:

The ACM approach to supplying adequate footwear under the detention standards is barely adequate, in that most residents complain they are provided with rubber thongs and insufficient clothing.<sup>126</sup>

The Manager reiterated her comments in February 2002 but added that detainees were not given the opportunity to buy their own clothing to supplement that supplied by ACM:

There are continuous complaints from residents that clothing and footwear from ACM Welfare is inadequate and that they are not permitted sufficient shopping excursions to buy these items.<sup>127</sup>

A nurse working at Woomera in 2000 recounted the complicated process of obtaining appropriate shoes:

... there was one time when a woman was asking me for some shoes, and the big charity truck had arrived. And everybody was in such a big hurry that the sandals that she got for her nine year old, or ten year old daughter did not fit. So then she came to the medical department because she had blisters on her feet. And then I said, well, you know – and then she said – I said, 'Okay, let's see if we can get you some more sandals'. And so we put in a second request. The second time around the mother was somewhere else. A guard came. Took the child. She picked her own size. And these sandals did not fit again. Second time around, the woman could not then get another pair of shoes or sandals because she was told she has already had two pairs.<sup>128</sup>

The Department states that in 2001 the ACM practice was to provide detainees without appropriate footwear, with thongs in the summer and closed shoes in the winter.<sup>129</sup> Although it is possible, as the Department claims, that some detainees did not accept closed shoes, the Inquiry heard from a number of detainees that they were not offered these shoes when needed.

During its June 2002 visit to Woomera, Inquiry staff noted that despite the extremely cold temperatures several children were wearing thongs.

### (a) Findings regarding clothing

Although it appears that detainee families were able to access adequate clothing provisions generally, the provision of appropriate shoes was a problem for children in the remote centres. Considering the extreme climatic conditions of the desert centres, and the harsh ground cover, adequate shoes are essential for preventative health care. As detainees are not free to buy their children shoes when they are needed, it was incumbent on the Department and ACM to ensure that children were provided with adequate footwear.

### 10.3.4 Crowding

Over 2002 the detainee populations decreased and the accommodation areas were relatively empty. However, some submissions noted concerns about overcrowded accommodation prior to that time, especially at remote centres.<sup>130</sup> As noted in Chapter 3, Setting the Scene, several of the remote detention facilities have been populated beyond their capacity at times covered by this Inquiry.

In particular, starting at the latter part of 1999, there was a very significant increase in the number of unauthorised arrivals to Australia. The population peaked in August 2001, and this stretched centres to full capacity. Port Hedland exceeded its 800 person capacity in January 2000, when there were 839 detainees of whom 90 were children. Woomera's nominal capacity was 1200, but from March to July 2000, and again from September to October 2001, the population was above that number. Curtin's nominal capacity was 800 detainees, but between December 1999 and September 2000 it exceeded that capacity, and did so occasionally during 2001.<sup>131</sup>

Many of the families in the remote detention facilities had to share small demountable buildings (dongas). In Woomera they were separated only by a curtain. As the detention population decreased in the various centres, some families had a donga to themselves. A family at Curtin told the Inquiry that:

For one and a half years we were in a single room, living there. We were living in a single room, very small, I don't know, you came before us, you notice that. But now because it is less crowded in camp, the reduced number, we had a chance to get a room little bit larger.<sup>132</sup>

In addition to causing mental stress, the shared accommodation raised cleanliness concerns. However, several submissions note that the lack of privacy was a primary concern of families.<sup>133</sup> Health staff at Woomera stated that the shared accommodation meant that parents needed to keep their babies quiet and this minimised the impact of any programs to encourage the development of babies.<sup>134</sup>

The bunk beds also raised problems for families with young children. In April 2002, the DHS examined the circumstances of several families and found that, in relation to one family:

There is no safe sleeping environment for the baby, the family are sleeping on the floor on blankets because they have access only to bunk beds which is not safe for an infant or 2 year old.<sup>135</sup>

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The Inquiry also received evidence of an infant girl who fractured her ankle falling off a bunk bed shortly after arrival at Woomera.<sup>136</sup>



Accommodation room at Curtin, June 2002.

### (a) Findings regarding crowding

The Inquiry acknowledges that infrastructure limitations create difficulties in accommodating sudden increases in the detainee population. However, unpredictable influxes are to be expected in the context of immigration detention and appropriate contingency plans should be in place. The Inquiry is therefore concerned that the Department was unable to deal with these increases expeditiously. While the detention facilities are no longer as crowded as they were during the period 1999-2001, the conditions at the time caused great discomfort and stress to children and their families. One option may have been to transfer children and families to alternative places of detention.

### 10.3.5 Hygiene

The bulk of cleaning in remote centres was undertaken by detainees who were paid the equivalent of one dollar per hour. The Department's Infrastructure Manager at Woomera in 2000 stated that:

with the ablutions it didn't need a supervisor to do that other than necessarily a block officer who would expect the toilets to be cleaned twice, three, four

times a day or whatever was necessary. It seemed that people volunteered for these types of duties to relieve their boredom, to give them some sort of commitment. Why there weren't regular cleaning teams going through, I don't know. Again, a cost factor and I would imagine that it was an agreement under their contract that it was something that could be done by inmates.<sup>137</sup>

ACM states that the arrangements were 'designed to provide detainees with the opportunity to take a degree of responsibility and ownership over their living environment' and that 'for the most part, this was successful'.<sup>138</sup>

However, during periods of tension and unrest in the facilities, some of these jobs were not done. For instance, during the Inquiry's visit to Woomera in June 2002 staff observed faeces on the floor of the toilets. The Inquiry was told that the toilets had not been cleaned in a few days because the detainees were on a hunger strike and were therefore not doing their assigned tasks. When asked why alternative arrangements had not been made to keep the place clean, neither ACM nor the Department could provide an answer.

Hygiene in toilets was also reported to be a problem in Curtin and Woomera in the June quarter of 2000.<sup>139</sup> Moreover in the March quarter of 2001 the Woomera Manager reported that:

Better maintenance of ablution blocks is required – is a continuing problem, which needs a structured maintenance and detainee educational program together with detainee assistance in quality control.<sup>140</sup>

Some of the problems may have arisen because of the different style of toilets used in Australia than in the countries from which the detainees originate. Nevertheless, the submission from National Legal Aid states that:

The parents described the toilet facilities at the [first IDC] as putrid. For more than two hundred people, there were five toilets for the males and five for the females. The ground outside was muddy, and with people of many cultures using the western style toilets, the toilets were never clean. They said facilities for washing were too awful to describe.<sup>141</sup>

ACM gives the age of the infrastructure in some centres, which is the Department's responsibility, as a further explanation for the lack of cleanliness of the toilets. It states, for example, that bathroom facilities at Stage One at Villawood, are 'aged and cleaning does little to enhance the appearance and hygiene of the area'.<sup>142</sup>

In November 2001, December 2001, January 2002 and February 2002 the Port Hedland Department Manager expressed concern about the cleanliness of the accommodation blocks. For instance in February 2002, the Manager notes that:

The general cleanliness and state of disrepair of the accommodation buildings, particularly of ablution blocks is unsatisfactory. Upper India, Juliet and Echo blocks remain unclean and unattended, despite low resident numbers providing an opportunity to clean them thoroughly.<sup>143</sup>

## A last resort?

This problem appears to have been rectified by ACM taking more direct responsibility for the cleaning and maintenance. By March 2002, the Port Hedland Manager notes 'significant improvements in the overall appearance and cleanliness of the accommodation blocks' as a result of the appointment of specific ACM Block Officers.<sup>144</sup>

### (a) Findings regarding hygiene

The Inquiry finds that there were insufficient systems in place to ensure an acceptable level of hygiene in bathrooms, which were used by adults and children alike. While it is not necessarily inappropriate to allocate cleaning jobs to detainees, this does not absolve the Department and ACM from the responsibility of ensuring that when that system fails, contractors are brought in.

## 10.4 What health care services were available to children in detention?

The following sections consider the policies and practices of Department and ACM staff regarding the prevention, identification and treatment of the health problems of children in detention.



Cot in the medical centre at Baxter, December 2002.

### 10.4.1 Health assessment and treatment procedures

One of the problems faced by the Inquiry in assessing the health levels of children in detention generally was the absence of systemic evidence. Although ACM did collect some data relating to health services, for example the numbers of persons hospitalised, the Department acknowledged that there was no consolidated statistical data of different categories of medical conditions.<sup>145</sup> The low level of data analysis was an issue addressed by the Bollen Report and appears to have been an ongoing issue for ACM.<sup>146</sup>

One of the reasons for the lack of systemic data about the health of children in detention may lie in the perfunctory nature of the health assessment procedures. When children arrive in detention facilities, two types of health assessments are conducted which determine their care needs while in detention. First, there is public health screening which is concerned mainly with the identification of communicable diseases such as typhoid and tuberculosis. Second, there is screening for the purpose of identifying the general health needs of each detainee so that appropriate health care can be provided.<sup>147</sup> After the initial assessments there should be an ongoing process of assessing and diagnosing symptoms.<sup>148</sup>

Children arriving from countries all over the world may have a variety of ailments that are not common to Australia, and therefore require specialised assessment procedures. However, evidence received by the Inquiry suggested that the initial assessments, based on a pro forma assessment form and conducted by nurses, may be insufficient to identify the pre-existing problems facing asylum seeker children. The Melbourne International Health Group stated:

Now it is our information that the initial assessment is conducted by a [Registered Nurse] and they are most looking for infectious diseases like TB. I have worked in refugee camps and with UNHCR and I have got about 20 years experience with refugees in and out of camps so in a refugee camp in Somalia, the first thing is an initial assessment which is comprehensive. In that assessment, you are going to pick up anything which may indicate nutritional problems. For example, a child may be in a refugee camp in Pakistan for a long time, been on the sea for a long time, and they may be having micronutrient deficiencies that are manifest as changes in the eyes so you check the eyes, the ears and every other thing. You will pick up nutritional deficiencies and develop a base line against which to measure any changes as you go along, so you need competent staff at that initial assessment for a start...<sup>149</sup>

The Bollen Report raised the concern that the procedure is difficult to follow when there are sudden intakes of detainees. It also raised issues concerning the lack of systematic follow up:

At the detention centre a nurse undertakes a health assessment on each detainee within 24 hours of admission. Nurses use a pro forma admission sheet to obtain a medical history and follow a protocol to record basic observations and urine analysis. In practice this timeline is impossible to achieve when a detention centre has large intakes of detainees over short periods ...

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A medical officer does not routinely review the admission sheets. Detainees are referred to the medical officer if they have a medical condition volunteered to the nurse, or have some abnormality identified by the nurse considered sufficiently important or urgent. There is no formal protocol or specific criteria for such referral.<sup>150</sup>

There is some evidence suggesting that the initial assessments were child-specific and varied depending on the age of children. The primary measurements taken were weight, height and dietary intake. There was also an assessment of immunisation status. However, only those in the age group 0-5 years seem to have had any testing relating to sight ('visual acuity' and 'squint test'), and there is no reference to hearing issues for any age group.<sup>151</sup> The Department contends that sight and hearing testing is undertaken by Health Services Australia as part of the visa application process but this does not necessarily translate into service provision.<sup>152</sup> ACM also confirms that hearing, at least, was not provided in the first round of assessments.<sup>153</sup>

Some children expressed concern about their health care treatment in detention. The submission from the NSW Commission for Children and Young People quotes children who say that no matter what they complained about, the treatment was 'water and panadol'. This view of treatment, as the NSW Commission for Children and Young People points out, 'is consistent with what immigration detainees have said for the last decade'<sup>154</sup>, and was confirmed by interviews conducted by the Inquiry:

I had a tooth pain and they say just drink water. If the person had eye problem, drink water. Stomach problem, drink water. If you drink water 10 glasses, then drink 11. If we drink 11, then drink 12, 13. All the people sick, then drink water – nothing else. (Unaccompanied teenage boy)

I think the same treatment as everyone – water. Once I had a stomach ache and I was prescribed panadol and a few times headaches and general body pain and whenever I approached the medical staff I was told to drink water. (Unaccompanied teenage boy)<sup>155</sup>

It is possible that complaints about water and Panadol may result from detainee misunderstandings of a diagnosis or from different cultural expectations of appropriate medical treatment. However, the prevalence of these comments among children is of concern, if only as a reflection of the level of mistrust which detainees had towards the primary health care they received in detention. Children in detention appear to have a strongly held perception that their illnesses were not being taken seriously, and that there were serious consequences. For example:

When we were in the detention centre and someone was sick, headache or sick, they would say, "Just drink water". The doctor said, "Drink water, three or four cups, and, if you don't get better, just drink more". My sister has a problem with her eyes. She said her eyes were so painful and she went to the doctor who said, "You just have to drink water". Now we come to Sydney and the doctor says she has a problem in her eyes ... (teenage girl)<sup>156</sup>

These complaints also raise the concern that health problems were not identified and therefore not treated appropriately. Evidence from community groups assisting children after their release from detention suggests that there were several serious health problems identified after release that were not diagnosed and treated in detention:

There are a lot of congenital problems not diagnosed in detention centres and those extra months of lack of detection are delaying children's development. In the last 12 months:-

- two children with polio;
- several children with rickets;
- many children with developmental delays;
- many children with nutrition problems;
- many children with height and weight not appropriate for their age;
- many children with emotional problems, behaviour problems, bed wetting and indicators of depression;
- there have also been blood conditions.<sup>157</sup>

Section 10.4.6 sets out some other claims that health problems in children were detected and treated only following release from detention.

ACM suggests that the identification of problems in detainees on release does not mean that a diagnosis did not occur. ACM also told the Inquiry that it did not always have the sufficient notice of a detainees release to allow for the transfer of medical records, which may indicate that a diagnosis did occur.<sup>158</sup> However, if it was the case that diagnosis did occur in detention, it raises issues about the quality of treatment provided in response.

Even allowing for the slow development of certain illnesses, and the difficulty of their early detection, the fact that serious health problems are quickly identified once children are released into the community suggests that the assessment and treatment procedures in detention were less than rigorous. Further, the health assessment of children in immigration detention may require a level of expertise not always available in the detention environment, as discussed in the following section.

#### **(a) Findings regarding health assessment and treatment procedures**

The Inquiry finds that there were processes in place for initial health assessments of detainees. However, those assessments failed to address the specific needs that child asylum seekers were likely to have. This may be related to the difficulties in recruiting staff with appropriate expertise (see section 10.4.2 below).

There was no routine testing of hearing and sight. The fact that some illnesses, eye problems in particular, were detected quickly following release from detention suggests that assessment and follow-up was not as systematic as it should have been.

### 10.4.2 Qualifications and expertise of ACM health staff

The Department's submission states that:

The Department requires [ACM] to ensure that health services are delivered by qualified, registered and appropriately trained health care professionals, and that they have appropriate expertise and experience to respond to the particular needs of detainees. The mix, expertise and qualifications of [ACM's] health services staff need to be appropriate to the detainee profile at each detention facility at any given time.<sup>159</sup>

This suggests that the Department expected that health staff have the appropriate medical qualifications to address the special needs of detainees.

The evidence before the Inquiry suggests that medical staff in detention facilities had the appropriate formal medical qualifications in that they were properly registered. Moreover, some of the doctors and nurses encountered by the Inquiry appear to be highly professional and caring. However, the Inquiry is concerned that in order to provide the highest attainable standard of health care for asylum-seeking children, health staff may need specialised knowledge and experience. It has been difficult to ensure the appropriate mix of such expertise.

The Bollen Report found that:

Most of the remote rural detention centres have an ongoing problem recruiting and retaining staff with even basic qualifications and rarely have the opportunity to choose and obtain the right mix of medical personnel to reflect the population demographics.<sup>160</sup>

Health staffing problems are also faced by rural and remote communities outside of detention. Therefore, it is not surprising that the location of detention centres in remote or rural areas limits the ability of ACM to attract appropriate health care experts.

#### (a) Paediatric experience of health staff

When children are detained, health professionals with paediatric experience should be available. The Department's submission suggests that it is of the view that ACM has met this criterion:

Facilities with children try to ensure that nursing or general practitioner staff have experience in paediatrics or child health.

The policies of [ACM] require that all new health staff attend a one-day formal orientation program addressing issues such as cultural awareness and sensitivity, managing detainees assessed to be at risk and child protection.<sup>161</sup>

However, in relation to paediatric experience, the Bollen Report found that:

Very few of the health care staff had paediatric experience....Many of the centres will continue to be limited to recruiting those health care staff willing

to work in a detention centre, particularly in a remote rural area. To address this inevitable deficiency, arrangements should be made with other service providers to provide short term input of more specialised services when required to fill any areas of deficiency.<sup>162</sup>

The Bollen Report also recommends that '[a]t least some nurses should be trained in child health, midwifery, and psychiatry'.<sup>163</sup>

The Inquiry heard evidence from one paediatric registrar who worked in Woomera for two short-term contracts of two weeks but is unaware of any other paediatricians who worked in the centres.<sup>164</sup> The Inquiry has not received any specific evidence suggesting that general practitioners with paediatric experience worked in the centres, nor does it have specific evidence about referrals to paediatricians, although this may have occurred. Evidence as to the availability of child psychologists is discussed in Chapter 9 on Mental Health.

A nurse who worked in Woomera in 1999 suggested that the absence of nurses with paediatric qualifications may have been problematic in conducting assessments:

We conducted medical assessments. It was by a three page document that had to be filled in. For instance... none of us were experts in child development issues... The children did not normally have access to a paediatrician who would do the normal milestones ... the only regular sort of assessment that we used for children was to do the weight and growth charts.<sup>165</sup>

The Department has stated on the other hand that:

it needs to be remembered that most Australian children do not routinely have access to health professionals specialising in paediatrics. It is normal practice for a general practitioner to refer children to a paediatrician only if required. This normal practice is followed in detention facilities and medical practitioners refer children to paediatricians, as necessary.<sup>166</sup>

However, when a child is detained for long periods of time, it is incumbent on the Department to ensure that the highest attainable standard of care is available to the detainees. Child detainees, particularly children with special health needs as many asylum seekers are, may require specialised medical assistance. Concerns about delays in accessing external health care, discussed later in this chapter, undermine any reliance on referrals to outside paediatric help.

## **(b) Cultural awareness of health staff**

The level of cultural awareness of health staff impacts on the quality of health care provided to asylum-seeking children in detention. If a health care practitioner is not culturally aware, he or she may fail to identify the ailment of these children. This can occur for a variety of reasons.

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For example, female children and mothers may feel it to be culturally inappropriate to recount their medical history to a male nurse or doctor. As the Bollen Report notes:

Women's health presents a problem in those centres with only male doctors. This creates a cultural problem for many female detainees who are unwilling, or whose husbands are unwilling for them to be examined by a male doctor. While many of the nurses at the detention centres are female, most nurses have no formal training in conducting a full clinical examination and making a diagnosis. This is an important cultural matter requiring resolution. It should be possible to arrange for a female medical officer to visit such detention centres on a regular basis to run women's health services...<sup>167</sup>

ACM reports, in June 2002, that it responded to this recommendation in the Bollen Report by ensuring that all centres have access to a female medical officer.<sup>168</sup>

In addition to the specific cultural background of detainees, it must also be remembered that the trauma of travel and persecution can profoundly affect a child or parent's capacity to remember or determine what is relevant.<sup>169</sup> Moreover, the Inquiry heard that asylum seekers may be concerned not to reveal health problems that could affect their visa application.

Hence, in order to provide effective diagnosis and treatment it is essential for health staff to be aware of the culture and backgrounds of asylum-seeking children, and how this may affect detainee responses to health services. Specialised training can assist health staff to address such issues.

The Department states that it provided detention officer training to ACM staff entitled 'Cultural Diversity In Immigration Detention Facilities – A Resource Kit for Immigration Detention Service Providers' which gives 'basic information relevant to health professionals treating people from other cultures'. The kit includes small sections on health concerns for different cultural groups. The Department also states that it 'understands that ACM also conducts training for health staff that gives insights into cultural needs and differences'.<sup>170</sup> ACM states that:

health staff receive training on 'Barriers to Communication' skills and input on multicultural communication during their orientation program. Officers also receive an Induction Manual that addresses cultural issues. Officers also receive training sessions in working with families and children which have cultural content.<sup>171</sup>

It is unclear from the evidence before the Inquiry whether such training specifically addressed health issues; when such training commenced; whether it included all ACM staff; and whether it only took place at induction.

During the Inquiry's visits to Woomera in June 2002 health staff commented that there was no cultural training at all and that everything that they had learned was through the detainees.<sup>172</sup> Chapter 15 on Religion, Culture and Language discusses cultural training in more detail.

### (c) Expertise in refugee health

In addition to cultural awareness, in order to promptly and appropriately treat detainee children medical staff should have some medical experience in diagnosing and treating ailments specific to children of particular backgrounds.

A doctor, who worked at Woomera from October 2000 to the end of June 2001, confirmed that asylum seekers suffered from ailments that were not common in Australia and for which the medical staff were not fully prepared:

There was severe diabetes, sugar-levels high, high – never seen before. There were heart diseases, murmurs. Many things we have never seen because we are such a developed country and these things are picked up when a child is born or blood-pressure is monitored. There were the chronic illnesses, asthma – severe asthma. Chronic illnesses.

Then there were the infectious diseases. The hepatitis Bs and Cs. The infections of the skins, scabies. You could see tracks of scabies under the skin, we had never seen before. Huge tropical sores, we have never seen before. It was a learning experience for all of us. I had to ring tropical medicines to find out the treatment and so on. And those were the tropical diseases. Intestinal parasites, we call them liver flukes and so on. Causing severe abdominal pain and so on.<sup>173</sup>

The Department accepts that health care staff do not always have extensive experience in treating some of the diseases found in the detention population, but does not see this as a significant concern providing the medical staff can quickly access information about these diseases and modern treatment methods.<sup>174</sup> However, there have been some concerns about access to such information. The Bollen Report recommended that detention facilities be better equipped with reference material regarding current medical treatments.<sup>175</sup> The Inquiry is pleased to note that in response to the Bollen recommendations, ACM audited its medical resources and ordered new reference material.<sup>176</sup>

However, to the Inquiry's knowledge, training of ACM health staff did not include medical training in identifying common ailments in child asylum seekers.

### (d) Findings regarding qualifications and expertise of ACM health staff

The Inquiry finds that while medical staff were generally available to children and their parents, the quality of care was compromised by the detention environment. A key difficulty appears to have been in recruiting sufficient medical staff, especially to remote areas, with the specialist qualifications necessary to meet the special needs of asylum-seeking children.

While it appears some efforts have been made to improve cultural responsiveness of medical staff, for example by providing some cultural training, the specifics of that training remain unclear to the Inquiry. Moreover, the Inquiry saw little evidence of specific and systematic paediatric or refugee health training for on-site health staff to help them address the special health issues facing asylum-seeking children. The Inquiry notes that parents who wish to see doctors with expertise in the

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community may seek advice from refugee and asylum seekers health networks, which can refer them to specialist doctors, often at no cost.

### 10.4.3 Availability of interpreters

The provision of on-site interpreters for the purpose of medical examinations appears to have been a persistent problem for the Department and ACM, in particular in Port Hedland.<sup>177</sup> The Department Manager at that facility reported an absence of on-site interpreters over a period of 19 months.<sup>178</sup> This is also acknowledged by ACM.<sup>179</sup> The failure to rectify this problem was the subject of a lengthy exchange during the hearings of the Inquiry.<sup>180</sup>

During the Inquiry, Counsel assisting the Inquiry pointed the Department to the Performance Linked Fee Report for the December 2001 quarter which stated that:

There was a lack of on site interpreters at Port Hedland throughout the majority of 2001, this issue has serious implications in the sensitive area of induction and medical care and has been raised with ACM formally on many occasions including at COG and in correspondence. Whilst acknowledging the difficulties ACM had in attracting staff to Port Hedland DIMIA urges ACM to resolve this issue urgently and will apply sanctions for this quarter given the serious implications.<sup>181</sup>

The Department penalised ACM ten points for this breach. However, nine months later, the September 2002 Port Hedland Manager's report notes that the problem was continuing:

*Unchanged from previous months*

Lack of onsite interpreters, combined with the cramped conditions under which medical staff operate, means that lack of privacy continues to be a particular issue for residents attending the clinic.<sup>182</sup>

ACM states that, with respect to the absence of on-site interpreters at Port Hedland during this period, the telephone interpreting service (the Commonwealth Government Translating and Interpreting Service, TIS) was still in operation. It also states that 'the Department eventually recognised and accepted the use of TIS and the penalty was subsequently removed'.<sup>183</sup>

Although the use of the TIS may have addressed some of the difficulties faced by adults, the Department has acknowledged that TIS is unlikely to be appropriate for medical assessments involving children.<sup>184</sup> Moreover, it appears that at least during 2001 at Port Hedland, TIS was rarely used by medical staff.<sup>185</sup> The Bollen Report notes:

All centres have ready access to [TIS]. The majority of medical, nursing and mental health staff interviewed had difficulties with TIS, mainly because they found TIS difficult to access and using a speakerphone for interpreting, distracting or slow. Some staff used TIS regularly and without difficulty. Most staff preferred face-to face interpreters and asked that more interpreters...be

dedicated to the health services... Interpreters also contend that, if permitted, they could help staff understand cultural needs and differences that might assist staff in relating to detainees.<sup>186</sup>

During its visit to the Cocos (Keeling) Islands facility, the Inquiry noted that there was only one phone for the entire facility (including staff) and therefore no practical access to TIS.

During the Inquiry's other detention centre visits in 2002, there did appear to be at least some interpreters available. Medical staff at Curtin reported to the Inquiry in June 2002 that interpreters are available for all medical appointments although they are short on female staff.<sup>187</sup> The Department informs the Inquiry that the situation with regard to interpreters has improved considerably. On-site interpreters are available at Port Hedland and Baxter, where many of the children are detained.<sup>188</sup>

The absence of interpreters has a dual impact on children. The children who did not speak English found medical examinations to be an intimidating process. The children who did speak English often ended up interpreting for their parents, getting them involved in matters which were not their concern.

A doctor working at Woomera stated that the absence of an interpreter raised the obvious problem of a risk of an inaccurate diagnosis:

We had a lot of difficulty not being able to speak very good Farsi or Arabic, and most of the detainees had very little or no English. So there were often instances, and we were extremely alert to the possibility of children being abused by people in the centre. And I remember one specific instance when a seven or eight year old child was brought in screaming with blood pouring from his lip. And somebody said that he had been assaulted. Eventually we found an interpreter who was able to get the hysterical mother to explain that, no, he had been playing soccer and had tripped on the rocky ground and cut his mouth open on the ground, which was much more likely and something that we saw much more commonly.<sup>189</sup>

The absence of interpreters during the triage process also created problems:

Well we certainly weren't able to see all of the people in the book when I was there and it wasn't a particularly good process because there is no interpreters available in the medical clinics so the detainee got into the nurse to ask to be seen by the doctor had to be – was done without the benefit of an interpreter. So often the problem that we thought we were seeing was completely different.<sup>190</sup>

#### **(a) Findings regarding the availability of interpreters**

Although access to on-site interpreters may have improved, during the period of time covered by the Inquiry the provision of an adequate number of interpreters for medical examinations was a problem at several centres, particularly in Port Hedland from 2001 through to 2002. The shortage appeared to be related to difficulties in recruiting a sufficient number of appropriate interpreters to remote locations.

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The TIS service may address some of the difficulties faced by adults, but it is not the most appropriate response to the needs of children in medical examinations. The shortage of interpreters for medical examinations likely exacerbated the difficulties of treating children and raised the risk of inaccurate diagnosis and treatment.

### 10.4.4 Access to ACM health staff

All immigration detention centres have health care staff available for medical treatment, including triage, nursing and first aid, although the hours of availability differ in each centre.<sup>191</sup> Detainees who could not be treated by ACM nursing staff and doctors were referred to external specialists or hospitals.

In its submission to the Inquiry the Department provides a summary of health care services and facilities as at 31 January 2002, which listed the number of staff available on that day.<sup>192</sup> The Department also provided a comparative chart which indicates a higher doctor-population ratio in detention than in the general community. As the submission acknowledges, this is in order to address 'the special needs of people in detention, including the treatment of existing illnesses which were present at the time of arrival'.<sup>193</sup>

However, evidence provided to the Inquiry suggests that, at least some of the time, the detention facilities were understaffed.<sup>194</sup>

The Bollen Report found that all 'health services regularly experience difficulties recruiting and retaining health staff'.<sup>195</sup>

A doctor at Woomera for nine months ending June 2001 stated that

The workload was heavy. Very, very heavy. On 24 hours a day. We would get three or four calls through the night with regard to self-harm in the night.<sup>196</sup>

Woomera health staff interviewed in June 2002 also stated that they were stretched with each employee working 120 hours every fortnight on a variety of shifts.<sup>197</sup>

Port Hedland has also suffered from shortages at different periods of time.<sup>198</sup> The Bollen Report states that:

Until recently, Port Hedland IRPC had been unable to retain a permanent doctor and had relied on short term locums or used the local medical practice....At one stage, Port Hedland relied on getting advice and having prescriptions faxed from the doctor at Curtin.<sup>199</sup>

The Victorian Department of Human Services reports that children in Maribyrnong:

consistently stated that there were always more detainees needing to see medical professionals than there were doctors or nurses available to see them, and that at times, they were forced to wait for hours or on occasion, days, before being seen.<sup>200</sup>

A doctor at Woomera described the pressures on doctors to keep up with the caseload:

And we were never able to keep up with what was in the book because there was always emergencies that came in on top of the appointments that were booked but there was usually two doctors and you would get there in the morning and there would be a list of code numbers of people that we had to see – that we would see that day who would be called, one by one, over the loud speaker by their code number.<sup>201</sup>

Triage processes are commonly used in hospitals in Australia as a means of relieving the pressure of demand on doctors and ensuring that the most needy patients receive appropriate treatment promptly. However, a nurse who formerly worked at Woomera noted that the triage process differed from normal community practice:

...normally, if people feel unwell, they decide to go to the doctor themselves. At the detention centre, they would have to see nurses and we would then refer the person to the doctor.<sup>202</sup>

A doctor stated that the process of having nurses filter the cases sometimes resulted in delayed treatment for children:

DR OZDOWSKI: So nurses constitute a barrier of access to medical practitioners?

DR PFITZNER: In one way if you want to be negative, we could put it as a barrier; on the other way we could put it that we were almost over-worked and the nurses were trying to filter the severe cases to us. So I would like to put it in a positive manner, that this was done, but of course there were errors made and sometimes delay. And this particular child that I'm thinking of, there was some delay. I would have liked to see that particular child when the child had arrived with obvious physical defect, mental and physical defect. But I think I didn't see the child until the child had become, fitting or severe breathing problems for about four to six weeks, and I happened to see the child and the nurses treating it, and called the child up and then identified the severe defect.

So in ideal circumstances yes, that child should have been seen earlier than four to six weeks.<sup>203</sup>

An unaccompanied child recounted a situation where the problem went away before he managed to see the doctor:

I was sick there, I waited for one week to see the doctor. You have to put in a form, so by the time the doctor sees you, there's nothing wrong. I was sick with diarrhea but by the time I saw the doctor he said 'what's wrong with you?' and I said 'nothing'. It was gone. He said 'you wrote me a letter to see you' and I said 'that was one week ago, I am better now'. If it was serious I could die in there.<sup>204</sup>

The Bollen Report noted several systemic problems with the triage process:

No centre had any agreed formal and documented criteria for referral. The triage process was unmonitored, had the potential for error, particularly in

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those centres with a high staff turnover of nurses with varied nursing experience and skills in primary care and triage.<sup>205</sup>

ACM reported in June 2002 that triage arrangements were reviewed by AUSEMED and in August 2002 ACM was developing training programs for health staff in triage.<sup>206</sup>

The Inquiry also heard that access to ACM health staff was controlled by detention guards. The medical centres were usually located in a different compound to the accommodation blocks. For security reasons, a guard was posted at the entrance to each compound. In some centres, this meant that children and their parents needed to ask permission from guards in order to go to the medical centre. The Inquiry heard allegations that this power was sometimes abused. A nurse formerly employed at Woomera stated that:

The ability of detainees to access the Medical Centre was compromised by ACM officers. Detainees were regularly turned away by ACM officers. On occasion, they were incorrectly told that the clinic was closed, that there were too many people at the clinic, or told that they were not sick and that they didn't need to see the doctor.<sup>207</sup>

The submission from National Legal Aid gave an example of the impact of this system:

At about 2am one very cold, wet night, the younger daughter's breathing became almost imperceptible. Her lips turned blue and she became limp and cold. Her father said he wrapped her in some bedding and carried her across an open area to the building where the medical office was located. Despite the father's protestations, the guard on duty at the building's reception area refused the father entry for half an hour. The father stood outside, trying to shield his daughter from the rain. He commented that this was one of the most cruel and demeaning experiences of his life. *"My child and I were treated like stray dogs, left out in the cold. Can you imagine how hopeless I felt for my family, standing there shivering and wondering if my daughter would die in my arms?"*<sup>208</sup>

### (a) Findings regarding access to ACM health staff

The Inquiry acknowledges that, despite the efforts of on-site doctors and nurses, staffing shortages and the high demand for health services within detention at certain points in time, placed the health services under a great deal of pressure to meet the needs of children and their parents. The remote centres had difficulties recruiting and retaining staff, which further exacerbated these pressures.

The implementation of a triage system was introduced to address these difficulties; however, in some cases this resulted in delayed treatment. Further, access by detainees to health services was controlled by security staff on certain occasions. This controlled access contrasts to the open access to doctors by children in the community.

Irrespective of the operational difficulties faced by ACM and the Department with regard to health services, the Department has a responsibility to ensure that children receive medical attention in a prompt manner. Failure to do so in a detention environment can lead to unnecessary levels of stress, and delayed treatment.

### 10.4.5 Access to medication

The Department states that:

For children or their parents taking medication, supervision is considered necessary to preclude accumulation of toxic or life threatening doses of medication.<sup>209</sup>

Given the high levels of self-harm described in Chapter 9 on Mental Health, this would appear to be a sensible strategy in principle. However, it appears that it led to substantial delays in distribution of medication even when that medication could not be used for self-harm purposes. Further, it appears that there were other reasons why detainees were not permitted to self-administer medication. A nurse formerly employed at Woomera reported the following:

Detainees were not allowed to take medication to their accommodation blocks. This led to lengthy and inappropriate delays in the distribution of medication.

For example, in one instance a child with an ear infection had to represent four times a day for antibiotics that could only be distributed from the main Medical Centre because they required refrigeration. On one occasion the child and his mother had to queue for three hours in the rain at night to receive the medication, as there was only ever one nurse on duty at night. This caused the child and the mother great distress.

This example is one of many where detainees and their children had to queue for hours at night to receive medication.<sup>210</sup>

Moreover, this example indicates how waiting for medication can cause great distress to children, particularly at night.

A former detainee child also pointed out that the shortage of staff made the process very difficult:

They will give you a slip type thing that says you have to come 3 times a day, to get your tablet, but there is one nurse – how can you?<sup>211</sup>

Another child stated that he had to wait two hours to receive medication.<sup>212</sup>

#### (a) Findings regarding access to medication

It is understandable that the Department and ACM are reluctant to allow detainees to self-administer medication for fear of self-harm. However, the Inquiry is concerned that the blanket policy of controlling medication distribution resulted in some children experiencing unnecessary delays in obtaining their prescribed medication. This caused considerable distress.

### 10.4.6 Access to external doctors and hospitals

The medical centres within the detention facilities are only intended to provide primary care. The Department's submission states that:

Detainees who cannot be treated within the detention facility are referred to off-site specialists, hospitals or other institutions for ongoing care.<sup>213</sup>

The Bollen Report states that '[d]etainees can be referred to other health services when required' but that the remoteness of the facilities results in delays and 'health staff frequently encounter difficulties in obtaining specialist appointments'.<sup>214</sup> Furthermore, the Bollen Report notes that in 2001:

The IRPCs, because of their location, do not have ready access to emergency services including surgical, obstetric, dental and psychiatric services nor the ready availability of consultants to offer the necessary backup to the primary care service providers. Arrangements for provision of secondary care services for IRPCs are inconsistent and require innovative approaches to enable detainees and their primary care providers to have the level of support consistent with that available to the Australian community. Some innovations are being trialed, including videoconferencing for psychiatric diagnosis and management. However, a range of specialist health care consultants should be engaged and funded to provide readily available telephone advice to IRPC medical staff.<sup>215</sup>

Most health staff in the detention facilities were of the view that when children required specialist treatment or hospitalisation those services were generally provided. The Department has provided some examples of health treatment given to detainees, such as:

- in excess of \$9000 was spent treating a child suffering from tuberculosis
- \$920 was spent providing occupational therapy to a child.<sup>216</sup>

However, the Inquiry heard some examples of children waiting substantial periods of time before being referred to external services. The most serious examples occurred with respect to children with disabilities. This is addressed in the following chapter.

The Inquiry also heard several examples relating to eye problems. For instance, an unaccompanied child in Curtin saw a doctor for visa purposes shortly after his arrival in May 2002. The doctor noted that he had previously had lens replacement surgery and that there should be 'further investigation diagnosis and management of these conditions'.<sup>217</sup> A month later, the ACM medical records note that the boy asked to be put on the optometrist's list and this was done four days later.<sup>218</sup> However, there is no record of any follow-up on his eye condition, as suggested by the previous doctor, nor whether he saw an optometrist. The Inquiry understands that the boy underwent substantial restorative eye surgery after he was released from detention.

Another unaccompanied child described how he had an appointment with an eye specialist but was not collected for the appointment:

I have an eyes problem. I have missed an appointment. It was their responsibility to tell me I was going to a doctor but there was a school excursion that day ... I had this problem in Afghanistan, I never saw a doctor. Still I can't see with this eye, just with this one.<sup>219</sup>

The Victorian Department of Human Services found that:

...several unattached minors were assessed as requiring corrective glasses soon after their release into Victoria. Another young person was found to have a severe hearing loss and required a hearing aid.<sup>220</sup>

The Curtin Department Manager report for March 2002 notes that:

A number of cases came to notice during the month where ACM were not providing glasses for detainees who required them. This has now been rectified.<sup>221</sup>

One child alleged that he had serious kidney problems that were never seen to by a specialist:

I have got a kidney problem in both kidneys and I suffered a lot with that in the camp. I was having this pain and they were telling me to drink water. Any sickness or any pain we were told to drink water. Very little painkillers. Altogether five or six times I was ill. My older brother lobbied a lot for me to be sent to a doctor. One night I was very sick and he felt I should see a doctor but they gave me two panadol and told me to drink water. (Unaccompanied teenage boy)<sup>222</sup>

The Inquiry does not have evidence why delays in referrals to external treatment occurred in these particular cases.

However, some concern was expressed to the Inquiry about the difficulties encountered by doctors when referring patients to external doctors and hospitals.

Firstly, the isolation of some of the centres placed added pressures on doctors as it was not as easy to access specialists to assist them in their diagnosis and treatment:

Yes, with regard to working in the hospital you would be less stressed because you have powers of your colleagues, peers and seniors to relate to, to discuss, to give you a sense that you are doing things the right way. When I was there I was the only medical officer except for a part-time. We used to discuss but we had difficulty referring to our specialists. Skin specialists, mental specialists and other infectious diseases specialists. So, in that way we were more pressured with regard to letting us know whether we were doing the right thing. We checked constantly but the people were not on tap.<sup>223</sup>

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The distance of some of the centres from metropolitan areas may also have forced doctors to make more dramatic referral decisions than might otherwise have been necessary:

[T]his was part of the problem of being located where the centre is, so far away from any other form of civilisation, is that there was no in between, between what we were able to do in the medical clinic and essentially a patient being seen in a tertiary hospital in Adelaide. Which was not only expensive but a cumbersome arrangement and not always completely necessary. Something half way would have been adequate for a lot of people, but we just didn't have that option that we would have if the centre was located closer to civilisation.<sup>224</sup>

ACM, in its response to the draft of this report, acknowledges that the location and corresponding limited availability of medical services may have been frustrating for medical practitioners in the remote centres.<sup>225</sup>

Secondly, the Inquiry also heard a number of suggestions that cost was a consideration in the decision to transfer a detainee to external health treatment. For example, the Inquiry heard from one doctor as follows:

DR CARROLL ... So if we needed to transfer somebody to another hospital or to another setting, we had to get permission from the [ACM] Health Services Manager (a nurse), who had to get permission from the organisational people, and I don't know how much of that was ACM and how much was DIMIA. I mean we were constantly reminded that the operation was a financial one and that we had to try and make savings or not increase costs where that could be avoided.

DR OZDOWSKI: In your normal practice would you make similar considerations? Would you make similar choices?

DR CARROLL: No. Well, not on the same scale, no. I mean working in a public hospital setting, things are done when they need to be done as long as that is feasible. I wasn't used to being told that things shouldn't be done in order to save money, no. Not in terms of direct patient welfare.<sup>226</sup>

The Western Australian Government also stated they believed that there had been some reluctance to provide care to a child in Curtin because of the cost, although this situation was eventually resolved:

there was a situation in which referral of an adolescent in detention was made to the North West Mental Health Service, which is based in Broome. The adolescent was assessed and the result of that was a recommendation as to a particular treatment program. My understanding is that there were some discussions and negotiations about the cost of providing that particular treatment approach for that adolescent. But at the end of the day, best practice was what was followed and the adolescent was actually instituted with that treatment program.<sup>227</sup>

However, not all doctors were of the view that cost was a consideration:

In terms of physical health, I was of the view that children received appropriate levels of care at the WIRPC when I was working there. I did not think that

medical care was denied on the basis of cost. In my opinion it was always available when it was pressed for.<sup>228</sup>

ACM denies that payment arrangements between ACM and the Department impacted on the provision of health services in detention centres. However, it suggests that Dr Carroll's evidence cited above 'appears to confuse the need for legislative authority from DIMIA to remove a detainee with authority to pay for relevant treatment'.<sup>229</sup>

The Inquiry did not receive any evidence that access to external treatment was actually denied to a child detainee because of cost considerations nor that this was a consistent instruction to medical staff. However, ACM's comments and the doctor's claims raise the issue as to whether the procedures were sufficiently clear to assure doctors that cost was not an issue.

Thirdly, it appears that in order to ensure the speedy transfer of patients to external treatment, doctors were required to take extra measures to propel the process:

I think it was up to the nurses and the medical officer if there was a severe problem. I would myself go down and say, you know, "This person needs to go". I'd speak to the DIMIA officer to get the release to go to the hospital, because that was a financial commitment there. And then go to ACM and say, "Let's get a car and guards and whatever is needed to go down," and ring the hospital and make the appointments. So all our medical role did not only refer to medical diagnosis. If we wanted the thing to progress it was up to the doctor and the nurse, and I took that task on, to actually go and push the thing through.

So it may be some of the other doctors may have felt their task was just medical, and just referred and hoped that it percolated through. In my experience if that was done, and I don't know, the progress would be very slow. And I would myself go and see the DIMIA staff, the DIMIA director, go and see the ACM staff, the ACM manager, to get all those things together. It was a very huge logistic operation, because you had to get permission, then you have to ring the hospital to make sure that the child would be received, and then the whole thing would progress.<sup>230</sup>

The Inquiry recognises that many of these witnesses are commenting on the period of 2000 to early 2002. However, it appears that the procedure for making referrals and transferring to hospitals was unclear as recently as June 2002, when ACM noted that:

To date there has been no discussion with DIMIA regarding criteria for access to health services for detainees. ACM continues to welcome the opportunity to work with DIMIA, relevant community agencies and the proposed Health Advisory Panel (HAP) to develop guidelines for secondary and tertiary referrals based on clinical status, length of time in detention and age and sex of the detainee.<sup>231</sup>

The controlled access to specialists and hospitals for children in detention marks a significant distinction to the free access available to children in the community.

### (a) Findings regarding access to external doctors and hospitals

There were no specific allegations that treatment was denied to a child because of the system of external referral. However, it appears that unclear procedures and the location of remote centres led to long delays in accessing the appropriate secondary care at various times. The Bollen Report suggests that the result was a lower level of care than in the Australian community. The Inquiry is particularly concerned by the restricted access to external health care experienced by some children with disabilities, as discussed in the following chapter, and children with eye problems discussed above.

The use of short-term contracts for medical practitioners in detention facilities means that it is extremely important to have clear and easy referral procedures regarding external specialists and hospital care. The Inquiry finds that this has not been the case.

There is insufficient evidence to suggest that cost concerns were generally a barrier to accessing external health care, although at least one doctor had the perception that this was the case.

### 10.4.7 Hospitalisation and contact between families

Detention means that family members do not have the same freedom to choose when to visit or accompany parents or children in hospital as they would if they lived in the Australian community. Thus, where a child or parent is hospitalised, it is incumbent on the Department and ACM to ensure that there is appropriate contact between family members.

The evidence received by the Inquiry suggests that generally when a detainee child requires hospitalisation, at least one parent is given the opportunity to accompany the child to hospital.<sup>232</sup> This includes cases which require air transport. The Inquiry met a family where hospitalisation meant that for a month, one child was in hospital in a capital city, the mother was in a motel near the hospital and the father and the other children were in a remote detention centre.<sup>233</sup>

On the other hand, the Inquiry also received evidence that on one occasion, at least, parents were restricted in the amount of time they could spend with the child in hospital:

An Iraqi family of four had been in another IDC for six months when the father and his six-year-old son were transferred to Maribyrnong to obtain medical treatment for the child suffering from a heart condition. The mother and two-year-old son remained in the other IDC. The father was distressed about the family's separation, particularly as his wife was diabetic and three months pregnant.

The child, who could not speak English, was hospitalised for approximately two weeks. During this period, two ACM officers escorted the father to the hospital to visit his son for one hour each day. The father was frustrated and angry that he could not remain with his son in the hospital for longer periods.

The family was separated for six weeks before the father and son were returned to the other IDC and reunited with the other members of the family.<sup>234</sup>

The Department states that the restricted visiting hours were ‘certainly not a condition imposed by ACM’.<sup>235</sup> It is possible that the hospital restricted visiting hours, presumably a condition which would be applied to all hospital patients. However, it seems unusual for the hospital to restrict parental visits to one hour a day, even for a very sick child, especially when the child does not speak any English.

The Inquiry also heard a number of examples when parents have been hospitalised, leaving children behind in the detention centre. For example an Iranian mother and her seven-year-old child were separated from each other for five and a half weeks after the mother attempted suicide in their fifteenth month of detention at Woomera.<sup>236</sup>

Generally, arrangements are made for children to visit their parents during this time, although only in rare cases are children given the option of moving into or close to the hospital with the parent.<sup>237</sup> For example, the father of an 11-year-old boy at Woomera was hospitalised several times in 2002. At one point both parents were in hospital and ACM granted the child access to them after school in order to maintain the family unit as much as possible.<sup>238</sup> The child visited his father in hospital daily.<sup>239</sup>

However, the Inquiry received some evidence that, at Woomera at least, the frequency of the visits by children were restricted to times convenient for the detention centre. Some children with parents in hospital complained to the Inquiry that they were only allowed to visit the hospital on weekends. ACM claims that there is no evidence to suggest that ACM restricted children in visiting their parents in hospital or contacting their parents by phone.<sup>240</sup> The Department also ‘strongly rejects’ any allegation that they deliberately restricted phone calls and visits by children.

However, ACM’s records show that a 12-year-old boy climbed on the razor wire fence and slashed himself stating that he wanted to see his mother in hospital. ACM said that the visit would be arranged ‘as soon as possible’<sup>241</sup> and the records show that it happened six days later.<sup>242</sup>

The 12-year-old boy and his sibling were permitted to visit their mother twice a week, on Saturdays and Sundays only. However, contrary to the Department and ACM’s assertions, it appears that children were not allowed to telephone their parents whenever they liked. For example, on one occasion the son in this family asked if he could call his mother and was refused permission because ‘he had had one [call] yesterday’.<sup>243</sup>

#### **(a) Findings regarding hospitalisation and contact between families**

The Inquiry finds that generally the Department and ACM made efforts to ensure that children and their parents were able to maintain contact with each other during periods of hospitalisation. When a child was hospitalised, one parent usually accompanied the child to hospital or visited on a regular basis. However, when a parent was hospitalised the children generally remained in detention. Either way, children in detention did not have the same freedom of access as children in the community.

## A last resort?

The separation of parents and their children can have an impact on the health of children remaining in the detention centre as well as on the child or parent in hospital. This issue is discussed further in Chapter 9 on Mental Health (section 9.3.4) and Chapter 14 on Unaccompanied Children (section 14.6).

### 10.4.8 Access to pre and postnatal care

Between 1 January 1999 and 26 December 2003, 71 babies were born in detention to unauthorised boat arrival mothers.<sup>244</sup> The evidence received by the Inquiry suggests that as a general rule prenatal and postnatal services were provided to pregnant women.

However, the Inquiry received some evidence that communication difficulties in postnatal care, including lack of access to an interpreter, were problematic in one case raised with the Inquiry. The example raised by the Australian Association for Infant Mental Health (AAIMH) suggests that a woman had a caesarean without consent and inadequate postnatal care.<sup>245</sup> The South Australian Department of Human Services examined the circumstances in this case and reported the following:

Mother was taken to Port Augusta because of her pregnancy. She remained in hospital for 20 days, after 15 days she had a caesarean. She is unclear why she was to have this procedure as [it] wasn't term and there were no signs of labour. She alleges she had no regular access to an interpreter, only telephone access upon medical request. She was supervised 24 hours by ACM staff. She describes feelings of powerlessness and isolation while in the hospital. She had little contact with her family. She says she went on hunger strike while in the hospital, due to her frustration regarding lack of communication with family and issues around the birth...

The mother experienced bleeding on the third day back in Woomera, it was recommended she be admitted to hospital, she refused admission. She threatened to kill herself if she was forced to be re-admitted. The baby ... has not had the recommended 6 week postnatal checks.<sup>246</sup>

The Minister publicly responded to this allegation in November 2002 by restating Departmental policy on the treatment of pregnant women, although not refuting the specific claims.<sup>247</sup> The Department's response states that the responsibility for communication and interpreting on medical treatment while in hospital lies with the State authority.<sup>248</sup>

ACM states that its staff had no influence over the decision to perform a caesarean section. ACM also asserts that the woman had access to a competent postnatal check up by a female doctor attending the centre. The doctor did not recommend a return to hospital. ACM adds that the Health Services Coordinator at the time was an Early Childhood Nurse with extensive experience running a Baby Health Clinic.<sup>249</sup>

This case highlights the critical links between the mother's mental health, the health of a newborn baby, and the need for adequate communication. An example of the difficulty in dealing with postnatal depression in detention is discussed in section 9.3.4 in Chapter 9 on Mental Health.

The Inquiry also heard concerns about the re-location of pregnant women in remote detention centres to city hospitals at 36 weeks, sometimes without their husbands.

The AAIMH describes the impact of early transfer to hospital as follows:

...this is a practice that seemed to be best practice in obstetric care in rural and remote areas, so it just does not apply to women in immigration detention. Unfortunately the problems of language and understanding about obstetric care are seen to be very lacking in terms of the antenatal care for women in detention centres and I think the recommendation is that women consent – are fully aware of their options in terms of giving birth and fully consent to those options so that they are not traumatised further by separations from their families, of which they know no reason for.<sup>250</sup>

The Bollen Report also comments that this practice is 'both unnecessary and expensive'.<sup>251</sup>

On the other hand, a doctor at Woomera was of the view that this was best practice, albeit with associated difficulties:

DR OZDOWSKI: From what you said it appears that women were spending a relatively longer period of time in Port Augusta Hospital, usually as I understand a woman would go a day or two days before birth and in the case of Woomera they went substantial periods of time in advance to the hospital. Were they told, were they explained the reasons for it?

DR PFITZNER: Yes. I don't think they were sent for any greater length of time compared to the other women in the South Australian community. It is the set procedure in the country because there were not obstetricians available easily, that they went to a specific hospital, in this case it was Port Augusta Hospital, to be looked after and that was at 36 weeks until their delivery which is, you know they stayed about four weeks, and this was normal procedure. My understanding is that they were involved in being informed as to why they were there for four weeks. The only difficulty was that the husband may not have been able to go with mother because the husband had to stay back and look after the other children that were left at the detention centre and although we did advocate that the husband and the rest of the family might go and stay at Port Augusta this was not able to be done because of financial or logistic reasons.<sup>252</sup>

While the Inquiry did not hear evidence that the quality of the care provided was inferior as a result of re-location, it notes that detainee women are likely to have significant language and cultural barriers which may require greater support during the birthing process. Yet they cannot choose someone, such as their husband, to support them at the birth during that time. They may also be separated from their other children for a prolonged period of time during this process, unlike women detained in the city centres.

As a general rule, it appears that detainee children and fathers were not permitted to accompany their mothers/wives to the place where they gave birth. In one case, ACM, 'as a measure of good will', approved the visit by a husband to his wife who had already given birth in Port Augusta Hospital.<sup>253</sup>

## A last resort?

In its submission, the Department cites an example where a child accompanied her mother to an accommodation unit close to a hospital for the last four weeks of her mother's pregnancy, and then visited the hospital regularly after the birth.<sup>254</sup> However, as described above, in the case of one family, there was separation for several weeks.<sup>255</sup> This same mother had another child in detention. Following the birth, the entire family was housed in an Adelaide motel for several weeks.<sup>256</sup>

An ACM employee, who worked at Curtin for more than two years, first as a nurse and later as Health Services Manager, told the Inquiry that:

My days with ACM were finally numbered when I was posted to Christmas Island. While there I refused to be the escort nurse for two pregnant women who were being forcibly separated from their husbands and children so that they could be taken to the mainland to have their babies. Their families were not allowed to accompany them because once on the Australian mainland they would be able to apply for a visa. Breaking up families meant that the wife would voluntarily leave the mainland to reunite with her family. These ladies would. Especially because while on the mainland they are kept in isolation from other detainees. They were also not told their legal rights.<sup>257</sup>

ACM comments that it had no control over the need to move women to regional hospitals in these circumstances. It had no control over the location of the detention centres, nor the availability of services in these areas. In such a circumstance, it claims that 'the logistics involved in transferring entire families from remote locations makes this option non-viable'. However, 'ACM makes every effort to ensure that family members have open lines of communication when mothers are hospitalised prior to giving birth'.<sup>258</sup>

While the remote location makes it more expensive to keep a family together during the weeks before a child's birth, the Inquiry notes that, as indicated in the more recent examples given above, it is not impossible for the whole family to be transferred close to the hospital, even if logistically difficult.

### **(a) Findings regarding access to pre and postnatal care**

While the Inquiry believes that efforts have been made to provide pre and postnatal care to women and their babies in detention, it is concerned that the restrictions that come with detention in remote areas and the shortage of interpreters made the process unduly traumatic for pregnant women.

Although the performance of a caesarean operation may have been necessary in the case highlighted above, it is concerning that a woman received the operation without properly understanding the procedure. It is irrelevant whether ACM or the State authorities were directly responsible for providing adequate interpreter services because it is ultimately the Commonwealth's responsibility to ensure that women receive the highest attainable birth care.

The Inquiry also notes that although it may be commonplace for families in the community in remote areas to be separated during a period of confinement, unlike

detainees they are free to make the decision to move close to the hospital during that period of time, pending financial and other personal considerations. Women detainees, on the other hand, are restricted in this choice. As discussed in the previous sections, this separation can cause children extreme anxiety and stress. Further, these women are especially vulnerable due to language and cultural barriers as well as a complete unfamiliarity with the Australian medical system.

#### 10.4.9 Access to dental care

Dental care is particularly important for asylum-seeking children who are likely to have had low levels of nutrition and dental care in their countries of origin. Consequently there is a huge demand for dental services by detainee children.

The Department states that:

Dental health care is provided for the preservation of dental health, and where physical health may be jeopardised as a result of a dental condition. Dental services for children and adult detainees are not provided for cosmetic purposes...Dentists visit regularly...<sup>259</sup>

The Bollen Report found that '[a]ll centres reported managing demand for dental services as a major problem'.<sup>260</sup> The Bollen Report recognised that access to dentists was a problem for the Australian community generally but also found that 'there is a high incidence of severe dental caries, dental abscesses and gum disease amongst detainees'.<sup>261</sup> As a result when dentists were called in to the centres, they spent all their time on pain relief, with no time left for the conservative care required by children:

For the remote centres, ACM has contracted a dentist who will fly in when required, but generally every 4-6 weeks. I was told that the dentist sees 40-60 detainees daily at each visit, sometimes working for more than 12 hours each day, mainly to provide management of pain and infection. Because of the extent of dental pathology, most treatment is extraACction. Given the time available for each patient, and the extent of dental pathology, it is unlikely that much conservative dentistry could be practised.<sup>262</sup>

A child told the Inquiry that he complained of problems with his teeth but never saw a dentist:

I told them about my teeth, that I had some difficulties and had some problems there. I told them about my breath that it was very bad because of my teeth and needed some attention. They didn't even care about that.<sup>263</sup>

ACM notes that in December 2001, children in Woomera were assessed for their teeth and gums by a visiting dentist.<sup>264</sup> In May 2002, a local dental practice offered to provide services to Woomera.<sup>265</sup> It is unclear whether this offer was taken up and whether children were given appointments for preventative work.

In June 2002, ACM stated that it was in the process of developing guidelines for the provision of dental care for children.<sup>266</sup> While the Inquiry has not been provided with

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a copy of those guidelines, it does appear that some steps were taken to improve the provision of dental care in detention. For example, in July 2002, the Department Manager at Curtin reported that:

During July the Health Services Coordinator was able (after much difficulty) to bring a dentist on site to do a preliminary examination of most detainees from which he could prioritise cases and appointments made.<sup>267</sup>

ACM also informs the Inquiry that it provided dental health education on correct brushing and eating appropriate foods, although it is unclear how often that occurred, when it commenced and at which centres it took place.<sup>268</sup>

However, in August 2002 the Curtin Department Manager comments that 'dental care still remains an issue for detainees but ACM have ongoing visits to the dentist in Broome'.<sup>269</sup>

During the Inquiry's visit to Baxter in December 2002, staff reported that persons who had been in detention for two years were now entitled to a wider range of dental services.<sup>270</sup> It is to be hoped that, as a general rule, children would not need to wait two years in detention before seeing a dentist for conservative work.

The Inquiry is aware that many children in the community find it difficult to access preventative dental care. However, by taking children into detention the Department assumes a higher duty of care in order to provide the 'highest attainable standard of health' to those children. The longer children are in detention the higher the responsibility to ensure not just restorative but preventative care for children. As the Bollen Report notes: '[p]oor dental health may have a significant impact on general health and nutrition'.<sup>271</sup>

### (a) Findings regarding access to dental care

The Inquiry finds that the dental care provided to children detained for long periods of time has been inadequate. The initial policy of providing emergency dental care may have been sufficient for children detained for short periods. However, when children are detained for long periods they will require preventative as well as recovery work. This is especially the case in light of the high incidence of dental health problems among the detainee population.

#### 10.4.10 Immunisation

The Department's submission states that since November 2000 all children in detention are offered immunisation based on the Australian Standard Vaccination Schedule. All immunisation is voluntary but if parents do choose to have their children vaccinated, ACM 'provides each detainee on discharge with a record of all immunisations given during detention'.<sup>272</sup>

The Inquiry has received conflicting evidence on the regularity with which immunisations were provided to children. This may partly have been the result of staffing issues. ACM states that immunisation is undertaken by either qualified nurse practitioners in immunisation or medical practitioners. However, it appears

that when there were no qualified nurse practitioners in immunisation, there were delays.

For example, the Bollen Report states that:

The ability to immunise within one week of arrival is dependent on having the staff including interpreters to fulfil this requirement. Nurses providing immunisation must hold either an immunisation certificate or work under the supervision of a doctor. Lack of staff members with immunisation certificates in some centres has resulted in inevitable delays in meeting the DIMIA and public health requirements for immunisation....Staff had experienced difficulties gaining informed consent from parents who do not speak English, because of the scarcity of interpreters.<sup>273</sup>

A doctor at Woomera expressed the following concerns about the process for ensuring the immunisation of children as at June 2001:

I was not able to get an appropriate programme in place for immunisation. Again this was because of a dispute between SA Department of Child and Youth Health and the Commonwealth about who would pay for this. Nurses at the WIRPC lacked the training or confidence to perform immunisation so I therefore tried to immunise children myself. I was critical of the failure to properly immunise children as it was important not only in the immediate individual case but also for when the child was released in to the community.<sup>274</sup>

However, it appears that in that same month, Child and Youth Health Services from Adelaide visited to advise ACM on and provide immunisation for under-16s.<sup>275</sup> In September 2001 ACM notes that two of the health staff were focused on improving immunisation status of young detainees but there is 'still more catching up to do'.<sup>276</sup>

A witness from the New Arrivals Clinic in Adelaide stated that from the end of 2001 systems had been implemented to ensure the full immunisation schedule was carried out:

To the best of my knowledge, at the moment children have been given full immunisation services. This was not always the case. I believe originally they were only offered oral polio vaccine and measles, mumps and rubella. That has changed since, I believe last year.<sup>277</sup>

Nevertheless, it appears that this witness based her statements on the assumption that the South Australian Immunisation Unit was providing the vaccinations.<sup>278</sup> Another witness stated that this service was only provided on two discrete occasions and was not an ongoing program.<sup>279</sup>

In May 2002, the Department investigated allegations made by a nurse that 'the vaccine register is often incomplete for children' on their release from Woomera.<sup>280</sup> The investigation found that South Australian Immunisation Unit 'has confirmed that it had no concerns about the immunisation program or reporting' at Woomera.<sup>281</sup> Nevertheless, in July 2002, ACM notes that it continued to monitor immunisation levels.<sup>282</sup>

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A nurse who had conducted a research paper on immunisation in Australian detention facilities found that:

children that were born while in detention were put on to the Australian vaccination schedule, but those that arrived were not and they were put on a small catch-up schedule that may not have covered them for all the diseases that we protect against.<sup>283</sup>

In August 2002, ACM notes that at Curtin IRPC, children's 'catch-up' vaccinations continued.<sup>284</sup> There are also records of immunisations being given to children in February 2001 and December 2001.<sup>285</sup>

Hence it appears that immunisation occurred at detention centres at various times over the period covered by the Inquiry, but that not all children were sufficiently covered by the program by the time of release. ACM explains this discrepancy on the basis that people's release from detention did not match the designated schedule for immunisation, which requires an appropriate time gap between doses.<sup>286</sup>

Evidence on whether children and parents had the appropriate vaccination records on release during the period covered by the Inquiry is not conclusive. It appears that 'some of them do, some of them don't'.<sup>287</sup> The Department states that it is aware of the allegations that detainee vaccination records were not adequately maintained but adds that ACM has confirmed that these problems were resolved by early 2002.<sup>288</sup>

Where records were provided, some are of poor quality:

the records that I have seen have just been written up very briefly and they haven't often numbered the dose number to whether it's dose 3 of OPB that they've been given or dose 4 or 5, or dose 1 of MMR or dose 2 so it's just poor documentation.<sup>289</sup>

Immunisation nurses in the community state that where children do not have the appropriate records they assume that none are done and start from the beginning.<sup>290</sup>

### (a) Findings regarding immunisation

The evidence regarding the immunisation scheme over the period covered by the Inquiry is inconclusive. However, it does appear that at certain periods of time immunisations were given, and that newborn infants were appropriately immunised.

#### 10.4.11 Medical records

The Department provided the Inquiry with a great number of medical records created by ACM health staff. The level of detail and currency of the medical logs of ACM doctors and nurses appear to have been of a high quality. However, there is some concern as to whether the same level of record-keeping was maintained with respect to recommendations of external specialists.

Several service providers to children in the community state that children released from detention were either not properly diagnosed, or the diagnoses were not properly communicated in order to facilitate continuity of health care. For example, the South Australian Department of Human Services states that:

The health worker reports that there are often significant physical health issues that appear to be undiagnosed or formal communication not provided on these conditions, if previously diagnosed in detention. Conditions such as poliomyelitis, haemiplegia, ricketts, blood and infectious disorders have been diagnosed in children following their release into the community. The health workers indicated that many of these children would have benefited from earlier interventions or the communication of medical information if such interventions had been in place.<sup>291</sup>

The Victorian Department for Human Services found that many unaccompanied children were found to have hearing and sight problems on release:

As a consequence, it has become general RMP [Refugee Minor Program] practice to ensure that unaccompanied minors newly released from detention receive a full medical assessment and any identified medical issues are followed up.<sup>292</sup>

Regarding the transfer of medical information on release of detainees, the Department states that:

The detention services provider is required to ensure that upon discharge all detainees are provided with a copy of medical treatments received in immigration detention. While the Department accepts that in the past there have been issues with the provision of discharge summaries, the detention services provider has advised that new procedures were implemented to ensure that all ex-detainees are now provided with summaries of medical treatment received while in immigration detention.<sup>293</sup>

The Inquiry did not receive any evidence on new procedures in this regard. ACM identifies two difficulties with carrying out this 'procedure'. Firstly, it is difficult to transfer medical information when releases occur suddenly without opportunity for summaries to be provided. Secondly, full medical records for detainees remain the property of the Department and when detainees are released their medical records are returned and archived with the Department.<sup>294</sup>

### **(a) Findings regarding medical records**

The Inquiry finds that the medical logs kept by ACM doctors and nurses were of high quality. However, the integration of specialists' recommendations and the provision of records on release appear to be wanting. The contradictory evidence of ACM and the Department indicates a lack of clarity regarding any procedure to ensure that medical information is transferred to child detainees and their families on release. This may have implications for the proper diagnosis and treatment of children when they are released from detention.

## 10.5 Summary of findings regarding the right to health for children in detention

The Inquiry finds that there has been a breach of articles 22(1), 24(1) and 39 of the CRC. The Inquiry's findings in relation to articles 3(1), 6(2) and 37(c) are set out in more detail in Chapter 17, Major Findings and Recommendations.

Australia's mandatory detention laws result in the long-term detention of children, which creates inherent difficulties for the provision of an adequate standard of health care. However, the Department has a responsibility to ensure that the health needs of children are addressed, within the confines of Australia's laws, in a manner that ensures the protection of their rights under the CRC. The Inquiry finds that the Department failed to fulfil that responsibility for the reasons set out below.

The Inquiry acknowledges the efforts that the Department and ACM have made to provide children with health services and recognises that there have been improvements over time. In particular, the Inquiry notes that an independent review of health services (the Bollen Report) was commissioned by the Department in October 2001 in order to improve the detention health system. While noting that it took some time to undertake this review, the Inquiry commends the Department for this initiative and ACM for its efforts to respond to the recommendations throughout 2002. Furthermore, it is clear that individual staff members sought to provide the best health care possible in the circumstances.

However, the standard required by the CRC in relation to health is 'the highest attainable standard'. The Inquiry finds that the circumstances within which health staff had to operate prevented children in remote detention centres from enjoying 'the highest attainable standard of health' available in Australia, and from accessing the facilities necessary to achieve those standards (article 24(1)). This is especially the case taking into account the special needs of children seeking asylum (recognised by article 22(1)) and the obligation to take 'all appropriate measures to promote physical and psychological recovery ... in an environment which fosters the health, self-respect and dignity of the child' (article 39).

Unlike children in the community, children and their families in detention are unable to choose the environment in which they live and the health care that they receive. As a consequence children and their families rely on the Department and ACM to provide the environment, facilities and services necessary for children to enjoy the highest attainable standard of health.

The first problem arises from the physical detention environment itself, particularly in the remote detention facilities. The extreme climate and physical surroundings of the remote centres caused children great discomfort and at certain times there appears to have been insufficient cooling and heating. Some children in separation detention appear to have had insufficient access to open air. The provision of shoes was at times inadequate for the needs of children in the remote desert surroundings. The detention facilities were filled beyond capacity for months at a time, resulting in overcrowding. There were also insufficient systems in place to ensure that the toilets and accommodation blocks were clean.

The Inquiry also finds that food was not tailored to the needs of children, and was variable in quality over the period of the Inquiry. Moreover, there is no evidence that individual nutritional assessments of children were conducted over the period of time covered by the Inquiry, in order to ensure that any pre-existing nutritional deficiencies were being addressed. The provision of baby formula and special food for infants was uneven.

As the Bollen Report notes, the policies and practices for the provision of health services to detention facilities were unclear in several areas and differed between centres. The inevitable result was that the quality of health care provided to children varied over the period of time covered by this Inquiry, with most improvements occurring after the Bollen Report was delivered to the Department at the end of 2001.

The health assessment procedures sometimes failed to identify illnesses that were identified shortly after release from detention. The evidence suggests a lack of comprehensive initial health assessments addressing the special vulnerabilities of children seeking asylum. There were no requirements that health care staff have the necessary expertise to diagnose and treat illnesses of child asylum seekers, including expertise in paediatrics and refugee health. Further, while it appears that the Department and ACM made some efforts to provide cross-cultural training, the specific content and effectiveness of that training remain unclear. Furthermore, there was a shortage of on-site interpreters for the purpose of medical examinations, especially in Port Hedland. On-site interpreters are especially important for the examination of asylum-seeking children.

The number of on-site health staff was insufficient to fully meet the needs of the detainee population at various times. The system of triage led to delays in accessing doctors. There were also delays in children receiving their medication.

The absence of clear procedures for referring detainees in remote areas to external doctors and hospitals, and the difficulties associated with isolation in these remote areas, were frustrating for doctors and led to delays in external treatment. The Bollen Report notes that the level of secondary care available to detainees in remote centres at the end of 2001 was less than the standard available to the Australian community. The evidence before the Inquiry does not establish that cost was a barrier to accessing external services, although one doctor perceived this to be the case.

The location of the detention facilities, coupled with lack of access to interpreters, also made the birthing arrangements for pregnant women in detention less than ideal. Further, while the Department and ACM facilitated contact between parents and children when a member of the family was hospitalised, the frequency of contact appears to have been restricted by the detention environment.

The dental care provided to children was inadequate for the needs of long-term detainee children. The system for providing medical records to detainees on release appears to have been wanting. However, it seems that newborn infants were appropriately immunised and that immunisations were given to older children at certain points in time.

## A last resort?

Together these factors lead the Inquiry to find that the Commonwealth breached articles 24(1) and 39 of the CRC.

The Inquiry also finds that the above shortcomings in the provision of health care reflects an inadequate acknowledgement of the special needs of asylum-seeking children and a corresponding failure to take appropriate measures to ensure that they received appropriate protection in the enjoyment of their rights to the highest standard of health under the CRC. This breaches article 22(1).

As suggested earlier, the Inquiry acknowledges that the circumstances in remote detention facilities created hurdles for staff who were trying to provide appropriate health care services. For example, the desert climate had an impact on the ailments that children suffered in detention. The remote location had a negative impact on the ability to recruit sufficient numbers of appropriately qualified refugee and paediatric health care workers, interpreters and dentists. Detention in remote areas also inhibited access to appropriate secondary care (including specialists and hospitals) and created tensions regarding the preservation of family unity during hospitalisation, especially during births.

Concerns peculiar to the detention environment also created barriers for staff. For instance, whereas full courses of medication are usually provided to parents in the community, children in detention had to line up for each dose for fear that they may use the medication inappropriately. Such impediments to the provision of adequate levels of health care may indicate that the best interests of the child were not a primary consideration for the Department in its decisions regarding the location of children, contrary to article 3(1). This is considered further in Chapter 17.

Infrastructure limitations also had an impact. The Inquiry acknowledges that influxes of arrivals sometimes placed a great deal of strain on the facilities. Such influxes led both to overcrowding and increased demand on health services. However, unpredictable numbers of arrivals are inherent to the nature of immigration detention and require appropriate contingency planning. The Inquiry notes that if the numbers of people in detention become so great as to threaten the health care services available to children in detention, options such as releasing or transferring families to alternative places of detention may be the appropriate course of action, rather than detention in circumstances in which their basic rights cannot be met.

The Inquiry notes that decisions as to the location and manner of detention are within the control of the Department and the failure to consider and implement alternatives to detention when there were overcrowded remote centres suggests that the interests of children were not a primary consideration for the Department when it made such decisions. The Inquiry acknowledges that this problem was exacerbated by inadequate flexibility in the detention laws to deal with such contingencies. This reinforces the Inquiry's concern that Australia's detention laws, and the manner in which they are applied, fail to adequately consider the best interests of the child (article 3(1)). This issue is considered further in Chapter 17.

Finally, it is clear that the longer children are in detention the greater their needs. For example, while access to preventative dental care may not be important if children

are in detention for short periods, it is vital if children are detained for long periods – especially when many children seeking asylum start out with dental health problems. Similarly, the monotony of a menu or the absence of individualised nutritional assessments may not create great problems in the short term but can have a great impact on children in the long term.

The Inquiry finds that, to a certain extent, the long-term detention of children in remote facilities inevitably results in an unhealthy environment for physical and psychological recovery and leads to a lower standard of health than these children might achieve if they were living in the Australian community. This further reinforces the Inquiry's concern that the mandatory detention laws, and the manner in which they are applied by the Minister and the Department, fail to take into account the best interests of the child as required by article 3(1) of the CRC. It also highlights the connection between the need to be detained as a matter of last resort and for the shortest appropriate period of time, and the ability to enjoy the right to the highest attainable standard of health.

The conditions of detention and the processes in place to provide health care services are also factors to take into account when considering whether there has been a breach of a child's right to the maximum possible development (article 6(2)) and the right to be treated with humanity and respect for the inherent dignity of the human person (article 37(c)). Compliance with the JDL Rules is a useful guide in determining whether children in detention have been treated in accordance with article 37(c). The Inquiry notes that those rules suggest, amongst other things, that there should be immediate access to adequate medical facilities and equipment appropriate to the numbers and requirements of its residents and that, ideally, treatment should occur in health facilities in the community. Also there should be adequate preventative and remedial dental and ophthalmological care. As set out above, these rules have not been complied with at certain points in time. However, the Inquiry's findings regarding articles 6(2) and 37(c) are addressed more generally in Chapter 17.

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## Endnotes

- 1 Paul Hunt, Special Rapporteur on the right to the enjoyment of the highest attainable standard of physical and mental health, 'Healthy Environments for Children', 7 April 2003.
- 2 General Comment 14 of the Committee for Economic Social and Cultural Rights which outlines the core obligations under article 12 of the ICESR. See also HREOC, *National Inquiry into Children in Immigration Detention*, Background Paper No.4, Health and Nutrition, p3.
- 3 Article 37(c) mirrors article 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR). The Human Rights and Equal Opportunity Commission (the Commission) has previously found that failure to provide medical treatment to a detainee in immigration detention resulted in a breach of this article 10(1) of the ICCPR: HREOC, *Report of an inquiry into a complaint by Mr Hassan Ghomwari concerning his immigration detention and the adequacy of the medical treatment he received while detained*, HREOC Report No. 23, October 2002. The UN Human Rights Committee has encouraged State Parties to report on whether they are applying UN guidelines on the treatment of prisoners in order to assist it in assessing whether or not there has been a breach of article 10. See Human Rights Committee, *General Comment 21*, para 5.
- 4 See also Save the Children and UNHCR, *Separated Children in Europe Programme, Statement of Good Practice*, 2000, para 10.

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- 5 Committee on the Elimination of Discrimination Against Women, General Recommendation 24, 1999, para 6.
- 6 DIMIA, Submission 185, p56. See also DIMIA Managers' Handbook, Section 5.1, Issue 3, 30 April 2002, para 2.
- 7 IDS, 1998, section 8.1, [www.immi.gov.au/detention/det\\_standards.htm](http://www.immi.gov.au/detention/det_standards.htm).
- 8 See further Chapter 8 on Safety and Chapter 9 on Mental Health for further discussion of the operation of State child welfare legislation in immigration detention centres.
- 9 See Melbourne International Health and Justice Group, Submission 63, p15. The Department informed the Inquiry that it does not automatically apply juvenile justice standards as they relate to punitive rather than administrative detention: DIMIA, Response to Draft Report, 10 July 2003.
- 10 DIMIA Managers' Handbook, Section 5.1, Issue 3, 30 April 2002, para 3. See also DIMIA, Submission 185, p3.
- 11 DIMIA, Submission 185, p57, Appendix C p133.
- 12 IDS, 1998, sections 8.2-8.4; DIMIA Managers' Handbook, Section 5.1, Issue 3, 30 April 2002, paras 6, 11.
- 13 IDS, 1998, sections 9.2, 9.3.
- 14 DIMIA Managers' Handbook, Section 4.3, Issue 1, 21 December 2001; IDS, 1998, section 9.5.
- 15 DIMIA Managers' Handbook, Section 5.1, Issue 3, 30 April 2002, para 9.
- 16 DIMIA Managers' Handbook, Section 5.1, Issue 3, 30 April 2002, para 10.
- 17 ACM states that it monitors the physical health of all children through Individual Management Plans, amongst other mechanisms. ACM, Response to Draft Report, 22 August 2003. The quality of these plans is discussed in relation to unaccompanied children in Chapter 14 on Unaccompanied Children.
- 18 DIMIA, Response to Draft Report, 10 July 2003.
- 19 DHS, Submission 181, p43.
- 20 Dr Michael Bollen and Dr Chris Bollen, *Review of Health Services at Immigration Detention Centres and Immigration Reception and Processing Centres*, October-November 2001 (Bollen Report) (N1, Q9, F10).
- 21 ACM, The Bollen Report – Status of Recommendations: Update on Matters Raised in the Report, 11 June 2002; DIMIA Assistant Secretary, Memo, to Minister, 28 March 2002, (N1, Q9, F10).
- 22 DIMIA Managers' Handbook, Section 5.1, Issue 3, 30 April 2002, para 7.
- 23 DIMIA, Response to Information Required, (N4, Q9, F8).
- 24 Under new contract arrangements with Group 4 Falck, the requirements outlined in the Handbook, as described above, will apply in all facilities. DIMIA, Response to Draft Report, 10 July 2003.
- 25 Bollen Report, p47. (N1, Q9, F10).
- 26 DIMIA, Response to Draft Report, 10 July 2003.
- 27 Inquiry, Notes from visit, Port Hedland, June 2002.
- 28 DIMIA Managers' Handbook, Section 5.1, Issue 3, 30 April 2002, para 7.
- 29 DIMIA, Submission 185, p57.
- 30 ACM Health Services Operating Manual, Policy 6.13, Detainees Immunisation, Issue 2, 9 May 2002, (N1, Q8, F9).
- 31 ACM, Policy 9.2, Detainee Menus, Issue 4, 12 August 2001, para 4.8.
- 32 ACM Health Services Operating Manual, Policy 10.0, Female Detainees – Health Care, Issue 2, 9 May 2002, (N1, Q8, F9).
- 33 ACM Health Services Operating Manual, Policy 10.1, Female Detainees – Pregnancy, Issue 2, 9 May 2002, (N1, Q8, F9); ACM Health Services Operating Manual, Policy 10.2, Pregnant Detainees, Issue 2, 9 May 2002, (N1, Q8, F9). See also ACM, Policy 16.3, Special Care Needs for Pregnant Women, Issue 4, 12 August 2001, (N1, Q1, F2).
- 34 ACM Woomera, Procedure 8.01, Hygiene, 16 November 2001, (N1, Q8, F9).
- 35 ACM Woomera, Procedure 9.03, Food Services Hygiene, 16 November 2001, (N1, Q8, F9).
- 36 ACM Woomera Residential Housing Project, Procedure 26.03, Medical Policy, 16 November 2001, (N1, Q8, F9).
- 37 ACM Woomera, Procedure 6.01, Health Services Policy and Procedures Manual, 16 November 2001, (N1, Q8, F9).
- 38 ACM, The Bollen Report – Status of Recommendations: Update on Matters Raised in the Report, 11 June 2002, (N1, Q9, F10).
- 39 Executive Director Medical, Letter, to Director of Medical Services, North West Health Services, (N4, Q9, F8).
- 40 DIMIA, Submission 185, p58.

- 41 DIMIA, Response to Draft Report, 10 July 2003, ACM, Response to Draft Report, 22 August 2003.
- 42 Dr Annie Sparrow, Transcript of Evidence, Perth, 10 June 2002, p63. Dr Sparrow was employed at Woomera only.
- 43 DIMIA, Transcript of Evidence, 2 December 2002, p6.
- 44 Bollen Report, p8, (N1, Q9, F10).
- 45 Kids in Detention Story, Submission 196, Health Section, pp19-20.
- 46 DIMIA, Submission 185, pp72-73. See also ACM, Response to Draft Report, 22 August 2003.
- 47 Melbourne International Health and Justice Group, Submission 63, p55.
- 48 Bollen Report, Recommendation 32, p66, (N1, Q9, F10).
- 49 S MacQueen, *Review of the Food Service and Menu at the Woomera Immigration Reception and Processing Centre (WIRPC) with Particular Reference to the Nutritional Needs of Young Children*, 31 May 2002, (N1, Q8, F9). The same recommendations were made in respect to a review of the food and menu at Villawood detention centre: Sally MacQueen, *Review of the Food Service and Menu at the Villawood Immigration Detention Centre (VIDC), with Particular Reference to the Nutritional Needs of Young Children*, 21 June 2002. ACM, Response to Draft Report, 22 August 2003. ACM states that a nutritionist 'continues to review and advise on all detention centre menus at least annually': ACM, Response to Draft Report, 22 August 2003.
- 50 ACM, Response to Draft Report, 22 August 2003.
- 51 S MacQueen, *Review of the Food Service and Menu at the Woomera Immigration Reception and Processing Centre (WIRPC) with Particular Reference to the Nutritional Needs of Young Children*, 31 May 2002, (N1, Q8, F9). See also Bollen Report, pp64-65 (N1, Q9, F10).
- 52 Dr Annie Sparrow, Transcript of Evidence, Perth 10 June 2002, p73.
- 53 S MacQueen, *Review of the Food Service and Menu at the Woomera Immigration Reception and Processing Centre (WIRPC) with Particular Reference to the Nutritional Needs of Young Children*, 31 May 2002, (N1, Q8, F9).
- 54 Allan Clifton, Transcript of Evidence, Adelaide, 2 July 2002, p7. Mr Clifton was the former Operations Manager at Woomera from early 2000 until July 2001. He also worked as Centre Manager at Perth and spent a few weeks at Christmas Island facility following his time at Woomera.
- 55 Allan Clifton, Transcript of Evidence, Adelaide, 2 July 2002, p8.
- 56 ACM, Response to Draft Report, 22 August 2003.
- 57 ACM, Letter to Inquiry, 14 January 2003.
- 58 ACM, Detention Services Monthly Report, Curtin, December 2001, p126.
- 59 ACM, Letter to Inquiry, 14 January 2003.
- 60 DIMIA Port Hedland, Manager Report, January-March 2001, (N1, Q3a, F5).
- 61 DIMIA Curtin, Manager Reports, November 2001, December 2001, April 2002, May 2002, (N1, Q3a, F5).
- 62 DIMIA, Contract Operation Group Minutes, 20 June 2002, (N1, Q3, F4).
- 63 ACM, Response to Draft Report, 22 August 2003.
- 64 ACM, Detention Services Monthly Report, April 2001, Services and Assets End of Month Report, (p60).
- 65 Inquiry, Notes from visit, Baxter, December 2002.
- 66 Performance Linked Fee Report for quarter ending 30 September 2001, 18 December 2001, p12.
- 67 Inquiry, Focus group, Sydney, March 2002; Inquiry, Focus group with Iraqi boys, Melbourne, 30 May 2002.
- 68 Focus group with Afghan and Iraqi unaccompanied boys, Melbourne, May 2002.
- 69 ACM Managing Director, Letter, Comments on Performance Assessment for the Quarter Ending September 2001, to DIMIA First Assistant Secretary, 4 February 2002, Attachment para 8.4.
- 70 Confidential Transcript of Evidence, Adelaide, 1 July 2002, p20.
- 71 Inquiry, Interview with detainees, Woomera, June 2002.
- 72 DIMIA, Response to Draft Report, 10 July 2003. Some menus were also obtained during visits to detention centres.
- 73 DIMIA Curtin, Manager Report, May 2002, (N1, Q3a, F5).
- 74 National Legal Aid, Submission 171, p22.
- 75 Inquiry, Focus group, with Afghan teenage boys and girls, Perth, June 2002.
- 76 Inquiry, Focus group with teenage unaccompanied children, all ex-Curtin, Perth, June 2002.
- 77 Curtin DIMIA, Manager Report, May 2002, (N1, Q3a, F5).
- 78 Most centres hold regular detainee representative meetings where detainees can raise issues of concern with centre management. Children do not generally participate in the meetings.
- 79 ACM, Policy 9.2, Detainee Menus, Issue 4, 12 August 2001, para 4.8.
- 80 ACM, Letter to Inquiry, 14 January 2003.

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- 81 DIMIA, Response to Draft Report, 10 July 2003.
- 82 ACM, Response to Draft Report, 22 August 2003.
- 83 Australian Association for Infant Mental Health (AAIMH), Transcript of Evidence, Adelaide, 1 July 2002, p31. See also Melbourne International Health and Justice Group, Transcript of Evidence, 31 May 2002, p41.
- 84 ACM, Response to Draft Report, 22 August 2003.
- 85 Inquiry, Focus group with Iraqi primary school children and their parents, Perth, June 2002.
- 86 Inquiry, Focus group with Afghan teenage boys and girls, Perth, June 2002. See also Kids in Detention Story, Submission 196, Health Section, p33.
- 87 Dr Annie Sparrow, Transcript of Evidence, Perth, 10 June 2002, p73.
- 88 Barbara Rogalla, Transcript of Evidence, Melbourne, 30 May 2002, p34.
- 89 Mark Huxtep, Submission 248a, paras 31-34.
- 90 Confidential Submission 255, p7.
- 91 Inquiry, Interview with detainees, Woomera, June 2002.
- 92 DIMIA, Submission 185, p74; ACM, Letter to Inquiry, 14 January 2003.
- 93 Confidential Transcript of Evidence, Adelaide, 1 July 2002, p27.
- 94 Allan Clifton, Transcript of Evidence, Adelaide, 2 July 2002, p21.
- 95 Dr Bernice Pfitzner, Transcript of Evidence, Sydney, 16 July 2002, p4.
- 96 ACM, Response to Draft Report, 22 August 2003.
- 97 Confidential, Transcript of Evidence, Adelaide, 2 July 2002, p81.
- 98 DHS, Woomera Detention Centre Assessment Report, 12 April 2002, Submission 181a, p11.
- 99 Confidential, Transcript of Evidence, Adelaide, 2 July 2002, p78.
- 100 Confidential, Transcript of Evidence, Adelaide, 2 July 2002, p80.
- 101 Mark Huxtep, Submission 248a, paras 15-16.
- 102 DIMIA, Response to Draft Report, 10 July 2003.
- 103 DIMIA, Transcript of Evidence, Sydney, 5 December 2002, p98.
- 104 Inquiry, Focus Group, Adelaide, July 2002. See also Alliance of Health Professionals, Submission 109, p26.
- 105 DIMIA Port Hedland, Manager Report, February 2002, (N1, Q3a, F5).
- 106 Inquiry, Focus Group, Brisbane, August 2002.
- 107 ACM, Response to Draft Report, 22 August 2003.
- 108 Inquiry, Interview with family, Curtin, June 2002. Inquiry, Interview with family, Baxter, December 2002.
- 109 Confidential, Transcript of Evidence, Perth, 10 June 2002, p18.
- 110 Dr Paul Carroll, Transcript of Evidence, Perth, 10 June 2002, p62.
- 111 National Legal Aid, Submission 171, p22.
- 112 Inquiry, Focus groups with teenage boys, Perth, June 2002 and Melbourne, May 2002.
- 113 Inquiry, Focus group with unaccompanied children, all ex-Curtin, Perth, June 2002.
- 114 Inquiry, Focus group with unaccompanied children, all ex-Curtin, Perth, June 2002.
- 115 Inquiry, Interview with detainees, Woomera June 2002.
- 116 Inquiry, Focus group with Iraqi primary school children, Perth, June 2002.
- 117 See further Chapter 7 on Refugee Status Determination, which discusses separation detention as a Departmental requirement for new arrivals.
- 118 Inquiry, Interview with former Port Hedland detainee family, Melbourne, May 2002.
- 119 Inquiry, Interview with detainees, Port Hedland, June 2002.
- 120 Alliance of Health Professionals, Submission 109, p21.
- 121 IDS, 1998, para 8.2.1.
- 122 In 2000 in Woomera the amount of donated clothing from Sabian Mandaeans was so great that there were substantial delays in distributing the clothing. See Performance Linked Fee Report for quarter ending 30 September 2000, 23 March 2001, para 8.2. In May 2001 ACM notes that it has rectified the problem. ACM Managing Director, Letter, to DIMIA First Assistant Secretary, 8 May 2001.
- 123 CARAD, Transcript of Evidence, Perth, 10 June 2002, p28.
- 124 Inquiry, Focus group with Afghan teenage boys and girls, Perth, June 2002.
- 125 DIMIA Port Hedland, Manager Report, October 2001, (N1, Q3a, F5).
- 126 DIMIA Port Hedland, Manager Report, January 2002, (N1, Q3a, F5).
- 127 DIMIA Port Hedland, Manager Report, February 2002, (N1, Q3a, F5).
- 128 Barbara Rogalla, Transcript of Evidence, Melbourne, 30 May 2002, p34.
- 129 The Department states that on occasions it has purchased additional footwear for young detainees, for example for external school excursions: DIMIA, Response to Draft Report, 10 July 2003.

- 130 For example, Youth Advocacy Centre and Queensland Program of Assistance to Survivors of Torture and Trauma, Submission 84, p9. Also, DIMIA Woomera, Manager Report, March 2000, (N1, Q4a, Attachment A) noted that privacy within the compound for women and children is severely hampered by the overcrowding of accommodation constraints. Crowded sleeping accommodation was also raised with the Human Rights Commissioner during his visits to detention centres in 2001: HREOC, *A report on visits to immigration detention facilities by the Human Rights Commissioner 2001*, p32.
- 131 DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 132 Inquiry, Interview with detainees, Curtin, June 2002.
- 133 See for example, Kids in Detention Story, Submission 196, Health Section, p23; Mental Health Section p16, Further Interview Material, Appendix 1.
- 134 Inquiry, Notes from visit, Woomera, June 2002.
- 135 DHS, Woomera Detention Centre Assessment Report, 12 April 2002, Submission 181a, p11.
- 136 ACM Woomera, Medical Records, 2 September 2001, Perrett Medical Imaging, X-Ray Report, 7 September 2001; ACM Woomera, Medical Incident Report, 5 September 2001, (N5, Case 17, pp6, 22, 40).
- 137 Former Department Infrastructure Manager Woomera 2000, Transcript of Evidence, Adelaide, 1 July 2002, p9.
- 138 ACM, Response to Draft Report, 22 August 2003.
- 139 Performance Linked Fee Report, for quarter ending 30 June 2000, paras 7.7, 8.5.
- 140 DIMIA Woomera, Manager Report, January-March 2001, (N1, Q4a, F5).
- 141 National Legal Aid, Submission 171, p22.
- 142 ACM, Response to Draft Report, 22 August 2003.
- 143 DIMIA Port Hedland, Manager Report, February 2002, (N1, Q3a, F5).
- 144 DIMIA Port Hedland, Manager Report, March 2002, (N1, Q3a, F5).
- 145 DIMIA, Response to Draft Report, 10 July 2003.
- 146 Bollen Report, Recommendation 34, p105 (N1, Q9, F10). DIMIA Assistant Secretary, Memo, to Minister, 28 March 2002, (N1, Q9, F10); ACM, The Bollen Report – Status of Recommendations: Update on Matters Raised in the Report, 11 June 2002, (N1, F10, Q9).
- 147 In addition, within the first two weeks of detention a further medical assessment is conducted as part of the visa application process by Health Services Australia (HAS), which comprises a physical examination and questionnaire. DIMIA, Submission 185, p59.
- 148 DIMIA, Submission 185, Appendix E, pp143-145.
- 149 Melbourne International Health and Justice Group, Transcript of Evidence, Melbourne, 31 May 2002, p35. See also *Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s*, United Nations Children's Fund, 1990. Screening tests are routinely performed, for example, on all babies born in New South Wales (where parental consent is obtained). NSW Department of Health, *Newborn screening: Test to protect your baby*, 1998.
- 150 Bollen Report, p51, (N1, Q9, F10).
- 151 ACM Curtin Acting Health Services Coordinator, Letter, Re: Statistics on Children in Detention, to ACM National Operations Manager, 1 February 2002, (N1, Q8, F9).
- 152 DIMIA, Response to Draft Report, 10 July 2003.
- 153 ACM, Response to Draft Report, 22 August 2003.
- 154 NSW Commission for Children and Young People, Submission 258, pp36-38. See also, for example, HREOC, *Those who've come across the seas*, 1998, pp165-167.
- 155 NSW Commission for Children and Young People, Submission 258, p37-38.
- 156 NSW Commission for Children and Young People, Submission 258, p36.
- 157 SA Coalition for Refugee Children, Submission 183, p16. See also NSW Commissioner for Children, Submission 258, pp37-38.
- 158 ACM, Response to Draft Report, 22 August 2003.
- 159 DIMIA, Submission 185, p58.
- 160 Bollen Report, p32, (N1, Q9, F10).
- 161 DIMIA, Submission 185, p58.
- 162 Bollen Report, p33, (N1, Q9, F10).
- 163 Bollen Report, p36, (N1, Q9, F10).
- 164 Dr Annie Sparrow, Transcript of Evidence, Perth, 10 June 2002.
- 165 Barbara Rogalla, Transcript of Evidence, Melbourne, 30 May 2002, pp35-36.
- 166 DIMIA, Response to Draft Report, 10 July 2003. ACM has also pointed out that only a small percentage of children and babies in the community receive screening by paediatricians: ACM, Response to Draft Report, 22 August 2003.

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- 167 Bollen Report, p46, (N1, Q9, F10).
- 168 ACM, The Bollen Report – Status of Recommendations: Update on Matters Raised in the Report, 11 June 2002, (N1, F10, Q9).
- 169 D Silove, Z Steel, C Watters, 'Policies of Deterrence and the mental health of asylum seekers in Western countries', *Journal of the Australian Medical Association*, vol 284, 2000, p605.
- 170 DIMIA, Response to Draft Report, 10 July 2003.
- 171 ACM, Response to Draft Report, 22 August 2003.
- 172 Inquiry, Notes from visit, Woomera, June 2002. See also Donna Bradshaw, Email to Inquiry, 2 October 2002.
- 173 Dr Bernice Pfitzner, Transcript of Evidence, Sydney, 16 July 2002, p12.
- 174 DIMIA, Response to Draft Report, 10 July 2003.
- 175 Bollen Report, Recommendation 5, p34-35, (N1, Q9, F10).
- 176 ACM, The Bollen Report – Status of Recommendations: Update on Matters Raised in the Report, 11 June 2002, (N1, Q9, F10). See also DIMIA Assistant Secretary, Memo, to Minister, 28 March 2002, (N1, Q9, F10). Other reference material that may be useful includes the guidelines on refugee health prepared by countries like the UK and New Zealand: New Zealand, Ministry of Health, *Refugee Health Care: A Handbook for Health Professionals*, Auckland, 2001; British Medical Association, *Asylum-seekers: meeting their health care needs*, October 2002. Also, Victorian Foundation for Survivors of Torture, *Caring for Refugee Patients in General Practice – A Desk-top Guide 2nd Edition*, 2002.
- 177 Adult detainees have complained previously to the Commission about the lack of use of interpreters. See, for example, HREOC, *A report on visits to immigration detention facilities by the Human Rights Commissioner 2001*, p36; HREOC, *Immigration Detention, Human Rights Commissioner's 1998-99 Review*, pp29-30.
- 178 DIMIA Port Hedland, Manager Reports, January-March 2001, July-September 2001, November 2001, December 2001, January 2002, February 2002, March 2002, April 2002, June 2002, (N1, Q3a&4a, F5).
- 179 ACM, Response to Draft Report, 22 August 2003.
- 180 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, pp71-79. It has also been noted in the Performance Linked Fee Reports, which assess the performance of ACM, since at least June 2000: Performance Linked Fee Report, for quarter ending 30 June 2000, 19 December 2000, para 3.
- 181 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p77.
- 182 DIMIA Port Hedland, Manager Report, September 2002, (N4, Q1, F1).
- 183 ACM, Response to Draft Report, 22 August 2003.
- 184 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p71.
- 185 See for example, DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p74. ACM has, however, provided the Inquiry with the number of times TIS was used by all staff at all centres during 2002/2003, which appears to indicate extensive usage. For example, between July and December 2002, TIS was used 235 times and on-site interpreters were used only 34 times: ACM, Response to Draft Report, 22 August 2003.
- 186 Bollen Report, p63, (N1, Q9, F10).
- 187 Inquiry, Notes from visit, Curtin, June 2002. TIS can provide female interpreters on request, although access may not be immediate.
- 188 DIMIA, Response to Draft Report, 10 July 2003.
- 189 Dr Paul Carroll, Transcript of Evidence, Perth, 10 June 2002, p74.
- 190 Dr Paul Carroll, Transcript of Evidence, Perth, 10 June 2002, p75.
- 191 DIMIA, Submission 185, Appendix D, pp135-141.
- 192 DIMIA, Submission 185, Appendix D, pp135-141.
- 193 DIMIA, Submission 185, Appendix C, p133.
- 194 Complaints of poor access to health staff by adult detainees have been made occasionally to the Commission over the past several years. See HREOC, *A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner 2001*, p35. Also, a HREOC inquiry into a complaint found that a detainee with Hepatitis B was not provided with adequate medical treatment at Villawood in June 2000, in part because of the absence of a medical officer on a daily basis. HREOC, *Report of an inquiry into a complaint by Mr Hassan Ghomwari concerning his immigration detention and the adequacy of the medical treatment he received while detained*, HREOC Report No.23, August 2002.
- 195 Bollen Report, p31, (N1, Q9, F10).
- 196 Dr Bernice Pfitzner, Transcript of Evidence, Sydney, 16 July 2002, p13.
- 197 Inquiry, Notes from visit, Woomera, June 2002.
- 198 DIMIA Port Hedland, Manager Report, January-March 2001, (N1, Q4a, F5).

- 199 Bollen Report, pp39-40, (N1, Q9, F10).
- 200 Department of Human Services Victoria, Submission 200, p13.
- 201 Dr Paul Carroll, Transcript of Evidence, Perth, 10 June 2002, p75. The practice of referring to a detainee by number, and its impact on children, is discussed in section 9.3.7 in Chapter 9 on Mental Health. ACM states that it is 'important to recognise that recording a detainee's number is a critical and important way of ensuring the correct identity for the purpose of treatment and medication' ACM, Response to Draft Report, 22 August 2003. However, recording the number is different from calling the number out over the loudspeaker.
- 202 Barbara Rogalla, Transcript of Evidence, Melbourne, 30 May 2002, p37.
- 203 Dr Bernice Pfitzner, Transcript of Evidence, Sydney, 16 July 2002, pp10-11.
- 204 Inquiry, Focus Group, with Afghan unaccompanied boys, Adelaide, July 2002.
- 205 Bollen Report, p52, (N1, Q9, F10).
- 206 ACM, The Bollen Report – Status of Recommendations: Update on Matters Raised in the Report, 11 June 2002, (N1, Q9, F10).
- 207 Mark Huxtep, Submission 248a, para 14.
- 208 National Legal Aid, Submission 171, p22.
- 209 DIMIA, Submission 185, p61.
- 210 Mark Huxtep, Submission 248a, paras 11-12.
- 211 Focus group, with Afghan unaccompanied boys, Adelaide, July 2002.
- 212 Focus group, Melbourne, May 2002.
- 213 DIMIA, Submission 185, p57.
- 214 Bollen Report, p47, (N1, Q9, F10).
- 215 Bollen Report, p13, (N1, Q9, F10).
- 216 DIMIA, Response to Draft Report, 10 July 2003.
- 217 Medical Adviser, Health Services Australia, Report to Doctor in Charge, Curtin Detention Centre, 26 May 2001, (N5, Case 5, p18).
- 218 ACM Curtin, Medical Records, 25 June 2001, 29 June 2001, (N5, Case 5, pp7-8).
- 219 Inquiry, Interview with unaccompanied child, Adelaide, July 2002.
- 220 Department of Human Services Victoria, Submission 200, p13.
- 221 DIMIA Curtin, Manager Report, March 2002, (N1, Q3a, F5).
- 222 NSW Commissioner for Children and Young People, Submission 258, p37.
- 223 Dr Bernice Pfitzner, Transcript of Evidence, Sydney, 16 July 2002, pp13-14. See also Dr Paul Carroll, Transcript of Evidence, Perth 10 June 2002, p69.
- 224 Dr Paul Carroll, Transcript of Evidence, Perth, 10 June 2002, p69.
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- 226 Dr Paul Carroll, Transcript of Evidence, Perth, 10 June 2002, p69.
- 227 Western Australian Government, Transcript of Evidence, Perth 10 June 2002, p43.
- 228 Dr Bernice Pfitzner, Submission 264, para 16. Inquiry, Notes from visit, Curtin, June 2002.
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- 230 Dr Bernice Pfitzner, Transcript of Evidence, Sydney, 16 July 2002, p11.
- 231 ACM, The Bollen Report – Status of Recommendations: Update on Matters Raised in the Report, 11 June 2002, (N1, Q9, F10).
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- 233 Inquiry, Interview with refugee family, Melbourne, May 2002.
- 234 Confidential Submission 203, p13.
- 235 DIMIA, Response to Draft Report, 10 July 2003.
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- 238 ACM Woomera, Medical Records, 3 June 2002, (N3, F12).
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- 240 ACM, Response to Draft Report, 5 September 2003.
- 241 ACM Woomera, HRAT Watch Log, 30 June 2002, (N3, F9).
- 242 ACM Woomera, HRAT Watch Log, 6 July 2002, (N3, F9). Two other children from different families told the Inquiry that the only way they could get ACM to take them to see their mothers in hospital more often was to climb up above the razor wire and threaten to jump, (Inquiry, Interviews with detainees, Woomera, June and September, 2002). However, due to the confidentiality of these allegations, ACM did not have the opportunity to verify whether this was the case.
- 243 ACM Woomera, HRAT Watch Log, 31 May 2002, (N3, F9).

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- 247 Minister for Immigration and Multicultural and Indigenous Affairs, Pregnant Women in Detention, HREOC Children in Detention Inquiry 2002 Public Hearings – fact versus fiction, [www.minister.immi.gov.au/borders/detention/hreoc\\_issues/women.htm](http://www.minister.immi.gov.au/borders/detention/hreoc_issues/women.htm), viewed 15 December 2003.
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# Chapter 11

## Children with Disabilities in Immigration Detention

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## 11. Children with Disabilities in Immigration Detention

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One of the underlying goals of international and Australian laws relating to children with disabilities is to provide the highest possible level of support and assistance in the least restrictive way. Laws, policies and programs should be designed to ensure that children with disabilities have the opportunity to participate, to the maximum extent possible, in all aspects of the general community.

By definition, the detention of children poses barriers to achieving integration within the general community. Furthermore, the challenging task of providing appropriate services to children with disabilities in the community becomes even more difficult when children are in immigration detention. However, by legislating for the mandatory detention of children, including children with disabilities, the Commonwealth assumes the responsibility of ensuring that those children get at least as good care and opportunities to achieve their full potential, as they would in the community.

The Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA) submission to the Inquiry refers to two families in detention with children with serious disabilities, as examples of how the detention system can provide care to such children.

The first family (Case 1) includes two boys and a girl, aged 6, 11 and 13 on arrival, with aspartylglucosaminuria (AGU), an intellectual disability. The children are cared for by their mother and older sister.<sup>1</sup> The family arrived in Australia in August 2000 and were detained in the Port Hedland detention centre until they were transferred to Villawood detention centre on 1 September 2003. The family were released on permanent refugee protection visas in December 2003, after three years and four months in detention.

The second family (Case 2) includes a boy with cerebral palsy. He was 14 when he was detained in November 2000. The boy came to Australia with his two brothers, who were 10 and 15 on arrival, and his mother. The family were detained in Curtin until it closed in September 2002 when they were transferred to Baxter. The family were released on permanent refugee protection visas in October 2003, after two years and eleven months in detention.

## A last resort?

The Inquiry uses the same families as the Department to examine whether children with disabilities have been provided with timely, appropriate and effective services and opportunities consistent with Australia's international responsibilities.<sup>2</sup> The Inquiry required the production of documents relating to the provision of care for these children and their parents and explored the situation of these families with the Department in some detail during the Inquiry hearings in December 2002.<sup>3</sup>

These two cases are representative of the Department's efforts to meet the special needs of children with serious disabilities during the period investigated by the Inquiry. However, the Inquiry has also included information regarding the treatment of other children with disabilities where appropriate.

The questions addressed in this chapter are:

- 11.1 What are the rights of children with disabilities in immigration detention?
- 11.2 What policies were in place to ensure that children with disabilities enjoyed their rights in detention?
- 11.3 Was there early identification of disabilities for children in detention?
- 11.4 Was there appropriate case management for children with disabilities in detention?
- 11.5 Was there appropriate support for parents of children with disabilities in detention?
- 11.6 Was there appropriate physical access, aids and adaptations for children with disabilities in detention?
- 11.7 Was there appropriate education for children with disabilities in detention?
- 11.8 Were there appropriate recreational activities for children with disabilities in detention?
- 11.9 Were appropriate steps taken to transfer or release children with disabilities from detention?

There is a summary of the Inquiry's findings at the end of the chapter.

### **11.1 What are the rights of children with disabilities in immigration detention?**

The *Convention on the Rights of the Child* (CRC) is very explicit about the special efforts that must be made to ensure that children with disabilities have access to services designed to promote the maximum possible integration in the community.

1. States Parties recognise that a mentally or physically disabled child should *enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.*

2. States Parties recognise the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be *designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development*, including his or her cultural and spiritual development.

*Convention on the Rights of the Child, article 23*  
(emphasis added)

The long-term mandatory detention of children with disabilities imposes obvious barriers to participation and integration into the general community. This suggests that the principle that children be detained as a matter of last resort and for the shortest appropriate period of time (article 37(b)) is of particular importance to children with disabilities. Indeed, the United Nations High Commissioner for Refugees (UNHCR) Detention Guidelines recommend that asylum seekers with physical and mental disabilities should only be detained:

on the certification of a qualified medical practitioner that detention will not adversely affect their health and well being. In addition there must be regular follow up and support by a relevant skilled professional. They must also have access to services, hospitalisation and medication counselling etc., should it become necessary.<sup>4</sup>

Furthermore, the 'best interests' principle in article 3(1) requires the Commonwealth – including the Parliament and the Department – to consider whether, and how, children with disabilities in detention can fully enjoy their rights under article 23.

The threshold for satisfying article 23 is high. Not only does it seek to promote integration into society, article 23(3) reinforces that children with disabilities are to be provided with the extra assistance they need to enjoy all other rights in the CRC. For example, they must have '*effective access to*' the appropriate health care services (article 24(1)), education (article 28(1)), and recreational activities (article 31). In most cases this will mean that children in detention should enjoy at least the same health care, education and recreational opportunities as those available to children with disabilities in the community.

Article 23(2) also recognises that parents of children with disabilities may require additional support. This reflects the general obligation in article 18(2) which requires Australia to 'render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities'. Single parents are likely to need greater support, as is the case with the two families discussed in this chapter.

Children with disabilities also have the right to enjoy, to the maximum extent possible, a healthy environment which fosters development and rehabilitation and reintegration from past torture and trauma (articles 6(2) and 39) as well as the right to be treated with respect for their inherent dignity while in detention (article 37(c)). Furthermore, article 22(1) of the CRC requires that appropriate assistance be given to ensure that the special needs of asylum-seeking children with disabilities are addressed.

## A last resort?

Finally, the principle of non-discrimination in article 2(1) of the CRC requires that there be no discrimination against children with disabilities whether or not they are in detention. The *UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities* also upholds the principle of equality for children with disabilities, as does the *Declaration on the Rights of Disabled Persons* and the *UN Declaration on the Rights of Mentally Retarded Persons*.<sup>5</sup>

## 11.2 What policies were in place to ensure that children with disabilities enjoyed their rights in detention?

### 11.2.1 Department policy

The Commonwealth, through the Department, is ultimately responsible for ensuring that all children with disabilities who are in immigration detention enjoy their rights under the CRC. It is the Department's responsibility to decide who should and should not be in detention under Australia's laws. However, generally, under the contract with the detention services provider, the Department relies on it to provide most of the day-to-day services.

The severe nature of the disabilities of the children in the two case studies discussed in this chapter has meant that they have required a high level of services, which is costly. This has led to some blurring of the role and responsibilities between the Department and Australasian Correctional Management Pty Limited (ACM) as discussed below.

#### (a) Immigration Detention Standards

The Immigration Detention Standards (IDS) in the detention services contract with ACM did not specifically address the provision of care to children with disabilities but provided generally that:

The individual care needs of detainees with special needs are identified and programs provided to enhance their quality of life and care.<sup>6</sup>

The Department Managers' Handbook states that:

[C]hildren who experience intellectual or physical disability may require additional help and support to enable them to benefit from participating in relevant activities.<sup>7</sup>

The Department states that the provision of services for children with disabilities has evolved over time:

I think that it would be fair to say that the Department takes its duty of care towards children with disabilities particularly seriously and some of the processes that may have been in place earlier on have evolved since the beginning of – well late 2000, 2001 to the point now where I believe that we have something that is more robust in place than we did at that time.<sup>8</sup>

The more evolved policy appears to be the one described in the Department's submission:

Child detainees with disabilities are provided special care and assistance on entry into immigration detention facilities through the development of case management plans. Services are required to be tailored to suit the child's individual health, educational and recreational needs. Where possible, this includes the provision of lodgings that specifically accommodate the physical needs of the child...

In addition to addressing the medical condition, other factors considered by the facilities' health professionals include:

- possible enrolment at local schools;
- education programs;
- religious studies;
- recreational activities; and
- external excursions (depending on local arrangements).

The role and assistance of the parents is assessed at the same time, and the parents are asked to contribute to the process and agreed management plan for their child. Once finalised, necessary resources can be allocated to ensure the child is able to commence the program as soon as practicable.<sup>9</sup>

### **(b) Commonwealth disability legislation**

The Commonwealth *Disability Discrimination Act 1992* (DDA) prohibits direct and indirect discrimination against people on the ground of their disability. The DDA binds Commonwealth and State government agencies as well as individuals and private companies.

Section 52 of the DDA provides a general exemption from discrimination on the grounds of disability in relation to the provisions of the *Migration Act 1958* (Cth) and its administration. The Inquiry is of the view that while the provision allows for discrimination in the granting of visas on the basis of disability, it does not amount to a blanket exemption in relation to the treatment of people, detainees and staff, in the course of the operation of detention centres. Such an approach is clearly supported by the objects and purposes of the DDA.<sup>10</sup>

Furthermore, the *Disability Services Act 1986* (Cth) highlights the importance of promoting services to persons with disabilities in order to assist them to fully integrate into the community.<sup>11</sup>

### **(c) Monitoring**

As set out in Chapter 5 on Mechanisms to Protect Human Rights, the Department has a responsibility to monitor ACM's compliance with the IDS. At a Contract Management Group meeting in April 2001, the Department 'highlighted the importance of providing appropriate care for people with special needs in detention'.<sup>12</sup> The Department requested that ACM provide the Department Managers in each detention centre with a list of all the detainees with disabilities and information on the management plans put into place. In turn, the Department Managers were to forward the information to DIMIA's Central Office on a monthly basis.

## A last resort?

In October, November and December 2001, the Department Manager at Curtin noted that a father had difficulty coping with his daughter who had 'possibly borderline cerebral palsy'.<sup>13</sup> He notes that the father 'has on occasion required counselling in relation to his obligations' and requested that ACM 'include in management plan speech therapy and signing'.<sup>14</sup> The identical words were repeated in each monthly report, indicating that there had been little progress, or little attention paid to the progress, regarding this family.

However, nowhere in the above reports is there any mention of the child with cerebral palsy discussed in Case 2. There is no mention of him or his family until the March 2002 Department Manager report, which details the crisis point when the mother relinquished care of her child (see section 11.4.2 below).<sup>15</sup>

As for the family in Case 1, the Port Hedland Department Manager makes no mention of them in her reports until November 2001.<sup>16</sup>

Consistent reporting by Department Managers on the situation of children with disabilities appears to have begun after November 2001, around the time this Inquiry was announced.

### **(d) Payment arrangements with ACM**

The cost of providing support for a child with disabilities can be extremely high. In the Australian community many of the costs associated with support services are met by State and Commonwealth service providers. However, as set out below, neither the Department nor ACM regularly engaged those government service providers, and it was therefore left to them to provide and pay for the individual care needs.

While the care for children with 'special needs' was generally contemplated by the contract between ACM and the Department, it appears that neither foreshadowed the extent and cost of services that might be required to provide appropriate care to children with significant disabilities. This issue is discussed primarily in the context of the provision of care for the boy in Case 2, who has cerebral palsy. However, it was also an issue regarding education for the children in Case 1.

#### **(i) Case 1: Port Hedland**

A letter from the Department to ACM in November 2001 deals with a payment request in relation to education of the children with intellectual disabilities:

I refer... to [ACM's] request that DIMA approve in principle costs associated with the provision of special schooling for the children.

I do not consider that such approval is required from DIMA as the provision of education for all children in immigration detention facilities is incorporated into the Detention Agreements... As such it is the responsibility of ACM both to provide education (including catering to special needs) at the facilities and to fund any associated costs...<sup>17</sup>

As described in more detail in section 11.7.1 below, it appears that there was no education specifically directed to the children's needs until May 2002, almost two years after their arrival, when an ACM teacher concentrated exclusively on them. Even then, that teacher had no specific training in educating children with disabilities. It is of concern to the Inquiry that this delay in providing special education may have been related to cost concerns. However, ACM denies that there is any connection between the cost of services and their provision.

### (ii) Case 2: Curtin

The Department described the dilemma as to who would pay for disability support services as follows:

[W]e're talking here about a situation where, as we've identified, the child is profoundly disabled and we are now in a situation where, as I understand it, the mother is not able to care for the child, or wasn't for a good proportion of this year, able to care for the child in the way that she had previously and that required round the clock care by some other specialist staff. I think it is quite reasonable that the services provider might want to discuss with us something that was well outside the scope of the contract in the beginning when I think, frankly I don't think either the people, any of the people negotiating the contract in the first instance envisaged that we may have a profoundly disabled child.<sup>18</sup>

In April 2002, ACM had estimated that the cost of caring for the boy was \$372,218.25 a year, and asked for reimbursement for at least part of the cost.<sup>19</sup> In June 2002, ACM had not received any reply from the Department and threatened to 'dump the child on DIMIA's doorstep':

This afternoon [the Department's Deputy Manager] was advised by the ACM Manager that unless ACM received an immediate response to their request for additional funding for the care of the child they (ACM) would be dumping the child on DIMIA's door step tomorrow morning. ACM Manager advised that this direction had come directly from [ACM Managing Director]. [He] also instructed ACM manager to contact DCD [Department for Community Development] and advise them of the intention to dump the child.<sup>20</sup>

In August 2002, more than a year and a half after the child's arrival, ACM noted that the Department had verbally agreed to meet costs for ACM staff providing services at the previous Contract Operation Group Meeting but that no formal correspondence had been received.<sup>21</sup> In September 2002, the Department wrote to ACM stating that the daytime supervision was within the scope of the contract and therefore the Department would only pay for the overnight care and supervision.

Also in September 2002, a doctor at the Port Augusta Hospital noted that:

Normally I would organise for him to see physio, OT and speech for assessment of needs as well as involving [the Crippled Children's Association of South Australia] and Orthopaedics for management of contractures. I understand this cannot be done through the state system unfortunately.<sup>22</sup>

## A last resort?

This emphasises the considerable financial and logistical burden that was placed on the Department and ACM to provide care that is normally arranged by the State authorities.

In October 2002, ACM wrote to the Department stating that it was 'not responsible for the ongoing care of a child in detention and as such should not be required to meet the costs of caring for a child on a long-term basis'.<sup>23</sup> The Department confirmed that as at October 2002, the issue of who pays for what had still not been resolved.<sup>24</sup>

The Department states that the negotiations as to costs 'in no way has affected the actual care that has been provided to the child for that period [starting March 2002]'.<sup>25</sup> ACM also denies that cost influenced the level of care provided to the boy.<sup>26</sup> As set out below, the Inquiry acknowledges that from March 2002 the level of care provided to the boy was very intensive and to that extent cost disputes may not have affected the level of care. Nevertheless, the Inquiry remains concerned that the lack of clarity as to who would pay the costs of caring for this child may have been a factor in the 16-month delay in providing this level of care. Neither ACM nor DIMIA have provided any other convincing explanation for the delay.

### 11.2.2 ACM policy

There does not appear to have been any specific ACM policy regarding the special care of children with disabilities. However, in May 2002 ACM issued a policy relating to special needs resulting from 'a significant medical or psychiatric illness, or developmental disability' which stated that:

Where a detainee's illness or disability may impact on the detainee's housing, program assignments or transfer, the appropriate health care staff will see the detainee and the detainee's assignment will be governed by written medical orders.<sup>27</sup>

The ACM policy on special care needs for minors generally notes that:

4.1 When a minor is admitted into the Centre, the Nurse will interview the child's parents and child to determine the special needs of the child. Factors to be addressed include the possible enrolment at local schools, education programs, religious studies, recreational activities and external excursions....

4.3 Once a plan has been agreed with the parents, necessary resources will be allocated to ensure the child is able to commence such activities as soon as practicable.<sup>28</sup>

The former ACM Health Services Coordinator, employed at Curtin from late 1999 to early 2002, told the Inquiry that 'there was never any coherent policy by ACM or DIMIA for the care of the disabled'.<sup>29</sup>

### 11.2.3 State disability standards and arrangements with State disability authorities

Each State has developed disability services standards which help define what standards should be provided to people with disabilities. In Western Australia, where the children in the case studies were detained, the Disability Services Commission (DSC) published the Disability Services Standards (the Standards) pursuant to the *Disability Services Act 1993* (WA). One of the guiding principles in the Standards is that disability services be provided in the 'least restrictive way'. The Standards define this concept to mean:

The provision of services which are appropriate to people's need, while allowing them as much freedom of choice, independence and opportunity as possible.<sup>30</sup>

This reflects article 23 of the CRC which requires special measures to encourage active participation and integration into the community. The Standards are not reflected or referred to in either ACM or Department policy documents.

In addition to developing the Standards, State disability authorities provide comprehensive services designed to assist children with disabilities and their families. While it is clear that service providers throughout Australia face serious challenges in meeting the demand for services, the Inquiry was concerned to ascertain whether the Department or ACM had taken steps to seek advice from and involve those State authorities in the care of children with disabilities in detention. The Department told the Inquiry that:

No arrangements or agreement exist between the Department and State or Commonwealth disability agencies relating to access to, and funding or payment for, disability assessment, treatment and rehabilitation for children in Australian immigration detention facilities.<sup>31</sup>

The Department also states that it is ACM's responsibility to make such arrangements:

Where disability agencies are engaged for the purpose of providing access to disability assessment, treatment and rehabilitation for child detainees, they are engaged by Australasian Correctional Management (ACM) on a case by case basis.<sup>32</sup>

The Western Australian Government confirmed that there were no formal agreements with the Department to provide services to children with disabilities in detention. It emphasised that the WA Government could not provide any services without a formal agreement and payment:

In order for the [Disability Services] Commission to provide services such an agreement would need to be in place, and this agreement would need to provide for a formal notification by DIMIA identifying the children with disabilities and their families who are in need of services and support. It would require an assessment by the Commission as to the needs and the possible services that could be provided and the cost of those services and

## A last resort?

it would also require that the cost of those services be met by the Commonwealth.

It is important to highlight the importance of the Commonwealth meeting the costs and services that could be provided to children with disabilities and their families.<sup>33</sup>

The South Australian body that provides disability services to children, Child and Youth Health, also indicated that there were no arrangements to provide support services to children with disabilities in Woomera.<sup>34</sup>

However, the children in both Case 1 and Case 2 have had some contact with the Western Australian child welfare authorities (rather than the disability authorities). The relationship between the Department and child welfare authorities is discussed more generally in Chapter 8 on Safety and Chapter 9 on Mental Health.

### **(a) Case 1: Port Hedland**

On the evidence available to the Inquiry, the first contact made with DSC occurred 22 months after the family arrived in Port Hedland. DSC, rather than ACM or the Department, initiated the visit and even then only after a conversation with this Inquiry. The Department's Port Hedland Manager reported that:

The reason for the visit was because the children had been brought to their attention by HREOC and they were following this up.<sup>35</sup>

In the correspondence available to the Inquiry, DSC stated that it would be willing to 'assist in any way'.<sup>36</sup> However, the Department Manager was of the view that DSC 'concluded that [the three children] were not disabled enough to qualify for any service from the Commission'.<sup>37</sup> It is unclear on what basis the Manager came to this conclusion; however, there is no evidence of any further contact between DSC, the Department or ACM in relation to these children.

The Department did have some contact with the State child welfare authority (as opposed to DSC) regarding the relationship between the mother and the children (see section 11.5.1 below).

### **(b) Case 2: Curtin**

In March 2001, four months after the family's arrival, the senior occupational therapist at the Derby Regional Hospital noted that she had consulted DSC for advice on the most appropriate seating system for the boy with cerebral palsy.<sup>38</sup>

The first contact with the child welfare authority, the Department for Community Development (DCD), was a year later, in March 2002.<sup>39</sup> DCD became involved with the care of the child after the mother declared that she was no longer able to cope and passed over responsibility for the child to the detention staff (see sections 11.4.2 and 11.5.2 below).

At the same time, DCD suggested that the Department contact DSC. DCD's case management notes state:

DIMIA to follow up whether Disability Services Commission could assist in planning and assessment of [the boy's] needs.<sup>40</sup>

A margin note states that 'ACM can initiate this', but the first record of any contact is where DCD notes that it, rather than ACM or the Department, contacted DSC in April 2002 in order to arrange for a communication device for the boy.<sup>41</sup> This occurred 17 months after the boy arrived at the Curtin detention centre.<sup>42</sup> It appears that, amongst other things, he had no communication device until after that time. This evidence suggests that neither DSC nor DCD had been involved in the assessment of the child or the case management planning until March 2002.

The South Australian child welfare authority, Family and Youth Services (FAYS, within Department of Human Services)<sup>43</sup> were contacted in December 2002, when the boy had been detained at Baxter for three months. They were called in to discuss 'the services and assistance [the boy] is receiving from ACM staff due to [his mother's] current inability to cope with caring for him due to his special needs'.<sup>44</sup>

FAYS agreed to contact the South Australian Disability Services about 'possible additional service provision'. FAYS also contacted the Crippled Children's Association of South Australia (CCA) which was willing to provide an assessment 'in order to establish what ongoing therapy, equipment needs may be required and if "home support" is needed'.<sup>45</sup> The boy became a registered client of the CCA in March 2003.<sup>46</sup>

FAYS monitored the care of the boy regularly from December 2002 onwards. In April 2003, FAYS noted that the family was satisfied with the level of care being provided but recommended the purchase of some new equipment, including a 'fully functioning stroller'.<sup>47</sup>

#### **11.2.4 Findings regarding policies on provision of services to children with disabilities**

The Inquiry finds that neither the Department nor ACM had any formal policies that clearly set out the procedures and responsibilities for the care of severely disabled children at the time that the children in Case Studies 1 and 2 required assessment and service coordination.

Furthermore, there were no formal arrangements between either ACM or the Department, and State disability authorities. They did not routinely or promptly draw on their expertise when children with disabilities arrived into detention centres. However, there was some consultation with child welfare authorities when parenting became a child protection issue.

The absence of clear policies as to who would take responsibility for the considerable effort, cost and consultations required for the care of children with serious disabilities affected many aspects of their lives.

These issues are explored further throughout this chapter.

### 11.3 Was there early identification of disabilities for children in detention?

The UN Committee on the Rights of the Child has highlighted the importance of early identification of disabilities to ensure that the necessary care is provided.<sup>48</sup>

The Department's submission states that:

The initial health screening of detainees on entry to an immigration detention facility provides for the early detection and treatment of disabilities in child detainees. Children are screened for evidence of physical and/or mental disability, as well as other developmental or learning impairments.<sup>49</sup>

The Department provided figures to the National Ethnic Disability Alliance (NEDA) stating that there were 16 children with disabilities in detention on 5 February 2002 (4.2 per cent of children in detention).<sup>50</sup> The Department states that on 30 April 2002 there were nine children in detention with disabilities.<sup>51</sup>

The South Australian Department of Human Services (DHS) gave evidence that, in Woomera, there were children with disabilities who had not been appropriately identified by the detention centre staff. DHS were of the view that the health staff were not using the guidelines used in Australia to identify children with disabilities and the staff did not have the experience needed to apply those guidelines properly. DHS states that the consequence is that:

Certainly children arrive at the Migrant Health Centre after release with disabilities that have not been identified during detention.<sup>52</sup>

However, evidence from DHS also suggests that some children may have been sent to Adelaide for assessments. For example:

We've also had one child with unexplained paraplegia and he was in Woomera Detention Centre for some months before he was sent to Adelaide for assessment. I know he was granted a TPV while he was in the Women's and Children's Hospital.<sup>53</sup>

Several disability organisations also expressed concern about the ability of the Department and ACM to properly identify children with disabilities, including the Multicultural Disability Advocacy Association (MDAA) and NEDA.<sup>54</sup>

MDAA described the consequences of failing to identify disabilities to include the following:

- poor health;
- development of patterns of movement and behaviour that inhibit functional patterns;
- impaired learning and development;
- increased physical deterioration (especially for children with cerebral palsy) ...;
- increased need for adaptive/specialised equipment which is costly and ongoing ...;

- increased communication and behavioural support needs (especially for children with autism or intellectual disability) ...;
- increased financial costs re long-term 'burden of care', on the caregiver, the community and future government agencies;
- family breakdown/severe stress/severe impact on other siblings in the family;
- long-term social/emotional problems;
- nutritional/diet concerns/consequences in non-identified children with disabilities can also involve the development of Type 1 diabetes (especially in under-nourished communities); the increased rate of oesophageal cancer in Iranian populations; the impact of vitamin A deficiencies in refugee populations (eg, vitamin A deficiencies resulting in blindness; vitamin D deficiencies resulting in rickets and often prevalent in Asian populations)...<sup>55</sup>

### 11.3.1 Case 1: Port Hedland

The evidence available to the Inquiry suggests that the exact nature of the disability of the three siblings in Port Hedland – a lysosomal storage disease<sup>56</sup> – was not determined until two years after their arrival in Australia.<sup>57</sup> The Department states that:

this particular disability that these children, as I understand it, that these children have, is not something that's easy to diagnose and it has been a process that's taken some time for the medical experts to be able to eliminate certain suspected names for the disability and to be able to identify in particular what we now believe to be the actual disability that these children have.<sup>58</sup>

The Department has cited evidence that only one in 500,000 Australians have the disease.<sup>59</sup> ACM, on the other hand, cites evidence that only 30 people in the world, outside Finland, where there are more than 200 cases, have the disease.<sup>60</sup> One of the studies cited by the Department also states that the average age at which children are diagnosed with this particular disease is 9.7 years, and the median age is 2.7 years old.<sup>61</sup> Both ACM and DIMIA argue that it is therefore understandable that it took some time to properly diagnose these children.

It is not necessary for the Inquiry to determine whether the evidence cited by the Department or ACM regarding the prevalence or difficulty of diagnosing the disease is correct because the concern in this case is not just that it took a long time to diagnose, but that there is no evidence of serious efforts to commence the diagnostic process until seven months after this family's arrival in Australia. Furthermore, there was slow follow-up once the process had commenced.

In any event, if the studies are correct it must be remembered that two of the children were well over 9.7 years old on arrival (11 and 13) and the study cited by the Department states that there is a strong correlation between the age at diagnosis, severity of the disease and life expectancy.<sup>62</sup> It is therefore possible that the delay in diagnosis may have contributed to increased problems for the children in the future.

A last resort?

One possible reason for the delay in commencing the diagnostic process is that the family was in separation detention for the first seven months in Port Hedland.<sup>63</sup> The Inquiry was concerned that the Department may have taken the position that it was unnecessary to determine the illness of these children if they were to be returned back to their home country. However, the Department disputed that this would have any effect on the care provided.<sup>64</sup>

A teacher formerly employed at Port Hedland told the Inquiry:

    Their disability has never been formally assessed. After your Inquiry was announced late last year [November 2001], there was another panic attack about this family and there were weekly meetings about this family as well as about what was going to be done with them and so on and so forth. ... We don't even know what is wrong with them so we couldn't even ask people who were qualified for help or assistance to know what is suitable for these – what learning material is suitable for these children.<sup>65</sup>

The following chronology sets out the documentary evidence provided to the Inquiry regarding the efforts made to obtain an accurate assessment of the cause of the children's disabilities and their corresponding needs.<sup>66</sup>

Case 1: Chronology of disability assessment

August 2000	Family arrive in Australia and initial assessments are conducted. Records identify that the 13-year-old has 'delayed development' and the 11-year-old has 'intellectual impairment', but lists no health problems for the 7-year-old. <sup>67</sup> Family kept in separation detention for seven months.
March 2001	Paediatrician assesses developmental status and suggests that 'Fragile X' is a possible diagnosis. Further tests ordered. <sup>68</sup> Results not provided to the Inquiry.
June 2001	Medical records of the mother note that two of the children are 'mentally challenged'. <sup>69</sup>
August 2001	One of the boys attends Perth hospital and sees a doctor without an interpreter. Further tests are ordered. <sup>70</sup>
November 2001	Letter from the Department to ACM regarding payment for care notes a diagnosis of Fragile X Syndrome. <sup>71</sup> Inquiry announced.
December 2001	ACM psychologist discusses possible needs assessment of children with mother <sup>72</sup> and tests girl's IQ. <sup>73</sup> Psychologist emphasises importance of obtaining an accurate assessment. <sup>74</sup>
March 2002	Department notes that another ACM psychologist assesses that: <i>the intellectual disability problems of the family are well beyond the capacity of the Centre to deal with. They need a dedicated team of ID specialists working to best practice and that cannot occur here. There has been no official diagnosis of Fragile X and [psychologist] does not know where that comes from. The children need a diagnosis of the ID problems and a program of specialist therapeutic care.</i> <sup>75</sup> Disability Services Commission offers to 'assist in any way'. <sup>76</sup> However, Department Manager states that DSC has found they are 'not disabled enough to qualify for any service from [DSC]'. <sup>77</sup>

April 2002	Department Manager notes need for much more comprehensive program for the children. ACM provides a plan including recommendations for detailed assessments, genetics testing and a therapeutic program by an occupational therapist. There are notes of tensions between ACM and the Department over the plan. <sup>78</sup> Psychologist states that mother and sister should be told of results of genetic testing as soon as possible. <sup>79</sup>
June 2002	ACM doctor requests a 'definitive diagnosis' from an external doctor. <sup>80</sup> Inquiry visit to Port Hedland.
July 2002	External paediatrician identifies some screening tests that can be 'pretty simply done' to diagnose the condition. He orders those tests for one of the boys. <sup>81</sup>
August 2002	A cytogenetics report for one of the boys states that screening for Fragile X is negative. <sup>82</sup> Paediatric registrar suggests children may suffer from a metabolic storage disorder and orders further tests to 'assist in the diagnostic process'. <sup>83</sup> Results show final diagnosis of aspartylglucosaminuria. <sup>84</sup> Children referred for audiology assessment. <sup>85</sup>
September 2002	Children referred for speech pathology assessment. <sup>86</sup>
November 2002	Minister writes to Inquiry noting final diagnosis. <sup>87</sup>

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### 11.3.2 Case 2: Curtin

The medical records concerning the boy in Case 2 begin four days after his arrival at the detention centre. Within a month, the medical records and a referral to the occupational therapist note the boy's cerebral palsy.<sup>88</sup> He first saw a physiotherapist six weeks after his arrival and an occupational therapist eleven weeks after his arrival.<sup>89</sup> They agreed with the diagnosis of cerebral palsy.<sup>90</sup>

Nevertheless, not all of the relevant baseline tests were conducted at this time. For example, while there is some evidence of ongoing dental and psychological care,<sup>91</sup> several of the May 2002 management strategies note that dental, optical, hearing, speech and bone density assessments, as well as skeletal x-rays, needed to be done.<sup>92</sup> ACM states that a full psychiatric assessment occurred in April 2002, a social work assessment in May 2002 and a psychological assessment in June 2002 – long after the child arrived in the detention centre.<sup>93</sup> Further, in June 2002, a doctor at Derby Hospital stated that he would order chest, hip and spine x-rays for the boy, 'as baseline investigations,' which indicates that they had not yet been performed.<sup>94</sup>

### 11.3.3 Findings regarding early identification

There is no evidence of any guidelines regarding the assessment of children with disabilities at the time the families in Case 1 and 2 were detained. There were no formal arrangements, nor any routine or prompt consultation with State disability authorities which have the special expertise to assist in the process of identifying disabilities.

## A last resort?

In Case 2, where the source of the disability is clear, the initial identification process was relatively prompt. However, broader baseline testing took much longer to occur.

The pursuit of an accurate diagnosis for the children in Case 1, who had more complicated disabilities, was extremely slow. The Inquiry does not accept the suggestion by the Department and ACM that the rarity of the disability excuses the delay in diagnosis. Despite the observable developmental delays, it took seven months to commence the medical diagnosis process of the three children and insufficient attention was paid to the follow-up of that process. Once a decision had been made in June 2002 (22 months after their arrival) to seek a 'definitive diagnosis' from an external doctor, the condition was diagnosed within two months.

### **11.4 Was there appropriate case management for children with disabilities in detention?**

The Department recognises its obligations to provide individualised care to children with disabilities:

Services are required to be tailored to suit the child's individual health, educational and recreational needs.<sup>95</sup>

NEDA is also of the view that:

The best outcome for children with disabilities will be achieved through addressing their individual needs via specific intervention programs that are incorporated into their daily routine which include the education of their care-givers.<sup>96</sup>

An ACM psychologist highlighted that the first step for developing a case management plan is to identify the problem:

The importance of assessment cannot be understated. Much of the solution to any problem [lies] in defining it accurately. In order to provide genuinely meaningful and effective management of a child with an [intellectual disability], it is necessary to obtain an accurate and comprehensive understanding of that child's general abilities and deficits.<sup>97</sup>

As set out above, there were sometimes substantial delays in commencing the needs assessment process. This created even longer delays in implementing a holistic strategy to address those needs.

However, some of those difficulties may have also been caused by the absence of staff with sufficient expertise in the remote detention centres. MDAA suggests that 'mainstream health professionals do not usually have the expertise in disability required'.<sup>98</sup> The Department has not stated that it has specially trained staff on site. However, a former ACM doctor, who worked at Woomera between October 2000 and the end of June 2001, stated that children with disabilities did receive appropriate care:

I assessed quite a few of them. ... There were some who, two or three who were completely deaf, weren't speaking. One was five years old. Another was two years old. Another was seven. And they were all referred

appropriately to the ... Women's and Children's Hospital, in Adelaide, and given the appropriate treatment. There were a couple of children with very severe birth defects, and sometimes we marvel at how they came across, or severe birth defects, and they had what our children would have had. Sometimes they had it even more rapidly because we pressured them very hard, because the Woomera detention centre was not a place to have these children, with severe birth defects.<sup>99</sup>

### 11.4.1 Case 1: Port Hedland

As set out below, in her reports until April 2002, the Department Manager at Port Hedland consistently noted dissatisfaction about the quality of the case management plans intended to address the needs of the three children.

The Department's version of events at the Inquiry hearings in December 2002 paints a more positive picture of the care being provided to the children than that of the Department Manager. The Department explained that the absence of documentation supporting their version demonstrated that the management of children was an evolving process that was increasingly sophisticated over time.<sup>100</sup> The Inquiry cannot assess management strategies that have not been documented, and on that basis prefers the view of the Department Manager on the ground.

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#### Case 1: Chronology of Case Management

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August 2000	Family arrive in Australia and initial health assessments are conducted.
March 2001	Commence 'behaviour modification' plan with ACM counsellor. No mention of addressing intellectual disability needs. <sup>101</sup>
June 2001	Nurse notes that mother 'has a very difficult time with her children, two are mentally challenged and difficult at the best of times. She also endures hostility from other residents who are intolerant of her children's behaviour'. <sup>102</sup>
Nov 2001	Department Manager notes failure to assess or address the special needs of the children and suggests involvement of WA Family and Community Services and DCD. <sup>103</sup> ACM note the need to create a behaviour modification plan in conjunction with health team, teachers and guards. <sup>104</sup> Psychologist asked to draft a document on how to manage children with special needs. <sup>105</sup> Inquiry announced.
Dec 2001	Department Manager states that the children's needs are 'still not being met'. <sup>106</sup> Delay in creating management plan is due to priority of unaccompanied minor management plans. <sup>107</sup> Medical notes state that 'management are in the process of formulating management plan for whole family'. <sup>108</sup>
Feb 2002	Department Manager states that children's needs are being addressed. <sup>109</sup>
March 2002	Department Manager believes that children's needs 'are still not being met adequately. ACM is very slow to produce suitable and implement management plans'. <sup>110</sup> ACM psychologist discusses behaviour management program with family <sup>111</sup> then drafts it. <sup>112</sup>

## A last resort?

April 2002	Department Manager states that behaviour management program should be a 'much more comprehensive plan of action that gives them structure and routine, and urgently'. <sup>113</sup> A new plan is produced. <sup>114</sup> No evidence of any further management plans.
June 2002	Inquiry visit to Port Hedland.

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The ACM medical records provided to the Inquiry indicate that the primary concern about these children related to the disruptions caused by their behaviour. The records do not connect the behaviour problems and the intellectual disability.

While a behaviour modification plan may be of considerable value to the children as well as the family, such a plan should be integrated into an individual program plan which addresses wider issues of education, personal development and social integration into the community. It appears that this process commenced in November 2001, when the medical records note that a 'program to modify the behaviour of [the] family' would be created in conjunction with the officers, nurses, counsellor, education and recreation staff.<sup>115</sup>

By December 2001, the children were beginning to become involved in a variety of activities, such as painting a wall, which helped to develop some motor skills and made the children easier to care for.<sup>116</sup>

In March 2002, a 'behaviour management plan' was created. During the public hearings, the Department explained that 'behaviour management plans' in fact referred to 'case management plans':

I think we also need to be careful about the use of the term 'case management' because I think there is – as we referred to earlier in the evidence from the Department, there has been an evolution of the way that we approach the management of individuals with special needs and others in the Department. I think the term case management is something that we have become more used to using towards the end of that year, but the information that I have available to me here is that a behaviour management plan for some members of the family was in place from 25 March [2002]...

I think that what we are seeing here is some quite intensive management of the case from early on in their time in detention and some appropriate action being taken to manage their condition.<sup>117</sup>

The program entailed weekly sessions with the psychologist as follows:

- one 45-minute counselling session with mother
- one 45-minute behaviour management session with the two boys
- one 45-minute family dynamic session with mother and three children.

In addition, the plan contained recommendations for further assessments by health professionals, plus the design of occupational therapy sessions and daily living programs.<sup>118</sup>

The records suggest that by June 2002, the behaviour management program was no longer being implemented. The mental health nurse recorded at that time that the children's mother was angry, distressed and worried about one of her sons.<sup>119</sup>

The children were frequently observed by the High Risk Assessment Team (HRAT). However, as noted in Chapter 8 on Safety, the HRAT scheme was more focussed on monitoring the physical safety of the children than their developmental needs. Therefore, while this may have been a useful strategy to protect the physical safety of the children in the detention environment, it is not a measure that is designed to encourage their development and participation in meaningful activities. Nevertheless, the records indicate that ACM detention officers played a part in teaching the children appropriate behaviours, such as shaking hands with strangers rather than hugging them.<sup>120</sup>

### 11.4.2 Case 2: Curtin

The case management of this boy with clearly identifiable disabilities occurred in two stages with a large gap of time in between. Shortly after his arrival, the boy's needs were assessed and staff developed a care strategy in close liaison with occupational therapists, physiotherapists and others at the local hospital.<sup>121</sup>

In March 2001, the ACM paediatric nurse noted that she had the responsibility to liaise with the education and welfare departments regarding the boy's behaviour management and implement a multi-disciplinary program.<sup>122</sup>

However, within a few months some difficulties arose regarding the mother's level of involvement in his therapy (as discussed below). ACM states that it 'attempted to support the mother in caring for the boy rather than usurp her care'.<sup>123</sup> However, the documents available to the Inquiry suggest that the mother's lack of engagement led to some frustration in ACM staff with the result that they appear to have stepped back from actively providing services to the boy over the course of 2001.

In May 2001, ACM management overrode the judgment of its Health Services Coordinator who had recommended that the family move to a metropolitan detention centre because Curtin was not set up to meet the major needs of this child.<sup>124</sup> The reply from ACM's Centre Manager at Curtin put operational considerations above medical considerations:

Whilst I appreciate your professional medical opinion that a transfer may be, in the medical sense, a help [to the boy's] development I must point out that operationally there is no requirement for a transfer.<sup>125</sup>

However, on 5 July 2001, after a further recommendation from his health staff to relocate the family, the ACM Centre Manager wrote in the margin that 'discussions are also underway to relocate this family. DIMIA for comment'.<sup>126</sup> The following week, the ACM Health Services Manager again recommended transferring the family to a metropolitan detention centre as they could not be adequately cared for at Curtin.<sup>127</sup>

## A last resort?

In August 2001, the Health Services Coordinator states that a health support officer with experience in disability services attempted to liaise with the psychologist, nurses and school teachers to develop a new program. He notes that the boy's mother halted this process.<sup>128</sup>

The Department Manager noted that it had provided ACM with an opportunity to move the family to Villawood in October 2001:

ACM were given the opportunity six months ago to have the family transferred to Villawood where more appropriate care would be available for the child. They refused to agree to this.<sup>129</sup>

ACM denies that this offer was ever made and states that it was the Department Manager who vetoed the transfer, as 'he was convinced [the mother] was "using" her son's disability and care requirements for personal gain'.<sup>130</sup>

In February 2002, ACM reported that the child was 'under a programme with the Minor Liaison Officer, counsellor and nurse to maximise his potential, physically and mentally'.<sup>131</sup>

In March 2002 the boy 'was put into the care of ACM by his mother after she found it too difficult to cope with his care'<sup>132</sup> giving rise to the financial dispute set out above. At that time the Department Manager mentioned the boy for the first time in his monthly Manager's reports. He observed that there had been serious problems regarding the boy's case management since the time of his arrival:

In reviewing this case it is apparent that ACM have not developed an appropriate program to focus on the individual needs of both the child and the mother. Had the needs of the mother been addressed 18 months ago when she arrived at Curtin it is likely that she would not have reached the stage that she is now at where she is psychologically not able to cope with her disabled child.<sup>133</sup>

In March 2002, the WA child welfare agency, DCD, became involved in developing a case management plan. At that time ACM and DCD developed a comprehensive strategy, which included recommendations for physiotherapy, occupational therapy and education.<sup>134</sup> An ACM psychologist with psychology and special education training also helped to develop a case management strategy.<sup>135</sup> In late July 2002, intensive physiotherapy and speech therapy began.<sup>136</sup>

The records indicate that a case management strategy appears to have continued at least until September 2002, when the family was transferred to Baxter detention facility.<sup>137</sup>

When the Inquiry visited Baxter in December 2002, the boy was accompanied by a carer. ACM told the Inquiry in September 2003 that it continued to provide 24 hours a day, seven days a week carers and other management strategies while the boy was at Baxter in 2003.<sup>138</sup>

### 11.4.3 Findings regarding case management

According to the Western Australian Disability Service Standards, each person with a disability should receive 'a service that is designed to meet, in the least restrictive way, his or her individual needs and personal goals'.<sup>139</sup>

The Inquiry recognises the significant improvements in the Department's commitment to providing individualised case management of children with disabilities over 2002. However, these improvements occurred long after these children with disabilities began to be detained. The Inquiry therefore finds that the Department failed to ensure the prompt development of comprehensive individual case management strategies that address the specific developmental needs of children with disabilities during the period of the Inquiry. There has been insufficient consultation with State disability authorities and other experts, who are otherwise available to children in the community, to assist in the process.

Regarding Case 1, the Inquiry finds that there were ad hoc efforts by individual staff members over 2001 and 2002. However, on the evidence available to the Inquiry there was still no comprehensive plan which addressed the individual needs of the children in the areas of health care, education, recreation and other developmental issues by the end of 2002.

Regarding Case 2, the Inquiry finds that there were efforts to create a case management plan on arrival. However, within six months ACM staff were of the view that the child could not be properly cared for in Curtin and the mother became disengaged in the process. The Department Manager was of the view that there was no appropriate case management plan for the child or his mother. These circumstances culminated in the mother handing over the child in March 2002.

In March 2002, the child welfare authorities were called in for assistance and an appropriate case management plan was developed. The Inquiry finds that a high level of service was provided pursuant to this plan. However, the Inquiry is extremely concerned that it took 16 months of detention before this level of service was provided. In the Inquiry's view this delay unnecessarily compromised the development of the child and the psychological health of his family.

## 11.5 Was there appropriate support for parents of children with disabilities in detention?

Chapter 9 on Mental Health demonstrates that the detention environment can have a serious impact on the ability of parents to fulfil their role as carer. This is even more the case for parents of children with disabilities due to the additional needs of their children. For example, a parent seeking to care for a child with disabilities in the community would likely seek assistance from specialist doctors, nurses, advocacy groups and State disability agencies. They would need to obtain specialist equipment and access specialist schools or units within community schools. They are also likely to seek the support of other parents in a similar situation. In the detention environment, these options are not always available and therefore parents

## A last resort?

are not necessarily in the position to make the decisions that they believe are in the best interests of their child.

The Department recognises that parents should actively participate in the decisions concerning their children:

The role and assistance of the parents is assessed [on entry], and the parents are asked to contribute to the process and agreed management plan for their child.<sup>140</sup>

The Department also acknowledges that parents of children with disabilities may need some support in order to carry out that role:

[P]arents play a role in the management of their children in detention facilities and that in particular for families with disabilities – children with disabilities – it was important to ensure that they were supported.<sup>141</sup>

In July 2001, the Department Manager at Villawood noted that insufficient respite care was provided to parents of another child with cerebral palsy, since 'ACM have relied on parental supervision over a 24 hour period, seven days per week'.<sup>142</sup>

Case 1 and Case 2 highlight the enormous pressures that the detention environment places on the mental health of carers of children with disabilities. They also demonstrate the difficulties in providing parents with appropriate support within that environment. Many of those difficulties stem from the deprivation of liberty itself, which restricts access to facilities like support groups.

In neither Case 1 nor Case 2 is there a father to assist in the care of the children. However, in Case 1, the children's sister (aged 19 on arrival) has an equally important carer role as their mother. In Case 2, both the boy's brothers (aged 10 and 15 on arrival) also have a role, but the mother is primarily responsible for the boy's care.

### 11.5.1 Case 1: Port Hedland

From January 2001, there are fairly detailed records of the difficulties that the mother of the three children in this family with disabilities was having in coping with her children's needs.<sup>143</sup> She was also having some trouble dealing with the reaction of other detainees to her children.<sup>144</sup>

The mother and children were frequently put on a HRAT watch.<sup>145</sup> The close supervision by detention staff may have relieved some of the pressure on the mother and assisted in the protection of the children. However, HRAT does not provide proactive coping strategies for parents.

In April 2001, the medical records note that 'a behaviour modification program' would start with the counsellor and that this would include family counselling.<sup>146</sup>

The WA Family and Community Services (FACS) were brought in to consult with the mother regarding the discipline of her children in March 2001, December 2001 and May 2002.<sup>147</sup> Evidence as to what exactly the counsellor or FACS recommended

for the mother was not available to the Inquiry. However, the ACM Child Liaison officer did provide the mother with some guidance as to appropriate disciplinary strategies in December 2001.<sup>148</sup> Also in December 2001, the ACM psychologist discussed 'positive parenting strategies' with the children's mother.<sup>149</sup>

From February 2002, both the mother and the eldest daughter saw the ACM counsellor more regularly and in April a behaviour management plan was created proposing appropriate support.<sup>150</sup> The counsellor stated that:

[B]oth [the mother and the sister] appear to be unable to stop the cycle of negative behaviours, even though this behaviour pattern is [affecting] their progress in school and life in general. The family are unable to restrain [the two boys] without support.<sup>151</sup>

It is unclear for how long the management plan was pursued. However, the medical records indicate that the difficulties continued well after the creation of that plan.

In July 2002, the ACM psychologist stated the following about the mother and eldest sister:

My concerns with the [name removed] family are not for the three children with special needs, but for their mother and older sister, as my reviews (weekly, when I was at the centre) indicate that it is they who are displaying signs of lowered mood and general deterioration in presentation.<sup>152</sup>

### 11.5.2 Case 2: Curtin

ACM and the Department were of the view that the primary responsibility for the boy with cerebral palsy lay with his mother. The Department stated the following at the hearings:

notwithstanding the Department's duty of care, which extends to all detainees including the members of this family... the child arrived with his mother and there was obviously a competent adult able to take care of the day-to-day needs of the child in question.<sup>153</sup>

While it is clearly the case that this mother had primary responsibility for her children, while in detention she had to rely on the Department and ACM to assist her in providing the care and facilities she needed. It appears that there was some dispute between ACM and the Department as to who should pay for this assistance:

ACM wishes to remind DIMIA that under the current contract parents are responsible for the care of their children whilst in detention. ACM is not responsible for the ongoing care of a child in detention and as such should not be required to meet the costs of caring for a child on a long-term basis.<sup>154</sup>

In any event, the child's mother had such difficulty coping with his care that she handed him over to detention staff in March 2002, 16 months after their arrival in Australia.<sup>155</sup> The Curtin Department Manager notes that one of the likely causes of this dramatic act was the absence of a case management plan for the child and his mother.<sup>156</sup>

## A last resort?

The mother's continuing detention and visa rejection also had an impact on her ability to cope with her child with disabilities and other two children.<sup>157</sup> ACM summarises the pressures as follows:

There is no doubt that caring for a severely disabled child in detention is a difficult physical and emotional task for a single mother particularly given the range of other emotional issues associated with seeking asylum. There is also no doubt that these pressures contributed to the mother's withdrawal. The boy's mother was however quite uncooperative...<sup>158</sup>

The primary documents provided to the Inquiry give a detailed record of the difficulties facing the mother and her reluctance to take full responsibility for the care of her son. However, prior to March 2002, there is very little record of any comprehensive plan to provide the boy's mother with respite care or to help her develop coping strategies. In endeavouring to determine what led her to leave her child, the Inquiry asked the Department to explain what it had done to ensure support for the extra needs of the boy's mother:

[O]n 7 February 2001, the ACM counsellor began counselling processes with the mother of this family and there was ongoing counselling support provided. I also understand that on 22 May 2001 there was also a meeting, I think, with the psychologist in which, as I think I mentioned earlier, parenting strategies were discussed with the mother of the child. On the 4th of April [2002], there was also a referral made for the mother. However, she declined to take advantage of that offer and of ongoing care in relation to the health and welfare that was provided from the centre.

So I think that there has been support provided to the family over time. As I mentioned, the ongoing counselling that started back in 2001. So that support from welfare staff members within the centre and as we've said, we've also been seeking advice from external specialists in relation to the conditions for the children and no doubt that information would be passed on to the mother of the child as well.<sup>159</sup>

The medical reports in February 2001 suggest that:

Maybe group meeting of Teacher, counsellor, paediatric nurse etc. could be organised to develop some strategies to assist this mother in coping alone with 3 young boys along with other stressors.<sup>160</sup>

Moreover, a case management plan in February 2001 indicates that parenting education programs were arranged by the ACM medical centre.<sup>161</sup> However, there is no indication of what those programs were and how long they went for.

By the beginning of March 2001 the medical records note that a management strategy had been developed, however there is no evidence of what that strategy involved.<sup>162</sup> Nevertheless, the medical records indicate that the mother had regular contact with the medical staff.

In May 2001, the psychologist notes that 'the mother was ... instructed in positive parenting strategies and agreed to commence their implementation'.<sup>163</sup> ACM states that in October 2001 'nursing staff offered the boy's mother regular respite and kept up his physiotherapy and play'.<sup>164</sup>

However, it appears that these measures were of limited effect. When DCD assessed the situation in March 2002, they recommended that the mother be put under psychiatric care for depression, and to commence appropriate therapy. They also recommended that the mother 'be supported in caring for [her son] at a pace that is comfortable to her'.<sup>165</sup> A further report notes that:

Psychiatric Assessment to take place as soon as possible – her mental health may be impacting on her ability to make any commitment to [her son].<sup>166</sup>

A psychiatric report in April 2002 states that:

Recently [the boy's mother] started to feel 'psychologically tired'. When asked to explain this, she found it difficult but agreed that it contained elements of depression, stress, a feeling of wanting to give up and general unhappiness. It is this state of feeling that has led her to refuse to look after [her son] who requires 24 hours supervision. She insisted that she loves him...but felt that he is getting bigger and that she would need assistance to care for him wherever she was. She feels he will ultimately need to be looked after in a special setting and come home to her two or three days per week.<sup>167</sup>

The Department recognised that the mother should 'not be considered as having abandoned her son but rather as a parent requiring respite care'.<sup>168</sup> ACM took active control of the care of the child from this time, giving the mother the respite she needed.<sup>169</sup> However, this did not fully address the stressors facing the mother.

A report from DCD notes that the boy's mother 'has been struggling' and that she said that as 'long as I am here my psychological state will not get better and therefore I could not care for [my son]'.<sup>170</sup> The same report notes that she had obtained some support by talking about her problems with another detainee. The social worker notes 'coping strategies within the detention environment' should be developed. One of those strategies was to help her find work within the detention facility. It appears that this did occur. However, the problems were still ongoing in August 2002,<sup>171</sup> despite full time care of the child by ACM staff.<sup>172</sup>

The family was transferred to Baxter on 7 September 2002, where the boy received ongoing care until they were granted permanent refugee protection visas 13 months later. The boy's mother was apparently participating more fully with his care there.<sup>173</sup>

### 11.5.3 Findings regarding support for parents

Cases 1 and 2 demonstrate that the normal pressures placed upon parents with children with disabilities are exacerbated in the detention environment. Support systems available to families with children with disabilities in the community are not available to families in detention, for example there is no access to other parents who experience the stresses of supporting children with disabilities.

Further, families in detention face the additional stressors that come with the detention environment and deprivation of liberty (see further Chapter 9 on Mental Health). This combination of factors increases the risk of serious breakdowns in the family unit, impacting both on the care provided to children with disabilities and other children in the family. This highlights the inherent risks in the long-term detention of children with disabilities.

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However, the Department has an obligation to ensure that the support provided to parents in detention is effective to protect their health and the health of the children. Despite efforts by individual staff to provide counselling and respite, there has been a failure to address the needs of parents in a comprehensive and effective manner. This is demonstrated by the continuing problems faced by the mothers in Case 1 and Case 2.

### **11.6 Was there appropriate physical access, aids and adaptations for children with disabilities in detention?**

The Building Code of Australia and Australian Standards guide design for access and mobility including access for children and adolescents with physical disabilities. Disability organisations have been concerned about the level of compliance with these standards in detention centres:

The buildings are demountable with stairs leading to a door, which would make it impossible for a child in a wheelchair for example to negotiate independently. Furthermore [People With Disabilities] notes that in some detention centres particularly those in remote areas that the ground surface is very dusty and uneven. This would also contribute significantly to the lack of accessibility to children with disability.<sup>174</sup>

Children with physical disabilities which restrict mobility require the appropriate aids to ensure their maximum development (for instance wheelchairs, eating aids, special shoes), and buildings should be designed to cater to their needs. Moreover, children must be provided the appropriate assistance to use those aids:

Appropriately equipping children addresses safety issues, enhances functioning, assists in pain relief, and stops or lessens further physical complications, such as bone fusion, reduced lung capacity, dislocated hips or arms, and swallowing problems. Ultimately, this reduces the long-term financial and social costs which can be associated with a disability.

In the short-term lack of access to facilities decreases mobility and physical and social function and contributes to continued dependence in self-care and community living skills. In the long-term, it limits overall learning, development and independence; inhibits social interactions/environmental opportunities; and discriminates against/denies the disable[d] the basic right to be 'included' with others.<sup>175</sup>

A doctor working at Woomera in August 2001 and January 2002 described a situation where a young boy was forced to go to the women's bathroom because there was nobody other than his mother to help him:

There was one particular case of a child in a wheelchair when I was at the centre in August [2001]...This meant that the child was now in a very vulnerable situation because it was culturally, totally inappropriate for him to enter the shower blocks or the toilet blocks with his female mother which I found to be a very frustrating and distressing situation to deal with and certainly the mother found it almost impossible to deal with and he required a great deal of support, of course, because he simply could not walk.<sup>176</sup>

The March 2001 Port Hedland Department Manager report notes that ACM 'attempts where possible to accommodate families with small children and the elderly or handicapped on the ground floors' of the two storey accommodation blocks.<sup>177</sup>

### 11.6.1 Case 2: Curtin

ACM states that:

the need to care for a child with a disability as significant as [this boy] was an unusual occurrence and there was some delay in identifying all the necessary aids and equipment. However, ACM provided effective care... The issues concerning costs did not arise until March 2002. It is the case that additional equipment was purchased after this time. Nonetheless [the boy] had received the highest possible standard of care since his arrival at Curtin and despite the dispute between ACM and DIMIA cost was not a relevant factor...<sup>178</sup>

The boy was moved around in a baby stroller for the first seven months of his detention there. As the Human Rights Commissioner noted:

[In early 2001] I saw her pushing a pram with a child in it and having real difficulty doing it, because it was a near desert situation – there were plenty of pebbles on the ground.<sup>179</sup>

ACM states there was a wheelchair available in the health centre but the boy's mother chose to use the stroller instead.<sup>180</sup> It is unclear to the Inquiry why the mother would have refused a wheelchair if it was appropriate for her child.

ACM states that a wheelchair was ordered in January 2001 and arrived in June 2001.<sup>181</sup> It also suggests that a wheelchair was provided to the child (along with a beanbag and play mat) in December 2000.<sup>182</sup> However, the primary records suggest that it was not until February 2001, three months after the family's arrival at Curtin, that the child was assessed by an occupational therapist regarding his wheelchair needs. She recommended the purchase of a particular chair in March 2001.<sup>183</sup> The same week, an ACM nurse recorded a conversation with the boy's mother about when she would bring her child to the clinic for his 'stimulation therapy' session:

[The mother] stated that she had no chair for [the boy] to bring him to the Clinic. She also said that ACM will buy [him] a wheelchair – "So where is it?". I asked her was the pram broken – she said it was too small for [the boy] and his legs were cramped. I suggested that perhaps if she had money she could purchase a chair for [him].<sup>184</sup>

The ACM psychologist assessed the boy on 22 May 2001 and noted that 'currently there is no means of transporting [him]' as the stroller was still broken.<sup>185</sup> A 'Special Needs III Baby Jogger' was delivered on 25 May 2001.<sup>186</sup>

The Baby Jogger was different to the wheelchair recommended by the Occupational Therapist in March 2001. The Department states that the manufacturer of the Baby Jogger was consulted because the recommended wheelchair was not immediately available from Derby Hospital.<sup>187</sup> An ACM nurse states that she consulted Baby

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Jogger because she thought the recommended wheelchair would not be practical, but that she would seek the input of the occupational therapist as to the suitability of the jogger.<sup>188</sup>

In March 2002, the psychologist noted that the boy's mother requested a bedrail to stop him falling out of bed.<sup>189</sup> Modifications were made to a donga (demountable sleeping quarters) where the boy was being temporarily housed at that time 'to accommodate his needs re assisted showering etc'.<sup>190</sup>

In April 2002, an occupational therapist noted that the Baby Jogger was inappropriate to the child's needs because it was too small for him and lacked a solid base for postural support. She stated that this had already been mentioned in an earlier occupational therapy report.<sup>191</sup> The therapist recommended a wheelchair similar to that recommended in March 2001. Another physiotherapist noted 11 other items as 'Equipment Requirements' for the boy.<sup>192</sup> On 19 April it was agreed that a vacant donga would be converted to accommodate his 'personal care, physical therapy and educational needs'.<sup>193</sup>

The records show that in May 2002 ACM requested quotes for cutlery, slings, a patient lifter and other items.<sup>194</sup> On 7 May 2002, ACM purchased the wheelchair, tilting bed and mobile shower commode.<sup>195</sup> The wheelchair arrived in early June 2002, as did a device to assist with walking ('Maywalker'). The tilting bed arrived in July.<sup>196</sup>

DCD contacted the Disability Services Commission regarding a communication system for the boy and suggested that the Department or ACM organise referral to a speech pathologist for assessment.<sup>197</sup>

It is clear that the purchase of these items and the provision of round-the clock-care greatly assisted the boy. However, it is disappointing that it took more than 18 months to make this investment. It also highlights the difficulties that the boy's mother must have faced in the absence of all these aids. For example, it must have been quite difficult for her to feed and bathe her son without the required equipment for such a long time.

The boy's accommodation at the Baxter facility was purpose built and offered substantial improvements to this family:

At the Baxter facility we have the capacity to provide particular accommodation units that are designed for people with disabilities. These units include wheelchair access and particular configurations in the units themselves that are more suitable for use with people with disabilities who may have equipment that they need to use in the accommodation unit...

It is my understanding that the facilities at Baxter where the child is now accommodated with his mother and siblings is better suited to meeting the needs of his particular condition in that disabled unit.<sup>198</sup>

However, in April 2003, FAYS reported that the boy's stroller was again unsatisfactory, as it was:

...reportedly fraying near the seat and as a result the carers are unable to position him correctly. In the long term, this could be detrimental to his physical health. It is vital that [he] be provided with a fully functioning stroller.<sup>199</sup>

The Inquiry is unaware whether a new wheelchair was provided.

### **11.6.2 Findings regarding physical access, aids and adaptations**

The Inquiry rejects ACM's submission that the boy with cerebral palsy 'received the highest possible standard of care from the time of his arrival at Curtin'.<sup>200</sup> For the first seven months of detention the boy's mother struggled with a pram unsuited to his needs to move him around. In May 2001, the pram was replaced with a special needs 'Baby Jogger', which was different to what was originally recommended by the occupational therapist. While the Baby Jogger may have been purchased with the appropriate advice, in April 2002 an occupational therapist noted that the Baby Jogger was unsuitable. In June 2002, a wheelchair similar to the one originally recommended in March 2001 was purchased.

The Inquiry finds that after March 2002 the boy was provided with a bed, eating utensils, shower commode and other aids and adaptations that were appropriate to his needs. There were also substantial improvements in the facilities provided after his transfer to Baxter in September 2002.

However, the Inquiry is extremely concerned about the long delay in providing the appropriate aids and adaptations necessary to assist the boy achieve appropriate developmental levels.

## **11.7 Was there appropriate education for children with disabilities in detention?**

As Chapter 12 on Education sets out in some detail, education is a fundamental right of all children. In the case of children with disabilities, the standard of education offered should be equivalent to that available to children with disabilities in the community. This would usually mean that the children would be best catered for by attending external schools that provide such facilities. These may either be specialist schools or general schools with special needs support. There is a specialist school in Port Hedland. Furthermore, most general schools in Australia's capital cities are required to provide appropriate facilities, including special education support.

In October 2002, the boy in Case 2 was 'to be enrolled in a special needs school' in Port Augusta; however, he did not commence attending the school until 1 August 2003.<sup>201</sup> The children in Case 1 began attending the special needs school in Port Hedland at the start of the 2003 academic year. To the Inquiry's knowledge this is the first time that this has occurred in relation to any child with disabilities in detention. The children were also enrolled in local schools with special needs units when they were transferred to Villawood detention centre in September 2003.<sup>202</sup>

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The National Ethnic Disability Alliance states that:

Children with disability, particularly those with cognitive disability, require a program that is designed to meet their specific needs to ensure that they are equipped with basic life skills and enough independence during their transition into the community. Without this, children with disability will require additional support and assistance which means additional costs.<sup>203</sup>

The Department's submission states that the management plan for a child must be tailored to suit the child's individual educational needs.<sup>204</sup> The first step in designing such a plan is to obtain an assessment by teachers with special training in the area. The Inquiry has not seen any evidence of routine and early assessment of children with possible cognitive difficulties. A case management plan for a child at Woomera noting possible cognition problems suggests that 'in an Australian school situation this child would be referred to an educational psychologist for assessment'.<sup>205</sup>

The ACM Education Coordinator at Woomera suggested that some teachers might have had special needs training but there was no dedicated teacher:

MR WIGNEY (INQUIRY COUNSEL): What about, for example, children with – who were developmentally delayed or had development difficulties? Were there sufficient or adequate resources ...

MS LUMLEY (ACM EDUCATION OFFICER): Well, we had a – we had a child with an intellectual disability. Sometimes, they can be integrated into the normal classroom and that's good for socialisation. Other times, they might need assistance.

INQUIRY COUNSEL: But were there any teachers trained in the provision of special education for such –

ACM EDUCATION OFFICER: Some of the teachers may have done extra training in special needs but we didn't have a solely special needs teacher, as such, no.<sup>206</sup>

The Department states that while special needs teachers were not routinely employed this does not mean that:

a properly qualified teacher could not provide the level of education needed or provide meaningful activities to all participants in the spirit of inclusive education.<sup>207</sup>

While this may be correct in theory, Case 1 and Case 2 demonstrate that in practice the teachers were not equipped to cater to the children's educational needs, nor were they provided with special education support, as is often the case in the outside community. Furthermore, there appear to have been impediments to gaining access to special schools when ACM staff identified difficulties that they were having in providing appropriate education within the detention centres.

The former ACM Health Services Coordinator at Curtin described the difficulty in obtaining permission to send a child with a hearing impairment to the Derby school:

We had another child who was deaf and I had great trouble getting DIMIA to allow this child into Derby where the school actually had someone trained in education of the hearing impaired child unlike the Curtin school. DIMIA refused this to happen citing they did not have a memorandum of understanding with the primary school. This is despite the fact that the high and primary school were on one site, with one administration ... and the teacher in question happy to take the child.

The little girl was around 5 years old and arrived sometime late in 2001. ACM school were reluctant to do anything with this child. They insisted that a nurse take the child to school as if she was a medical case requiring supervision. The senior teacher ... was most uncooperative. When the school did take the child she sat in class for an hour with colouring pencils while routine classes carried on. Then she went over to the recreation office where she watched videos (no subtitles) with other kids for an hour and then played under supervision for an hour. This was recorded as a three hour education session for the girl.<sup>208</sup>

### 11.7.1 Case 1: Port Hedland

In January 2001 at least one of the three children was going to the ACM school in separation detention for three hours a day.<sup>209</sup> In March 2001, it appears that all three children were being taught but only for two hours a day.<sup>210</sup> Furthermore there were no specialist teachers or curriculum for these children.

In October 2001, 14 months after the family arrived, the Child Liaison Officer was trying to facilitate the girl's return to the on-site school (as she had not been attending) and considered special education classes.<sup>211</sup> In December 2001 and again in February 2002, it appears that ACM staff were encouraging the children to go to the on-site school. The records also show that there was intermittently some resistance from their mother, possibly because of teasing by other children.<sup>212</sup>

According to the Department's Manager, one of the children attended the on-site school about 60 per cent of the time in the month of November 2001, but the other two did not attend at all.<sup>213</sup> According to a teacher employed at Port Hedland, the reason for erratic attendance was that the children in this family had 'been banned from the school in the compound ... because of behavioural difficulties'.<sup>214</sup>

Another teacher working at Port Hedland described the challenges of teaching these children:

It was left up to me to set simpler work for them. There were two support detainees in the class that I was teaching in and we just tried to keep them going with very simplified work and quite often the other children would rile the smaller boy as it was very easy to do that and he would jump on tables and start screaming out and run round the classroom. It was very difficult to know what to do, I guess. After a while I developed some techniques. It took time. But it was another area – it was yet another level to deal with in that classroom and the people working with me were untrained. They were very

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humane and very good with the children, excellent actually, but they weren't trained in any – in that specialist area.<sup>215</sup>

According to the Department Manager at Port Hedland, the 'needs of intellectually disabled residents [had] still not been assessed or addressed' in November 2001.<sup>216</sup> This was the first time she had mentioned the children in her Manager's reports to Central Office.

In December 2001, 16 months after the family's arrival, a special education teacher visited the detention centre to advise ACM staff as to the type of program the children needed.<sup>217</sup> The Department Manager stated that:

The special needs of the three intellectually disabled children still not being met. Meeting with special education teacher elicited some useful ideas and suitable plans were subsequently devised by the psychologist. These have not been implemented however due to lack of personnel with suitable language skills.<sup>218</sup>

In January 2002, the ACM psychologist set out three options for providing appropriate education to the children with intellectual disabilities:

The option that is the most ideal (but also the most difficult) is that of a community based educational facility that is specifically designed and geared to teach appropriately sized groups of children with special needs. While this option will always be difficult, I feel that it should nonetheless be perused [sic] and exhausted before exploring the next two options... Option two is to construct a special needs school within the centre... Given the already under-resourced nature of the school, I feel that this option would never come to pass. Another practical and perhaps even more important shortcoming of this option however would be the excessively small class size (only two-three students) and essentially the total lack of social skills development opportunities... The third option is that of integration into existing classes which is the option that I suggest for the [three children] (especially as [one of them] is already in a mainstream class).<sup>219</sup>

In January 2002, the youngest of the children was attending the on-site school but there were problems with managing his brother's behaviour.<sup>220</sup> In February, both boys were attending the on-site school on a regular basis.<sup>221</sup> However, in March the Department Manager reiterated her view that ACM was taking too long to produce and implement plans for these children, because of understaffing.<sup>222</sup> In April, the Manager noted that 'there is an ongoing problem that their need for special education and training is not being addressed'.<sup>223</sup>

The difficulties in providing appropriate education to these children were made clear in a memo from the ACM Programs Manager to the ACM Centre Manager. He set out a range of other options, including enrolment in the local special education school:

It is difficult, under present circumstances, to devise an education plan for these children. Each requires a carer, at all times, for education to be a success. ... Each appears to have an intellectual disability. ... Educationally, it is best if trained staff work with these children. One option is for the children

to attend the Special Education Class at South Hedland, if this were possible. Another option is to employ a special education teacher, or aide, at the [detention] Centre. There are volunteers offering to work with the children.<sup>224</sup>

In May 2002 the other children at Port Hedland started going to the local Catholic school. The school did not have a special education teacher or program but permitted ACM to use a spare room so that the three children could leave the centre and mix with other children during recess.

An ACM teacher accompanied the three children to the local Catholic school for half a day. However, he did not have any special education training.<sup>225</sup> He tried to contact State schools in Port Hedland that had special education teachers in order to obtain some guidance:

He hopes that he can get some input from one or other, even if it's just a couple of days a week that special ed teacher spends with them.<sup>226</sup>

For two to three weeks in June 2002 the ACM teacher was assisted by a voluntary special needs teacher's assistant for two to three hours a day.<sup>227</sup> In July 2002, the teacher reported on the education progress of the children. He stated that the decision to teach the children at the school 'has been partially successful':

In the longer term it's likely to be counterproductive – these children have unmet special needs...

I persist with the view that **the children belong in a Special School setting...**the most urgent needs are **ESL assessments and Education development testing**. If the education authorities are unwilling to take these responsibilities I recommend that funding be sought and the test undertaken as soon as possible.

In the interim Centre Management needs to build on the good work the children have begun by continuing their schooling...under the care of a Special Education teacher assisted by a suitable carer.<sup>228</sup>

From July-September 2002, the children's mother apparently prevented them from going to the Catholic school, possibly related to concerns over their safety.<sup>229</sup> By December, the children were again attending the local Catholic school<sup>230</sup> with their older sister assisting the teacher.

Despite the persistent urgings of the teacher, there is no evidence that a special education teacher was provided, nor that the educational assessments he suggested were conducted until the start of the 2003 school year when the children started attending the local special needs school in Port Hedland.

It is unclear why there was a delay in enrolling the children at this school. The Department stated that it had made several unsuccessful efforts at enrolling the children at the Port Hedland special needs school but did not provide reasons for the failure.<sup>231</sup> ACM states that the Principal of the school refused to accept them but gave no reasons for that refusal.<sup>232</sup> Evidence from the Western Australian Government suggests that it expected to be paid for the attendance of any children from the detention centres even though it would be provided at no cost if the children

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had appropriate visas.<sup>233</sup> It may therefore be that cost was the barrier to the children's access to the special needs school.

During the Inquiry's December hearing, the Inquiry asked the Department to assess whether appropriate education had been provided to the children:

INQUIRY COUNSEL: ... accepting for present purposes that the Department and ACM did offer the best available services open to them to offer in this detention environment, the point is that the best available at the time was not good enough to adequately deal with ... these disabled children. That is the point, isn't it?

MS McPAUL (DIMIA ASS SEC (UNAUTH ARRIVALS)): Well, I would accept that it is not part of the State curricula for special education. So to that extent I accept broadly what you are saying.<sup>234</sup>

### 11.7.2 Case 2: Curtin

In December 2000, the ACM Education Co-ordinator notified the Programs Co-ordinator that the boy with cerebral palsy had special education needs and outlined a program of 25 minutes at school, 30 minutes of play group and 30 minutes of reading group, all accompanied by his mother.<sup>235</sup>

There is a detailed education program dated March 2001, with 20 minutes a day of special education, approximately 35 minutes where he would join the mainstream class in the ACM school within the detention centre, playgroup with the other children, 10 minutes of optional reading and half an hour of therapy in the medical clinic.<sup>236</sup> There is no evidence of how long this program was pursued.

The next document in the Inquiry's files regarding education of this child is dated March 2002 when DCD suggested that:

ACM to consider increasing [the child's] participation in schooling. [He] would be participating in full time education (with the extra assistance of a One to One Worker – employed by the Education Department) – if he was in the community – the Curtin School would more than likely need to employ an educational assistant for [him]. The school to devise educational activities appropriate to [his] needs.<sup>237</sup>

It appears that the boy did start attending the on-site ACM school for two hours a day in order to interact with other children, but there was no special curriculum for him.<sup>238</sup> In June 2002, DCD noted that there was still no special curriculum:

Full time schooling curriculum to be designed specifically for [the child's] educational needs.<sup>239</sup>

ACM's Daily Activity Sheets noted increasing attendance at educational activities from June to August.<sup>240</sup> However, in August 2002, Department staff noted that there had been nothing done to implement DCD's recommendation to develop a special program:

All I can suggest for this that this be a matter discussed with his new carer at Baxter who will be responsible for his program and that it be considered in

amongst his swimming, physio, medical needs, excursions and other activities designed for his development and care.<sup>241</sup>

In October 2002, the ACM Baxter Case Management Plan notes that the boy is to be enrolled at the special needs school near the detention centre, 'to be commenced on twice weekly structured days'.<sup>242</sup> In July 2003 the boy had still not been enrolled. The Department states that there has been some resistance from parents of other children at the special school but it expects that this barrier to enrolment would soon disappear.<sup>243</sup>

A July 2003 assessment by the Crippled Children's Association notes that it would benefit the boy:

to have access to a customised educational program and specialised equipment designed for children with special needs to help him develop his physical and cognitive skills to their full potential. As there is limited space available and a restricted range of social opportunities, it is difficult for [him] to have these opportunities in the detention centre however he would have more opportunities to access these in a special school environment.<sup>244</sup>

### 11.7.3 Findings regarding education

The Inquiry finds that the Department has failed to ensure that children with disabilities are provided with an education adapted to their specific needs. There have been insufficient staff with the appropriate qualifications and support to develop and implement an education strategy within the detention environment. Furthermore, there have been inadequate efforts to enrol the children in external schools which have the appropriate staff and facilities for children with disabilities.

The Inquiry is particularly concerned about the very long delay in obtaining appropriate education for the children in Case 1. On the evidence before the Inquiry, it took 14 months before special education classes for these children were considered and two and a half years before they started attending the special needs schools in the local community.

Regarding the boy in Case 2, as at July 2003, external agencies were still recommending the implementation of a special education program. On 1 August 2003 he commenced attending a special needs school in Port Augusta.<sup>245</sup>

## 11.8 Were there appropriate recreational activities for children with disabilities in detention?

As set out in Chapter 13 on Recreation, recreational activities have a vital role to play in children's development. While children with certain disabilities may be able to join the activities provided to other children on occasion, they may also require specially designed programs. Moreover, they may require additional assistance to participate in the programs designed for other children. For example, it may be necessary to provide additional supervision in order to allow children with a disability to participate in excursions or participate in games with defined rules.

## A last resort?

The Department states that services must be tailored to suit a disabled child's individual recreational needs and that external excursions are considered by detention centre health staff.<sup>246</sup>

### 11.8.1 Case 1: Port Hedland

ACM states that the three children in this family enjoyed a variety of recreational activities including, picnics, swimming, movies, shopping, art classes, shell collecting and walks outside the detention centre.<sup>247</sup> However, ACM has not provided the dates on which these activities began or the frequency with which these activities took place other than to say they occurred 'regularly' or 'whenever possible'.

The primary documents before the Inquiry do not note specific recreational activities until March 2002. This does not mean that they did not occur prior to that time, but it does suggest that if these activities did take place it was not documented in the children's case management plans.

The ACM Programs Manager described the following recreational activities plan for the children in March 2002:

Special consideration is currently made for the children, to some extent. Games and art/craft materials are supplied to the children. They join some of the after-school activities.

Organised, simple games and sports for all children, but occasionally aimed at the abilities and interests of these particular children, may be helpful.

They have been welcome to attend the Saturday morning movie and popcorn session for children. [One of the children's] current behaviour should preclude him from attending without a carer.<sup>248</sup>

The Department's submission, dated May 2002, states that the three children with intellectual disabilities:

have recently been enrolled in Riding for the Disabled classes. This experience will assist with socialisation skills for the children, as well as provide a break for their carers.<sup>249</sup>

During the hearings the Department indicated that the riding class was 'an eight week course that actually commenced some time earlier in May [2002] and probably finished some time in June'.<sup>250</sup> However, the Department Manager reports indicate that the children were participating in August and September 2002.<sup>251</sup> In any event, the children did not attend every session, sometimes because their mother would not permit them to go, and other times because ACM did not have the staff to take them.<sup>252</sup> The ACM psychologist reported the horse riding program a 'resounding success'.<sup>253</sup> However, it was not an ongoing activity.

In July 2002, the psychologist reported that the children had done woodwork classes 'aimed at developing improved motor functioning and spatial awareness (and of course to have fun)'.<sup>254</sup> The medical records indicate that there were some efforts

to involve them in painting in order to better manage their behaviour (see section 11.4.1 above). The children also participated in a sausage sizzle outside the centre in June 2002.<sup>255</sup>

### 11.8.2 Case 2: Curtin

Although there is some evidence of a program to encourage the boy to play in a variety of positions, hold a spoon, reach for objects unassisted, and so on, in January 2001, this was occupational therapy rather than recreational activity.<sup>256</sup> In June 2001, the Health Service Coordinator discussed the possibility of daytime excursions to give the boy's mother some respite.<sup>257</sup> However, once again, the records provided to the Inquiry demonstrate that a planned recreational program only began in earnest after March 2002.

At that time, DCD recommended that the Department and ACM 'explore options for daily walks other than around the compound' and that 'activity based opportunities...be devised so that the family can spend time together (eg weekly outing if possible)'.<sup>258</sup> He started recreational outings from March 2002, although with a carer rather than his mother.<sup>259</sup> ACM also went to some effort to make staff and a vehicle available for family outings and gave them a television and video cassette recorder.<sup>260</sup>

The Daily Activity Sheets from April to August 2002 indicate that the boy attended four of the excursions provided to other children in the centre, all of which were during July, to the local swimming pool.<sup>261</sup>

### 11.8.3 Findings regarding recreation

As discussed in Chapter 13 on Recreation, the deprivation of liberty itself limits the recreational activities available to children with disabilities in immigration detention.

The Inquiry finds that there have been some discrete events, like Riding for the Disabled, arranged for the children in Case 1. However, this event occurred after they had been in detention for more than 18 months and it lasted approximately eight weeks. The Inquiry also finds that children with disabilities were permitted to attend some of the recreational activities provided to other children. However, these efforts were insufficient to amount to a recreational program that addressed the special needs of children with serious disabilities in detention for long periods of time.

## 11.9 Were appropriate steps taken to transfer or release children with disabilities from detention?

Much is known about the ill-effects of institutional settings on people with disability. It is widely agreed that those settings have negative effects on people with disability in terms of their health, emotional, intellectual and social developments.<sup>262</sup>

## A last resort?

Both ACM and the Department suggest that children in immigration detention enjoyed access to superior disability services while in detention than they might have obtained if they were in the community. While the Inquiry readily acknowledges that many children in the community with disabilities might have trouble accessing the full complement of services, the Department has a responsibility to ensure that children in detention are provided with the highest attainable standard rather than the lowest common denominator. This is because the family's freedom to seek out the best services – be it health, education, recreation or moral support – is taken away by detention. Furthermore, their arguments ignore the psychological harm caused by detention.

Many of these difficulties are the result of deprivation of liberty itself, which is why international law is so clear in providing that detention of children, and especially children with disabilities, be a matter of last resort (see further section 11.1 above on international law).

The importance of liberty for children is emphasised not only by article 37(b) of the CRC, but by article 23 which talks about maximising the ability of a child to participate in the general community. The UNHCR Detention Guidelines recommend that children with disabilities only be detained if there is a medical certification that detention will not impact on their well-being and the Australian Disability Services Standards require that disability services be provided in the 'least restrictive way'.

As Chapter 6 on Australia's Detention Policy explains, the Department has two options for removing children from a detention centre prior to the grant of a protection visa.

First, the Department can issue a bridging visa on the grounds of 'special health needs'. It is the view of the Inquiry that once children with disabilities have been identified, they are likely to be obvious candidates for such bridging visas. However, the Department states that:

while it is unfortunate that children are held in immigration detention, it is usually in their best interests (including if they are disabled) to remain with their parents [in detention].<sup>263</sup>

As discussed more fully in Chapter 6, a proper interpretation of the 'best interests' principle leads to the conclusion that it will usually be in the child's best interests to be released from detention *with* their parents. However, the current bridging visa regulations make it extremely difficult to bring about such a result.

Nevertheless, the Department has a second option available to it, namely the transfer of children and their parents to alternative places of detention in the community. The Department states that the reason it has not transferred the children with disabilities out of detention centres is that any alternative place must have 'a commensurate level of service, security and welfare as in the detention facility' and no such place has been located for these families.<sup>264</sup> Given the difficulties that the Department faces in providing care to the families in detention, it is surprising that an appropriate alternative has not been identified, especially when at least one of the families has close relatives in the community.

### 11.9.1 Case 1: Port Hedland

The Inquiry has not received any evidence that the Department made efforts to arrange for a bridging visa or transfer this family to an alternative place of detention in the community. This is particularly disappointing in light of the fact that the mother's sister lives in Sydney.

The first record of requests by the children's mother to be moved to Sydney is noted in the medical records in April 2002.<sup>265</sup> At the same time there is a note that a letter will be written 're transfer to another Centre where there are facilities to help with her children'.<sup>266</sup> She repeatedly requested appointments with the Department to ask to be moved to Sydney near her sister.<sup>267</sup>

The Department acknowledges that it was aware of the family ties. Moreover, it has stated that the presence of contacts in the community is one of the factors considered when a detainee asks to be moved from one detention facility to another.<sup>268</sup> The Department must also have been aware that there was more ready access to disability expertise in Sydney than in Port Hedland. However, the Department was unable to shed any light on why this family was not moved except that:

...there are a very large number of people who would probably prefer to be accommodated in Villawood and that is just simply not possible. Villawood has a fairly high capacity at the moment and is primarily used for managing the compliance program, compliance pick-ups from the New South Wales and to some extent Queensland jurisdictions. So you know, there are a number of different factors there that we have to balance up in terms of questions about where individual families might be located...<sup>269</sup>

The Department eventually changed its mind and on 1 September 2003, the family were transferred to Villawood detention centre.<sup>270</sup> The family was released on permanent refugee protection visas in December 2003.

### 11.9.2 Case 2: Curtin

As noted above, in May 2001, an ACM Health Services Manager recommended that the family move to a metropolitan detention centre because Curtin was unable to meet the needs of the child. While acknowledging that such a transfer 'may be, in a medical sense, a help for [the boy's] development', ACM management refused to do so due to operational considerations.<sup>271</sup> ACM states that the final decision rested with the Department Manager at Curtin, who refused to allow the transfer to go ahead (see section 11.4.2 above).

In March 2002, the Department Manager at Curtin noted that ACM had been emphasising 'having the child taken into care within the community'.<sup>272</sup> The Department acknowledged that March 2002, after the mother had left the boy in the care of ACM and the Department, was:

the first time that the Department probably, given the changed circumstances of the family in the centre, were seriously looking for other possibilities for the care of the child in some kind of a supported community arrangement.<sup>273</sup>

## A last resort?

In May 2002, the Department Manager at Curtin proposed five options regarding the care of this child:

1. Child is placed in a community facility and other family members are moved to an IDC in a metropolitan location;
2. Child is placed in a community facility and other family members are placed in an alternative place of detention within the community close to disabled child accommodation;
3. Child is placed in a community facility and other family members remain in an IRPC facility;
4. Representations made to authorities in [country of origin] to give consideration to forced return of family to [country of origin];
5. Entire family including the disabled child remains in an IRPC facility and ACM are assisted financially to provide care for the child utilising available community resources.<sup>274</sup>

The proposal notes that there are many difficulties with obtaining community placement for the child, including the absence of available places for children with disabilities. The Department also referred to the fact that:

DCS have advised that it will be impossible to place this child in the local community of either Derby or Broome. He will be a difficult placement, given his degree of dependence. Community placements in the best of circumstances are very difficult to achieve and waiting times run into years.<sup>275</sup>

Moreover in metropolitan centres, even though:

[F]oster care options do exist for foster children but in cases of profound disability, it is a very big ask of any other person to take on. It is extremely difficult for the welfare authorities to find a suitable placement that we could take advantage of.<sup>276</sup>

The May 2002 proposal also states that:

[T]he family would be very difficult to manage in an alternative place of detention and would definitely present a flight risk as they have exhausted all avenues to remain legally in Australia.<sup>277</sup>

When challenged as to the likelihood that a family with a child with such profound disabilities would be a flight risk, the Department did not address the specific characteristics of the family, but it gave the more general response that:

[O]nce families are not able to achieve the migration outcome they'd hoped for by coming to Australia as unauthorised boat arrivals or other unauthorised arrivals, the likelihood or propensity for absconding does increase with the advanced stage of processing and the number of determinations that have been made that the family have not been found to be refugees.<sup>278</sup>

The proposal concludes that option 5 – keeping the family in detention with increased financial support to ACM – appears to be the only viable one. The final recommendation is that the boy 'remain within the detention environment unless other reasonable options for placement in the community become available'.<sup>279</sup>

In June 2002, a social worker from DCD stated that she believed:

that this family should be released from detention and placed into the community as soon as possible....the family's breakdown and stressors is a direct result of the detention environment.<sup>280</sup>

A Departmental Minute in June 2002 suggested that the Department had made attempts to find 'suitable placement in the community' but was unsuccessful.<sup>281</sup> The Minute also stated that 'this option could be explored further following the family's relocation to Baxter'.<sup>282</sup>

In August 2002, 21 months into the family's detention, DCD wrote to the Department recommending the family's urgent release from detention:

The Department [DCD] has been involved with this family since March 2002 and is very concerned about their well being. Of particular concern is the deteriorating emotional and physical health of the children. It is strongly recommended that this family should be released from detention and placed in the community as soon as possible.<sup>283</sup>

The Department responded to DCD with an outline of the steps it had taken to develop coping strategies for the child and the rest of the family and then stated:

While the Department is willing to explore possible options for places for alternative detention, it would be necessary to establish that any community placement would be at least consistent with the level of support and access to services currently available to the family.<sup>284</sup>

The Department appeared to be suggesting that the child was better off in detention than in the community. However, it went on to suggest that the possibility of alternative detention might be discussed with the South Australian Government after the child was moved to Baxter.

The Inquiry also explored whether the Department had given any consideration to moving this family to a metropolitan detention facility:

I think the situation with this particular family group, as with the other family with disability – disabilities – that we've already discussed, is that very careful consideration needs to be given to changing the arrangements that might be in place and while we accept that the process of providing services and management plans to these individual families has improved over time, one of the features to provide successful management of these cases is to enable the families to live in an environment that is familiar, that is understood by the children and disruption through moves that might be operationally convenient to the Department from one compound or one centre to another would need to be carefully weighed up against the effects that that might have on the children themselves.<sup>285</sup>

The May 2002 proposal from the Department's Manager at Curtin, which considered the best place to move the family on its closure, went through the pros and cons of Port Hedland, Woomera and Baxter. It did not consider the metropolitan centres.<sup>286</sup> In any event, after 22 months in detention at Curtin, the boy and his family were

moved to Baxter. They were detained there for a further 13 months, until they were granted permanent refugee status in October 2003.

### 11.9.3 Findings regarding release and transfer

The Inquiry finds that the Department has failed to promptly pursue the available options for releasing or transferring children with disabilities from remote detention centres. As set out in Chapter 6 on Australia's Detention Policy, the Inquiry recognises that the criteria for granting bridging visas are extremely narrow, making it difficult to arrange for release on such visas. However, the Department has always had the possibility of transferring the family to an alternative place of detention in the community or, at the very least, to metropolitan detention centres with greater access to disability support services.

The Department failed to explore the possibility of transfer outside the facility regarding the family in Case 2, until 18 months after they had been detained. The family were released in October 2003, 35 months after they were detained.

Furthermore, in Case 1 the Department appears to have put 'operational considerations' above both the mother's desire to be near her sister in Sydney and the increased access to disability services in Sydney. In September 2003, more than three years after their arrival, they were transferred to Villawood. The family were released in December 2003, 40 months after they were detained.

The Department has suggested that one of the reasons it did not pursue the option of release on a bridging visa or alternative detention in the community is because the children received better services in detention than they would have in the community. The Department highlights the scarcity of resources for Australian children with disabilities in making this argument. ACM have also submitted that the services provided to the children in Case 1 and Case 2 over 2002 and 2003 are at least as good as the services that can be accessed by most families in the community with similar needs. Putting aside the inappropriateness of the delay in providing those services, the Inquiry is of the view that these arguments fail to take account of the following factors.

Firstly, detention per se limits the ability of children with disabilities to participate and integrate with the general community as required by article 23 of the CRC. The Department itself seems to recognise the limitations in the context of Case 2:

INQUIRY COUNSEL: ... Do you think that the conditions in which this child has been detained since November of 2000 have been such as to ensure that he has enjoyed a full and decent life in conditions which have ensured his dignity, promoted his self-reliance and facilitated his active participation in the community?

DIMIA ASS SEC (UNAUTH ARRIVALS): Look, I think to the fullest extent possible under the circumstances, that has been the case.<sup>287</sup>

Secondly, detention restricts the choices available to parents to seek the services that address the best interests of their children. The Inquiry readily acknowledges that the services available to families in the community may be scarce. However,

those families have the freedom to assess and lobby for the highest attainable care for their children and the most appropriate support for themselves. Families in detention do not have this option; they have no choice but to rely on the Department and ACM to provide for their children. As seen above, this has not always resulted in the best possible outcome for their children.

Thirdly, detention not only takes away certain choices from parents, it impacts on the mental health and coping mechanisms of parents and their children (see further section 9.3.4 in Chapter 9 on Mental Health). While this is an important factor for all children and parents, it can have a disproportionate impact on families with children with disabilities.

### **11.10 Summary of findings regarding the rights of children with disabilities in detention**

The Inquiry finds that there has been a breach of articles 2(1), 3(1), 6(2), 18(2), 23, 24(1), 28(1), 37(b) and 39 of the CRC.

In Chapter 6 on Australia's Detention Policy the Inquiry finds that Australia's mandatory detention laws, as administered by the Commonwealth, have resulted in the long-term detention of unauthorised arrival children, whether or not they have disabilities. Long-term detention creates particular difficulties for the care of children with disabilities. The Inquiry finds that the Department failed to address the needs of those children, within the confines of Australia's mandatory detention laws, in a manner that protects their rights under the CRC.

The Inquiry recognises that providing care to children with disabilities in detention is an extremely challenging task and that many individual staff members have done the best they can to assist these children. The Inquiry also acknowledges that, soon after the announcement of this Inquiry in November 2001, the Department started to focus greater attention on the development of management strategies, resulting in improvements in the quality of care. However, the Department has been responsible for children in detention for more than a decade.

When the children in the two case studies arrived in the Port Hedland and Curtin detention centres in August 2000 and November 2000 respectively, there were no systems in place to ensure routine and prompt consultation with State disability and child welfare authorities with the expertise to assist in the identification and management of children in detention with potential or observable disabilities. Furthermore, there does not appear to have been any use of the established State services standards to guide their service provision. This resulted in substantial delays in both these important areas.

The systemic failures in the management of children with disabilities in detention are reflected in the two case studies in this chapter. The children who are the subject of those case studies have serious disabilities with high needs, yet for most of the time that they were in detention these children and their families did not receive the services required to ensure that their special needs were met.

## A last resort?

On the evidence before the Inquiry, by the end of 2002 there was still no comprehensive case management plan and implementation strategy that adequately addressed the needs created by the intellectual disabilities of the children in Case 1. Regarding the boy with cerebral palsy in Case 2, there were efforts to create a plan on the boy's arrival but within six months staff were of the view that the boy could not be properly catered for in Curtin and the mother became disengaged. The services offered to the boy tapered off, culminating in the mother leaving the child in the hands of detention staff in March 2002. At this time State child welfare authorities became involved in the child's case management strategy and an appropriate plan was implemented.

There were also substantial delays in providing the appropriate aids and adaptations to the boy in Case 2. He was pushed around in a pram for the first seven months of his detention. There was also some concern about whether the 'Baby Jogger' that replaced the pram in May 2001 was best suited to his needs. In June 2002, a new wheelchair was purchased. Furthermore, it was only in March 2002 that the boy received appropriate eating utensils, bed, shower commode, communication devices and other aids and adaptations appropriate to his needs. The facilities improved further in September 2002 when the boy was transferred to Baxter.

The Inquiry therefore finds that the Department's failure to ensure a 'full and decent life' for these children 'in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community' resulted in a breach of article 23(1) of the CRC. The Department also failed to provide the special care and assistance required by these children to ensure that they had effective access to education, health care services, aids and adaptations and recreational opportunities 'in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual needs', as required by article 23(3). The Department's failure to provide appropriate levels of care to these children also breaches article 24(1), which requires that all children enjoy access to health care services to enable their enjoyment of the highest standard of health.

The Inquiry acknowledges that many of the stresses facing the mothers of the children were related to the detention environment itself. It was therefore very difficult for staff to provide the psychological treatment needed. Nevertheless, the Department has the obligation to ensure that the additional support needs of parents with children with disabilities are directly addressed. The Inquiry finds that, despite the efforts of staff to provide counselling to the mothers of these children in detention, there was no comprehensive plan of support sufficient to address their additional needs. In Case 2, the heightened pressures that come with detention, combined with a lack of support, led to a complete breakdown in the mother's ability to be primary carer of her children. This amounts to a breach of article 23(2) which requires that assistance be provided to those responsible for the care of a child with a disability and article 18(2) which requires appropriate assistance for parents in the performance of their child-rearing responsibilities.

The Inquiry acknowledges the efforts of on-site teachers to provide some education to the children in Case 1 especially. However, these teachers did not have special

education training nor were they provided with special education teaching support. Despite the inability of the internal school system to accommodate these children, in Case 1 it took 14 months before special education classes were considered and two and half years before they received education from appropriately qualified teachers. This occurred when they began attending the local school in Port Hedland which had a special needs stream. Prior to this time their education failed to address their special needs and fell well below the standard of education offered to similar children in the community. Regarding Case 2, in July 2003, external agencies were still recommending the implementation of a special needs education program. The boy commenced attending an appropriate school in August 2003.

The failure to provide the special education required by these children results in a breach of article 23(3). There has also been a breach of articles 2(1) and 28(1) which require that all children be provided with the appropriate level of education on the basis of equal opportunity and without discrimination on the basis of their disability or immigration status. Although the children in these two case studies were able to attend internal schooling for some of the time in detention, there were insufficient measures taken to ensure that they could benefit from this schooling to the same extent as children without disabilities.<sup>288</sup> In addition, while the children in Case 1 were permitted to use a classroom at the local Catholic school, neither they nor the boy in Case 2 had access to external schools that provided an education appropriate to their needs until 2003. Accordingly they did not enjoy education on the basis of equal opportunity as compared to either the other children in detention or children with similar needs in the community.

Discrete events, like Riding for the Disabled, were offered to the children in Case 1 after 18 months in detention. Furthermore, children with disabilities were permitted to attend some of the recreational activities provided to other children in the centre. However, these opportunities were inadequate to address the recreational needs of the children. The failure to provide targeted recreational (as opposed to therapeutic) opportunities for a substantial period of their time in detention is likely to be connected to the failure to produce comprehensive case management plans addressed to their specific needs. This results in a breach of article 23(3) which requires assistance to be provided to ensure that children have access to, and receive, appropriate recreational opportunities.

While the Inquiry acknowledges that providing the appropriate level of services to children in detention is a challenging task, especially when the children are in detention for long periods of time in remote areas, it is within the power of the Department to seek the prompt release or transfer of children with disabilities from those areas.

The Inquiry finds that the Department failed to promptly pursue the option of releasing the children on a 'special needs' bridging visa, or into alternative care in the community or, at the very least, to transfer the children to metropolitan centres where access to disability services is greater. It appears that operational considerations resulted in a three-year wait before transferring the family in Case 1 to Villawood in Sydney in September 2003. They were released from Villawood detention centre on permanent refugee protection visas in December 2003. The

## A last resort?

family in Case 2 was released on permanent refugee protection visas, after almost three years in detention, in October 2003. These circumstances amount to a breach of article 37(b) of the CRC which requires detention for the shortest appropriate period of time. In the circumstances of these children, their continued detention was not, in the Inquiry's view, appropriate.

Further, the Inquiry finds that Australia's detention laws and the manner in which they were administered by the Minister and Department – both in terms of the length and location of detention, and the care provided to the children – failed to ensure 'to the maximum extent possible' the development of the children, in breach of article 6(2). There has also been a failure to ensure that children with disabilities enjoy an environment that fosters their recovery and reintegration from past trauma in accordance with article 39.

The Inquiry also finds that the length of their detention and the failure to provide these children with the appropriate level of care, demonstrates that the best interests of these children was not a primary consideration in all decisions concerning them. The Inquiry therefore finds that article 3(1) of the CRC was breached in relation to these children. The extent to which the system of mandatory detention itself reflects a failure to make the best interests of children a primary consideration is considered further in Chapter 17, Major Findings and Recommendations.

The circumstances outlined above must also be taken into account in considering whether the conditions of detention are such to satisfy the right to be treated with the inherent dignity of the child in accordance with article 37(c). This is also discussed in Chapter 17.

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## Endnotes

- 1 They were also accompanied by their grandfather and uncle. Untitled document listing family's personal details and relationships to one another, (N5, Case 7, pp96-7).
- 2 See further DIMIA, Transcript of Evidence, 4 December 2002, p79.
- 3 See in particular, DIMIA, Transcript of Evidence, 4-5 December 2002.
- 4 UNHCR, *UNHCR Revised Guidelines on applicable Criteria and Standards relating to the Detention of Asylum Seekers*, 1999, guideline 7, 'Detention of Vulnerable Persons'.
- 5 *The Declaration on the Rights of Disabled Persons* and the *UN Declaration on the Rights of Mentally Retarded Persons* are scheduled to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).
- 6 IDS, 1998, 9.1, [www.immi.gov.au/detention/det\\_standards.htm](http://www.immi.gov.au/detention/det_standards.htm). The revised IDS attached to the detention services contract signed on 27 August 2003 are more detailed in their provision of services to children with disabilities. However, those IDS were not operational throughout the period of the Inquiry.
- 7 DIMIA, Managers' Handbook, Section 4.12, Issue 3, 30 April 2002, para 6.
- 8 DIMIA, Transcript of Evidence, Sydney, 4 December 2002, pp83-84.
- 9 DIMIA, Submission 185, pp69-70.
- 10 See also Multicultural Disability Advocacy Association (MDAA), Submission 122, p10.
- 11 Department of Human Services (DHS), Submission 181, pp34-35.
- 12 DIMIA, Contract Management Group Minutes, 19 April 2001, (N1, Q4, F4). See further Chapter 5 on Mechanisms to Protect Human Rights for a description of Contract Management Group and Contract Operations Group meetings.
- 13 DIMIA Curtin Manager Reports, October 2001, November 2001, December 2001, (N1, Q3a, F5).

- 14 DIMIA Curtin Manager Report, November 2001, (N1, Q3a, F5).
- 15 The Department provided the Inquiry with Curtin Department Manager Reports beginning in the first quarter of 2001, (N1, Q3a, F5).
- 16 The Department provided the Inquiry with Port Hedland Department Manager reports beginning in the first quarter of 2001, (N1, Q3a, F5).
- 17 DIMIA Director, Detention Operation Section, Letter, to ACM General Manager Detention Services, 5 November 2001, (N5, Case 7, p442).
- 18 DIMIA, Transcript of Evidence, Sydney, 5 December 2002, p62.
- 19 ACM Curtin Programs Coordinator, Memo, to DIMIA Curtin Manager, 19 April 2002, (N5, Case 2, p534).
- 20 DIMIA Curtin Manager, Email, to DIMIA Central Office, 20 June 2002, (N5, Case 2, p1662).
- 21 ACM Detention Services Monthly Report, Health Services Monthly Report, August 2002, p76.
- 22 Medical Practitioner, Port Augusta Hospital and Regional Health Services, Report, 20 September 2002, (N5, Case 2, p414).
- 23 ACM Managing Director, Letter, to DIMIA Assistant Secretary, Unauthorised Arrivals and Detention Services, DIMIA Central Office, 10 October 2002, (N5, Case 2, p1671).
- 24 DIMIA, Transcript of Evidence, Sydney, 5 December 2002, p63.
- 25 DIMIA, Transcript of Evidence, Sydney, 5 December 2002, p62.
- 26 ACM, Response to Draft Report, 5 September 2003.
- 27 ACM Health Services Operating Manual, Policy 6.6, Decision Making – Special Needs Detainees, Issue 2, 9 May 2002, para 4.3, (N1, Q8, F9).
- 28 ACM, Policy 16.1, Special Care Needs for Minors and Unaccompanied Minors, Issue 4, 12 August 2001.
- 29 Michael Hall, Submission 288a, p1.
- 30 DSC, Disability Services Standards, June 2001, Glossary, at <http://www.dsc.wa.gov.au/content/publications.asp#15>, viewed 25 November 2003.
- 31 DIMIA, Information Required, (N4, Q10, F9).
- 32 DIMIA, Information Required, (N4, Q10, F9).
- 33 Western Australian Government, Transcript of Evidence, Perth, 10 June 2002, p34.
- 34 DHS, Submission 181, Appendix 3, Child and Youth Health, p68.
- 35 DIMIA Port Hedland Manager, Facsimile, to DIMIA Deputy Secretary, 27 June 2002, (N5, Case 7, p438).
- 36 DSC, Letter, to DIMIA Port Hedland Manager, 19 June 2002, (N5, Case 7, p424).
- 37 DIMIA Port Hedland Manager, Facsimile, to DIMIA Deputy Secretary, 27 June 2002, (N5, Case 7, p438).
- 38 Derby Health Services, Letter, to ACM Curtin Nurse, 29 March 2001, (N5, Case 2, p958).
- 39 DCD, Acting Executive Director Community Development and Statewide Services, Letter, to DIMIA Assistant Secretary, Unauthorised Arrivals and Detention Services Branch, 1 August 2002, (N5, Case 2, p1681).
- 40 DCD, Case Notes, 25 March 2002, (N5, Case 2, p489).
- 41 DCD, Summary of Visit and Recommendations, referring to DCD contacting DSC on 4 April 2002, (N5, Case 2, p486).
- 42 DCD, Summary of Visit and Recommendations, 28 June 2002, (N5, Case 2, pp1682-3).
- 43 The Department of Human Services (DHS) is responsible for child protection and child welfare in South Australia. Family and Youth Services (FAYS) is the section of DHS that manages these responsibilities.
- 44 DHS, FAYS, Memo, to DIMIA Baxter Deputy Manager, 16 December 2002. ACM, Response to Draft Report, 1 October 2003, Attachment 44, p182.
- 45 DHS, FAYS, Memo, to DIMIA Baxter Deputy Manager, 16 December 2002. ACM, Response to Draft Report, 1 October 2003, Attachment 44, p182.
- 46 The Crippled Children's Association of South Australia, Planning Report, 17 July 2003. ACM, Response to Draft Report, 1 October 2003, Attachment 44, p190.
- 47 DHS, FAYS, Memo, to DIMIA Baxter Deputy Manager, 1 April 2003. ACM, Response to Draft Report, 1 October 2003, Attachment 44, p187.
- 48 United Nations Children's Fund (UNICEF), *Implementation Handbook for the Convention on the Rights of the Child*, United Nations Publications, Geneva, 2002, p335.
- 49 DIMIA, Submission 185, p69.
- 50 NEDA, Submission 210, p5.
- 51 DIMIA, Submission 185, p69.
- 52 DHS, Submission 181, Appendix 3, Child and Youth Health, p67.
- 53 DHS, Transcript of Evidence, Adelaide, 1 July 2002, p91.
- 54 See MDAA, Submission 122; NEDA, Submission 210.
- 55 MDAA, Submission 122, p11.

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- 56 Aspartylglucosaminuria (AGU).
- 57 Minister for Immigration and Multicultural and Indigenous Affairs, Letter, to Human Rights Commissioner, 20 November 2002.
- 58 DIMIA, Transcript of Evidence, Sydney 4 December 2002, p84.
- 59 DIMIA, Response to Draft Report, 10 July 2003, referring to TKT Europe, Epidemiology of LSD, [http://www.tkt5s.com/html/lysosomal/lys\\_epidemiology.html](http://www.tkt5s.com/html/lysosomal/lys_epidemiology.html), viewed 11 November 2003.
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# Chapter 12

## Education for Children in Immigration Detention

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## 12. Education for Children in Immigration Detention

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Just send my children to school, and let them be in freedom. They should live in a human good atmosphere, they should learn something good, and not the things they are learning here.<sup>1</sup>

A child's experience of detention is fundamentally affected by the level of education with which they are provided. This chapter assesses the provision of education to children in detention, compares it to the provision of education to similar children living in the Australian community, and determines whether the education that has been provided to children in detention meets Australia's international human rights obligations.

The provision of education to children in detention has changed considerably over time. At the announcement of the Inquiry in November 2001, most of the approximately 700 children in detention were being educated in internal detention centre schools. By the end of 2002, approximately half of the children in detention were accessing external education, with approximately 80 per cent in external schools by mid-2003.

Documents from the Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA) and its services provider, Australasian Correctional Management Pty Limited (ACM), as well as evidence from former detention centre teachers and detainees all suggest that there were serious barriers to the provision of an adequate education inside detention centres.

However, external education significantly improves the education received by detainee children. It is unfortunate it took until late 2002 before it was available to the majority of children.

This chapter addresses the following general questions:

- 12.1 What are children's rights regarding the provision of education in immigration detention?
- 12.2 What policies were in place regarding education for children in detention?
- 12.3 What education is provided to similar children in Australian schools?
- 12.4 What education was provided in internal detention centre schools?
- 12.5 What external education was provided to children in detention?

There is a summary of the Inquiry's findings and three case studies at the end of the chapter.

### 12.1 What are children's rights regarding the provision of education in immigration detention?

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available and free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

*Convention on the Rights of the Child, article 28*

Article 28 of the *Convention on the Rights of the Child* (CRC) applies equally to all children within Australia, whether or not they are in immigration detention. It sets out that the core minimum obligation is to ensure that primary education should be 'compulsory and available free to all'. Secondary education should be made 'available and accessible to every child'. Furthermore, 'educational and vocational information and guidance' should be made available and accessible to all children and measures should be taken 'to encourage regular attendance at schools and the reduction of drop-out rates'.

Article 29 sets out the broad goals of education, including 'the development of the child's personality, talents and mental and physical abilities to their fullest potential'.

The Department argues that the CRC does not establish a standard of education to which children are entitled:

States have some flexibility in the manner in which they implement such international obligations. Moreover while the [CRC] sets out the obligation to provide education it does not establish the quantity, quality or level of that education which obviously differ widely across the international community of States.<sup>2</sup>

While the Inquiry agrees that there is no *absolute* standard required by the CRC, the CRC is quite clear about *relative* standards. The principle of non-discrimination, set out in article 2 of the CRC, means that within a country there must be no lesser provision of education for any one group of children, regardless of nationality or immigration status and regardless of how the child arrived in the country. Article

28(1) of the CRC reinforces this general principle of non-discrimination by specifically recognising the right to education for all children on the 'basis of equal opportunity'.

The principle of non-discrimination with regard to the provision of education is also reinforced by the *Convention against Discrimination in Education* to which Australia is a party. It prohibits Australia from depriving 'any person or group of persons of access to education of any type or level', limiting 'any person or group of persons to education of an inferior standard' or establishing or maintaining 'separate educational systems or institutions for persons or groups of persons'.<sup>3</sup> Specifically, the treaty requires that States Parties give 'foreign nationals resident within their territory the same access to education as that given to their own nationals'.<sup>4</sup>

The Department argues that:

the principle of non-discrimination does not require that Australia provide education to children in detention in exactly the same manner as children in the community. Australia's obligation is to provide appropriate education to all children in Australia, consistent with Article 28 of the [CRC]. Such provision must, however, also take account of the individual circumstances of a child, which in this case will include, among other things, that the child is required to be detained.<sup>5</sup>

While the manner in which education is provided to children in detention may differ from the manner in which education is provided to children in the community, the Inquiry notes that this does not permit the Department to provide a level or quality of education inferior to that provided to similar children living in the Australian community who are not detained. Rather, when Australia implements a policy that requires detention of certain children, international law requires that special measures be taken to ensure that those children enjoy their right to education on the basis of equal opportunity. In other words, while the Inquiry acknowledges the difficulties that are presented by the detention environment in providing an adequate level of education to children who are detained, articles 28 and 2 of the CRC require Australia to overcome those problems in order to ensure an appropriate level of education.

Furthermore, article 22(1) of the CRC requires Australia to give special assistance to asylum-seeking children. In the context of education this means that schooling should be tailored to address the special needs of these children. The Refugee Convention makes it clear that the provision of education for refugee children should be equal to that provided for nationals of the same age with respect to primary education and equal to other non-national children with respect to secondary education.<sup>6</sup>

The Refugee Convention also requires the provision of education to all children irrespective of whether they have been recognised as refugees. Similarly, the United Nations Committee on the Rights of the Child has held that children who have had their refugee status applications rejected are entitled to education commensurate to that available to other children resident within a country.<sup>7</sup>

Furthermore, where there are various options regarding the provision of education to children in detention, article 3(1) of the CRC requires the Department to ensure

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that the best interests of the child are a primary consideration in determining the manner in which education will be provided.

The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the JDL Rules) provide some guidance on how to provide appropriate education to children who have been deprived of their liberty. First, the JDL Rules state that education for detained children should be provided in schools external to detention facilities, through 'programmes integrated with the education system of the country'.<sup>8</sup> The JDL Rules also state that:

Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education.<sup>9</sup>

Furthermore, the JDL Rules provide that children:

above compulsory school age who wish to continue their education should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes.<sup>10</sup>

The quality of education provided to children in detention has an impact on Australia's compliance with a child's rights to enjoy the maximum possible development (article 6) and the right to be treated with humanity and respect while in detention, taking into account the age of children (article 37(c)). It may also influence an overall assessment as to whether Australia's mandatory detention laws permit the best interests of the child to be a primary consideration (article 3(1)).

In summary, Australia is obliged to provide education to detained asylum seeking children to a standard commensurate with that provided to similar children attending schools within the Australian community, keeping in mind what would be in the best interests of the child. The United Nations recommends that this education should not take place inside detention centres.

## 12.2 What policies were in place regarding education for children in detention?

The Department is responsible for ensuring that children in detention can enjoy their rights under the CRC to access education on the basis of equal opportunity with other children in Australia. Under the detention services contract, ACM was responsible for actually providing these services. The Department states that by requiring ACM to provide these services it was fulfilling its human rights obligations. However, the Department must do more than just make contractual provision for services. It must monitor the performance of the contract and ensure that any shortfall is rectified.<sup>11</sup>

The monitoring of services is the responsibility of the Department's Manager in each centre. This responsibility included 'oversighting ACM service delivery and contract performance through day to day involvement in the centre as well as ongoing monitoring and reporting'.<sup>12</sup>

The performance measure for the assessment of education is the Immigration Detention Standards (IDS). The 1998 IDS defined education programs as:

pre-school and school curriculum based programs, focusing on English as a second language and taking into account variable lengths of stay in detention of students, in line as far as possible with local education authority standards, provided by qualified teachers, either within the detention facility, or within local schools if appropriate and within requirements for continued detention.<sup>13</sup>

The only other requirement specific to the education of children (as opposed to detainees generally) was that '[s]ocial and educational programs appropriate to the child's age and abilities are available to all children in detention'.<sup>14</sup> However, the IDS also stated that '[a]ll detainees have access to education, recreation and leisure programs and facilities which provide them the opportunity to utilise their time in detention in a constructive and beneficial manner'.<sup>15</sup>

The principal ACM policy governing education was contained in a document entitled 'Education, Recreation and Leisure programs'. The stated purpose of the policy is to 'ensure the detainees of the Centre are provided with the opportunity to participate in programs to the extent that local resources and the amount of time available to the detainee allow'.<sup>16</sup>

The ACM policy included 'general pre-school and primary school classes' in its list of programs, but did not mention provision of education for secondary school students.<sup>17</sup> The ACM policy stated that consideration would be given to the 'availability of local resources' in the provision of programs but that 'program participation will be voluntary'. The policy document did not contain any specific requirements or guidelines regarding curriculum, hours of education or the qualifications of teachers.

Neither the Department nor ACM sought the assistance of State governments in developing standards or policy regarding the provision of education for children in detention. This is surprising given the pre-existing expertise of State education authorities in providing education to similar children in the Australian community.

## **12.3 What education is provided to similar children in Australian schools?**

The central question in assessing whether Australia is meeting its obligations to children in immigration detention under the CRC is whether they are provided with education of a standard comparable to that provided to similar children in the Australian community. This requires consideration of the general standards of education provided in Australia, as well as the special provisions that are made for children similar to those in detention.

There are many children with similar experiences to detainee children who are educated within the Australian community. For example, children who arrive in Australia with a visa who seek asylum and live in the community on bridging visas;

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children who arrive under Australia's Refugee and Humanitarian Program; and children released from detention and living in the community on temporary protection visas all attend Australian schools. These children are of culturally and linguistically diverse backgrounds and have significant educational, emotional and social needs. Collectively they are the group of children referred to in this chapter as 'similar children'.

This section therefore describes the education generally provided to similar children in the Australian community. In particular it describes the New Arrivals Program.

### 12.3.1 Curriculum

There is no national curriculum in Australia. Instead each State, through the department of education or a statutory body, determines and administers its own curriculum. Schools are responsible for ensuring that the prescribed curriculum is delivered to all students.

Each State has specialist programs to cater to the educational needs of a cohort of students similar to those in immigration detention. In particular, in each State there is either an English as a Second Language (ESL) curriculum or an established practice of using ESL documents as a guide for targeted language teaching for ESL learners within the general curriculum.

Importantly, throughout Australia, ESL instruction occurs across the curriculum. Students requiring ESL instruction, even those who have very little English, acquire language skills at the same time as they receive instruction in the mainstream curriculum. Students are often taught by specialist subject teachers who also have ESL qualifications.

National ESL documents are widely used in Australia as a guide to help teachers record and assess the progress of students learning English as a second language in reading, writing, speaking and listening.<sup>18</sup> Generally, these documents provide:

- a set of benchmarks for ESL learner achievement
- a common language for reporting student achievement
- guidance to teachers in making judgments about students' level of achievement
- help in identifying ESL learners' needs to assist program and curriculum development.

The manner in which ESL is taught differs between States. Some states have a full ESL curriculum; some have documentation supporting ESL learning in mainstream curriculum areas; and some use national documents to assist in adapting curriculum for ESL learners. For example, Victoria has developed a specific ESL curriculum for all levels of schooling, and has ESL Course Advice documents for other key learning areas.<sup>19</sup> In New South Wales, outcomes from national ESL documents have been incorporated into the English Syllabus for years 7-10 and there is a specific ESL curriculum for students in years 11-12. In South Australia, the ESL Scope and Scales document, published in July 2002, operates as a guide to the implementation of

the curriculum for ESL learners. In Western Australia, there is no specific curriculum guide for the teaching of ESL. Rather, ESL teachers in the State use the national documents as both progress maps and planning documents. Across Australia, there are clear curriculum guidelines for developing programs for ESL learners.

### 12.3.2 New Arrivals Program

Within Australia, the provision of education is the responsibility of State and Territory governments.<sup>20</sup> However, the Commonwealth provides financial support for education systems, individual schools and individual students through its funding programs.<sup>21</sup> In particular, Commonwealth funds support State education authorities in providing ESL programs under the New Arrivals Program.<sup>22</sup>

In the Australian community, children similar to those in detention usually attend Intensive English Centres (IECs) partially funded through the Commonwealth's New Arrivals Program. Children attending IECs have significant special needs. As well as their second language learning needs, they may have had little experience of schooling, and may need special support due to prior experiences of torture and trauma. Schools operating as part of the New Arrivals Program specifically work to meet the special educational and social needs of these children.

Children attending these schools are provided with an intensive English program, which in each State is taught within the context of the key learning areas of the relevant mainstream curriculum. This means that students acquire English language at the same time as they study the relevant State curriculum.

For example, in South Australia, the New Arrivals Program provides intensive English support for children newly arrived in Australia.<sup>23</sup> Students attend New Arrivals Program centres for approximately one year before they enrol in local schools, while a course for children who have had 'no schooling, or limited schooling' may take up to 'six terms, 1½ years'.<sup>24</sup>

In the South Australian Primary New Arrivals Program, classes are small, organised by age, and students are taught the full range of primary school subjects in English. In the Secondary New Arrivals Program, students follow an intensive ESL course in all subject areas. This program is conducted:

in a supportive environment where students develop the skills and knowledge to successfully participate both in secondary schooling and society in Australia.<sup>25</sup>

The South Australian Department of Education describes the New Arrivals Program as follows:

The NAP is a well resourced part of the total ESL Program in South Australia. Staffing guidelines in the NAP provide for relatively generous allocations of teachers to provide the intensive teaching and support at this initial point of schooling. Teachers in the NAP are qualified and experienced ESL teachers.<sup>26</sup>

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Schools with ESL students in South Australia are provided with additional staffing, according to an assessment of the needs of their students. Within South Australia there is also support for new arrival ESL learners in geographically isolated schools. Professional development services are offered to teachers in schools where there are ESL learners, including schools in isolated areas.

Similar programs are offered in New South Wales, Victoria, and Western Australia.<sup>27</sup> Therefore, throughout Australia qualified staff meet the needs of newly arrived students through specialist programs. An example of the way in which one such program works is provided below.

### 12.3.3 Holroyd High School – providing education to new arrival students

Holroyd High School is in the Fairfield District of western Sydney. As well as providing mainstream schooling for Years 7-12, it is the largest of the fourteen IECs in NSW. The average monthly enrolment in the IEC in 2002 was 214 students. The majority of students are refugees. Students spend an average of three to four terms in the IEC.<sup>28</sup>

Since January 1999 the IEC has enrolled forty-eight students on temporary protection visas. As well, a small number of students with temporary protection visas have enrolled directly into the mainstream high school. All of these students were in immigration detention. None arrived with any documentation of schooling undertaken while in detention.

All students entering the IEC are assessed for English language competence and literacy when they enrol. On the basis of the initial assessment, students are allocated to regular or special needs classes. Special needs classes are small classes which cater for students with low literacy, interrupted schooling, or trauma. Currently, Holroyd IEC has nine special needs classes, one of which is for beginning literacy, and six regular classes.

Students enrolling from immigration detention typically have some spoken English 'picked up' from interactions with the detention officers in the detention centres, but have no written English, unless they have previously studied English at school in their country of origin. In the IEC, students receive English language instruction through subject areas. Classes are organised by age. Students also do sport, and take part in a program of experiential excursions.

At the conclusion of the New Arrivals Program, students exit the IEC to Holroyd and other high schools, or to TAFE. For students at Years 10, 11 and 12 levels, the high school operates a bridging course in the second semester of each year to enable successful transition into senior high school or TAFE. This is entirely school funded.

In the high school, ex-IEC students are provided with ESL support, through parallel classes, withdrawal groups and team teaching. The school has also developed a unique Board of Studies endorsed school course for Years 9 and 10 ESL students, English for Specific Purposes. This course has School Certificate accreditation.

In Years 11 and 12, students with fewer than five years of formal English instruction may undertake the Higher School Certificate ESL course. In the IEC, older students access the dual-accredited national course, the Certificate of Spoken and Written English, Levels 1 and 2, and in the high school, Level 3.

The school provides assistance to needy students through the Student Assistance Scheme (SAS) for subject contributions, school uniform, shoes, excursions, stationery and equipment, and basic sustenance. Both the high school and the IEC operate clothing pools. The IEC also uses SAS funds to subsidise excursions and to provide swimming lessons. TPV and bridging visa students have high support needs in comparison to other needy students, as they have few resources when they arrive in the school.

The Holroyd High School example clearly demonstrates that children of very similar background to detainee children have their needs expertly catered for in schools within the Australian community.

## **12.4 What education was provided in internal detention centre schools?**

The Department, ACM and former teachers at detention centres have told the Inquiry that there are several barriers to providing a full education program within detention centres. This section recognises those challenges and examines what efforts have been made by the Department and ACM to overcome those problems in order to ensure that children in detention can enjoy their right to education on the basis of equal opportunity to other similar children.

After addressing the general challenges to providing education inside detention centres, this section considers the following aspects of the education provided to children in internal detention centre schools:

- the attendance levels in internal schools
- the curriculum offered to children
- assessment and reporting of children's progress
- the number of teaching staff available to children
- the hours of tuition offered to children
- the educational infrastructure within the centres.

The Inquiry notes that by mid-2003 a significant proportion of children in detention were attending schools external to the detention centres. However, as most children detained since 1999 attended educational programs within detention, it is important to assess the quality of those programs. Furthermore, most of the children who gained access to external schools in 2003 had been detained for over two years during which time they were educated within the centres. Some children still in detention in November 2003 had never had the opportunity to go to external schools (see for example Case Study 3 at the end of this chapter). Therefore it is important to assess the programs offered within detention since 1999.

### 12.4.1 General challenges to providing an appropriate education in internal schools

Children's enjoyment of the right to education in detention centres is influenced both by the quality of the schooling offered to them and their capacity to absorb it within that environment.

The Department told the Inquiry that providing education within detention was uniquely challenging:

[T]here are a number of other factors that are rarely encountered in the wider community which complicate the provision of education to children in detention. These include:

- differing cultural beliefs about appropriate levels of schooling according to the age and gender of the child;
- disturbances within the detention facilities which result in the destruction of education facilities and/or result in an unsafe environment for both staff and children;
- socialisation and learning difficulties associated with past torture and trauma;
- a suspicion of authority arising from experiences with other governments and their agencies; and
- difficulties adapting to new environments.<sup>29</sup>

ACM also drew the Inquiry's attention to certain difficulties including:

- fluctuating and transitory nature of the school aged detainee population;
- vastly diverse cultural backgrounds and abilities of the children within a relatively small cohort of the same age group;
- infrastructure constraints, exacerbated by the destruction of facilities by detainees;
- need to ensure security and good order which ACM is contractually required to place before all other IDS;
- difficult access to resources and facilities in remote centres;
- long term detainee children's preoccupation with visa issues leading to loss of motivation to receive education.<sup>30</sup>

ACM emphasised that it did not have any control over many of these factors.

Teachers working in detention centres confirmed that there were inherent barriers to providing a good education in detention. A former Woomera teacher, who worked in the centre from May to August 2001, stated that during 2001:

a positive and meaningful education program [was] not possible in Woomera given the current political and management policies, treatment of detainees, environmental conditions, detainee's physical, mental and emotional states and extreme lack of resources, both material and human.<sup>31</sup>

This teacher further stated that 'disruptions due to disturbances/riots, continual relocation/rehousing of detainees between compounds, releases and arrivals, detainee health and psychological states' all contributed to this difficulty.<sup>32</sup>

Furthermore, another teacher formerly employed at Woomera summarised the problems as follows:

It was not possible to provide the type of educational services outlined by the Immigration Detention Standards (IDS). The lack of classrooms, the limited number of teachers and the hostile environment for teaching were the main factors. ... We made numerous overtures to the programs manager and the centre manager and through monthly reports about the shortage of teachers and classrooms (all to no avail).<sup>33</sup>

An overwhelming factor impacting on the children's ability to learn was their ever-increasing depression. Teachers and students all described how an initial excitement to learn gradually disappeared as their time in detention got longer. One former Woomera teacher told the Inquiry:

Some of the teenage children became visibly depressed the longer they stayed at the Centre [Woomera]. These children stopped coming to class or if they did attend their mood had deteriorated so they no longer showed any enthusiasm for learning.<sup>34</sup>

An unaccompanied child told the Inquiry that his increasing psychological distress during his time in detention meant that he had learnt nothing at all while he was there:

We did have an opportunity to study and as I mentioned before I was very depressed and psychologically I was very uncomfortable. So I stopped going to English classes and after a while, I decided to go back and while I was there I remember that the teacher used to tell us as long as you are here, try to learn as much English as you can and at least when you go out you can solve your problems. But then we weren't even able to think, when you're distressed because everyone was so psychologically distressed and no-one could concentrate. Now when I go back and I think about that I realise that there was lots of good books for us to study in there but unfortunately since psychologically I was not ready for that, I couldn't concentrate and when I got out of the detention centre, I had learnt nothing at all.<sup>35</sup>

A teenage girl detained at Woomera in June 2002 also said that her detention affected her ability to concentrate:

... we want freedom. We cannot learn properly, we need a lot of things and when we are depressed here we cannot at all study properly.<sup>36</sup>

The Department has stressed that the circumstances surrounding the detention of children during 2001, namely a large influx of detainees, should be taken into account in assessing the education with which they were provided. For example, the Department has suggested that:

With regard to the circumstances facing the department and services provider in later 1999 through 2001, the focus was on meeting basic needs,

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such as ensuring detainees were provided with accommodation, food and other essentials.<sup>37</sup>

Thus it appears that there are several aspects of the detention of asylum seeker children which make it difficult to provide a good education in detention. These factors include the changing numbers of students; the infrastructure available to teachers and students, especially in remote centres; the need to maintain security within detention centres; the occurrence of violent disturbances within the centres; the mental health problems caused by past torture and trauma and the detention environment; differing cultural backgrounds; and differing educational levels.

The fact that the Department and ACM were aware of these issues makes it all the more surprising that children were not immediately sent to mainstream Australian schools, which remove many of these barriers (see further section 12.5 on external education). In any event, it is clear that the Department and ACM were aware of the issues they needed to overcome in order to provide an adequate education. It is therefore important to examine what measures they took to address these challenges within the context of the internal schools.

### 12.4.2 Curriculum offered to children in internal schools

It was not a proper school, not like this, nothing like this, this is heaven.<sup>38</sup>

*Unaccompanied child comparing the education provided at Curtin to education at an Intensive Language Centre in Perth*

#### (a) Challenges to providing an appropriate curriculum to children in detention

The Department and ACM highlight three difficulties in providing a full curriculum to children in immigration detention. First they argue that the special needs of detainee children mean that the standard Australian curriculum is inappropriate. Second, they state that it was difficult to develop a specific curriculum for detainee children because of the transitory nature of the detention centre population. Third, they highlight the barriers to ensuring an appropriate level of curriculum resources.

With respect to the issue of applying the standard Australian curriculum the Department stated the following:

a number of factors need to be taken into account in determining whether it is appropriate for detainee children to receive an education directly comparable with children of the same age in the relevant State, including the child's:

- capacities and abilities;
- numeracy levels;
- literacy levels in English and in their own language; and
- degree of socialisation into any school system.<sup>39</sup>

The Department then draws the conclusion that:

It is not therefore always practicable to stream detainee children into the full Australia-based curricula – indeed in many cases it could be counter-productive and unfair on the children to do so. Just as in the general

community for non-English speaking children of newly arrived migrants and humanitarian entrants, adjustments to the curricula are needed to make English language tuition the priority.<sup>40</sup>

The ACM Education Coordinator from Woomera during 2001 also stated that the South Australian general curriculum was not used in Woomera as it was 'just impossible to use that kind of document with children that have no English at all'.<sup>41</sup>

In the Inquiry's view, these arguments ignore that throughout Australia there is either an ESL curriculum or an established practice of using national ESL documents to adapt the mainstream curriculum for ESL students. Furthermore, it fails to recognise that the New Arrivals Program delivers this curriculum to children with very similar needs to detainee children. In this program, English language tuition is a priority, but it is delivered across a range of curriculum areas. It is disappointing that these models were not adopted at the outset.

Regarding the difficulty of developing a specific curriculum for children in detention the Department informed the Inquiry that 'it is entirely appropriate that schooling has a focus on English and socialisation skill, and this is consistent with community standards for a similar cohort'.<sup>42</sup>

Furthermore, the Department informed the Inquiry that:

Despite the efforts to tailor curricula to the needs of detainee children, on occasion service provision within detention centres was affected by the available infrastructure and destruction of buildings during protests. These circumstances, however, are not directly comparable to other children in the community and it is therefore inappropriate to draw such links without acknowledging the distinctly different circumstances facing such children.<sup>43</sup>

ACM further informed the Inquiry that:

Setting guidelines and developing curricula in the detention environment is a dynamic process which must keep pace with the changing circumstances of the particular detention centre. For example, there was a huge transitory population in Woomera in 2001 during which the children typically stayed in the centre 6 weeks to 3 months. During that time, the focus of education was to teach these children English and socialisation skills vital to assisting them with adjusting to life in Australia. It was not appropriate to try to use the standard curriculum with these children because the majority of them had no English. It was not until it became clear that some of the children were staying longer and until they had developed some proficiency in English that ACM was able to consider setting up a curriculum and undertaking conceptual development for the children.<sup>44</sup>

ACM suggests that this statement 'argues against the feasibility or even desirability of a centralised, standardised curriculum in the times of rapidly changing circumstances in the detention centres'.<sup>45</sup>

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While the Inquiry acknowledges that the transitory nature and differing education levels pose challenges to providing a full curriculum these are barriers that automatically come with the creation of a mandatory detention system. It is the Department's obligation to address those challenges in a manner that ensures that children in detention receive an education of a standard commensurate with similar children living in the Australian community. It is therefore entirely appropriate to compare the education provided to children in detention with that provided to similar children in the Australian community. This is especially the case when models like the New Arrivals Program already exist to address many of these needs.

Regarding the third challenge of providing appropriate curriculum resources, the Department informed the Inquiry that from late 1999 until 2001, their focus was on meeting basic needs and that it was 'unrealistic to expect that a school environment could be ideally created in such a context'.<sup>46</sup>

ACM also informed the Inquiry that it faced significant difficulties in providing sufficient educational resources:

It was difficult to correctly allocate educational resources in advance due to the uncertainty of the number of detainee children in the centre at any given time. For example, there were 14 children in Woomera in December 2002 but 18 months prior to that, there were 400. Where there was a sudden influx of children in the centres, additional education material had to be ordered in. In remote centres like Woomera, supplies may take 4 to 6 weeks to arrive.<sup>47</sup>

However, once again, these are issues that arise with a mandatory detention policy that detains children in remote locations. Those issues do not excuse poor resourcing of educational programs; rather they highlight the heightened need for contingency planning.

It is therefore important to examine what efforts were made to address these challenges.

### **(b) Curriculum used in internal schools**

Meaningful education must be based upon a carefully developed and appropriate curriculum. The Inquiry received a range of evidence regarding the quality of the curriculum taught in detention centres.

#### **(i) Port Hedland**

The Port Hedland Department Manager noted the following problems in the March 2001 quarterly report:

The lack of adequate education programs is a major issue. More often than not no trained teacher [is] available, classes are irregular at best, no curriculum, no subject programs or timetables and no learning outcomes identified. This also has a negative impact on the behaviour of the children as they don't have enough to occupy their time constructively.<sup>48</sup>

Reports for the following two quarters made general statements that the standard of education had improved at Port Hedland. However, the Inquiry also heard from a teacher formerly employed at Port Hedland who worked in the centre from August 2001 to March 2002, that learning programs were developed locally and entirely at the discretion of the teachers employed at the time. She reported that:

There was no programme, no curriculum or syllabus in Port Hedland IRPC.  
 ... I wasn't instructed on what I was to teach, only that English was a priority.  
 The actual content of my classes were completely left up to me.<sup>49</sup>

On the other hand, the Programs Manager at the time reported that he instructed teachers in the centre to spend a third of their time on each of English, Maths and another subject from the standard curriculum.<sup>50</sup> He also said that the teachers in Port Hedland at the time were very capable and did not need more detailed instructions. He stated that the teacher quoted above said that she did not want more detailed instruction.

While the Inquiry accepts that the Programs Manager may have provided some instruction to teachers, curriculum planning should involve detailed consideration and coordinated implementation of the appropriate State curriculum documents. It does not appear that this occurred in any coordinated manner.

## (ii) Curtin

When the Inquiry visited Curtin in June 2002, ACM education staff and Department Managers reported that teachers did not use the formal Western Australian curriculum within the centre's educational facility. Instead, instruction was focussed on numeracy, literacy and social skills.

ACM education staff reported that the emphasis on these basic skills was a result of the time available, the attention span of the children and the importance of life skills and recreation.<sup>51</sup> They also stated that they used this type of program because the detention centre school operated as a transitional education experience, preparing students for attending the Derby District High School.<sup>52</sup> This evidence contradicts the Department's claim in its submission that educational programs in detention were based on the State curriculum.

The Inquiry does not agree that preparing students to attend the local school is justification for the provision of a limited program. Indeed, if integration was its purpose, that program should have been as close as possible to what was being taught in the local school. The ESL curriculum taught in the New Arrivals Program adopts this approach and would have provided an appropriate model.

One parent described the education offered in Curtin in June 2002 as follows:

Unfortunately the education is pretty poor there because what they did they giving one room for study ... Two three hours, showing them video and then say okay go to park and play in the park. Even my children until now they cannot really use their ABC unless we are just sitting together and trying to teach each other better than the school.<sup>53</sup>

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A young person, who was by June 2002 attending Derby District High School, said of the internal program:

when I was attending school here the hours were very limited and ... due to the limited hours we had to do sport and reading and so we never had any time to learn really, no substance in the program.<sup>54</sup>

### (iii) Woomera

Teachers who worked at Woomera in mid-2001 also reported that there was no coordination of the curriculum. One former ACM teacher stated that:

[i]t was ad hoc in terms of the curriculum. There was no curriculum set or advised by ACM or DIMIA in respect of teaching. What was expected of us – we were certainly given some classrooms to teach [in] and some materials in terms of white boards and so on for the teaching process, but nothing in terms of what type of syllabus for any subject so we made that up ourselves.<sup>55</sup>

Another teacher employed in 2001 made similar comments:

We were not ever given any instructions that we specifically had to teach any curriculum subjects. It was basically left, I think, to the discretion of the teaching staff as to what was specifically given as an education program.<sup>56</sup>

In response to this evidence, the Department argues that:

It is reasonable to expect that qualified teaching staff will be able to determine an appropriate school program, which is consistent as far as possible with State curricula while being responsive to the needs of children in his or her classroom.<sup>57</sup>

While a teacher clearly should respond to a child's needs it must be on the basis of an established curriculum with appropriate goals. In Australian schools, individual teachers do not set the curriculum. Within each school learning programs consistent with State curricula are coordinated within the school, with appropriate resources and teacher development. Where the school is teaching ESL students, then it should apply the appropriate curriculum to the children. It is this coordination of curriculum that was absent within the detention centre educational facilities for some time.

### (iv) Villawood

ChilOut, an organisation that has significant contact with children detained at Villawood also reported that there was a limited primary school curriculum at Villawood:

Children interviewed at VDC of primary school age reported that they receive English, maths and art lessons. When asked about other key learning areas of the primary curriculum such as science, they answered in the negative. No classes are offered in their culture or language.<sup>58</sup>

ChilOut reported that a more limited curriculum was offered to secondary school-aged children. For example, '[f]or young people of high school age, only English at

a very basic level and art were offered'.<sup>59</sup> Furthermore, '[o]ne 16 year old girl said that only English had been offered to her. She is articulate and obviously very capable, but had been in detention for over 18 months with no immediate hope of release'.<sup>60</sup> Department officers participating in the Villawood Community Reference Committee confirmed that '[t]he curriculum for high school students needs to be broadened and evaluated'.<sup>61</sup>

Documentary evidence provided by the Department suggests that in January 2002 classes were offered in English, Maths, Science, Human Society and Environment and Art at Villawood.<sup>62</sup>

### **(c) Introduction of a State based curriculum in internal schools**

The Department's submission states that '[e]ducational services for detainee children are provided, as far as possible, consistent with State/Territory curricula'.<sup>63</sup> However, the Department acknowledges that it has taken some time to apply a full curriculum:

When we had large numbers of children for relatively short periods of time there was a focus on trying to do the basics, education, English language, numeracy those sorts of things and over time as the numbers of children have reduced but their period in detention has increased we've shifted the focus of the provision of education.<sup>64</sup>

The ACM Education Coordinator from Woomera also reported that ACM considered developing a more extensive curriculum when it became clear that some children would be detained for long periods of time:

[I]t was then clear that these children were going to be staying longer, they've obviously developed some English skills by then, that we really needed to look at setting up the curriculum and ESL type curriculum and doing conceptual development for these children.<sup>65</sup>

ACM planning documents from November 2001 provide the first indication that the education staff planned to develop a curriculum for Woomera based on ESL guidelines. The 2001 Woomera Education Coordinator suggested that guidelines had not been developed previously as at the time there was no ESL curriculum in operation in South Australia.<sup>66</sup> However, at this time there existed an ESL Curriculum Statement for South Australian Schools (1996) and the national ESL Scales (1994) assessment and planning tool was in use within South Australian schools.

By February 2002, ACM teaching staff from Woomera reported that they were attempting to use the South Australian curriculum in their classes but that their efforts were severely hampered by a lack of resources. In their February 2002 monthly report, the ACM education staff state that '[t]he curriculum taught is based on a modified South Australian curriculum, for ESL learners' but that if they 'are to work towards teaching a more comprehensive curriculum then the issue of resources will have to be addressed immediately'.<sup>67</sup>

The decision to extend the curriculum offered at the school was reported in ACM documents to have occurred as a result of the stabilisation of the detainee population.

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In May 2002, Woomera teachers reported that '[c]hildren are settled at school and this will be reflected in an extension of curriculum activities that we would not have been able to attempt in the past'. Furthermore, they stated that:

Curriculum resourcing is being added to as we extend our use of the SA curriculum for ESL learners. There is a focus on introducing more practical science activities, particularly for the older students.<sup>68</sup>

Almost identical comments were made in June 2002.<sup>69</sup>

When the Inquiry visited Woomera in September 2002, it appeared that children were offered a full school day. Teachers reported that their programs were based upon the South Australian curriculum. By this time the East Gippsland Institute of TAFE had been engaged to advise on curriculum implementation for both Woomera and Baxter.

However, parents and children detained at Baxter consistently reported during the Inquiry's visit in December 2002 that they felt that the curriculum used was not appropriate for their age and abilities, and expressed concern that it was not as extensive as that which would be available in external schools. For example, one family reported that they felt that there was no proper teacher, and was concerned that one of the classes contained students ranging in age from eight years to seventeen years. They also reported that there was very little available to the older students in the areas of maths and physics. The children of several other families reported that the education provided was below their level. Several families also reported that they were not able to obtain adequate feedback from teachers regarding their children's progress.<sup>70</sup>

The father of children detained at Baxter told the Inquiry that:

There is no specific program and there is no definite curriculum for the children and it is part of the detention centre, even going to the school within the detention centre does not alleviate the pressure on the children. Psychologically they're still suffering because they know that they're not in a proper school and that the curriculum isn't exactly the same as the one outside.<sup>71</sup>

This man was trying to teach his children himself to supplement the education that they received at Baxter.

Although the extension of the curriculum at Woomera and Baxter improved the education offered to the children detained there, the Inquiry is surprised that it did not occur sooner. By the time efforts were made to extend the curriculum at Woomera, most of the children had been detained there for over twelve months.

Furthermore, the curriculum was not applied at Curtin because staff stated that their objective was to prepare students for external schooling and therefore there was no need to implement the State curriculum. At Port Hedland all students were already attending external schooling by this time.

#### **(d) Post-compulsory curriculum in internal schools**

In all Australian States, two years of post-compulsory education are available to all young people who are generally aged between 16 and 18 years. However, the Inquiry received very little evidence that appropriate post-compulsory education was provided to students in detention.

In Curtin the centre education policy from May 2000 stated that '[a]ll detainees aged between 4 and 15 years will be admitted to Curtin's weekly education classes' and that if the child detainee 'exceed[s] the age criteria ... then the Child student is entitled to enrol in the Adult Education Program'.<sup>72</sup> It appears that this policy was still operative in March 2001, as the Inquiry received evidence that at Curtin, unaccompanied children between 14 and 17 years of age were assessed for adult education rather than encouraged to participate in the educational programs offered for children.<sup>73</sup>

The minutes of an Unaccompanied Minors Meeting at Curtin from June 2001 indicate that these children were encouraged to attend adult education. The unaccompanied children in the centre were reported as stating:

That English classes were full and that they could not understand the lesson as well as the interpreter as they speak Farsi, not Dari. ... [Psychologist] said that there were three levels of classes and that they should attend the appropriate class for their needs and level. ... Request was made to have more under 18yr classes made available.<sup>74</sup>

The Inquiry is of the view that adult English classes are not adequate for post-compulsory aged children who should have access to a full curriculum appropriate for their age, including ESL tuition if necessary.

A girl of post-compulsory school age detained at Curtin reported to the Inquiry in June 2002 that:

[a]bout those classes ... we used to attend before, there was only one class and everybody like from five year old and I were put in the same class. And what they did was put a photocopy of some basic mathematics in front of us and they were trying like for example to teach me simple addition and these sort of things – basic mathematics.<sup>75</sup>

This young woman and her brother were not able to access the external schooling available to some other children detained at Curtin. By the time their English was assessed as being of a high enough level to permit attendance, they were of post-compulsory school age and excluded from going to Derby District High School. See further Case Study 3 at the end of this chapter.

Some programs were offered to children of post-compulsory school age at Port Hedland during 2001 and at Woomera in early 2002. However, these programs were significantly lesser than those which would have been offered to similar children attending schools in the Australian community.

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The minutes of an Unaccompanied Minors Meeting at Port Hedland on 29 November 2001 indicate that some classes were offered to older children but do not specify whether they were targeted to their needs, or whether they were the general adult English classes. In any event, most of the unaccompanied children were reported as not attending. Meeting minutes state:

When asked for the reasons why the other UAMs were not attending classes, again it was stated that they were not comfortable attending classes because they could only think about their visa applications and their families.<sup>76</sup>

At Woomera, in a memo of 2 February 2002, the ACM Education Coordinator reported that:

All 13-17 year olds can receive a minimum of 2 hours of schooling per day, 4 days a week, although attendance is not compulsory. ... As with the younger children, basic socialisation, English literacy and numeracy are addressed as a priority.<sup>77</sup>

Thus, although there is evidence that children aged 15 and over were able to access some education, it is clear that a full curriculum appropriate to their age was not offered.

### **(e) Curriculum offered in separation detention**

The Inquiry has received evidence that in Port Hedland an appropriate curriculum was not provided to children when they were in separation detention.<sup>78</sup> A teacher who worked there in 2001 reported that:

When I first arrived in Port Hedland in August [2001] this ... boat had just come in at the same time as me and there were around 330 people on that boat and they were all placed in isolation and I taught in isolation or separation, or whatever term was given to it, children were receiving on average one hour of education per day.<sup>79</sup>

The teacher reported that the children from this boat were released from separation detention within 2-3 months.<sup>80</sup> She explained that it was extremely difficult to provide education for children while they were held in separation detention:

They were absolutely chaotic, because the classes were held in the common room, which is a small room ... [I]t is a room that everybody uses and because the teacher was coming in without wearing any ACM uniform, we really were an attraction ... [W]hile we tried to separate children from adults, it just didn't work because they wanted some human interaction.

So you would have people coming in and talking, you had little tiny tots, two year olds pulling at you and saying, "A, B, C" and then you had full grown up men, walking around and saying, "Hello, hello" and you had women and it was just really, I could compare it to the circus. So, the numbers could vary from 20 to 40 people. Sometimes I took classes outside because I would arrive and the officer on duty had decided, "I am going to let these people out now for their hour". So I would arrive and say – and they would say, "Oh we will bring them back in now".

And I would say, "No, no, no, I don't want them to be brought back in, you know, this is their time outside, so we will go", I would go outside with them and for that time usually we play games, sing, dance, run around and I would just try to do light hearted things with the children at that point.<sup>81</sup>

It appears that at Woomera, education was provided in each separate compound until late 2001, and although the amount of education offered in different compounds varied, children in separation detention generally received a similar level of education to that provided to the rest of the children detained in the centre. The Inquiry has received no evidence about education in separation detention at any other centre.

#### **(f) Curriculum resources available to teachers in detention centres**

As mentioned above, one of the challenges faced by teachers in detention centre schools was the difficulty they had in accessing appropriate and sufficient resources to implement their curriculum.

A teenage girl described the educational resources available in detention as follows:

There was no education, just learn English lessons with one teacher for thirty students and different age groups, 5 to 20 years ... We had no computers. We had pens and exercise books. We just copied from difficult books, some books like dictionaries, just copying, then put in the rubbish bin. No easy story books, just dictionaries. Not learning English, just copying and copying. We were like a printer! [Teenage girl]<sup>82</sup>

A teacher who worked at Port Hedland from August 2001 to March 2002 reported that:

Books were available in the school. Most were unsuitable as they had been donated by local schools. They were outdated and not aimed at ESL students. Requests for the purchase of new educational materials were continually turned down until January 2002 when a new Programs Manager was appointed.<sup>83</sup>

The lack of appropriate books was particularly problematic as '[t]he school [has not had] a photocopier since last October [2001] ... working without text books and without a photocopier to hand, is a very difficult task for any teacher'.<sup>84</sup>

A teacher working at Woomera in 2001 also described a curriculum resource problem:

Resources were a huge problem. We had a small amount of basically primary school text books and resources in the staff room. ... I spent a great deal of time after work photocopying planning and programming profiles, all the ESL materials that I could find at the Woomera library and putting those in as masters for the staff to look at so that they had a little bit more idea. So resources, particularly in the early years ESL category area were almost non-existent.<sup>85</sup>

This teacher reported that there was a budget for purchasing curriculum resources and that while 'they never actually knocked you back, but very rarely did [the

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curriculum resources] appear, let us put it that way'.<sup>86</sup> She explained that ACM's rationale for the poor provision of teaching material was that:

[w]e can't provide much more material because the next time they riot it will all get burnt and then we will just have to replace it. ... logic would then say to you, you know, then move the teaching area somewhere else that they can't have access to so that you don't lose all of the resources.<sup>87</sup>

The ACM Education Coordinator said that it was difficult to ensure appropriate resources during an influx of detainees, particularly in July and August of 2001.<sup>88</sup> More generally, ACM told the Inquiry that:

It was difficult to correctly allocate education resources in advance due to the uncertainty of the number of detainee children in the centre at any given time. For example, there were 14 children in Woomera in December 2002 but 18 months prior to that, there were 400. Where there was a sudden influx of children in the centres, additional education material had to be ordered in. In remote centres like Woomera, supplies may take 4 to 6 weeks to arrive.<sup>89</sup>

The Department suggested to the Inquiry that ACM's Woomera monthly education reports indicate an improvement in curriculum resourcing, over time, especially in the latter half of 2001. However, these reports generally indicate a focus on resources for the teaching of adults.

Although the September 2001 ACM report states that 'A well-known new programme is being implemented for the early years children, which will facilitate their move into mainstream schools';<sup>90</sup> the December report notes a deficit in resources for children:

We have been running very low on exercise books and have run out of pens as there was a delay in the ordering process. We have also not received any glue sticks to stick work in children's books for several weeks and this is proving a hindrance to the presentation of children's work.<sup>91</sup>

However, the December 2001 report also comments on the improvement of library resources, again without comment as to whether these resources were targeted at adults or children.

A former teacher and the ACM Education Coordinator who worked at Woomera from April 2001 to June 2002 reported that there were adequate resources in the centre for the limited ESL curriculum that was offered in the centre but not for running a full curriculum.

For doing ESL work there was adequate resources. For running a full curriculum; we hadn't been required that we – well, it wouldn't have been appropriate to have been running a full curriculum, as I said, when it was a transitory population. So it wasn't resourced for running a full curriculum, because it had never been the case that we'd have been able to run that. Now that it is the case that we need to run a curriculum, it is better resourced.

But I guess back in 2001 we just – the infrastructure wouldn't have necessarily been there to be running in terms of buildings to be running a full curriculum.<sup>92</sup>

The ACM Education Coordinator also reported that at Woomera during 2002 there was a budget for purchasing resources and that consequently:

there are a huge amount of reading books and reading schemes available for the children, so we put a lot of money into that, and we put money into constructive play things for the younger children. Yes, and just – yes, and we're generally building on our resources all the time.<sup>93</sup>

Therefore, evidence from teachers who formerly worked in centres, ACM staff and documents received by the Inquiry all indicate some problems with the provision of curriculum resources, although there were improvements at Woomera by the end of 2002.

The Inquiry acknowledges that the uncertainty about the population of the centre may have provided challenges in ensuring that there were appropriate curriculum resources. However, in the Inquiry's view, 'expecting the unexpected' is an inherent part of good detention centre management. There should therefore have been some element of contingency planning in order to ensure that children were offered an appropriate education, irrespective of influxes.

#### **(g) Findings regarding the curriculum offered in internal schools**

The Inquiry acknowledges that providing an appropriate curriculum in internal detention centre schools was challenging. There were particular challenges in the period of 1999-2001 when there was a large and transitory population of children in detention and curriculum resources were stretched. However the Inquiry finds that the Department failed to place sufficient priority on addressing those challenges as soon as possible in order to ensure that children were offered an appropriate curriculum.

Furthermore, the Inquiry rejects the Department's view that the curriculum applied in Australian schools is inappropriate for children in detention. This assertion ignores the fact that a similar cohort of children are well catered for in Australian schools where they have access to a full curriculum delivered through an ESL teaching methodology. The most relevant comparison and model is the curriculum administered by the New Arrivals Program.

In late 2002, there were efforts to introduce a full State-based curriculum in Woomera and Baxter, although they were initially poorly resourced. However, the Inquiry heard consistent evidence across several centres that, prior to that time, there was no coordination of curriculum design or implementation. The curriculum taught in detention centres fell far short of that provided in Australian schools attended by similar children. In particular, there were no attempts to apply or adapt existing State curricula within an ESL framework to children in detention.

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Furthermore, there were inadequate curriculum resources to support adequate educational programs within detention. This was especially the case for children in separation detention at Port Hedland, at least during some periods in 2001.

Even after late 2002, there is no evidence of an appropriate curriculum being provided to children of post-compulsory age (and until 2003, these children did not have the opportunity to attend external schools).

The Inquiry notes that despite the improvements in late 2002, detainee parents and children still did not feel that they were receiving an education equivalent to that available in the Australian community.

### 12.4.3 Teachers available to children in internal schools

There was one little school in the camp and there were two teachers. One teacher was expelled, so there was one teacher for the whole lot and there were lots of children. So [the eldest girl] left the class because the school wasn't good.<sup>94</sup>

This section explores issues surrounding staffing of educational programs within detention. Most of the evidence received by the Inquiry concerns the staffing of educational programs at Woomera and Port Hedland.

#### (a) Challenges in providing sufficient teachers for internal schools

The Department and ACM both note that there were challenges in providing sufficient teachers for detention centre schools.

The Department suggested that the problems in ensuring sufficient staff at detention centres is 'not surprising ... as in the community, there might be difficulties in attracting and retaining suitably qualified staff in more remote locations'.

ACM also reported that it was difficult to ensure that there were enough teachers for a fluctuating population of children in detention:

At times of unforeseen shortages, extra teachers had to be recruited. The harsh conditions in the more remote centres made recruitment of appropriate personnel even more difficult and sometimes caused delays.<sup>95</sup>

While acknowledging these difficulties, two points must be noted. Firstly, the location of detention centres has exacerbated the problem of finding adequate numbers of teachers. Secondly, the Department has the responsibility to ensure an adequate education irrespective of the location of the children.

#### (b) Qualifications and training of teachers in detention centres

There are two issues to consider with regard to appropriate teacher qualifications in detention centre schools: first, whether they are fully qualified teachers; second, whether they have special ESL training.

In the Australian community there are clear standards regarding the qualifications of teaching staff. Teacher registration is required in Queensland, South Australia and Victoria.<sup>96</sup> There is no requirement for teachers to be registered in New South Wales, or Western Australia. Teachers working in intensive English centres in all States are required to be qualified teachers trained in the teaching of ESL.

The IDS required that education programs for children be provided by 'qualified teachers'.<sup>97</sup> However, ACM education policy did not include any specific requirements about the types of qualifications.

No evidence suggests that any teacher was without general State teaching qualifications. Department records of teacher qualifications in all the centres from April to September 2002 indicate that some, but not all teachers had ESL training. For example, records of teacher qualifications from Port Hedland from 31 January 2002 indicate that one of four teachers did not have ESL training.<sup>98</sup>

There is no evidence of teachers at Villawood having ESL qualifications prior to July 2002. From July until September 2002 only one of three teachers had ESL training.<sup>99</sup>

At Woomera, records indicate that from April to June 2002 all teachers had ESL training; however, none of the teachers employed in July 2002 were ESL trained. In August and September 2002 only one of five teachers had ESL training.<sup>100</sup>

### **(c) Numbers of teachers in detention centres**

The capacity to provide an adequate curriculum and adequate hours of tuition is determined in large part by the numbers and capacity of the teaching staff employed.

The Inquiry has received information suggesting that there were an insufficient number of teachers at both Woomera and Port Hedland during 2001. The Department suggested that this was a consequence of 'the extenuating circumstances facing the department and the detention services provider in 2001', namely an influx of detainees.<sup>101</sup> However, as noted earlier, it is the Department's responsibility to ensure the provision of an adequate standard of education in the light of these circumstances.

The Inquiry has received extensive evidence about the staffing problems at Woomera during 2001. One teacher who had worked there reported that during 2001 they needed three times the number of teachers actually employed.<sup>102</sup> Another teacher said that between May and August 2001, there were only four teachers available to work, and that 'we should have had to have at least, at least, ten teachers just for the children'.<sup>103</sup>

The ACM monthly education report states that in August 2001 at Woomera:

[w]ith the addition of India Compound to the education scope this has meant a decrease in delivery of education, particularly to the school aged children. ... With a teaching staff of 3.5 we are not able to run as effective a programme as we would like. Teachers have to spread themselves more thinly once again. ... Contact time for children remains minimal varying between 1 and

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2 hours per day. This is restrained by both accommodation and lack of teaching staff. There is currently no contact time for children in Mike Compound ...<sup>104</sup>

On 1 August 2001, there were 282 children at Woomera, and on 1 September 2001 there were 456 children detained at Woomera. During these months, there were between five and 3.5 teachers available. This means that the best possible staff to student ratio during this time was one teacher to 56 students. By comparison, the Australia Bureau of Statistics reports that in 2001, the average staff to student ratio for all schools in Australia was one teacher to 14.7 students.<sup>105</sup>

The average class size for Australian primary schools is between 25 and 30 students. Due to the large numbers of children detained at Woomera, the teachers simply had to reduce the number of hours of education delivered to children to 1-2 per day in order to maintain this class size.

There were similar problems over 2001 in Port Hedland. During part of the March quarter of 2001 there was no teacher at all at Port Hedland, when the population of children in the centre was at least 53.<sup>106</sup> The Department Manager at Port Hedland reported to Central Office that:

Educational facilities are below standard. For much of the quarter there were no teachers. Detainees occasionally took classes. A Programs Manager was appointed but he does not take classes although he is a qualified teacher.<sup>107</sup>

The makeshift arrangements over this period were as follows:

During the period concerned for two weeks only, programs were reduced to 2 hours a week. Normal hours of teaching were maintained for the rest of the period. A detention officer with teaching background assisted by a detainee conducted teaching during this period.<sup>108</sup>

Six months later, in October 2001, the Department Manager was still noting concerns regarding the low numbers of teachers at Port Hedland:

Three teachers for 133 children with a wide range of English ability, age and background education, means of necessity that the standard of education and time spent in school is barely adequate. ACM reluctant to pursue the option of mainstream schooling for any children due to cost.<sup>109</sup>

There were still problems in February 2002:

... the appointment of a new Programs Manager continues to show positive results, with a visible increase in external activities, especially for children. This improvement is somewhat negated by the reduction in the number of teachers this month to two. In addition a teacher was sacked due to professional/boundary issues with a specific male resident, leaving the Centre with only one teacher for a short period. A temp teacher was employed for three weeks. While the number of residents is fewer, the number of classes is the same and two teachers and a Program Manager/teacher cannot adequately cover four daily school classes as well as separate male and

female adult classes. As a result children are not receiving enough education and with more hours of idleness their behaviour has worsened.<sup>110</sup>

Thus the Department Manager at Port Hedland was clearly aware of the impact that the teacher shortage was having on the education of children. She also noted the connection between the low number of face-to-face hours and children's general behaviour.

The Inquiry observed a much higher staff to student ratio during visits to Woomera and Baxter in late 2002.

#### **(d) Turnover of teachers in detention centres**

The educational facilities within detention centres were largely staffed with teachers on short-term contracts, many of them being of six weeks duration.<sup>111</sup> While this may have been an appropriate measure to deal with large and short-term influxes, it appears to have had a negative impact on the quality of education. Furthermore, it appears that the changing population was not the only, or primary, reason for the short-term contracts.

The ACM 2001 Education Coordinator at Woomera told a hearing of the Inquiry that the six-week contracts were provided as the 'detention environment is not suitable for everybody and some people found ... that it was not the right place for them'. The Coordinator reported that if staff 'found it a suitable environment ... they would go on to a three month contract'.<sup>112</sup>

The Inquiry also heard that there is an incentive for staff to take six-week contracts due to the temporary recruitment agency rules that employment for a period longer than six weeks was seen as permanent work and therefore attracted a lesser rate of actual pay.<sup>113</sup>

A former Port Hedland teacher told the Inquiry of the impact of short-term contracts:

The education provided by the Centre lacked continuity, a factor essential to effective teaching. It takes time for a teacher to plan and implement a program suitable for their particular class. The nature of the contract system at Port Hedland did not allow for that time.<sup>114</sup>

A former Woomera teacher reported that during mid-2001, most teachers were on either six-week or three-month contracts, leading to a high rotation of teaching staff.<sup>115</sup> However, since there was a serious teacher shortage during this same time, it appears that the short-term nature of the contracts did not result in a corresponding increase in the number of teachers.

Since September 2001, there appears to have been a much greater consistency of teachers. The teachers working in the centre at the end of 2002 were reported to have been there for over a year.<sup>116</sup> The October 2001 ACM monthly education report from Woomera stated that:

due to the introduction of 3 month contracts for new Education Officers, a continuity and stability within the Education team has been established. This

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is notably beneficial for both the routine and the security of the residents and to ensure a more effective service is being delivered.<sup>117</sup>

In some centres there was greater stability in education staff. For example, Curtin had a relatively stable teaching staff, with two teachers employed for a period of two years, and two for more than one year since January 2000.

### (e) ACM Uniforms for teachers

Teachers working in detention centres were generally expected to wear ACM uniforms.<sup>118</sup>

Several teachers who worked at Woomera in 2001 commented that it was initially difficult for children to distinguish between teachers and detention officers. For example, one teacher said:

initially we were of course viewed as an ACM employee and also either a guard or a welfare officer or whomever, there were no particular distinguishing characteristics between the guards ... [and] the education staff ... Of course, once they became accustomed to seeing us they recognised that we were, in fact, teachers and so our role became slightly different.<sup>119</sup>

This teacher reported that it would have been easier to carry out her role as a teacher without being in uniform. Another teacher reported that although there was an initial impact on students of teachers wearing uniform, they eventually became used to it:

I found that initially, there was a little bit of hesitancy amongst the children but once they knew me, then there was no problem.<sup>120</sup>

During the Inquiry's visits to Curtin in June 2002 and to Woomera in both June and September 2002, teachers were wearing ACM uniforms and security earpieces. The former Education Coordinator from Woomera informed the Inquiry that earpieces were worn in case of emergency as teachers had no other form of contact in education areas.<sup>121</sup> However, the detainee children at Curtin in 2002 told the Inquiry that they perceived the teachers to be detention officers rather than teachers, because they looked the same as detention officers.

### (f) Detainee teachers

There was significant reliance on detainee teachers in educational facilities within detention centres until mid-2002. It appears that detainee teachers were generally employed as assistant teachers. They were paid the equivalent of \$1 per hour for their work.<sup>122</sup>

The two major issues of concern with regard to detainee teachers are: first, whether they taught unsupervised by Australian qualified teachers; and second, whether they were adequately trained for the work that they undertook.

The bulk of the evidence that the Inquiry has received regarding detainee teachers is from Woomera. ACM monthly education reports from September to December

2001 indicate that there were between 19 and 27 detainee assistant teachers employed at Woomera. In February 2002 there were 25 detainee assistant teachers employed.<sup>123</sup>

It appears that detainee teachers were actively recruited:

We are always looking for resident teachers and helpers. If you are interested in teaching either adults or children, or helping a teacher especially with interpreting, please approach any education officer and they will find a suitable position for you. Payment is the standard \$1 per hour.<sup>124</sup>

Detainee teachers were in particular demand when the teacher shortage was at its most critical stage. A teacher who worked at Woomera between May and August 2001 reported that detainee teachers were vital to a continuing education program:

if it hadn't been for the detainee teachers, as we called them, assistant teachers, there would not have been a program at all ... at one stage there were two teachers, as I said, for three weeks, for 1500 people.<sup>125</sup>

While it appears that most of the time detainees were assisting qualified teachers, the Inquiry has heard of instances in both Woomera and Port Hedland where detainee teachers conducted classes without supervision. The April 2002 ACM Woomera monthly education report notes that 'the 5 and 6 year olds continue to be in a 3<sup>rd</sup> separate class taught by a resident teacher with occasional Education Officer input'.<sup>126</sup> A memo from the Education Officer in May 2002 reports that:

residents run the 5-6 year old class. There is no input from any ACM Education Officer and although the residents are very good with the children, they are not trained teachers and have limited English. Therefore I recommend that the 5-6 year old class share half of the extra teacher from the secondary class.<sup>127</sup>

In May 2002, the Department expressed some concern that ACM was not providing qualified staff for kindergarten classes at Woomera.<sup>128</sup>

There was also significant reliance on detainee teachers in Port Hedland. An ex-teacher from the centre told the Inquiry that there was no time to guide detainee teachers on what to teach:

I taught with 2 untrained assistant teachers (detainees) who did their best under the circumstances. I did not have the chance to plan lessons with these residents because they were not given the time. ... These residents also taught alone for stints when teachers were not available, something that is illegal elsewhere. One resident taught the pre-school students on a regular basis for a long period of time.<sup>129</sup>

The little training that detainee teachers received was for their personal morale rather than on how to teach the children. For example, it appears that at Woomera during 2001:

Teacher training for the residents was addressed as a motivational issue, due to the nature of the low pay and the hard work that they always put in. It

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was arranged for the resident teachers from all compounds ... [to be given] some life skills training on job applications. In addition all teachers were given their own English language book, to be their own property to work from in their own time. The session was a great success, with the psychological impact of just being outside the Centre making it worthwhile. This will be carried out fortnightly and has already proved to be a significant morale booster.<sup>130</sup>

However, an ACM teacher said that detainee teachers were instructed on child protection laws at Woomera during 2001:

Friday mornings we usually met with all of the assistant teaching staff and went through induction packages with them. If they had to be inducted, I guess, and then basically deal with the mandatory notification and conduct and practice and what you could and couldn't do.<sup>131</sup>

### **(g) Findings regarding the teaching staff in detention centre education services**

The Inquiry finds that detention centre teachers worked extremely hard to provide the best possible instruction to children in the circumstances under which they were working. However, the Inquiry also finds that those conditions severely compromised their capacity to provide an appropriate standard of education.

First, the Inquiry finds that there was a serious shortage of teachers at Woomera during 2001, compromising the quality and amount of education provided to children. For example, during August and September 2001, there were approximately four times as many students to each staff member in Woomera, as compared to schools in Australia. There was also a serious shortage of teachers at Port Hedland during 2001, until the time that students were allowed to attend external schools.

While all teachers employed at the centre had general teaching qualifications, there were occasions when there were no teachers with ESL training. Furthermore, there was some concern that the high turnover of teachers impacted on the quality and continuity of the teaching.

The Inquiry acknowledges that the remote and rural location of most of the detention centres and the fluctuating population in detention centres poses challenges in ensuring the appropriate number of teachers with the necessary qualifications at all times. However, both these problems were known to the Department prior to placing children in these facilities and, in the Inquiry's view, there have been insufficient efforts to overcome these issues. In particular, the availability of short-term teacher contracts does not appear to have been used to make up for short-term increases in the population. Instead, it appears that detainee teachers, who did not have appropriate qualifications, were sometimes used to alleviate staffing shortages. At other times, there were no extra teachers at all.

The employment of detainees as assistant teachers may well have been appropriate and desirable, and it appears that most of the time this is the capacity in which they were employed. However, there were occasions when unqualified detainees were used in the place of qualified teachers. Furthermore, there were insufficient efforts to provide detainees with the appropriate teacher training.

The Inquiry is also concerned that the requirement that teachers wear an ACM uniform led to confusion in a child's mind between teachers and detention officers, although children seemed to get used to this fairly quickly.

#### **12.4.4 Hours of tuition available to children in internal schools**

In most Australian schools, students are provided with approximately 6 hours of education per day (including breaks).

##### **(a) Challenges in providing a full day of school in internal schools**

The teacher shortage clearly impacted on the ability to provide a full day of schooling for all children. However ACM emphasised to the Inquiry that the primary barrier to providing a full day of education was the inadequate infrastructure over which they had little control.<sup>132</sup> ACM's July 2001 monthly education report states that:

Despite an increase in teachers there is no more classroom space in the Main Compound to accommodate any extra hours and the currently large numbers of children.<sup>133</sup>

Furthermore, in evidence before a hearing of the Inquiry, the 2001 Education Coordinator for Woomera stated that:

[The lack of staff] was a resourcing issue but, if we'd have had 25 teachers on the ground, we wouldn't have had the buildings to put them in. So not much point getting a lot of teachers if we can't actually go into a room and teach.<sup>134</sup>

The Department has also stated that in its view between one to three hours of tuition was adequate for detainee children:

I think what I'm saying is that, given all of the factors relating to these children's detention, the length of time they were expected to be in the centre, the throughput at the centre at the time, the previous socialisation and school history for those children, the literacy in their own language, the degree to which they knew English language, the facilities and resources and capacities physically available in one day at the centre – all of those factors taken into account – I think that the circumstances were, at that particular time, probably adequate for the kind of detainee child population that we had.<sup>135</sup>

ACM was also of the view that:

The children's inability to concentrate for a lengthy period of time each day made it inappropriate for the hours of tuition to be longer than what they were.<sup>136</sup>

The educational infrastructure available to teachers is discussed in section 12.4.5. The Inquiry does not agree a full day's curriculum tailored to these needs is inappropriate. Similar children in the community attend a full day in the New Arrivals Program. Furthermore, as demonstrated later in this chapter, when children were offered the opportunity to attend schools outside the centre, they did not have any difficulty in adapting to a full day of school. In any event, evidence to the Inquiry

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suggests that detainee children's inability to concentrate is a consequence of the impact of the detention environment.

### **(b) Hours offered to children in internal schools**

The Department's submission reports the hours of tuition available to students as at 31 January 2002 as follows:

- Curtin, primary and secondary 5 hours 40 minutes
- Port Hedland, primary and secondary 5 hours
- Woomera, primary and secondary 3 hours
- Villawood, primary and secondary 7 hours
- Maribyrnong, no school age children detained on that date.<sup>137</sup>

It is important to note that these figures represent availability at one point in time. It does not necessarily reflect what was available in the centres in the preceding or following months or years.

For example, the Inquiry has heard differing reports on the number of hours of tuition available at Villawood throughout 2002. The Department's submission states that there were seven hours of tuition per day available to both primary and secondary students in January 2002. In response to a question on notice in May 2002, the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) stated that both primary and secondary classes were conducted for five hours each weekday, 48 weeks a year.<sup>138</sup> During the Inquiry's visit to Villawood in August 2002, staff observed that three hours of education was provided to both primary and secondary-aged children. Although these figures are from different periods of time, they demonstrate significant variation in hours of education which does not occur in Australian schools.

The Inquiry is concerned that the hours reported at Curtin are not reflective of what was actually provided. A January 2002 memo from the Curtin Education Department, states that primary and secondary children at Curtin at this time received 30 hours per week tuition. However, the timetable attached to the memo indicates that in the afternoon, children undertook only recreational activities or reading. In terms of core curriculum children were only offered computing, language and maths, in the morning of each school day, for a period of approximately three hours.<sup>139</sup>

At Curtin after the April 2002 riots, education was limited to three hours per day. As described in section 12.4.3 above, regarding the number of teachers in internal schools, in Port Hedland there was almost no provision of education during the March quarter of 2001.

There is much more detailed evidence regarding hours of education from Woomera. ACM documents regarding Woomera indicate that over 2001 'contact hours have fluctuated between 3 hours daily to 1 hour daily depending on the numbers in the centre'.<sup>140</sup> From November 2001 onwards, classes were conducted four days per week.<sup>141</sup> From July to October 2001, education staff consistently reported that they were only able to provide between one and two hours of tuition daily.<sup>142</sup>

A teacher who worked in the centre at the end of 2000 and between March and September 2001 confirmed that at the end of 2000, children received between four and six contact hours per day, but that by the middle of 2001 the number of children at Woomera necessitated the splitting of classes and that children received between one and two contact hours per day.<sup>143</sup> Another teacher who taught there between May and August 2001 reported that, '[t]he minimal or proposed contact hours a teacher had with any one particular class during the week was between four to five hours per week'.<sup>144</sup>

In December 2001, students aged between eight and twelve years commenced attending school at St Michael's, a disused Catholic school in Woomera town. Children at St Michael's were offered three hours of education per day, four days a week. ACM documents indicate that the number of classrooms at St Michael's impacted upon the provision of education: 'due to [there] only being 4 classrooms at the school we are taking the children down in two shifts every day'.<sup>145</sup>

The Inquiry heard from detainee children that they were not receiving even three hours education at St Michael's:

What kind of 3 hours? Just that's correct that we start from nine hours going from outside of our compound but as you know there are many gates that they should check the numbers, so it takes nearly one hour until we can go outside of the Woomera Detention, and one hour we spend in the bus (sitting, waiting for others, not moving). Until we can go outside, just we spend nearly one hour in Michael's school.<sup>146</sup>

A father said that:

School consists of taking the children from the Compound, making them stand in line for one hour, and go through them one by one (name and number) and when they get to school, the same thing happens, one by one, name and number. So then they only get half an hour or one hour of actual class. ACM guards go with them to school and are at the school all the time. So the time passes just like this.<sup>147</sup>

ACM education staff confirmed that travel time seriously encroached on the hours of education offered to the children attending St Michael's. Their January 2002 report states that:

[c]ontact hours for children aged 5-12 are now a steady 3 hours per day including some significant travel time. ... Programmes staff therefore have longer contact time with the children but less teaching time with them as the logistics of getting them out of the Centre from four compounds are time consuming.<sup>148</sup>

Providing education at St Michael's for younger children put additional pressure on the capacity to maintain education services to older children and other detainees remaining in the centre.<sup>149</sup> At this time ACM education staff reported that '[a]ll teenagers have the opportunity to attend 1 hour of English per day. Teenagers from the Main and November [compounds] also have access to one hour of computer time per day'.<sup>150</sup> In February 2002, ACM education staff reported that '[c]lasses for

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13-17 year olds have been running in Charlie Compound from 9.00am to 12.00pm Monday to Thursday'.<sup>151</sup> Children aged between 13-17 years were offered access to the program at St Michael's in early March 2002.<sup>152</sup>

By April 2002 the numbers of children detained at Woomera had significantly decreased, which should have increased capacity to provide educational services. However, according to the Department, the number of hours of education remained at three per day:

As at 20 April 2002, there were 47 children resident in Woomera IRPC. Prior to April 2002, when the number of children was significantly higher, the program for primary school children operated in two sessions, from 9am-12pm and 1.30pm-4.30pm, four days a week. Given the reduced numbers of children in the detention facility, the program hours are now Monday to Friday, from 9am-12pm. All children, including children over the age of 12 years, now have access to the program. All but one child in the detention facility were accessing the educational program as at 20 April 2002.<sup>153</sup>

Only in September 2002, by which time education was again being provided within Woomera (rather than St Michael's), was the school day lengthened to one that approximates a school day in the Australian community. During its visit to Baxter in December 2002, the Inquiry found that the hours of tuition also approximated a normal school day.

### **(c) Findings regarding hours of tuition**

Children within Australian schools generally have access to approximately six hours of education per day (including breaks). There has been a significantly lower number of hours offered to some children in immigration detention, particularly those detained at Woomera.

The hours of education reported by the Department in its submission, as at 31 January 2002, are generally appropriate. However at Woomera, until late 2002, and in some instances in other centres, considerably fewer hours of tuition were offered to children educated in detention facilities, than to children in mainstream Australian schools. One of the worst examples was in the middle of 2001 when children at Woomera received between one and two contact hours per day.

The low number of tuition hours available to children is linked to the shortage of teachers and classrooms in detention centres (see further sections 12.4.3 and 12.4.5). The low number of hours made it very difficult to provide a full curriculum.

The Department rejects any suggestion that 'it was "unwilling" to address issues related to hours of tuition, and notes instead that the capacity of the department and services provider was appropriately focussed on meeting basic needs and ensuring people were processed as speedily as possible' during periods when there were large increases in the number of arrivals.<sup>154</sup>

It is important to remember that it is incumbent on the Department to have systems in place that are designed to ensure that such external events do not affect the

quality of education provided to children. Thus while acknowledging that this influx posed challenges within the constraints of detention centre management at that time, it is the Inquiry's view that the Department failed to place sufficient priority on ensuring that children would be unaffected by these events. For example, if children were going to external schools, an influx of children should not affect their ability to enjoy a full school day. A similar result would arise if children were in alternative places of detention in the community or if the detention legislation permitted the speedy release of children.

### **12.4.5 Educational infrastructure available in internal schools**

As suggested above, the provision of adequate education also requires appropriate educational infrastructure, including classrooms, playgrounds and facilities for teachers. This includes providing an environment where children can feel safe and secure.

#### **(a) Challenges in providing sufficient educational infrastructure**

The Department states that:

the educational infrastructure in detention facilities provides a safe and secure environment with equipment and resources available for both educational and recreational use. The capacity to provide a range of educational services is affected by the buildings and areas available.<sup>155</sup>

However, at the same time, the Department accounts for some of the difficulties in the provision of education through 'disturbances within the detention facilities which result in the destruction of education facilities and/or result in an unsafe environment for both staff and children'.<sup>156</sup>

For example, the Department informed the Inquiry that the destruction of educational facilities by fire at Woomera affected the capacity to provide education. Fires destroyed these facilities in August 2000 and then again in November and December 2001, when '[f]ive educational facilities were lost, being two kindergarten buildings in Main Compound, and one education building each in Oscar, November and Mike Compounds'.<sup>157</sup> The Department further stated that:

Notwithstanding the difficult circumstances facing the department and the services provider in 2001 in Woomera IRPC, the maximum available infrastructure was being utilised to provide services and programs to detainees, including detainee children. That this service provision was challenged by the destruction of buildings and the unprecedented arrival of large numbers of people are factors that the Inquiry should take into account in determining the provision of education to detainee children, who at that time were primarily in detention for short periods of time.<sup>158</sup>

ACM acknowledges that it had concerns regarding insufficient educational infrastructure within immigration detention centres but emphasises that infrastructure is beyond its control.<sup>159</sup> In January 2002, ACM education officers at Woomera reported that:

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Accommodation in the Main Compound is more than adequate with current numbers, but due to fires over the Christmas period there are no educational or activities buildings to use in Mike, November or Oscar compounds.

ACM also reported that:

The small libraries in Mike and November compounds were very popular. Unfortunately all of these were destroyed during the Christmas fires and there are no plans to replace these at this stage.<sup>160</sup>

The impact of violence in detention centres on the educational facilities available to children is of concern to the Inquiry. It demonstrates some of the inherent problems of detaining children in such an environment.

Nevertheless, even when not impacted by violence the infrastructure was inadequate, and this affected the education provided to children. The ACM Education Coordinator at Woomera in 2001 reported that: 'when you've got 400 children and four classrooms, it's actually not possible to get them in there for five hours a day and teach them all for five hours a day'.<sup>161</sup>

### **(b) Facilities available for education purposes**

A teacher formerly employed at Woomera stated that during 2001 there were five classrooms (three in the Main Compound, one in November Compound, one in Mike Compound and none in India and Oscar compounds), but that '[w]e needed at least 15 classrooms for the centre overall to facilitate an effective teaching program'.<sup>162</sup> The lack of appropriate classroom space in compounds Mike and November led to classes being conducted in the mess.<sup>163</sup> These reports are confirmed by the evidence of the 2001 Woomera Education Coordinator who stated that during 2001 'the infrastructure wouldn't have necessarily been there ... in terms of buildings to be running a full curriculum'.<sup>164</sup>

ACM documents regarding Woomera indicate that during mid-late 2001 there was discussion about the lack of suitable accommodation for educational programs. The July 2001 report states that 'there is no more classroom space in the Main Compound to accommodate any extra hours and the currently large numbers of children'.<sup>165</sup> The August 2001 report states that '[w]e continue to work at full capacity in the Main Compound. In India Compound we are using both the mess and a spare unfurnished room'.<sup>166</sup> The September 2001 report states that '[w]e continue to work at near full capacity in Main, Mike and November compounds'.<sup>167</sup> In October 2001 the report indicates that there was sufficient accommodation: '[a]s the numbers are decreasing, accommodation is adequate'.<sup>168</sup>

Although most evidence regarding educational infrastructure was regarding Woomera, the Inquiry also heard that there were problems with infrastructure at Port Hedland and Curtin. A teacher who had worked at Port Hedland said:

The school lacked the usual facilities at most schools e.g. library, gym, proper outdoors play area. There was an unshaded outside area for games which the climate rendered useless for sustained play. ... I taught in a small,

enclosed room under fluorescent lights. Not much light filtered into the room because of the way it was constructed. Bars on the windows added to a feeling of confinement.<sup>169</sup>

When the Inquiry visited Curtin during June 2002, educational programs were being offered in two small dongas (demountable buildings) in the accommodation area, as the purpose-built school had been damaged in riots of April 2002. During the visit ACM staff reported that they hoped to relocate the school to the Main Compound.



School education buildings and recreation area at Curtin soon to be reopened, June 2002.

During visits to Woomera and Baxter in late 2002, the Inquiry found that there was adequate educational infrastructure for the number of students receiving education within the centre schools.

### **(c) Findings regarding educational infrastructure**

The Inquiry finds that until late 2002 the educational infrastructure at Woomera was inadequate, compromising the provision of education. The Inquiry also received evidence suggesting that infrastructure at Port Hedland and Curtin was at times inadequate for the needs of the internal education program.

The large detainee populations at certain times and the destruction of education facilities during disturbances certainly contributed to the difficulty of ensuring adequate facilities. Both these factors highlight the inherent difficulties in trying to provide education within a detention environment. In particular, the fact that the

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facilities became the subject of violence in detention calls into question the Department's assertion that education facilities offer a safe and secure environment for children.

However, as stated earlier, the Department has an obligation to ensure that the detention of children does not affect the quality of a child's education. Had there been a system in place to send all children to external schools, for example, these issues would not have presented such serious problems.

### 12.4.6 Assessment and reporting offered to children in internal schools

It is necessary to assess a child's pre-existing abilities in order to adequately provide for their educational needs.<sup>170</sup> As outlined by the NSW Department of Education, this can be a complex process:

Initial educational assessment of a child is essential but can be difficult, particularly for children with little or disrupted education and the resulting difficulties of literacy in a student's first language. Assessors need to have appropriate experience in assessing English language competence as well as experience in identifying the impact of previous torture and trauma and the settlement process on psychological development and educational progress. The use of bilingual support to conduct such educational assessments is necessary.<sup>171</sup>

The ACM policy regarding education required that '[e]ducational counselling will be provided in order to appropriately place detainees in available educational programs'.<sup>172</sup> Furthermore, the Curtin Education Department Child Detainee Student Policy states:

Enrolments ...

3. Child detainees will be further assessed on academic, behavioural and attendance performance. This process will vary between 2-3 weeks for a newly enrolled detainee child.

4. Once this process is complete, a detainee student will be allocated to the appropriate class.<sup>173</sup>

However, the Inquiry has not received any documentary evidence suggesting that this policy was routinely implemented. Furthermore, evidence from teachers suggests that the assessments did not routinely occur. For example, a former Port Hedland teacher told the Inquiry that '[t]here wasn't any profiling system. There wasn't anything done. It is supposed to be done when the kids first come into a school'.<sup>174</sup>

Similarly, the Inquiry heard from a former Woomera teacher that she:

was not aware of any formal educational assessments conducted by either ACM/DIMIA or the teachers of children when they arrived at the Centre. The only assessments that teachers were able to make, were whether a child could read/write in his/her own language and/or English.<sup>175</sup>

Meaningful education should also include reporting on achievement. All Australian schools have a method of reporting and these results are usually used to assist in

constructing appropriate learning programs for students and to inform parents of their child's progress.

ACM policy on education states that: '[s]ome type of formal recognition of the detainee's accomplishment shall accompany specific course completions'.<sup>176</sup> However, the same teacher cited above, who worked at Woomera during 2001, stated that reporting was very difficult due to 'the constantly fluctuating number of students, the contact time per class and the constant movement of children between compounds'.<sup>177</sup> This teacher reported that 'there is no continuity of learning or an established formal classroom teaching ... so that you could establish records'.<sup>178</sup> Furthermore, she reported that it was very difficult for teachers to provide students departing the centre with records of their achievement because they were not informed when children were leaving the centre.<sup>179</sup>

The principal of the Adelaide Secondary School of English, which many children attended upon their release from Woomera, stated that children arrived at her school with no documentation whatsoever.<sup>180</sup>

The 2001 Woomera ACM Education Coordinator confirmed that there was no reporting on student achievement at Woomera during 2001. She asserted, however, that some reporting to parents was undertaken, commencing in early 2002.<sup>181</sup> She stated that:

From the time when I was Education Coordinator, we did do progress reports on their file and we gave a copy to the parents, and our idea [was] that if we gave a copy to the parents that maybe the parents would take that to the school that their child is going to, and maybe that would be some help to the parents. We have no idea where these people go when they leave; I don't know if they end up – where they end up, so we are not able to follow through or send anything through because we don't know where they are. ACM are not privy to that information.<sup>182</sup>

ACM further emphasised that:

Any education report prepared by ACM staff would be sent to DIMIA along with the child's case management file. ACM has no control over the forwarding of information to the child's parents or school.<sup>183</sup>

The Woomera monthly education report from April 2002 confirms that some reports were provided to parents at Woomera in early 2002:

School reports were issued to parents for all children but there was no feedback from parents at all. Some of the older children were pleased to have had a school report and read the comments.<sup>184</sup>

The Inquiry also received a school report pro-forma from Woomera, used in late 2001 when the students commenced attending the St Michael's facility external to the centre.

The Inquiry heard that at Port Hedland, no assessment files were kept on a child's standard of education;<sup>185</sup> however it appears that in early 2002 'appraisal forms' were provided to students to assist in their transition to external schooling.<sup>186</sup>

### **(a) Findings regarding assessment and reporting**

The Inquiry finds that there has been inadequate educational assessment and reporting for children in immigration detention.

The Inquiry did not receive any evidence that initial assessments of a child's educational level were conducted. Furthermore, there is very little evidence of reporting on student achievement. This lack of educational assessment and reporting on achievement has compromised the provision of appropriate education to children in detention.

The constantly fluctuating number of students and their sudden release may make it difficult to provide reports on student achievement when the children are released. However, there is no reason why student progress cannot be recorded on an individual basis and a report provided to students and parents at regular intervals during their time in detention. This is especially important for children who have been detained for lengthy periods of time.

### **12.4.7 Attendance levels in internal schools**

Throughout Australia, State education legislation requires that all children attend school between the ages of six and fifteen.<sup>187</sup> Two years of post-compulsory education are also provided to Australian children. These laws apply equally to children from culturally and linguistically diverse backgrounds and all other children. However, neither the Department nor ACM are of the view that school attendances can be enforced in detention centres.

### **(a) Challenges in ensuring attendance in internal schools**

There are two related challenges in ensuring attendance at internal schools. Firstly, some children are reluctant to attend internal education programs because of mental health concerns or disinterest in the curriculum being offered. Secondly, the Department and ACM both note that they are of the view that attendance cannot, or should not, be enforced.

Regarding enforcement, the Department stated that:

[p]arents are ultimately responsible for ensuring the school attendance of their children. The Department has very limited powers to compel detainee parents to ensure that their children attend school programs that are offered or to compel children themselves to attend and there are no readily available sanctions for non-attendance.<sup>188</sup>

ACM documents provided to the Inquiry indicate that they were also of the view that attendance was optional. The ACM Education Induction Talk informed detainees that:

[s]chooling in the Woomera IRPC is not compulsory. However, attendance at school is expected and strongly advised for all children from 5 to 16 years old. This is for your child's benefit and to help them in their transition to an

English speaking Australian school. School hours are limited so maximum participation in the classes available is recommended.<sup>189</sup>

Furthermore, a memo from the Education Coordinator of 6 February 2002 states that '[e]ducational opportunities are provided to all school aged children. However, attendance is optional and not all children take up this facility every time it is available'.<sup>190</sup>

As mentioned above, the declining mental health of children in detention also impacted upon the ability of staff to encourage children to go to school. A boy at Curtin told the Inquiry how his diminishing hope affected his enthusiasm to learn:

When I came, first here, we were very hopeful to get out, we thought that our stay here was very short, in a few months and we get out. And after that I became very upset and depressed and because of my mental condition I couldn't bring myself to go to the school.<sup>191</sup>

A former Woomera teacher made similar observations:

All children, I think, drifted away from a learning type of environment experience. They were very enthusiastic, especially some of the girls, to start off with and then they started to gradually weaken in terms of the resolve to learn and take part in classes so in that sense a long term type situation is hopeless in terms of providing adequate – any type of adequate services for them.<sup>192</sup>

The mental health of the children's parents also affects attendance:

As the children's parents psychological condition deteriorated, I observed that their children would also go downhill and stop attending classes.<sup>193</sup>

Even if I had to educate them myself, if I were in a better state of mind I would be able to do so, but in this condition I can't. The schooling that they are provided with is not adequate, if it weren't for my teaching them maths, reading, they wouldn't have learnt anything.<sup>194</sup>

ACM also suggested that cultural beliefs affected the level of attendance:

differing cultural beliefs about appropriate levels of schooling according to the age and gender of the child also act as a disincentive for adolescent children to attend school. For example, adolescent boys from middle eastern backgrounds are regarded in their cultures as adults rather than children. This explains their reluctance to attend school which is perceived as an activity for children.<sup>195</sup>

However, it must be noted that many children who had no interest in attending the classes provided onsite, had a great deal of enthusiasm for learning when they were offered the opportunity to attend schools outside the centre. It appears, therefore, that the children's eagerness to go to class may also have been connected to the quality of the education offered to them and the fact that it was conducted within the detention environment which is one of the causes of their mental decline (see further Chapter 9 on Mental Health).

### **(b) Difficulties in determining the actual attendance in internal schools**

The level of attendance at education programs in detention is difficult to determine. The figures in the Department's submission to the Inquiry are based on ACM internal monthly reports and the Inquiry is concerned that the figures contained in these reports are unreliable. Firstly, analysis of the figures in the reports indicates inconsistencies. Secondly, there are two instances where the Inquiry has received differing reports on the hours of education provided within detention centres.

ACM monthly reports regarding education at both Curtin and Port Hedland indicate significant inaccuracies. For example, with regard to Curtin, exactly the same figures for hours of attendance and the numbers of students attending are given for every month of 2002, even though the number of children in the centre decreased significantly over the year. The reports consistently state that there were 45 children receiving education at Curtin, although from April 2002 onwards there were fewer than 45 children detained in the centre. ACM acknowledge that these reports are sometimes incorrect, stating that 'it would appear that in some instances the amenities table was copied from one monthly report to the next'.<sup>196</sup>

Similar discrepancies can be found in the records for Port Hedland. For example, the ACM monthly report of February 2002 states that educational programs were provided for 62 children, a month during which they report that there were only 49 children detained in the centre. In March 2002 the report states that ACM was providing education programs for 38 children at a time when they report that there were only 33 children detained in the centre.

ACM explain that the discrepancy between the figure regarding educational programs and the number of children in the centre may be because the number of children reported detained in a month was occasionally not an average but the 'actual number on a sample day':

For example, the number of children in Port Hedland for February 2002 was erroneously reported as 49.<sup>197</sup> In fact, the number of children in Port Hedland decreased from 78 to 52 during the month. Had the correct method of aggregating the actual numbers each day and then dividing the aggregate by the number of days in the month been used, the average number of children for the month should have been 65. The average attendance figure of 62 for that month is therefore not inconsistent with the number of children in the centre for the month.<sup>198</sup>

Furthermore, the ACM education coordinator responsible for providing statistics at Port Hedland at the time gave evidence that in early 2002 he approximated figures for attendance at education as the method of calculation was very complicated and difficult.<sup>199</sup>

While these explanations account for some of the discrepancies, they also demonstrate the difficulty of relying upon these records for an accurate impression of educational programs provided to children. As the Department's submission appears to be based on these numbers, its reliability is also in question.

### (c) **Apparent attendance levels in internal schools**

Documents available to the Inquiry suggest that children's attendance at education programs inside detention centres decreased with the length of time that the children had been in detention.

A January 2002 report from Port Hedland states that 89 per cent of children who had been detained in the centre between 25-52 weeks attended school regularly but that only 70 per cent of those who had been detained in the centre for over 52 weeks attended school regularly.<sup>200</sup> At Curtin, children who had been in the centre for up to three months had a 95 per cent attendance rate, children who had been in the centre for up to nine months a 90 per cent attendance rate and children who had been in the centre for 12 months or longer an 85 per cent attendance rate.<sup>201</sup>

In some instances, attendance also appears to decrease with the increasing age of the children. In a memo of March 2002, the Woomera Programs Manager reports that approximately 85 per cent of children aged between 5-12 years attended education classes daily, while approximately 70 per cent of children aged between 13-16 years attended education classes daily.<sup>202</sup>

At Villawood, there has been very low attendance at internal education programs by secondary school-aged children. ACM documents indicate that for the years 1999-2000 and 2000-2001 approximately 20 per cent of secondary school-age children attended school in the centre, while for 2001-2002 approximately 50 per cent of secondary school-age children attended school in the centre.<sup>203</sup>

The Inquiry also received evidence that attendance at educational programs of particular groups of students was low. For example, an ACM document indicates that the attendance of adolescent girls at Woomera education programs in early 2002 was very low:

The 13-17 year old girls are a very small group, currently only 8 in the whole centre and with some lengths of stay 12 months plus. These girls have been contacted individually to inform them of new class times and the excursions within the RHP. It has been extremely difficult to motivate this group of girls. A few months ago some of the girls turned up daily for classes but in recent months they rarely turn up for either classes or their allocated times in the computer room. ... It would be unfair to say that the girls can only attend excursions if they attend classes as they are long term detainees and the benefits of getting them out of the Centre once a week outweigh the need to get them into classes.<sup>204</sup>

An ACM officer reported the reasons for which teenage girls were not attending class:

There were six girls and each had their own reason for not attending class. Three of them have been here for over a year and their enthusiasm for school has waned, two more go to a Resident teacher to learn English and one goes to work.<sup>205</sup>

## A last resort?

Department and ACM records from mid-2001 and early 2002 indicate that detention centre staff tried to encourage attendance at education programs, particularly for unaccompanied children. Minutes of meetings regarding unaccompanied children from June and July 2001 demonstrate that ACM officers were investigating the reasons for low attendance at school and that there were specific strategies in place to encourage unaccompanied children to attend education. However, these records also indicate that detention affects the unaccompanied children's desire to attend school.

For example, the minutes of 12 June 2001 note:

The UAMs appear to have the attitude:

- 'they will learn when they get out to Australia'
- 'they will work when they get out to Australia'

None of them appear to want to commit themselves while they are in the camp.<sup>206</sup>

In another meeting at Woomera regarding unaccompanied children on 3 July 2001, it is reported that:

Detainee students have been asked to attend class. It has been explained to them that 'when they hit the outside' they will have to go to school, it's not a matter of choosing ... Education Officer Three has had several detainee children tell her straight out 'that they are not interested in coming' to classes.<sup>207</sup>

General concern about low attendance was also recorded in the minutes of the teleconference regarding unaccompanied children on 17 January 2002:

All mainland centres agreed that it is becoming difficult to encourage UAM's to attend education. Many of the Afghani's are refusing to go to school and advise they have no inclination to do so until their protection claims are granted. The meeting discussed strategies for increasing attendance, including testimonials from former detainees as to the merits of taking English classes, linking school attendance to certain privileges.<sup>208</sup>

The Department informed the Inquiry that 'unaccompanied minors over compulsory school age may choose to leave their schooling'<sup>209</sup> and that although efforts were made, there were 'difficulties in encouraging attendance' for post-compulsory aged children.

### **(d) Findings regarding attendance**

Although there is some evidence that staff actively encouraged children to attend school, in most cases these efforts do not appear to have been effective. While unreliable record-keeping makes it difficult to determine the exact attendance levels, it appears that it has generally been low, particularly with long-term detainee and older children. The primary reasons for non-attendance by children appear to be increasing depression and the absence of a stimulating curriculum suited to the various ages and levels of children.

There is no evidence that the Department sought to enforce school attendance for children between 6 and 15-years-old, as required in the Australian community.

#### **12.4.8 Summary of the provision of education in internal schools**

The preceding sections explain that education within detention facilities was inadequate, and certainly nowhere near the level of education offered to similar children in the community primarily for the following reasons:

- The standard State and ESL curricula were not offered to children in detention until late 2002; this was especially problematic for children of post-compulsory school age.
- There were severe teacher shortages and infrastructure restrictions resulting in an extremely short teaching day.
- There was inadequate assessment and reporting.
- The poor curriculum and mental health issues facing children in detention meant there was very little enthusiasm for attending the classes that were on offer.

The Inquiry recognises that many of these problems arise from challenges inherent in running a school within the detention environment. Many of those problems disappeared when children started going to Australian schools.

The next section outlines when children started attending community schools and why it took so long for access to these schools to be organised.

### **12.5 What external education was provided to children in detention?**

In Port Hedland there is a school outside. It is a public school. It was a primary school I think. I used to stand on a chair and look out at them. I like to see what they looked like in their school uniform. There was an officer, she pulled my shoulder down and put me on the ground and said, you are not allowed to look at those people because they are different to you. And I was like "Why are they different to me – because they know English and they are Australian, does that make them better?"<sup>210</sup>

Many of the problems encountered with the internal education program disappeared when detainee children attended the local schools in the communities surrounding the various detention facilities. Children were immediately enthusiastic about attending school. The primary reason for this was that children had the opportunity to leave the detention centre every day and interact with Australian children. However, children also reported a radical difference in the quality of the education that they were receiving.

## A last resort?

In evidence to the Inquiry, the Department stated that it 'acknowledges that access to [external] schooling is likely to be appropriate and beneficial for most children':

Attending a school in the community provides children with much more than a formal education. It allows them to experience a normal day in the life of any school aged child, offers them opportunities to socialise and make friends outside the detention environment and importantly has a very positive effect on the emotional and social wellbeing of the whole family.<sup>211</sup>

This section discusses the following issues regarding external education:

- when and where children have attended external schools
- progress of negotiations for routine access to external education
- impact of remote locations on access to external schools
- payment for access to external education
- participation in external education
- impact of external education on detainee children
- education in alternative detention.

The section concludes with a summary of findings regarding external education.

### 12.5.1 When and where children attended external schools

Access to external education has varied considerably across centres and over time. In evidence before the Inquiry the Department stated that '[o]ver the years at various times children from Maribyrnong, Villawood, Curtin, Port Hedland and Christmas Island have attended local schools outside the detention facilities'.<sup>212</sup> The Inquiry is not aware, however, of the existence of regular access to external schooling prior to 2002 except in the cases of Curtin and Maribyrnong. Following is a brief synopsis of what has been available to detainee children.

#### Maribyrnong

1998 Children had access to education at St Margaret Mary's Catholic primary school from the beginning of 1998. Approximately 12 children participated in this arrangement.

2002 In October children commenced attending the local State schools.

#### Port Hedland

1998 Two children enrolled at St Cecilia's Catholic School.

2002 In April two children began attending St Cecilia's. All of the children attended the school from May onwards.<sup>213</sup>

#### Curtin

2001 Children commenced at Derby District High School in March 2001. Five children attended during 2001.

2002 Approximately 16 children attended Derby District High School. This was a small proportion of the children detained at the centre at the time.

**Villawood**

2002 In August 2002 some children commenced attending local State schools. More children in the centre commenced at external schools in October; however, not all children could participate.

**Woomera**

2002 In December, primary school-aged children commenced attending St Barbara's Catholic Parish School in Roxby Downs two days a week.

2003 By mid-2003 children detained at the Woomera Residential Housing Project were attending the Woomera Area School.

**Baxter**

2003 In March 2003 secondary school-aged children commenced attending local State schools and in April 2003 primary school-aged children commenced attending local State schools. Some children were excluded from these arrangements.

**12.5.2 Early ad hoc arrangements for access to external education**

Although the Department has stated that the main impediments to organising access to external schooling were barriers such as the requirements of State authorities or local communities, evidence provided to the Inquiry reveals that the Department did not begin to coordinate its efforts to organise access to external schooling until mid-2002.<sup>214</sup> This is particularly concerning, given that external education was first recommended in the 1994 report of the Joint Standing Committee on Migration.<sup>215</sup>

The Inquiry heard that initial access to external schools was organised locally and in an ad hoc fashion. For example, the Inquiry heard that the arrangement for child detainees from Curtin to attend Derby District High School was initiated after an approach was made to the Principal of the school by the ACM Manager from Curtin. There was no general approach from the Department or ACM to the Western Australian State education authority.<sup>216</sup>

The arrangement at Port Hedland was also locally negotiated. The Principal of St Cecilia's reported to the Inquiry that in April 2002 he approached the Department's Manager to suggest that the detainee children attend his school. In Port Hedland ACM reported that prior negotiations had been conducted with State schools, but the detainee children were not accepted into the State schools as they were not Australian citizens.<sup>217</sup>

The Department suggests that access to external education was negotiated in 2002 due to the 'evolving educational needs of longer-term detainee children from 2002 (as the caseload changed in response to the numbers of unauthorised boat arrivals ceasing)'.<sup>218</sup>

## A last resort?

The Department further argues that:

Prior to the unprecedented arrivals of unauthorised boat arrivals, access to external education for detainee children was more effectively negotiated at a local level in response to the individual circumstances of the child. Such an “ad hoc” ... process was appropriate for addressing the presenting issues at the time.<sup>219</sup>

However, very few children detained between 1992 and 2001 had any access to external education, despite recommendations that this occur. For example, no child detained at Villawood was able to access external education until mid-2002. Clearly, the ad hoc arrangements did not deliver external education for many children in detention.

### 12.5.3 Negotiating routine access to external schools

The Department assumed complete responsibility for negotiation of access to education during 2002, when negotiations of Memoranda of Understanding (MOU) with State education authorities regarding placement of children in external schools commenced in New South Wales, South Australia, Victoria and Western Australia. Prior to this there was some confusion as to whether the Department or ACM was responsible for negotiating access for detainee children.

This is particularly evident in the case of Woomera, where responsibility for negotiations with the State education department alternated between the Department and ACM over 2001-2002.

ACM reports that negotiations between ACM and the Woomera Area School commenced in early 2001 when support was ‘gained at the local level for children from [Woomera] to in some way use the facilities of the Woomera Area School’. However, ACM alleges that the South Australian Department of Education refused to let any detainees attend the school.<sup>220</sup>

It seems that the negotiation process was then handed back to the Department, which states that it made contact with the South Australian Department of Education in mid-2001.<sup>221</sup>

However, in February 2002 it seems that negotiations were back in ACM's hands. The South Australian Department of Education reports that in February 2002 ‘the matter of children in detention enrolling in Woomera Area School was raised by ACM with the school directly’. The SA Department's view was that this proposal ‘put undue pressure on the school and that any request of the kind being presented should be made at government-to-government level’.<sup>222</sup>

Negotiations continued between ACM and the school and in April 2002 ACM put a proposal to the principal of the Woomera Area School for the trial integration of a maximum of 15 lower primary aged children from Woomera.<sup>223</sup>

It does not appear that this proposal made any progress and negotiations resumed between the Department and the South Australian Department of Education. In an

appearance before the Human Rights Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade in August 2002, the Department stated that it was 'still in discussions in South Australia where we do not yet have access to external school based education'.<sup>224</sup>

This example demonstrates the lengthy and confusing process followed by the Department and ACM prior to 2002.

The first MOU to be finalised was between the Department and the NSW Department of Education and Training, on 28 June 2002. Discussions were initiated in April 2002. In May 2002, Ken Boston, then Director-General of Education, was quoted in the media as saying that:

This is an educational, moral and ethical issue, not a political one. There are 26 young people there of school age, most of them illiterate, many who have never been to school, who I believe should be given the gift of education.<sup>225</sup>

The next MOU was finalised between the Department and the South Australian Government on 17 December 2002. However, access to external schooling for the children detained at Baxter was considerably delayed while the process of consultation with the local community in Port Augusta was concluded.

Negotiations with the Victorian Government commenced when the local Catholic primary school was unable to accommodate children detained at the centre in June 2002.<sup>226</sup> These children were educated within Maribyrnong between June and October 2002. A draft MOU between the Department and the Victorian Government had progressed to a stage where detainee children could commence school in October 2002. The MOU was signed on 5 February 2003.

According to the Department, formal negotiations of a MOU with the Western Australian Government began in November 2002.<sup>227</sup> As at September 2003, this MOU was still not finalised.

Each of the MOUs regarding external education has very similar content. In each agreement the Department acknowledges that it seeks to access public education in the local community for detainee children, provided the requirements of the *Migration Act 1958* (Cth) (Migration Act) to detain unlawful non-citizens are met.<sup>228</sup>

Under each agreement, participating schools must be approved as alternative places of detention, and the principal or teachers must be designated [or directed] persons responsible for the detention of the children. The agreements require directed persons to exercise a high level of responsibility with regard to detainee children.<sup>229</sup>

The Department has sought to explain the delay in reaching these agreements as follows:

The degree of support by the State education authority for the arrangements and negotiations may also affect the length of time in which the department may be able to agree upon access. The extent to which senior support can expedite the negotiation process is evident in the negotiations with the NSW State education authority.<sup>230</sup>

## A last resort?

The Inquiry accepts that the willingness of State authorities to accept children into their schools will impact on the speed at which agreements are reached. However, the children in detention centres are the Department's responsibility and have been so since at least 1992. It is therefore disappointing that the Department did not approach State authorities in a comprehensive manner prior to 2002.

### 12.5.4 Payment arrangements for external education

One of the issues with regard to the provision of external schooling is the question of who should be responsible for meeting the cost. Within Australia, public primary and secondary education is largely funded by State authorities, with a lesser proportion of funding provided by the Commonwealth. Private schools receive the majority of their funding from the Commonwealth, with the remainder funded by State authorities and school fees.

Despite repeated questioning at the Inquiry's public hearing for the Department, the Inquiry was not able to ascertain whether over the past few years the responsibility for payment of fees has rested with ACM or the Department.<sup>231</sup> There is some evidence that the Department considered the responsibility to be ACM's. For example, the Port Hedland Manager report in November 2001 noted that 'ACM [was] reluctant to pursue the option of mainstream schooling for any children due to cost'.<sup>232</sup>

However, the early localised arrangements for external schooling, for example in Derby (Curtin) and Port Hedland, suggest that attendance by detainee children was dependent on the generosity of the individual schools. In other words, it appears that neither ACM nor the Department met all of the costs of educating children who attended school under these arrangements.

In June 2002, the principal of the Derby District High School told the Inquiry that initially there was no funding for the students from Curtin to attend the school, and that the school absorbed the cost within its own resources. From 2002 the detainee students were counted as part of the total enrolment of the school, which meant that the Western Australian Government provided the bulk of the funding for the education of these children.

Similarly, initially there was no provision for payment of fees or other costs for children attending St Cecilia's Catholic School in Port Hedland. In October 2002, the Catholic Education Office of Western Australia requested a contribution to the costs of educating the detainee children. After a lengthy process of negotiation, in mid-2003 the Department agreed to meet the costs of the children's education (including school fees and the equivalent Commonwealth funding provided for the education of other children at the school) backdated to the commencement of the negotiations in October 2002.

The cost of external education may have affected access for children detained at Woomera. The Department's former Infrastructure Manager at Woomera told the Inquiry that when the detention centre opened, it was thought that the children could attend the local school, but that the Department decided to provide education

on-site as this would require fewer staff.<sup>233</sup> This former senior Department officer also reported that early suggestions to use the empty St Michael's school facility were initially rejected by Department management, apparently because 'additional staff resources would be required to manage school attendance out of centre'.<sup>234</sup>

The Inquiry also received evidence that reluctance to meet the costs of external education affected the access of children from Maribyrnong to external schools. Children from Maribyrnong had been placed in the local Catholic primary school from 1998 onwards. However, when three children arrived at the centre in mid-2001, the school was unable to accommodate them. ACM unsuccessfully attempted to place the children in local State schools. The Department then negotiated access to the State schools, which requested payment at the overseas student rate.

The Victorian Education Department's fees were \$5842 (or \$142.49 weekly) for primary children and \$7190 (or \$175.37 weekly) for secondary children, commensurate with the charges that apply to a fee paying student from overseas. If children required an intensive ESL course, the cost rose to \$217.80 weekly.<sup>235</sup>

Department staff at Maribyrnong reported the following in both July and August 2001:

Two children aged 13 and 6 that have been detained since March are not receiving educational programs appropriate to their age and abilities. ACM had indicated that it was unable to access suitable 'English as a second language' and secondary education. ACM advised that the Victorian education system would not enrol the detainees. DIMA resolved the obstacles to enrolment in the Victorian education system. ACM declined to enrol the children on the basis that the cost was too great.<sup>236</sup>

The Department asserted that children could access ACM education programs while negotiations were conducted. However, this does not take into account the Centre Manager's claim that they were not appropriate.<sup>237</sup>

With regard to the cost of external education, the Department noted that:

with the possible exception of the first instance where this arose, issues of cost have not affected detainee children's attendance at external schooling. The department determined that cost issues would not be an obstacle for detainee children's access to schooling.<sup>238</sup>

The recently signed MOUs do not incorporate any final agreement as to who meets the costs of external education for children in immigration detention. In each agreement, the Department acknowledges that there may be costs to the State education authority over and above any Commonwealth/State funding arrangements which may apply. Each agreement contains the statement that:

Given the fluctuating numbers and periods in the school system of such children and uncertainties over the numbers of schools which may be involved any additional costs may be difficult to identify in the short term.<sup>239</sup>

The Department will consult with each State education authority regarding costs once the agreement has been in place for six months.

## A last resort?

It appears that once the new services provider contract is in operation, Group 4 Falck will be responsible for meeting the cost of external education. The Department informed the Inquiry that 'absolute clarity has been built into the proposed new detention services contract, with the payment of fees and other costs at external schools identified as the responsibility of the services provider'.<sup>240</sup>

### 12.5.5 Impact of remote locations on access to external schools

The Department has indicated that the location of the detention centres made it difficult to arrange for detainee children to attend local schools because the child detainee population sometimes exceeded the capacity of the schools:

For example, around September 2001 there were over 450 children at the Woomera centre. The local school had a student population of around 70 children. The logistics of integrating the detainee children, many of whom moved out within a short time, would have been impossible. In these circumstances education was conducted mainly within the detention facilities and focused on English language, literacy, numeracy and socialisation skills. This enabled children to integrate into local schools effectively if they were granted a visa.<sup>241</sup>

The Inquiry also heard evidence that remote area schools had difficulty in providing sufficient ESL support to its detainee students. For example, the principal of St Cecilia's told the Inquiry that he felt that the needs of the children could not be fully met as the school did not have any extra ESL assistance. In contrast, children detained within city centres have access to Intensive English Centres with a full range of specific services. This point was emphasised by the South Australian Education Department which stated that allowing children to attend the Woomera Area School:

wouldn't be the best solution because Woomera is a fairly isolated situation and we would have to load in all of the kind of support services that we are able to do in the big metropolitan areas but there are lots of children who are new arrivals who don't live in metropolitan areas and we do a very good job in those situations.<sup>242</sup>

The Inquiry acknowledges that the limited physical and professional capacity of remote area schools poses very real challenges to the Department in arranging for detainee children to attend these schools. The Inquiry takes the view that this problem highlights the inherent inconsistency between the current mandatory detention system, and the protection of children's fundamental rights. Nevertheless, there are solutions within the current system. If children must be detained they should either be detained in city detention centres where the access to schools is much easier, or they should be transferred to places of alternative detention such that they can access appropriate schools.

The Department has told the Inquiry that operational considerations mean that not all children can be detained in the metropolitan detention centres. Once again, this highlights the barriers that the mandatory detention system raises. Furthermore, it demonstrates that the best interests of the child was not a primary factor in

determining the location of children and families as it appears that operational concerns took priority over the provision of services such as education.<sup>243</sup>

### **12.5.6 Determining which children attended external schools**

Prior to the establishment of agreements with State education authorities, the criteria for determining which children could attend external schools were established between the schools and detention centre staff.

Some children were excluded from attending external education under local arrangements. For example, the local agreement between Derby District High School and Curtin education staff stated that children would only be permitted to attend school if ACM staff assessed that the child could cope with the external school environment and their English and social skills were good enough.

In June 2002, Inquiry staff interviewed a family where one sibling attended the Derby District High School for twelve months prior to another sibling being assessed as having sufficient English to meet the selection criteria. The sibling who was excluded told the Inquiry that not being able to attend the external school was a cause of great 'sadness'. Exclusion of children from external school as a result of criteria such as these would not occur in the community where all new arrival children have access to full school programs, regardless of their level of English.

The impending closure of Curtin also prevented some children from going to Derby District High School, even though they were assessed as meeting criteria for participation. ACM education staff told the Inquiry in mid-June 2002 that seven children had reached the stage where they were ready to attend school in Derby, but that they were not going to be sent as it was not known when Curtin would close. Curtin finally closed in the third week of September. The principal of the Derby District High School told the Inquiry that he could see no reason for not enrolling students for a short period of time, such as six to eight weeks. These children were denied access to external education for a period of over three months. This is especially concerning as there was no immediate access to external education at Baxter, the centre to which the children were transferred, until March and April 2003.

The Inquiry also heard of situations where age affected opportunity to attend external school. This has occurred at both Woomera and Curtin. In Woomera, primary school-aged children commenced attending Roxby Downs Catholic Primary School in November 2002. At this time secondary school-aged children in Woomera could not go to external schools. Some of these students told the Inquiry in September 2002 that they were aware that children from other detention centres attended external education and they were extremely upset that they were not able to do the same.

At Curtin, children who were post-compulsory school age (16 to 18-years-old) were also unable to access external education. The impact of this exclusion is described in Case Study 3 at the end of this chapter.

## A last resort?

The MOUs signed by State education authorities set out standard criteria for participation in external schools. All children who are expected to be in detention for longer than three weeks will be considered for external schooling. Participation is based on the Department's assessment of: (a) the length of time a child will be in detention and (b) whether the requirements of the Migration Act can be met. The State education authority also conducts an assessment of: (a) the child's socialisation capacities; (b) the child's abilities, including literacy in English and numeracy; and (c) the capacity of a local school to meet the needs of such a child.<sup>244</sup>

Not all children are able to attend local schools under these criteria. For example, the children of one family detained at Villawood began attending an outside school soon after the NSW MOU was finalised, while the children of another remained in detention for another few months. The children in this second family were initially excluded due to security concerns; however, after some time the Department decided that the best interests of the children outweighed any security concerns and permitted the children to go to school. These children had been in detention for nearly three years by the time they were finally allowed to attend an external school. The situation of this family is described in Case Study 2 at the end of this chapter.

Children detained at Baxter have been excluded from attending external education in 2003.<sup>245</sup>

### 12.5.7 Impact of external schooling on detainee children

External education has significant benefits for detainee children. The benefits include the experience of a full curriculum, the opportunity to socialise and make new friends, and the opportunity to regularly leave the detention environment. As stated in the introduction to this section, the benefits of external education for children have been acknowledged by the Department.

The Department reported that children were doing well at external schools:

For example:

- the children from Curtin IRPC attending the local Derby school were described by the Principal of the school as being 'model students' who integrated very well, often excelled in their studies, and participated in school sporting competitions (one child was on the school soccer team and attended Country Week in Perth);
- of the children currently attending local schools at Port Hedland IRPC: one is the Head Girl at her school; one is going to Perth for Country Week for an interschool soccer carnival; another recently went to Perth for a week with a school team and participated in the Young Australia Achievement program; and
- of the children currently attending local schools at Baxter IDF: there is a high level of participation in extracurricular activities such as school excursions, including school camps and choirs, and sports (recently, some detainee boys were included in a team for a carnival of stateside representative soccer).<sup>246</sup>

An adolescent boy from Curtin graphically reported to the Inquiry the importance of external education when asked whether he liked going to school. He said: 'Yeah, I like, because if I don't go there I will destroy'. In September 2002, this child was transferred from Curtin to Baxter where there was no opportunity to attend external education until March 2003.

Parents told the Inquiry that they preferred their children to attend external school. For example, mothers at Curtin said:

So what I am saying, probably it is more formal to send them to Derby they have more curriculum, schooling and education. They have more focus on subjects and give them more study to do in Derby.

*Mother, Curtin, June 2002*

[W]e cannot compare the schooling in Derby town with the school inside the camp. Here in this camp there was no difference in ages for all students there were the same text and when the text was given to them, then they repeated it again and again.

*Mother, Curtin, June 2002*



Derby District High School attended by some of the children in Curtin, June 2002.

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## A last resort?

Department staff also noted the positive impact of attending external schools. For example, the Department Manager from Port Hedland reported in June 2002 that the '[b]ehaviour and socialisation skills of the children [are] improving as a result of attending community schools'.<sup>247</sup>



St Cecilia's Catholic school attended by children in Port Hedland, June 2002.

Although children attending external education are given an important opportunity to leave the detention environment, the Inquiry has heard that children in detention may not be able to take full advantage of this educational experience.

For example, the Inquiry heard repeatedly about the trauma of returning to the centre each day after going to external schools. The children were acutely aware of the difference between their lives and those of Australian students attending these schools. In June 2002 a young boy attending St Cecilia's in Port Hedland stated that:

But it's really different, but it's making worse also, because when we go outside we see the children, they go out free, when they go back to home, we have to come back here, sometimes they say to each other we're going to beach or somewhere else, we can't go.<sup>248</sup>

Similarly, an adolescent boy from Curtin told the Inquiry, in June 2002, that:

We are witnessing that the other kids are going shopping any other excursion or trips with their parents whilst we are coming back toward the camp, we feel bad.<sup>249</sup>

The Inquiry also heard of limitations on the parents' ability to participate in their children's education while they are in detention. At Port Hedland some parents of detainee children reported that they were not allowed to attend St Cecilia's to meet their children's teachers.<sup>250</sup> In Curtin, however, it appears that parents from Curtin were able to attend parent teacher interviews at the Derby District High School, with visits facilitated by education staff from Curtin.<sup>251</sup>

Furthermore, while attending local schools is clearly preferable to on-site schooling, to the Inquiry's knowledge none of the schools which the children from remote centres attended are Intensive English Centres or schools running a New Arrivals Program. As set out in section 12.3, those programs offer the education best suited to the needs of most detainee children.

### **12.5.8 Education in alternative places of detention**

The 14 unaccompanied children who were transferred from Woomera to foster care detention in Adelaide in early 2002, were all enrolled in the Adelaide Secondary School of English, the secondary New Arrivals Program centre in Adelaide. The South Australian Department of Education reports that an 'agreement is currently being negotiated between the Department of Human Services and DIMIA to, among other things, seek full cost recovery for educational services provided to children in alternative detention'.<sup>252</sup>

The principal of the Adelaide Secondary School of English, which these students attend, reported that being in alternative detention does not compromise the students' participation in school activities. The students must be dropped off and collected from school, but otherwise, 'if there is an activity outside of school as long as a teacher is willing to supervise them then they can go and there's been no teacher that has said that they don't want to take them on an excursion'.<sup>253</sup>

### **12.5.9 Findings regarding external schooling**

The Inquiry is disappointed that it took more than a decade of detaining children in immigration detention facilities before there was a comprehensive approach to the provision of external schooling.

Early successes at obtaining access to external schools occurred on an ad hoc basis. However, over 2002 the Department made more widespread efforts at making arrangements with local schools.

Prior to negotiating MOUs, the Department made no proactive attempts to meet the costs of external education, instead waiting for approaches to be made from the schools or education authorities who had accepted the detainee children as students. A clearer understanding as to the responsibility for meeting the costs of education is outlined in the MOUs with State authorities and the new detention services contract.

The Inquiry is concerned by the criteria that are used to determine access by children to external schools. A child's level of socialisation, literacy or numeracy should not

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be a barrier for children in detention any more than it is for any other child in the Australian community. Children in the community are required to go to school no matter what their level of education or behaviour patterns. While the Department may legitimately take into account security concerns, this consideration should be interpreted in the light of the principle that the best interests of the child be a primary consideration.

Finally, the Inquiry is of the view that while external education is far preferable to internal education, it is less than ideal. Although many detainee children have benefited from external education, they may not be able to take full advantage of the experience due to the constraints of the detention environment. They or their parents may have poor mental health and returning to the centre each day may be traumatic. Friendships with other children from the school are restricted by the detention imperative. Furthermore, to the extent that external schools in rural and remote areas do not have the appropriate ESL capacity, those schools may not be the best suited to the special needs of these children. All of these factors indicate the difficulty of providing effective education of any kind for children held in detention centres.

## 12.6 Summary of findings regarding education for children in detention

The Inquiry finds that there has been a breach of articles 2(1), 3(1), 22(1) and 28(1) of the CRC regarding the right to education.

The effect of articles 2(1) and 28(1) of the CRC is to require Australia to provide children in detention access to the same level of education as any other child in Australia with similar needs. Article 22(1) requires that appropriate efforts be made to cater to the special needs of asylum-seeking and refugee children. In the context of Australia's current immigration detention system, this responsibility falls primarily on the Department.

The Commonwealth-funded New Arrivals Program caters specifically to the needs of asylum-seeking and refugee children living in the Australian community. This program provides an appropriate benchmark for the assessment of education provided to children in detention.

While there have been significant variations in the amount and quality of education provided in different detention centres at different times, the Inquiry finds that, until some children began attending schools in the Australian community in 2002, the education available to children in detention fell significantly short of the level of education provided to children with similar needs in the community. The Inquiry finds that the Commonwealth breached articles 2(1), 22(1) and 28(1) of the CRC for the reasons set out below.

Prior to late 2002, the on-site detention centre schools failed to develop a curriculum suited to the needs and capacities of children in immigration detention. The evidence suggests that there were no efforts to coordinate curriculum design or implementation and until late 2002 no systematic attempt to adopt the State curricula

available and apply it within the ESL framework. Furthermore, unlike in Australian schools, there was no suitable curriculum for children above the compulsory age of education. Despite improvements in late 2002, when there were efforts to teach a State-based curriculum in Woomera and Baxter, parents and children still felt the education was inferior to that available in the Australian community.

Children were inadequately assessed as to their educational needs, and there was insufficient reporting of children's educational progress. Furthermore, there was insufficient infrastructure, curriculum resources, and teachers available to support the curriculum that was being taught.

While all teachers hired by ACM had general teaching qualifications, there were occasions when there were no teachers with ESL qualifications. Furthermore, there were times when detainees without teaching qualifications were used to make up the shortfall in qualified teachers. A high turnover of teachers also impacted on the quality of teaching.

In situations where there was a shortage of teachers and classrooms, the hours of schooling were well under the standard six-hour day in Australian schools. One of the worst examples was in Woomera in mid-2001, when children were offered between one and two contact hours a day.

While there were efforts to encourage children to attend classes, neither the Department nor ACM required children under the age of 15 to attend classes. The attendance levels were generally low, particularly with long-term detainees and older children. This was related to a combination of increasing depression in long-term detainees and the absence of a sufficiently stimulating curriculum.

Thus despite the enormous efforts of teachers to provide the best possible education within the circumstances, there were formidable barriers to providing an adequate education to children within detention centres.

The Department suggests that it did the best it could in the light of large influxes of children, destruction of classrooms during riots, difficulties in recruiting teachers to remote and rural areas and the varying needs of the children in detention centres. The Inquiry acknowledges that there were many challenges to providing an adequate level of education to children within detention centres, especially when children were there for long periods of time. However, the CRC makes it clear that the Department had an obligation to overcome those difficulties in order to ensure that children enjoyed a level of education comparable to similar children in the Australian community. In the Inquiry's view the Department made insufficient efforts to address those issues until 2002 when it commenced negotiating routine access for children to external schools in the community.

While there were ad hoc arrangements to send individual children to schools prior to 2002, the first time a large group of children attended a community school was in early 2002. At this time children from Curtin began attending Derby District High School, a local State school, and children in Port Hedland began attending St Cecilia's, a local Catholic school. At the same time the Department began to pursue comprehensive arrangements with State education authorities.

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Arrangements for external schooling are a marked improvement in the level of education provided to children in detention, although the Inquiry notes that the fact that children must return from school every day to a detention centre prevents them from taking full advantage of the external education experience.

Furthermore, there are still children in detention who are excluded from attending Australian schools and the Inquiry questions the application of some of the criteria on which they are excluded. For example, while concerns about flight risks may be a legitimate reason, this consideration must be assessed against the best interests of the child, which needs to be a primary consideration in any decision made. In addition, in the event that external schools in rural and remote areas do not have the appropriate ESL capacity, those schools may not be the best suited to the special needs of these children.

The Inquiry finds that to a certain extent the long-term detention of children inevitably leads to inadequacies in the education provided because of the difficulties presented by the detention environment. This reinforces the Inquiry's concern that Australia's mandatory detention laws, and the manner in which they are applied by the Minister and Department, fail to adequately consider the best interests of the child as required by article 3(1) of the CRC (see further Chapters 6 and 17). Furthermore, it highlights the connection between compliance with article 37(b) of the CRC, which requires detention as a last resort and for the shortest appropriate period of time, and compliance with article 28(1) of the CRC.

The Inquiry also notes that in making decisions about the location in which children are detained (the remoteness of some of Australia's detention centres presenting logistical difficulties in providing an adequate level of services), a proper consideration of the best interests of the child will include an assessment as to whether their right to education can be met in that location. In the Inquiry's view, the decision to detain children in remote locations contributed to the inadequacy of their education and suggests that their best interests may not have been a primary consideration in those decisions, contrary to article 3(1). This issue is discussed further in Chapter 17, Major Findings and Recommendations.

The right to enjoy a level of education, on the basis of equal opportunity with similar children in the Australian community, is closely linked to a child's right to achieve the highest possible level of development under article 6(2) of the CRC. It is also an important factor to take into account when assessing Australia's compliance with article 37(c), which requires that there is respect for the inherent dignity of children, taking into account the needs of their age. Since compliance with the JDL Rules is a useful guide for assessing whether or not there has been compliance with article 37(c), it is relevant to note that those rules recommend that children be sent to schools external to a detention facility and that there be an appropriate curriculum for those children beyond the compulsory age of education. As set out above, there have been periods of time during which those rules have not been complied with. However, the Inquiry makes no conclusive finding regarding articles 37(c) or 6(2) in this chapter. Rather it flags these issues for consideration in Chapter 17.

## 12.7 Case studies

### 12.7.1 Case Study 1: Inadequate on-site education for a 15-year-old girl, Woomera

There is no point in us going on living like this. I used to be able to read. I can't read or concentrate. I wished I could go back to school, but now I can't. What is the point in my life?<sup>254</sup>

These are the words of a 15-year-old girl first detained at Woomera on 5 January 2001. They were recorded in an interview with a psychiatrist in July 2002, when she had been in detention for over 18 months.

For most of 2001 there was only between one and three hours of tuition available to students at Woomera, four days a week.<sup>255</sup> In December 2001, some children from Woomera began attending classes at St Michael's, a disused school building in Woomera town where ACM teachers taught children from the detention centre. When the first children started going to St Michael's, she remained behind in the centre as she was too old. She could have attended St Michael's from April 2002 onwards, but by May 2002 she had lost interest in attending school due to her depression.

ACM medical records from 15 May 2002 state that she 'still feels upset and depressed. She has no interest in activities and doesn't wish to go to school. Has nightmares, poor energy. Would be interested in going to a normal school'.<sup>256</sup>

Although some of the primary school-aged children from Woomera finally had an opportunity to attend the Roxby Downs Catholic School two days a week in late 2002, she and her sister were not able to attend due to their age.

She finally commenced classes at an external secondary school, the Woomera Area School, on 28 April 2003, over two years after she was first detained at Woomera. She was released from detention on a temporary protection visa in August 2003.

### 12.7.2 Case Study 2: Impact of restricted access to external education, Curtin, Port Hedland and Villawood

This family arrived in Australia in December 1999, when their children were aged 4, 9, 13, and 15. The family was initially detained at Curtin and then transferred to Port Hedland in May 2000. In July 2001, the family was relocated to Villawood. They were detained for over three years prior to leaving Australia in early February 2003.

This family had a volatile time in detention, with both parents and the two older sons charged with involvement in riots at Port Hedland. For a period of time during 2001 the parents and older sons were kept in State correctional facilities, with the two younger children cared for by other detainees. The family came to be considered a security risk.

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This had a serious impact on the younger children of the family. When external schooling was finally arranged for children detained at Villawood in mid-2002, the children from this family were denied access due to security concerns, even though they had been in detention for over two and a half years.<sup>257</sup>

Frustration at being denied access to external schooling reached the stage in July 2002 where the two youngest children from the family then refused to attend the internal school at Villawood.<sup>258</sup>

On 1 August 2002, the Villawood Department Manager stated that he believed that 'placement into local school would be high risk' due to the potential for the children to 'abscond/escape', assisted by the family's strong community support group.<sup>259</sup>

An August 2002 report on the younger son states that he had made excellent progress at school, but that he is:

Currently distressed by the granting of outside schooling to the children of another family and trying to cope with being excluded. Therefore the family and [son] are angry with this and feel they are being discriminated against.<sup>260</sup>

In mid-August 2002, both of these children were certified by ACM medical staff as being medically fit to attend external school.<sup>261</sup> A report from the centre psychologist of 12 August 2002 states that:

Prior to [the parents'] decision to remove their children from [Villawood] school in mid-July 2002, [the children] were both motivated and appeared to strive to achieve academically within the educational setting at [Villawood].<sup>262</sup>

On 12 August 2002 the children stated a desire to attend external schooling:

Both [children] stated today that they would like to attend community schooling, that they felt they could manage a school program five days a week between approximately 9am and 3pm and that they would behave appropriately.<sup>263</sup>

On 22 August 2002, a senior Department officer expressed the view that the children should attend school, stating that 'given the long term nature of their detention, I think we need to balance the security concerns with the possible psychological benefits'.<sup>264</sup>

The same day the Department and the NSW Department of Education and Training agreed to initiate educational assessments for these children. The assessments were conducted on 12 September 2002. On 17 September, the NSW Department of Education and Training notified the Department that the children were suitable for external schooling, with some additional English literacy support. At this stage, only one week of Term 3 remained, so the children commenced school at the beginning of Term 4, in mid-October 2002.<sup>265</sup>

The family left Australia in February 2003. Of their three years in detention, the children of this family attended mainstream schools for less than three months.

### 12.7.3 Case Study 3: Education for older children, Curtin

The children of this family were detained at Curtin in mid-2000, when the daughter was 17-years-old and the son was 16-years-old.

These young people had been detained for over two years when the Inquiry met them at Curtin in June 2002. They were extremely distressed that they had been denied educational opportunities due to their age.

The brother reported that:

... we've been here two years. When we first arrived here I and my sister talked to the authorities and I asked them for some education opportunities. They told us at the time because we didn't know enough English there was no point in sending us to school. Now that we have been here for 2 years they tell us that we are over 16 years and they can't send us to school according to their rules. So there have always been some excuses.

The young people claimed that no efforts were made to provide external education for them, and believed that it might be in part due to the pending closure of the detention facility.

We have actually talked to the authorities in here about the possibilities of some opportunities for people over 16 years of age but they told us that because they're planning to relocate the camp at the moment anything they will do will be temporary so they can't do anything at the moment.

These young people both reported that the quality of education offered in the camp was poor. The brother told the Inquiry:

Before all these problems and complications at the camp there were some classes. Both my sister and I would participate in the classes. The quality of the education was extremely poor in the classes and there was no opportunity basically for learning anything. At the moment my sister and I are longing to learn English, your language, but at the moment in the camp there is no facilities like computers or a teacher or even books. Other children go to school outside the camp and they have the opportunity to improve their English but my sister and I were denied that right.

His sister reported that:

About those classes that my brother told you we used to attend before, there was only one class and everybody like from five year old and I were put in the same class. And what they did was put a photocopy of some basic mathematics in front of us and they were trying like for example to teach me simple addition and these sort of things – basic mathematics.

The children's mother was also distressed about the poor educational opportunities available to these children:

They even deprived my children from education. I have been talking to people in here, the authorities in here, people responsible and every time I went and complained about education of my children they said that they don't

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know enough English to be able have any education. Whereas when we first came here two years ago there were three other children who used to go to school and knew about the same amount of English that my children did.

In two years every time you talk to them they delayed and postponed my request. I have got to the point that now my children are 17 and 18 and they say that in Australia only children under 16 can go to school. Mind you even before people who are 16 years at the camp, there are some children at 16 go to school, but even they are not put in the proper age bracket because it's a mix and all ages have been put in the same class. If they really wanted to consider the education of the children and they really wanted to help them they would have separate classes for different ages. [My son] tries to speak English a little bit and [my daughter] is at the same level of English that [my son] has so you know how much English [my children] know.

This family was relocated to Baxter, where secondary school-aged children commenced attending external schools in March 2003. These children were not able to attend due to their age.

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## Endnotes

- 1 Inquiry, Interview with detainee father, Woomera, June 2002.
- 2 DIMIA, Submission 185, p77.
- 3 *Convention against Discrimination in Education*, article 1.
- 4 *Convention against Discrimination in Education*, article 3.
- 5 DIMIA, Response to Draft Report, 10 July 2003.
- 6 Refugee Convention, article 22.
- 7 Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Belgium*, UN Doc CRC/C/15/Add.38, 20 June 1995, para 9; *Concluding observations of the Committee on the Rights of the Child: Denmark*, UN Doc CRC/C/15/Add.33, 15 February 1995, para 14.
- 8 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the JDL Rules), Geneva, 1990, rule 38.
- 9 The JDL Rules, rule 38.
- 10 The JDL Rules, rule 39.
- 11 See further Chapter 5 on Mechanisms to Protect Human Rights.
- 12 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p6. See further Chapter 5 on Mechanisms to Protect Human Rights.
- 13 IDS, 1998, Definitions, [www.immi.gov.au/detention/det\\_standards.htm](http://www.immi.gov.au/detention/det_standards.htm).
- 14 IDS, 1998, para 9.4.1.
- 15 IDS, 1998, para 4.4.
- 16 ACM, Policy 13.1, Education, Recreation and Leisure Programs, Issue 5, 31 May 2002, para 3.1.
- 17 ACM, Policy 13.1, para 4.1.
- 18 For example Curriculum Corporation, *ESL Scales*, Carlton, 1994; Australian Education Council, Curriculum and Assessment Committee, *ESL Bandscales*, Australia, 1993.
- 19 Victorian Department of Education, Curriculum Standards Framework, located at <http://www.vcaa.vic.edu.au/csfcfd/home.htm>, viewed 4 April 2003.
- 20 Ministerial Council on Education, Employment, Training and Youth Affairs, *National Report on Schooling in Australia 2000*, 2000, ch 2.
- 21 Ministerial Council on Education, Employment, Training and Youth Affairs, *National Report on Schooling in Australia 2000*, 2000, ch 2.
- 22 Commonwealth Department of Education, Science and Training, English as a Second Language New Arrivals Program, <http://www.dest.gov.au/schools/literacy&numeracy/ESL/index.htm>, viewed on 4 April 2003.

- 23 There are currently six primary and two secondary New Arrivals Program schools in South Australia.
- 24 Maria Iadanza, Principal, Adelaide Secondary School of English, Transcript of Evidence, Adelaide, 1 July 2002, p41.
- 25 South Australian Department of Education, Email to Inquiry, English as a Second Language Program, 5 November 2002.
- 26 South Australian Department of Education, Training and Employment, Submission 154, pp3-4. The South Australian Department of Education, Training and Employment changed its name to the Department of Education and Children's Services on 1 July 2002.
- 27 New South Wales Department of Education and Training, <http://www.schools.nsw.edu.au/studentsupport/programs/esl.php>, viewed 3 April 2003; Western Australia, Department of Education and Training, <http://www.eddept.wa.edu.au/esl/index.htm>, viewed 3 April 2003; Sofweb, Department of Education and Training, Victoria, [www.sofweb.vic.edu.au/lem/esl/enew.htm](http://www.sofweb.vic.edu.au/lem/esl/enew.htm), viewed 3 April 2003.
- 28 Summary provided by Principal, Holroyd High School.
- 29 DIMIA, Submission 185, pp79-80.
- 30 ACM, Response to Draft Report, 5 September 2003.
- 31 Australian Education Union, Submission 226, p11.
- 32 Australian Education Union, Submission 226, p12.
- 33 Dr Tom Mann, Submission 254c, p1.
- 34 Dr Tom Mann, Submission 254a, para 28.
- 35 Inquiry, Focus group, Melbourne, May 2002.
- 36 Inquiry, Interview with teenage girl, Woomera, June 2002.
- 37 DIMIA, Response to Draft Report, 10 July 2003. See also DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p6.
- 38 Inquiry, Focus group, Perth, June 2002.
- 39 DIMIA, Submission 185, pp77-78.
- 40 DIMIA, Submission 185, p78.
- 41 ACM, Transcript of Evidence, Sydney, 4 December 2002, p31. This is despite a claim made in the ACM Management Plan for Children at the WIRPC Centre, 15 March 2001, that the 'South Australian curriculum is available to all students', (N2, Q3, F2). The Inquiry notes that in South Australia the curriculum operates under the South Australian Curriculum, Standards and Accountability (SACSA) Framework, administered by the South Australian Department of Education and Children's Services. In July 2002 the ESL Scope and Scales document was published. This support document for the SACSA Framework operates as a guide to the implementation of the curriculum for ESL learners. Prior to the implementation of the Scope and Scales, there existed a locally written ESL curriculum statement for South Australian schools which was used in conjunction with the national ESL Scales document.
- 42 DIMIA, Response to Draft Report, 10 July 2003.
- 43 DIMIA, Response to Draft Report, 10 July 2003.
- 44 ACM, Response to Draft Report, 5 September 2003.
- 45 ACM, Response to Draft Report, 5 September 2003.
- 46 DIMIA, Response to Draft Report, 10 July 2003.
- 47 ACM, Response to Draft Report, 5 September 2003.
- 48 DIMIA Port Hedland, Manager Report, January to March 2001, (N1, Q4a, F5).
- 49 Katie Brosnan, Transcript of Evidence, Perth, 10 June, 2002, p33.
- 50 Geoffrey Howard, Statutory Declaration, 8 September 2003. ACM, Letter to Inquiry, 10 September 2003.
- 51 The Department has suggested that this curriculum focus is appropriate, quoting the submission of the NSW Department of Education and Training, Submission 257, p5. 'The development of students' literacy and numeracy skills and understanding through a broad range of subjects is a fundamental focus of the curriculum and this is supported by the provision of English as a Second Language tuition for students whose first language is not English': DIMIA, Response to the Draft Report, 10 July 2003. The Inquiry notes however, that this evidence suggests that a broad range of subjects is offered, through which literacy and numeracy are developed, rather than a more limited provision of classes only in literacy and numeracy as occurred at Curtin.
- 52 Inquiry, Notes from visit, Curtin, June 2002.
- 53 Inquiry, Interview with detainee father, Curtin, June 2002.
- 54 Inquiry, Interview with teenage boy, Curtin, June 2002.
- 55 Dr Tom Mann, Transcript of Evidence, Adelaide, 2 July 2002, p49. Dr Mann worked at Woomera school from March to September 2001.

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- 56 Inese Petersons, Transcript of Evidence, Adelaide, 2 July 2002, p31. Ms Petersons worked at Woomera school between May and July 2001.
- 57 DIMIA, Response to Draft Report, 10 July 2003.
- 58 ChilOut, Submission 120, pp5-6.
- 59 ChilOut, Submission 120, p6.
- 60 ChilOut, Submission to 120, p6.
- 61 Villawood Community Reference Committee Meeting, Minutes, 15 August 2001, (N1, Q5, F6).
- 62 ACM Villawood, VIDC Primary School Timetable, 31 January 2002, (N1, Q12, F13).
- 63 DIMIA, Submission 185, p81.
- 64 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p45.
- 65 ACM, Transcript of Evidence, Sydney, 4 December 2002, p31.
- 66 ACM, Transcript of Evidence, Sydney, 4 December 2002, pp30-31.
- 67 ACM Woomera, Monthly Education Report, February 2002, (N1, Q12, F13).
- 68 ACM Woomera, Monthly Education Report, May 2002, (this report is incorrectly dated 28 April 2002) (N1, Q12, F13).
- 69 ACM Woomera, Monthly Education Report, June 2002, (N1, Q12, F13).
- 70 Inquiry, Notes from visit, Baxter, December 2002.
- 71 Inquiry, Interview with detainee, Baxter, December 2002.
- 72 ACM Curtin, Curtin Education Department, Child Detainee Student Policy, May 2000, (N1, Q12, F13). The Department states that 'the fact that children of 16-17 years were *entitled* to access the adult education classes is not, of itself, proof that post-compulsory school age children were *denied* access to the Curtin IRPC school'. DIMIA, Response to Draft Report, 10 July 2003. The Inquiry notes that the Child Detainee Student Policy, however, indicates that age-appropriate education was not available to post-compulsory aged children.
- 73 ACM Curtin, Detainee Management Strategies, March 2001, (N2, Q3, Supp 2).
- 74 DIMIA Curtin, Unaccompanied Minors Meeting Minutes, 29 June 2001. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 75 Inquiry, Interview with teenage girl, Curtin, June 2002.
- 76 DIMIA Port Hedland, Unaccompanied Minors Meeting Minutes, 29 November 2001, DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 77 ACM Woomera Education Coordinator, Memo, Response to DIMA Enquiries, to ACM Woomera Centre Manager, 7 February 2002, (N1, Q12, F13).
- 78 Separation detention is examined in Chapter 7 on Refugee Status Determination.
- 79 Katie Brosnan, Transcript of Evidence, Perth, 10 June 2002, p10.
- 80 Katie Brosnan, Transcript of Evidence, Perth, 10 June 2002, p10.
- 81 Katie Brosnan, Transcript of Evidence, Perth, 10 June 2002, p10.
- 82 NSW Commission for Children and Young People, Submission 258, p31.
- 83 Katie Brosnan, Submission 227, pp1-2.
- 84 Katie Brosnan, Transcript of Evidence, Perth, 10 June 2002, p6. See also Amnesty International Australia, Submission 194, p21.
- 85 Inese Petersons, Transcript of Evidence, Adelaide, 2 July 2002, p30.
- 86 Inese Petersons, Transcript of Evidence, Adelaide, 2 July 2003, p30.
- 87 Inese Petersons, Transcript of Evidence, Adelaide, 2 July 2002, p30.
- 88 ACM, Transcript of Evidence, Sydney, 4 December 2002, p39.
- 89 ACM, Response to Draft Report, 5 September 2003.
- 90 ACM Woomera, Monthly Education Report, September 2001, (N1, Q12, F13).
- 91 ACM Woomera, Monthly Education Report, December 2001, (N1, Q12, F13).
- 92 ACM, Transcript of Evidence, Sydney, 4 December 2002, p36.
- 93 ACM, Transcript of Evidence, Sydney, 4 December 2002, p38.
- 94 Inquiry, Focus group, Perth, June 2002.
- 95 ACM, Response to Draft Report, 5 September 2003.
- 96 Teachers in Queensland must register with the Board of Teacher Registration; teachers in South Australia with the Teachers Registration Board of South Australia; in Victoria non-government teachers must register with the Registered Schools Board. See also South Australian Department of Education, Training and Employment, Submission 154, p2.
- 97 IDS, 1998, definitions.
- 98 ACM Port Hedland, Report – PHIRPC Education Centre, undated, (N1, Q12, F13).
- 99 DIMIA, Letter to Inquiry, 13 December 2002.
- 100 DIMIA, Letter to Inquiry, 13 December 2002.

- 101 DIMIA, Response to Draft Report, 10 July 2003.
- 102 Dr Tom Mann, Submission 254b, p1.
- 103 Inese Petersons, Transcript of Evidence, Adelaide, 2 July 2002, p29.
- 104 ACM Woomera, Monthly Education Report, August 2001, (N1, Q12, F13).
- 105 Australian Bureau of Statistics, *Australian Social Trends 2002*, at <http://www.abs.gov.au>, viewed 22 July 2002.
- 106 DIMIA, Letter to Inquiry, 24 December 2002, Attachment F.
- 107 DIMIA Port Hedland, Manager Report, March 2001, (N1, Q4a, F5).
- 108 DIMIA, Contract Operations Group Minutes, 19 July 2001, (N1, Q3, F4).
- 109 DIMIA Port Hedland, Manager Report, October 2001, (N1, Q3a, F5).
- 110 DIMIA Port Hedland, Manager Report, February 2002, (N1, Q3a, F5).
- 111 The Department informed the Inquiry that '[w]hile the department is of the view that short term contracts are not generally desirable, it is understandable that in some instances such contracts might be required to both attract individuals and to assess suitability for the positions'. DIMIA, Response to Draft Report, 10 July 2003.
- 112 ACM, Transcript of Evidence, Sydney, 4 December 2002, p53.
- 113 Inquiry, Notes from visit, Port Hedland, June 2002.
- 114 Rose O'Connor, Submission 230, p2.
- 115 Dr Tom Mann, Transcript of Evidence, Adelaide, 2 July 2002, p53.
- 116 ACM, Transcript of Evidence, Sydney, 4 December 2002, p32.
- 117 ACM Woomera, Monthly Education Report, October 2001, (N1, Q12, F13).
- 118 The Department informed the Inquiry that this is not the case in all centres, specifically that teachers at Villawood were not required to wear uniform: DIMIA, Response to the Draft Report, 10 July 2003. See also ACM, Transcript of Evidence, Sydney, 4 December 2002, p48.
- 119 Inese Petersons, Transcript of Evidence, Adelaide, 2 July 2002, pp24-25.
- 120 Dr Tom Mann, Transcript of Evidence, Adelaide, 2 July 2002, p50.
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# Chapter 13

## Recreation for Children in Immigration Detention

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## 13. Recreation for Children in Immigration Detention

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The opportunities for children to engage in play and recreation have a critical impact on a child's experience of detention. However, the detention environment brings with it inherent difficulties in providing adequate opportunity for play and recreation.

For example, unlike other children in Australia, children in detention cannot, with their friends or parents, visit cinemas, shopping centres, beaches or parks. The Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA) must take positive measures to overcome these difficulties in order to ensure that children are occupied not only during school hours but throughout the day.

On the one hand, the adequacy of the opportunities for play and recreation in detention can have an impact on children's mental health and development. On the other hand, the mental health of children can also have an impact on their interest and capacity to participate in activities offered in detention.

This chapter discusses the interaction of these factors and examines the efforts made by Australasian Correctional Management Pty Limited (ACM) and the Department to provide opportunities for play and recreation.

In particular this chapter considers the following questions:

- 13.1 What are children's rights regarding play and recreation in immigration detention?
- 13.2 What policies were in place to ensure appropriate play and recreation for children in detention?
- 13.3 What impact does detention have on the ability to enjoy the right to play and recreation?
- 13.4 What play facilities and equipment were available to children in detention?
- 13.5 What recreational programs were available to children in detention?
- 13.6 What excursions were available to children in detention?

Finally, the chapter provides a summary of the Inquiry's findings regarding play and recreational facilities provided to children in detention.

### 13.1 What are children's rights regarding play and recreation in immigration detention?

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

*Convention on the Rights of the Child, article 31*

Rest and leisure, play, recreational activities and participation in cultural and artistic life, all of which are provided for in article 31 of the *Convention on the Rights of the Child* (CRC), are vital for the healthy development of the child.<sup>1</sup>

The United Nations Children's Fund (UNICEF) *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF Implementation Handbook), and the United Nations High Commissioner for Refugees' (UNHCR) publication *Refugee Children: Guidelines on Protection and Care* (UNHCR Guidelines on Refugee Children), provide a guide to what the rights under article 31 mean in practice. They also highlight that children in a refugee situation may require special measures to ensure the protection of their rights under article 31, on account of their vulnerability.<sup>2</sup> Article 22(1) of the CRC requires Australia to take such measures.

The right to rest requires that all children have adequate time for quality sleep and relaxation. The right to leisure extends beyond these necessities and includes having the time and freedom to do as one pleases.<sup>3</sup> The right to play refers to unstructured activities free from adult direction, whereas recreation refers to structured activities undertaken for pleasure. Children should be able to choose for themselves whether to participate in play and recreational activities.<sup>4</sup>

Recreation activities can include sports, arts, science, films and games. Where recreation equipment is shared between adults and children, children should have equitable access to the equipment. Recreation facilities should always be provided in a culturally sensitive manner, and should ensure that girls have equal access.

The right to 'participate freely in cultural life and the arts' refers to a child's right to access developmentally appropriate artistic and community events.<sup>5</sup>

The quality of play and recreation is directly related to the environment in which it takes place. For example, children should be provided with safe and accessible play areas.<sup>6</sup>

Article 31(2) speaks of Australia's obligation to 'encourage the provision of appropriate and *equal opportunities* for cultural, artistic, recreational and leisure activities'.<sup>7</sup>

However, when children are in detention, their ability to engage in leisure activities and cultural life are automatically restricted. For example, children cannot choose

to go to the park or the cinema at will. They cannot decide whether or not to join the local football team or dance class. They cannot freely participate in the cultural life that occurs within Australia. Thus in order to ensure that children in detention can enjoy these rights on the basis of *equal opportunity*, there is an obligation on the Department, as the detaining authority, to take special measures to compensate for the restrictions that come with detention.

The principle of 'equal opportunity' in article 31 is very similar to article 28(1) regarding the provision of education. As discussed in Chapter 12 on Education, article 2(1) of the CRC reinforces this principle by requiring that there be no discrimination against children in detention. However, unlike education services, there is no clear comparison against which the recreational opportunities afforded to children in detention can be measured.

The UNICEF Implementation Handbook suggests that the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the JDL Rules) are an appropriate guide to what special measures should be taken for children in detention.<sup>8</sup> Rule 47 of the JDL Rules states:

Every juvenile should have the right to a suitable amount of time for daily free exercise in the open air whenever weather permits, during which time appropriate recreational and physical training should normally be provided. Adequate space, installations and equipment should be provided for these activities. Every juvenile should have additional time for daily leisure activities, part of which should be devoted, if the juvenile wishes, to arts and crafts skill development.<sup>9</sup>

Furthermore, rule 18(c) of the JDL Rules states:

Juveniles should receive and retain materials for their leisure and recreation as are compatible with the interests of the administration of justice.

The UNHCR guidelines regarding unaccompanied children also suggest that:

Facilities should not be located in isolated areas where culturally appropriate community resources...may be unavailable.<sup>10</sup>

These rules set a low threshold for compliance with article 31. The rules also provide some guidance regarding compliance with article 37(c), which requires that children be treated with respect for their inherent dignity, taking into account the needs of their age.

However, it is important to note that play, recreation and participation in cultural life have a strong impact on a child's development and mental health. Through play, children learn social and personal skills such as negotiation, sharing and self-control. For child asylum seekers, play can help the child cope with what has happened to them, including past experiences of trauma or violence. Play can relax the child, relieve tensions, assist with the assimilation of learnt experiences and help the child function better within the family and the community.<sup>11</sup> For children in detention, play and recreation can help them cope with their circumstances. Article 6(2) of the CRC imposes a high obligation on the Commonwealth to ensure that children live

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in an environment which fosters 'to the maximum extent possible' a child's development. Article 39 also sets out the importance of a healthy environment to encourage recovery from past trauma.

A child's freedom to enjoy play and recreation is also an important factor to take into account in determining what actions will be in the best interests of the child (article 3(1)). For example, the ability to play and participate in cultural life may affect a decision regarding whether or not to detain a child, where to detain a child, or the conditions in which to detain a child.

### 13.2 What policies were in place to ensure appropriate play and recreation for children in detention?

The Department is responsible for ensuring that detained children have adequate opportunities to engage in play and recreation. Over the period of the Inquiry, ACM had a contractual responsibility to provide recreational services to children in detention on a day-to-day basis. Guidelines for ensuring that detainee children had access to play and recreation are primarily contained within the 1998 Immigration Detention Standards (IDS) and ACM policy.

The IDS applicable during the period of the Inquiry contain only one specific requirement regarding recreation programs for *children*:

Social and educational programs appropriate to the child's age and abilities are available to all children in detention.<sup>12</sup>

The IDS also contain general requirements for the provision of recreational and social activities to all detainees:

- 4.1 Each detainee is able to receive visitors except where the security and good order of the detention facility would be compromised.
- 4.2 Detainees have access to spiritual, religious and cultural activities of significance to them.
- 4.3 Detainees are provided with appropriate recreational activities.
- 4.4 All detainees have access to education, recreation and leisure programs and facilities which provide them the opportunity to utilise their time in detention in a constructive and beneficial manner.
- 4.5 Detainees are encouraged to participate in such programs.
- 4.6 Detainee programs are regularly evaluated.<sup>13</sup>

There is no requirement in the IDS to provide excursions to children in detention.

The core ACM policy governing provision of recreation is entitled, 'Recreational Equipment and Facilities'.<sup>14</sup> Notably, this policy does not make any specific reference to the provision of recreation for children. It states that:

Detainees will be provided with appropriate recreational activities which will provide them with the opportunity to utilise their time in detention in a constructive and beneficial manner.<sup>15</sup>

The policy outlines the recreational equipment that should be available within each detention centre.<sup>16</sup>

The ACM policy does not place any obligation on centres to organise excursions from the centre but states that:

The Supervisor, in consultation with the Centre Manager and Education Officer shall regularly assess the possibility of external escorts to local attractions for all detainees.<sup>17</sup>

Excursions are 'subject to vehicle and staff availability'.<sup>18</sup>

ACM policy also specifies the recreational facilities that should be available to detainees in separation detention:

While in separation detention, detainees are to have reasonable access to the full range of detention facilities and services including food, health, welfare and recreation.<sup>19</sup>

They may also have access to suitable videos and reading material in languages used by major groups of detainees.

The Department Managers' Handbook, designed to assist the Department in monitoring the performance of ACM, makes specific comment about the provision of recreation to children, stating that '[c]hildren should have access to safe, secure areas where they can play without fear of harassment and a range of safe and useable equipment and resources both for educational purposes and recreation'.<sup>20</sup>

Furthermore, the Handbook states that with regard to unaccompanied children:

care should be taken to ensure they enjoy at least the same access to sporting, recreational and leisure activities as children whose families are with them at the facility. They may also need additional activities, monitoring and support since they are without a close family network to nourish and encourage their learning.<sup>21</sup>

This chapter will discuss the challenges in providing effective opportunities for recreation and play to children in detention, and assess the provision of these facilities within detention centres.

### **13.3 What impact does detention have on the ability to enjoy the right to play and recreation?**

The fundamental restriction on play and recreation is the deprivation of liberty itself. Children who are detained are limited in their ability to make choices about their play and recreation. For example, they are not able to choose to visit a local park, or visit friends. Their ability to choose who they play with is limited, and choices as to the kind of play in which they engage are restricted. Although there is evidence of some involvement in community sporting and recreational activities, this too is limited.<sup>22</sup>

## A last resort?

The Inquiry found that there were three recurring themes regarding the impact of detention on play and recreation:

1. the physical environment
2. security concerns
3. children's mental health.

The following sections explore each of these three themes.

### 13.3.1 The physical environment

The Inquiry heard that the harsh physical environment, especially of the remote detention centres, has an impact on children's capacity to enjoy opportunities for play and recreation.

For example, a psychiatrist from the Australian Association for Infant Mental Health (AAIMH) stated that Woomera:

is a physically harsh environment with very poor opportunities for infants and children to play freely so enriching that environment may be one way of offsetting the stress, providing proper early child development enrichment tools, having proper facilities for enriching children's development, having facilities for parents to play with their children and having the freedom to do so.<sup>23</sup>

However, she was also of the view that improving the environment would be 'tinkering around the edges and not getting to the fundamental issue and that is of the kind of environmental deprivation that is part of the detention structure'.<sup>24</sup>

Another specialist told the Inquiry that he did not believe that an enriching environment could be created in Woomera:

You know we could get together and design a play-rich environment for children within the Woomera Detention Centre, but I would be very pessimistic about it being effective because of the context in which it is happening and because, really, I would feel pessimistic about implementing the good ideas that people might come up with.<sup>25</sup>

This psychiatrist found that Woomera had:

cognitively impoverished conditions, with little opportunity for play and legitimate academic pursuits ... [and a] hostile and deprived physical environment with intimidating and ever-present security measures.

These factors contribute to the psychiatrist's conclusion that:

It is hard to conceive of an environment more potentially toxic to child development.<sup>26</sup>

Similarly, a former Woomera Department Manager who worked at the centre between May 2000 and May 2001 told the Inquiry that the detention environment was difficult for children as it was a '[h]arsh physical environment and [there was] a lack of sensory stimulation (colours, smells, textures) such as plants, grass, play equipment, colour, smell that e.g. flowers would provide'.<sup>27</sup>



Play area near the accommodation units at Woomera, June 2002.

In the remote centres there were no grassed areas on which children could play. Sport such as soccer, popular with detainees, had to be played on rocky dirt fields instead of on grass, thus increasing the likelihood of injury for children participating in the sport.<sup>28</sup> An unaccompanied boy, detained at Woomera until early 2002, told the Inquiry that 'when we played we badly hurt ourselves because of the rocks. It was very difficult for us'.<sup>29</sup>

A former Woomera Activities Officer reported that the absence of grass has had a detrimental psychological impact on children:

Comments were often made by detainees regarding the absences of greenery, and how this contributed to their feeling sad. I recall taking a group of children on an excursion to St Michael's school in Woomera, when I took the children to the oval, the whole group became overexcited began laughing with delight and ran directly to the grass making comments like 'Play, play, play' – 'Very happy' – 'Run, run'. The children behaved as if they had never seen grass before. They did not want to leave the grass when it was time to go.<sup>30</sup>

A family who were released from Port Hedland in February 2002 told the Inquiry that '[t]he little children used to sit and play in the sand'. One of the children told the Inquiry that '[m]e and my sisters and brothers we used to try and go out and play outside, but the sand was coming into the eyes and causing a lot of problems. It was very distressing for the kids'.<sup>31</sup>

## A last resort?

Although there is a small grassed courtyard area at Maribyrnong, in May 2002 detainees told the Inquiry that a larger grassed area was reopened to detainees two weeks previously, after a period of two and a half years.<sup>32</sup>

There are grassed areas at the Woomera Residential Housing Project, grassed communal areas within the Baxter compounds, and open grassed areas at Villawood.<sup>33</sup>

### 13.3.2 Security

A report by the South Australian Department of Human Services outlines the impact of the need to have play facilities in locked compounds:

There is no normality for the children, even in play. A child cannot just decide to ride his bike because that is a limited activity, controlled by the availability of staff to arrange and supervise. There is no grass for the children to play on; there are no trees for them to climb. For the youngest children, they cannot go to the 'playground' when they want to as this is only accessible for certain hours during the day. There are very few toys and the kindergarten room has scarce resources.<sup>34</sup>

This is especially problematic when play equipment or friends are located in different compounds. For example, in Woomera in June 2002, some children were restricted from going into the Main Compound to use facilities there.<sup>35</sup>

Riots and disturbances within detention centres also interrupted recreational activities. For example, the Curtin Department Manager reported that in April 2002:

A planned camp to Broome had to be postponed as a result of the riot. Videos and equipment are limited at present due to the looting and damage during the riot.<sup>36</sup>

A former ACM Activities Officer who worked at Woomera during 2001 also reported that:

During disturbances all activities and education ceased. They only recommenced a few days after the disturbances. There were countless disturbances while I was employed at the Woomera IRPC and they could last for 5 or 6 days during which time everyone was kept locked in their compound.<sup>37</sup>

The Department informed the Inquiry that it 'accepts that on occasion the provision of recreational activities and excursions has been affected by incidents such as the destruction of buildings during protests and other security concerns'. The Department continued:

Excursions and activities may be cancelled or postponed for reasons pertaining to the safety and security of detainees and the facility. ... in ensuring the safety of children and others who may inadvertently be involved in a disturbance, from time to time officers may be relocated and therefore not available for escort or supervision duties for excursions. This is a decision that is taken with the overarching principles of safety and security in mind.<sup>38</sup>

In response to the disturbances at Woomera in 2001 the Department also noted that:

Notwithstanding the difficult circumstances facing the department and the services provider at the time, the maximum available infrastructure and resources were being utilised to provide recreational programs to detainees, including detainee children. That this service provision was challenged by the destruction of buildings and the arrival of large numbers of unauthorised arrivals, are contextual factors that, in all fairness, the Inquiry needs to take into account in assessing the provision of recreational services to detainee children ...<sup>39</sup>

Although ACM policy states that children held in separation detention should have access to recreation, the Inquiry heard that this access was limited.<sup>40</sup> For example, a teacher who worked at Port Hedland between August 2001 and April 2002 stated that detainees were only allowed to go outside for between one and two hours per day while in separation detention at Port Hedland.<sup>41</sup> One family from Port Hedland reported that they were in separation detention for seven months, and that they were only allowed outside for a short period of time per day.<sup>42</sup> Former child detainees confirmed these restrictions. One child said that '[d]uring the first two months at the camp each day we only came out for two hours, and all day we spent in our rooms'.<sup>43</sup> Another said that:

For just one hour in the morning we come out of the room to see the sky and one hour in the afternoon. And then the doors closed, locked in. I could visit friends in other rooms but not go outside ... We had one small TV for 17 or 18 people ... for one or two hours, we have ball to play ... but very small place to play and, if we kicked the ball out, we ask the officers, "Could we have the ball please?" and they would say, "No. Why did you kick the ball out?" (Unaccompanied teenage boy)<sup>44</sup>

While the Inquiry acknowledges the need to deal with disturbances in detention may take short-term priority over the provision of recreation opportunities, the Department must endeavour to overcome these difficulties to ensure appropriate recreational opportunities are provided.

The impact of security issues on excursions from detention centres is discussed in section 13.6.6 below.

### 13.3.3 Mental health

The long-term detention of children creates a vicious circle regarding mental health and recreation. The Inquiry heard that on the one hand the deprivation of liberty places restrictions on a child's ability to choose where, when, how, what and with whom they play and this impacts on their mental health and development. On the other hand, the deprivation of liberty itself impacts on their mental health generally and this affects their interest in any activities that are offered to children. This issue is discussed further in Chapter 9 on Mental Health.

## A last resort?

For example, a mother detained at Port Hedland told the Inquiry that detention had impacted on her child's capacity to play: 'my younger son was a very good drawer or painter, but now he just draws lines and lines'.<sup>45</sup> The child told the Inquiry that there is nothing to draw but the fence.

Furthermore, a family from Woomera, told the Inquiry that their young daughter occasionally engaged in inappropriate play: 'Even when they play with the toys or they don't have good playing and good normal with the toys, it's just hitting/hating and swearing and they talk about "I make problem, I do problems"'.<sup>46</sup> This mother went on to say that:

All the time she seeks excuses and tells me "I hate myself, I hate my clothes, and I hate this room and please take me to another place, take me to the park, to the cinema" or something like that and I can't.... Yes, they are here too many kids but they don't have normal playing together, all the time they have accidents and they fight together and swear together and they play with wood and rocks and something like this. And when we come back to our room, she doesn't feel like playing with her toys.<sup>47</sup>

A psychiatrist with experience regarding the impact of detention reported to the Inquiry that the mental health of children, teenagers in particular, prevents their participation in education and recreation, and expressed pessimism about improving what was offered in the centres:

I think within that environment it is very difficult for teenagers to focus on either learning or to become involved in other kind of more constructive recreational activities.

There is a kind of listlessness and an aimlessness which pervades the whole group so that even – yes, I think that one of the things that needs to be recognised is that there are very severe constraints on the extent to which you can improve conditions within the centres in their current state so that it is not simply a matter of putting in more resources, making more recreational opportunities available, making available a bigger and more effective mental health or medical team. None of that deals with the fundamental problems that lead to these difficulties.<sup>48</sup>

ACM documents provided to the Inquiry suggest that children were too depressed to participate in recreational activities. For example, the minutes of an Unaccompanied Minors Meeting from Port Hedland in November 2001 state that:

[t]he UAMs were asked what activities they participated in within the centre. Their response was that they are generally too worried about their applications and families overseas to be concerned about activities within the centre.<sup>49</sup>

Similarly, January 2002 minutes of a meeting with unaccompanied children at Port Hedland suggest a connection between uncertainty regarding their visa processing, detention, and a lack of interest in recreational programs:

DIMIA ASS MGR: It can take a long [time] to go through the process of getting a visa, so how can we make [it] better for you in the centre while you wait?

Silence from the group.

PSYCHOLOGIST: If we could get activities like woodwork would this be alright ... would this be better?

UNACCOMPANIED CHILD: If you here long time you don't know your future what can you do?

UNACCOMPANIED CHILD: Nothing, it's too confusing.

Silence from the rest of the group.<sup>50</sup>

The mental health of parents is also a significant impediment to a child's ability to enjoy recreational opportunities. For example, a psychologist with extensive experience in working with detainee families reported to the Inquiry the story of a mother who could not play effectively with her children:

She says sometimes she can play with her children but sometimes she doesn't feel able to and I think very poignantly she says how she tells – tries to tell her children stories which her own parents told her to try and maintain some kind of family tradition but she is forgetting these stories. She is forgetting them because her memory and concentration have become very poor so she is talking about becoming bereft of her own culture and not being able to impart that to her children.<sup>51</sup>

Similar evidence was provided to the Inquiry by a medical practitioner who worked at Woomera between October 2000 and June 2001:

When I was there we worked very hard with the children to give them play facilities and developmental activities and we worked very hard with the parents to try to bolster their moods but it was very, very hard because again, I stress, they did not know the status of their visa application and therefore although facilities were available to the children, play facilities, school facilities, the parents would not want to take them.<sup>52</sup>

Finally, the Inquiry heard many reports that children who were taken on excursions from the centres became more depressed upon their return:

A common reaction when returning children to the centre after excursions was sadness, children becoming withdrawn and sullen. This was particularly the case for long term minors. Early in January 2002, I was returning to [Woomera] from an excursion with a group of long term minors. Three girls pleaded with me not to take them back to the centre, they cried when they realised I had to return them. This behaviour was reported informally and formally by other programs staff returning children to [Woomera] after excursions and most often involved long term minors.<sup>53</sup>

### **13.3.4 Findings regarding the impact of detention on play and recreation**

The Inquiry finds that a combination of the deprivation of liberty itself, the physical environment of detention, the security measures used in detention centres and mental health concerns all affected children's participation in play and recreation.

## A last resort?

The harsh physical environment and absence of grass in remote detention centres significantly affected the nature of recreational activities that could be undertaken, and generally had an impact on the psychological well-being of children.

Security measures impacted on children's ability to engage in play and recreation. For example, the fences between accommodation and recreation areas created physical barriers between the children and play equipment. Furthermore, riots and disturbances taking place in the centres significantly interrupted access to recreational activities and equipment.

However, the most serious barrier to full enjoyment of play and recreational activities for children in detention was the impact that detention had on their mental health. This created a vicious downward cycle. On the one hand, long-term detention contributed to depression and a lack of enthusiasm for play and recreation. On the other hand, inadequate play and recreation opportunities contributed to the poor mental health and development of children in detention.

The seriousness of the impact of all of these factors increases the longer that children are in detention.

### **13.4 What play facilities and equipment were available to children in detention?**

The availability of appropriate play facilities and equipment is critical to children's ability to exercise the right to play, particularly in facilitating unstructured and spontaneous play.

#### **13.4.1 Playground equipment**

At the time of Inquiry visits, all detention centres had some playground equipment. However, it appears that the provision of playground equipment at Woomera did not occur until late 2001, nearly two years after the centre opened in November 1999.

The Woomera Department Manager's report of March 2000 states that '[c]omprehensive recreation facilities are difficult due to the overcrowding and the on-going development of the general compound'.<sup>54</sup> The report from December 2000 states that there is a '[l]ack of adequate playground for children'.<sup>55</sup>

The former Department Infrastructure Manager who worked at Woomera from November 1999 to December 2000 said that the delay in installing the playground equipment was connected to issues of legal liability:

Playground equipment that had been dismantled from the town had been made available to the [detention centre] but it sat dismantled for many months because ACM had concerns about legal liability in the event that children were hurt. Ultimately DIMIA insisted that it be put up to give children something to play on. It was modern, plastic equipment that had been in use until recently in the town before the downturn in Woomera's population made it surplus to requirements.<sup>56</sup>

A former ACM Operations Manager who worked at Woomera from May 2000 to June 2001 confirmed that liability was an issue for ACM. He also told the Inquiry that cost had a role to play in decisions regarding the extent of recreational facilities:

When they started building – like in November [2000] – compounds, there were big plans to have playgrounds and grassed areas in place and it didn't happen because of the costs. They could never agree on how much it should cost or how much money should be spent and I remember arguing with them several times, and I wasn't the only one. The Centre Manager at the time was arguing as well, and program staff were arguing, but it didn't happen.<sup>57</sup>

A psychologist who worked at the centre from September 2000 to January 2002 also said that at first:

There was no grass and no adequate recreation facilities for children. In the latter part of last year [2001] some playground equipment was finally erected. Some lip-service was given to making the environment better, and token gestures such as the painting of buildings and planting trees were made, but the basic situation remained unchanged.<sup>58</sup>

A woman detained at Woomera in early 2001 reported to the Inquiry that there was no playground equipment when she first arrived at the centre, that it was being built.<sup>59</sup> Furthermore, the family of a pre-school-aged child detained at Woomera told the Inquiry that there was no adequate play equipment for their daughter when they arrived in the centre in August 2001:

One year ago that we came to detention, most of the time my little girl complained to me that 'Father, I am really bored, I want to go outside and play'. There was no facility there, nothing, no playground, nothing, just red soil, so just I took her hand and walked around the fences, nothing for little kids that ask to enjoy also, there is nothing.<sup>60</sup>

The problems with play equipment at Woomera appear to have been ongoing. The Woomera Department Manager's report from March 2001 noted that 'Better facilities [were] needed for improved play opportunities' for infants and young children.<sup>61</sup> The Department-ACM Contract Operations Group meeting of April 2001 reported that 'ACM requested playground equipment proposals for Woomera start-up be accepted. DIMA agreed that the proposals will be examined and given early consideration'.<sup>62</sup> This confirms that there was inadequate play equipment in the centre at this time, 18 months after the centre's opening. The Department informed the Inquiry that the 'installation of modern playground equipment at Woomera IRPC, suitable for a wide range of ages, was substantially completed by September 2001'.<sup>63</sup> This was nearly two years after the centre opened.

## A last resort?



Playground equipment at Woomera, June 2002.

The Department suggested to the Inquiry that:

this was a period when the sheer volume of unanticipated unauthorised arrivals meant that the department's focus was to ensure that all were provided with the necessities – adequate good quality food, comprehensive medical services, safe, clean accommodation, adequate ablution facilities, clothing and footwear. The demand for a rapid response required the department to focus on these practical aspects of managing detention before attending to improving facilities, amenities and services and the development of more comprehensive educational and recreational programs.<sup>64</sup>

The Inquiry does not accept that the circumstances were such as to justify a two-year delay in the installation of play equipment at Woomera.

It appears that there was greater provision of recreational facilities within the city detention facilities. For example, the Inquiry received the following report on the facilities at Maribyrnong in August 2001:

Children have access to a grassed area known as the courtyard. The playground contains a swing set, treadmill, sandpit, small exercise trampoline, and outdoor furniture.<sup>65</sup>

The Inquiry did not receive any evidence about the provision of playground equipment at Port Hedland or Curtin. However, it did observe equipment during its visit in June 2002.

### 13.4.2 Toys

It appears that there were, on occasion, an insufficient number of toys for children in detention centres. The Department informed the Inquiry that:

all toys are subject to wear, tear and loss. Replacement of toys was undertaken but was not always immediate, as to some extent replacement was dependent upon the availability of supplies whether in the local community or further afield. New toys sometimes took weeks to arrive. The department queries whether the gaps or delays in acquiring new supplies were outside the spectrum of community norms.<sup>66</sup>

In early 2001, concerns were raised at the Contract Operations Group meeting about the frequency with which toys were purchased by ACM. In April 2001 '[i]t was agreed by both parties that toys must be regularly replenished, as they tend to go missing over time'.<sup>67</sup>

Staff at the Woomera Residential Housing Project appear to have taken action to ensure equitable provision of toys in November 2001:

Many toys have been "disappearing" as each family leaves. As families left they would pass their toys onto another family and some families ended up with an excess of toys whilst new families had only a few. In order to address this, all toys were removed from the houses, a list was made of all programmes toys (attached), and then toys were redistributed to families in a more fair and age appropriate manner. As families are released their list of toys is collected, ready to be distributed to newcomers.<sup>68</sup>

There is also evidence that toys were purchased and replaced at certain points of time at Woomera. For example, an ACM report of August 2001 states that '[a]n order of toys for babies and toddlers has been received and put into the Kindy', and an ACM memorandum of 23 November 2001 refers to the purchase of toys to replace those destroyed by fire in the centre.<sup>69</sup>

Children detained at Port Hedland reported that sometimes there were 'no toys, no games, no ball for the kids'.<sup>70</sup> In another example, a father from Curtin told the Inquiry during the visit in June 2002 that toys had only been provided recently:

Since we came here, we did not have any toys, maybe just the last three months so, they start to get some toys to the children.<sup>71</sup>

The children's mother reported that there were toys in the centre earlier, but that the children had very limited access to them:

At the beginning they used to go to school, they would go to school for half an hour and then for another half hour they would have some toys, they would play with toys and then they would take toys away.<sup>72</sup>

### 13.4.3 Sports equipment

The Department's submission states that sports equipment was located in every centre. Inquiry visits confirmed that this was generally the case, but that there were shortages at certain times. Furthermore, children did not always have access to the equipment that was on the premises.

A former Activities Officer from Woomera, employed from May 2000 to January 2002 told the Inquiry that:

One significant problem with equipment and resources for activities was that because of property damage during disturbances and through wear and tear (such as cheap soccer balls on the stony ground), things would no longer be available and were not always replaced.<sup>73</sup>

This Activities Officer noted that children sometimes had problems getting access to the equipment:

there were soccer balls, volley balls, basketballs, badminton, table-tennis, all those things, and the children's play equipment ... they could only access it when we were on duty, either the Activities Officers or the Welfare Officers.<sup>74</sup>

Access was generally only between the hours of 10am and 4pm.<sup>75</sup> Similarly, a family detained at Curtin told the Inquiry in June 2002 that they were not able to access sports equipment after 4pm in the afternoon.<sup>76</sup>

The Department informed the Inquiry that:

in taking operational security requirements into account, the services provider requires that at some centres sporting equipment be available during certain daylight hours only. This policy is implemented with the safety and security of detainees and staff in mind, and hours of availability sometimes fluctuated seasonally. For example, due to high daily temperatures during summer months in north Western Australia, sporting equipment was generally available from 6am at Port Hedland IRPC.<sup>77</sup>

The Inquiry heard of an instance where bicycles were provided for use by detainees at Curtin, but only for a short period of time. A family from the centre made the following comments:

For example, there was a time they brought some bicycles for the children here. For example when they brought this bicycle for two weeks the children they just had rounds, like two rounds in these two weeks and some pictures and within the ACM books, that's all.<sup>78</sup>

In a meeting with ACM and Department officers during a visit to the centre the Inquiry was told that the bicycles were brought into the centre by the police for a road safety visit and then taken out again.<sup>79</sup>

In its submission to the Inquiry, the Department lists children's bicycles amongst the sporting equipment available to children at Villawood.<sup>80</sup> However, during the

Inquiry visit to Villawood, detainees informed the Inquiry that bicycles in the centre were in fact privately owned.<sup>81</sup>

It appears that the provision of sports equipment at times took priority over the provision of equipment for other recreational activities. For example, the Port Hedland Department Manager's report of December 2001 noted:

The limited funds allocated for activities is almost all spent on soccer and table tennis balls each month, with little or no provision of even basic materials such as pencils, paints, paper, fabric, thread etc for non-sporting activities. This is an ongoing source of frustration to detainees wishing to engage in meaningful activities other than sport. The problem would be even more serious were it not for regular donations of materials and equipment such as sewing machines.<sup>82</sup>



Sports hall at Baxter, December 2002.

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### 13.4.4 Television and audiovisual facilities

The Inquiry has received varied reports about the availability of television and audiovisual equipment between immigration detention centres and over time.



Television viewing area at Curtin, June 2002.

In some instances it appears there were insufficient television and audiovisual facilities and poor access for children. For example, children detained at Port Hedland in June 2002 reported that they had to wait until the adults had finished watching their programs before they were allowed to watch theirs.<sup>83</sup>

The Inquiry heard that there was adequate access to televisions at Woomera, but reduced access at Baxter. By 2002, at Woomera each donga (which housed several families) contained a television. However, in Baxter television facilities had to be shared between detainees in an entire compound. Detainees could have their own televisions in their rooms if they purchased them, however, there were no antennae facilities in individual rooms. A detainee family told the Inquiry that:

In Woomera we had access to a few TV channels SBS, ABC, and we had access to satellite channels, but here unfortunately and you know that in Woomera in every donga [dismountable sleeping quarters] we had TV and video set, but here we have not. Here we have only TVs in the recreational rooms.<sup>84</sup>

The father of this family said that it was difficult for children's programs to be screened in recreational rooms as other programs took priority.

The parents of another family reported that reduced audiovisual facilities at Baxter had a detrimental impact on their children:

At least in Woomera we had a television. He could watch television all night, he was sitting and watching movies, but here he regrets that he came here because there's nothing ... here it's only one channel and it's not clear. When we tell them they say if you want to go and buy yourself a television.<sup>85</sup>

When the Inquiry visited Baxter in December 2002, the ABC was the only channel available, and this had extremely poor reception.

The Department informed the Inquiry that:

The Department does not agree that the expectation that televisions and videos would be provided in individual living quarters at Baxter was a realistic one. Local free to air television channels, including ABC, are available at Baxter. However, as the reception at Baxter is poor, an Austar television satellite service (31 channels) is provided with four televisions in each compound for use by detainees. This provides sport, movies, news, entertainment and documentary channels.<sup>86</sup>

Another issue with regard to audiovisual equipment is the appropriateness of the material viewed by children. Some families felt that their children were being exposed to inappropriate audio-visual material. For example, one mother from Baxter told the Inquiry that:

video games ... have been brought in and they're all for the children. The children are playing video games all day and there is a lot of violence involved and she's finding that the children are learning these traits and are trying to emulate what's happening.<sup>87</sup>

This concern was also mentioned to the Inquiry by parents at other detention facilities. The Department emphasised that parents and guardians in detention are responsible for monitoring the activities of their children.<sup>88</sup>

### 13.4.5 Findings regarding play facilities and equipment

The Inquiry finds that there was playground equipment in all immigration detention centres in 2002. However, the Inquiry is concerned about the two year delay in installing the playground equipment at Woomera. This suggests that the provision of play facilities in Woomera, where many children were detained, was a low priority for the Department.

The Inquiry also finds that toys and sporting equipment were generally provided in all centres. However, there were times when there were insufficient numbers of toys to meet the needs of children. Similarly, sporting equipment was not always replaced when damaged and in some cases was only available during limited hours.

Finally, access to television and audiovisual facilities varied between centres. While in some centres there was adequate access, in others there was some competition for children to watch the television. Access to audiovisual equipment was particularly problematic in Baxter in December 2002.

### 13.5 What recreational programs were available to children in detention?

For children to draw full benefits from play and recreational opportunities they need structured and resourced recreational programs in addition to opportunities for free play.

The Department states that there are organised recreational and social programs available to children at all centres, but that these vary, depending on 'the number of children, the skills and interests of the children, the skills and capabilities of the activities officers, and the local attractions and environmental factors'.<sup>89</sup>

Common elements, however, are celebrations of birthdays, arts and crafts classes, recreational videos after school and on weekends, organised sporting activities, supervised access to computers, and excursions outside the facility.<sup>90</sup>

Recreational programs were offered in all detention facilities, usually by Activities Officers with relevant expertise. The Department's submission contains extensive lists of recreational programs offered within detention centres, stating that:

The following range of activities were provided across the network of all immigration detention facilities, as at February 2002:

- drama
- cooking
- roller-skating
- jewellery-making
- dances and singing
- concerts
- discussion groups on topics such as 'Australian life'
- regular sports games such as netball and soccer.<sup>91</sup>

The Inquiry has received varied reports regarding the availability of these programs, both between centres and over time.

The bulk of documentary evidence provided to the Inquiry about recreational programs, concerned Woomera. Very little evidence was provided regarding Port Hedland or Curtin.

The Inquiry encountered some difficulties in determining exactly what recreational programs were offered to children in detention at any specific point in time. In particular, the Inquiry has been faced with discrepancies between official reports of activities and accounts by detainee children; and within program reports provided by ACM. This section discusses some of those difficulties and then goes on to assess what opportunities were provided, on the basis of the evidence before the Inquiry.

### 13.5.1 Difficulties in determining what recreational programs were offered to children in detention

The Department's submission lists the recreational facilities and programs available in each detention centre as at 31 January 2002.<sup>92</sup> The Inquiry sought to verify the accuracy of those lists by showing them to detainees during its visits over 2002. Children and their parents overwhelmingly denied that these were accurate lists. In fact, many detainees had not even heard of some of the activities.

During the Inquiry's visit to Curtin in June 2002, ACM Programs staff reported that jewellery making and parachute exercises were two of the activities offered by staff at that time. Once again, when detainees were asked whether they had participated in those activities, the detainees denied having any knowledge of such activities.<sup>93</sup>

The Inquiry acknowledges that there was some time lag between 31 January 2002 and the date on which the lists were shown to detainees. This may have meant that some detainees had forgotten that those activities were available at the time. Nevertheless, the consistency of the denials raises serious doubts as to whether those lists were an accurate representation of the activities that were conducted in the centre at that time.

The 2001 Joint Standing Committee on Foreign Affairs, Defence and Trade Report on Detention Centre Visits also notes that the range of recreational activities, at Curtin in particular, was not as extensive as claimed by ACM.<sup>94</sup> The Committee found that the pattern in the detainee statements across all the centres could not be ignored, and therefore that the 'range of activities was not adequate for the number of detainees, especially for children and older children in particular'.<sup>95</sup>

The Inquiry required ACM to produce the Detention Services Monthly Reports, from January 2000 to December 2002. From early 2001 these reports included lists of recreation programs and attendance rates.

A close analysis of these documents revealed a sufficient number of discrepancies to call into question the reliability of the reports. In particular, the ACM reports from Curtin and Port Hedland raised some concerns.

For example, the records regarding the activities at Curtin are identical for every month between January 2002 and August 2002 (except for February 2002, when no list was supplied). The reports claim that there were the following recreational activities and participation rates for each of the seven months:

- Toys to enhance fine motor skills – 11 [children]
- T-ball equipment – 10
- Parachute – 11
- Netball – 6
- Jewellery making – 6
- Needlework – 6
- Art/Craft/Plaster crafts – 8
- Videos – 20<sup>96</sup>

## A last resort?

In the Inquiry's view, it is unlikely that the participation rates for these activities would have remained identical when the numbers of children detained in the centre progressively decreased from 60 in January 2002 to 29 in August 2002.<sup>97</sup> ACM did not offer any conclusive explanation for this discrepancy.<sup>98</sup>

The Port Hedland ACM report for February 2002 notes that 55 children attend soccer training *daily*. This report also states that the average participation *per day* in preschool, 'weekly excursions to fishing, swimming or school excursions' and 'after school activities such as sports, arts and crafts' is 71 children. However there were only 49 children detained at the centre at the time.

The March 2002 Port Hedland report also states that 71 children participated per day in the excursions and after school activities, but there were only 33 children in the centre. In April and May 2002, 30 children were said to have participated in the activities but there were 13 and 11 children detained at the centre respectively.<sup>99</sup>

The accuracy of these ACM reports is of particular concern to the Inquiry because the Department appears to rely on these same reports in order to monitor the provision of recreation programs. For example, the list of recreational programs and attendance numbers in the Department's submission to the Inquiry is clearly based upon the ACM Detention Services Monthly Reports from the ACM Centre Managers for each facility.<sup>100</sup>

The Department informed the Inquiry that inconsistencies in reporting were raised at the Contract Operations Group meetings in July, August and September 2002. It also reported that:

In August 2002 departmental staff at the centres commenced verifying certain information in the Amenities Table [table of activities provided in the ACM reports] in a further effort to ensure accuracy.<sup>101</sup>

Although this is appropriate action regarding assessment of the service provider's performance, it had not occurred at the time that the Department made its submission to the Inquiry.

The following sections evaluate the recreational programs available to children in detention. It is important to note that the ACM documents relied on below are centre-specific documents, rather than the Department's submission or the monthly reports noted above. The Inquiry believes the centre-specific documents to be more reliable.

### 13.5.2 Woomera

Monthly ACM Programs Overview documents from Woomera were provided for most of 2001, listing the programs available to detainees. For example, the April 2001 Programs Overview reports many specific activities for children, including:

- Unaccompanied Minor Activities, Recreational (Sporting Competitions)
- Behaviour Reward Therapy Children and UAMs
- Children's Special Sport
- Juvenile Band

- Children's Song and Dance
- Children's Journey, Journal and Creative Drawing, Poetry and Writing
- Children's After School Club, Diverse Variety Games and Activities
- Young Infant Care Program (Mothers and Babies) Diverse Variety Games and Activities
- Young Female Adult Program i.e., Emotional Support and Medical Issues
- Children's Birthday Parties.<sup>102</sup>

Similar lists are found in each of the monthly ACM program reports from Woomera. The April 2001 report noted that there was a 'lack of grassed areas for sporting events'.<sup>103</sup> This observation was repeated in reports of May, June, August, and September 2001.

An 'After School Club' was developed at Woomera in early 2001. In January 2001, between 30 and 50 children attended this club daily. However, the Youth Recreation Officer noted several significant barriers to its operation, including a 'highly unsuitable and inadequate venue', 'excessive heat in a small demountable building', that the 'venue is appallingly small', and that there is a 'lack of safe area for sporting activities'. The memo requested that '[a] much needed grassed area for playing sport and outdoor recreation' be provided.<sup>104</sup>

A former Activities Officer from Woomera, between January 2001 and January 2002 said that the level of activities available to children varied over the year she was there, depending on staffing levels and numbers of detainee children.<sup>105</sup>

The November 2001 minutes of an ACM meeting regarding unaccompanied children noted serious staffing shortages:

Activities Officer Two said that she had been working in November Compound for nine and a half weeks. Sometimes she had between 70 and 80 children in her care. She assumed that this was [how] things were and tried to do the best job that she could under the circumstances.<sup>106</sup>

A doctor who worked at Woomera in August 2001 and January 2002, reported that:

the adolescents were very vulnerable because at that time there was no provision made for them. .... There were no recreational facilities, there were no resources for them other than a couple of televisions and therefore there was simply nothing for them to do all day.<sup>107</sup>

Furthermore, when Action for Children in South Australia conducted interviews with families detained in Woomera in January 2002, they found that the absence of recreation programs was a common complaint:

One of the issues most frequently raised by families was the lack of sufficient leisure and recreational activities. Parents of younger children indicated that there was a dire shortage of toys and play equipment. There is very little access to art supplies.

Adolescent girls complained about their inability to pursue hobbies such as sewing and tapestry work. Young men stated their frustration at not being able to play sports such as basketball. Adult families [*sic*] members were interested in having access to board games such as chess.

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Parents were very aware that the paucity of leisure and recreational activities meant their children had no physical release for their pent-up energy and that the lack of access to hobby and craft materials meant there was little ability for children to develop their creativity. All of the parents interviewed expressed concern for their children's ability to develop intellectually, physically as well as emotionally.<sup>108</sup>

A father of children detained at Woomera told the Inquiry in June 2002 that his children were prevented from playing with computers which was all that they were interested in:

Nothing to do for older kids, just they do some painting. They don't use any computers – they say 'you're a child, you're not allowed to go' to the compound where the computers are. The computers were just for the men, not for the children.<sup>109</sup>

### 13.5.3 Other centres

It appears that more extensive recreational programs were available at the city immigration detention centres, Villawood and Maribyrnong. This seems to be because there were many more outside groups who were permitted to conduct their own programs with children in detention.

For example, the Inquiry received evidence from Villawood that during April 2002, a group called Youth with a Mission visited weekly, providing 'various arts, crafts, recreational, leisure and sporting activities', and that Project Crayon visited twice weekly providing 'arts and crafts, simulation type games, [and] educational development programs'.<sup>110</sup>

Activities reports regarding recreational programs offered to children at Maribyrnong during 2001 indicate that regular art and craft activities, cooking lessons, and other activities were provided. For example, the July 2001 report from the centre states:

Other activities participated in by the children within the centre included art and craft, where the children made their own 3D paintings involving shoe boxes, cardboard and string, they are currently displayed in the family area. Cooking was also a very popular activity, not only for the children, but also for those detainees who ate the delicious results.<sup>111</sup>

The September 2001 report states:

As a result of pre-school children living in the centre having limited opportunities for interaction with children of their own age, the Counsellor and I have commenced taking the children to "storytime" at the local library once a week. The first session proved to be very exciting for the children, with stories, singing and an art and craft activity. They can't wait to go back next week.<sup>112</sup>

### 13.5.4 Findings regarding recreational programs

There are significant discrepancies between detainee reports and official reports regarding the availability of, and participation in, recreational programs. However, the Inquiry prefers the view of detainees as there are significant inconsistencies in the ACM reports and a high level of consistency in detainee accounts. This leads the Inquiry to find that recreational activities provided were fewer than those listed in the Department's submission.

The Inquiry finds that individual staff members went to considerable efforts to try and provide recreational programs to children. However, in Woomera in particular, there were periods of time during which those programs were unable to meet the needs of children in detention. This was primarily due to understaffing and inadequate facilities and equipment. More programs appear to have been offered in Villawood and Maribyrnong due to greater access to community groups and facilities.

The Inquiry did not receive sufficient evidence regarding Port Hedland and Curtin to make a finding about the recreational programs that were offered there.

## 13.6 What excursions were available to children in detention?

Excursions are extremely important for children in detention. It is their opportunity to see and experience normality. The importance of excursions is recognised by the Department:

Such events are important for children to vary the routine of the facility. It allows them to experience a range of activities which are not available within a detention facility ... For example, excursions are arranged on a regular basis to local parks, swimming pools, and local attractions.<sup>113</sup>

As one former detainee child told the Inquiry that '[i]t was like new life for us when we went out of the centre'.<sup>114</sup>

Evidence provided to the Inquiry indicates that there were significant efforts in some centres during certain periods to organise excursions for children. The Human Rights Commissioner noted some of these efforts in his report on visits to immigration detention facilities in 2001.<sup>115</sup>

Evidence from detainees, ACM and Department documents suggest variations in the number and frequency of excursions offered to children, both between centres and over time. The Inquiry is also concerned that, on occasion, when excursions were offered to children in detention, only a small number of those detained did actually participate.

### 13.6.1 Woomera

During the Inquiry's visit to Woomera in June 2002, children detained at the centre reported infrequent opportunities to participate in excursions.

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For example, children from one family reported that they had travelled to Port Augusta once in 15 months and that they had only been taken on excursions in the last two months.<sup>116</sup> A twelve-year-old boy, detained for 14 months, reported going on excursions outside of Woomera only two or three times – to Roxby Downs and to visit a sheep station – and that these excursions had only commenced in the last few months.<sup>117</sup> Another twelve-year-old boy, also detained for 14 months, reported that he had been on four excursions in eighteen months: swimming, Port Augusta, Roxby Downs and fishing.<sup>118</sup>

Other children who were detained at Woomera during 2001 and early 2002, reported that they had been taken on excursions to Breen Park (the local park) and the swimming pool in Woomera town, but that this was the limit of the excursions. One unaccompanied child told the Inquiry that in four months of detention during 2001 he was taken to Breen Park twice.<sup>119</sup> Other unaccompanied children detained at Woomera until early 2002 told the Inquiry that they were taken to Breen Park twice and swimming in Woomera once.<sup>120</sup> Another child detained at Woomera in early 2001, told the Inquiry that '[w]e had to remain at the camp site all the time, and in the 3.5 months I was there, only once were we allowed outside to a park'.<sup>121</sup>

These reports conflict with the 'Minors Management Plan' from March 2001, which states that '[a]ll detainees including children are taken on excursions on a weekly basis. Some places they are taken to are, Breen Park, Youth centre, Bowling centre, and the Swimming Pool'.<sup>122</sup>

ACM documents indicate that excursions were organised in late 2000. In October 2000, children are reported to have visited a cinema in Woomera.<sup>123</sup> Similarly, a November 2000 memo states that:

Children visited the Woomera Cinema with 13 children attending and 4 staff assisting. Two outside BBQ's have been attended and one trip to the swimming pool. More outings to progress in the month of December. These activities are very popular.<sup>124</sup>

The December 2000 ACM programs report states that women and children visited the swimming pool in Woomera.<sup>125</sup>

The January 2001 ACM programs report states that '[t]his month has brought about many changes through 5 new boat arrivals'; however, there are no reports of any excursions.<sup>126</sup> The February 2001 report states that '[e]xcursions have continued, however detainees have only been able to visit the Breen Park facilities till further notice from DIMIA'.<sup>127</sup> The March and April 2001 reports state that there are excursions, but do not specify what type. The May 2001 report notes excursions to 'Breen Park, Bowling, Local School Gymnasium'.<sup>128</sup> In the June and August reports there are no reports of excursions. In September 2001, external excursions are mentioned but there is no explanation of the number or type of excursions.<sup>129</sup>

The October 2001 ACM programs report states that the 'UAMs went on an excursion to Breen Park' and that '[a] group of 11 long term children from the Main Compound

went on an excursion to Roxby Downs to Wendy's Café having hotdogs and ice-cream, followed by play time at the park'.<sup>130</sup> In November 2001 it is reported that 'Long term minors visit Roxby Downs for Wendy's Ice-cream and dogs; UAMs Woomera swimming pool then BBQ at Breen Park; Thirty (30) children Woomera to visiting circus'.<sup>131</sup> The December 2001 report states that an excursion to St Barbara's School in Roxby Downs had been organised.<sup>132</sup>

It appears, therefore, that between January and September 2001, most excursions were to a park in Woomera township, with limited other excursions from the centre. During this time there were large numbers of children detained at Woomera.

The number of excursions offered to children increased during 2002, particularly to the swimming pool. The ACM programs report from January 2002 states that '[o]ver the past month, all children in the 5-12 year range have had the opportunity to attend swimming'.<sup>133</sup>

ACM meeting minutes from May 2002 note that 'children had three excursions this week. The sheep shearing, drama group and the science fair. This was held in conjunction with the Woomera area school, and was very successful, the children interacted well'.<sup>134</sup>

When the Inquiry visited Woomera in June 2002, ACM staff reported that they aimed to hold excursions from the centre every week, and that in the previous two months excursions had been taken to Port Augusta to go fishing, to a sheep station, to Woomera Area School and to Breen Park.<sup>135</sup>

### 13.6.2 Port Hedland

Children formerly detained at Port Hedland told the Inquiry that they were offered very few opportunities to leave the centre. An unaccompanied child, detained at Port Hedland between March and August 2000, told the Inquiry that he did not leave the detention centre at any time.<sup>136</sup> Another unaccompanied child told the Inquiry that he was not taken out of Port Hedland during the seven months that he was detained.<sup>137</sup>

The October 2001 Department Manager report notes several problems with the excursions program:

In general, a broad range of activities is provided. Lack of proper management and supervision of programs, however, as previously reported, is an ongoing problem. One outcome of this is that some residents are well-catered for whereas others are overlooked and may miss out entirely. For example some detainees have been taken on several excursions/activities outside the Centre, whereas among the unaccompanied minors, a vulnerable group, none has ever gone out.

Community invitations to engage in sports matches not accepted, as well as other opportunities for interaction with the community, which is a concern DIMA is trying to address. Currently the only external activities for residents are those which are initiated and driven by DIMA.<sup>138</sup>

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However, the report also commends ACM for some external activities for detainee children:

Weekly participation of four girls in the Port Hedland Girl Guides group ... About twelve women and children were taken on a picnic with a group of local women, which was much enjoyed.<sup>139</sup>

The Inquiry has received evidence from Port Hedland that ACM did not understand the cost of excursions to be covered by the contract, and that they were an 'optional' extra. In November 2001, a Department officer queried the cancellation of an excursion for unaccompanied children at Port Hedland:

At the last meeting we had with the UMs [unaccompanied minors] they were promised that they would be taken on a fishing trip last Wednesday afternoon. This did not eventuate and no-one provided me with any reasonable reason as to why it did not/could not go ahead. As you know there are seven UMs and none of them have ever been outside the Centre for any type of excursion which is pretty poor given the number of trips offered to adults and children.<sup>140</sup>

In reply, the ACM Centre Manager commented that:

These sort of trips can be arranged and are usually offered on the weekend when there are less internal escorts and that sort of thing. Given that we are the only Centre that does excursions these activities are watched closely by Sydney who question all activities which are outside of the requirements of the contract. We regularly conduct excursions even though these are above the requirements of the contract. All excursions have to be cost effective and I cannot bring extra staff in just for these activities. Canberra has advised that DIMA will not pay for excursions.<sup>141</sup>

This situation was reported in the Port Hedland Department Manager's report of November 2001:

ACM's CO has advised ACM management at the centre that there are to be no excursions unless at nil cost. Consequently excursions have been significantly cut back and this is a concern. As excursions have been common at this Centre and proved to be an excellent management tool, particularly for longer-term residents, requests for outings have escalated.<sup>142</sup>

By December 2001, there seems to have been an increase in the number of excursions:

Although lack of proper management and supervision of programs continued to be a problem this month, there has been an increase in the number of excursions offered (shopping and fishing trips, women's and children's excursions). Ten children went to see a ballet.<sup>143</sup>

In January 2002, the Port Hedland Manager notes that the '[a]ppointment of a new Programs Manager as a result of a merit selection has seen positive results, with a visible increase in external activities, especially for children'.<sup>144</sup> Over the next few months, the reports consistently note that there were frequent excursions which were well organised.<sup>145</sup>

The Inquiry also received ACM documents providing weekly summaries of programs, including all excursions for a period of three weeks in May and June 2002. These documents indicate that apart from the daily trip to school outside the centre, the only excursions were a weekly soccer training session for ten children and a trip to Horse Riding for the Disabled at the Port Hedland Pony Club for three children.<sup>146</sup>

### 13.6.3 Curtin

It appears that excursions from the centre were introduced at Curtin in September 2000. The Department Manager reported at this time that '[d]uring quarter program of off site activities introduced for Children. Eg visits to parks and beach volleyball'.<sup>147</sup>

The Inquiry heard from a family detained at Curtin in June 2002 that they had excursions outside the centre approximately every two months:

Swimming pool. We go just for maybe twenty minutes in the bus and we stop. We go to Broome. Just twenty minutes and we stop and we go every one or two months. And we go there, there is water, deep water.<sup>148</sup>

The children from this family had been in detention for 18 months, and reported that they had been on excursions outside the centre nine times. They also reported that they had in the past played cricket and soccer, but they were tired of that now.

A teenage boy detained at Curtin told the Inquiry in June 2002 that in two years of detention he was taken on excursions twice.<sup>149</sup>

ACM staff told Inquiry staff in June 2002 that they tried to organise an excursion every fortnight, for example to Cable Beach, the library, or to the swimming pool. Detainees who were interviewed during the Inquiry visit did not support this claim.<sup>150</sup>

### 13.6.4 Baxter

It appears that more frequent excursions have been offered to children detained at Baxter. A child interviewed during a visit to Baxter in December 2002 reported that children were taken on excursions outside of the centre, for example to Whyalla Zoo, approximately every two weeks.<sup>151</sup>

### 13.6.5 Maribyrnong and Villawood

More frequent and varied excursions were available from the city detention centres, Villawood and Maribyrnong. The Inquiry received evidence that the monthly excursions provided for children attending school at Villawood during 2001, increased to two excursions per month in April 2002.<sup>152</sup> These excursions included visits to Darling Harbour, National Maritime Museum, Botanic Gardens, Sydney Opera House, Coogee Beach, Taronga Park Zoo, the Sydney Aquarium, and a wildlife park.<sup>153</sup>

The Inquiry received monthly activities reports for Maribyrnong which indicate that excursions were regularly offered to children detained at the centre. For example, the September 2001 activities report states that during the school holiday program,

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'[a]ctivities provided were roller-skating, the movies, cooking, a picnic at Williamstown beach, lunch in St Kilda, and a stroll along the Maribyrnong river'. Younger children from the centre were taken to 'Storytime' at the Maribyrnong library.<sup>154</sup> Excursions included visits to see a puppet show, the swimming pool, local parks, the local library and visits to the Melbourne zoo.<sup>155</sup> The report of June 2001 states:

Four children attended with their respective parent and from all reports enjoyed the show. It was great for the children to get out of the centre for a morning and is something we would like to do more often.<sup>156</sup>

### 13.6.6 Impact of the detention environment on excursions

As set out in section 13.3 above, the detention environment brings with it some inherent difficulties in providing opportunities for play and recreation. These difficulties are especially visible with excursions due to the obvious conflict of the need to detain with a child's desire to visit places of interest.

The Inquiry also heard that logistical and security issues made organising excursions difficult and meant that they were often cancelled. A former Activities Officer from Woomera, employed during 2001 told the Inquiry that:

Excursions were infrequent and often cancelled. I can recall on several occasions having 30 or 40 kids ready at the gate to go on an excursion and then it was cancelled. Whether or not excursions went ahead depended upon the mood of the camp and the attitude of the transport and escort officers. Some officers made excursions difficult. Also, if the camp was full not all detainees were able to participate in excursions, so some missed out.<sup>157</sup>

This officer reported that if there was a disturbance in the centre, a planned excursion would be cancelled, even if the disturbance did not involve children. This was due to the officers being required in the centre to monitor the disturbance. The Activities Officer said that she:

was in the practice of not telling detainees there was an excursion until the night before, because it would be cancelled so often that it can make them feel worse. You know, if you think you're getting out of the centre for a couple of hours and then 10 o'clock in the morning you're not going now, what happened?<sup>158</sup>

There were a variety of other reasons why excursions were cancelled. For example, in Woomera on 1 May 2001 ACM documents report that '[e]xcursions last week had to be cancelled due to staff shortages'.<sup>159</sup> On 12 June 2001, excursions were cancelled completely until further notice, with documents stating that '[t]his is due to accusations being made about the excursions that detainees have been able to give information to people within the Centre on how to get about outside'.<sup>160</sup> On 24 August 2001, documents state that an '[e]xcursion to town facilities for male UAMs were scheduled this week ... however they have been cancelled due to the large influx of new arrivals'.<sup>161</sup> On 28 August 2001, it is noted that '[e]xcursions have been cancelled for the past three weeks'.<sup>162</sup> Finally, on 2 October 2001 it is reported

that '[c]hildren's planned excursion to the cinema had been cancelled due to suspected outside protestors and typhoid alert'.<sup>163</sup>

Former detainees from both Port Hedland and Woomera reported to the Inquiry that there was a significant presence of officers while they were on excursions. Children detained at Woomera during 2001 reported that:

After three months, they took us to a park [Breen] for one hour, but we were not allowed to go out of the park. A dozen or so of them – there was an officer for every three or four people, observing us.<sup>164</sup>

Two children detained at Port Hedland during 2001 told the Inquiry that when they went on an excursion, 'for every person there were two officers – they just took us to see the water, the seaside. We did not go into the water. Wherever we went, there were two officers per person'.<sup>165</sup> Another family detained at Port Hedland told the Inquiry that with regard to excursions:

Yes, it happens but very rarely and when you go there you regret going even. The officers they watch us like they are watching prisoners and for us it is very embarrassing because it gives us a feeling of being convicts.<sup>166</sup>

Another example of security concerns affecting children's participation in excursions is that children who were on HRAT (High Risk Assessment Team) watch were generally not allowed to attend excursions. For example, at Woomera on 20 November 2001, it was reported that '8 UAMs were supposed to attend the circus excursion on Saturday evening. As they were on HRAT this was not possible'.<sup>167</sup>

However, in February this requirement was waived. An Activities Officer reported that he was able to take children who were on HRAT swimming as he had detention officer training. 'He said it was advantageous to their state of mind that they in fact take part in the activities out of the Centre. He said this was a very rare occurrence'.<sup>168</sup>

Finally, the Inquiry heard that on occasion excursions were organised due to official visits to the centre. For example, a former Activities Officer reported to the Inquiry that '[w]hen I first started as an Activities Officer it was January 2001. We were told that Human Rights were coming tomorrow, "Go out and tell the families they're going on an excursion tomorrow"'.<sup>169</sup>

### **13.6.7 Behaviour as a criterion for participation**

Not all children were permitted to go on excursions. The Inquiry heard that participation in excursions has been restricted due to prior bad behaviour.

For example, a Detainee Management Strategy from January and March 2001 from Curtin states:

The Minor Liaison Officer organises excursions out of the centre for the unaccompanied minors. Due to Operational limitations, a maximum of eight unaccompanied minors can attend each excursion. The Minor Liaison Officer is responsible for selecting which unaccompanied minors attend the excursion. Selection can be based on rewarding good behaviour, (eg school

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attendance), and the current emotional wellbeing of the unaccompanied minor. These excursions also facilitate the unaccompanied minors' integration into society (pending the approval of a visa) by exposing the unaccompanied minor to the Australian community and culture.<sup>170</sup>

There is also evidence that behaviour affected participation in excursions at Woomera. For example, the minutes of a meeting of 4 September 2001 regarding unaccompanied children note that 'The UAMs have been advised that they will be able to go on excursions if they clean up the recreation room, which at the moment they will not do unless they are paid for it'.<sup>171</sup> Furthermore, the minutes of a meeting of 30 October 2001 report that:

On the 15 November there would be an excursion to the circus and Uniform Officer One would choose those UAMs who had been attending school and sticking to curfew from the Main compound.<sup>172</sup>

When the Inquiry visited Baxter in December 2002, ACM staff reported that behaviour affected eligibility for excursions, and that a child who had been leaving lunch papers on the ground was barred from attending an excursion.<sup>173</sup> Another family from Baxter told the Inquiry that children were barred from attending excursions if they didn't do their homework.<sup>174</sup> One parent from Baxter told the Inquiry that:

like if a child laughed in the class then they're excluded from the excursion. They think that this is bad behaviour. If two children have an argument then the two children are prevented from going ...<sup>175</sup>

During the visit to Port Hedland in June 2002 the Inquiry was informed that excursion rights are suspended as a punishment for bad behaviour.<sup>176</sup>

Involvement in activities within the centre has also been used as a criterion for participation. For example, during the visit to Villawood in August 2002, the Inquiry was informed that children have to be attending the school within Villawood to be eligible to attend excursions.<sup>177</sup>

Although behaviour might normally be seen as an appropriate criterion for participation in excursions, very careful consideration should be given to its use in the detention context. This is particularly the case given that the detention environment itself may contribute to children's 'bad' behaviour.

This conclusion is supported by the Port Hedland Manager's report of January 2002:

The availability of work and excursions remains contingent on good behaviour by residents, even small children. They are often left out of excursions due to bad behaviour and this seems an inadequate/poor reaction given the environment the children live in.<sup>178</sup>

The Department has informed the Inquiry that parents are primarily responsible for their children, 'including the provision of discipline and decisions about participation in play and recreational activities such as excursions'. They further state that:

The department agrees with the Inquiry that this strategy of providing rewards does need to be exercised carefully. It is not unreasonable, however, to expect

that children, particularly older children, understand that there are consequences for some behaviours and to take some responsibility for those consequences.<sup>179</sup>

### 13.6.8 Family excursions

The Inquiry has received some reports that opportunities for families to participate in excursions together are limited. For example, the parents of one family from Port Hedland told the Inquiry in June 2002 that they could not watch their children play in a soccer competition held outside of the centre.<sup>180</sup>

A family of pre-school-aged children detained at Maribyrnong in mid-2002 were taken on weekly excursions by the program staff, for example:

With the onset of cooler weather, the children have enjoyed two visits to local indoor swimming pools. Their confidence is increasing in the water, with splashing the activities worker being their favourite activity! In the coming weeks it is hoped the children will be confident enough to learn floating, kicking and blowing bubbles under water. The children are also enjoying a weekly outing to the park, endeavouring to try out every swing in our local area.<sup>181</sup>

The children's mother was not allowed to accompany them on these excursions. This led to the development of what the programs staff believed was an inappropriately high level of attachment between the children and themselves.<sup>182</sup>

In another example, a mother detained at Baxter told the Inquiry that she and her young child had only been taken out of the detention centre once in 21 months of detention.<sup>183</sup>

There is, however, some evidence of family excursions in some centres. The December 2000 Department Manager report from Curtin notes that '[o]ff site activities continue for children. Eg visits to parks and beach volleyball. Mothers of children able to accompany children on some outings'.<sup>184</sup>

Some children formerly detained at Woomera told the Inquiry that on one occasion they had been allowed to go on an excursion to the park with their parents.<sup>185</sup> Furthermore, the minutes of a meeting regarding children at Woomera on 26 March 2002 note that the 'plan for the last week of swimming is to take the children with their parents. Fathers will attend with the boys swimming and mothers with their daughters'.<sup>186</sup> Parents of children detained at Woomera also attended an open day at St Michael's school in March 2002, and a family sports day was held at a park in Woomera on 16 April 2002.<sup>187</sup>

### 13.6.9 Findings regarding excursions

The Inquiry notes that providing excursions is not a requirement under the Immigration Detention Standards. However, both ACM and the Department recognised the importance of providing excursions to children in detention in order to give children some relief from the detention centre.

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The Inquiry finds that some level of excursions were offered to detainee children in all centres.

However, in Woomera, for the bulk of 2001, excursions appear to have been largely limited to visits to a park in Woomera town. Although opportunities appear to have increased during 2002, children detained there in June 2002 told the Inquiry of infrequent opportunities to participate in excursions.

Similarly, there were a limited number of excursions offered to children in Port Hedland until 2002.

In Curtin there appears to have been a policy in place from 2000 to conduct fortnightly excursions. ACM staff in June 2002 stated that the policy still applied at that time. Detainees, however, did not support this latter claim.

More frequent excursions were offered to children detained at Baxter, Maribyrnong and Villawood detention centres.

However, it appears that programmed excursions were frequently cancelled due to logistical and security concerns. Furthermore, depending on the population in the centres, not all children could regularly participate in the excursions that did occur. This may explain some of the discrepancies between the documented program and the evidence of children who report infrequent outings.

The Inquiry is also concerned by reports that children were excluded from participating in excursions as a result of minor behavioural issues. The Inquiry understands that excursions may be used as an incentive for good behaviour in the general community. However, it is particularly important for children in detention to obtain some relief from the detention centre. Furthermore, as discussed in greater detail in Chapter 9 on Mental Health, the behavioural issues can be related to the detention environment itself, making an outside visit all the more important.

The Inquiry finds that opportunities for family excursions from detention were rarely offered.

## **13.7 Summary of findings regarding the play and recreational facilities available to children in detention**

The Inquiry finds that there has been a breach of article 6(2) and 39. The Inquiry finds no breach of article 31 or 2(1) of the CRC. However, the Inquiry has considerable concerns about the ability of children to enjoy the right to play and recreation within the detention environment.

Australia's obligation to ensure the right to enjoy play, recreation and cultural life is about providing children with appropriate choices for recreation and play. Article 31 of the CRC requires that those choices be provided on the basis of 'equal opportunity'. In the context of Australia's immigration detention system, the primary responsibility for ensuring compliance with this right lies with the Department.

Unlike the right to enjoy education on the basis of 'equal opportunity' (see Chapter 12 on Education), there is no clear standard of recreational opportunities in the community against which the Inquiry can compare the opportunities available to children in detention for the purposes of articles 31 or 2(1). However, the Inquiry accepts that the JDL Rules are an appropriate guide as to what constitutes an acceptable standard of recreational opportunities for children deprived of their liberty.<sup>188</sup> Those rules do not set a very high threshold for compliance. Despite the Inquiry's significant concern that the detention of children denies them the same freedom to access and participate in cultural life as children in the community, the following factors lead the Inquiry to conclude that the requirements of article 31 have been met.

The evidence available to the Inquiry suggests that there were no constraints on children regarding leisure time or access to outdoor areas, albeit that those outdoor areas were surrounded by razor wire and usually not grassed. The exception to this is with respect to children held in separation detention in Port Hedland, who had limited access to the outdoors.

By 2002 all centres had play equipment, although the Inquiry notes with concern that it took two years for playground equipment to be installed at Woomera. Toys and sporting equipment were generally provided, although there were times when they were insufficient to meet the needs of children in the centres. Access to televisions and videos varied between centres, but they were generally available to children. There have, however, been some problems in Baxter.

Each centre had a recreational program in place, although the quality of those programs varied between centres. It has been difficult to determine the exact extent of the recreational programs and the attendance rates due to unreliable reporting. However, the Inquiry finds that the programs offered to children were fewer than that represented in the Department's submission. Nevertheless, it appears that staff members in Woomera went to some effort to try and provide activities to children during 2001 and 2002, although understaffing and resource constraints meant that the needs of children in Woomera were not always met. Children detained in the metropolitan detention centres of Villawood and Maribyrnong had greater access to recreational programs due to the access to outside community groups and facilities. There was insufficient evidence to make any findings regarding recreational programs with respect to Curtin, Port Hedland or Baxter.

Excursions were arranged on an ad hoc basis at all centres at different points in time. Concerted efforts to offer regular excursions only began in late 2001. However, there were several periods during which no excursions were offered at all, and, in some centres, excursions were often cancelled at late notice. The Inquiry is concerned that children were barred from excursions for minor behavioural issues and that there was little opportunity for families to participate in excursions together. It is important to keep in mind that excursions were highly sought after by children as they provided some relief from the detention centre environment.

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Thus, while the provision of play equipment and recreational programs was far from ideal, the Inquiry is of the view that the Department and ACM satisfied the low threshold for ensuring that children in detention were not deprived of free time, nor prevented from playing outdoors and there were some opportunities to participate in recreational programs.

Nevertheless, the Inquiry remains seriously concerned about whether children held in remote detention centres for long periods of time can ever fully enjoy the right to recreation and play on the basis of equal opportunity with children who are at liberty in the Australian community. The detention environment is inherently unsuited to promoting the right of children to participate fully in play and recreational activities for several reasons.

First, detention places a physical barrier between children and community programs and events, cinemas, parks, parties and other activities that form part of a normal child's social life. Detention in remote facilities exacerbates the problem due to the reduced access to community groups that can offer alternative activities to children. For example, groups in Sydney and Melbourne helped children detained in Villawood and Maribyrnong access a greater number of activities and excursions. This is one reason why UNHCR guidelines recommend against detention of children in remote locations.

Second, the quality of recreation and play is affected by the environment in which it occurs. As mentioned above, the harsh physical environment surrounded by razor wire and the absence of grass, affects the enthusiasm of many children to engage in free play.

Third, the need to maintain security within detention centres poses barriers to accessing the activities and equipment that is on offer. For example, play equipment was often in different compounds to those in which children were accommodated. Sports equipment was locked up between certain hours. Riots and disturbances in the facilities sometimes resulted in the destruction of play equipment. Furthermore, security concerns meant that excursions have been cancelled at a moment's notice because detention staff were needed elsewhere.

The impact of each of these factors becomes more serious the longer a child is in detention. In particular, experts have told the Inquiry that the impact of long-term detention on the mental health of children has a significant impact on a child's ability and interest in participating in recreational opportunities that are offered. They suggest that little can be done to create that enthusiasm other than release or transfer from detention centres. At the same time, the lack of interest in those activities puts the mental health and development of children at greater jeopardy. In other words, there is a vicious downward cycle connecting the length of detention, mental health and development and the ability of a child to enjoy the right to play and recreation on the basis of equal opportunity with children in the community.

Considering all of these factors, while the Inquiry does not find a breach of article 31, the Inquiry does find that detention centres do not provide an environment which fosters a child's maximum possible development and recovery from past

trauma. Therefore, Australia's detention laws, and the manner in which they have been administered by the Department, results in a breach of articles 6(2) and 39 of the CRC, keeping in mind the close link between play, development and recovery from trauma for refugee children.

These same factors also raise the question as to whether the Department has adequately considered the best interests of children in deciding whether children should be detained in remote detention centres, metropolitan centres or, more ideally, alternative places of detention in the community (article 3(1)). This issue is addressed more fully in Chapter 17, Major Findings and Recommendations.

As previously indicated the Inquiry finds that the Department complied with the JDL Rules regarding recreation. The Inquiry therefore finds that the quality of play and recreational activities does not contribute to any breach of article 37(c). See further Chapter 17.

Once again, the difficulties faced by children in relation to recreation highlight the importance of ensuring that children are detained as a matter of last resort and for the shortest appropriate period of time in accordance with article 37(b) of the CRC.

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# Chapter 14

## Unaccompanied Children in Immigration Detention

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## 14. Unaccompanied Children in Immigration Detention

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Most children come to Australia with their parents, but some come alone, either sent by their family for their protection or because they have lost their family in a crisis. These children are known as unaccompanied children, separated children or unaccompanied minors (UAMs).<sup>1</sup> The Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA) uses the term unaccompanied minor which it says is the 'broad term used to describe a non-citizen, under 18 years of age who does not have a parent to care for them in Australia'.<sup>2</sup> This chapter uses the term unaccompanied child and unaccompanied minor interchangeably.

Unaccompanied children who are seeking asylum are particularly vulnerable on several accounts. These children have faced the challenge of making the difficult journey to Australia alone, and upon their arrival in Australia they must negotiate the refugee status determination process and the experience of detention without family support. International law recognises their special vulnerability and requires that appropriate assistance be given.

Most of the unaccompanied children seeking Australia's protection from persecution arrive without a visa (unauthorised arrivals), and therefore are detained while their claims for protection are assessed. Between 1 January 1999 and 30 June 2002, 285 unaccompanied children arrived in Australia without a visa seeking asylum and they were all detained. The highest number of unaccompanied children in detention was in mid-2001, when there were over 100 unaccompanied children in detention in Australia. Most of the unaccompanied children detained were adolescent boys, and either Afghani or Iraqi.<sup>3</sup>

Many unaccompanied children were detained in remote detention centres for lengthy periods of time. There are, however, two options within the current migration laws pursuant to which unaccompanied children may be removed from detention: (a) the grant of a bridging visa or (b) transfer to alternative detention in the community. In Chapter 6 on Australia's Detention Policy the Inquiry finds that neither of these options were appropriately pursued.

## A last resort?

Between 1999 and 2002 only one unaccompanied child was removed from detention pursuant to the first of these options: an eight-year-old was granted a bridging visa in November 2001 after he had been detained for five months. Between January and April 2002, just under 20 unaccompanied children were transferred to alternative detention in foster homes in Adelaide, pursuant to the second of these options. The case studies at the end of the chapter link the difficulty of satisfying the best interests of unaccompanied children within detention centres with the importance of ensuring their speedy release.<sup>4</sup>

However, this chapter focuses primarily on the efforts made to care for unaccompanied children who remained within detention centres for substantial periods of time.<sup>5</sup> The bulk of the evidence available to the Inquiry covers 2001 and early 2002, which is also the period during which the largest numbers of unaccompanied children were in detention facilities.<sup>6</sup> Furthermore, as most unaccompanied children were detained at Curtin, Port Hedland and Woomera during 2001, this chapter focuses on the general systems in place to ensure that unaccompanied children received special protection and assistance within those detention centres.<sup>7</sup>

This chapter addresses the following questions:

- 14.1 What are the rights of unaccompanied children in immigration detention?
- 14.2 Who was responsible for the care of unaccompanied children in detention centres?
- 14.3 What did ACM do to care for unaccompanied children in detention centres?
- 14.4 What did the Department do to care for unaccompanied children in detention centres?
- 14.5 What did State child protection authorities do to care for unaccompanied children in detention centres?
- 14.6 What care was provided to children who were temporarily separated from their parents?
- 14.7 What was done to trace the parents of unaccompanied children?

At the end of the chapter there is a summary of the Inquiry's findings and three case studies.

### **14.1 What are the rights of unaccompanied children in immigration detention?**

The *Convention on the Rights of the Child* (CRC) requires Australia to ensure that children lacking the support of their parents, especially those who are seeking asylum, receive the extra help they need to guarantee enjoyment of all rights set out under the CRC and other international human rights or humanitarian instruments:

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

*Convention on the Rights of the Child, article 20*

When read with the best interests principle in article 3(1) of the CRC and the obligation to take appropriate measures to assist asylum seekers in article 22(1) of the CRC, the Convention makes it clear that Australia must provide special protection and assistance to ensure that the best interests of unaccompanied children seeking asylum are a primary consideration at all times.

Effective guardianship is an important element of the care of unaccompanied children. Article 20(2) of the CRC requires Australia to 'ensure alternative care for such a child,' which may be met through the appointment of a guardian.

Article 18(1) states that 'the best interests of the child will be [the legal guardian's] basic concern'. Thus article 18(1) suggests that the best interests of an unaccompanied child must not only be a primary consideration (as suggested by article 3(1)) but *the* primary consideration for his or her guardian.

Article 18(2) of the CRC states that:

For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

Thus legal guardians should be assisted in ensuring that children enjoy all the rights set out in the CRC.

The United Nations High Commissioner for Refugees (UNHCR) has applied the 'special protection and assistance' provisions of the CRC to the context of unaccompanied children seeking asylum and recommends that 'an independent and formally accredited organization ... appoint a guardian or adviser as soon as the unaccompanied child is identified'.<sup>8</sup>

The legal guardian should be a person who understands what a child needs and can put the child's interests first:

The guardian or adviser should have the necessary expertise in the field of childcaring to ensure that the interests of the child are safeguarded, and that the child's legal, social, medical and psychological needs are appropriately covered during the refugee status determination procedures and until a durable solution for the child has been identified and implemented.<sup>9</sup>

## A last resort?

The role of a guardian or adviser is to take on the role of a parent and ensure that the best interests of each unaccompanied child are a primary consideration in all actions taken regarding the child. To this end, the guardian should act 'as a link between the child and existing specialist agencies/individuals who would provide a continuum of care required by the child'.<sup>10</sup> In the context of unaccompanied children who are unauthorised arrivals seeking asylum in Australia, the role of the guardian would include:

- advocating that an unaccompanied child not be detained by reason of his or her immigration status, or if detained, for the shortest possible period of time in the best possible conditions (see Chapter 6 on Australia's Detention Policy)
- ensuring suitable legal representation and other assistance regarding an unaccompanied child's claim for asylum (see Chapter 7 on Refugee Status Determination)
- ensuring suitable care, accommodation, education, language support and health care provision both during and after refugee status has been determined
- assisting in tracing the parents of an unaccompanied child
- advocating on behalf of an unaccompanied child regarding any other issue concerning him or her.<sup>11</sup>

UNHCR has recommended that unaccompanied children should never be detained.<sup>12</sup> However, in the event that detention does occur, unaccompanied children should be detained in conditions appropriate for children. UNHCR recommends that:

If children who are asylum seekers are detained in airports, immigration-holding centres or prisons, they must not be held under prison-like conditions. All efforts must be made to have them released from detention and placed in other appropriate accommodation. If this proves impossible, special arrangements must be made for living quarters which are suitable for children and their families. The underlying approach to such a programme should be 'care' and not 'detention'. Facilities should not be located in isolated areas where culturally-appropriate community resources and legal access may be unavailable.<sup>13</sup>

Thus the guardian should first seek to ensure the unaccompanied children are released from detention and placed in alternative accommodation. However, if this proves impossible, they should ensure that appropriate care is being taken of the unaccompanied child inside detention. Article 3(2) of the CRC states that:

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Irrespective of whether the child remains in a closed detention environment, open reception centre or a form of alternative care, the guardian should ensure that the child is being regularly supervised and assessed to ensure their physical and psychosocial well-being.<sup>14</sup> In other words, special measures should be taken to ensure that unaccompanied children can enjoy an environment which provides, to the maximum extent possible, the right to development and recovery from past trauma (articles 6(2) and 39). Children who remain in detention must also be treated with respect for their inherent dignity, in accordance with article 37(c) of the CRC.

A further obligation regarding unaccompanied asylum-seeking and refugee children is to provide assistance with tracing their family:

States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist ... a child [who is seeking or who has achieved refugee status] and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.

*Convention on the Rights of the Child, article 22(2)*

Where an unaccompanied child has reason to believe that his or her parents may be alive, tracing should commence immediately, in conjunction with the services of the national Red Cross Society in the country of asylum.<sup>15</sup> Children should be properly informed and updated about the process and, where an unaccompanied child's parents have been located, or whereabouts are known, the child has the right to maintain personal relations and direct contact with her or his parents on a regular basis (articles 9(3) and 10(2)). This also applies to children in detention who have become temporarily separated from their parents within Australia.

### **14.2 Who was responsible for the care of unaccompanied children in detention centres?**

As discussed in section 14.4.1, according to Australian law, the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) is the guardian of all unaccompanied children seeking asylum in Australia. The Minister has the 'same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have'<sup>16</sup> and remains their legal guardian from the moment of arrival until the unaccompanied child turns 18 or leaves Australia.<sup>17</sup>

The Minister is permitted to delegate the exercise of any of his or her powers and functions as guardians to any officer or authority of the Commonwealth or of any State or Territory.<sup>18</sup> A form of this delegation has existed since 1986, when cost-sharing arrangements between the Commonwealth and the States for the care of unaccompanied children were first established.<sup>19</sup> Since 1999, these powers have been formally delegated to State child welfare authorities and since 2002 to the Department's Managers or Deputy Managers.

## A last resort?

However, since 1999, responsibility for the day-to-day care of unaccompanied children in detention has generally been understood to belong to Australasian Correctional Management Pty Limited (ACM). Documents provided to the Inquiry indicate that ACM believed that it had a role in the guardianship of these children even though the Minister had, at no stage, delegated the guardianship of unaccompanied children to ACM.<sup>20</sup>

This perception, albeit incorrect, most likely stems from statements and practices of the Department to the effect that while it retains:

ultimate responsibility for all detainees, the Department ... exercises its duty of care commitments through the engagement of a Services Provider within the framework of relevant legislation, comprehensive contractual obligations, the Immigration Detention Standards and associated performance measures.<sup>21</sup>

The Department also states that it relies on State child welfare authorities for advice regarding the management of unaccompanied children. Specifically it states that in making decisions about the welfare and care of unaccompanied children in detention:

DIMIA Managers and Deputy Managers draw upon the advice of people with expertise in child welfare, such as the Services Provider, psychologists and the State child welfare authority.<sup>22</sup>

Furthermore, the Department states that:

State child welfare authorities are also regularly consulted and advised on the status of each unaccompanied minor and the effectiveness of the management plan.<sup>23</sup>

As discussed further in section 14.4 below, the appointment of a guardian is not sufficient in itself to satisfy the obligations towards children. The guardian must address his or her mind to the best interests of the child in all actions affecting children including:

- (a) whether or not to detain
- (b) the length of detention
- (c) the location of detention
- (d) the care arrangements made for children while in detention.

It is the last of these considerations which is discussed in some detail in this chapter. The first three have been considered in Chapter 6 on Australia's Detention Policy. However, this chapter demonstrates that there is a close link between the length of detention, the location of detention and the ability to ensure that unaccompanied children receive the level of care necessary to fully enjoy all their rights under the CRC.

### 14.2.1 Department policy and standards regarding the care of unaccompanied children

The care provided to unaccompanied children is governed by both the Immigration Detention Standards (IDS) in the contract between the Department and ACM and, since September 2002, by a Migration Series Instruction (MSI) issued by the Department.

The IDS nominate unaccompanied children as ‘detainees with special needs’ and require that ‘[u]naccompanied minors are detained under conditions which protect them from harmful influences and which take account of the needs of their particular age and gender’.<sup>24</sup> This was the only specific mention of unaccompanied children in the IDS that were applicable during the period of the Inquiry.

The first occasion on which the Department outlined, in detail, the specific care arrangements required for unaccompanied children was in Migration Series Instruction 357 (MSI 357), ‘Procedures for Unaccompanied Wards in Immigration Detention Facilities’, issued on 2 September 2002. At the time this MSI was issued, there were three unaccompanied children accommodated within detention centres,<sup>25</sup> and 14 unaccompanied children residing in alternative places of detention.<sup>26</sup>

MSI 357 stated that decisions concerning the day-to-day care of an unaccompanied child should be made by the Department Manager, taking into account the recommendations of persons with expertise in child welfare, including ACM staff and State child protection authorities.<sup>27</sup>

The MSI required ACM to ‘develop an individual management plan for each unaccompanied ward which identifies, records and addresses their special care needs’.<sup>28</sup> The ‘management plan is designed to ensure DIMIA’s duty of care and the Minister’s guardianship responsibilities under the *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act) are fully discharged’.<sup>29</sup> The Department Manager must approve ACM’s management plan and is responsible for ensuring that the plan meets obligations under the CRC. The Manager must also liaise with State child welfare authorities regarding the plan.<sup>30</sup> MSI 357 also sets out in significant detail the means by which the well-being of an unaccompanied child should be monitored by the Department Manager within the context of a detention centre.<sup>31</sup> It appears that this instruction formalises some of the care arrangements that had been gradually established by ACM and the Department in the immigration detention facilities.

MSI 357 was replaced on 2 December 2002 by MSI 370. This later instruction is substantially the same in terms of the care arrangements for unaccompanied children. However, as discussed further in Chapter 6 on Australia’s Detention Policy, the new MSI includes a presumption that it is in the best interests of an unaccompanied child to be transferred out of a detention centre to a place of alternative detention in the community or released on a bridging visa as soon as possible after arriving in the country.<sup>32</sup> This is the first occasion on which the Department has been directed to consider whether it is in the best interests of unaccompanied children to remain in detention at all.

### **14.2.2 ACM policy and procedure regarding the care of unaccompanied children**

Until MSI 357 was issued in September 2002, the only documents setting out the strategy for the care of unaccompanied children were ACM policy documents. The general ACM policy document regarding unaccompanied children, entitled 'Special Care Needs for Minors and Unaccompanied Minors', appears to have been in place in April 2001.<sup>33</sup> The August 2001 version of this policy required ACM staff to:

- assess all minors on induction for special needs, including for all known or anticipated risks
- develop a plan addressing the special needs of unaccompanied minors
- locate safe accommodation and ensure this is approved by the Department Manager
- assess whether it is appropriate to appoint a suitable mentor from the detainee community for the unaccompanied minor 'to provide guidance and support while the unaccompanied minor remains in immigration detention'
- conduct weekly monitoring of the welfare and special needs of unaccompanied minors (conducted by the centre nurse)
- conduct two hourly observation of unaccompanied children
- provide a weekly written report on the welfare and special needs of all unaccompanied minors to the Department Manager.<sup>34</sup>

The Woomera facility issued its own procedure based on these principles in August 2001 and updated it in November 2001. The procedure has substantially the same provisions as the general policy, but sets out the procedures to be undertaken by ACM officers in their care of unaccompanied children in further detail.<sup>35</sup>

Another procedure specific to unaccompanied children at Woomera was the Integrated Care & Social Support Program (ICASS). This policy was issued in May 2002, although some ICASS documents were present in case management files from December 2001. The ICASS system aimed to establish an 'integrated cross referral process for professional colleagues in Medical, Psychological, Educational and Recreational/Welfare fields to meet resident needs more comprehensively at Woomera'.<sup>36</sup> If a detainee was identified as having special needs, an ICASS assessment should have been undertaken. The assessment form included a diagram on which a detainee's needs in these four areas could be noted. The Programs Manager was responsible for ensuring that the needs identified through the assessment were met.

### 14.3 What did ACM do to care for unaccompanied children in detention centres?

ACM, being primarily responsible for the care of unaccompanied children in detention, developed a range of management strategies for these children over time. These strategies expanded the requirements set out in ACM policy regarding unaccompanied children. They included:

- the appointment of a designated officer to work with the unaccompanied children
- case management plans
- regular meetings of all staff involved with unaccompanied children, commencing in 2001 in most centres
- progress reports on unaccompanied children
- provision of adult detainee mentors to unaccompanied children.

The ACM staff who implemented these strategies worked very hard to ensure that unaccompanied children were as well cared for as possible in the environment in which they were detained. Two former ACM staff members, who worked at Woomera during 2001, gave evidence to the Inquiry that unaccompanied children had a higher level of care than children who were detained with their parents. A psychologist who worked at Woomera from May 2001 until December 2001 stated:

I regarded unaccompanied minors as being relatively well taken care of. Indeed, because other children had to rely on their parents to provide care, and sometimes the parents were, or became, unable to do this, unaccompanied minors sometimes received better levels of care.<sup>37</sup>

A former Activities Officer who worked at Woomera between May 2000 and January 2002 told the Inquiry:

From my experience physical, educational and recreational needs of unaccompanied minors were met at a higher level than those children who were in detention with their parents because of the extra attention that was paid to the needs of unaccompanied children.<sup>38</sup>

It does appear to the Inquiry that unaccompanied children were quite appropriately given greater attention by ACM staff than children with parents. However, as the following sections and the case studies at the end demonstrate, these systems were not sufficient to address the problems faced by the unaccompanied children in detention.

This section discusses how the primary elements of ACM's management strategy for unaccompanied children were implemented in Woomera which, according to ACM, represents 'best practice'. It also discusses the operation of these policies in Port Hedland and Curtin.

### 14.3.1 Provision of designated ACM officers for unaccompanied children

As noted above, the Woomera procedure regarding the Special Care Needs for Minors and Unaccompanied Minors, dated November 2001, sets out that certain detention officers (UAM Officers) will be given responsibility for supervising the care of unaccompanied children.

The role of the UAM Officer is articulated in the November 2001 Woomera procedure regarding unaccompanied children:

A Detention Officer designated by the Centre Manager to monitor, supervise and record occurrences of unaccompanied minor daily needs in relation to Detention Standards and ACM Policy on Security, Health, Welfare and daily living needs. The Designated Officer will monitor and supervise unaccompanied minors on a day-to-day basis.<sup>39</sup>

It appears that the first UAM Officer was appointed in Woomera in January 2001 when a large number of unaccompanied children arrived at the centre. The officer appointed at this time identified that the unaccompanied children had significant support needs and appeared to work hard to meet these needs.<sup>40</sup> The minutes of the Unaccompanied Minors Committee meetings at Woomera<sup>41</sup> also indicate that there were designated officers for unaccompanied children from early 2001 onwards.<sup>42</sup>

However, ACM staff at Woomera expressed concern that there were, on occasion, an insufficient number of UAM Officers to address the needs of the unaccompanied children in the centre. For example, the minutes of a meeting in Woomera on 6 November 2001 stated that:

Uniform Officer One reported that after today she would be the only UAM officer in the Centre. Uniform Officer Two and Uniform Officer Three were at the end of their rotation and their contracts were not being extended. To their knowledge no other officers had been contracted to carry out UAM officer duties. Detention Manager UAMs advised that these positions had been advertised and would remain open for another two weeks to enable staff presently out of the centre to apply.<sup>43</sup>

The following week's minutes state that the contracts would be extended for another four weeks, but that '[t]here did remain a problem however in that UAM Officers were constantly being tasked on other duties such as contractor escort'.<sup>44</sup>

In Port Hedland, an ACM Child Protection Officer was appointed during the January – March 2001 quarter, charged with ensuring 'that the needs and welfare of all the children are attended to'.<sup>45</sup> The Port Hedland Department Manager expressed some concern that, in September 2001, the role of these officers was unclear because the policy with respect to unaccompanied children was vague:

Title of Child Protection Officer changed by ACM to the more appropriate Minors Liaison Officer. The duties of this position are currently being reviewed by the Health Services Coordinator, partly due to the vagueness or absence of clear policy guidelines relating to UMs.<sup>46</sup>

However, by 2002 this issue appears to have been clarified. In March 2002 the Port Hedland Department Manager stated that:

The ACM Child Liaison Officer (CLO), who talks to all the unaccompanied minors on a daily basis and carefully monitors and addresses their needs and welfare. The CLO is readily available to DIMIA staff for consultation concerning issues pertaining to unaccompanied minors.<sup>47</sup>

There is also evidence that there was a UAM Officer at Curtin. For example, the Department Manager's reports of October 2001, November 2001 and December 2001 all stated that:

All UAMs have regular contact with the Minors liaison officer to ensure that their welfare is being monitored and that they are receiving appropriate care from all service areas.<sup>48</sup>

Former child detainees gave varied reports on the support that they received from designated officers. Children formerly detained at Woomera told the Inquiry that they needed special support during their time in detention. When asked whether there was an officer responsible for his care, one child reported that:

After one month they brought one woman but you don't know who she is – we are just UAMs with her. At this age we need mother and father – we not leave mother and father unless there are big things to make us leave our families.<sup>49</sup>

Other former Woomera unaccompanied children said that they knew an officer was responsible for their care but they did not perceive that their needs were being met by these officers. One child told the Inquiry that:

Yes it is true but they don't come all the time and ask. When I need them it is true there is an officer they don't come and ask you what you need – if I need something I am told to come back after an hour, after one hour. I have to beg for what I want and they say to come back. And when I get it I have to have my arm out for it, it is like suffering.<sup>50</sup>

Another child who was detained at Woomera told the Inquiry that there were officers who were assigned to the unaccompanied children but that they 'did not sit with us and ask us how we were'.<sup>51</sup>

On the other hand, some unaccompanied children found the close observation by the designated officers to be intrusive.<sup>52</sup> One unaccompanied child told the Inquiry:

When I was in Woomera two years ago, in our time it was like usually the officers were coming because of checking if we are in the camp, twice a night, and some nights they were coming because some of us that we didn't go to eat, they were asking where were you, what were you doing and usually, twice they were coming at night. And in our time they were like coming and okay, where is, for example where is [number removed] or something, and then okay, he's in this room, come, come out and I want to see you if you are the real one, in the middle of the night. You can't just like, say, 'it's me'. It's like WAKE UP and show yourself.<sup>53</sup>

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One unaccompanied child who had been detained at Port Hedland, said:

We were treated very inhuman. Nobody looked after us, or told us, this is ... your guardian.<sup>54</sup>

Some of the children who were detained at Curtin also reported that they received special attention. One child said that:

We had a guardian and he took us swimming and to play football and also teaching us there. For example they gave us pencils and notebooks and things like that, but toys and things were very limited, two or three times they checked on us that we are okay and not sick or anything, that we were unwell so they have to let medical people know, then an officer took us there.<sup>55</sup>

Another reported that they had weekly meetings with their guardian:

We had a guardian. Her name is [name removed]. And she looked after us. Every Friday she came with an interpreter and he talked with us and asked a lot of questions: 'How's your situation, do you want to go to school?' She gave us a pencil and paper and she told us you must study English in here and that when you go outside all the people speak English and if you don't understand English it will be hard for you.<sup>56</sup>

### 14.3.2 ACM case management plans for unaccompanied children

The requirement to produce individual case management plans was first articulated in ACM policy in November 2001. However, the Department first formalised the requirement to produce case management plans in MSI 357, issued in September 2002.<sup>57</sup>

ACM clarified that prior to November 2001:

there was no obligation on behalf of ACM to keep [individual case management] records. However, a generic management plan for children at Woomera was in place during March of 2001. A modified version of this plan was attached to each minor's file and acted as a [case management plan].<sup>58</sup>

Thus, despite the absence of any written requirement for case management plans prior to November 2001, ACM informed the Inquiry that they were first created in March 2001 for children detained in Woomera, Port Hedland and Curtin; in December 2001 at Maribyrnong; and in May 2002 at Perth and Villawood.<sup>59</sup>

In its submission to the Inquiry in May 2002, the Department states that:

Each unaccompanied minor in detention has an individual case management plan developed by the Service Provider, in consultation with Departmental staff and the State child welfare authority. This plan is developed by the Services Provider's welfare officers, psychologists and medical staff. The plans are designed to ensure that duty of care for each unaccompanied minor is fully met.<sup>60</sup>

According to the Department, the content of these case management plans included strategies regarding: social development and interaction; health needs (medical, dental, psychological); recreation and leisure activities; educational needs (including English and first language skills, numeracy, schooling arrangements, interests and talents, and any other special learning needs); disabilities; counselling needs; religious and cultural considerations; and mentoring arrangements.<sup>61</sup>

Thus, on the face of it, individual case plans were a vital tool to ensure that the needs of unaccompanied children in detention were being met. The Inquiry was therefore concerned to test the Department's and ACM's assertions about the existence, substance and effectiveness of the plans for unaccompanied children in detention facilities.

The Inquiry issued Notices to both ACM and the Department requiring the production of case management plans for specific periods of time on 18 July 2002 (Notice 2). However, concerned that these documents may not have fairly represented the full system, the Inquiry issued further Notices and requests to ACM on 24 October 2002 (ACM Notice 5). The Department was given further opportunity to provide case management plans to the Inquiry after the hearing in December 2002.

In summary, the Notices and requests required production of the following:

From all centres:

- Individual case management plans for all unaccompanied children taken into immigration detention in all detention facilities between 1 January 2001 and 31 March 2001 (Woomera – 36 children; Port Hedland – 3 children; Curtin – 23 children).

From Woomera and Port Hedland:

- All case management plans for all children taken into detention at Woomera and Port Hedland between 1 April and 30 June 2001.

The following is a description of the case management system at Woomera, Port Hedland and Curtin based on all those documents.

### **(a) Woomera**

The Inquiry received a total of 28 individual case management plans for unaccompanied children at Woomera, 27 of which were created in early December 2001.<sup>62</sup> The Inquiry also received generic management plans created in March 2001 and April 2001 and an 'Unaccompanied Minor Plan', dated 16 August 2001, which was also a generic document.

The March and April generic plans were identical two-page documents recording the services and programs offered to all unaccompanied children.<sup>63</sup> The August 2001 plan states that Designated UAM Officers will 'ensure all essential needs of the minors are addressed on request'. This plan also states that weekly meetings will be held by the UAM Committee, and stipulates the process for medical care

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and for meeting the educational and recreational needs of unaccompanied children.<sup>64</sup>

In November 2001, the Department told ACM that it required individual (rather than generic) plans for unaccompanied children.<sup>65</sup> The ACM Programs Manager advised that every child's file already contained a management plan; however, as indicated above, the Inquiry received no evidence of individual management plans existing at this time.<sup>66</sup>

In any event, the majority of the individual case management plans created in December 2001 were also very general in nature. Most of the plans received by the Inquiry included one line observations about the good behaviour of the unaccompanied child, but made very few recommendations for his or her management.

Some of these plans are accompanied by a one-page diagram entitled 'Integrated Personal Care and Social Support/Development Program for Minors at the Woomera Immigration Reception and Processing Centre', containing information about unaccompanied minor needs and recommendations for their care. These diagrams are part of the ICASS (Integrated Care & Social Support Program) described above in section 14.2.2. ACM describe these plans as a 'psychosocial approach in the provision of integrated social development and care services at Woomera'.<sup>67</sup> The Inquiry is not satisfied that the inclusion of these diagrams demonstrates the operation of a comprehensive system of monitoring the needs of unaccompanied children. Most of these diagrams are extremely brief in their comment on the needs of these children.

One of the more detailed plans concerning an unaccompanied child who had been detained for eleven months notes that he is 'well behaved, polite and a good influence on the other boys'.<sup>68</sup> The section entitled Management Plan contains the following:

[name removed] has been exposed to very limited socialisation. Will require comprehensive assistance with respect to the social institutions and in particular education, religion and recreation. Close support from ACM Officer [name removed] crucial as his major "significant other". If possible, involvement in work would be valuable as this is the only activity that he seeks positively.<sup>69</sup>

However, this paragraph is the only element of the document that could be described as a plan.

The Inquiry received only one comprehensive management plan for an unaccompanied child at Woomera, in a follow-up plan for one of the children for whom there was a plan in December 2001.<sup>70</sup> This document largely details the child's lack of involvement in activities in the centre, and makes only one specific recommendation for the management of the child, namely that ACM officers visit him to ensure that he attends school.

In November 2001, eleven unaccompanied children were involved in a self-harm incident following an ACM decision to move them to a safer compound. This incident is described in detail in Case Study 2 at the end of this chapter. The Inquiry is concerned that the case management plans for these children which were written in the month following the November 2001 incident make extremely brief mention of this incident. For example, one of the case management plans notes that the child was 'involved in one minor disturbance', and that after the incident he was '[p]laced on HRAT [High Risk Assessment Team watch] and counselled by a psychologist'.<sup>71</sup> The management plan contains no discussion of the child's well-being in the aftermath of this incident or of his risk of engaging in further self-harm.

In January 2002, the majority of the unaccompanied children remaining in the centre were involved in hunger strikes, some sewed their lips, and some engaged in a range of other self-harm actions. These instances of self-harm led to the transfer of most unaccompanied children to alternative detention in foster homes in Adelaide. The situation of unaccompanied children in Woomera in January 2002 is described in detail in Case Study 3 at the end of this chapter. While these events may have been very difficult to predict, the Inquiry is surprised that the December 2001 case management plans did not draw out the difficulties that the children were obviously experiencing as a result of their detention.

### **(b) Port Hedland**

No management plans were provided to the Inquiry for children detained at Port Hedland, even though ACM reported that case management of unaccompanied children commenced in March 2001, and there were at least three unaccompanied children taken into detention at Port Hedland during the period for which production of management plans was required.<sup>72</sup> Initial plans should have been created for these children in March 2001.

The Port Hedland Department Manager's report of October 2001 appears to confirm that there was no case management system operating at the centre prior to this time, noting that none of the unaccompanied children in the centre were being case-managed.<sup>73</sup> The Department Manager requested on 26 October 2001 that 'individual management plans tailored specifically around the needs of each child' be developed.<sup>74</sup>

Although no plans were produced to the Inquiry in response its request, one plan was included in a child's general file provided to the Inquiry. This child was detained in August 2001, and the plan, his 'Initial Management Plan' was dated 12 December 2001. This plan is the most detailed of any seen by the Inquiry from any centre. It provides a comprehensive assessment in the areas of physical health, educational services, social supports and activities, and psychological health and makes specific recommendations.<sup>75</sup> It is unclear why this particular case warranted a detailed plan when there was so little evidence of plans concerning other children. It can only be presumed that such plans were not uniformly applied.

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Department Manager reports indicate that by January 2002 a case management system was in place at Port Hedland:

There is an emphasis on attention paid to U[A]Ms by ACM and DIMIA. Each has an individual case management plan and are seen regularly by mental health and teaching staff. ACM reports that this attention is having a negative impact on UAM behaviour. The UAMs receive special attention in classes which detract teacher resources from other minors and adults at the Centre.<sup>76</sup>

The Department does not explain what aspects of the attention paid to unaccompanied minors had a negative impact on unaccompanied children's behaviour, what that behaviour was, or what they did to address the problem.

### (c) Curtin

ACM reports that case management plans were introduced at Curtin in March 2001. This is supported by the production of eleven plans from this time. These plans, called Detainee Management Strategies, were created when most of the unaccompanied children had been in detention for less than a month. They are almost identical to each other in content. The only section that differs from report to report is one line in each report describing the child's current medical needs.

The uniformity of the reports is surprising, given that each strategy states that '[t]his strategy has been developed in order to ensure the educational, welfare and medical needs of this unaccompanied child are addressed'. The strategies also state that '[i]t is anticipated that these recommendations will provide a cohesive network which acts to provide a total case management approach to the care and welfare of the detainee'.<sup>77</sup> There are no follow-up reports for any of these children.

Two case management strategies created in November 2001 contain reports that are very similar to each other, noting that the boys concerned have a pattern of sleeping at day and staying up at night. Action was taken to work with the boys on their sleep habits.<sup>78</sup> There were no follow-up reports for either of these unaccompanied children.

Follow-up Detainee Management Strategies were only provided for one unaccompanied child, with plans created in November 2001, and January, March and April 2002. The reports on this child indicate that management strategies were in place. For example, in the report of 18 January 2002, ACM developed a strategy to encourage the child to turn up at mealtimes.<sup>79</sup> It is also apparent that ACM was monitoring the child's mental health during this period. Despite indication of attention to the needs of this child, it is of significant concern that the first plan for this child was created only after he had been in detention for 8 months,<sup>80</sup> even though case management plans were being developed for other children at the time he was detained in March 2001.

The Inquiry also received a series of one-page weekly reports regarding one child from March – June 2001, which are almost identical to each other. They do not indicate a high level of individual attention.

The Inquiry is concerned that reports on only 15 children at Curtin were provided even though 23 unaccompanied children were detained during the period for which the plans were required.<sup>81</sup>

### **(d) Summary of case management plans**

Having conducted a comprehensive review of all the case management plans provided to the Inquiry regarding unaccompanied children in Woomera, Port Hedland and Curtin, the Inquiry was left with a strong impression that completion of case management documents for unaccompanied children was not a high priority. ACM told the Inquiry that:

The level of documentation may not have reflected the high level of service provision that was provided to UAMs. The relationships and interaction between UAM officers and relevant minors are given higher priority than constantly recording and documenting such processes. The relationship between unaccompanied children and designated officers is highly dynamic and fluid. To maintain such a relationship and to maximize normalised living requires that designated officers spend a great deal of time 'face to face' with unaccompanied children. This is considered by ACM to be a preferable approach to the management of UAMs.<sup>82</sup>

ACM also emphasised that:

There are no formal documented Departmental guidelines for case management of detainees by the service provider ... It is the case that the concept and expectations for case management need to be clearly defined and until such a clarification is made, allegations of inadequate documentation in regards to case management will continue without resolution.<sup>83</sup>

The Department urged the Inquiry to take into account that case plans were only one part of the strategy to protect the rights of unaccompanied children in detention:

case management plans were a component part of a much broader strategy for managing unaccompanied minors, which included dedicated ACM staff with responsibility for managing unaccompanied minors, centre meetings specifically about management of unaccompanied minors and weekly unaccompanied minor teleconferences convened with the department's Central Office where issues of concern were raised and dealt with.<sup>84</sup>

The following sections address the other components of the care strategy for unaccompanied children referred to by ACM and the Department. It is therefore premature to conclude that the absence of detailed individualised case management plans necessarily means that unaccompanied children were receiving inadequate care. However, it is clear that the case management plans contributed very little to that overall strategy.

### 14.3.3 Staff meetings regarding unaccompanied children

ACM and the Department both suggest that regular staff meetings regarding the welfare of unaccompanied children in detention are an important element of the care of unaccompanied children in all detention centres.

Again, the Inquiry relied on the production of documentation by the Department for evidence of meetings regarding unaccompanied children. The following documents were required:

From all centres:

- Minutes of all meetings regarding unaccompanied children from all centres from the date on which the meetings commenced until 30 September 2002.

From Woomera:

- Minutes of all meetings regarding unaccompanied children; reports created as a result of these meetings; and correspondence with the South Australian child welfare agency (Department of Human Services, Family and Youth Services)<sup>85</sup> for the period 1 April 2001 to 30 June 2002.

In Woomera, weekly meetings regarding unaccompanied children began in February 2001.<sup>86</sup> These meetings included ACM officers, health staff, programs staff and education staff, as well as an officer from the Department, although the Department officer did not regularly attend. Although the name of this meeting changed slightly over time, this chapter will refer to all such meetings as Unaccompanied Minors Committee meetings.<sup>87</sup>

The minutes of the meetings held at Woomera are extremely detailed and demonstrate that significant attention was paid to the needs of the unaccompanied children detained in the centre. The meeting minutes note detailed discussion of issues facing individual unaccompanied children as well as general issues such as education and health. Thus, although the case management plans discussed previously were sparse in detail, it appears that the children received attention on a day-to-day basis.

For example, the minutes of the staff meeting of 20 September 2001, when 55 unaccompanied children were detained at Woomera, contain the following:

- detailed comment about the care of an eight-year-old unaccompanied child residing in the centre
- discussion of the individual needs of several other children
- discussion of planned recreational activities for all unaccompanied children
- strategies to encourage school attendance by unaccompanied children.<sup>88</sup>

However, the minutes of these meetings only make very brief reference to the November 2001 self-harm incident that is detailed in Case Study 2. There was more detailed discussion of the children involved in self-harm in January 2002, with minutes containing detailed comment on the situation of individual children.<sup>89</sup> The situation of these children is discussed in detail in Case Study 3 at the end of this chapter.

The nature of these meetings changed slightly over time as the numbers of detained unaccompanied children, and children generally, decreased. From February 2002 onwards the meetings considered the needs of all children (not just unaccompanied children) in the centre. From 30 April 2002 onwards the minutes included a section called Individual Management Plans that considered the needs of individual children (including the one remaining unaccompanied child).<sup>90</sup>

Meetings regarding unaccompanied children commenced at Port Hedland in November 2001.<sup>91</sup> These meetings were between unaccompanied children and representatives from ACM and the Department and were held until January 2002.<sup>92</sup> In these meetings the children raised issues about which they were concerned (medical care, education, work, and the request for a room to use for recreation purposes) with ACM and Department staff. The Department was not always able to answer their questions. For example, in the meeting of 3 January 2002, one unaccompanied child asked whether the Department had stopped granting visas to Afghans, to which the response from the Department's Assistant Manager is recorded as '[n]ot sure'.<sup>93</sup>

In late January and early February 2002 there were two meetings regarding unaccompanied children involving ACM and Department staff at Port Hedland. Unaccompanied children did not attend these two meetings. However, the minutes of these meetings are detailed and demonstrate action being taken to meet the needs of unaccompanied children. In particular, there are specific notes of concern regarding individual children.<sup>94</sup>

In March 2002, the Port Hedland Department Manager stated that meetings regarding unaccompanied children continued on a weekly basis:

there is a weekly meeting between the DIMIA UMLO [Unaccompanied Minor Liaison Officer], the ACM CLO [Community Liaison Officer], the ACM psychologist, the ACM counsellor, and ACM Programs Manager, during which there is discussion of specific issues relating to the welfare and wellbeing of unaccompanied minors.<sup>95</sup>

However, after February 2002, no minutes of meetings were provided to the Inquiry despite the continuing presence of unaccompanied children.<sup>96</sup> The Notice to Produce required production of minutes of all meetings regarding unaccompanied children until 30 September 2002.

The documents regarding the convening of regular ACM staff meetings to monitor the care of unaccompanied children suggest that the level of attention paid by ACM staff to unaccompanied children varied quite substantially between centres. At Woomera, staff held regular meetings and kept extremely detailed minutes. At

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Port Hedland, minutes of meetings were provided for only a short period of the time that unaccompanied children were held in the centre.

At Curtin there was no ACM involvement in meetings regarding unaccompanied children, with meetings instead being held between Department staff and children (see further section 14.4.3).<sup>97</sup>

While it may be that there was regular informal contact between staff and unaccompanied children at Curtin and Port Hedland, that contact was not adequately documented in either the case management plans or meeting minutes. The Inquiry is concerned that these issues were taken too casually in these centres. Furthermore, it is disappointing that there was no consistent strategy between centres regarding the conduct and documentation of such care strategies.

### 14.3.4 Progress reports regarding unaccompanied children

At Woomera, weekly progress reports regarding unaccompanied children were created by ACM staff from February 2001. Woomera was the only centre at which progress reports were produced.

The progress reports were the formal reports from the Unaccompanied Minors Committee meeting; however, they generally contained much less detail than the minutes from those meetings. They were initially only provided to ACM management, but from at least 12 April 2001 were given to the Department Manager, with copies to all ACM officers involved in the care of unaccompanied children in the centre.<sup>98</sup>

From 8 June 2001 the South Australian child welfare authority, Family and Youth Services (FAYS), a section of the South Australian Department of Human Services (DHS), were noted as recipients of these reports.<sup>99</sup> However, in the minutes of the UAM Committee Meeting of 3 July 2001, it is noted that '[f]or many months the Committee has thought that UAM Reports have been faxed off to FAYS. As a matter of concern it has been discovered that they have not been faxed to FAYS'.<sup>100</sup>

These progress reports indicate monitoring and follow-up of significant issues regarding the unaccompanied children in Woomera. For example, there is detailed and ongoing comment about the needs and care of an eight-year-old unaccompanied child in July and August 2001.

However, the reports for the latter half of 2001 are remarkably similar, with only minor details being changed from report to report, despite there being a large number of unaccompanied children detained in the centre. No comment regarding any specific unaccompanied child is made in the reports from September 2001 onwards; the reports instead contain general descriptions of the services and activities available to unaccompanied children. There is also only a brief reference to a serious incident of self-harm by a group of unaccompanied children in November 2001 which is discussed in detail in Case Study 2. No progress reports were created for the period during January 2002 when the majority of unaccompanied children were involved in self-harm incidents as described in Case Study 3. When the meetings recommenced in February 2002, they note that there is only one unaccompanied child remaining in the centre.<sup>101</sup>

Reports from 15 February 2002 onwards concern the one remaining unaccompanied child in the centre (a detached minor).<sup>102</sup> From 26 April 2002 onwards these reports are almost identical, with repeated reference to this unaccompanied child not attending recreational and educational activities. There is no indication of any strategy to encourage this unaccompanied child to engage in education or recreational activities.

### **14.3.5 Provision of adult detainee mentors to unaccompanied children**

ACM policy requires staff to assess whether unaccompanied children might benefit from the appointment of an adult detainee 'mentor'.

In the case of Curtin, several of the case management plans created in March 2001 contain a space for the notation of the detainee under whose 'guardianship' the unaccompanied child is placed. None of the plans has this section completed, although some of the plans noted that 'no detainee willing to take on task',<sup>103</sup> indicating the absence of detainee mentors.

However, mentors were appointed on certain occasions. For example, an ACM memo dated 17 April 2001 refers to six unaccompanied children in Woomera residing with 'de-facto' families. Two of these 'de-facto' carers concerned 'detached minors', in other words they were the child's aunt, uncle or cousin.

Furthermore, as set out in some detail in Case Study 1, despite the serious difficulties in finding a suitable foster carer for an eight-year-old unaccompanied child detained at Woomera during 2001, staff went to considerable trouble to try and make appropriate arrangements.

Thus, the evidence before the Inquiry suggests that adult mentors were not routinely appointed to unaccompanied children nor were they 'fostered' with other detainee families. However, the Inquiry accepts the Department suggestion that a reason for the low number of mentors was that:

the vast majority of unaccompanied minors were males in the mid to late teens. In many cultures, such young men are considered adults and, indeed the majority of such unaccompanied minors viewed themselves this way. Accordingly, some were unwilling to participate in any mentoring arrangement they perceived as diminishing their 'adult' status.<sup>104</sup>

### **14.3.6 Findings regarding ACM involvement in the care of unaccompanied children**

The Inquiry acknowledges that many individual ACM staff worked hard to meet the needs of unaccompanied children in detention. ACM also developed a range of strategies over time for the care of these children, the most comprehensive articulation of which is found in the November 2001 Woomera procedure regarding unaccompanied children. However, there were significant weaknesses in the system despite these efforts.

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Designated officers with responsibility for the care of children appear to have been appointed in Woomera and Port Hedland in early 2001 and in Curtin by late 2001. By late 2001 Department records indicate that they had regular contact with unaccompanied children in all centres. However, several former detainee children interviewed by the Inquiry reported that, at least from their point of view, there was no specific person responsible for their welfare in detention.

The practice of using individual case management plans as a guide for the care of unaccompanied children developed in late 2001 shortly before the majority of unaccompanied children were removed from detention. ACM stated that the system began in Woomera, Curtin and Port Hedland in March 2001. However, the Inquiry finds that although generic case management plans existed at Woomera from March 2001 onwards, individual case management plans were first created at Woomera in December 2001. Although individual case management plans were created at Curtin in March 2001, they were of very poor quality. The Inquiry is not satisfied that any case management plans were produced in Port Hedland prior to December 2001.

Even where individual case management plans were produced, they were generally formulaic, sparse in detail, contained few recommendations for management of children and were rarely followed up. The Inquiry therefore finds that while individualised case management plans are an appropriate measure in principle, in practice they were an ineffective tool to address the needs of unaccompanied children in Woomera, Curtin and Port Hedland detention centres.

The Inquiry finds that regular meetings discussing the care of unaccompanied children were held at Woomera from February 2001. The minutes of these meetings demonstrate that significant attention was given to the needs of the unaccompanied children detained at the centre. At Port Hedland, the meetings were less effective and only commenced in November 2001, well after the date on which many unaccompanied children were initially detained. At Curtin there were no minuted meetings between ACM staff and unaccompanied children.

Weekly progress reports regarding unaccompanied children were created in Woomera only. From April 2001 these reports were provided to the Department's Manager at Woomera; however, they were not regularly provided to the South Australian child welfare authorities. While these reports initially contained significant detail, the Inquiry is concerned that in the latter half of 2001 they did not adequately document the situation of unaccompanied children in the centre.

Finally, the Inquiry finds that mentors or de facto guardians were rarely appointed to unaccompanied children, although accepts that in many cases this was because they were older teenagers.

Therefore, despite the considerable efforts of individual staff members and the development of some systems for the care of unaccompanied children in detention, the Inquiry finds that some elements of the system of care were not adequately implemented, others were not adequately documented and all commenced well

after the dates on which unaccompanied children were initially detained. Furthermore, there is considerable variation in the implementation and documentation of these systems between centres – with Woomera providing the best example.

Despite the fact that the system was working at its best in Woomera, those systems failed to provide sufficient guidance as to how to protect the wellbeing of children in long-term detention. Those systems failed to prevent or address the levels of distress demonstrated in the group self-harm incidents described in Case Studies 2 and 3 at the end of this chapter. Furthermore, those systems failed to adequately protect the best interests of an eight-year-old unaccompanied child, as described in Case Study 1. This raises the question as to whether the best interests of unaccompanied children can ever be fully satisfied within a detention centre, especially where that detention is for prolonged periods. It is the Department's responsibility to address that larger question.

### **14.4 What did the Department do to care for unaccompanied children in detention centres?**

The Department is primarily responsible for ensuring that unaccompanied children receive the special assistance required by international law. To the extent that the Department relies on ACM to fulfil that duty it must effectively monitor the care provided to ensure that it is appropriate. When care is found to be inadequate, the Department must take action to remedy the deficiencies.

The Department has an additional responsibility due to the fact that under domestic law the Minister is the guardian of unaccompanied children in detention and therefore has a heightened duty to put the best interests of the child first. This section sets out those responsibilities in greater detail and assesses the measures taken by the Department to fulfil those duties.

#### **14.4.1 The Minister's and the Department's responsibilities towards unaccompanied children**

By definition, unaccompanied children arrive in Australia without a legal guardian. This makes them especially vulnerable because they do not have someone to support them through the difficulties encountered within a detention environment and the potentially confusing process of applying for asylum.

The IGOC Act provides that the Minister is the guardian of all unaccompanied children seeking asylum in Australia.<sup>105</sup> This includes children in excised offshore places, but not those in Nauru and Papua New Guinea.<sup>106</sup> The Minister has the 'same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have'<sup>107</sup> and remains legal guardian from the moment of arrival until the unaccompanied child turns 18 or leaves Australia.<sup>108</sup>

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The Federal Court of Australia<sup>109</sup> has found that the duty of the guardian under the IGOC Act is to ensure that all children under the guardian's care enjoy the fundamental human rights enshrined in the CRC, and in particular that the guardian must act at all times in the best interests of the child.<sup>110</sup> The guardian must ensure that the child under care is properly fed, clothed, housed and educated.<sup>111</sup>

Furthermore, there is High Court support for the view that a guardian has a fiduciary obligation towards his or her ward.<sup>112</sup> This means that the guardian is bound, in matters falling within the scope of the fiduciary relationship, to place the interests of the ward before his or her personal interests.<sup>113</sup>

In the context of unaccompanied children who arrive in Australia without a visa, this means that the guardian must address his or her mind to the following questions regarding each and every unaccompanied child:

- (1) whether the child should be detained
- (2) whether to pursue release of the child from detention by the grant of a bridging visa
- (3) if the child remains in detention, the form of detention that can provide the best care (including consideration of whether the child would be better off in home-based detention in the community, a residential housing project or a metropolitan detention centre)
- (4) the manner in which the child is cared for while in detention.

Each of these four considerations is interlinked. For example, the longer a child is in detention the more difficult it will be to ensure that his or her best interests are met within that context. Similarly, where the care arrangements in detention centres are ineffective to protect a child's best interests it becomes more important to ensure prompt release or transfer to home-based detention.

Questions (1)-(3) are discussed in some detail in Chapter 6 on Australia's Detention Policy. Briefly, regarding question (1), Chapter 6 finds that Australian legislation does not leave room for the guardian to make any choices regarding whether or not to detain in the first place. Regarding questions (2) and (3), Chapter 6 finds that the Minister, through the Department, failed to actively pursue the release or transfer of unaccompanied children from detention centres prior to January 2002 and as a result, failed to properly address the best interests of unaccompanied children.

This chapter focuses primarily on question (4) which requires the guardian to address his or her mind to whether the care arrangements in detention are effective in protecting the best interests of the child and ensuring that each unaccompanied child is able to enjoy all the rights in the CRC. Those rights include the right to assistance through the refugee status determination process (see Chapter 7), the right to be protected from violence (see Chapter 8), the right to the highest attainable standard of mental and physical health (see Chapters 9 and 10), the right to education and recreation (see Chapters 12 and 13) and cultural life (see Chapter 15).

The Department's primary responsibility with regard to unaccompanied children is to act as the delegated guardian of the Minister. The Department acknowledges its special duty of care to unaccompanied children:

[o]ver and above the duty of care to all detainees, and to detainee children in particular, a special duty of care is owed to unaccompanied minors because of the Minister's guardianship responsibilities for these children.<sup>114</sup>

The Department also acknowledges that the Minister's special duty of care includes ensuring that the rights of children under his or her care are protected.<sup>115</sup>

The Minister delegated the powers relating to the guardianship of unaccompanied children to Department officers on 11 January 2002. The delegation to the Department Managers and Deputy Managers appears to make practical sense in that the Departmental officers working in the various centres are more likely to understand the particular needs of unaccompanied children than the Minister.

However, prior to the official delegation in January 2002, it appears that the Department effectively acted as a representative of the Minister as guardian. Indeed, it appears that some ACM staff understood that Department officers were acting on behalf of the Minister. For example, in Woomera, the Unaccompanied Minors Committee meeting of 29 May 2001 states that the Department Manager is the legal guardian and must be informed of notifications to FAYS.<sup>116</sup>

### **14.4.2 Difficulties facing the Department in fulfilling its duties to unaccompanied children**

In addition to the difficulties facing the Department with regard to release from detention centres (as discussed in Chapter 6 on Australia's Detention Policy), Department Managers face the following difficulties in executing their duty of care within the detention context.

#### **(a) Child welfare expertise of Department Managers**

The IGOC Act does not require that the Minister or his or her delegates have any particular child care qualifications to become the guardian of an unaccompanied child.

Given that the Minister and the Department's Managers are normally immigration professionals, rather than child care professionals, it is more likely than not that they do not in fact have such qualifications. This was admitted by the Department in the hearings of the Inquiry.<sup>117</sup> The Department was asked whether it provided child care training to the Managers. The answers given indicate that almost no such training exists.<sup>118</sup>

The Department has argued that the absence of special qualifications is overcome by the fact that the Department consults child welfare authorities and hands over the care of unaccompanied children to ACM staff with close monitoring by the Department.<sup>119</sup> However, section 14.5 on the role of State authorities suggests that,

## A last resort?

until the mass self-harm events described in Case Studies 2 and 3 at the end of this chapter, the State authorities had little to do with the care of unaccompanied children.

While ACM staff may well have had appropriate child care qualifications, the findings set out in section 14.3.6 above suggest that during certain periods in certain centres there was sparse documentation by ACM staff regarding the progress and management of unaccompanied children. Therefore to the extent that Department Managers were relying on child welfare assessments and management strategies administered by ACM staff, they were hampered by the absence of documentation in some centres. In any event, ACM staff were the people who the Department Managers were supposed to be monitoring. The Department could not therefore rely on them for an independent assessment of the quality of care being given to unaccompanied children.

Thus it is difficult to see how the Department Managers and the Minister, as guardian, can properly monitor and ensure the appropriate care and progress of an unaccompanied child by others if they do not have appropriate qualifications or specific experience in child welfare.

### **(b) Guidelines for Department Managers**

As discussed earlier, prior to September 2002 when MSI 357 was issued, there were no guidelines explaining to Department Managers their role and responsibility with regard to unaccompanied children. For example, the Department Managers' Handbook is missing the chapter on unaccompanied children.

Although the Department states that the *Migration Act 1958* (Cth) (the Migration Act) and the Migration Regulations are also a guide for Department Managers,<sup>120</sup> they provide no specific information about the services that should be provided to children in detention. Therefore, the Department Managers were in the difficult position that they had no expertise, no additional training regarding children, and no guidelines as to what they should be doing.

### **(c) Independence of the Minister and his or her Departmental delegates**

The primary role of a guardian is to step into the shoes of a parent and ensure that the best interests of an unaccompanied the child are protected. International law experts and community groups have suggested that the Minister's ability to fulfil that role is seriously compromised by the fact that he or she is simultaneously the guardian, detaining authority and visa decision-maker.

For example, the United Nations High Commissioner for Human Rights Special Representative, Justice Bhagwati, who visited immigration detention centres in Australia in 2002 said:

Furthermore, the policy of detaining unaccompanied minors also appears seriously flawed and must be regarded as totally unacceptable from a human rights perspective. A particular issue of concern is the fact that the Minister for Immigration is both the "detainer" and the guardian which represents a serious conflict of interest.<sup>121</sup>

A Western Australian community legal centre, Southern Communities Advocacy Legal and Education Service (SCALES), stated that:

Well, I think that having the Minister for Immigration as their guardian [and] also the person that decides, is the ultimate arbiter of their case in terms of their application for asylum, can represent a conflict of interest, particularly to the Government's policy and certainly, the Minister has stated, intention ... to use mandatory detention models and to continue using them. And so he has those conflicting issues about what is the Government policy as opposed to acting in the best interests of the children involved.<sup>122</sup>

The Refugee Council of Australia (RCOA) stated that:

There is no delegation of guardianship to a person who has the best interests of the child as his/her sole and unambiguous responsibility ... [t]here is therefore no designated individual who can:

- ensure that the child is properly represented during the refugee status determination procedures and take legal responsibility for signing documents on his/her behalf;
- act as an advocate for the child if there are problems in the refugee status determination process or with welfare or other issues;
- oversee the care and management of the child;
- ensure that the child is not exposed to abuse or neglect.<sup>123</sup>

The Federal Court has recognised and accepted that there may be a conflict between the role of the Minister as guardian of unaccompanied children under the IGOC Act and his or her role in administering the Migration Act:

Although it is clear from the wording of the [I]GOC Act, and accepted by the Minister, that the Minister is the guardian of unaccompanied asylum-seeker children, the potential for conflict of roles must, of course, exist.<sup>124</sup>

In the context of visa decisions, the Federal Court found that any such conflict was resolved by the provision of independent merits review by the Refugee Review Tribunal.<sup>125</sup> The Department suggests that the conflict is removed by the appointment of a migration agent.<sup>126</sup>

The Federal Court did not directly address how the conflict could be resolved in the context of unaccompanied children's care in, or removal from, detention centres. The Minister states that the conflict of interest regarding care is removed through the delegation of guardianship to the Department Managers and Deputy Managers.<sup>127</sup> However, the RCOA argues that the delegation of guardianship to Department Managers:

does nothing to resolve the problems of conflict of interest. The DIMIA manager is the Minister's delegate in the centre and as such, has the same responsibilities – and conflicts – as the Minister and while ACM does have a responsibility for the care and welfare of the detainees, it also acts as their custodians.<sup>128</sup>

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The current structure places Department officials in an invidious position with respect to unaccompanied children. On the one hand they are asked to gain the children's trust as delegated guardian, on the other hand, generally, the children want to be released from the detention centre for which the Manager is responsible. A former ACM psychologist told the Inquiry that in his view the absence of an independent advocate for unaccompanied children may have resulted in them staying in detention longer than they needed to:

I regarded the failure to remove UAMs, over whom the Minister for Immigration was guardian, from [Woomera] as a matter of particular concern. There did not appear to be a competent and independent advocate for UAMs.<sup>129</sup>

The extremely limited number of instances in which unaccompanied children were released from detention centres by the grant of a bridging visa or transfer to an alternative place of detention is the clearest evidence of the problems caused by the absence of an independent advocate. The seriousness of the problem is illustrated by Case Study 3 at the end of this chapter (regarding January 2002). This issue also discussed in detail in Chapter 6 on Australia's Detention Policy.

Note that MSI 370, issued in December 2002, has addressed this issue to some extent by importing a presumption that the best interests of unaccompanied children are usually that they be released from detention centres. MSI 370 also imposes an obligation on the Department Manager to pursue this option.

### **14.4.3 The Department's execution of its responsibilities towards unaccompanied children**

As discussed above, in addition to pursuing the speedy release or transfer of children from detention centres (see Chapter 6 on Australia's Detention Policy), one of the Department's primary responsibilities as the representative of the Minister and delegated guardian is to monitor the care that is provided to unaccompanied children in order to ensure that their best interests are protected.

A former Department Manager from Woomera, who worked at the centre between May 2000 and May 2001, provided evidence that the monitoring of the care and well-being of unaccompanied children was taken very seriously by Department staff:

I insisted that there be at least one male, one female detention officer allocated to the minors and they be consistent, continuous. I insisted that there be a psychologist assigned to them. I insisted that there be a weekly report of everybody and everything, no matter how small come in, that I get copies of it. We also implemented a system of them having a different band around their ID card. It wasn't to pinpoint them so much as to say, if they were lining up for meals and they were being jostled by some older men that they were immediately recognised by the detention officers and they were told to act in a parental role, to resolve it, support the boy. I also – normally if I wasn't in court or facing another Inquiry, I would see them once a fortnight myself.

I also [told] one of my staff, 'I want you to keep an eye on – just go and see them', ... because she has a gentleness there, and in addition I reinforced

to the boys that they needed to support each other as well. We accommodated them together, around families rather than single men. An additional thing we did – or I did – because they didn't have their parents who would explain about the whole process of their application. ... They were minors so I ran a couple of sessions for them and had them ask questions, you know, even explaining down to the Federal Court, where they could complain, how they could get forms, all of that. Actually, most of that was videoed, it is somewhere in ACM at Woomera.<sup>130</sup>

In addition to the regular reporting mechanisms of monthly Department Manager reports and incident reports,<sup>131</sup> the Department informed the Inquiry that it monitored the care of unaccompanied children through the following mechanisms:

- monitoring ACM case management plans
- involvement in regular meetings regarding unaccompanied children
- regular teleconferences regarding unaccompanied children
- regular consultation with State child welfare agencies.<sup>132</sup>

The following subsections evaluate the quality of the Department's monitoring of the care provided by ACM on the basis of the primary records provided by the Department.

### **(a) Monitoring of case management plans**

The Department suggests that it kept a close watch on the case management plans developed for each unaccompanied child.

Central Office involvement appears to have commenced in 2002. The minutes of the first Unaccompanied Minor Teleconference of 13 December 2001 state that all management plans for unaccompanied children had been forwarded to Central Office.<sup>133</sup> Although the situation of unaccompanied children appears to have been discussed in detail in these teleconference meetings from 28 February 2002 onwards, the only discussion of the quality of case management plans occurred in the first teleconference.

In the case of Port Hedland, the Department Manager testified before the Federal Court that case management plans were provided by ACM to the Department for approval:

The creation of individual management plans for unaccompanied minors was advised to DIMIA Centre management through the weekly Unaccompanied Minors' in Detention Conference and High Risk Assessment Team (HRAT) meetings (which always include a DIMIA representative) and endorsed by DIMIA Management.<sup>134</sup>

It is unclear when this practice began. It is also unclear what advice Department Managers sought in order to assess the plans. However, the generally poor quality of the written case management plans, as set out in the findings in section 14.3.6 above and Case Study 3 at the end of this chapter, suggest that this responsibility was not a high priority.

### **(b) Department meetings regarding unaccompanied children**

The weekly meetings that the Department refers to as a monitoring tool are the Unaccompanied Minors Committee meetings discussed in section 14.3.3. In the case of Woomera, although Department representatives were on the invitation list for these meetings, a review of the minutes shows that they were regularly absent. Department staff attended no meetings in April 2001, June 2001, and July 2001; 25 per cent of meetings in November 2001, February 2002, March 2002 (late arrival), April 2002, and May 2002; and 50 per cent of meetings in December 2001, and January 2002.

There appears to have also been irregular direct contact between Department officials and unaccompanied children at Woomera. This contact occurred when the unaccompanied children's mood was low and they asked for information about Department processes regarding refugee status determination.

The Department Managers were generally well received by the unaccompanied children when they did come to meetings. For example, it was reported that the Department Manager met with the unaccompanied children on 23 March 2001 and that '[s]ince this meeting there is marked change in attitude, behaviour and positive actions on the UAM's behalf'.<sup>135</sup> A 20 April 2001 report notes that a Department representative attended the last few life-skill development programs which helped the unaccompanied children 'to come to terms with the processing of their visas and other DIMA related issues'.<sup>136</sup> On 11 May 2001 the Department Manager met with the unaccompanied children to ensure that they fully understood the refugee status determination processes.<sup>137</sup> The Department Manager appears to have visited the personal development program on two further occasions in June 2001.<sup>138</sup>

It appears that meetings between the Department and the unaccompanied children at Woomera had lapsed by October 2001. This is indicated by the query from the centre psychologist regarding:

what happens to the UAMs when they receive an RRT rejection as they appear not to have anyone to talk to about the rejection. DIMA used to have regular meetings with the UAMs to explain processes to them.

It was agreed that the meetings between the Department and the unaccompanied children would recommence.<sup>139</sup>

For Curtin, the Inquiry was provided with minutes from meetings which occurred approximately fortnightly between June and December 2001. These meetings appear to have been between the Department's Deputy Manager and the unaccompanied children. They were opportunities for the unaccompanied children to raise concerns about issues such as provision of clothing and bedding, health care and education. The Department Deputy Manager generally indicates that she will address the issues raised regarding welfare and care with ACM. The minutes of the first meeting noted some significant problems with the care provided to these children, in that not all of them had blankets or sufficient warm clothing, and that they were not provided with an interpreter to explain their protection visa decisions.<sup>140</sup>

### (c) Teleconferences regarding unaccompanied children

The Department states that it monitors the overall care of unaccompanied children by a national teleconference regarding unaccompanied children, the Unaccompanied Minor Teleconference. These teleconferences commenced in December 2001, long after large numbers of unaccompanied children began arriving in detention centres. They involve staff from the Department's Central Office and each immigration detention facility. From February 2002 other 'children of interest' were also discussed at these meetings.

Although the early minutes of these teleconferences indicate that each unaccompanied child was discussed, this discussion was not minuted. The minutes are concerned with general issues such as whether case management plans existed and whether they had been forwarded to State child welfare authorities. The minutes do indicate some action was taken on these general issues, for example, in the minutes of 13 December 2001, regarding Port Hedland it is noted that 'all UAMs had management plans however DIMIA manager was concerned with quality and each plan is now being revised'.<sup>141</sup>

The Inquiry is concerned that significant incidents regarding unaccompanied children, like those set out in Case Studies 2 and 3, were not discussed at the meetings, or at least they were not minuted. For example, teleconferences held during and after the events of January 2002 do not mention the hunger strike at Woomera in which significant numbers of unaccompanied children were participating.<sup>142</sup>

From late February 2002, teleconferences involved detailed discussions about children of concern, with statements regarding what action was being taken or recommendations for further action. By this date, very few unaccompanied children remained in detention.

### (d) Department Manager reports

As discussed in Chapter 5 on Mechanisms to Protect Human Rights, Department Manager reports are the primary forum for the on-the-ground Department Manager to report to Central Office regarding ACM's performance under the IDS. It may be that from December 2001 the teleconference, described above, took over as the main form of monitoring regarding unaccompanied children. However, unaccompanied children did not appear to capture a great deal of attention in the Woomera Department Manager reports prior to this time.

One of the only reports mentioning unaccompanied children concerns the self-harm incident in November 2001, described in Case Study 2. The comments are extremely brief:

Following a move to a different compound eleven unaccompanied minors made self-harm attempts – minor lacerations to arms and in a number of instances, chests. Placed on HRAT – FAYS informed.<sup>143</sup>

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In the December 2001 Department Manager's report the comments about this incident are identical, indicating that this was not an issue that was seen to require any specific and individualised reporting in the Department Manager reports.

The situation of unaccompanied children is mentioned in the Port Hedland Department Manager's report of October 2001 which states that:

DIMA-initiated weekly meetings commenced (between deputy DIMA manager, Minors Liaison Officer and Health Services Manager), with the intention of raising the standard of service to this vulnerable group. Set up in response to a growing awareness that the individual needs of UMs are generally not being addressed. The first meeting revealed that some have inadequate clothing, none being case-managed and none has been taken out of the Centre since they arrived.<sup>144</sup>

These meetings are discussed in section 14.3.3, which did indicate detailed consideration of the needs of unaccompanied children in the centre, although the meetings do not appear to have continued into 2002 despite the continuing presence of unaccompanied children.

At Curtin, the March 2001 Department Manager's report notes that:

[a]ll unaccompanied minors are cared for appropriately. All are on individual management plans which ensure that they are monitored on a daily basis. All are allocated guardians within the Centre and all seen by the counsellor on a weekly basis.<sup>145</sup>

In October 2001, the Curtin Department Manager again notes that all unaccompanied children are on individual management plans and have regular contact with the Minors Liaison officer 'to ensure that their welfare is being monitored and that they are receiving appropriate care from all service areas'. The identical words are used in the November and December 2001 reports.<sup>146</sup> As discussed in section 14.3.2, the case management plans in March 2001 were very broad and generic in nature. Thus the Manager's statement regarding the effectiveness of the case management plans may be an overstatement.

In March 2002, the police investigated allegations of sexual assault against an unaccompanied child. This incident suggested to the Curtin Department Manager that the case management system was not working very well:

It came to the notice of DIMIA staff during the month that ACM staff had not been monitoring unaccompanied minors in accordance with their management plans. Reasons for this occurring appear to range from insufficient staff to staff not being fully aware of the priority given to the welfare of UMs. Issues being raised on daily HRAT sheets in regard to UMs were not being addressed to shift supervisors. Partially as a result of ACM's failure to monitor the UMs a police investigation became necessary to explore a possible sexual assault against one of the UMs. Had proper monitoring taken place this investigation was unlikely to have been necessary.<sup>147</sup>

There were no follow-up comments in subsequent monthly reports.

From September 2001, there was a 'Special Needs' section at the end of the Woomera Manager reports to note concerns about individual cases. This was rarely used to note concerns about unaccompanied children. The only mention of unaccompanied children occurred when four individual cases were noted in the September, October and December 2001 reports. There was also a note of general concern about unaccompanied children in the January 2002 report.<sup>148</sup>

In summary, the monthly Department Manager reports from Woomera, Port Hedland and Curtin reporting on the progress of unaccompanied children are surprisingly brief given the significant issues of concern regarding these children in all centres during 2001 and 2002.

### **14.4.4 Findings regarding the Department's involvement in the care of unaccompanied children**

The Inquiry finds that the Minister and his delegates failed to exercise their duty to address their mind to the best interests of each unaccompanied child in order to ensure the full enjoyment of their rights within detention centres.

The Department's practical involvement in the care of unaccompanied children was minimal and its monitoring of the care provided to unaccompanied children by ACM was ineffective to protect them. There is very little evidence of Departmental monitoring of case management plans; Department officers attended very few meetings within detention centres regarding unaccompanied children, particularly in Woomera; and teleconferences regarding unaccompanied children only commenced in December 2001 – long after unaccompanied children had entered detention centres. Significant incidents involving unaccompanied children were scarcely mentioned in Department monitoring documents.

However, the Inquiry recognises that there were significant impediments to the Department Managers effectively fulfilling their role as delegated guardian for unaccompanied children. They did not have child care qualifications or experience. They were not provided with training specific to ensuring that the needs of unaccompanied children were met. There were no guidelines describing the role of the Department Manager.

Furthermore, there is a significant conflict of interest in the role of the Minister as guardian, detention authority and visa decision-maker. The Inquiry is of the view that this conflict of interest remains despite delegation of the care responsibilities to Department Managers and Deputy Managers. In fact, the delegation to Department Managers creates an additional tension. Department Managers are not in a position to both manage the detention facility and make decisions in the best interests of the child within that context. This is especially the case when consideration of the best interests of the child requires the Manager to find that the detention facility is not adequately meeting the child's needs.

While the Inquiry acknowledges that the Department has made efforts to clarify the responsibilities of Department Managers in the new MSIs, they were created well

## A last resort?

after most unaccompanied children had been released. Furthermore, the MSIs do not adequately deal with the issues of conflict of interest and the expertise of Department Managers.

Case Studies 1-3 at the end of this chapter demonstrate the difficulties of fully addressing the needs of unaccompanied children within detention centres. This fact is recognised in MSI 370 which presumes that it is in the best interests of unaccompanied children to be transferred from detention centres to alternative places of detention or be released on a bridging visa. Nevertheless, the systems in place prior to the introduction of this MSI did not enable the Department to meet its obligations to unaccompanied children.

### **14.5 What did State child protection authorities do to care for unaccompanied children in detention centres?**

As noted earlier, the Department clearly states that it relies on State authorities for advice regarding the management of unaccompanied children.

#### **14.5.1 The guardianship role of State authorities**

The Minister formally delegated the powers relating to the guardianship of unaccompanied children to various senior officials in State and Territory child welfare agencies on 1 December 1999. As noted earlier, a form of this delegation has existed since at least 1986.

Prior to September 2002, it was unclear from the delegations themselves whether the Minister, his or her State and Territory delegates and his or her Departmental delegates were simultaneously responsible for all unaccompanied children, or whether there were specific circumstances under which a particular child was under the responsibility of a particular guardian.<sup>149</sup>

In 2001, the Federal Court in *Jaffari v Minister for Immigration & Multicultural Affairs* noted:

that arrangements for the proper supervision of the welfare and protection of unaccompanied minors seeking asylum seem to be somewhat inchoate with a presently ill-defined role on the part of the Director of Community Development notwithstanding that the current delegation has been in place for nearly two years.<sup>150</sup>

During the hearings of the Inquiry and in its submissions, the Department acknowledged that despite the unlimited delegation of guardianship to State authorities in 1999, in practice, the role of the State authorities as guardian only commenced after release from detention.<sup>151</sup> This also appears to represent the current understanding of legal practitioners<sup>152</sup> and the States themselves.<sup>153</sup>

The situation was clarified in September 2002 in MSI 357, which stated that the delegation of guardianship powers to State agencies commenced only after an unaccompanied child had been released from detention, with the exception of children transferred to home-based care.<sup>154</sup> However, State authorities told the Inquiry

that, in the intervening period, they could not have fulfilled the responsibilities of a guardian even had that been the intention of the delegation. The Victorian Department of Human Services told the Inquiry that it was not generally told when unaccompanied children were in detention and was therefore not in a position to provide any assistance.<sup>155</sup>

The Western Australian Government told the Inquiry that absence of automatic access to the children in detention would have prevented any appropriate implementation of its guardianship powers and responsibilities:

Given their extreme vulnerability, all unaccompanied children in detention should have a guardian who can ensure that the full range of their needs (relating to education, health, legal status, safety and general welfare) is met. Such a guardian must have the authority and capacity to fulfil the role in the best interests of the child. Since children are being detained in centres under Commonwealth control, State government officers are not in a position to exercise guardianship responsibilities effectively.<sup>156</sup>

Home-based detention is the one exception to the understanding that State authorities have no guardianship powers for children in detention. In South Australia, there is a draft Memorandum of Understanding between the Department and DHS regarding the care of unaccompanied children in alternative detention. That document states that when unaccompanied children are transferred to alternative detention arrangements in the community, the Minister remains the ultimate guardian but officers of DHS can exercise delegated guardianship.<sup>157</sup> The practical effect seems to be that the State exercises control. Home-based detention is discussed further in section 6.4.2 in Chapter 6 on Australia's Detention Policy.

### **14.5.2 Involvement of State authorities in other aspects of managing unaccompanied children**

Although State authorities had no effective guardianship role regarding unaccompanied children in detention, the Department states that it relies on State authorities' expertise regarding the care of unaccompanied children:

State child welfare authorities are also regularly consulted and advised on the status of each unaccompanied minor and the effectiveness of the management plan.<sup>158</sup>

Prior to September 2002, when MSI 357 required the Department to consult State authorities about the case management of unaccompanied children, the interaction between the Department, ACM and DHS regarding unaccompanied children was uneven.

Two serious mass self-harm incidents regarding unaccompanied children in Woomera in November 2001 and January 2002, described in Case Studies 2 and 3 respectively, are the primary examples of extensive consultation between the Department and the State authorities. The State authority involvement in January 2002 eventually led to recommendations for removal of the unaccompanied children from Woomera and their placement in alternative detention.

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However, there are other examples of attempts to consult State authorities. As noted earlier, it was originally intended that the Unaccompanied Minors Committee meetings at Woomera would include FAYS. However, the record of attendance for meetings in Woomera indicates that this never eventuated.<sup>159</sup> It also was intended that the minutes of these meetings should be sent to FAYS; however, this did not happen until mid 2001.<sup>160</sup>

In Western Australia, the relevant State child welfare agency is Family and Community Services, within the Department for Community Development (FACS, DCD). It appears that DCD was not involved in the management of unaccompanied children at Port Hedland until March 2001.<sup>161</sup> And even then, there does not seem to have been a routine practice of involving DCD in assessing and managing the needs of unaccompanied children.

In the case of one unaccompanied child who arrived in Port Hedland in May 2000, DCD was not consulted until February 2002:

DCD was not requested by DIMIA to become involved with the appellant until late February 2002. This was because the appellant had consistently presented to ACM mental health staff as well-adjusted and enjoying firm support from his cultural peer group in the Centre.<sup>162</sup>

The case management plans produced at Curtin in March 2001 state that FACS will be notified of the child's arrival and will be provided with 'a monthly status update of each unaccompanied minor whilst resident in the Curtin IRPC',<sup>163</sup> and the March 2001 Department Manager report states that FACS are advised about all unaccompanied children.<sup>164</sup> The Inquiry has received no primary evidence of this interaction.

In February 2002, the Department's Central Office in Canberra requested that DCD assess all unaccompanied children in both Port Hedland and Curtin. The letter stated that:

We request that you look at the current emotional status of the individuals, and how this is impacted by being placed in a detention centre. We would further request your advice on what can be done to minimise or eliminate any negative consequences of being in the detention centre.<sup>165</sup>

DCD's report back to the Department, dated 19 March 2002, stated that:

It is therefore recommended that all young people are issued with bridging visas or temporary protection visas, and are provided with community placements by the Department or community-based agencies. Given the ages of the young men, these placements would generally be in share-houses, with access to a range of services relating to education, counselling, and support. If the young men are released on visas the Department would provide support and services consistent with those already provided to unaccompanied minors released from detention, and on a cost-recovery basis.<sup>166</sup>

At this time there were at least three unaccompanied children detained at Port Hedland, and three detained at Curtin.<sup>167</sup> By 28 March 2002 three unaccompanied

children from Port Hedland were detained in a hotel.<sup>168</sup> By June 2002 all three had been released.

Three unaccompanied children from Curtin were transferred into alternative detention in Adelaide on 23 April 2002.

### **14.5.3 Findings regarding State involvement in the care of unaccompanied children**

The Inquiry finds that prior to September 2002, when the operation of the Minister's delegations regarding the guardianship of unaccompanied children was clarified, there was considerable confusion as to the role of State authorities in the care of unaccompanied children in detention. At this time it became clear that State authorities have no guardianship responsibilities for unaccompanied children until they are released from detention on a visa or transferred to an alternative form of detention.

State authorities also have an advisory role for the care of children in detention. However, there is no evidence to suggest that State authorities were called in at the moment an unaccompanied child was detained. Furthermore, prior to January 2002, State child welfare authorities were rarely called in to assess the situation of unaccompanied children and therefore had little active role in providing advice on the day-to-day care of children, rather they were called in when things started to go wrong. However, the recommendations made by the State authorities regarding children detained in January 2002 were implemented by the Department. Case Study 3 sets out the influence of State authorities in January 2002.

## **14.6 What care was provided to children who were temporarily separated from their parents?**

Some children who arrive in Australia with their parents nonetheless become temporarily separated from them at various times within detention. They are effectively left alone without supervision by an adult relative during this time.

This can occur for a variety of reasons, including hospitalisation of a parent or the removal of a parent from the compound or the detention centre for security reasons.

In effect, these children temporarily become unaccompanied minors, and have the right to special protection and care as specified under article 20 of the CRC. However, unlike children who arrive without their parents, the Minister is not the guardian of these children. The parents retain responsibility for their children, although as the following examples make clear, they do not have control over their children's care or location. That responsibility is left to the Department as the detaining authority. These children have the right to maintain personal relations and direct contact with both parents on a regular basis, unless it is contrary to the child's best interests.

### **14.6.1 General provisions for the care of children who were temporarily separated from their parents**

The Department and ACM do not have procedures and policies that specifically ensure that children who are temporarily separated from their parents within detention receive appropriate care in the absence of parental care.<sup>169</sup> The Department suggests that 'it is very difficult to develop a set of rules that applies across all circumstances which could determine the best interests of the child, length of separation, and care arrangements'. However, 'where the Department has felt it necessary, specific guidelines have been developed'.<sup>170</sup>

The IDS make some provision for facilitating contact between family members generally. Standard 11.1 specifies that contact between detainees and their families is permitted and encouraged except when in separation detention. This contact is facilitated through detainee access to telephones, through regular visits and letters.

### **14.6.2 Examples of children temporarily separated from their parents**

It appears that in certain cases at least, children temporarily separated from their parents have had similar care arrangements as those in place for unaccompanied children. For example, designated officers have been organised for children temporarily separated from parents.

Chapter 9 on Mental Health (section 9.3.4) and Chapter 10 on Physical Health (section 10.4.7) set out some examples where hospital transfers have caused children to be left without one or more parents at Woomera during 2002. In one example examined by the Inquiry, the Department acted relatively quickly to ensure that a nine-year-old girl was cared for in close proximity to her mother, who was hospitalised for over six months.<sup>171</sup> Eight days after the separation of mother and daughter, the Department received Ministerial approval to place the girl in foster care in Adelaide, closer to her mother. The decision was made on the advice of DHS.

It is clear from the evidence available to the Inquiry that the girl had regular and direct contact with her mother during the ensuing six months of separation.

In another example, an Iranian mother and her seven-year-old child were separated from each other after the mother attempted suicide in their fifteenth month of detention at Woomera.<sup>172</sup> For the five and a half weeks of separation, during which the mother was hospitalised, the boy was looked after by other detainees, firstly at the detention centre, then at the Woomera Residential Housing Project (RHP). The following is from a memo from the ACM Acting Programs Manager to the ACM Centre Manager on the twelfth day of separation (20 June 2002):

[The detainee at the housing project] states that she does not want to look after [the child] as it is now apparent that his mother is likely to be in hospital for an indeterminate period. [The detainee] says that she had her eldest daughter in hospital, she is under a great deal of stress with her own case and it is too difficult to cope with [the boy] when he is having nightmares

and not eating properly. She agreed to look after him for a few days until ACM found a solution.

[On 18 June, ACM's Social Welfare Officer] asked every lady in [Woomera detention centre] if they would look after [the boy]. All ladies were very apologetic but were unable to take on a child as they were either too depressed, too sick, already looking after other children or had enough children of their own to look after. There were 3 families in the [housing project]. [Name deleted] is too sick, [name deleted] has 3 children and is 5 months pregnant. She has subsequently been released. [Name deleted] is an Arabic speaker and ... it would not be appropriate to place [the boy, who speaks Farsi] with her in the long term.

[ACM's Social Welfare Officer] then went to visit [the mother] who stated that she is too weak and sick to look after [her son] and she needs all of her strength to fight her case. She would also like [him] to be fostered out in the long term as she is unable to look after him. If she took him back she would attempt suicide again as it would be better for her if [he] were an Unaccompanied Minor as he would then get a visa.

Following this I spoke with [the ACM Centre Manager] about various options and then spoke with the [Department's Manager], who advised us to maybe bring the child back to the [detention] Centre, pay a [detainee] to look after him and dismissed the idea of fostering [the boy] into the community.<sup>173</sup>

On the same day, ACM took some interim steps pending feedback from social workers.<sup>174</sup> ACM decided to give the boy the option of either sleeping in proximity to another 'foster mother' in the housing project or in a room made up in the ACM Officers' Station. ACM decided that the first 'foster mother' would remain the authorised carer and would be asked to spend more time with the boy. Meanwhile, the second 'foster mother', a 19-year-old Afghan woman who ACM had earlier mentioned was 'too sick' to care for a child, would 'be asked if she would mind if [he] slept [in her house] and maybe do his washing and oversee him at bath time'. In addition, an ACM guard would oversee the child day and night and 'keep his case file up to date'. Under these circumstances, ACM aimed to keep the child 'in the most stable and secure environment possible to ensure a minimum psychological impact'.<sup>175</sup>

After his mother returned from hospital to the detention centre, the boy remained in the housing project, as the mother did not want to care for her child in the detention centre environment.<sup>176</sup>

Child psychiatrists reported that whilst his mother was in hospital and the boy was in the housing project, 'he was very happy...however he soon began to miss his mother and wanted to be reunited with her' and that '[his mother] often draws a parallel between how [her son] lost his father during the divorce and now he is afraid that he might lose his mother as well'.<sup>177</sup> The boy stated that he 'can only stand being away from his mother for up to a month and needs up to a week in order to charge his energy again'.<sup>178</sup>

Two weeks after his return to the detention centre, the boy and his mother were reunited in the housing project.

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This example demonstrates the considerable efforts made by ACM and the Department to look after the child in his mother's absence and the difficulties of doing so in an environment where many of the alternative carers have mental health problems of their own. It is important to note that they are neither registered foster parents nor the mother's family or friends. The Inquiry is not aware of a designated officer assigned to the care of the child during this period, nor of individual management plans.

In another case, four children in a family seeking asylum were separated from their parents on various occasions in the three years they spent in Australian immigration detention centres. Circumstances of the children's major separations<sup>179</sup> from their parents while they were detained by the Department are as follows:

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### A family's experience of separation in detention

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20 Dec 1999	Family arrives at Christmas Island, transferred to Curtin. Children aged 4, 9, 13 and 15. Older son already in detention (since 8 Nov).
May 2000	Family transferred to Port Hedland.
Dec 2000	14-year-old son hospitalised in Perth, family separated between Perth and Port Hedland for two weeks.
Dec-Jan 2000	Mental health practitioners recommend the family be transferred to a more suitable detention centre with appropriate psychiatric services.
May 2001	Parents sent to prison, older boys sent to juvenile prison. Younger children 'fostered' to Port Hedland detainees, monitored by ACM.
July 2001	Children transferred to Villawood; parents remain in WA prisons.
Sept 2001	Mother transferred to Villawood, reunited with children.
April 2002	Father transferred to Villawood, reunited with children.
10 Feb 2003	Family removed from Australia.

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While the parents were at different prisons,<sup>180</sup> the two youngest children were kept at Port Hedland without their parents or any other relatives to look after them. They had regular phone calls to their brothers in juvenile prison.<sup>181</sup> However, phone calls with their parents appeared to be less frequent and were to be 'on a once a month basis, as per policy'.<sup>182</sup> The ACM Counsellor told the ACM and Department Managers that she would 'negotiate more regular calls for the children'.<sup>183</sup> The Child Protection Officer reported that 'visits to see their parents ... have not been [arranged] due to the fact that they [have] been transferred to other facilities'.<sup>184</sup>

The option of foster care within the centre was discussed with the children's mother, who designated a fellow detainee with a child as a foster parent. For four months

the children were 'fostered' to various adult detainees<sup>185</sup> although the ACM officer designated as their 'Child Protection Officer' noted that:

There may not be a suitable family in the centre to look after the children.<sup>186</sup>

This same person was the designated officer for all unaccompanied children. She expressed reservation about her capacity to take on the care of the two children:

I would like to state at this stage I am not happy with this situation. As I do not have the qualifications to implement a management plan, and I am not happy to put my name to the document that might cause problems for myself or the company should anything go wrong ... I spoke with [the ACM Operations Manager] regarding the management plan. I said that I would not be happy to put my name to it and that anything I came up with would have to be cleared by both ACM Management and DIMA before I would act on it. [He] said that between myself and the counsellor [name deleted] that we should be able to come up with something.<sup>187</sup>

The officer went ahead, keeping detailed notes on the children's whereabouts and behaviour over the six weeks that they were 'unaccompanied minors' at Port Hedland, prior to being transferred across the country to Villawood. This transfer was in accordance with advice from medical professionals that the children be transferred to a centre where access to more suitable psychiatric services was available.<sup>188</sup>

Meanwhile, the older children were held at a juvenile detention facility until they appeared before a magistrate who released them without conviction or punishment. They were released to the Department which detained them in Perth immigration detention centre,<sup>189</sup> and eventually transferred them to Villawood to be with their younger siblings. At Villawood, the children were designated 'unaccompanied minors', although ACM did not appoint a dedicated officer to supervise them for six and a half weeks.<sup>190</sup> It appears that a Care Management Plan for the youngest child was written on the 1 September which outlined a proposal for shared supervision by a nurse and detention centre officers for daily care needs, such as ensuring she is taken to school and is ready for bed.<sup>191</sup> However, this was almost seven weeks after their arrival at Villawood:

Initially, another detained family took care of the children. This 'proxy' family was deported soon after the children's arrival. The youngest, and the only girl, had to spend evenings by herself in the female dorm, as her older brothers had separate accommodation. Other detainees [said that] the child would cry for her mother at night and did not want to sleep in her own bed. [She displayed] increasingly aggressive behaviour. The two oldest children suffered depression, and ... both attempted suicide on at least one occasion by cutting their wrists. The mother was released from prison after four months and was reunited with the children in Villawood. At the time of writing, the father was still in prison.<sup>192</sup>

When the children were transferred to Villawood, the parents remained in detention in Western Australia. The mother was sent to Villawood several months later, whereas the father remained in Western Australia until April 2002.

### **14.6.3 Findings regarding the care of children who are temporarily separated from their parents**

The above cases illustrate the problems of caring for children within the detention environment in the absence of both parents. Children in the community whose parents are in prison or hospital may have friends and family, and community services, to support them during the period of separation. However, children in detention must rely on other detainees, who are coping with their own distress at being in detention, and ACM officers, who are not necessarily trained in child welfare.

The examples show that the children were clearly distressed by their parents' absence and may have required additional care to provide them with some normality and continuity and to help them maintain close contact with their parents.

The case of the nine-year-old girl described above indicates that the Department was able to arrange foster care for children in the community relatively quickly when the situation demanded. However, Department and ACM records on other temporarily unaccompanied children do not indicate any routine consideration of options other than ACM supervision or detainee fostering within detention.

The Inquiry also finds that while the Department and ACM generally took measures to arrange contact between temporarily separated children and their parents, detention clearly restricts the ability of children to maintain direct contact to the extent available to children in the community. In the last example described above, contact was clearly restricted by the children remaining in Port Hedland, and then being transferred to Villawood while their parents remained in Western Australian prisons – considerable distances from these facilities. The case of the nine-year-old girl suggests that alternative arrangements could have been made to ensure more regular and more direct contact.

## **14.7 What was done to trace the parents of unaccompanied children?**

Separation from family can cause unaccompanied children considerable distress. One unaccompanied child told the Inquiry that:

I sent a couple of letters but didn't see a response. Now I am going to see someone specially to see if they can find my family. Maybe they moved, maybe something happened. But we can't think 'something happened', because it's like, you know [fights tears] ... but maybe something happened.<sup>193</sup>

International law recognises the importance of family tracing and imposes a specific obligation to help children in this process.

### 14.7.1 Provisions for tracing of and communication with parents

The Department states that 'Australia assists, to the extent possible, the process of reunification of unaccompanied minors who are currently seeking asylum in Australia with their families, whether they are in detention or in the community'.<sup>194</sup>

The Department goes on to state that it:

cooperates with the United Nations and other competent international organisations to trace the parents of any refugee child for the purposes of reunification. In particular, the Department and the Australian Red Cross work in a cooperative and collaborative manner to provide these services to detainees, with a particular attention on assisting unaccompanied minors.

Where the location of a parent is unknown, tracing of parents or other relatives by the Australian Red Cross is requested by the DIMIA Manager as soon as practicable. The Australian Red Cross will visit the child in detention and seek information to assist them to undertake a tracing request. The unaccompanied minor is kept informed by the Australian Red Cross of the process on a regular basis, as it is important for the general wellbeing of the child to know that someone is looking for his or her parents.<sup>195</sup>

The documents provided to the Inquiry suggest that the Department facilitated access to the Australian Red Cross Tracing Service, particularly from late 2001 onwards.

For example, the minutes of a meeting between the Department Manager and unaccompanied children at Curtin, on 12 October 2001, record that an unaccompanied child was 'concerned about his family who live in Kabul, Afghanistan. I said I would arrange for the Red Cross to talk to him when they next visited, as they may be able to assist in contacting them'.<sup>196</sup> A file note by a Department officer from Curtin on 23 October 2001 noted that the Red Cross met with all of the unaccompanied children from the centre.<sup>197</sup>

The minutes of a January 2002 meeting regarding unaccompanied children at Port Hedland also indicate that tracing services were offered in the centre:

DIMIA DM reported that the Red Cross had attended the Centre for a period of 2 days and although the UAM's were encouraged to make an appointment to speak with them, only [two unaccompanied children] met with them. The Red Cross indicated that the meetings went well.<sup>198</sup>

There is further evidence regarding the provision of tracing services to unaccompanied children in the minutes of Department teleconferences regarding unaccompanied children. The minutes of the teleconference of 13 December 2001 note that 'Red Cross tracing in relation to family members of [young unaccompanied child] (... family believed to have drowned in boat sinking off Indonesia)'.<sup>199</sup> The minutes of the teleconference of 17 January 2002 note that tracing should occur for two unaccompanied children detained in Curtin. The minutes of the teleconference

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of 31 January 2002 note that at Woomera, the Red Cross would be requested to focus on unaccompanied children.<sup>200</sup> The minutes of 28 March 2002 note that the details had been forwarded to the Red Cross of an unaccompanied child who wished to go home if his family could be located.<sup>201</sup> April minutes note that a child from Curtin had been seen by the Red Cross to assist in contacting relatives.<sup>202</sup>

The difficulties involved in successful tracing were understood by unaccompanied children. One of the Afghan unaccompanied children now living in the community on a temporary protection visa described the difficulties of tracing family in Afghanistan:

The problem is that in Afghanistan, more than 80 per cent of the people are living in villages. And if there is a town, they give the address of the town as 'one or two hours walk by donkey behind the mountains' but there are heaps of mountains and behind the mountains there are houses. So it's really hard for Red Cross or UNICEF to find them. They have no number, they have no post box. No postal address.<sup>203</sup>

On 7 May 2003, a Memorandum of Understanding (MOU) between the Department and the Australian Red Cross regarding the provision of certain services to detainees was signed. The MOU formalises the tracing services that were already provided by the Australian Red Cross. Regarding unaccompanied children, the MOU states that:

The DIMIA Manager, as the delegated guardian of certain unaccompanied minors, agrees to discuss the special needs of any unaccompanied minors with ARC representatives during a visit, and in particular, unaccompanied minors' access to ARC core services.<sup>204</sup>

### 14.7.2 Findings regarding tracing and communication with parents

The Inquiry finds that access to family tracing was generally offered to children at some stage during their detention.

## 14.8 Summary of findings regarding the care of unaccompanied children in detention

The Inquiry finds that there has been a breach of articles 3(2), 18(1), 18(2) and 20(1) of the CRC. There has been no breach of articles 22(2) or 9(3) of the CRC.

The obligations in the CRC in relation to unaccompanied children recognise that children without their parents are extremely vulnerable, especially when they are asylum seekers or refugees, and therefore need assistance to ensure that they can enjoy all their rights.

There is a special duty on the Commonwealth to ensure that the best interests of unaccompanied children are protected. Article 20(1) states that children temporarily or permanently deprived of their family are entitled to 'special protection and assistance'. Article 18(1) states that a legal guardian shall make the best interests

of the child not merely a primary consideration (as required by article 3(1)) but *'their basic concern'*. The Australian common law has come to a similar conclusion about the responsibilities of the Minister as the legal guardian. Article 18(2) also requires that a legal guardian be given appropriate assistance in the performance of his or her child-rearing responsibilities.

Chapter 6 on Australia's Detention Policy contains the Inquiry's findings that Australia's legislation and the administration of that legislation by the Minister and the Department fails to ensure that the detention of children, including unaccompanied children, is a matter of last resort and for the shortest appropriate period of time (in accordance with article 37(b)). That chapter also finds that the long-term detention of children results in further breaches of articles 3(1) and 20(1). The Department's Migration Series Instruction 370, issued in December 2002, also recognises that the best interests of unaccompanied children are better protected if children are removed from a detention centre as soon as possible. The three case studies at the end of this chapter further support those findings.

This chapter has focused on what measures have been taken by the Department to ensure that the best interests of each unaccompanied child are protected during the period that they are required to remain in detention centres.

The Inquiry acknowledges that many ACM staff members worked hard to try and take care of unaccompanied children in detention. This was particularly the case in the Woomera facility during 2001. The Inquiry also acknowledges that the strategies to assist unaccompanied children improved over time. However, it was not until April 2001 that the ACM strategies were clearly articulated. Designated officers with the responsibility to watch over unaccompanied children were appointed in Woomera and Port Hedland in early 2001 and in Curtin by late 2001. However, this was well after large numbers of unaccompanied children started arriving in detention centres in late 1999.<sup>205</sup>

In Curtin there were some individual case management plans in March 2001 but they were of very poor quality. In Woomera there were some generic case management plans in March 2001 but individual case management plans were only created in December 2001. There is no evidence of case management plans in Port Hedland until December 2001. In any event these case management plans were formulaic, sparse in detail, contained few recommendations and were rarely followed up. Case Study 3 demonstrates the large gaps between the information contained in those case management documents and the psychological well-being of the children. Thus while individual case management plans were an appropriate strategy in principle, they were introduced at a late stage and they failed to give an accurate picture of the needs of unaccompanied children in detention or the strategies best suited to meet those needs.

ACM Woomera staff initiated weekly Unaccompanied Minors Committee meetings in February 2001. Unlike the case management plans, the minutes of these meetings indicate that a great deal of attention was given to unaccompanied children by ACM staff in that centre over 2001. Departmental staff, however, at best only attended

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half of these meetings each month and there were several months where they failed to attend any meetings at all.

ACM staff at Woomera also created weekly progress reports on unaccompanied children which were provided to the Department Manager from April 2001. On a limited number of occasions those reports were also provided to the South Australian child welfare authorities. The quality of those reports diminished in the latter half of 2001.

In Port Hedland there were some meetings between ACM staff and unaccompanied children from November 2001; however, they do not appear to have been particularly effective in monitoring children's needs. There were no minuted meetings at Curtin.

Detainee mentors or de facto guardians were rarely appointed to unaccompanied children in detention. However, it appears that this was primarily due to the fact that the children were often older teenagers and such measures were seen as unnecessary.

Case Studies 2 and 3 at the end of this chapter demonstrate that despite the fact that the system was working at its best in Woomera, those systems failed to adequately protect the best interests of unaccompanied children. The primary reason for this is that the children were in the detention centre for too long, making the mental harm caused to these children almost unavoidable. However, the fact that the Department's practical involvement in the care of unaccompanied children was minimal and its monitoring of the care management systems was inadequate may well have exacerbated the problem. In particular, the Unaccompanied Minor Teleconferences, which were specifically designed to bring together the Department's detention centre staff and Central Office to address the well-being of unaccompanied children, only commenced in November 2001, long after the children began arriving in detention centres. The Department Manager reports rarely mentioned unaccompanied children and the Department failed to regularly attend the ACM meetings discussing the children.

However, the Inquiry acknowledges that the reason that the Department Managers did not become more involved in the management and monitoring of unaccompanied children in detention may be related to the Department's failure to ensure that these Managers had the relevant expertise. The Department Managers had no child welfare experience. The Commonwealth failed to provide them with appropriate assistance in the form of training or support which would have enabled them to better meet the needs of these children. There were no guidelines for Department Managers until late 2002. There was also a failure to ensure routine consultation with State child welfare authorities who did have the appropriate expertise.

In addition, the legislation providing that the Minister be the guardian of children (the IGOC Act), and the delegation of those powers to Department Managers, created an insurmountable conflict of interest. In the Inquiry's view the Minister cannot possibly make the best interests of an unaccompanied child his or her primary concern when, at the same time, he or she is the detaining authority and

visa decision maker. This conflict is not removed by delegation to the Department Managers. Indeed those Managers are placed in the invidious position of trying to gain children's trust while those same children view him or her as the person responsible for their detention.

Department Managers did not actively consult State child welfare authorities regarding care strategies for unaccompanied children until January 2002, when a group of unaccompanied children at Woomera threatened to commit mass suicide. However, Case Study 3 demonstrates that the Department did implement the recommendations of the State authorities in that case by transferring most children to home-based detention.

The Inquiry concludes that the protection and assistance which was provided to unaccompanied children was inadequate. It fell short of the 'special protection and assistance' to which unaccompanied children have a right under article 20(1) and therefore amounts to a breach by the Commonwealth.

The Inquiry also finds that the legal guardian of unaccompanied minors, namely the Minister and the Minister's delegates, failed to make the best interests of unaccompanied children 'their basic concern', as required by article 18(1) of the CRC. In the Inquiry's view, one of the primary reasons for this failure lies in the fundamental conflict between the pursuit of a mandatory detention policy and the interests of the individual children who are detained in furtherance of that policy.

Where legal guardianship or associated responsibilities were delegated to Departmental staff, the Inquiry finds that the Department failed to provide appropriate assistance in the performance of those responsibilities, as described above. This is a breach of article 18(2).

The ineffective management of unaccompanied minors also leads the Inquiry to conclude that Australia's detention laws, and the manner in which they were administered by the Department, failed to ensure those children such protection and care as was necessary, in breach of article 3(2).

These failures also impact on an assessment of whether unaccompanied children were provided with the opportunity for the maximum possible development and recovery from past trauma in accordance with articles 6(2) and 39, as well as respect for the inherent dignity of unaccompanied children in accordance with article 37(c). These issues will be discussed further in Chapter 17, Major Findings and Recommendations.

The Inquiry recognises that ensuring the adequate care of unaccompanied children within a detention centre may be extremely difficult. The Inquiry also acknowledges that unaccompanied children who were in detention centres for short periods of time were less affected by that environment than children who were there for longer periods of time. However, Case Studies 1, 2 and 3 demonstrate that the management systems designed to deal with children who were held in detention centres for extended periods were inadequate to protect the best interests of a significant number of unaccompanied children and therefore amount to a breach of article

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3(1) by the Commonwealth. These factors highlight the importance of ensuring that unaccompanied children are detained as a measure of last resort and for the shortest appropriate period of time (article 37(b)).

The Inquiry is also concerned that there were no clear policies in place to ensure that children who became temporarily separated from their parents within detention (due to the hospitalisation, behaviour management or imprisonment of parents) were provided with appropriate care for the duration of the separation. However, the Inquiry finds that sufficient efforts were made to facilitate regular contact between these children and their parents within the context of the detention environment, albeit that some of that contact was by phone. The Inquiry therefore finds no breach of article 9(3).

The Inquiry also finds that there have been sufficient efforts to provide children whose parents may be outside Australia with appropriate tracing services and therefore finds no breach of article 22(2).

## 14.9 Case studies

### 14.9.1 Case Study 1: Woomera July 2001-June 2002, care arrangements for an eight-year-old unaccompanied child

This case study describes the sequence of events regarding an eight-year-old unaccompanied child who was detained in Woomera in July 2001. To the Inquiry's knowledge, he is the youngest unaccompanied child to have arrived by boat in Australia.

In the Inquiry's view, the treatment of this boy represents the unaccompanied child management system working at its best. The primary documents show that Department and ACM staff went to considerable efforts to try and ensure that this child was looked after in the best way possible. However, despite these genuine efforts:

- The child was fostered by six different foster families over four months, demonstrating the difficulty in organising continuity of care within detention centres.
- It took six weeks for the Department to approach the State welfare authorities for assistance in developing a solution for this child outside the detention environment. The State authority recommended release as soon as possible, yet this recommendation was not acted upon for another two months.<sup>206</sup>
- It took ten weeks to move the child to the Woomera RHP.
- It took over three months for the Department to recommend that he be granted a bridging visa and another three weeks to grant that visa.
- It took two months to commence the refugee status determination process and almost a year before the Department made a primary decision about his application for a protection visa.

Thus this case study is yet another illustration of the artificial nature of the detention centre environment; the absence of clear procedures for dealing with unaccompanied children in July 2001, for example immediate contact with State authorities; and the strictness of the mandatory detention laws and bridging visa regulations all inherently mitigate against protecting the best interests of the child.

*9 July 2001*

Child taken into detention at Woomera.

On the journey to Australia, the child is cared for by a family with three children. Upon arrival at Woomera the child and the family are interviewed together. Although the child agrees to remain with the family, he demonstrates independent behaviour, including sleeping in the detention officer's quarters rather than with the family. He agrees to move into the family's quarters but the psychologist recommends that he be carefully supervised by detention officers.<sup>207</sup>

*13 July 2001*

Psychologist interviews child and suggests management strategies, including: officers closely monitor foster family arrangements and the child's safety and well-being; the child remain supervised at all times, by either a detention officer or one of his foster parents; and the psychologist review the child on a regular basis.<sup>208</sup>

*13 July 2001*

The first 'foster' family advises that they are having difficulty managing the child.<sup>209</sup>

*17 July 2001*

Child is fostered to another family in Mike Compound.<sup>210</sup>

*24 July 2001*

Child moves back to the family that originally fostered him, a temporary arrangement. Concern is expressed that he was found wandering around the compound late at night and a strategy for watching him is set up by ACM staff.<sup>211</sup>

*25 July 2001*

Child is moved again, and two women, both of whom had children of their own, share his fostering.<sup>212</sup>

*7 August 2001*

Unaccompanied Minors Committee meeting. Detailed notes are made regarding the child, his behaviour and the capacity of his foster parents to care for him. 'It was suggested that [the child's] family be given extra support. Welfare Officer One was asked to visit each day and ensure that this child attends school and that parenting support is given to the foster Mothers'. It is also determined that the psychologist interviews the child formally.<sup>213</sup> Management plan created for the child.

*8 August 2001*

ACM notes that his younger foster mother not coping with him.<sup>214</sup>

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*9 August 2001*

Boy is interviewed by the centre psychologist. She reports that:

the flow of the population in the Detention Centre will not give stability to the fostering of this young child. Contact is currently being made with the Family and Youth Services [FAYS] in Port Augusta for advice on this matter.<sup>215</sup>

Psychologist calls FAYS on the same day, to discuss the possibility of the child being fostered in the community.<sup>216</sup>

FAYS advises that the recommendation should be sent through ACM or DIMIA channels rather than from the psychologist directly:

so that any discussion regarding plans for the ongoing care for this child can be held between the appropriate Commonwealth and State officers. Given the age of this child, we would welcome as much notice as possible if you are intending releasing him into the community, to enable us to recruit a suitable placement.<sup>217</sup>

*15 August 2001*

Memo from the centre psychologist to ACM Centre Manager states that it is unlikely to be possible to arrange:

lasting foster care in the Centre, because of the flow of the population. Successive changes to his care situation will undoubtedly have a disadvantageous effect on this child. ... I request that an immediate referral be made to Family and Youth Services to find a more permanent placement for him. It does not appear to be within the power of ACM at Woomera to provide this child with an environment to support his needs.<sup>218</sup>

*16 August 2001*

Child's older foster mother is released on a temporary protection visa.

*21 August 2001*

Department formally approaches FAYS requesting assessment including 'whether an external care arrangement (with a foster family) would be in the best interest' of the child.<sup>219</sup>

*24 August 2001*

Child is interviewed by FAYS.

*29 August 2001*

FAYS recommends that it would be in the child's best interests to be removed from the detention environment. The report recommends that the child be placed with a former foster family that had been released from detention. It further states that:

If this is not an option, then the child would need to be matched with an appropriate foster family in the state he is to be released to. The best outcome would be for the child to remain at Woomera until a foster family is found to prevent the child from having a number of short term/emergency placements.<sup>220</sup>

*30 August 2001*

The Department requests that FAYS commence investigating a possible foster placement in South Australia. It also asks that they investigate the possibility of the child being fostered with the family that had been released from detention.<sup>221</sup>

*Early September*

Child's younger foster mother leaves the centre at the beginning of September. Another family is found, but the child refuses to move accommodation to be with the new family. He is then fostered by a young couple, a woman aged 17 and a man aged 20,<sup>222</sup> 'but this arrangement has been determined to not be suitable'.<sup>223</sup> The child is not eligible to participate in the Woomera RHP at this stage as he had not reached the 'immigration stage'.<sup>224</sup>

*10 September 2001*

Department conducts its first interview regarding the refugee status determination phase. The Department engages UNHCR to urgently help with tracing with a view to returning the child to his home country.<sup>225</sup> The Department states that child was not interviewed earlier because he did not present any claims during his initial interview, and the Department hoped to locate his family to return him.

*17 September 2001*

Western Australian child welfare authority advises that the carer proposed by FAYS officers on 29 August 2001 is an unsuitable foster parent. This information is sent to FAYS by the Department the following day. The Department requests that FAYS continue its efforts to locate a suitable foster family for the child.<sup>226</sup>

*18 September 2001*

FAYS asks a series of questions about the type of visa likely to be granted, the probable timing of his release from detention and costs. Department responds on 25 September 2001.<sup>227</sup>

*28 September 2001*

Child is moved to the Woomera RHP to the care of a foster mother who had two sons aged nine and seven, until her release on 16 October 2001. He is then fostered by a woman who had one son.<sup>228</sup> ACM requests staff provide a weekly report on the child.<sup>229</sup>

*5 October 2001*

Department gives FAYS an update on the child's progress and asks them to provide advice regarding a possible placement.<sup>230</sup>

*12 October 2001*

Department recommends that child be granted a bridging visa.<sup>231</sup>

*1 November 2001*

Boy released into the community on a bridging visa.

*18 June 2002*

Boy recognised as a refugee and granted a temporary protection visa.

### **14.9.2 Case Study 2: Woomera November 2001, group self-harm by unaccompanied children**

This case study describes an incident that occurred in November 2001, where eleven unaccompanied children from Woomera attempted self-harm after ACM moved them to a safer and more child-appropriate compound.

As with the first case study, this case demonstrates that the detention environment is unsuited to protecting the best interests of unaccompanied children, even when staff are trying to do their best. However, unlike the first case study, this example does not represent the case management or monitoring system at its best.

While the Inquiry accepts that the purpose of moving the boys to the safer compound was appropriate, the move appears to have been poorly handled given the pre-existing knowledge that the children were unhappy about it. Furthermore, the management and security systems intended to protect children clearly failed to prevent the occurrence of self-harm. Nevertheless, the Inquiry acknowledges that the self-harm incident may not have been due to the failure of the management strategy itself as the detention environment as a whole made preventing such behaviour extremely difficult. This is discussed in greater detail in Chapter 8 on Safety and Chapter 9 on Mental Health.

The Department did ultimately impose an economic sanction on ACM regarding this event. However, the Department's monitoring documents do not suggest that it viewed this event as a sign of the mental fragility of the unaccompanied children or the inappropriateness of the environment for those children. The State child protection authority was immediately notified of the self-harm. However, this incident did not trigger efforts to arrange for these children to be removed from the environment.

The chronology of events is as follows:

#### *6 November 2001*

The Unaccompanied Minors Committee meeting reports that some of the unaccompanied children had been:

refusing to attend school or to go to work. The attitude of the UAMs was extremely negative. They have claimed ownership of the Designated Officers in that they believe the Officers are working for them. If they cannot have their own way they simply refuse to go to school, to work or they simply trash their rooms. The officers have tried to enforce good behaviour with a positive outcome but this does not always have a good result.<sup>232</sup>

#### *9 November 2001*

The UAM progress report states the '[c]urrent mood of the UAMs is good with some longer-term resident UAMs demonstrating frustration and despondency'.<sup>233</sup>

#### *16 November 2001*

ACM moves 25 unaccompanied children from Main Compound to Mike Compound for 'behavioural management purposes'.<sup>234</sup> Incident reports note that the children

were not staying in their designated area in Main Compound, were not complying with curfew restrictions and were not attending education daily.<sup>235</sup> Incident reports further note that the move to Mike Compound was decided upon for the following reasons:

- Large open areas to better facilitate recreational programs.
- The opportunity to further enhance the monitoring, educational attendance and active participation of all resident UAMs accommodated in Mike compound.
- To further enhance the family environment for all of the UAMs accommodated within Mike compound.<sup>236</sup>

Some of the unaccompanied children make it clear to ACM officers that they are not happy with the move. This prompts the calling of an eight-member Centre Emergency Response Team (CERT) to 'provide assistance if required'. A directive was 'issued to the non-compliant UAMs to pack their personal belongings, or that the officers would have to pack it for them'.<sup>237</sup> Two of the children lie on the floor, but are assisted to their feet and the move is completed.

After the children are moved, a group of Afghan unaccompanied children indicate that they are not happy in Mike Compound and request permission to return to the Main Compound.

At 12.25pm on the same day, 14 of the unaccompanied children 'held razor blades to their arms and demanded to be returned to the Main compound'. Eleven of these children inflict 'minor lacerations to their arms and a number to their chests'. The children are aged between 12 and 17 years. The incident report notes that '[t]he injuries are relatively minor and all were returned to Mike compound except [one unaccompanied child] who was moved to India compound'.<sup>238</sup>

FAYS are asked to address the immediate self-harm problem. They are not asked to assess whether it was in the children's best interests to remain in Woomera. A psychologist is asked to counsel all of the unaccompanied children.

### *19 November 2001*

The self-harm incident is discussed at the HRAT meeting:

The current situation regarding the UAMs was discussed at great length, and it was decided by the team members that all of the UAMs had responded in a positive manner to the counselling from both the psychology and designated officer staff.<sup>239</sup>

### *20 November 2001*

The Unaccompanied Minors Committee meeting minutes report that the children have been moved, and that there are no further concerns about them. The minutes note that the Centre Social Psychologist has been asked by the Centre Manager to explain why the 'UAM's behaviour is so difficult' and that he will interview each unaccompanied child and prepare a report.<sup>240</sup>

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### *22 November 2001*

Contract Operations Group meeting minutes<sup>241</sup> report a general discussion of self-harm, with no reference to the incident with the eleven unaccompanied children. The recommended action is to 'consider options for reducing incidents of self-harm'.<sup>242</sup>

### *23 November 2001*

The progress report on unaccompanied children for 23 November 2001 notes that the '[c]urrent mood of the UAMs has improved towards the end of this week', and that the 'ACM Centre Psychologists are monitoring the UAMs along with the designated UAM officers'.<sup>243</sup>

### *27 November 2001*

The Unaccompanied Minors Committee meeting minutes note that 'the huge upheaval in moving them all to Mike compound had upset the boys [but that] now they were much more settled and happy'.<sup>244</sup> There is no mention of the self-harm inflicted by the unaccompanied children.

### *November 2001*

The Woomera Department Manager report makes very brief reference to unaccompanied children. The report states that '[f]ollowing a move to a different compound eleven unaccompanied minors made self-harm attempts – minor lacerations to arms and in a number of instances, chests. Placed on HRAT – FAYS informed'.<sup>245</sup> Exactly the same text is used in the December 2001 report.

### *December 2001*

During December the Unaccompanied Minors Committee meeting minutes either report that the unaccompanied children are happy, or make no mention of them at all. Extremely similar comments are made in the progress reports for the remainder of December.

Department Unaccompanied Minor Teleconference minutes make no mention of the situation of the unaccompanied children at Woomera.

As the Department is 'of the view that the unaccompanied minors were not protected from harmful influences in this instance' a sanction is applied in the Performance Linked Fee Report for the December 2001 quarter. In response to the deduction of points, ACM states that the movement of the children was to remove them from 'harmful influences in the main compound', and that there was extensive liaison with the children prior to the move.<sup>246</sup>

### *22 January 2002*

The Contract Operations Group meeting minutes note 'great concern due to the involvement of the large numbers of Unaccompanied Minors'.<sup>247</sup>

The Department informed the Inquiry that there was intensive and ongoing monitoring and follow-up of all unaccompanied minors involved in the self-harm incident:

For example, a social needs analyst was employed at Woomera to prepare “Care and Social Support/Development Personal Management Plans” for each unaccompanied minor. Furthermore, the DIMIA representative at the UAM Committee meeting on 4 December 2001 reported that the children had informed her they did not want to meet with her as often as had been occurring. In addition there was extensive and ongoing telephone contact with the department’s Central Office about the incident.<sup>248</sup>

However, as described earlier in this chapter, the Inquiry is not satisfied that the case management plans sufficiently considered the situation or needs of unaccompanied children, and the telephone contact regarding the incident was not documented.

Furthermore, it is disappointing that this series of events did not trigger the Department or the Minister into taking steps to bring about the release of these children from the detention environment that was clearly causing them such distress – either by transferring these children to home-based detention or commencing the process of obtaining a ‘best interests’ bridging visa (see further Chapter 6 on Australia’s Detention Policy).

### **14.9.3 Case Study 3: Woomera, January 2002, group self-harm resulting in removal of unaccompanied children**

This case study describes the involvement of unaccompanied children in the hunger strikes, lip-sewing and other acts of self-harm in Woomera in January 2002. This incident was serious enough to trigger the transfer of almost all unaccompanied children in Woomera to foster care and group homes in Adelaide. The mechanisms for this transfer are discussed in some detail in Chapter 6 on Australia’s Detention Policy. The general circumstances leading up to these protests are described in Chapter 8 on Safety. The information set out below sets out the case management documents for most of the unaccompanied children who took part in these protests and the assessments conducted by FAYS when it was called in to help in January 2002.

The documents demonstrate that for the most part internal records either failed to identify the mental fragility and other worries of unaccompanied children that contributed to these drastic acts or failed to recommend any specific strategies to ensure the overall well-being of those children. They also raise the question as to why FAYS was not called in to assess the well-being of the children prior to this incident rather than afterwards.

While there is some evidence to suggest a failure to take sufficient proactive measures to ensure the best interests of children are a primary consideration within detention centres, in the Inquiry’s view it would be over-simplistic to conclude from this that the self-harm was the direct result of those weaknesses. Rather, as the Department and ACM have stressed to the Inquiry, there are a variety of pressures within Woomera that led to the incident. For example, the Department explained that these disturbances:

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mainly involving adults ... included hunger strikes, lip-sewing, and occasional other acts of self harm, that encouraged the actions of the unaccompanied minors. ... Despite the efforts of ACM and DIMIA, the behaviour of the adults involved clearly influenced the children, ultimately rendering it necessary for the department to remove the majority of unaccompanied minors.<sup>249</sup>

The covering letter to the 28 January 2002 FAYS report makes a link between the 'group suicide pact' by certain unaccompanied children and the desire to pressure the Government to release them from detention:

[t]he Department of Human Services remains seriously concerned regarding all minors in Woomera. They have stated that they are intending to "group suicide" and whilst this statement can be regarded as an attempt to pressure the Commonwealth government to release them from detention the risk of suicide remains high.<sup>250</sup>

The fact that children would go to such desperate measures, albeit under the influence of other detainees, only goes to emphasise the inappropriateness of keeping unaccompanied children within immigration detention centres. It shows the difficulties of protecting a child's best interests within that environment and the corresponding importance of ensuring that children are removed as soon as possible.

The first group of children released into alternative detention included five unaccompanied children. On 14 January 2002, the Department requested that FAYS conduct urgent investigations of the situation of three of these children, the youngest unaccompanied children in the centre. Specifically FAYS was asked about the possibility of having the children alternatively housed, outside the centre, on a bridging visa. These children were aged between 12 and 14 years of age and had been detained at Woomera between June and August 2001. These children were removed from Woomera on 24 January 2002.

On 16 January 2002, hunger strikes began at Woomera in response to the Minister's announcement that all processing of applications by Afghan asylum seekers would be suspended. Following are details regarding two of these children:

### **Child 1 – 12-years-old, detained June 2001, transferred to Adelaide 24 January 2002**

Case management plan (December 2001): '[Child] is always polite and well behaved. He tends to follow the lead of the older boys and subsequently has been involved in one minor disturbance'. The only recommendation on the attached ICASS form is that he attends St Michael's school.

This child was one of the youngest unaccompanied children in Woomera during 2001. On 18 December 2001, he alleged he was assaulted by ACM officers.<sup>251</sup> On 20 January 2002, he sewed his lips together. He remained on hunger strike until he was removed from the centre on 24 January 2002. In documents provided to the Commission, there is no evidence of this child being allocated a detainee mentor or an ACM staff member to monitor his welfare.

### **Child 2 – 14-years-old, detained August 2001, transferred to Adelaide 24 January 2002**

Case management plan (December 2001) '[Child] interacts well with the other UAMs and is generally polite and well mannered. He follows direction accordingly and has never been in any trouble'. There are no recommendations for the management of this child.

A month later, he threw himself against a wall, threatened to kill himself at least three times, went on hunger strike and ingested shampoo.

Four more unaccompanied children were removed from Woomera on 27 January 2002. Three of these children had been assessed by FAYS in the previous days. FAYS reported on 26 January 2002 that the children assessed 'should be removed as a matter of urgency from the Detention Centre'.<sup>252</sup> Following are details regarding two of these children:

### **Child 3 – 15-years-old, detained June 2001, transferred to Adelaide 27 January 2002**

Case management plan (December 2001): '[Child] is a very quiet young man and is always polite and well mannered. He tends to follow the other UAMs in which ever direction they take. [He] has been involved in one minor disturbance'. The ICASS form for this child recommended the development of links with the UAM designated officer and the education officers.

On 23 January FAYS noted that the child reported that 'he had sewn his own lips and is on a hunger strike that is in it's 8<sup>th</sup> day'; 'that when upset he removes himself to a corner and cries and has no one to talk to about his situation'; and that he had 'no adult support within the centre and no information about his own family's whereabouts and well being'.<sup>253</sup> This child clearly felt like there was no person who had his best interests at heart.

Medical records of 19 January 2002 noted his hunger strike (four days after he started). At that point he had already sewn his lips together. He was taken to the Woomera Base Hospital on 19 January, returned to the centre and then hospitalised again on 4 January 2002.<sup>254</sup> He was transferred from Woomera to Adelaide on 27 January 2002.

### **Child 4 – 16-years-old, detained April 2001, transferred to Adelaide on 27 January 2002, released 12 February 2002**

No case management plans were received for this child.

On 26 January 2002, FAYS reported that the child had been on hunger strike since at least 19 January 2002, had ingested shampoo on 21 January 2002,<sup>255</sup> when he was admitted to the Woomera Base Hospital. He remained on hunger strike until 25 January 2002.

FAYS reported that he 'presented as highly depressed, with an inability to focus his energies on anything other than dying via starvation and dehydration'.<sup>256</sup> One possible reason for this depression was that he was successful in the Refugee Review Tribunal in early November,<sup>257</sup> but was not released on a temporary protection visa until 12 February 2002. There are no documents suggesting that the child was assisted and supported throughout this difficult time.

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A number of unaccompanied children remained in the centre. Five of these children were the subject of the FAYS assessment of 28 January 2002 after the hunger strikes, which suggests that the children felt like their needs were not given sufficient priority and they therefore felt they had to resort to this form of protest:

The Afghani minors identified a cycle of initial co-operation with no perceived outcome, frustration/aggression and then experiencing despair and desperation. They report being on a hunger strike for 10 days (in protest of holds on visa processing) but say they have been taking liquids. ... They were resolved that a drastic action of self harm was the only option to draw attention to their despair of their living conditions.

They also pressed a futility and frustration at the amount of people who had spoken to them within the camp, concerned for their well-being, who do nothing to change their circumstances. They stated that the compound is unfriendly, they are unable to play in the yard, as they get scratched by rocks. They indicated that a lack of education, work or skill development activities (ie computer skills) added to their despair. Not knowing where any of their family were was also distressing for them. They also indicated they had all seen a psychologist at the WIRPC, but found this of no assistance.<sup>258</sup>

FAYS recommended the children's immediate release from the centre. The Department did not act on this recommendation. A week later, on 7 February 2002, these children reinstated their pact to self-harm if they were not removed from the centre by the end of the day.<sup>259</sup> In a letter of 7 February 2002, DHS again 'strongly recommended that the young people subject to these notifications be placed outside the Woomera Detention Centre to ensure their safety'.<sup>260</sup> These five unaccompanied children were finally released into alternative detention on 8 February 2002.

It is of concern to the Inquiry that, despite the desperate measures taken by these children in January 2002, the case management plans from December 2001 indicate very few issues of concern regarding these children, nor do they mention any forward looking management strategies.

### **Child 5 – 17-years-old, detained January 2001, transferred to Adelaide 8 February 2002**

Case management plan (December 2001): 'No outstanding DIMA/legal matters at this time. Has not indicated any wish to depart Australia voluntarily'. The attached ICASS form stated that he 'wants to see psychologist. Stopped attending English classes after rejection – broken heart'.

January 2002, participated in group suicide pact. Transferred to alternative detention on 8 February 2002.

### **Child 6 – 17-years-old, detained June 2001, transferred to Adelaide 8 February 2002**

Case management plan (December 2001): '[Child] is a hard worker and always follows directions accordingly. He is polite and well spoken. [He] has been involved in one minor disturbance'. There are no recommendations for the management of this child.

January 2002, participated in group suicide pact.

**Child 7 – 17-years-old, detained June 2001,  
transferred to Adelaide 8 February 2002**

Case management plan (December 2001): '[Child] is a quiet, well mannered young man. He continues to be a positive influence on the other UAMs. [He] has no known issues'.

January 2002, participated in group suicide pact.

**Child 8 – 17-years-old, detained June 2001,  
transferred to Adelaide 8 February 2002**

Case management plan (December 2001): '[Child] interacts well with other residents and is always polite and well mannered. [He] always follows directions accordingly. He has no known issues'. There are no recommendations for the management of this child.

January 2002, participated in group suicide pact.

**Child 9 – 16-years-old, detained August 2001,  
transferred to Adelaide 8 February 2002**

Case management plan (December 2001): '[Child] is a quiet polite young man. He is always happy and follows direction accordingly. He has no known problems or issues'. However, the attached ICASS form stated that he is '[u]nhappy in this prison'.

January 2002, participated in group suicide pact.

The Unaccompanied Minors Committee meeting minutes taken at the time indicate that ACM staff took very seriously the situation of unaccompanied children in the centre during January. The minutes of the meeting of 22 January 2002 describe in detail the situation of several of these children. The minutes of 29 January 2002 indicate substantial discussion of the situation of the remaining unaccompanied children.

However, the Department's monitoring systems do not indicate detailed consideration of what was happening to these children. In January 2002, the following was the only reference in the Department Centre Manager's report:

A number of unaccompanied minors made threats to self harm or actually made attempts. Investigated by FAYS and some then released to home based detention in Adelaide, others then made threats or attempts in the belief that they too would be released – most were right.<sup>261</sup>

The Department's teleconferences regarding unaccompanied children had commenced by this stage. However, there is no mention of the hunger strike in the minutes of the meeting of 31 January. Even if the discussion about individuals was not minuted, there is no evidence of consideration of the overall situation of the unaccompanied children or of action that may have been possible to remedy it.

At the Inquiry hearing a senior officer from the Department stated that the situation in January 2002 emerged very quickly and that 'we didn't anticipate at that point that unaccompanied minors would be involved or would be impacted by that significant incident that happened at Woomera at the end of January'.<sup>262</sup> However,

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it is of concern that it took the dramatic events of January 2002 before there was any consideration of whether it was in the best interests of these children to remain in detention, or whether it would be possible for an alternative to their detention to be organised by the Department.

ACM's case management strategy was clearly not meeting the needs of these children. This is evident in a comparison between the case management reports of December 2001, and the events of January 2002. For every child there is a glaring discrepancy between the comment on their case management plan, and their situation a month later. These case management plans generally contained only brief discussion of the circumstances of each child and in most cases cannot be described as detailed evaluations of the welfare and special needs of these children. More detailed case management plans may not have prevented the events of January 2002. However, given the extent of the distress exhibited in January 2002, it is surprising that the case management plans of December 2001 did not demonstrate concern at the impact of detention on these children.

ACM emphasises that they had no control over the factors precipitating the hunger strike, and that it was commendable that 'ACM was able to ensure that no UAM inflicted serious injury or harm to themselves'.<sup>263</sup> However, the Inquiry strongly disagrees that it can be concluded that no unaccompanied child inflicted serious injury or harm to themselves, given the dramatic events described above.

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## Endnotes

- 1 Note that the Separated Children in Europe Programme (a joint initiative of Save the Children and UNHCR) uses the term 'separated children' rather than unaccompanied minor because 'it better defines the essential problem that children face. Namely that they are without the care and protection of their parents or legal guardian and as a consequence suffer socially and psychologically from this separation'.
- 2 DIMIA, Submission 185, p107. The Department notes that there are two types of unaccompanied children: Unaccompanied Wards are non-citizens under the age of 18 years, who do not have a parent or relative (who is over the age of 21) to care for them in Australia; Unaccompanied Non-wards do not have a parent, but do have a relative over the age of 21 years to care for them in Australia. ACM defines unaccompanied children as 'Children under 18 years of age who are not accompanied by a parent or adult sibling or relative'. ACM, Policy 1.1, Glossary, Issue 6, 12 June 2002.
- 3 See further Chapter 3, Setting the Scene, section 3.5.1.
- 4 Note that there is also some overlap with Chapter 8 on Safety which discusses the involvement of unaccompanied children in various protests during the same period.
- 5 For example, of the nine unaccompanied children considered in Case Study 3 at the end of this chapter, who remained in detention in early 2002, one had been detained since January 2001, one since April 2001, five since June 2001, and two since August 2001.
- 6 DIMIA has argued that this is an inappropriate period for the Inquiry to focus on because the large influx of detainees over 2001 'required the department to focus on these practical aspects of managing detention before focussing on improving facilities, amenities and services and the development of more comprehensive educational and recreational programs'. DIMIA, Response to Draft Report, 10 July 2003.
- 7 The Inquiry notes that while there are very few unaccompanied children resident in detention centres as at September 2003, the systems established for the care of unaccompanied children continue to apply to those few who continue to be detained within the centres.
- 8 UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (UNHCR UAM Guidelines), Geneva, 1997, para 5.7.

- 9 UNHCR UAM Guidelines, para 5.7.
- 10 UNHCR UAM Guidelines, para 5.7.
- 11 Save the Children and UNHCR, Separated Children in Europe Programme, *Statement of Good Practice*, para C.4.; UNHCR UAM Guidelines, para 8.3.
- 12 UNHCR UAM Guidelines, p2.
- 13 UNHCR UAM Guidelines, para 7.7.
- 14 UNHCR UAM Guidelines, paras 7.4-7.5.
- 15 UNHCR UAM Guidelines, para 5.17.
- 16 *Immigration (Guardianship of Children) Act 1946 (Cth)* (IGOC Act), ss6, 4AAA.
- 17 IGOC Act, s6.
- 18 IGOC Act, s5.
- 19 DIMIA, Letter to Inquiry, 13 December 2002.
- 20 Case management plans created at Curtin in late 2001 state that the children were either under the guardianship of the mental health team or the counsellor. ACM Curtin, Detainee Management Strategies, 19 November, 20 November 2001, (N2, Q3, F2); ACM Curtin, Detainee Management Strategy, 30 March 2001, (N2, Q3, 19 August 2002).
- 21 DIMIA, Submission 185, p33.
- 22 DIMIA, Submission 185, p98.
- 23 DIMIA, Submission 185, p102.
- 24 IDS, 1998, para 9.2.1, [www.immi.gov.au/detention/det\\_standards.htm](http://www.immi.gov.au/detention/det_standards.htm).
- 25 DIMIA, Unaccompanied Minor Teleconference Minutes, 5 September 2002. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 26 DIMIA, Response to Draft Report, 10 July 2003.
- 27 DIMIA, Migration Series Instruction 357, Procedures for unaccompanied wards in immigration detention facilities (MSI 357), 2 September 2002, paras 3.4.1, 3.4.3.
- 28 DIMIA, MSI 357, para 6.1.1.
- 29 DIMIA, MSI 357, para 6.1.2.
- 30 DIMIA, MSI 357, para 6.2.1-6.2.5.
- 31 DIMIA, MSI 357, section 9.
- 32 DIMIA, MSI 370, 2 December 2002, para 1.1.5.
- 33 ACM Woomera, Unaccompanied Minors (UAM) Team Meeting, 3 April 2001, (N2, Q5, F4).
- 34 ACM, Policy 16.1, Special Care Needs for Minors and Unaccompanied Minors, Issue 4, 12 August 2001.
- 35 ACM Woomera, Procedure 16.01, Special Care Needs for Minors and Unaccompanied Minors, 16 November 2001, (N1, Q19, F18).
- 36 ACM Woomera, Procedure 16.06, Integrated Care & Social Support Program, 22 May 2002, para 3.1, (N1, Q19, F18).
- 37 Dr Marie O'Neill, Submission 252, para 20.
- 38 Sharon Torbet, Submission 62a, para 30.
- 39 ACM Woomera, Procedure 16.01, para 4.9, (N1, Q19, F18).
- 40 ACM Woomera UAM Officer, Memos and reports, to ACM Operations Manager, 10 January 2001, 12 January 2001, 13 January 2001, 14 January 2001, 15 January 2001, 19 January 2001, 22 January 2001, 23 January 2001, (N1, Q19, F18).
- 41 Unaccompanied Minor (UAM) Team Meetings were weekly meetings of all ACM staff at Woomera involved in the care of unaccompanied children. These meetings were also attended on occasion by Department officers. The first set of minutes for this meeting provided to the Inquiry are from 3 April 2002, (N2, Q5, F4).
- 42 The minutes of these meetings indicate that there was a designated officer for unaccompanied children from this time, although designated officers were not in attendance at all meetings, (N2, Q5, F4).
- 43 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 6 November 2001, (N2, Q5, F4).
- 44 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 13 November 2001, (N2, Q5, F4).
- 45 DIMIA Port Hedland, Manager Report, January-March 2001, (N1, Q4a, F5).
- 46 DIMIA Port Hedland, Manager Report, July-September 2001, (N1, Q4a, F5).
- 47 Katina Kannis, DIMIA Port Hedland Manager, Affidavit, 1 March 2002, para 18, filed in proceedings before the Full Federal Court, *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29.
- 48 DIMIA Curtin, Manager Report, October 2001, (N1, Q3a, F5); See also DIMIA Curtin, Manager Report, November 2001; December 2001, (N1, Q3a, F5).

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- 49 Inquiry, Interview with unaccompanied child, Woomera, January 2002.
- 50 Inquiry, Interview with unaccompanied child, Woomera, January 2002.
- 51 Inquiry, Focus group, Adelaide, July 2002, unaccompanied child formerly detained at Woomera.
- 52 ACM emphasised to the Inquiry that the purpose of regular observation of unaccompanied children is to ensure 'the safety and well being of unaccompanied children is maintained at all times'. ACM, Response to Draft Report, 5 September 2003.
- 53 Inquiry, Focus group, Melbourne, May 2001, unaccompanied child.
- 54 Inquiry, Focus group, Sydney, April 2002.
- 55 Inquiry, Focus group, Melbourne, May 2002, unaccompanied child formerly detained at Curtin.
- 56 Inquiry, Focus group, Sydney, April 2002, unaccompanied child formerly detained at Curtin.
- 57 DIMIA, MSI 357, Procedures for Unaccompanied Wards in Immigration Detention Facilities, 2 September 2002.
- 58 ACM, Response to Draft Report, 5 September 2003.
- 59 ACM, Letter to Inquiry, 14 November 2002.
- 60 DIMIA, Submission 185, p101.
- 61 DIMIA, Submission 185, p101.
- 62 It appears that, in total, 34 management plans for unaccompanied children were created at this time, as this number were forwarded to DHS in South Australia on 7 December 2001. DIMIA Woomera Deputy Manager, Letter, to DHS, FAYS, Port Augusta, 7 December 2001, (N2, Q7, F6).
- 63 The April 2001 plan notes that it specifically refers to five children. ACM Woomera, Minors Management Plan, 15 March 2001; ACM Woomera, Minors Management Plan, 18 April 2001; ACM Woomera, Unaccompanied Minors & Children Management Plan, 18 April 2001, (N2, Q3, F2).
- 64 ACM Woomera, Unaccompanied Minor Plan, 16 August 2001, (N2, Q3, F2).
- 65 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 20 November 2001, (N2, Q5, F4).
- 66 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 20 November 2001, (N2, Q5, F4).
- 67 ACM, Response to Draft Report, 5 September 2003.
- 68 ACM Woomera, Unaccompanied Minor Management Care Plan, December 2001, for unaccompanied child detained since 2 January 2001, (N2, Q3, F2).
- 69 ACM Woomera, Unaccompanied Minor Management Care Plan, December 2001, for unaccompanied child detained since 2 January 2001, (N2, Q3, F2).
- 70 ACM Woomera, Detainee Individual Management Strategies, undated, but probably produced in July 2002, for child detained since 5 January 2001, (N2, Q3, F2).
- 71 ACM Woomera, Unaccompanied Minor Management Care Plan, undated but probably December 2001, for unaccompanied minor detained since 3 June 2001, (N2, Q3, F2).
- 72 DIMIA, Information Required (N2, Q1, F1).
- 73 DIMIA Port Hedland, Manager Report, October 2001, (N5, Q3a, F5).
- 74 DIMIA Port Hedland Manager, Minute, to ACM Health Services Manager, 26 October 2001.
- 75 ACM Port Hedland, Unaccompanied Minors Management Plan, 12 December 2001, (N5, Case 8).
- 76 DIMIA Port Hedland, Manager Report, January 2002, (N1, Q3a, F5).
- 77 ACM Curtin, Detainee Management Strategy, 30 March 2001, for unaccompanied child detained since 15 March 2001, (N2, Q3, 19 August 2002).
- 78 ACM Curtin, Detainee Management Strategy dated 19 November 2001, for unaccompanied child detained since 8 January 2001, (N2, Q3, F2).
- 79 ACM Curtin, Detainee Management Strategy, 18 January 2002, for unaccompanied child detained since 21 March 2001, (N2, Q3, 19 August 2002).
- 80 ACM Curtin, Detainee Management Strategy dated 20 November 2001, for unaccompanied child detained since 21 March 2001, (N2, Q3, F2).
- 81 DIMIA, Information Required (N2, Q1&Q2, F1).
- 82 ACM, Response to Draft Report, 5 September 2003.
- 83 ACM, Response to Draft Report, 5 September 2003.
- 84 DIMIA, Response to Draft Report, 10 July 2003.
- 85 The Department of Human Services (DHS) is responsible for child protection and child welfare in South Australia. Family and Youth Services (FAYS) is the section of DHS that manages these responsibilities.
- 86 ACM, Letter to Inquiry, 14 November 2002. Minutes for meetings were provided from February 2001 onwards.
- 87 The name of these meetings changed over time. They were initially called the Unaccompanied Minors (UAM) Committee Meeting, then in early 2003 the Unaccompanied Minors and Minors (UAMM) Committee Meeting, then finally the Minors Committee meeting.

- 88 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 20 September 2001, (N2, Q5, F4).
- 89 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 22 January 2002, (N2, Q5, F4).
- 90 ACM Woomera, Minors Committee Meeting, 30 April 2002, (N2, Q5, F4).
- 91 ACM, Letter to Inquiry, 14 November 2002.
- 92 ACM Port Hedland, Unaccompanied Minors Meeting Minutes, 1 November 2001, 8 November 2001, 3 January 2002, (N1, Q19, F18); ACM Port Hedland, Unaccompanied Minors Meeting Minutes, 29 November 2001. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B. The October 2001 Department Manager Report notes that the meetings were already occurring; however, the Inquiry only received minutes from November 2001 onwards.
- 93 ACM Port Hedland, Unaccompanied Minors Meeting Minutes, 3 January 2002, (N1, Q19, F18).
- 94 ACM Port Hedland, Unaccompanied Minors Meeting Minutes, 31 January 2002, 13 February 2002, (N1, Q19, F18).
- 95 Katina Kannis, DIMIA Port Hedland Manager, Affidavit, 1 March 2002, para 27, filed in proceedings before the Full Federal Court, *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29.
- 96 Department teleconference minutes indicate that there were three unaccompanied children detained at Port Hedland in March 2002, two in April 2002 and one in May and June 2002. DIMIA, Unaccompanied Minor Teleconference, 14 March 2003, 28 March 2003, 11 April 2003, 2 May 2003, 6 June 2003, 27 June 2003. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 97 ACM reported that with regard to Curtin, 'Meetings were held but ACM cannot say when they were first held because it cannot now find minutes for meetings among the archived records for Curtin, some of which presumably have been destroyed by fire'. ACM, Letter to Inquiry, 14 November 2002. However, the Inquiry received minutes for meetings between June and December 2001.
- 98 Progress Reports regarding unaccompanied children for all of 2001 and until June 2002 were provided to the Inquiry.
- 99 ACM Woomera, UAMs Progress Report, 8 June 2002, (N2, Q6, Attachment B).
- 100 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 3 July 2001, (N2, Q5, Supp 1).
- 101 ACM Woomera, UAMs Progress Report, 15 February 2002, (N2, Q6, Attachment B).
- 102 A detached minor is a child who is not accompanied by a parent, but is accompanied by a relative over the age of 21 years. Despite the Department's differentiation between unaccompanied minors and detached minors, within detention detached minors were usually cared for in the same manner as unaccompanied minors.
- 103 ACM Curtin, Detainee Management Strategies, March 2001, (N2, Q3, 19 August 2002).
- 104 DIMIA, Response to Draft Report, 10 July 2003.
- 105 The IGOC Act requires that an unaccompanied child intends to become a permanent resident of Australia for guardianship to vest in the Minister; s4AAA. The Department indicated in evidence before the Inquiry that unaccompanied children who are seeking asylum in Australia are treated as having such an intention.
- 106 See Chapter 6 on Australia's Detention Policy.
- 107 IGOC Act, ss6, 4AAA.
- 108 IGOC Act, s6.
- 109 The Federal Court has jurisdiction to supervise the Minister's function as guardian pursuant to s6 of the IGOC Act and s39(1A)(c) of the *Judiciary Act 1903* (Cth): *X v Minister for Immigration and Multicultural Affairs*, (1999) 92 FCR 524 at [79]; *Jaffari v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 10 at [16].
- 110 *X v Minister for Immigration & Multicultural Affairs* (1999) 92 FCR 524 at [43].
- 111 *X v Minister for Immigration & Multicultural Affairs* (1999) 92 FCR 524 at [41] and [43].
- 112 *Bennett v Minister for Community Welfare* (1992) 176 CLR 408 at 411 per Mason CJ, Deane and Toohey JJ. See also *Johnson v Department of Community Services* (2000) Australian Torts Reports 81-540.
- 113 *Birchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 408 per Dixon J; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 67 per Gibbs CJ, at 96-7 per Mason J.
- 114 DIMIA, Submission 185, pp2, 33, 42.
- 115 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p23; DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p102.
- 116 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 29 May 2001, (N2, Q5, F4).

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- 117 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p107; DIMIA, Transcript of Evidence, Sydney, 4 December 2002, p6.
- 118 DIMIA, Transcript of Evidence, Sydney, 4 December 2002, p6.
- 119 DIMIA, Submission 185, pp4, 50, 92-93, 98, 101-102; DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p107.
- 120 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p54.
- 121 Justice P. N. Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, Mission to Australia 24 May to 2 June 2002, *Human Rights and Immigration Detention in Australia*, para 53.
- 122 SCALES, Transcript of Evidence, Perth, 10 June 2002, p5.
- 123 RCOA, Submission 107, p6.
- 124 *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29 at [92].
- 125 *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29 per Black CJ, Wilcox and Moore JJ.
- 126 See further Chapter 7 on Refugee Status Determination.
- 127 Minister for Immigration and Multicultural and Indigenous Affairs, Border Protection, Children in Detention, HREOC Children in Detention Inquiry, Public Hearings, Fact versus Fiction, Conflict of interest, at [http://www.minister.immi.gov.au/borders/detention/hreoc\\_issues/conflict.htm](http://www.minister.immi.gov.au/borders/detention/hreoc_issues/conflict.htm), viewed 24 December 2003.
- 128 RCOA, Submission 107, p6.
- 129 Harold Bilboe, Submission 268, para 50.
- 130 Anthony Hamilton-Smith, Transcript of Evidence, Adelaide, 2 July 2002, p14.
- 131 See Chapter 5 on Mechanisms to Protect Human Rights for a detailed discussion on the Department's monitoring mechanisms.
- 132 DIMIA, Submission 185, pp4, 50, 93, 98, 102.
- 133 DIMIA, Unaccompanied Minor Teleconference Minutes, 13 December 2001. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 134 Katina Kannis, DIMIA Port Hedland Manager, Affidavit, 1 March 2002, para 17, filed in proceedings before the Full Federal Court, *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29.
- 135 ACM Woomera, UAM and UAW Progress Report, 30 March 2001, (N1, Q19, F18).
- 136 ACM Woomera, Progress Report on Unaccompanied Minors, 20 April 2001, (N2, Q6, Attachment B).
- 137 ACM Woomera, Progress Report on Unaccompanied Minors, 11 May 2001, (N2, Q6, Attachment B).
- 138 ACM Woomera, UAMs Progress Report, 8 June 2001; ACM, Woomera, UAMs Progress Report, 22 June 2001, (N2, Q6, Attachment B).
- 139 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 16 October 2001, (N2, Q5, F4).
- 140 DIMIA Curtin, Unaccompanied Minors Meeting, 22 June 2001. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 141 DIMIA, Unaccompanied Minor Teleconference Minutes, 13 December 2001. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
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- 143 DIMIA Woomera, Manager Report, November 2001, (N1, Q3a, F5).
- 144 DIMIA Port Hedland, Manager Report, October 2001, (N1, Q3a, F5). Although this report notes that the meetings occurred during October 2001, the Inquiry only received minutes from November 2001 onwards.
- 145 DIMIA Curtin, Manager Report, March 2001, (N1, Q3a, F5).
- 146 DIMIA Curtin, Manager Report, October 2001; November 2001; December 2001; (N1, Q3a, F5).
- 147 DIMIA Curtin, Manager Report, March 2002, (N1, Q3a, F5).
- 148 DIMIA Woomera, Manager Report, September 2001, October 2001, December 2001, January 2002, (N1, Q3a, F5).
- 149 On 11 January 2002, the Minister delegated guardianship powers to the Department's Managers and Deputy Managers in all detention facilities. This delegation did not revoke the delegation to the officials in the child welfare agencies.
- 150 *Jaffari v Minister for Immigration & Multicultural Affairs* [2001] FCA 1516 at [43], quoted in SCALES, Submission 176, p22.
- 151 DIMIA, Transcript of Evidence, 3 December 2002, pp104-105; DIMIA, Submission 185, pp13, 98, 109.

- 152 SCALES, Transcript of Evidence, Perth, 10 June 2002, p4.
- 153 Western Australian Government, Submission 223, p1; Western Australian Government, Transcript of Evidence, Perth, 10 June 2002, p33; Department of Human Services Victoria, Submission 200, p18.
- 154 DIMIA, Migration Series Instruction 357, Procedures for unaccompanied wards in immigration detention facilities, 2 September 2002, para 3.3.7.
- 155 Department of Human Services Victoria, Submission 200, p18.
- 156 Western Australian Government, Submission 223, p5.
- 157 *Draft Agreement between the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) and the South Australian Department of Human Services (DHS) relating to the care of some detainee minors*, paras 10.1-10.3, (N4, Q6, F5).
- 158 DIMIA, Submission 185, p102.
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- 161 Katina Kannis, DIMIA Port Hedland Manager, Affidavit, 1 March 2002, para 35, filed in proceedings before the Full Federal Court, *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29.
- 162 Katina Kannis, DIMIA Port Hedland Manager, Affidavit, 1 March 2002, para 36, filed in proceedings before the Full Federal Court, *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29.
- 163 ACM Curtin, Detainee Management Strategies, 30 March 2001, (N2, Q3, 19 August 2002).
- 164 DIMIA Curtin, Manager Report, January-March 2001, (N1, Q4a, F5).
- 165 DIMIA, Assistant Secretary, Unauthorised Arrivals and Detention Services Branch, Letter, to Acting General Director, DCD and FACS, 14 February 2002.
- 166 DCD, Assessments of Unaccompanied Minors – Port Hedland and Curtin Detention Centres, 19 March 2002.
- 167 DIMIA, Unaccompanied Minor Teleconference Minutes, 14 March 2002. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 168 DIMIA, Unaccompanied Minor Teleconference Minutes, 28 March 2002. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 169 Nonetheless, Standard 2.2.3.2.3 of the revised IDS entered into with the new detention services provider in August 2003 specifies that 'suitable care arrangements are made for children when parent(s) are absent from the detention facility, including but not limited to the absence of an expectant mother when she is giving birth'.
- 170 DIMIA gives as an example the draft Memorandum of Understanding between DIMIA and DHS regarding the placement of detainee minors in alternative detention arrangements, which stipulates care arrangements and contact between children and their parents in the event of separation. DIMIA, Response to Draft Report, 10 July 2003.
- 171 N5, Case 26.
- 172 They were detained in April 2001.
- 173 ACM Woomera Acting Programs Manager, Memo to ACM Woomera Centre Manager, 20 June 2002, (N5, Case 19, pp180-1).
- 174 FAYS recommended in their assessment report of 18 June 2002, that the mother and child be moved to the housing project. DHS, FAYS, Woomera Child Protection Investigation: FAYS Assessment Report, 18 June 2002. (N5, Case 19, p11).
- 175 ACM Woomera Acting Programs Manager, Memo to ACM Woomera Centre Manager, 20 June 2002, (N5, Case 19, pp180-1).
- 176 DIMIA Woomera Deputy Manager, Email to DIMIA Central Office, 17 July 2002, (N5, Case 19, p52).
- 177 Department of Psychological Medicine, Women's and Children's Hospital, Adelaide, Report, to ACM Woomera Manager, 16 July 2002, (N5, Case 19, p58).
- 178 The child was speaking through an interpreter, quoted in Department of Psychological Medicine, Women's and Children's Hospital, Adelaide, Report, to ACM Woomera Manager, 16 July 2002. The report was based on an interview with mother and son conducted on 15 July 2002, (N5, Case 19, pp57-61).
- 179 There is not enough space to include all separations that occurred within the detention centres for this family over the period of their detention.
- 180 The father was at Hakea Men's Prison, south of Perth; the mother at Bandyup Women's Prison, north-east of Perth.

## A last resort?

- 181 ACM Port Hedland Child Protection Officer, Reports from 26 May to 27 June 2001, (N5, Case 31, pp504-545). The Officer notes on 30 May 2001 that twice weekly phonecalls with their brothers were arranged.
- 182 Presumably this refers to prison policy. ACM Port Hedland Counsellor, Memo, to DIMIA Port Hedland Manager and ACM Port Hedland Centre Manager, 30 May 2001, (N5, Case 31, p543).
- 183 ACM Port Hedland Counsellor, Memo, to DIMIA Port Hedland Manager and ACM Port Hedland Centre Manager, 30 May 2001, (N5, Case 31, p543).
- 184 ACM Port Hedland Child Protection Officer, Report, 28 May 2001, (N5, Case 31, p540). ACM claims that visits were organised. ACM, Response to Draft Report, 5 September 2003. However, the Inquiry was not provided with evidence that this occurred.
- 185 The initial foster carer received a protection visa and was released. Hence two new carers were arranged for each of the two youngest children: ACM Port Hedland Child Protection Officer, Report, 19 June 2001, (N5 Case 31, p515).
- 186 ACM Port Hedland Child Protection Officer, Report, 26 May 2001, (N5, Case 31, p544).
- 187 ACM Port Hedland Child Protection Officer, Report, 26 May 2001, (N5, Case 31, p544).
- 188 ACM Port Hedland Mental Health Nurse, Memo, to ACM Port Hedland Centre Manager, 19 January 2001, (N5, Case 31, pp204-205).
- 189 Usually for adults only.
- 190 They arrived at Villawood on 6 July 2001 and ACM records dated 21 August 2001 state that there was a 'dedicated officer assigned to supervise children': ACM Villawood, HRAT Morning Meeting, 21 August 2001 (N3, F15). ACM claims that immediately on arrival at Villawood a female officer was assigned to the children 24 hours a day. ACM, Response to Draft Report, 5 September 2003. There is no record of this in evidence before the Inquiry. HRAT records on 4 September 2001 also show that a 'personal carer [was] to be followed up by HSC [Health Services Manager], to help look after children 6.00 – 22.00'. However, records for the following day show that an outside carer is 'no longer an option' and '4 staff members to be trained as carers' instead: ACM Villawood, HRAT Morning Meeting, 4 September 2001 and 5 September 2001, (N3, F15).
- 191 ACM Villawood, Health Services Manager, Care Management Plan, 1 September 2001 (N5, Case 31, p632).
- 192 Confidential, Submission 203, p7. The father was released and the family reunited seven months after the mother's arrival at Villawood.
- 193 Inquiry, Focus group, Adelaide, July 2002, Afghan unaccompanied child.
- 194 DIMIA, Submission 185, p102.
- 195 DIMIA, Submission 185, pp103-104.
- 196 DIMIA Curtin, Unaccompanied Minors Meeting, 12 October 2001. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 197 DIMIA Curtin, File Note, 23 October 2001. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 198 ACM Port Hedland, Unaccompanied Minors Meeting Minutes, 31 January 2002, (N1, Q19, F18).
- 199 DIMIA, Unaccompanied Minor Teleconference, 13 December 2001. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 200 DIMIA, Unaccompanied Minor Teleconference, 31 January 2002. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 201 DIMIA, Unaccompanied Minor Teleconference, 28 March 2002. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 202 DIMIA, Unaccompanied Minor Teleconference, 11 April 2002. DIMIA, Letter to Inquiry, 27 November 2002, Attachment B.
- 203 Inquiry, Focus group, Adelaide, July 2002, Afghan unaccompanied child.
- 204 *Memorandum of Understanding between the Department of Immigration and Multicultural and Indigenous Affairs and Australian Red Cross for the provision of certain services to immigration detainees.* DIMIA, Letter to Inquiry, 5 June 2003.
- 205 See further Chapter 3, Setting the Scene.
- 206 The Department informed the Inquiry that it was 'impossible under the bridging visa regulations to release the child from detention on 29 August 2001 before a suitable foster family in the community had been located'. DIMIA, Response to Draft Report, 10 July 2003.
- 207 ACM Woomera, Psychological Assessment Summary, 13 July 2001, (N5, Case 13, pp14-15).
- 208 ACM Woomera, Psychological Assessment Summary, 13 July 2001, (N5, Case 13, pp14-15).
- 209 DIMIA, Minute, Request for Grant of Bridging Visa (Subclass 051), 12 October 2001, (N5, Case 13, p49ff).

- 210 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 17 July 2001, (N2, Q5, F4).
- 211 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 24 July 2001, (N2, Q5, Supp 1).
- 212 DIMIA Woomera Acting Manager, Letter, to ACM Centre Manager, 25 July 2001, (N5, Case 13, p8); DIMIA, Minute, Request for Grant of Bridging Visa (Subclass 051), 12 October 2001, (N5, Case 13, p49ff); DIMIA, Minute, Information Brief, Unaccompanied Minor at Woomera IRPC, 27 July 2001, (N5, Case 13, p122).
- 213 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 7 August 2001, (N2, Q5, F4).
- 214 ACM Woomera officer, Memo, to ACM Programs Manager, 8 August 2001, (N5, Case 13, p3); ACM Woomera, Update [on unaccompanied minor], 6 August 2001, (N5, Case 13, p91).
- 215 ACM Woomera, Psychological Report, 9 August 2001, (N5, Case 13, p88).
- 216 DHS, FAYS, Acting Manager Operations, Country, Email, to DIMIA Central Office, 9 August 2001, (N5, Case 13, p89).
- 217 DHS, FAYS, Acting Manager, Operations, Country, Email, to DIMIA Central Office, 9 August 2001, (N5, Case 13, p89).
- 218 ACM Woomera Psychologist, Memo, to ACM Centre Manager, 15 August 2001, (N5, Case 3, p86).
- 219 DIMIA, Minute, Request for Grant of Bridging Visa (Subclass 051), 12 October 2001, (N5, Case 13, p49ff).
- 220 DHS, FAYS, Assessment Report Re: Unaccompanied Humanitarian Minor, 29 August 2001, (N5, Case 13, p74).
- 221 DIMIA Central Office, Email, to Woomera Deputy Manager, 30 August 2001, (N5, Case 13, p70).
- 222 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 4 September 2001, (N2, Q5, F4).
- 223 DIMIA, Minute, Request for Grant of Bridging Visa (Subclass 051), 12 October 2001, (N5, Case 13, p49ff).
- 224 DIMIA, Minute, Re: [unaccompanied child], 2 October 2001, (N5, Case 13, p95).
- 225 DIMIA, Minute, Request for Grant of Bridging Visa (Subclass 051), 12 October 2001, (N5, Case 13, p49ff).
- 226 DIMIA, Minute, Request for Grant of Bridging Visa (Subclass 051), 12 October 2001, (N5, Case 13, p49ff).
- 227 DHS, FAYS, Acting Manager, Operations, Country, Email, to DIMIA Woomera Deputy Manager, Woomera, 18 September 2001; DIMIA Woomera Deputy Manager, Email, to FAYS, Acting Manager, Operations, Country, 25 September 2001, (N5, Case 13, pp62-63).
- 228 DIMIA, Minute, Request for Grant of Bridging Visa (Subclass 051), 12 October 2001, (N5, Case 13, p49ff).
- 229 ACM Woomera, Memo, Re: [unaccompanied child], 28 September 2001, (N5, Case 13, p102).
- 230 DIMIA, Response to Draft Report, 10 July 2003.
- 231 DIMIA, Minute, Request for Grant of Bridging Visa (Subclass 051), 12 October 2001, (N5, Case 13, p49ff).
- 232 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 6 November 2001, (N2, Q5, F4).
- 233 ACM Woomera, UAMs Progress Report, 9 November 2001, (N2, Q6, Attachment B).
- 234 DIMIA, Performance Linked Fee Report, for quarter ending 31 December 2001.
- 235 ACM Woomera, Incident Report 736/01, 16 November 2001, (N5, Case 20, p38).
- 236 ACM Woomera, Incident Report 736/01, 16 November 2001, (N5, Case 20, p38).
- 237 ACM Woomera, Incident Report 736/01, 16 November 2001, (N5, Case 20, p38).
- 238 ACM Woomera, Incident Report 736/01, 16 November 2001, (N5, Case 20, p38).
- 239 ACM Woomera, Incident Report 736/01, Follow up Incident Report No 3, 24 November 2001, (N5, Case 20, p48).
- 240 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 20 November 2001, (N2, Q5, F4).
- 241 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 27 November 2001, (N2, Q5, F4).
- 242 The Contract Operations Group is a higher level meeting between Department and ACM staff. See further Chapter 5 on Mechanisms to Protect Human Rights.
- 243 DIMIA, Contract Operations Group Minutes, 22 November 2001, (N1, Q3, F4).
- 244 ACM Woomera, UAMs Progress Report, 23 November 2001, (N2, Q6, Attachment B).
- 245 DIMIA Woomera, Manager Report, November 2001, (N1, Q3a, F5).
- 246 ACM Managing Director, Letter, Performance Assessment for Quarter Ending December 2001, to DIMIA First Assistant Secretary, 11 July 2002.
- 247 DIMIA, Contract Operations Group Minutes, 22 January 2002, (N1, Q3, F4).
- 248 DIMIA, Response to Draft Report, 10 July 2003.
- 249 DIMIA, Response to Draft Report, 10 July 2003.

## A last resort?

- 250 DHS, FAYS, Executive Director, Country Services, Disability Services, Letter, to Acting First Assistant Secretary, DIMIA, 29 January 2002, (N2, Q7, F6).
- 251 ACM Woomera, Incident Report 823/01, 19 December 2001, (N5, Case 29, p73).
- 252 DHS, FAYS, Executive Director, Country Services, Letter, to Acting First Assistant Secretary, DIMIA, 26 January 2002, (N2, Q7, F6).
- 253 DHS, FAYS, Executive Director, Country and Disability Services, Letter, to DIMIA First Assistant Secretary, 24 January 2002, (N2, Q7, F6).
- 254 ACM Woomera, Medical Records, (N3, F3).
- 255 ACM Woomera, Incident Report 67/02, 22 January 2002, (N5, Case 21).
- 256 DHS, FAYS Assessment Report, 26 January 2002, (N2, Q7, F6).
- 257 ACM Woomera, Medical Records, (N3, F2).
- 258 DHS, FAYS Assessment Report, 28 January 2002, (N2, Q7, F6).
- 259 DHS, FAYS, Acting Regional Director Country, Letter to DIMIA, 7 February 2002, (N2, Q7, F6).
- 260 DHS, FAYS, Acting Regional Director Country, Letter to DIMIA, 7 February 2002, (N2, Q7, F6).
- 261 DIMIA Woomera, Manager Report, January 2002, (N1, Q3a, F5).
- 262 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p82.
- 263 ACM, Response to Draft Report, 5 September 2003.

# Chapter 15

## Religion, Culture and Language for Children in Immigration Detention

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## 15. Religion, Culture and Language for Children in Immigration Detention

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The *Convention on the Rights of the Child* (CRC) requires Australia to protect children's rights to cultural identity, language and religion. The most effective way of ensuring enjoyment of these rights is to encourage and allow refugee and asylum-seeking children to participate in cultural and religious activities in the community. The Australian community is well equipped to respond to this need as a wide range of cultural and religious opportunities are readily accessible and this remains a key factor in the maintenance of our multicultural society.

Obvious difficulties arise, however, when some of the children are in detention and are therefore deprived of access to the Australian community, particularly if they are detained in remote detention centres. Detention therefore imposes greater responsibility on the Commonwealth, through the Department of Immigration and Indigenous and Multicultural Affairs (the Department or DIMIA), because the deprivation of liberty means that children cannot choose to participate in the ordinary community. For example, children cannot go to a mosque or church, or attend community events.

This obligation on the Department extends to its management of the internal dynamics of the detainee population. Tensions between groups from different cultural or religious backgrounds inevitably increase when they are detained together. Children's rights require that they be protected against interference in their culture, religion and language including protection from religion-motivated violence and intimidation, whether physical or verbal.

The Inquiry did not receive extensive evidence from children or parents regarding their practice of religion, culture and language while in detention centres. Further, while many submissions made general reference to these rights, few of them contained any detailed evidence on these issues. However, the Inquiry required the production of additional information from the Department and its services provider, Australasian Correctional Management Pty Limited (ACM), and has sought to assess the evidence before it in order to determine whether children have been in a position to enjoy these rights.

## A last resort?

This chapter makes some observations on the measures taken by the Department and ACM to ensure that detainee children are not deprived of the right, in community with members of their group, to enjoy their culture, speak their mother tongue and freely practise their religion. It assesses any action taken by the Department and ACM to ensure that children in detention were able to enjoy these rights.

In particular this chapter addresses the following questions:

- 15.1 What are children's rights regarding religion, culture and language in immigration detention?
- 15.2 What are the languages and religions of children in detention?
- 15.3 What policies were in place to ensure children's rights to religion, culture and language while in detention?
- 15.4 How were children's rights to religion, culture and language protected in practice?

At the end of the chapter there is a summary of the Inquiry's findings.

### **15.1 What are children's rights regarding religion, culture and language in immigration detention?**

Children's rights to enjoy their culture, religion and language are set out in article 30 of the CRC:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority...shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

*Convention on the Rights of the Child, article 30*

The United Nations Human Rights Committee (the Committee) has interpreted the equivalent obligation in article 27 of the *International Covenant on Civil and Political Rights* (ICCPR), to mean that there is a positive obligation to ensure the enjoyment of these rights despite the use of the negative term 'shall not be denied'.<sup>1</sup> This is also the position taken by the United Nations Children's Fund (UNICEF) in relation to these rights and the Inquiry believes that the Commonwealth must take steps to ensure that those rights are respected.<sup>2</sup>

Article 14(1) of the CRC reinforces Australia's obligation to respect a child's fundamental right to freedom of religion. This right is subject only to 'such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others' (article 14(3)) and the 'direction and guidance' of a child's parents (article 5).<sup>3</sup>

Article 2(2) of the CRC imposes a positive obligation on Australia to take all appropriate measures to protect children from all forms of discrimination or punishment on the basis of religion, language or national or ethnic origin.<sup>4</sup> The

concept of 'culture' in article 30 refers to the languages, traditions, rituals, beliefs and art forms connected with an individual's identity.

A child's right to 'use his or her own language' is about children being able to freely speak their native language with those in their immediate family and in their community without interference.<sup>5</sup> Thus children must be able to retain and, where necessary, become literate in, their mother tongue, in addition to learning the local language. While children's rights to use their own language under the CRC may not necessarily include being taught entirely in that language, in the case of refugee children special provision may be necessary to enable them to retain, and become literate, in their own language.<sup>6</sup>

The right to religion, culture and language assumes great practical importance for asylum-seeking and refugee children because they are interwoven with the right of children to preserve their identity. Article 8(1) of the CRC states that:

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

*Convention on the Rights of the Child, article 8(1)*

An 'unlawful interference' in this aspect of identity includes the failure to give institutionally placed children the opportunity to enjoy their ethnic, cultural, linguistic or religious heritage.<sup>7</sup>

Article 22(1) imposes an obligation on Australia to take appropriate measures to ensure that asylum-seeking and refugee children enjoy these rights. The United Nations High Commissioner for Refugees (UNHCR) stresses the benefit to refugee and asylum-seeking children of cultural and religious activities:

Religious festivals and rites of passage such as birth, transition into adulthood, marriage and death are extremely important in unifying a community and in conferring identity on its individual members. The importance of such activities to community mental health should not be underestimated.<sup>8</sup>

The UNHCR *Refugee Children: Guidelines on Protection and Care*, (UNHCR Guidelines on Refugee Children) also highlight that restoring the 'cultural normalcy' to asylum-seeking children, by re-establishing community life is vital to ensuring healthy development and is usually in the best interests of the child.<sup>9</sup> Children suffering the trauma of war and displacement particularly need the reassurance of familiar cultural practices.

Parents are in the best position to assist their children to exercise their religious, cultural and language rights, particularly in younger years. It is therefore important that parents are supported in directing the development of their child, particularly in a new cultural environment such as Australia (article 5 CRC).<sup>10</sup>

## A last resort?

All these rights apply equally to children in detention as they do to children in the Australian community. However, the deprivation of liberty imposes inherent barriers that must be directly addressed by the Department.

An exercise of the rights regarding the practice of religion, culture and language often requires access both to a child's immediate family circle and to members of their community.<sup>11</sup> Detention imposes a physical barrier to any community. For example, children are not free to participate in a cultural society, religious gathering or language group that they might otherwise attend if they were not detained. It therefore falls on the Department to ensure that there are appropriate opportunities to exercise those rights 'to the fullest extent compatible' with detention.<sup>12</sup>

The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the JDL Rules) provide some guidance on this issue.

Every juvenile should be allowed to satisfy the needs of his or her religious and spiritual life, in particular by attending the services or meetings provided in the detention facility or by conducting his or her own services and having possession of the necessary books or items of religious observance and instruction of his or her denomination. If a detention facility contains a sufficient number of juveniles of a given religion, one or more qualified representatives of that religion should be appointed or approved and allowed to hold regular services and to pay pastoral visits in private to juveniles at their request. Every juvenile should have the right to receive visits from a qualified representative of any religion of his or her choice, as well as the right not to participate in religious services and freely to decline religious education, counselling or indoctrination.<sup>13</sup>

Religion, culture and language are also relevant to the exercise of a variety of other rights in the CRC. For example a child's cultural and religious practices can affect what must be done to enjoy the highest attainable standard of health (article 24(1)), the right to an appropriate education (article 28(1)), and the right to fully participate in cultural and artistic life (article 31).<sup>14</sup> Article 20(3) of the CRC imposes an additional responsibility to ensure that 'due regard [should] be paid to the desirability of continuity in the child's upbringing and to the child's ethnic, religious, cultural and linguistic background' when considering appropriate care arrangements.

The exercise of the right to religion, culture and language is also an element to take into account when considering the best interests of the child (article 3(1)). Furthermore, religion, culture and language are relevant to ensuring that children enjoy the maximum possible development (article 6). They are also relevant to the issue of whether or not each child's human dignity is respected in detention (article 37(c)).

## **15.2 What are the languages and religions of children in detention?**

There are a variety of religions, languages and cultures among the detainee children in Australian detention centres.<sup>15</sup>

For those asylum seeker detainee children detained between 1999 and 2002, there are three main languages, namely, Arabic, Dari (Afghan Persian) and Farsi (Modern Persian). Smaller numbers of detainee children seeking asylum speak Pashto, Singhalese, Tamil and Turkish.<sup>16</sup>

In recent years, the majority of the Iraqi, Afghan and Iranian detainee children have been of the Shi'a Muslim faith.<sup>17</sup> The Palestinian and Turkish detainee children, and a minority of the Iraqis and Afghans, are of the Sunni Muslim faith.<sup>18</sup> There have also been a number of Christian children of various nationalities in immigration detention. Among the Iranian and Iraqi children, there have been a number who profess the Sabian Mandaean faith.<sup>19</sup>

Thus this chapter focuses mainly on Muslim, Sabian Mandaean and Christian practices.

## **15.3 What policies were in place to ensure children's rights to religion, culture and language while in detention?**

### **15.3.1 Department policy**

In its submission to the Inquiry the Department states:

Ensuring children and their families are able to maintain their cultural and linguistic diversity in the detention environment is ... a key consideration in the management of detention facilities.<sup>20</sup>

Regarding religious freedom, it states:

All detainees are encouraged to [practise] their religion of choice and are provided with the necessary resources to do so where possible ... children are free to practise their religious beliefs with their families and to participate in religious activities, ceremonies and services.<sup>21</sup>

On preserving language, the Department states:

Maintaining first language is an important development need for all individuals in detention, especially children, as it allows for the preservation and reinforcement of cultural values and identity.<sup>22</sup>

However, the Department states in its submission to the Inquiry that '[a]ppropriately responding to the range of cultural and linguistic backgrounds of the detention population is a challenge'.<sup>23</sup>

## A last resort?

One of the principles underlying the Department's Immigration Detention Standards (IDS) is that the 'dignity of the detainee is upheld in culturally, linguistically, gender and age appropriate ways'.<sup>24</sup> The IDS require that:

Detainees have access to spiritual, religious and cultural activities of significance to them.<sup>25</sup>

The IDS also require that the right to practise religion be upheld in detention centres:

Detainees have the right to practise a religion of their choice, and if consistent with detention facility security and good management, join with other persons in practising that religion and possess such articles as are necessary for the practice of that religion.<sup>26</sup>

Barring any security concerns, pastoral care is to be facilitated:

A qualified religious representative approved under guidelines is allowed to hold regular services and to pay pastoral visits to detainees of the appropriate religion at proper times, so long as it does not interfere with the security and management of the detention facility.<sup>27</sup>

The Department states that for many detainees:

cultural beliefs and religious faith provide not only spiritual, but also practical guidance. For example, a detainee's religion may determine gender roles, diet, and issues relating to health and hygiene. Management responses must, therefore, take account of cultural and religious background to ensure effective communication and understanding between staff and the detainee population.<sup>28</sup>

On culture, the Department's IDS state:

Services, facilities, activities and programs are based on the concept of individual management and designed to meet the individual needs of detainees and have regard to cultural differences.<sup>29</sup>

Food is to be culturally appropriate.<sup>30</sup> Staff are expected to possess 'an understanding and appreciation of the diversity and cultural backgrounds of detainees',<sup>31</sup> as well as the 'ability to effectively communicate and work with detainees of a diversity of backgrounds'.<sup>32</sup> Communication with detainees must be in a language they can understand:

If a detainee cannot understand written information and where it is required that a detainee be informed of a matter in writing, the information is also conveyed orally in a language the detainee can understand.<sup>33</sup>

Where a detainee has a non-English speaking background, written information is provided in a language the detainee can understand. An interpreter is always provided for a detainee who does not understand English, when discussing with them matters relating to their management.<sup>34</sup>

### 15.3.2 ACM policy

ACM had a policy on religious and pastoral care whereby 'detainees are to be provided a range of religious services and programs that, to the extent practical, satisfy the beliefs of most major faith groups'.<sup>35</sup> The purpose of this policy is 'to meet the spiritual needs of detainees and to offer every reasonable opportunity for detainees to [practise] their bona fide religious or spiritual beliefs as individuals or groups'.<sup>36</sup> The policy contains the following elements:

- the equitable delivery of religious services to all faith groups
- no detainee is to be compelled to participate in any religious activity and any attendance at religious instruction must be voluntary
- sufficient space, equipment and supplies are to be available for all necessary religious programs
- visiting clergy must be qualified and endorsed by a religious body
- volunteer workers can visit too, once screened and interviewed by ACM
- a range of pastoral services are permitted, such as leading prayer, conducting sacramental ceremonies, classes, forums, counselling, choirs and spiritual maturity groups
- detainees may receive religious publications and materials.

Furthermore, the Detainee Privacy policy states that:

Detainees shall be provided with an area for their various religious observances. Such an area must be situated so that detainees can gather for religious purposes without being subject to interruption from other detainees.<sup>37</sup>

The policy regarding ACM searches of detainees' rooms states that searches:

are to be conducted in a professional and dignified manner, and being mindful of cultural and religious sensitivities.<sup>38</sup>

In the ACM Detention Services Code of Conduct, reproduced in a staff induction handbook, staff are instructed to:

be courteous, reasonable and fair in their dealing with all detainees, colleagues and members of the public, irrespective of race, religion, gender, disability, sexual orientation or any other factors.<sup>39</sup>

The induction handbook at Woomera also includes advice for staff on how to treat detainees in a culturally sensitive manner. For example, on 'the language barrier':

The Arabic people don't use 'please' and 'thank you' in their form of request, unless they've learnt to since arriving, so don't expect it when you talk with them.

When you use an interpreter, look at the person you are addressing, not the interpreter, because most communication is non-verbal – you need to look at the person to whom you're talking. Keep messages clear and simple and talk slowly. Smile a lot and it will be returned in kind. A miserable bastard is just as unlikable in Iraq as Australia.

Although the Inquiry received no evidence from the Department or ACM as to how the handbook was used, for example in training, it is apparent that staff working at Woomera in 2001 had access to the advice. However, the former Health Services Manager at Curtin told the Inquiry that it was not distributed to staff in that facility.<sup>40</sup>

### **15.4 How were children's rights to religion, culture and language protected in practice?**

A detention centre reflects neither the child's home culture nor Australia's multicultural society. Although a child may be detained with people who share their language, culture and religion, the restrictions of detention mean that a child and his or her family are not free to access cultural and religious activities to the same extent as children in the community, especially if detained in a remote facility.

At the very least, the Department must ensure that children in detention are not denied the right to enjoy their culture, use their own language and practise their own religion without interference. Ideally, the Department should also encourage the provision of activities for this enjoyment. This chapter discusses whether the Department and ACM have taken measures to ensure that children are able to:

- engage in prayer, both privately and in community with others
- receive visits by clergy
- receive religious instruction
- participate in religious and cultural life, including festivals
- eat culturally and religiously appropriate food
- use their own language
- participate in daily cultural life without interference from detainees and staff
- be treated with respect for their culture and religion.

#### **15.4.1 Prayer in detention**

The Department states that:

Space is made available in each facility for religious services, as well as equipment, supplies and other items incidental and necessary to religious programs. Program buildings and outdoor shade structures are often used for religious activities. To the degree practical, all faith groups are treated equitably in access to facilities for religious observance.<sup>41</sup>

The Inquiry heard evidence that at some centres there were no special places set aside for prayer. Furthermore, although detainees were not actively prevented from engaging in private prayer, detainee accommodation rooms had insufficient space for detainees to pray in comfort and privacy. One former detainee mother said:

It was not banned to practise the religion but there were no facilities. For example, if you are a Muslim and need a place to do your daily prayer it was a special place and our room was too small.<sup>42</sup>

In several focus groups, former detainee children said the same thing. For example:

INQUIRY: What about prayer, was there somewhere you could pray during the day?

BOY 1: No, there was no mosque.

INQUIRY: And not a prayer room with mats?

BOY 1: You just prayed in your room.

BOY 2: There wasn't a special area, there was not much. We had just the Main Compound, I told you we have five parts and just in Main Compound there was like a Mess and they could pray but otherwise in other compounds, no.<sup>43</sup>

For Muslims it is essential for women to have a place to pray separately from men if at all possible. However, the Inquiry heard several complaints that separate public space was not always available.

In a room with three families, we did not have enough space to pray. There was just a tiny space to put our prayer mats so we had to make a roster. One person would pray and, when she had finished, another would pray. I found it uncomfortable as I did not have my own space to pray. *[Was there any other space within the camp where the men could pray together and the women pray together?]* There was no such place in the closed camp. The single man sharing a room with us went to another room to pray.<sup>44</sup>

The Lebanese Muslims Association stated that:

The absence of adequate facilities such as a separate prayer space make parents' transmission and maintenance of their religious traditions to their children more difficult, for example, in Islam, prayers are physical as well as verbal and spiritual; due to the nature of the prayers, men and women tend to pray in separate distinct sections of a prayer hall.<sup>45</sup>

Children pointed out that in separation detention the conditions were even more cramped, although it did not stop them praying:

In the closed camp we had no choice but to pray all the time as we were locked in our rooms. In the free camp there was a mosque.<sup>46</sup>

At Curtin, Muslim detainees had no separate prayer room, and there were no visiting religious leaders, but they were provided with prayer mats.<sup>47</sup> Christian detainees in Curtin faced the same issue:

For many months Christian meetings were only allowed in an outdoor area with little shade. Considering the climatic conditions at Curtin [this] was less than satisfactory and meant in particular that children had to suffer very hot and often very humid conditions to come and participate in the church activities.<sup>48</sup>

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Muslim prayer room at Port Hedland, June 2002.

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However, it appears that most centres had set aside rooms for prayer. At Port Hedland in June 2002, the Inquiry observed two rooms for Muslim prayer and one for Christians.<sup>49</sup>

According to the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister), one accommodation room at Maribyrnong is set aside for religious observance.<sup>50</sup>

Despite the closure of the Villawood 'mosque' (in fact a multipurpose hall that was also used by Muslims as a prayer space) for some time, after detainee escapes in 2001, the Inquiry is satisfied that religious facilities at Villawood are now adequate.

Regarding Woomera, the Minister states that:

Each compound has outdoor prayer area and indoor facilities can be utilised when necessary for religious observance.<sup>51</sup>

During the Inquiry's visit to Woomera in June 2002, some detainees reported that they had enough space to pray:

DR OZDOWSKI: Do you have a place to pray and can you do your religious practices here?

DETAINEE FATHER: No problem ... We brought a Qur'an with us.<sup>52</sup>

At Christmas Island, the Inquiry heard that there was inadequate space to pray inside the facility:

Whilst in the centre, I noticed that the majority of detainees were Muslim. In the single men's dormitory, the beds were packed very closely together, which impeded any walking around the dorm, especially as men were praying in between the beds. I don't believe their religious needs were taken care of in this respect – they had only cardboard prayer mats, and very limited space in which many men were expected to sleep, read, pray, sit, and generally be. In a similar [vein], privacy for women in the family dormitory was limited, and I am guessing that Muslim women had to wear their head scarves and coverings almost 24 hours so as not to be seen by men.<sup>53</sup>

However, by mid-2002, all Christmas Island detainees attended places of worship outside the detention centre once a week.<sup>54</sup>

### **(a) Findings on prayer**

The Inquiry finds that while the cramped accommodation at many facilities during the period made it difficult for children to conduct private prayer with ease, children had the freedom to pray in detention. Most detention centres had provided specific rooms for prayer. The Inquiry is concerned, however, that there were inadequate facilities for public prayer in Curtin and Christmas Island, and that this is in contrast to the stated policies of both the Department and ACM to provide resources for religious programs.

### **15.4.2 Visits by clergy to detention centres**

The Department states that:

Visits by local, accredited religious personnel are facilitated, and in some facilities there may be an existing practice of regular pastoral visits or religious services being conducted. These representatives provide or coordinate a range of religious services, ceremonies, classes, forums and lectures. ... If detainees request a pastoral visit from a local pastor, priest or minister, [ACM] or, as necessary, the Department, endeavour to make appropriate arrangements.<sup>55</sup>

The evidence regarding pastoral visits varies between detention centres.

Villawood has the most comprehensive program for worship with a church timetable showing Buddhist, Chinese Korean, Catholic, Muslim, Persian and Pentecostal services.<sup>56</sup> The Supreme Islamic Council of NSW told the Inquiry that they sent an Imam every Friday to hold prayers at Villawood, where he was well received by Sunnis and Shi'ites.<sup>57</sup> During its visit to Villawood in August 2002, the Inquiry observed a religious service being conducted in the visits area. It appears that some outside community members could also attend services, as the following month the Department Manager reported to Canberra that:

DIMIA has noticed that religious services denomination [with] outside participants have increased in numbers. The issue for DIMIA is the

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management of this increased number and the flow on effect related to security and accountability process employed by ACM.<sup>58</sup>

At Curtin, there was no local Imam to come to the centre and conduct Friday prayers. However, detainees appointed a mullah from the detainee population. Former Curtin detainee children told the Inquiry:

BOY: I don't know why but after that all the Afghani and Iraqi got together and they say we don't need [an Imam to visit] and the reason was we had a mullah in Curtin.

INQUIRY: There was a mullah in Curtin?

BOY: We had a mullah but he was chosen from one of the detainees and we also had a special area for praying. There were some mats so whenever went to pray and we took them out and we prayed.<sup>59</sup>

For Christian detainees at Curtin, the Uniting Church's Frontier Services in the Kimberley conducted services when they visited the area.<sup>60</sup> The Department Manager stated that 'representatives from the Uniting and Anglican churches visit the centre regularly for Christian services. This is facilitated by ACM'.<sup>61</sup> However, the Minister of the Broome Anglican Church described to the Inquiry the difficulties he experienced regarding the arrangement of visits to conduct services for Christian detainees:

Visits were not permitted during weekdays [which] severely restricted my access. Broome is approximately 200km from Curtin IRPC, which meant that I could not perform my duties in Broome on Sunday and also visit Curtin IRPC. This meant Saturday was the only possibility for the Christians to have formal Christian services.

On many occasions, subsequent to initial permission being granted for my visit, it was revoked without any real explanation, only a generic one ('operational concerns'). This meant that the Christian children would be expecting to go to a church meeting, and as late as the day before being told that it had been cancelled (often without any explanation) ...

When access was granted, the Christians within the centre were not allowed to meet as one group.

- This meant only groups of 20 (and sometimes 25) were permitted at any one time. As a result the children of Christian parents who would come to these gatherings were never present all together. This in conjunction with the short duration allowed by ACM to meet with each of these groups meant that special teaching activities specifically for children were not able to be included.
- This also reduced informal personal contact time where children were able to openly share their concerns and needs (spiritual, emotional, or physical) with me as their Christian minister. This would be a normal part of church life in the Australian Christian context.<sup>62</sup>

The Anglican Minister also claimed that the treatment of Christian detainees differed from other religious groups at the centre:

[The] restricted meeting protocol was in sharp contrast to [members of] the more freely [practised] majority religion in the centre, who, although no special arrangements were made for them, were able to meet without special permission due to [their] numbers within the body of the camp.<sup>63</sup>

In response to this allegation, the Department indicates that although the Anglican minister's visit was approved in principle, operational considerations, such as the size of the group and tensions at the centre one month previously, had some bearing upon the restrictions described in this case.<sup>64</sup>

At Woomera, the various Department Managers reported regular visits by local Christian clergy.

However, visits by Muslim clergy do not appear to have been regular. A teacher employed at Woomera in 2001 told the Inquiry that the Muslim detainees were neglected by Muslim clergy in the community:

During my time the Imam from Adelaide only visited the Woomera centre once ... There was little support from the Muslim community outside. [The local Catholic nun] tried to get them to come on a regular basis and to help in other ways. Apart from a supply of winter jackets it didn't work out. So it was left to those inside (the detainees) to organise prayer and other meetings (often done on a country basis for Iran, Iraq and Afghanistan). There were some [detainee Imams] at the start to help with this though this was more difficult with their release. When the Imam did turn up on one occasion there was a demonstration and ... some people were frightened or angry, particularly some Christians and Sabian Mandaean. [The nun] tried to calm them down saying the Imam was there to bring peace and harmony.<sup>65</sup>

It appears the above visit was the only time a Muslim cleric visited Woomera. A Muslim former detainee there recalls it as follows:

There were no religious representatives. In one occasion, ACM invited a Muslim religious leader to the camp and it was when detainees had hunger strike, and they set the building alight as a sign of protests. They invited him to make detainees calm down, he made promise on behalf of ACM and also give them free telephone card. He also told detainees if they don't stop, then ACM won't give them early breakfast (Sahari) for Ramadan, when Muslims are fasting.<sup>66</sup>

A refugee teenager who was detained at Woomera told the Inquiry:

INQUIRY: Did you ever have a visit from a religious leader?

BOY: Yeah. In my time and during the fasting month, Ramadan, we had a religion man. He came to advise the people and give them some ideas about the fasting, yep.<sup>67</sup>

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A teacher working at Woomera in 2001 said that the Sabian Mandeans at Woomera were even more neglected than the Muslims from outside:

There was only one visit by a [Mandaean] priest from Sydney. So [the local Catholic priest and nun] catered to both the Christians and the Sabian Mandeans with services and pastoral care.<sup>68</sup> It could mean 1-2 visits a week by [the priest] and 3-4 visits a week by [the nun]. The Christians and Sabian Mandeans either worshipped together on some occasions or apart on other occasions. Then there were separate holy or feast days for Christians and Sabian Mandeans and they might invite [the nun] to attend these.<sup>69</sup>

Port Hedland's Department Manager reported during 2002 that 'religious leaders visit weekly to provide pastoral services and pastoral care' but she was referring to Christian clergy only.<sup>70</sup> In September 2002, the Baxter Department Manager reported that 'ACM have facilitated access to site by local ministers association, which is providing pastoral care for Christian detainees'.<sup>71</sup>

At Christmas Island, Muslims went to the local mosque every Friday, the Buddhists went to the local temple and the Christians to church services.<sup>72</sup>

### (a) Findings on visits by clergy

The Inquiry finds that the Department and ACM did not prevent children from receiving visits from religious clergy in detention. However, the remote location of Woomera, Curtin, Port Hedland and Baxter centres, with the highest child populations, has had the effect of restricting some children's access to pastoral visits. While Christian ministers were able to visit on a more regular basis, the Muslim population of the towns near these detention centres is small or non-existent. However, in the absence of Imams visiting for Friday Prayers, Muslim detainees appointed religious leaders from among the population and this appears to have been adequate. As with the Muslim clergy, Sabian Mandaean clergy visited detainees in remote centres infrequently.

The Inquiry is also concerned that operational considerations within detention centres may have had the effect of limiting the access of clergy to children at various times.

### 15.4.3 Religious instruction in detention

The Inquiry heard that religious education was primarily left to parents; as one submission advised:

*Were the children able to have religious instruction from their parents?*

Families themselves are free if they want to teach their children.

*Were there any daily programs in place to ensure that their language, religion, arts and traditions of children's culture were met?*

There was no such program to cover children's religion, language, art etc needs.<sup>73</sup>

The Inquiry also heard that the impact of detention on parents affected their ability to undertake religious instruction:

With the children not receiving appropriate and adequate instruction, only having access to instruction from their parents who are too concerned about their own plight means that those children are missing at a crucial time in their life some very important aspects or teachings that are crucial to their development as human beings at a time that they are so impressionable that will impact on their life as adults and it is really at this time that they need as much support as possible from community leaders and from people who are appropriately qualified in matters of religion and culture and history.<sup>74</sup>

One submission alleged that children detained at Woomera did not have access to the correct books, materials or teachers to practise their religious faith.<sup>75</sup> Although a former ACM staff member employed at Woomera told the Inquiry that in mid-2000 the Department provided a number of Qur'ans 'to assist with the ... spiritual development of the detainee community'.<sup>76</sup>

Nevertheless, in a few instances it seems that assistance with religious instruction was offered to detainee children. For example, child detainees at Christmas Island attended religious schools outside the detention centre. The school-aged children, all of whom were Muslim, received instruction in Islam at the local Malay Islamic School from 2 September 2002.<sup>77</sup>

The Department also states that the local Muslim Association at Port Hedland offered religious instruction classes after school to detainee children at Port Hedland. However, the offer was not taken up by the children and their families. It is not clear when that offer was made or why it was refused.<sup>78</sup>

At Curtin, the Inquiry heard that one family was receiving religious education by correspondence.<sup>79</sup>

### **(a) Findings on religious instruction**

The Inquiry finds that children in detention were not prevented from receiving religious instruction from their parents, and in some instances the Department and ACM facilitated access to religious instruction by external authorities. However, the Inquiry is concerned that children without family in detention, and especially those located in remote facilities, are at a disadvantage in accessing religious instruction. Moreover, although copies of the Qur'an were provided at Woomera in 2000, there were no religious libraries to assist the parents, nor was there evidence of the routine provision of relevant religious texts.

### **15.4.4 Religious and cultural activities in detention**

UNHCR Guidelines on Refugee Children emphasise the importance of cultural activities such as traditional music and dance, the celebration of traditional events or festivals, and sports, games and other recreational activities.<sup>80</sup>

## A last resort?

In its submission, the Department states that cultural celebrations are held in detention 'throughout the year', with voluntary participation by all detainees regardless of religion. For example, at Port Hedland:

[A]n evening concert was held on 20 December 2001. Approximately 200 detainees attended the concert, including many children. Community guests (about 20) also attended, including a local flautist who performed. Staff and residents performed. A karaoke machine was used to support a number of songs performed by ACM staff. Residents danced and performed songs in English, Arabic, Farsi, Dari and Somali. The children were presented with class awards and one class sang a Christmas carol. All the children were provided with wrapped Christmas gifts donated by the community. The concert was harmonious and the residents have requested for such events to occur again in the future. Similarly, during the Eid Al-Adha celebrations in Port Hedland, all children received a present consisting of a book or toy, depending on the age and requirement of the child and a t-shirt. The toys were selected specifically for each child by the ACM Activities Officer, using her knowledge of the children's preferences. The residents also received a choice of cake or sweets with their breakfast and a can of drink and an ice cream with their lunch.<sup>81</sup>

However, the only centre that recorded regular cultural and religious meetings between the ACM Programs Manager and detainees was Villawood.<sup>82</sup> The minutes from these meetings at Villawood in 2001 do not generally include or discuss children, although 'the children's programs organised for the detainee children' is referred to once in the context of discussion about the possible introduction of classical cultural dances and songs.<sup>83</sup> In September 2002, the Department Manager noted that there had been a Chinese Mid Autumn Festival, and guitar lessons introduced in two of the compounds, although it is unclear whether children were involved.<sup>84</sup>

As discussed more fully in Chapter 13 on Recreation, ACM staff – guards, teachers and nurses alike – have made efforts to mitigate the boredom for child detainees in detention centres. Moreover, the Inquiry heard in one submission that for the most part, it is left to detainees to provide daily cultural and religious activities for the children, 'with scarce resources and lack of motivation through depression'.<sup>85</sup> For example, a group of unaccompanied children at Woomera organised their own event:

BOY: We [unaccompanied minors] had one night with officers. We did something for officers. We made the officers dance!

INQUIRY: Traditional dance?

BOY: Yes, Afghani. They didn't want it. One boy danced and another officer with a woman also they danced.

INQUIRY: With Afghani music on a tape?

BOY: No, tabla.

INQUIRY: You had a tabla with you in the detention centre?

BOY: Somebody made it in the camp. Most of the people made things from wood. I carved from rock and I was always doing things.<sup>86</sup>

Detainees are dependent on ACM approving any such events, and for the provision of food, props and space essential for the conduct of such activities.

Hence, although there is no evidence that children were denied cultural activity, there is also little evidence of a consistent program of events at each detention centre specific to the children's culture. However, for special religious festivals, ACM and the Department have a good record of service provision, as discussed below.

### **(a) Muslim festivals**

At all detention centres, ACM made commendable efforts to accommodate the fasting month of Ramadan. During that month, Muslims are permitted to eat and drink between sunset and sunrise only. Therefore, to accommodate Ramadan, meal times needed to be changed and detainees needed to be out of the sun, as they were not permitted to drink water during the daylight hours of Ramadan.

The 2002 Ramadan menu at Port Hedland shows an effort to provide special food for different nationalities of Muslim detainees, and chips and toys for the children at the Eid al-Fitr celebration of the breaking of the fast.<sup>87</sup>

Villawood's 2001 'Ramadan Program' included rostering on a detainee Muslim cook for the month, changing of meal times and organising suitable sweets for the final Eid celebration.

At Curtin in 2001, ACM catered for Ramadan – for both Shi'a and Sunni detainees – on the advice of the WA Islamic Council.<sup>88</sup> ACM issued comprehensive operational orders regarding Ramadan to staff.<sup>89</sup> Detainees were given a special ration of yoghurt and dates during the (otherwise ordinary) evening meal, and breakfast was served from 1:30am to 3:00am. Staff rosters were modified to reflect the Ramadan daily routine, staff were given a glossary of Ramadan terminology and a seven page overview of Islam. The ACM Food Services Coordinator reminded management that:

Residents who participate in this month long fast will have to be treated with respect and tolerance during this period, as they are unaccustomed to the northwest heat and humidity. These conditions usually cause short tempers on both sides, residents and staff. Again staff are reminded to understand the importance of this occasion and accommodate the changes that occur and sometimes need to be made.<sup>90</sup>

Detainees at Curtin also participated in the 'Ashura' festival in March 2002.<sup>91</sup>

Ramadan was not as well catered for at Woomera, at least in 1999-2000.<sup>92</sup>

INQUIRY: What about preparing food in the night for Ramadan? Were you able to eat at the time that you wanted to?

BOY: Very hard. We didn't have our food on time, you know. We had the same food like always and in Ramadan you eat once a day and [it was] just some bread, some rice and that's it.<sup>93</sup>

## A last resort?

Another former detainee child told the Inquiry:

In Woomera detention centre they were searching our dongas [demountable sleeping quarters] for two reasons,...the second reason for food. They just wanted to make sure that we don't have enough food, any food around...Some of our friends were actually fasting, and they didn't want to eat it at that particular time that they wanted them to eat, and they wished to take it with them and eat it at the right time according to our religion but then they were not allowed to do that. I still wonder why they weren't allowed to.<sup>94</sup>

However, Woomera's catering for Ramadan appeared to improve.<sup>95</sup> The Inquiry met an Iraqi teenage boy later found to be a refugee, who had been detained at Woomera for three and a half months in early 2001. He told the Inquiry that those who wanted to fast could request food at a specific time. Food would be given at breaking the fast time and the remainder would be kept with the detainee until the early morning meal.<sup>96</sup>

The Inquiry heard that at the Woomera Housing Project, staff planned the 2001 Ramadan with detainees and followed their suggestions.<sup>97</sup>

However, it appears that as late as 2003, other group celebrations were not always easy to facilitate. At Baxter in February 2003, the Inquiry heard allegations that the Department did not permit detainees to conduct a group religious service for Eid Al-Adha festival, which takes place after Ramadan. Evidently the decision was subsequently changed, as not long after detainees were reporting to friends in the community that they were able to pray in a group. However, this example demonstrates that, as late as March 2003, there was not a consistent policy on large group prayer sessions across the detention centres.

### **(b) Sabian Mandaean festivals**

The Inquiry heard that the ability of Sabian Mandaean children to practise their religion was hampered by their confinement in detention centres. Their religion requires them to live near water yet most have been detained in the desert.<sup>98</sup> Even in Villawood, a Sabian Mandaean family reported that they were unable to attend an important religious ceremony (baptism in river), despite making a request to the Programs Manager well in advance.<sup>99</sup> A child in this family told the Inquiry:

We had the festival in May, and we asked them to go to baptism ... and they asked that we give them the request about one month before, and after one month they told me, 'you're not allowed to go to the festival'. Do you think this is not persecution?<sup>100</sup>

Following the refusal to attend this ceremony, ACM medical records indicate that the whole family was in a state of distress on finding that they could not attend the festival, which was the holiest day in the Sabian Mandaean religion.<sup>101</sup>

Although the reason for the refusal is unclear, this example indicates the inherent restrictions of a detention environment for religious practice by certain groups such as Sabian Mandaeans.

**(c) Christian festivals**

The Inquiry heard evidence that Christian festivals, in which non-Christian detainee children could also participate, have been facilitated in the detention centres. For example, there was a Christmas celebration in the Curtin airport hall one year, and special food was provided on Christmas Day 2002 at all centres.<sup>102</sup>

**(d) Findings on religious and cultural activities**

The Inquiry finds that the Department and ACM have facilitated general cultural activities for detainees on a few occasions, although with the exception of Villawood, there is no evidence of a consistent approach to providing activities which allow child detainees to enjoy their culture. For the most part this has been left to detainees themselves to facilitate.

However, the Inquiry finds that ACM has taken commendable measures to facilitate specific religious festivals and events in detention. For the most part, religious groups were able to hold important religious festivals such as Ramadan, and special arrangements were put in place to accommodate these.

The Inquiry notes, however, that the inherent constraints of detention meant that such activities were not as easily organised as in the outside community. Detainees must first obtain permission from the Department and ACM to hold such an event. Further, religious requirements may not always be able to be accommodated for those detained in remote desert areas; for example the Sabian Mandaean requirement for baptism in a river.

### **15.4.5 Culturally appropriate food and meal times**

The Department states that:

Detainees are able to observe religious requirements and cultural preferences in relation to food, taking into account, in an equitable way, the different ethnic and religious food sensitivities and requirements of the changing detainee populations in each immigration detention facility.<sup>103</sup>

Food is an important element of preserving the culture of children in detention. Although it is reasonable to expect strange new food in a new country, the length of children's detention risks alienating them from their food practices. Submissions to the Inquiry alleged that eating arrangements were culturally inappropriate because a child's mother is unable to cook and serve the family meal in accordance with the family's cultural practices, or even choose what time to eat. Preparing and eating food can be an important cultural practice. The importance of family cooking is implicitly recognised in the Residential Housing Project in Woomera, discussed further in Chapter 6 on Australia's Detention Policy, where detainees are able to cook for themselves.

Current and former detainees spoke about a lack of respect for their cultures, and for children this was 'most notable with the food, where the children and families are continually given food that isn't part of their regular diet'.<sup>104</sup> Many parents of

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young children in Woomera and Villawood complained to the Inquiry that the food served there was too spicy for children.

In focus groups, former detainee children who were Muslim said that they had been told that the food was halal, but they were still not sure whether this was true or not. The Inquiry did, however, observe current halal certificates in the detention centre kitchens during its visits in 2002.

ACM also states that it has in place detainee committees to advise on menus and that cooks from various ethnic groups work in the kitchens of detention centres, 'contributing to ethnically recognisable menus', although it provided no evidence of when this practice began in each centre.<sup>105</sup> The Inquiry met detainees (all adult men) who staffed the kitchen and cooked food from their cultures, with 'Afghan' menus some days and 'middle eastern' on others.<sup>106</sup> The Inquiry notes, however, that there were many different cultural groups in detention centres and the food that was appropriate to one group was not always appropriate to another. This was a cause of tension for some detainees. In Woomera in June 2002, ACM staff were about to introduce a new system where both Afghan and Iranian food would be available every day.<sup>107</sup>

As discussed above, ACM have made some efforts to provide appropriate food for detainees at religious festivals.

### **(a) Findings on food preparation and mealtimes**

Although not comparable to the cultural experience of food preparation and mealtimes which take place in normal homes in outside communities, the Inquiry finds that some efforts were made by ACM to provide culturally appropriate food prepared according to religious requirements. It also made efforts to assist detainees with special food preparation to celebrate religious festivals. However, the Inquiry is concerned that over prolonged periods of detention, the absence of family food preparation and enjoyment deprives a child of a key means of cultural identity.

## **15.4.6 Development and preservation of language in detention**

If a child's first language is not developed, especially if other aspects of culture and traditions are not practised, the child risks losing his or her cultural identity.

Amnesty International states that:

in the environment of a detention centre there are inadequate provisions for the maintenance and practice of a child's language, religion or culture. If these needs are not met this could undoubtedly have a negative impact on their social integration skills and sense of identity, which may lead to emotional problems.<sup>108</sup>

The Inquiry did not receive any evidence that children are prevented from using their own language in the detention centres. Children have an opportunity to speak and develop their language with their families and other detainees from the same language group without interference.

However, while the use of the child's mother tongue is not prohibited in detention centres, it is not facilitated either. All education classes for children, both internal and external, are conducted in English. The Department states that education classes in detention focus on learning English, since it allows them 'to learn and improve their English skills while maintaining their first language'.<sup>109</sup>

There is nothing wrong with encouraging and teaching English, especially considering that many of the children will eventually be granted a visa. However, it is important to remember that the detention environment imposes restrictions on children which make it more difficult to develop and maintain their first language outside of regular classes. For example, access to written materials in a child's first language is limited. The Inquiry inspected libraries in detention centres and noted that the majority of children's books were in English. Unlike for children in the community, there were no Saturday morning classes or distance education classes available in the children's mother tongue. Furthermore, while children accompanied by their families might be encouraged to develop their first language skills further, unaccompanied children may not receive such encouragement without special measures in place to address this.

Further, for those children who speak minority languages, the detention environment imposes some difficulties on the exercise of the right to use their mother tongue, because there may not be many people in the detention centre speaking the same language. The International Commission of Jurists' Australian Section states that:

Children from minority cultural groups in detention centres suffer disadvantages with problems in maintaining language and cultural identity. For example, Tamil children in immigration detention centres have very few people with whom they can communicate freely and with whom they share a religion. It has been reported that Tamils often feel very isolated in large detention centres such as Port Hedland and Woomera and that young Tamil boys are at risk of self-harm because of this.<sup>110</sup>

The Department states that it:

acknowledges that language is an important element of a child's identity, and it is for this reason that interpreters are provided to enable communication in languages that can be understood by detainees who do not speak English. These interpreters are available to children.<sup>111</sup>

However, while access to interpreters is an essential element in facilitating cross-cultural communication, interpreters are not employed to provide opportunities for children to practise and maintain their language and identity. They may provide an opportunity for children to speak their language on occasions, but this is not part of their job requirement. In any case, there were a number of complaints about the lack of interpreters during the period covered by this Inquiry (see section 10.4.3 in Chapter 10 on Physical Health).

The Department also notes that the use of detainees as teacher aides up to mid-2002 facilitated the children's first languages.<sup>112</sup> ACM also asserts that this measure allowed children to receive their lessons bilingually.<sup>113</sup> As discussed in Chapter 12

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on Education, there has been some positive assessment of the use of detainee teachers in classrooms who were able to interpret for some children from the same language group. However, this measure was not applied as a uniform policy to assist children maintain and further their own language skills.

### (a) Findings on language

The Inquiry finds that children in detention are not denied the right to use their first language. However, it also notes that there are no measures in place to actively facilitate the maintenance and development of this language. They do not have access to written materials or language schools, and are therefore reliant on practising and developing their language with their families and other detainees. This situation may be of concern in particular for unaccompanied children and children from minority languages who either may not have family support for language learning or have limited opportunities to maintain and develop their language with other detainees.

### 15.4.7 Prevention of interference in children's right to practise their religion in detention

The Department has an obligation to both facilitate opportunities to practise religion and prevent interference by others.

The Inquiry did not receive any substantial evidence that staff in the detention centres deliberately interfered in children's right to practise their religion. Therefore, this section examines whether there was any interference from other detainees and visiting clergy.

### (a) Interference from other detainees

Religious differences amongst detainees appear to have had a negative impact on some children's lives in detention centres. A community service provider working with former detainees told the Inquiry of the effect of detention on religious tensions:

There are conflicting groups forced into close proximity with each other that leads to tensions. ... Religious tensions that may have caused people to flee in the first place are part of everyday life in the detention centres.<sup>114</sup>

The Inquiry heard that children in particular are affected by religious tensions in detention:

Children in detention suffer religious discrimination from other children, which is a replication of the discrimination they faced in their home countries, which caused their parents to flee. The exposure of children to the religious tensions of their home countries has a significant detrimental impact on general and religious development. Sabian Mandaean [children] reported ongoing discrimination in the centre from non-Sabian children. This was a significant issue for all children of this faith.<sup>115</sup>

The Sabian Mandaean Association generally raised the long-standing persecution of Sabian Mandaeans by Muslims, often the very reason why Sabian Mandaeans sought asylum in Australia in the first place.<sup>116</sup>

The Inquiry heard that at Woomera, children were 'fearful of others in the compounds that [practise] different faiths'.<sup>117</sup> A Christian mother reported to the South Australian child protection agency that she was:

persecuted by Muslims in the detention centre because of her religious beliefs. They view her as unclean and she was assaulted by a Muslim detainee when she tried to pass food to him while she was working in the detention centre kitchen.<sup>118</sup>

Although the Inquiry heard no allegations of Christian children not being able to worship, the South Australian Family and Youth Services (FAYS, within the Department of Human Services) reported that 'the additional stress of being part of a distinct minority in the detention centre and having an ongoing sense of rejection and persecution heightens the risks' for two Christian boys at Woomera in 2002.<sup>119</sup> FAYS reported that the brothers aged 17 and 13 years old:

were immovable in their belief that they were being persecuted because of their religious group. ... The persecution theme has been reinforced in many ways both in the Detention Centre and in transition to Australia. The boys recounted an incident on the boat where one of them drank water blessed by the largely Muslim 'passengers' and although water was a scarce commodity it was poured into the seas because of contamination by a Christian.<sup>120</sup>

When the Inquiry visited Curtin, Port Hedland and Woomera, Sabian Mandaean families complained about their treatment at the hands of some Muslim detainees housed in the same compounds. As well as physical assaults, Sabian Mandaean families complained of verbal abuse (being called 'untouchable' and 'unclean'). In its submission to the Inquiry, the Sabian Mandaean Association said that:

Situations where there are very few Mandaean children and a large number of Muslim children have resulted in the prevalence of severe forms of bullying ... Often, Mandaean children ... find that the playground of the place wherein they are incarcerated is essentially no different in the treatment it affords them from the playgrounds of the countries they have escaped. Often, also, there are only Muslim children to play with and as this is itself unpalatable to Muslim children of extremist parents, Mandaean children are physically and emotionally secluded within detention.<sup>121</sup>

A priest who visited Woomera regularly said that Sabian Mandaean children at Woomera:

are constantly subjected to verbal harassment by both adults and peers. Sometimes it happens that [Mandaean] children and Muslim children develop a friendship. On these occasions, it is not uncommon for the Muslim child to be instructed by his or her parents to inform the [Mandaean] child that the [Mandaean] is not to touch the Muslim, nor to share food, or to be in

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any sort of contact, as this would render the Muslim child 'unclean'. This has a serious psychological impact on the [Mandaean] child, amounting substantially to persecution.<sup>122</sup>

The Inquiry heard of a Sabian Mandaean mother at Woomera who had attempted to modify her normal behaviour in order to assimilate with Muslim families, but it was unsuccessful.<sup>123</sup> She and her children felt so harassed that ACM eventually moved them to a different compound for their own safety. The South Australian Department of Human Services commented on a Sabian Mandaean family detained at Woomera as follows:

An Iranian family reports that they are ostracised/persecuted within the centre because they belong to John the Baptist Church. The family report that the children are called names, pushed around and taunted. The parents are not accepted by 'social groups' in camp because they are considered 'dirty, unclean because (they) aren't Muslim'. Other detainees won't eat with the family in the shared food hall.<sup>124</sup>

In February 2003, the Department stated that it 'takes all claims of discrimination and persecution very seriously and investigates all such allegations'.<sup>125</sup> This is reiterated in its response to the first draft of this report.<sup>126</sup>

Evidence before the Inquiry indicates two identifiable measures undertaken by the Department and ACM to prevent such interference and bullying on religious grounds.

Firstly, the Department states that it has in place a complaints mechanism, which allows detainees to raise issues or concern with ACM and the Department.<sup>127</sup> In the case of the allegations of religious interference and harassment it emphasises that:

Many of the allegations referred to were not brought to the attention of either the services provider or the department at the time they are alleged to have occurred by those involved. Where allegations have been subsequently been brought to the attention of the department and the services provider, through third parties, these have been thoroughly investigated where there has been sufficient evidence for this to occur. The police have been requested to investigate numerous allegations but, to date, there has been insufficient evidence on which to lay charges.<sup>128</sup>

Secondly, the Department demonstrates that it took such allegations seriously by offering separate accommodation to Sabian Madaeans on several occasions. The Department offered the Sabian Madaeans at Port Hedland an opportunity to move to another compound and went as far as putting in phones there, but the offers were regularly refused. Sabian Mandaean detainees at Port Hedland told the Inquiry that they did not want to be separated like this as it would mean that they were even further isolated from facilities, and this would be difficult for the children to accept.<sup>129</sup> However, the Inquiry heard that at Port Hedland there was one instance where Sabian Madaeans agreed to be housed separately because the situation became dangerous:

They were threatened with death, basically, and they couldn't really bear being there for very long because they already felt they were being punished,

and now they were punished even further [by being isolated] for being persecuted on top of that. Although they are being persecuted in detention, they are getting statements by the government saying, well, no, we don't accept that you are persecuted back home, even though you are being persecuted here in detention, and we are refusing to acknowledge that. So their situation, as you can imagine, is dismal in the extreme.<sup>130</sup>

In this case, the Department states, local police were called to attend the centre to speak to all parties concerned. However, insufficient evidence was found on which to pursue charges.<sup>131</sup>

In September 2002, the Department took action to protect Sabian Mandaean detainees by reserving a compound at the newly-commissioned Baxter facility exclusively for them. Some families stated that they felt safe for the first time. A young detainee told the Inquiry:

We are twelve families that we have been separated from the other camp because we are all minorities ... and the Muslim people told us that we were dirty and did not want to touch anything that we touched. So, we wrote a letter and complained and it is better now than what it was before. They don't bother us any more.<sup>132</sup>

The fact that such drastic measures needed to be implemented to protect those families demonstrates the serious impact which religious tension can have on their sense of safety and well-being within the detention environment.

Neither the Department nor ACM provided any detailed evidence of other preventative measures undertaken to protect children from harassment and interference in detention centres regarding religion. Possible preventative measures could have included: educational programs for children focussing on the importance of tolerance; inviting religious leaders to address the problem; and developing specific training for detainees and staff setting out how to treat people of different religions and the consequences of the failure to do so under Australian law. The absence of positive reinforcement as to a child's right to practise his or her religion, and the right not to be harassed, may partly explain the fact that relatively few complaints were brought to the attention of the Department and ACM by detainees.

### **(b) Interference from visiting clergy**

The Inquiry heard allegations from community groups about interference in children's right to practise their religion freely, in the form of visiting clergy performing conversions to Christianity on Muslim children.

The Lebanese Muslims Association told the Inquiry that:

the presence of people who are actively converting Muslims to Christianity in the IDCs also makes it difficult for parents to maintain and transmit their own religion to their children. The pressure to convert is increased by the notion that it might increase peoples' chances of success in applying for refugee status. Children are not excluded from [being] proselytised to and this also mitigates against the preservation of their original religion and culture, breaching the Convention of the Rights of the Child.<sup>133</sup>

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Its submission also claimed that the Mufti of Australia was refused entry to the Villawood detention centre by the Minister on the grounds that this could be seen as proselytising:

[Staff said that the request for access] was referred to DIMA who referred it to Canberra – apparently they did not have the authority to make a decision without referring the matter to the minister. The answer came later that they could not allow the Mufti to make an official visit as this could be seen as proselytising. It would seem that the Minister on this occasion was not prepared to allow Muslim detainees the 'solace' of their own religion. Yet on other occasions such as [on] the Radio National 'Religion Report' he seems to support similar efforts by Christian clerics. This contravenes the prohibition against discrimination on religious grounds in the Convention on the Rights of the Child, the Refugee Convention and Australian law.<sup>134</sup>

The Inquiry was not provided with further evidence concerning this allegation, and therefore makes no conclusions as to its truth.

Additionally, the Inquiry heard no direct evidence from current or former detainees of visiting Christian clergy trying to convert children. In the case of the remote detention centres, a local nun or priest were detainees' only visitors and provided support and someone to talk to, regardless of their respective faiths. Neither did the Inquiry receive any evidence that Muslim clergy were trying to convert non-Muslim detainees.

The Inquiry did hear that a number of baptisms have been performed on adult detainees who were formerly Muslim but the evidence suggests that the conversions were at the detainees' request.

### **(c) Findings on protection from interference in children's religion**

The Inquiry finds that some children in detention have felt threatened, both verbally and physically, by other detainees because of their religious beliefs. This can have a direct impact on a child's ability to practise their religion freely.

The Inquiry finds that the Department and ACM took action to protect children from interference with religion, on some occasions, by investigating complaints and offering separate accommodation. However, they were unable to ensure complete protection from such treatment at all times.

The tension between Muslim and Sabian Mandaean families, for example, appears to have reached such heights that it could only be solved by putting the two groups in separate and secure compounds, as occurred in Baxter in late 2002. While better education on the need for tolerance would be a preferable way of preventing the issue at the outset, the Inquiry acknowledges that this measure solved the immediate problems facing the Sabian Mandaean families at that time.

These issues highlight the inherent difficulties of detention, where people of different cultural and religious backgrounds are forced to live together in a confined space. The problems are exacerbated by the fact that some religious minorities may be

forced to live alongside members of a group whose religious affiliation may have prompted flight from their home countries.

#### **15.4.8 Cultural awareness and sensitivity of detention staff**

In addition to protecting detainees from interference from other detainees, the Department and ACM must ensure that staff treat children with respect and encourage tolerance and understanding of diverse cultures.

As outlined in the Department's policy, all staff at detention centres are expected to have an understanding and appreciation of the diversity and cultural backgrounds of detainees, as well as the ability to effectively communicate and work with detainees of a diversity of backgrounds.

##### **(a) Cultural sensitivity of staff**

The Inquiry heard mixed reports about the cultural sensitivity of detention staff.

ACM provided a list of over 136 staff members who spoke languages ranging across 49 cultures, some of them relevant to the backgrounds of detainees.<sup>135</sup> The list was not specific as to when, where and for how long these staff members were employed. However, it does suggest that there were some efforts to promote cultural diversity in its workforce. This cultural diversity may have had some positive impact on cultural sensitivity towards detainees.

There were some indications that gradual efforts were made to improve cultural sensitivity over the period covered by the Inquiry. For example, in mid-2000 the Department's Manager reported to Canberra:

Good progress in arranging facilities for Shi'ite Muslims, but need further cultural training on other religion and sects.<sup>136</sup>

By the first quarter of 2001, he reported:

Improved sensitivity shown towards residents by ACM staff. For specific religious occasions arrangements made in consultation with the residents, eg. playing of prayer through the loudspeaker has been arranged for special occasions. An issue remains the presence of an Imam, but it will not be resolved by ACM acting in isolation.<sup>137</sup>

Further, he acknowledged:

the progress at Woomera with respect to social interaction, and in particular the presentation of the Samoan Cultural night by Sierra detainees which is one of many examples of positive social interaction.<sup>138</sup>

On the other hand, other evidence indicated a lack of cultural sensitivity on the part of certain ACM officers, which hurt the feelings of child detainees.

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For example, a psychologist employed at Woomera in 2002 told the Inquiry that while some staff were kind and helpful, others were disrespectful of religion:

While some officers sincerely and helpfully responded to detainees, other officers and staff displayed a lack of understanding towards detainees. For example during one religious ceremony an officer said in response to my query 'oh that is just some stupid mourning thing they do'. I noted an officer going through the clothes of a Muslim woman while her husband objected. The officer ignored his concern. There was a pervasive attribution of the distress that they exhibited as being due to 'their culture'.<sup>139</sup>

A former Department Manager at Woomera told the Inquiry that some nursing staff 'exhibited racist attitudes' and:

Some staff, having often come from a prison background, did approach detainees in a way that I thought lacked sensitivity and understanding. ACM management locally did deal with this issue by removing some staff and introducing training programs. However, later some of these staff were returned to [Woomera] by ACM Sydney.<sup>140</sup>

A former ACM health staff member at Woomera believed that her colleagues were racist:

I'm sorry, I've worked [all over] this country, I love working with people but in Woomera I hated everything, I just hated it because I found the [nurses] racist, I found the people careless, irresponsible and unprofessional. I will never, ever forget this experience.<sup>141</sup>

Notwithstanding whether certain staff members displayed cultural insensitivity to children directly, to their parents or to their group in general, it appears the children witnessed such behaviour. A child psychiatrist who has treated detainee children told the Inquiry:

The intimidation I think – I mean, the families reported to me – and this is obviously their report – intimidation of the children in calling them 'towel heads, little terrorists'. A mother asking for some new head gear for her daughter has been told, 'why don't you make it out of the curtains?' I mean a systematic kind of undermining and insulting of the parents and of the children.<sup>142</sup>

A nurse employed at Woomera in 2000 stated:

I've seen and heard guards laughing at the pain and suffering of the people imprisoned in Woomera. Singing to the Iraqis who have had a rejection, 'I'm leaving on a jet plane, goin' back to see Saddam Hussein'. Witnessed the guard making a detainee beg for soap. No English did this woman speak, she had learnt the word soap from someone. To the guard she said, 'soap'. The soap was proffered and withdrawn when she reached for it, again and again until she said 'please'. I watched these poor women in their purdahs, cringe in shame as we forced them to abandon every cultural sensitivity they had and attend a mixed clinic, sit in a room with men and then have to ask for sanitary products. They would stuff them under their abeyahs or

jumpers and scurry heads down, shame emanating, to the puerile little boxes we provided for them to sleep in.<sup>143</sup>

A former detainee at Curtin described ACM harassment during a detainee protest there on 8-9 June 2000, alleging that they 'heaped curses and indecent words on us like "You are terrorists", "You are Islamic terrorists" '.<sup>144</sup>

While these individual allegations have not been tested by the Inquiry, the number of complaints reproduced in submissions made to the Inquiry concerning the cultural insensitivity of officers towards families in detention seem to indicate more than an occasional instance.

### **(b) Cultural training**

The Inquiry considers that in the detention environment comprehensive staff training in cultural awareness and understanding is essential to ensure that children and their families are treated with respect.

Some guidance on how to achieve this was submitted to the Inquiry by the Melbourne International Health and Justice Group. The submission suggested that in order to be 'culturally competent',<sup>145</sup> staff need to have an understanding of detainees' culture, and speak the detainees' language or use a trained interpreter.<sup>146</sup> They should also be confident in encouraging detainee children to maintain their knowledge and pride in their own cultures. Importantly, to develop and maintain cultural competence at an organisational level it is necessary to have procedures in place for regular and effective cross-cultural training, preferably at an accredited course, and mechanisms to ensure that detention officers and other staff do not react to detainees in a negative or racist manner.

The evidence of cultural training presented to the Inquiry does not suggest that cultural training was comprehensive, consistent and effective over the period of time covered by the Inquiry.

In November 2001, the Inquiry notes that a meeting between the Department and ACM discussed cross-cultural training of staff across all detention centres:

ACM noted that they have incorporated cross cultural training into their Detention Officer training. Other ACM measures include sending information on the subject to officers and requesting Muslim officers to explain the significance of important parts of their culture to fellow officers. [The Departmental representative] noted that on the training course she conducted recently trainees had a vague awareness of the Koran but did not know what it looked like or its significance. ACM assured DIMIA that Cross Cultural training was now a major part of the training package.<sup>147</sup>

In its response to the draft of this report, ACM stated that it has provided training to staff in cultural awareness since the commencement of the contract in 1999. Modules include 'Culture and Diversity', 'Cultural Differences and Cross Cultural Communication' and 'Cross Cultural Communication'. The Inquiry is concerned

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that some aspects of the modules may be culturally insensitive, especially if not explained further or discussed in face-to-face training. For example, Module 2 on Culture and Diversity first states the dangers of stereotyping and then suggests that many Muslim men find it difficult to deal with women in positions of authority, and that it 'suits men of this culture to affect superiority over women' even though this has no basis in the Qur'an.<sup>148</sup> The Inquiry did not receive evidence of how these written modules were delivered, who conducted the training, whether the training covered all staff in all detention centres, or how often the training occurred.

The Department provided the Inquiry with a copy of a resource kit dated December 2001 and entitled *Cultural Diversity in Immigration Detention Facilities*<sup>149</sup> which it states was intended as background information for Department and ACM officials. The Department states that it was also distributed as part of cross-cultural induction training of ACM officers.<sup>150</sup>

The resource kit contains information on the most common nationalities and religions amongst detainees. There is a page or two on each nationality and several pages on religions and religious practices. The Inquiry notes that while some information contained in the kit appears useful,<sup>151</sup> some of the information appears inadequately targeted to the detainee population. For example, under 'Afghanistan', there is no explanation that the majority of the Afghan detainees are from the Hazara minority or its significance. Similarly, the information provided on Iran, under 'Religions', makes no mention of the Sabian Mandaean religion, despite its followers comprising a significant proportion of Iranian detainees. The Department has since informed the Inquiry that the resource kit has been updated with information about the Sabian Mandaean faith.<sup>152</sup>

The Department's submission states that all detention officers are required to attend cultural awareness training conducted by refugee specialists.<sup>153</sup> The Department also states that the training program for its Managers and Deputy Managers at the detention centres includes cultural awareness training, and each manager receives an information package on cultural diversity in detention centres.<sup>154</sup> In addition, the Department provided some briefing notes for detention officers (ACM guards) including a section on National and Cultural Backgrounds.<sup>155</sup> However, while this information is current as at April 2003, the Inquiry did not receive information regarding when this training commenced, how often it took place or whether it took place at all centres.

Further evidence on training is provided by the Minister's announcement to Parliament in late August 2002 that ACM guards received:

- approximately 30 hours on cultural diversity issues pre-service ('Module 6: Multicultural Awareness');
- refresher training and support material supplied regarding new cultural groups;
- ongoing assessment including on the job training and performance monitoring.<sup>156</sup>

The Minister also said that all ACM staff (not just guards) received induction training including a two-hour topic on 'Multicultural Understanding' which covered:

communication skills, cultural values (including facial expressions, gender roles, touching, greetings, food/diet), barriers to communication, prejudice, racial humour, stereotyping, privacy, effective communication strategies and use of interpreters.<sup>157</sup>

Hence, it appears that some cross-cultural training was being provided to staff at detention centres at various stages during the period covered by the Inquiry. However, the relationship between the various training programs mentioned above is unclear, if indeed they refer to the same training.

The Inquiry also received a number of comments from staff and former staff suggesting that the training either did not occur consistently over the period of time covered by the Inquiry, or that it was inadequately delivered.

When the Inquiry asked former ACM staff what cross-cultural training they had received, one man employed as an Activities Officer at Woomera during 2000 said that staff were shown training videos:

The videos were about:

- not being too friendly and getting emotionally involved with 'inmates' (criminals) which we had to translate to detainees;
- the dangers of detainees obtaining anything they could make weapons from;
- general 'management' of difficult clients.

So, they were not about children and family groups, they were about violent male criminal prisoners, and how to deal with them. If anything, this just shows how little consideration was given to the welfare of families in Woomera.<sup>158</sup>

Some comments to the Inquiry were critical of the effectiveness of ACM's induction training, suggesting that the cultural component was either non-existent or of limited effect.

A teacher who worked at Port Hedland in 2001-2002 said:

I never heard anything about cultural awareness or understanding ... or religious instruction of children. The first day I started working there they just told me about how dangerous and manipulating 'these people' can be and what to do when a riot etc. starts. When I started teaching, I was neither mentally prepared at all for the traumatised children and adults nor did I know anything about their political or religious situation in their countries. I even had to find out myself where everyone was from. And I even was not supposed to know anything about them. Share no private information was one rule.<sup>159</sup>

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A teacher who worked at Port Hedland in 2001 said:

I received a 30 minute induction on arrival to Port Hedland IRPC. Nothing about culture, religion or this manual you mentioned. Induction largely dealt with what to do in a hostage situation and how important my keys were. Nothing to do with race, nationality, religion, refugee issues or cultural sensitivity ...<sup>160</sup>

A former ACM teacher who attended induction training sessions at Woomera in October 2000 and March 2001 said that there was nothing presented on 'multicultural understanding', although he believed that later induction training sessions did include such a topic.<sup>161</sup>

A nurse who worked at Woomera in 2000 said that some nursing staff spoke to interpreters to inform themselves about cultural issues:

Our very kind detainee interpreters informed us on how we should approach cultural issues esp. with treating women. It was very difficult to address certain issues in that close-knit environment.<sup>162</sup>

Even in 2002, it was evident that cultural awareness training was not conducted regularly. Reporting on ACM's performance, the Department Manager at Curtin said in July, August and September 2002 that he was 'not aware of any cultural awareness training having taken place for some months'.<sup>163</sup>

At Port Hedland in June 2002, staff told the Inquiry that they had no knowledge of what detainees had been through to get to Australia or about the persecution the detainees had faced at home. They reported a lack of training on how to treat detainee children but said they were instructed to treat detainees the way they would want to be treated.

At Woomera in June 2002, ACM nurses said there was no cultural training and that everything they learned was through the detainees.<sup>164</sup>

While it is clear some cultural training did take place, and that materials had been prepared, on the basis of evidence before the Inquiry it does not appear to have comprehensively covered all staff or to have been effectively delivered at all times during the period covered by the Inquiry.

### **(c) Findings on cultural sensitivity and training of staff**

The Inquiry finds that many current and former detention centre staff who gave evidence to the Inquiry exhibited a caring and culturally sensitive attitude towards detainees.

Nonetheless, there have been a number of allegations that detainees have been treated without respect. While the Inquiry recognises that it is difficult to guarantee that all staff will treat detainees in a culturally sensitive manner, the Department and ACM are responsible for making every effort to ensure that children and their families are treated with respect and are encouraged to participate in cultural and religious life.

Comprehensive training is a key mechanism to ensuring the cultural sensitivity of staff. While there have been some efforts to institute cross-cultural training as part of the staff induction training, the Inquiry has received insufficient evidence to conclude that cultural training has been regular and effective over the period covered by the Inquiry.

The issue of cultural training in the context of health staff, and the impact that it has on health care, is discussed in Chapter 10 on Physical Health.

### **15.5 Summary of findings regarding the right to religion, culture and language in detention**

The Inquiry finds no breach of articles 2(2), 8(1), 14, or 30 of the CRC concerning children's right to enjoy their religion, culture and language in immigration detention.

The threshold for compliance with article 30 is that children are 'not to be denied' the right to practise their religion, culture and language. Thus Australia's primary obligation under article 30 is to respect a child's right to engage in those practices. Articles 14(1) and article 8(1) impose an obligation to respect freedom of religion and a child's right to preserve identity and article 22(1) requires Australia to take appropriate measures to ensure that asylum-seeking children enjoy those rights. The evidence available to the Inquiry suggests that the Department took the following steps to ensure that those rights were respected within the detention context.

In most centres there was space set aside for public prayers and services. Children could engage in prayer in those facilities or in their private accommodation, albeit sometimes in cramped conditions. Outside clergy were generally permitted access to the detention centres and detainees were free to appoint their own representatives to conduct religious services. In some cases the Department and ACM organised religious instruction. In any event, parents were permitted to engage in the religious instruction of their children and on some occasions were provided with the appropriate religious texts.

The Department and ACM facilitated certain special cultural events and Muslim and Christian religious festivals. There have also been measures to provide food which is culturally and religiously acceptable. In terms of language, detainee children were not denied the right to use their own language with their families and other detainees.

While the Inquiry finds that the Department generally respected the right of children to identify with their culture, language and religion, it is concerned that some children in immigration detention have felt unsafe due to fears of bullying and harassments on the grounds of their religious beliefs.

Article 2(2) of the CRC requires the Commonwealth to take 'all appropriate measures to ensure that a child is protected from all forms of discrimination'. Immigration detention centres bring different groups into close contact with each other to an extent that does not occur in the outside community. The close environment can

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exacerbate pre-existing tensions between different groups causing behaviour that may amount to discrimination.

The Department has taken some general measures to try to protect families from discrimination and harassment by other detainees on religious grounds. When allegations of assault were brought to its attention, the police were notified for the purposes of investigating the allegations. The Department also offered separate accommodation to Sabian Mandaean families to protect them from the alleged harassment in September 2002 in the Baxter facility.

The Inquiry acknowledges that the placement of Sabian Mandaean families in a separate compound at Baxter resolved many of the issues facing that group of people at that time. However, the Inquiry is concerned that the situation reached the point where such drastic measures had to be pursued. The Inquiry has not seen any evidence of a more comprehensive preventative approach to discrimination and harassment, which may have included educational programs for child and adult detainees, promoting tolerance and respect and advising detainees of the law in this regard.

The Inquiry acknowledges that many detention staff have exhibited a caring and culturally sensitive attitude towards children in detention. While the Inquiry has not found evidence of systemic disrespect by detention staff, there have been some allegations of insensitive treatment. The Inquiry is of the view that there has been insufficient cultural awareness training for most staff members working inside detention facilities over the period of time covered by the Inquiry.

While the Inquiry is of the view that there could have been greater efforts to alleviate the cultural and religious tensions within detention facilities, the evidence before the Inquiry does not support a finding of breach of article 2(2).

A more comprehensive and effective training program would have assisted in ensuring that children in detention were treated with the appropriate respect and dignity required by article 37(c) of the CRC. However, the Inquiry accepts that compliance with the JDL Rules generally suggests compliance with article 37(c) and finds that the provisions made regarding culture, religion and language in detention centres are largely in accordance with the JDL Rules. This issue is discussed further in Chapter 17, Major Findings and Recommendations.

While the Inquiry finds that neither the Department nor ACM denied children the right to religion, culture and language, the Inquiry is of the view that the legislation requiring the detention of children, often long term, places inappropriate fetters on the free and full exercise of those rights. This impacts on an assessment of article 6(2) which requires Australia 'to ensure to the maximum extent possible' a child's development. It also affects an assessment as to whether the detention policy as a whole and the Department's decisions regarding the location of children in detention have properly taken into account the best interests of the child in accordance with article 3(1). This is also discussed in Chapter 17.

The deprivation of liberty places a physical barrier between children and churches, mosques, clergy, religious schools, language schools, cultural centres, culturally appropriate foods and so on. The detention of children in remote areas makes access to those facilities even more challenging. For example, although clergy may not generally be prevented from visiting children in remote facilities, they are much less likely to make pastoral visits to children in these facilities due to the distances. Similarly, the likelihood of being able to access local religious schools or the relevant cultural community is greatly reduced in remote and rural areas. Furthermore, some religious requirements are location-specific, for example the Sabian Mandaean requirement to be able to visit a river at certain times. These factors have been particularly problematic for children from Muslim and Sabian Mandaean religions.

The detention of children in remote facilities has an especially serious impact on unaccompanied children who do not have the cultural and religious reference points that accompanied children have through their families. For unaccompanied children, contact with the outside world through clergy, cultural groups or outside family may be of vital importance for the maintenance of their cultural identity.

Furthermore, children from minority groups which are not widely represented in the detainee community face greater hurdles. For example, the maintenance and development of a child's first language relies on outside contact or specific language assistance. The latter has not been provided within detention centres and the former may be compromised by detention in remote areas.

The problems caused by the restricted environment of detention and the location of the detention centres are exacerbated by the length of time in detention. Thus certain restrictions which may seem minor at the outset, escalate in importance for children over time. For example, if a child is in detention for a short period without a visit from the clergy, or without religious instruction, or without access to culturally-specific community groups that help give a child a sense of identity, this may not be of great concern. However, when a child is in detention for months or years, all these factors have a greater impact. Similarly, the inability of parents to prepare and pass on the skills of preparing culturally appropriate family meals may not be serious in the short term, but in the long term it can affect a child's ability to maintain his or her cultural identity.

Further, the placement of different religious groups, often with a history of antagonism towards each other, in a closed detention environment, increases the likelihood that children will feel unsafe.

While these issues do not of themselves lead the Inquiry to conclude that the rights of children have been breached, they reinforce the Inquiry's overall concern that a failure to ensure that children are detained as a matter of last resort and for the shortest appropriate period, in accordance with article 37(b), can have a serious impact upon the enjoyment by children of their fundamental rights.

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### Endnotes

- 1 UN Human Rights Committee (HRC), *General Comment 23*, UN Doc HRI\GEN\1\Rev.1 at 38, 8 April 1994, para 6.1. The Committee on the Rights of the Child has made a number of recommendations that State Parties take positive measures to allow children to enjoy their rights under article 30.
- 2 United Nations Children's Fund (UNICEF), *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF Implementation Handbook), United Nations Publications, Geneva, 2002, p455.
- 3 Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR) also guarantees the right to freedom of thought, conscience and religion, subject to the same limitations as article 14 of the CRC.
- 4 Australia has also committed to take measures to eliminate racial discrimination in all its forms under the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD), and has agreed to comply with the *Declaration on Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, which prohibits discrimination on the grounds of religion or belief in particular.
- 5 See HRC, *General Comment 23*, 8 April 1994, para 5.3.
- 6 UNICEF, *Implementation Handbook*, 2002, p459; UNHCR, *Refugee Children, Guidelines on Protection and Care* (UNHCR Guidelines on Refugee Children), Geneva, 1994, ch 3.
- 7 UNICEF *Implementation Handbook*, 2002, p125.
- 8 UNHCR Guidelines on Refugee Children, ch 3, III.
- 9 UNHCR Guidelines on Refugee Children, ch 3, III.
- 10 Parents can include '... where applicable, members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child ...', CRC, article 5.
- 11 CRC, article 30. See also, ICCPR articles 18(1) and 27; *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, article 1(1).
- 12 HRC, *General Comment 22*, Article 18, UN Doc HRI\GEN\1\Rev.1 at 35, 30 July 1993, para 8.
- 13 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the JDL Rules), rule 48. See also HREOC, *Immigration Detention Guidelines*, para 5.1 and 5.2. See also *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, article 6; *United Nations Standard Minimum Rules for the Treatment of Prisoners*, rules 41 and 42; UNHCR, *UNHCR Revised Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, Geneva, 1999, guideline 10 (viii).
- 14 Note that the word 'culture' in article 31 is used more in its artistic sense, unlike the word 'culture' in article 30. UNICEF *Implementation Handbook* (2002), p465. Chapter 13 on Recreation discusses the right to recreation activities and cultural life.
- 15 See section 3.5.5 of Chapter 3, *Setting the Scene* for more details.
- 16 DIMIA, Submission 185, p45. Other languages spoken by detainees reflect the non-asylum seeker detainee population, for example, Thai, Korean.
- 17 This is despite the fact that the vast majority of Afghans in Afghanistan are of the Sunni faith. The difference is that in Australian detention centres, most Afghan children have been of the Hazara ethnic minority, who are also a religious minority (Shi'a, rather than Sunni).
- 18 Although Sunnis constitute about 90 per cent of the Muslims in the world, Iran and Iraq both have a Shi'a majority. In Afghanistan there are pockets of Shi'a, the main group being the Hazara ethnic group. 77.5 per cent of the detained Afghan children from 1999 to 2002 were Hazara. See section 3.5.5 in Chapter 3, *Setting the Scene* for further information.
- 19 The Sabian Mandaean faith is an ancient Gnostic religion predating Judaism, Islam and Christianity. Its essential religious rituals include marriages and river baptisms. The majority of Sabian Mandaeans live in Iraq (30,000-35,000) and about 5000 live in Iran. As Sabian Mandaeans have remained unmixed with any other race or religion for thousands of years, scholars consider them as both a religion and an ethnicity. The Sabian Mandaean community in Australia is concentrated in Sydney.
- 20 DIMIA, Submission 185, p44.
- 21 DIMIA, Submission 185, pp46, 47.
- 22 DIMIA, Submission 185, p44.
- 23 DIMIA, Submission 185, p44.

- 24 IDS, 1998, [http://www.immi.gov.au/detention/det\\_standards.htm](http://www.immi.gov.au/detention/det_standards.htm). These are the IDS in force over the period under examination in this report.
- 25 IDS, 1998, para 4.2.
- 26 IDS, 1998, para 10.1.
- 27 IDS, 1998, para 10.2.
- 28 DIMIA, Submission 185, p44.
- 29 IDS, 1998, para 2.2.
- 30 IDS, 1998, para 8.4.1.
- 31 IDS, 1998, para 6.2.3.
- 32 IDS, 1998, para 6.1.1.
- 33 IDS, 1998, para 2.3.
- 34 IDS, 1998, para 2.4.
- 35 ACM, Policy 15.1, Religious and Pastoral Care, Issue 5, 26 March 2002, para 1.1.
- 36 ACM, Policy 15.1 is replicated in ACM Woomera Procedure 15.01, 16 November 2001, and ACM Villawood Procedure 15.01, 7 October 2001, (N1, Q15, F16).
- 37 ACM, Policy 19.10, Detainee Privacy, Issue 1, 30 May 2002, para 5.5.
- 38 ACM, Policy 10.22, Centre Searching, Issue 5, 23 November 2001, para 4.4.
- 39 ACM Woomera IRPC Detainee Induction Booklet: Welcome to Woomera. 1 February 2001. However, its contents are clearly intended for ACM staff as the front cover is marked 'Not for Release to External Agencies or Detainees'.
- 40 Inquiry telephone conversation with Michael Hall, former ACM Health Services Manager at Curtin from 2000-2002, 7 May 2003.
- 41 DIMIA, Submission 185, p46.
- 42 Former detainee mother interviewed in April 2002, in Diversity Directions, Submission 149, p19.
- 43 Inquiry, Focus group, with Afghan unaccompanied children, discussing Woomera, Melbourne, May 2002.
- 44 Teenage refugee girl, NSW Commission for Children and Young People, Submission 258, p53.
- 45 Lebanese Muslims Association, Submission 123, p3.
- 46 NSW Commission for Children and Young People, Submission 258, p53. Detention centre not named.
- 47 Inquiry, Notes from visit, Curtin, June 2002.
- 48 Rev Andrew Ford, Submission 296, p1.
- 49 Inquiry, Notes from visit, Port Hedland, June 2002.
- 50 DIMIA, Services, amenities and facilities at Maribyrnong IDC, at [http://www.minister.immi.gov.au/borders/centres/mari\\_irpc.htm#services](http://www.minister.immi.gov.au/borders/centres/mari_irpc.htm#services), viewed 21 November 2003.
- 51 DIMIA, Detention Centres – Woomera Immigration Reception and Processing Centre (IRPC), at [http://www.minister.immi.gov.au/borders/centres/woomera\\_irpc.htm](http://www.minister.immi.gov.au/borders/centres/woomera_irpc.htm), viewed 21 November 2003.
- 52 Inquiry, Interview with Shi'a detainee family, Woomera, June 2002.
- 53 Kirsti Abbott, Submission 15, p3.
- 54 DIMIA Christmas Island, Manager Reports, August 2002, September 2002 (N4, Q1, F1).
- 55 DIMIA, Submission 185, p46.
- 56 ACM Villawood, Church Timetable, undated, (N1, Q15, F16). See also DIMIA, Services, amenities and facilities at Villawood IDC, at [http://www.minister.immi.gov.au/borders/centres/villawood\\_irpc.htm#services](http://www.minister.immi.gov.au/borders/centres/villawood_irpc.htm#services), viewed 21 November 2003.
- 57 Inquiry telephone conversation, August 2002. However, the Muslim Women's National Network of Australia met with members of the Immigration Detention Advisory Group on 4 March 2002 to request that a Shi'a Imam be permitted to visit VIDC regularly and conduct Friday congregational prayers, since, at the time, there was no visiting Imam. See Muslim Women's National Network of Australia, Submission 54, p9. The Inquiry also received a submission alleging that the Mufti of Australia was refused a visit to Villawood detention centre by the Minister, Lebanese Muslims Association, Submission 123.
- 58 DIMIA Villawood, Manager Report, September 2002, (N4, Q1, F1).
- 59 Inquiry, Focus group, with Afghan unaccompanied children discussing Woomera, Melbourne, May 2002.
- 60 Patrol Minister in the Kimberley, Uniting Church in Australia, Letter to ACM Curtin Welfare Officer, 24 June 2002, (N1, Q15, F16).
- 61 DIMIA Curtin, Manager Reports, July 2002, August 2002, (N4, Q1, F1).
- 62 Rev Andrew Ford, Submission 296, p1. Rev Ford paid pastoral visits to detainees at Curtin IRPC between October 2001 and August 2002. The Department, noting the date of the exchanges between

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- Rev Ford and ACM on this issue, states that there were particular circumstances which were in operation at that time. On one occasion, the request for a room to worship in occurred a month prior to closure of the centre. On another, the request occurred only one month after 'a period of unease' at the centre. DIMIA, Response to Draft Report, 10 July 2003.
- 63 Rev Andrew Ford, Submission 296, p1.  
 64 DIMIA, Response to Draft Report, 10 July 2003.  
 65 Tom Mann, Email to Inquiry, 4 October 2002.  
 66 Diversity Directions, Submission 149, p19.  
 67 Inquiry, Focus group, Melbourne, May 2002.  
 68 This was not the case in Curtin however, where Christian clergy 'asked repeatedly to see the Mandaean' but the Department's Manager denied access. Inquiry telephone conversation with Rev Andrew Ford of Broome Anglican Church, 4 February 2003.  
 69 Tom Mann, Email to Inquiry, 4 October 2002.  
 70 DIMIA Port Hedland, Manager Reports, July 2002, August 2002, September 2002, (N4, Q1, F1).  
 71 DIMIA Baxter, Manager Report, September 2002, (N4, Q1, F1).  
 72 DIMIA Christmas Island, Manager Report, August 2002, (N4, Q1, F1).  
 73 Former Woomera detainee mother, in Diversity Directions, Submission 149, p19.  
 74 Lebanese Muslims Association, Transcript of Evidence, Sydney, 16 July 2002, p28.  
 75 Confidential Submission 110, p32.  
 76 Confidential Submission 242a, p5.  
 77 DIMIA Christmas Island, Manager Report, September 2002, (N4, Q1, F1).  
 78 DIMIA, Response to Draft Report, 10 July 2003.  
 79 Inquiry, Notes from visit, Curtin, June 2002.  
 80 UNHCR Guidelines on Refugee Children, ch 3. III.  
 81 DIMIA, Submission 185, p47.  
 82 This applies to Villawood's 'Stage 2' compound only.  
 83 ACM Villawood, Minutes from Cultural and Religious Meeting – Stage 2, 18 May 2001, (N1, Q15, F16).  
 84 DIMIA Villawood, Manager Report, September 2002, (N4, Q1, F1).  
 85 Diversity Directions, Submission 149, p10.  
 86 Inquiry, Focus group, Melbourne, May 2002.  
 87 ACM Port Hedland, Ramadan Menus, undated; Ramadan Last Day Celebration, undated, (N1, Q15, F16).  
 88 ACM Curtin Food Services Coordinator, Memo, Ramadan 2001, to ACM Centre Manager, 9 November 2001, (N1, Q15, F16).  
 89 ACM Curtin, Operational Orders, Operation Ramadan, 9 November 2001, (N1, Q15, F16).  
 90 ACM Curtin Food Services Coordinator, Memo, Ramadan 2001, to ACM Centre Manager, 9 November 2001, (N1, Q15, F16). Ramadan in 2001 was from 16 November – 16 December, when temperatures at Curtin would have regularly been around 40 degrees Celsius.  
 91 DIMIA Curtin, Manager Report, March 2002, (N1, Q3a, F5). The Ashura festival is a Shiite Muslim festival which commemorates the death of Imam Hussein, grandson of the prophet Mohammed.  
 92 8 December 1999 to 8 January 2000.  
 93 Inquiry, Focus group, unaccompanied Shi'a boy, Melbourne May 2002. He was detained at Woomera shortly after it opened in late 1999.  
 94 Inquiry, Focus group with unaccompanied boys, Melbourne, May 2002.  
 95 Performance Linked Fee Report, for quarter ending 31 December 2000, mentioned detainees at Woomera complaining of inappropriate foods being served over Ramadan.  
 96 Inquiry, Focus group, Melbourne, May 2002.  
 97 ACM Woomera Residential Housing Project, Residential Detention Centre Weekly Report, 7 November 2001, (N1, Q16, F17).  
 98 Lutheran Community Care, Submission 134, p5.  
 99 Inquiry, Interview with detainee family, Villawood, August 2002. The family wrote to the ACM Manager complaining that they had had no response for 22 days. The Manager replied (on the same day), saying that 'we are awaiting a reply from DIMIA'. During the Inquiry's visit to Villawood in August 2002, the ACM Centre Manager provided the Inquiry with copies of the correspondence. ACM Villawood, Detainee Request Form, [detainee name deleted], 13 May 2002; ACM Villawood Centre Manager, Letter, to [detainee name deleted], 13 May 2002. Inquiry, Notes from Visit, Villawood, August 2002.

- 100 Inquiry, Interview with detainee family, Villawood, August 2002.
- 101 ACM Villawood, Medical Records, 14 May 2002. ACM, Response to Draft Report, 1 October 2003, Attachment 18.
- 102 DIMIA, *Immigration Detainees Enjoy Season's Festivities*, Media Release, 20 December 2002, at [http://www.immi.gov.au/media\\_releases/media02/d02099.htm](http://www.immi.gov.au/media_releases/media02/d02099.htm), viewed 21 November 2002.
- 103 DIMIA, Submission 185, p75.
- 104 Confidential Submission 119, p2.
- 105 ACM, Response to Draft Report, 5 September, 2003.
- 106 ACM Port Hedland, Ramadan Menu. The menu features separate meals for Afghan, African, Iranian, Iraqi, Palestinian and Sri Lankan nationalities, (N1, Q15, F16).
- 107 Inquiry, Notes from visit, Woomera, June 2003.
- 108 Amnesty International Australia, Submission 194, pp12-13.
- 109 DIMIA, Submission 185, p45.
- 110 International Commission of Jurists' Australian Section, Submission 128, p17.
- 111 DIMIA, Response to Draft Report, 10 July 2003.
- 112 DIMIA, Response to Draft Report, 10 July 2003.
- 113 ACM, Response to Draft Report, 5 September, 2003.
- 114 Lutheran Community Care, Submission 134, pp4-5.
- 115 Association of Major Charitable Organisations in South Australia, Submission 121, p8.
- 116 Sabian Mandaean Association, Transcript of Evidence, Sydney, 17 July 2002, p66.
- 117 Confidential Submission 110, p32.
- 118 DHS, Woomera Detention Centre Assessment Report, 12 April 2002, Submission 181a, p16.
- 119 DHS, FAYS Assessment Report, 22 February 2002, on an Iraqi Christian family at Woomera, (N2, Q7, F6).
- 120 DHS, FAYS Assessment Report, 22 February 2002, (N2, Q7, F6).
- 121 Sabian Mandaean Association, Submission 260, pp6-7.
- 122 Letter from priest to Refugee Review Tribunal, cited in *SCAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 80 at 8-10.
- 123 DHS, Woomera Detention Centre Assessment Report, 12 April 2002, Submission 181a, p17.
- 124 DHS, Woomera Detention Centre Assessment Report, 12 April 2002, Submission 181a, p16.
- 125 DIMIA, Director of Public Affairs, Letter to the Editor, *The Age*, 7 February 2003.
- 126 DIMIA, Response to Draft Report, 10 July 2003.
- 127 DIMIA, Response to Draft Report, 10 July 2003.
- 128 DIMIA, Response to Draft Report, 10 July 2003.
- 129 See also Sabian Mandaean Association, Transcript of Evidence, Sydney, 17 July 2002, p68: 'what we were told by these people, by the Mandaeans, is that it is bad enough as it is, the situation is bad enough as it is. If you were to take away the few privileges that they have or the rights that they have, it would just be unbearable for the children, and the children themselves have made it clear to their parents that they don't understand why they have to be isolated'.
- 130 Sabian Mandaean Association, Transcript of Evidence, Sydney, 17 July 2002, p68.
- 131 DIMIA, Response to Draft Report, 10 July 2003.
- 132 Inquiry, Interview with detainees, Baxter, December 2002.
- 133 Lebanese Muslims Association, Submission 123, p3.
- 134 Lebanese Muslims Association, Submission 123, p3.
- 135 ACM, Response to Draft Report, 5 September, 2003.
- 136 Woomera Department Manager Report, July-September 2000.
- 137 DIMIA Woomera, Manager Report, January-March 2001, (N1, Q4a, F5).
- 138 DIMIA Woomera, Manager Report, January-March 2001, (N1, Q4a, F5).
- 139 Lyn Bender, Submission 206, p3.
- 140 Anthony Hamilton-Smith, Submission 282, paras 11-12.
- 141 Inquiry, Confidential interview, Sydney, 2002.
- 142 Dr Sarah Mares, Transcript of Evidence, Adelaide, 2 July 2002, p41.
- 143 Note that on 17 January 2003, the Department said that there was a system in place for dispensing sanitary products. DIMIA, Provision of Sanitary Products to Female Immigration Detainees, at <http://www.immi.gov.au/detention/sanitary.htm>, viewed 21 November 2003. See also Moira-Jane Conahan, First-hand account of Woomera, at [http://www.chilout.org/information/first\\_hand\\_account\\_of\\_woomera.html](http://www.chilout.org/information/first_hand_account_of_woomera.html), viewed 21 November 2001.

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- 144 Unsigned affidavit of Roebourne Prison inmate dated 17 July 2000, in Confidential Submission 263, section 3.5.
- 145 Melbourne International Health and Justice Group, Submission 63, p50. The submission defines 'cultural competence' as the 'ability of individuals and systems to respond respectfully and effectively to people of all cultures, in a manner that affirms the worth and preserves the dignity of individuals, families and communities'.
- 146 There have been some deficiencies in the availability of interpreters over the period of time covered by the Inquiry. See further section 10.4.3 in Chapter 10 on Physical Health.
- 147 DIMIA, Contract Operations Group Minutes, 22 November 2001, (N1, Q3, F4).
- 148 ACM, Response to Draft Report, 5 September, 2003.
- 149 Toni Patrick, *Cultural Diversity in Immigration Detention Facilities*, DIMIA, December 2001, (N1, Q15, F16). This is an updated version of the Resource Kit.
- 150 DIMIA, Response to Draft Report, 10 July 2003. This resource kit was not mentioned by ACM in its response to the draft report.
- 151 For example, advice to staff on how to avoid causing religious offence to followers of Islam. Toni Patrick, *Cultural Diversity in Immigration Detention Facilities*, DIMIA, December 2001, (N1, Q15, F16).
- 152 DIMIA, Response to Draft Report, 10 July 2003.
- 153 DIMIA, Submission 185, p48. Specialists mentioned are the Victorian Foundation for Survivors of Torture and the Refugee Council of Australia.
- 154 DIMIA, Submission 185, p48.
- 155 DIMIA, Roles and responsibilities for immigration detention centres, undated, (N1, Q15, F16).
- 156 Question 552, Commonwealth House of Representatives Hansard, Thursday 29 August 2002, p6219.
- 157 Question 552, Commonwealth House of Representatives Hansard, Thursday 29 August 2002, p6220.
- 158 Nigel Hoffman, Email to Inquiry, 5 November 2002.
- 159 Elvira Leaver, Email to Inquiry, 1 October 2002.
- 160 Katie Brosnan, Email to Inquiry, 2 October 2002.
- 161 Tom Mann, Email to Inquiry, 2 October 2002.
- 162 Donna Bradshaw, Email to Inquiry, 2 October 2002.
- 163 DIMIA Curtin, Manager Reports, July and August 2002, (N4, Q1, F1).
- 164 Inquiry, Notes from visit, Woomera, June 2002.

# Chapter 16

## Temporary Protection Visas for Children Released from Immigration Detention

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## 16. Temporary Protection Visas for Children Released from Immigration Detention

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The immigration status that results in the detention of children under Australian law also affects their entitlements to various services on release from detention, after they have been recognised as refugees. As discussed in Chapter 6 on Australia's Detention Policy, most children detained in immigration detention facilities for long periods are detained because they arrive in Australia without a visa (unauthorised arrivals). More than 90 per cent of those children are subsequently found to be refugees and are therefore released on temporary protection visas (TPVs). This is in contrast to asylum seekers who arrive in Australia with a visa (authorised arrivals) who are not usually detained and, if found to be refugees, are generally granted permanent protection visas (PPVs).<sup>1</sup> Both TPV and PPV holders are refugees but TPV holders have the right to temporary stay and PPVs have the right to permanent residence.

This chapter discusses some of the difficulties faced by children released from detention on TPVs and examines how these difficulties may impact on their rights. In particular, it discusses the impact that detention has on their ability to settle into the Australian community and on the extra services needed to cater for those difficulties. It also assesses whether the level of services provided to children and their parents released from detention are sufficient to meet the requirements of the *Convention on the Rights of the Child* (CRC).

An extremely small number of children who are unauthorised arrivals are released from detention on bridging visas. This chapter also briefly addresses the rights of those children.

In particular this chapter addresses the following questions:

- 16.1 What are children's rights when released from immigration detention?
- 16.2 What conditions are attached to temporary protection visas?
- 16.3 What services are provided to former detainees living in the community?
- 16.4 What care is provided to unaccompanied children released from detention?
- 16.5 What is the impact of restricted services and entitlements on families on temporary protection visas?

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16.6 What services and entitlements are provided to children in the community on bridging visas?

There is a summary of the Inquiry's findings at the end of the chapter.

### 16.1 What are children's rights when released from immigration detention?

All of the rights discussed in preceding chapters of this report apply equally to children after they are released from detention.

Article 22(1) of the CRC requires Australia to take appropriate measures to ensure that refugee children can enjoy all of their rights, including the right to an adequate standard of living (article 27), health care (article 24), education (article 28) and access to social security (article 26). All of these rights impact upon a child's right to the maximum possible development, rehabilitation and social reintegration (articles 6(2) and 39).

There are certain issues of particular concern to refugee children. One of the most important is family reunification. Various articles of the CRC, including articles 5, 9 and 18, emphasise the importance of family unity and parental care for the well-being of children. Article 10 specifically addresses the situation where members of the same family are in different countries:

In accordance with the obligation of States Parties under article 9, paragraph 1 [family unity], applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

*Convention on the Rights of the Child, article 10(1)*

In other words, the CRC requires Australia to treat applications for family reunification in 'a positive, humane and expeditious manner'. This article should be applied in the light of the principle that the best interests of the child be a primary consideration (article 3(1)).

Further, the United Nations High Commissioner for Refugees (UNHCR) *Guidelines on Reunification of Refugee Families* recommend that governments ensure that 'the unity of the refugee's family is maintained',<sup>2</sup> specifically stating that in situations where members of the same family have reached temporary asylum in different states, their reunification should be facilitated.<sup>3</sup> The UNHCR states that:

respect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and to reunite family members who have been separated.<sup>4</sup>

Another right important to refugee children is the right to travel to see friends and family who remain overseas. This right is specifically protected by the Refugee

Convention, which requires that refugees be provided with 'travel documents for the purpose of travel outside their territory' (article 28). Paragraph 13(1) of the Schedule to the Refugee Convention requires that the holder of a travel document be able to use that document to come back to Australia when Australia issues that document.<sup>5</sup>

Unaccompanied children living in the community after a period of detention have additional entitlements. Article 22(2) of the CRC requires family tracing,<sup>6</sup> and states that:

In cases where no parents or any other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family for any reason.

Unaccompanied children also have the right to special assistance and protection in order to compensate for the absence of their parents and ensure that they can enjoy all their rights under the CRC (article 20(1)). Furthermore, the UNHCR recommends that as soon as an unaccompanied child has been recognised as a refugee or permitted to stay on humanitarian grounds, long-term placement in a community should be arranged.<sup>7</sup> The return of unaccompanied refugee children to their country of origin should only occur if appropriate care for the child can be arranged in that country.<sup>8</sup>

### **16.2 What conditions are attached to temporary protection visas (TPVs)?**

There are two means by which children may be released from detention under Australian law. They may be returned to their country of origin or granted a visa to remain in Australia. Children found to be refugees are generally released into the Australian community on a TPV. A very small number of child asylum seekers who arrived in Australia without a visa have received a bridging visa, Bridging Visa E, which allows them to reside in the Australian community while their application for a TPV is assessed. The limited entitlements of these children are discussed in section 16.6.

Children released from detention on the Australian mainland are generally granted a TPV (visa subclass 785). Children now living in the Australian community who were detained in Nauru or Papua New Guinea generally hold a 447 Secondary Movement Offshore Entry (Temporary) Visa or a 451 Secondary Movement Relocation (Temporary) Visa depending on whether they were intercepted in international waters or whether they arrived on an 'excised offshore place' like Christmas Island or Ashmore Reef.<sup>9</sup> The 785 visa was introduced in 1999 and the 447 and 451 visas were introduced as part of the 'Pacific Solution' strategy in 2001.<sup>10</sup> The Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA) clearly states that the motivation behind this new visa regime is 'to strengthen deterrence in relation to unauthorised arrivals'.<sup>11</sup>

Asylum seekers who arrive in Australia on a valid visa (other than a refugee visa) and then apply for a protection visa are usually granted a bridging visa until the

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determination of their protection visa application. However, as described in Chapter 6 on Australia's Detention Policy, with respect to unauthorised arrivals, almost no children were granted bridging visas over the period of the Inquiry. The few unauthorised arrival children who have been released on bridging visas were granted Bridging Visa E, subclass 051. This allows the visa holder to live in the community until his or her application for asylum is determined.

As the following table demonstrates, the visa granted to children released from detention after September 2001 (visa subclass 785) imposes the following conditions. The TPV holder is:

- ineligible for permanent residence (PPV) unless the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) exercises discretion<sup>12</sup>
- unable to bring any family to join them in Australia for the period of their TPV
- unable to travel outside Australia without jeopardising their protection visa, as TPVs are single entry visas.

The combined impact of these conditions is to effectively separate TPV holders from their immediate families for as long as they have an ongoing protection need. This need could continue indefinitely for many years. This situation contrasts greatly to that of children arriving in Australia on a visa who are normally granted a PPV.

Table 1: Conditions attached to protection visas

	TEMPORARY VISAS			PERMANENT VISAS	
	Temporary Protection Visa 785 (Onshore unauthorised arrivals)	Secondary Movement Offshore Entry (Temporary) Visa 447	Secondary Movement Relocation (Temporary) Visa 451	Permanent Protection Visa 866 (Onshore authorised arrivals)	Humanitarian Visas 200-204 (Offshore)
Who is eligible?	Asylum seeker arriving in Australia without a valid visa after October 1999.	Asylum seeker arriving at an 'excised offshore place' or intercepted in Australian waters without a valid visa, after September 2001.	Asylum seeker applying after September 2001 who has not entered Australian territory and has not spent seven days in a country where he or she could have obtained effective protection. May have been intercepted in international waters.	Asylum seeker arriving in Australia with a valid visa.	Asylum seeker who has applied from overseas for protection in Australia.
	Asylum seeker arriving in Australia with a visa applying for protection after September 2001, and has spent seven days in a country where he or she could have obtained effective protection.				
Automatic right to visa if meet criteria?	Yes, as long as pass security and health checks.	No. Minister's discretion.	No. Minister's discretion.	Yes.	No. Minister's discretion.
Detention during processing?	Yes. In mainland Australian detention facilities.	Yes. In Nauru, Papua New Guinea or Christmas Island.	Yes. Most likely in Nauru or Papua New Guinea.	No.	No.
Release from detention if found to be a refugee?	Yes, as soon as pass security and health checks.	No. Must wait for Australia or another country to grant a visa.	No. Must wait for Australia or another country to grant a visa.	n/a	n/a

TEMPORARY VISAS		PERMANENT VISAS		
	<b>Temporary Protection Visa 785</b> (Onshore unauthorised arrivals)  <b>Secondary Movement Offshore Entry (Temporary) Visa 447</b>	<b>Secondary Movement Relocation (Temporary) Visa 451</b>	<b>Permanent Protection Visa 866</b> (Onshore authorised arrivals)	<b>Humanitarian Visas 200-204</b> (Offshore)
<b>Visa duration?</b>	Three years.	Three years.	Five years.	Permanent.
<b>Further visas available on expiry of current visa?</b>	After September 2001, only eligible for consideration for a permanent protection visa if, since leaving their home country, the applicant has not resided for more than seven days in a country where they could have sought and obtained effective protection, unless the Minister exercises discretion to permit application for a PPV. Otherwise only eligible for successive TPVs.	Only eligible to apply for a further TPV unless the Minister exercises discretion to permit application for a PPV.	Eligible to apply for a PPV.	n/a
<b>Right to family reunion?</b>	No.	No.	No.	Yes.
<b>Travel outside Australia?</b>	Single entry visa. May depart Australia but have no automatic right of return.	No. Single entry visa.	No. Single entry visa.	Yes. Able to leave Australia and return without jeopardising visa.

### 16.2.1 Impact of the temporary nature of the TPV

It is like a cancer. It is like a brain tumour or something – you know that you are going to die after three years. Even if you have a brain tumour, you know that you are going to die in that certain time, and you know you are going to die, so you live happily. With this, you just die every day. You don't know what's going to happen. Sometimes I just think that I should leave studies. As soon as I find a job I will start working, because I don't think that there is a future in this country. I am going to go back with nothing. It's a really big shame. I won't even be able to finish school.<sup>13</sup>

Refugee children released from detention should be at the commencement of a period of recovery from the trauma resulting from persecution and flight as well as from their experience of detention.<sup>14</sup>

However, the evidence before the Inquiry indicates that the temporary nature of the protection accorded to children released from detention creates considerable uncertainty about their future. The uncertainty attached to temporary status has been an issue since the inception of the TPV system in 1999. However, as noted earlier, since September 2001, most TPV holders will only ever be eligible for successive temporary visas. This has exacerbated the situation of uncertainty for TPV holders.

Specialist torture and trauma counselling services have reported that the uncertainty inhibits the recovery of former detainee children from trauma suffered prior to and during detention. For example, the NSW agency reported that:

the environment created by temporary protection policies is more likely to compound the effect of any traumas sustained in detention, rather than contribute to successful recovery. As such, it should be regarded as an integral aspect of how children are affected by Australia's immigration detention policies.<sup>15</sup>

The Queensland torture and trauma service also noted the different recovery experiences between permanent and TPV holders:

Those on a Permanent Protection Visa I see as having a faster recovery from torture and trauma because they have a sense of safety. They can go through a process of remembering and mourning and then reconnecting but I found with this particular group of young people on a Temporary Protection Visa they have major problems trying to feel safe in their current situation.<sup>16</sup>

This service also reported that young TPV holders exhibited both physiological and psychological symptoms as a result of the uncertainty:

The crucial thing is the uncertainty that they are experiencing about their current situation and their view of the future, and that comes out in many ways but the most common way that I have heard, just about every day, one is through headaches, constant headaches. Another one is through sleeping problems, either major problems falling asleep or staying asleep and often wandering around in the middle of the night to try and sleep. And also

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problems concentrating and remembering things. And also signs of depression, so getting out of bed in the morning and actually attending school and continuing to attend school with the uncertainty of their future.<sup>17</sup>

The Victorian torture and trauma service also told the Inquiry that uncertainty creates new problems for former detainees, causing further deterioration:

Our experience is that families deteriorate further in the community. Whilst still in detention, the focus had been on getting out. Once out, they begin to experience the loss associated with an uncertain future. It is hard for many people to see the point of struggling to learn English and apply for jobs, facing the potential rejections that all this entails.<sup>18</sup>

In addition, former detainee children told the Inquiry that the TPV system inhibits their recovery from trauma. A 15-year-old unaccompanied child TPV holder said:

We've been in a continuous uncertainty, instability and ongoing trauma over the last year. First of all we went through the hell to be separated from our family, took a long, long journey and then we went through the hell of the detention centre experience there. Now after we released we feel that we will be better off somehow we are here but ever since they give us this Temporary Protection Visa and on top of us this uncertain news and even now and then we are hearing, it's like some sort of ongoing torture for us. Because if I just close my eyes I remember that I will be sent back to Afghanistan ... I am losing my mind and losing my concentration. Really psychologically we are losing our minds, we are getting crazy. They are just killing us piece by piece. They are leaving us in a limbo situation. If they just send us and say go today, we would just go today we would face death and would be finished, but now we are uncertain day to day.<sup>19</sup>

As well as having an impact on their mental health, the uncertainty faced by TPV holders has a direct impact on their capacity to settle in the Australian community. The NSW Centre for Refugee Research also told the Inquiry about the difficulties that child TPV holders had in settling in:

In doing that research which was in refugee children in general, one of the unexpected findings of the research was the comment made by just about every professional we spoke to, that it was their opinion that the children who had been in detention [and were therefore on TPVs] were having many more problems in resettlement in Australia than other refugee children who came direct. The research we did certainly did suggest that the children who had been in detention had grave problems in resettlement and there was a time lag in this.<sup>20</sup>

This point of view is supported by the Department of Human Services Victoria who reported to the Inquiry that with regard to unaccompanied refugee children:

The move towards TPVs has created enormous instability for unaccompanied minors and impacted on their ability to establish long term goals and a stable future while the spectre of deportation or indefinite temporary visa status is the governing basis of their stay in Australia.<sup>21</sup>

Many unaccompanied refugee children are at that time of life where they are contemplating their futures and making crucial preparations to become independent through study and work experience. Young people on TPVs consistently reported to the Inquiry that their uncertainty about their ongoing protection has affected their capacity to settle, particularly affecting choices about whether they should work or study. One young TPV holder told the Inquiry that:

Of course it is harder [than being on a PPV], because the [PPV holders] know what they are doing and they know what's going on and they know they will stay here and they know everything and they can plan the future and they can make a timetable for their future. But for me, it is like a *temporary life* and like you're living for three years and you don't know what will *happen* to you after that. It makes you worry about it. On the one hand, you want to study and on the other hand you want to work or you want to help others, or you want to see around this country. And you want to have some information about this country that you can take with yourself. And it's really very hard.<sup>22</sup>

Another child reported the following to Uniting Care Burnside:

It would be good if they would tell us if we are going to get it (permanent visa) or not now. If I am going to stay here for two years I want to work or study or something like that but this uncertain condition is really annoying, it's really bothering because we can't focus on anything. Choosing education or work ... because we don't have a permanent visa we can't really work, ... and also studying, we don't know where they are going because after two years studying in Australia the education here is different to (country of origin) and we don't know what will happen. It is really uncertain and that causes lots of anxiety ... so I can't decide what should I do now. If I study it will be good for me for my future. If not study, if they say, it is not possible to stay here for you after two years ... so I should work but my family there is no one to help them so it is all the responsibility for it belongs to me ...<sup>23</sup>

Finally, it appears that there was no notice given to TPV holders of the change in the legislation that prevented application for permanent protection if an application had not been lodged by 27 September 2001.<sup>24</sup> This means that refugee children and young people living in Australia on TPVs before September 2001 were not told that the conditions under which they could apply for permanent protection were about to be changed, rendering most of them ineligible for permanent protection in Australia.<sup>25</sup>

### 16.2.2 Impact of the restrictions on family reunion

Refugee children may be separated from one or both of their parents for a variety of reasons. Children may be sent to Australia alone, or with one family member only, leaving others behind, or families may also be separated by accident, for example they may end up on different boats.

As discussed in section 16.1, Australia has an obligation to deal with applications for family reunion by a child or his or her parents to enter or leave Australia in a positive, humane and expeditious manner. Further, as outlined throughout the report, where different parts of the same family are under Australian control, then Australia

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has an obligation to consider the best interests of the child, which usually entails family unity.<sup>26</sup> This includes situations where, under the 'Pacific Solution' strategy, one part of a family is transferred to Nauru or Papua New Guinea while others are in Australia.

However, the current restrictions on TPV holders limit the potential for family reunion. Refugees in Australia who hold PPVs can be joined by family members living overseas through the family reunion provisions of the visa. A TPV does not allow family reunion. Furthermore, TPV holders may not travel from Australia without jeopardising their visa. This effective restriction on travel means that, for example, unaccompanied refugee children on TPVs cannot leave Australia to visit their parents and the family cannot come to Australia to join the children. Therefore children on TPVs with parents outside Australia are prevented from seeing them for the duration of their visa.

These restrictions can potentially lead to family separation for extremely long periods of time. Initially the separation may be for the three years of the TPV. However, if the child's protection needs continue, the three years can turn into many more years.

The Inquiry has some concern that the restriction on family reunion and travel may have directly contributed to the increase in numbers of women and children making the perilous journey to Australia by boat. An Iraqi woman who waited in Jordan for two years, hoping to be reunited with her husband, told the Inquiry that it was very difficult for her living in Jordan as a woman alone with her children, and that eventually she decided that she could wait no longer, as there was no certainty that her husband would be granted a permanent visa:

I wait there in Jordan for two years, in order that he may take the permanent visa, or the law will change, and he can apply for me to come legally. There was no end.<sup>27</sup>

The Department informs the Inquiry that:

Family members overseas are eligible to apply for visas to enter Australia in their own right. This includes the opportunity to seek a place in Australia's extensive annual Humanitarian resettlement program.<sup>28</sup>

Further, the Minister can exercise his discretion to grant a PPV at any time, which has family reunion rights attached. However, the Department does not provide any evidence as to how these avenues for family reunion constitute a 'positive, humane and expeditious' manner of dealing with requests for reunification by refugee children and their families. There is no requirement for the Minister to consider such aspects as family reunion early in the refugee application process.

The Government's 'Pacific Solution' has also resulted in a situation where some members of a family who make this journey are detained in Nauru or Papua New Guinea, and others are in Australia, either in detention or living in the community.<sup>29</sup>

While the Inquiry was not able to visit families detained on Nauru and Papua New Guinea, it interviewed at least one family that had been separated in this way.<sup>30</sup> In

that case the mother and her three children aged 14, 12 and 7 years travelled towards Australia on a boat which was intercepted by the Australian navy in October 2000. The asylum seekers on this boat were transferred to Manus Island, Papua New Guinea, for refugee application processing. The children's father, who had arrived in Australia some months earlier, had been granted a TPV and was living in the Australian community. The mother and children were recognised to be refugees in April 2001, but it was not until four months later that they were granted visas to enter Australia. Hence, the family were separated for approximately 10 months.

The Minister has the power under s46A(2) of the *Migration Act 1958* (Cth) (the Migration Act) to allow persons arriving in 'excised offshore places' to apply for a protection visa.<sup>31</sup> However, as the example above indicates, this process may still take many months. The Inquiry also notes that the Migration Act gives some discretion to the Department as to whether to transfer persons to Nauru and Papua New Guinea in the first place. In other words, the Department is able to transfer family members to a detention centre located close to a family member in the Australian community. However, the Inquiry is unaware of any instances where this has occurred.

The ban on family reunion has had a negative impact on TPV holder's mental health and their ability to settle. The Department of Human Services Victoria said separation from family was especially distressing for unaccompanied refugee children:

Without the prospect of attaining permanent residence, unaccompanied minors are unable to sponsor family members. The absence of family reunion options is a particularly alarming prospect for the young people. It can significantly compound their anxiety about their prospects of future happiness and set back case support goals of helping them to deal with past trauma and embrace a more positive outlook.<sup>32</sup>

Refugee children on TPVs described the impact of being separated from their family:

It's ridiculous. You don't have access to your family, like your father and mother and that's awful. If you keep someone for three years away from their family you can imagine what will happen to their mind.<sup>33</sup>

The Victorian torture and trauma service told the Inquiry that many children separated from their immediate family are acutely affected by this separation:

The degree of withdrawal of these children is intensified. They cannot learn and are observed by teachers to be isolated and shut down. From a counselling perspective it is almost impossible to deal with their problems because the pain of separation is so intense that they are in a non-feeling state. They cannot talk about their problems because it would expose them to feeling the pain of separation much more acutely.<sup>34</sup>

The Refugee Council of Australia (RCOA) argues that:

[r]esettled refugees who are separated from family members are unable to devote their full energies to learning the new language, seeking employment and establishing themselves in the new community.

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The RCOA has found that TPV holders are preoccupied with locating lost family members or concerned about the well-being of family members in precarious situations overseas, and are therefore unable to make long-term plans until the family is reunited.<sup>35</sup>

### 16.2.3 Findings regarding the conditions of temporary protection visas

The Inquiry finds that the conditions attached to TPVs have a detrimental impact on refugee children. The lack of access to permanent protection leads to significant uncertainty about the future for child TPV holders. This uncertainty is more likely to compound mental health problems than facilitate rehabilitation from past trauma and integration into Australian society.

The Inquiry also finds that the combination of the prohibition on family reunion and the effective restriction on travel has a serious impact on the best interests of children, particularly in the context of mental health and family unity. While it is possible that separated family members may eventually join TPV holders in Australia by receiving an offshore visa in their own right, or through the exercise of Ministerial discretion, this process is neither guaranteed nor expeditious. These restrictions mean that children may be separated from their families for extremely long, potentially indefinite, periods of time.

## 16.3 What services are provided to former detainees living in the community?

As well as having significant conditions attached to their visas, there are restrictions in the social services and other entitlements available to children and families released from detention on TPVs and bridging visas.

A comparison of the services and entitlements provided to PPV holders, TPV holders and Bridging Visa E holders is illustrated in the following table.

Table 2: Commonwealth services provided to Protection and Humanitarian visa holders

	TEMPORARY VISAS			PERMANENT VISAS		
	<b>Bridging Visa E, subclass 051 (BVE)</b> (Unauthorised arrival in Australia, released from detention before the refugee status determination process is complete)	<b>Temporary Protection Visa 785</b> (Onshore unauthorised arrivals)	<b>Secondary Movement Relocation (Temporary) Visa 451</b> (Intercepted in International waters)	<b>Secondary Movement Offshore Entry (Temporary) Visa 447</b> (Arrived at an excised offshore place)	<b>Permanent Protection Visa 866</b> (Onshore authorised arrivals)	<b>Permanent Humanitarian Visas 200-204</b> (Offshore)
<b>Settlement support</b>	n/a	Only eligible for the Early Health Assessment and Intervention.			Only eligible for Early Health Assessment and Intervention.	Eligible for assistance through the Integrated Humanitarian Settlement Strategy, including: <ul style="list-style-type: none"><li>• Initial Information and Orientation Assistance</li><li>• Accommodation Support</li><li>• Household Formation</li><li>• Early Health Assessment and Intervention</li><li>• Community Support for Refugees</li></ul>

BRIDGING VISAS		TEMPORARY VISAS	PERMANENT VISAS
	<b>Bridging Visa E, subclass 051 (BVE)</b>	<b>Temporary Protection Relocation (Temporary) Visa 785</b> <b>Secondary Movement Entry (Temporary) Visa 451</b> <b>Secondary Movement Offshore Entry (Temporary) Visa 447</b>	<b>Permanent Protection Visa 866</b> <b>Permanent Humanitarian Visas 200-204</b>
<b>Employment</b>	Need to demonstrate that they have a compelling need to work.	Right to work. Until 1 January 2003, ineligible for employment assistance programs, except for the most basic services (for example touch screen job matching). From 1 January 2003, eligible for limited employment assistance programs.	Right to work. Access to all employment assistance programs.
<b>Social Security</b>	Not eligible.	Eligible for restricted entitlements – Special Benefit (paid at Newstart rates but subject to a more stringent income test), Rent Assistance, Family Tax Benefit, Child Care Benefit, and Maternity Allowance. From 1 January 2003 required to meet activity testing requirements.	Eligible to apply for the full range of social security benefits.
<b>Health</b>	Not eligible for Medicare unless they have permission to work.	Eligible for Medicare. Prior to 29 August 2000 TPV holders not automatically eligible for Medicare.	Eligible for full range of health services provided through Medicare.
<b>Mental health</b>	Not eligible.	Eligible for torture and trauma counselling.	Eligible for torture and trauma counselling.
<b>English Tuition for adults</b>	Not eligible.	Not eligible. Only eligible for the Language, Literacy and Numeracy Program if receiving Special Benefit. Fees payable for TAFE.	Access to 510 hours of English language training (free tuition under the Adult Migrant English Program, eligible for Advanced English for Migrants Program), with a further 100 hours if necessary.

BRIDGING VISAS		TEMPORARY VISAS		PERMANENT VISAS	
	<b>Bridging Visa E, subclass 051 (BVE)</b>	<b>Temporary Protection Relocation (Temporary) Visa 785</b>	<b>Secondary Movement Visa 451</b>	<b>Secondary Movement Offshore Entry (Temporary) Visa 447</b>	<b>Permanent Protection Visa 866</b> <b>Permanent Humanitarian Visas 200-204</b>
<b>Education for children</b>	Generally at the discretion of the States to waive fees. A Bridging Visa E can be issued with a condition that denies permission to study.	From 1 July 2002 eligible for funding through the New Arrivals Program.			Eligible for intensive English training through the Commonwealth-funded New Arrivals Program.
<b>Legal Assistance for visa applications</b>	Eligible for government-funded legal assistance.	Can receive government-funded legal assistance in preparing fresh visa application if experiencing financial hardship and disadvantaged, for example because of non-English speaking background or disability as a result of past torture and trauma. Unaccompanied minors who are wards of the Minister are entitled to legal assistance funded through the Immigration Advice and Application Assistance Scheme (IAAAS) administered by the Department.			n/a

### **16.3.1 Authorities responsible for providing services to protection visa holders**

Services to protection visa and Bridging Visa E holders are provided by the Commonwealth, the States and community-based organisations.

The Commonwealth exercises the most responsibility to provide services to refugees. It is responsible for the provision of settlement services and governs access to employment programs, social security benefits, health care through Medicare, Commonwealth-funded mental health services, language tuition for adults, Commonwealth-funded education programs for children and access to legal assistance for further visa applications.

However, there are significant restrictions to child TPV holders' access to Commonwealth-funded services, as outlined in the table above. The Inquiry has heard from State governments and community-based organisations that they have been forced to meet the gaps in provision of service to child TPV holders caused by lack of Commonwealth funding.

For example, the Western Australian Government stated that:

The failure to provide access to services places significant demands upon community volunteer groups and Western Australian Government service providers in the absence of DIMIA-funded settlement services. It also makes it more difficult for TPV holders to adjust following release from detention with potential long-term impacts on the state.<sup>36</sup>

State governments have variously acted to ensure that TPV holders have access to the services that they require. The most comprehensive strategy is in Queensland, where on 27 November 2000 the State Government adopted the position that:

The Queensland Government recognised the significant humanitarian issues associated with the arrival of TPV entrants in Queensland. The Queensland Government has approved that Queensland Government agencies provide the same level of services to Temporary Protection Visa holders as Permanent Protection Visa holders.<sup>37</sup>

Consequently, the following services are available to TPV entrants in Queensland:

- English Language tuition through TAFE Colleges;
- all full-fee vocational courses, subject to availability;
- rental bond loans;
- access to public housing;
- access to a 38 bed boarding house which has been provided for on-arrival accommodation;
- continued support to access the private rental market;
- TPV entrants with children have access to state schools at no cost;
- English as a Second Language (ESL) tuition for children in school.<sup>38</sup>

The Victorian Government has ensured that TPV holders have access to State-funded services such as public housing, education for children and young people and access to hospitals and community health care.<sup>39</sup> Furthermore, in February 2001, the Victorian Government made a grant of \$100,000 to assist the on-arrival settlement of TPV holders to two local governments and two rural regions based on the numbers of TPV holders being settled in each location.<sup>40</sup>

The Inquiry has also heard that the restriction in services available to TPV holders has led to a much greater reliance on community-based organisations. For example, the NSW Council of Social Service (NCOSS) reported that:

There are volunteer services being set up to essentially duplicate the role of the Migrant Resource Centres in providing support and assistance to duplicate the role of the Commonwealth funded English language programs in providing volunteer English language training, to provide assistance in obtaining employment, to answer a range of gaps and services that temporary protection visa holders and families and children need.<sup>41</sup>

The remainder of this chapter examines the impact of the level of services provided to child TPV holders across a range of essential services.

### **16.3.2 Settlement services available to children released from detention**

Settlement services are those services necessary for effective settlement in Australia, including information, accommodation and household formation, and specialist health services. In principle, the provision of settlement services is the responsibility of the Commonwealth. The Department has identified the special settlement needs of entrants under Australia's Humanitarian Program.<sup>42</sup>

All offshore Humanitarian Program entrants can access the Integrated Humanitarian Settlement Strategy (IHSS). Under the IHSS, offshore Humanitarian Program entrants are provided with:

- comprehensive settlement assistance that includes an orientation program linking them to a range of essential services
- access to support from community-based volunteers
- initial accommodation and support in securing long-term accommodation
- support in establishing a household, including the provision of household goods and basic furnishings.

The IHSS also includes the 'Early Health Assessment and Intervention Program', which provides physical and psychological health screening and access to torture and trauma services.

Former detainees living in the community on TPVs are a particularly vulnerable group in need of assistance with settlement, and, as discussed earlier, the conditions of the TPV system further heighten this need. However, TPV holders are denied access to almost all of these settlement services. The only element of the IHSS

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which is available to both TPV and PPV holders is the Early Health Assessment and Intervention Program.

The Department informed the Inquiry that:

The department's State and Territory settlement staff assist TPV holders' entry into the community at their final destination. They arrange for their reunification with any known family members residing in the Australian community, introduce them to Centrelink, Medicare and other essential services, and to volunteer organisations who may provide them with support.<sup>43</sup>

The reception of TPV holders released from detention depends on local arrangements in the city where they arrive. For example, in Brisbane, reception is managed by the Romero Community Centre, a non-government organisation. A similar service is provided in NSW by the House of Welcome, a church-based voluntary organisation which provides short-term accommodation for families on their release from detention. Stays average about four weeks, during which time the agency assists former detainees to 'organise Centrelink payments, Medicare cards, open bank accounts and find accommodation in the private rental market'.<sup>44</sup>

No on-arrival accommodation is provided by the Commonwealth for families and children released from detention. In some cases this gap in service provision is met by the States, as in South Australia where the South Australian Housing Trust provides short-term accommodation for TPV holders immediately after their release from detention.<sup>45</sup> No Commonwealth-funded household formation support is provided to any TPV holder. However, in South Australia a grant of \$200 per person may be made by the State Government for this purpose.<sup>46</sup>

As well as being denied access to most of the IHSS, TPV holders released from detention are ineligible for Department-funded general settlement assistance that is delivered by Migrant Resource Centres (MRCs) and Migrant Service Agencies. Services provided by MRCs include information and referral, community activities such as playgroups, English language classes and support for community migrant organisations.<sup>47</sup> PPV holders are eligible to access these services.

NCOSS told the Inquiry that although MRCs are prohibited from using Commonwealth funding to assist TPV holders, they may work with them when they can obtain other resources to do so.<sup>48</sup> However, MRCs' funding may be threatened if they work with TPV holders in any capacity. Consequently, MRCs hold 'the State funded events and meetings off-site so that TPV holders could attend without the MRC experiencing difficulties with DIMIA'.<sup>49</sup> The extent of the difficulties experienced by the MRCs is evidenced by their extreme reluctance to discuss issues relating to TPVs. They appear to be 'firmly of the opinion that if they were publicly identified as having spoken about this issue, they would be putting their organisation's funding at risk'.<sup>50</sup>

The restriction on settlement services for former detainees has a significant impact on children, as their families have considerably greater difficulty in establishing themselves in the Australian community.

### 16.3.3 Health care available to children released from detention

Children and families released from detention on TPVs have access to public health care. The Department reports that TPV holders are given a 'post-release information sheet in their own language' and 'this includes information on how to obtain a Medicare card and how to find help and treatment for medical problems'.<sup>51</sup> As noted earlier, TPV holders are eligible for the Early Health Assessment and Intervention Program that operates as part of the IHSS, and, since August 2000, a Medicare card.

The Inquiry heard that one of the greatest challenges in providing health care in the community for families and children released from detention is that they are generally released with no medical records. A Brisbane doctor told the Inquiry that the lack of medical records from the detention centre compromised the care of former detainees.<sup>52</sup> The Inquiry also heard of children being released without immunisation records, or with incomplete records, necessitating the recommencement of an immunisation schedule.<sup>53</sup>

Several studies have found that families released from detention have significant health care needs. The Queensland Government report on the impact of the TPV found that families arrive with both chronic and acute health care needs, and that unaccompanied refugee children specifically 'exhibited a range of health problems including dental, optical and cardiac'.<sup>54</sup> A Victorian study reported that when people released from detention were:

asked about their priorities, most did not list health as a first priority as they were more concerned about housing, employment and family reunion. When health [was] discussed, a frustration with accessibility of health services, the lack of culturally and linguistically appropriate services and the long periods of waiting time between request [for] the Medicare Card and its actual issuing by the relevant authorities.<sup>55</sup>

In terms of specific health needs, the Victorian study found that '[d]ental and optical care were immediate needs, followed by psychological care and counselling due to the experiences of torture, trauma, grief and separation anxiety. General health was seen as less significant than these other health issues'.<sup>56</sup>

### 16.3.4 Mental health care available to children released from detention

As outlined earlier, many children leaving detention have severe mental health problems. These are a consequence of both their experiences prior to arrival in Australia, and their experience of detention. These mental health problems are then compounded by the temporary nature of the TPV. Because all former detainee children who have been granted protection visas are refugees, they have, by definition, demonstrated that they were victims of persecution. The Victorian torture and trauma service told the Inquiry that:

The psychological impact of pre-arrival experiences will continue, even in a safe environment. However, when the new environment is harsh and uncertain, the negative psychological impact will be exacerbated.<sup>57</sup>

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As noted earlier, children and families released from detention on TPVs are eligible for 12 sessions of torture and trauma counselling funded by the Department through the IHSS.<sup>58</sup> Although Department funding is limited to these 12 sessions, TPV holders are also eligible for general programs through the torture and trauma centres.

The Victorian torture and trauma service said that such services were of limited assistance in dealing with survivors' symptoms without access to systematic provision of general settlement services.<sup>59</sup> The Queensland Government shares this perspective, arguing that '[i]solating people who have experienced torture and trauma through the denial of adequate settlement assistance further undermines their sense of safety, security and certainty'.<sup>60</sup>

### 16.3.5 Education available to children released from detention

Former detainee children often have significant educational needs. Their education may have been considerably disrupted due to conditions in which they lived prior to their arrival in Australia. In addition, they may have had very little experience of formal education prior to arrival in Australia.

Furthermore, as outlined in Chapter 12 on Education, the education provided within the detention environment has generally been of an inferior standard to that offered within Australian schools. As most children detained since 1999 have only been able to access education programs within the detention centres, they have often left detention insufficiently prepared for education in mainstream Australian schools.

The principal of the Adelaide Secondary School of English, attended by many former detainee children, reported to the Inquiry the difficulty that these children have settling into school.<sup>61</sup> The principal of Milpera State School in Brisbane, which has also received a large number of former detainee children, said, 'I would not say that, in a single one of the students – and that would be over a hundred – have I come across anyone that would have been prepared to go into a regular school situation'.<sup>62</sup> Both principals stated that no former detainee children admitted to their schools had any educational records from detention. As outlined in Chapter 12 on Education, teachers formerly employed in detention centre schools confirmed that detainee children did not receive reports of their educational achievement until early 2002 (see section 12.4.6).

Most refugee children who arrive in Australia with permanent visas attend an intensive English program for twelve months. Although these programs are offered through State-operated Intensive English Centres, they are partially funded through the Commonwealth New Arrivals Program (NAP). A synopsis of the typical programs offered by these centres is provided in section 12.3 in Chapter 12 on Education.

Prior to 1 July 2002, children on TPVs were ineligible for Commonwealth funding through the NAP (the Commonwealth New Arrivals Grant provided to the schools is currently \$3990 per student per annum). In many cases, until Commonwealth funding became available, State education authorities or other agencies met this gap in funding. For example, the South Australian education department met the full cost

of providing education to children on TPVs (approximately \$8000 per annum) prior to the availability of Commonwealth funding for these students.<sup>63</sup>

The State Education Department in Western Australia, unlike South Australia, did not automatically meet the cost of educating children released from detention in Intensive English Centres prior to 1 July 2002. Some children on TPVs were accommodated in mainstream schools without additional support, 'at risk of not achieving the major learning outcomes of schooling to levels that would enable them to achieve their potential because they have very low levels of English'.<sup>64</sup> A special English as a Second Language centre, funded by the Western Australian Government, was set up at Balga Senior High School to accommodate unaccompanied refugee children residing in the area. Intensive Language Centres in WA were also requested to accommodate TPV holders on a 'spare capacity basis once eligible children [had] been accommodated'.<sup>65</sup> Prior to the July 2002 decision that children on TPVs are eligible for the NAP, the WA Department for Community Development (DCD) paid full fees for unaccompanied refugee children to attend Intensive Language Centres.<sup>66</sup>

Although some of the impediments to child TPV holders accessing education have been removed since July 2002, the general conditions of the TPV system continue to operate as a barrier to participation in education.

As outlined earlier, the uncertainty engendered through the temporary nature of the protection that these young people enjoy has a significant impact on their desire to access education. The principal of the secondary school attended by the majority of TPV holders in Adelaide told the Inquiry:

One of the other difficulties too is given that they're on temporary protection visas and they know that they've got this three years, one of the issues that's beginning to surface is they're into the second year of their visas and now they are questioning what's the value of education and why are we here? Why do we have to learn English if we're going to be sent back to Afghanistan?<sup>67</sup>

Refugee young people interviewed for the Inquiry also reported that the uncertainty and fear of what would happen to them in the future compromised the priority that they put on education:

When I think about my future, I think it's very uncertain. The only thing that I love and I desire is to study. I really want to be educated, but then again when I think about my future then I think of going back, not being able to get a decent job or study, again I feel completely heartbroken. And I cannot even concentrate on my studies. I believe you can never study when you are full of fear or when your stomach is empty. So sometimes I feel like that and when I go to bed to sleep I think about these things.<sup>68</sup>

Not only that problem, you, you worried about your future, I mean I like myself I've spent two years of being here in Australia at a state school and now the period is ... my visa will finish at the end of this year and next I don't know what will happen.<sup>69</sup>

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Similarly, the South Australian Department of Education reported to the Inquiry that fear of the future had a significant impact on young TPV holders:

the fact that there is uncertainty amongst the children about their future is ... causing some issues for their educators. I think this particular group have ... caused [their educators] the most concern because of the fears that the students themselves have and there are psychological issues as a result of being in detention and as a result of being in limbo because of their visa status.<sup>70</sup>

Perhaps the most significant impact of the TPV system on education is the impact that it has on young people's choices regarding whether they will work or study:

This is the very major problem ... Because you cannot make decision what to do. To go to work or to study. If you are deciding to study you cannot concentrate and then when you go work then you think my future is not good.<sup>71</sup>

I am now in Year 10. Before, I was in intensive English centre [IEC] and some of my Afghani friends said, 'Why are you studying? You have to work to earn money because after two years your visit will be over and you have to go back. Just earn money'. That is why I didn't really study hard in the intensive English centre, because I thought I have to work and I was just wasting my time in the IEC. Then I went to the high school and I am not thinking about that anyway, just trying to study. Money is not everything.<sup>72</sup>

The Western Australian Government told the Inquiry:

The children, from what I have seen, there is a kind of an issue for them about whether they should attend school and try and attain some sort of educational proficiency in English or broader educational outcomes or whether they should go and work and it is a tension for them.<sup>73</sup>

Therefore, the temporary nature of the TPV has a significant impact on children's capacity to take full advantage of the education that is offered to them.

### 16.3.6 Findings regarding services provided to protection visa holders

The Inquiry finds that the denial of settlement services to child TPV holders compounds the vulnerability of this group.<sup>74</sup> The absence of adequate information, accommodation support, and household formation support all inhibit the successful settlement of these families.

The Inquiry finds that refugee children and their families released from detention are generally provided with adequate health care.

Similarly, while there is adequate provision of mental health care for children released from detention, the restrictions in basic settlement services undermines the effectiveness of this care. The need to establish basic living standards preoccupies the minds of this vulnerable group.

The Inquiry finds that since July 2002, when child TPV holders became eligible for the Commonwealth-funded New Arrivals Program, primary and secondary school-aged children have had adequate access to education. Prior to that time the provision of education varied between States. However, the Inquiry finds that the uncertainty caused by the temporary nature of the TPV system affects young peoples' capacity to access and take full advantage of that education.

### **16.4 What care is provided to unaccompanied children released from detention?**

Australia has a special responsibility to care for unaccompanied refugee children released from detention.

Arrangements for the care of former detainee unaccompanied children are made under the Department's Unaccompanied Humanitarian Minor Program, 'under which welfare, supervision and case management are delegated to State welfare authorities'.<sup>75</sup>

As explained in Chapter 14 on Unaccompanied Children, the Department understands the term 'unaccompanied minor' to be 'the broad term used to describe a non-citizen, under 18 years of age who does not have a parent to care for them in Australia'.<sup>76</sup> Those unaccompanied children who do not have a relative over the age of 21 to care for them fall within the provisions of the *Immigration (Guardianship of Children) Act 1946* (IGOC Act) which designates the Minister as their guardian.

At 31 March 2002, the total number of unaccompanied refugee children (under 18 at the time of their release) released from detention was 291, with the following number sent to each of the following destinations: Adelaide, 83; Perth, 81; Melbourne, 70; Brisbane, 53; Sydney, 4.<sup>77</sup>

The large majority of unaccompanied refugee children now living in the community have spent time in detention and were released on TPVs. At 31 March 2002, there were 165 child TPV holders who were still IGOC wards.<sup>78</sup> Most of them were 16 to 18-year-old boys from Afghanistan.<sup>79</sup>

#### **16.4.1 Guardianship and care arrangements for unaccompanied children**

While the Minister remains the legal guardian of unaccompanied refugee children, the care of unaccompanied refugee children on TPVs has generally been delegated by the Minister to officers of State child welfare agencies.

According to the Department, State authorities develop individual case plans for each unaccompanied refugee child, which:

ensure that UHMs are in an appropriate and stable placement or in stable supported accommodation; in an established, effective and caring relationship with an adult or linked into community support systems

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appropriate to their age and development; accessing appropriate health and social welfare services to reduce crises and trauma; and involved in education, training, social, sporting, recreational and/or cultural activities.<sup>80</sup>

All States have guidelines for the care of unaccompanied refugee children. For example in Western Australia, the Refugee Minor Framework outlines the services which the State welfare department is required to provide:

The department provides assistance to meet the social, emotional and practical needs of unaccompanied children living in the community. This includes assistance to obtain legal advice on a case by case basis, provision of counselling and referral and liaison with specialist mental health and other services, provision of clothing and other practical support such as enrolment in school and provision of information about other ethnic and community resources available to them.<sup>81</sup>

Each of the State child welfare agencies provides care for unaccompanied refugee children in line with the kind of care that would be provided for all other State wards. However, as the majority of unaccompanied refugee children in the care of State agencies hold TPVs, they require intensive assistance.<sup>82</sup> The Department of Human Services Victoria told the Inquiry that:

The lack of permanency and isolation faced by TPV holders makes it more difficult for the Refugee Minors Program to develop long term settlement arrangements for unattached minors on TPVs, significantly hampering the goals of trauma recovery and planning a stable future.<sup>83</sup>

The Western Australia Government provided the Inquiry with a comprehensive summary of the services that they provide for unaccompanied refugee children. Children are met by DCD upon arrival and are provided with:

emergency accommodation leased by DCD for this purpose. The children are provided with information and assistance to access community resources, such as the Association for Services to Torture and Trauma Survivors, Centrelink, education and training facilities and longer term accommodation. Where necessary, they are assisted with bond money for rental. DCD also provides counselling and payments for expenses such as school fees and clothing'.<sup>84</sup>

The type of accommodation provided for unaccompanied refugee children depends on their age, as reported by the South Australian Department of Human Services:

the type of care that the unaccompanied minors who are TPV holders gets is dependent on their age as it would be with any child who is a Guardian of the Minister child in South Australia and depending on the level of independence. 17 year olds for example pretty much all live independently and the South Australian Housing Trust provides them with subsidised accommodation but they still have support from a social worker and mentorship team. At 15, 16 they tend to live in group housing situations so there would be one adult and maybe four minors living together and anything under that they are in alternative care placements placed with a family, a foster family.<sup>85</sup>

Queensland is the only State where their care is not completely managed by the State welfare agency. In Queensland, the Department of Families (DOF) is responsible for the case management, while a non-government agency, Mercy Family Services (MFS) is responsible for day-to-day management of the unaccompanied children.<sup>86</sup>

### 16.4.2 Unaccompanied children's experiences of care in the community

The Inquiry met with unaccompanied refugee children in care within the community through focus groups held in capital cities. The young people interviewed presented varied perspectives on their experience of care in the community.

One 15-year-old told the Inquiry that he had been assigned a series of Department of Community Services (DoCS) officers in Sydney:

When I came to Sydney, the lady at DoCS, she was very helpful to me and she was very kind to me. When she had a baby she was gone. She left and another lady came, and she was good but she left also, she went overseas.<sup>87</sup>

This young man reported that he was not happy with his current carer, who had not assisted him when he needed medical treatment.

One boy aged 14 years had been placed with English-speaking foster families in Melbourne on release from detention. These families were unsatisfactory in the long term. In reference to the first family, he said:

There was nothing and we didn't say anything. I report to Immigration that I do not like here and I am very upset here. We did no shopping or anything like that. I told them I don't like and I want to live with my friends and they said never, you can't because it is Australian rule for under 15 year olds. I said I can't live here. If you leave me for one week, maybe I will die.<sup>88</sup>

This boy was then placed with another English-speaking foster family, which he said was an improvement, but he was still unhappy. He ultimately moved in with a man who he knew from Afghanistan.

A 15-year-old boy stressed the importance of care and attention in the absence of family contact:

Not many people will have the experience that we do because not many people will leave their family behind them and make this long, long journey by themselves unless they are in real danger. We were in real danger and that's why we left. And we are still in this situation, which somehow we have to deal with it, and we are not asking for anything more... but we should by law be under good supervision by DoCS or whatever. Its not a matter of money, money wouldn't give you feeling. We feel very lonely. We don't have our family. We don't have our parents or anybody. We need a sensible person to look after us here ... We have an expression in our language and it says 'you can offer just bread with onions [as long as it's] with love and care, it doesn't matter, it is the love that is important'. They can't give us the love of our parents but at least they can care about us and they can give us some guidance, something that we can know that we are normal.<sup>89</sup>

### **16.4.3 Costs to State agencies for providing care to unaccompanied children**

The Department states that 'a joint Commonwealth/State cost sharing agreement was established in 1985 with five State child welfare departments: NSW, Victoria, Western Australia, Queensland and South Australia'.<sup>90</sup> Under this arrangement the Commonwealth contributes 50 per cent of the salary costs of a case worker at a ratio of one case worker to 25 children, plus an additional one-third for on-costs.

With the exception of South Australia, where an agreement was signed in November 2002, the delegation of the care of unaccompanied refugee children to State agencies is currently managed through outdated agreements. The Western Australia Government said that they operated under a draft MOU from 1996, stating that under this agreement, the Commonwealth:

compensates the Western Australian Government for approximately 29 per cent of the salaries and related costs of DCD field staff working with unaccompanied children released from detention. No provision is made for important settlement services such as on arrival accommodation, clothing and other incidentals.<sup>91</sup>

The Department of Human Services Victoria reported dissatisfaction with a 1985 Cost Share Agreement between it and the Department which:

includes a funding formula under which the Commonwealth is responsible for meeting half the cost of the Refugee Minor Program workers' wages. Under this arrangement, the Commonwealth does not contribute to any additional operating expenses of the Refugee Minor Program, and the cost of supervision and client expenses are fully funded by the State.<sup>92</sup>

In August 2000, the States and Territories began a joint negotiation process with the Commonwealth to develop an MOU to replace the outdated arrangements.<sup>93</sup> However, both DCD in WA and the Department of Human Services Victoria reported that there had been no progress in these arrangements since October 2001.<sup>94</sup>

### **16.4.4 Problems in making applications for permanent protection visas (PPVs)**

The Department states that unaccompanied children on TPVs will receive legal assistance to prepare and lodge further protection visa applications if they wish.<sup>95</sup>

The Inquiry heard that unaccompanied child TPV holders perceive a conflict of interest in the Minister, who is their legal guardian, being the arbiter of their applications for permanent protection, even though the guardianship is delegated to the State child welfare authorities.<sup>96</sup> This is especially the case given the only way in which most TPV holders would be able to receive a PPV is through Ministerial discretion.

#### **16.4.5 Findings regarding the care of unaccompanied children released from detention**

The Inquiry finds that unaccompanied refugee children are generally adequately cared for by the State agencies to which their care is delegated.

However, the conditions of the TPV system, including its temporary nature, the restrictions on family reunion and travel, have a proportionally greater impact on unaccompanied refugee children than upon other children due to their isolation from their family.

### **16.5 What is the impact of restricted services and entitlements on families on temporary protection visas?**

Section 16.3 discussed some of the restrictions on services available to children holding temporary protection visas. Several of the restrictions on TPV holders pertain to adults rather than children, for example entitlements to social security. Nevertheless children living in TPV families are affected by these restrictions because they have a significant impact on the functioning of the family unit.

The Inquiry has heard that the detention experience can have a detrimental impact on the effective functioning of refugee family units. The Victorian torture and trauma service reported that parents in the community are often 'limited in their ability to provide the practical and psychological care required by their children as a result of their experiences of conflict, flight and a perilous journey', and that this is further compounded by the detention of families:

The act of mandatory detention and loss of freedom combined with the physical conditions of the detention centres result in a situation that undermines the capacity for families to function as a viable supportive unit.<sup>97</sup>

The Victorian torture and trauma service also stated that the TPV system compounded family problems:

A sense of hopelessness, frustration and anger characterise responses to the powerlessness and discrimination experienced by refugees with a temporary protection visa. This has a cost to mental health and also to the capacity of parents to respond to the needs of their children. Parents, particularly fathers, can feel ashamed at being unable to provide for their wife and children. Children and young people can sense the despair felt by their parents and feel equally despairing and helpless. ...

People came to Australia trying to achieve safety for themselves, and particularly their children. They cannot, however, offer this and this realisation impairs their confidence. We have observed them to become withdrawn. Children expect their hardships to be over once released but instead notice their parents are ineffectual and remote. Their hopes for being a family are not realised and so the children too become withdrawn, where they had been happy on release.<sup>98</sup>

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The Department disputes that families on TPVs are any worse off than any other family:

People who are released from immigration detention on a TPV have access to the same basic taxpayer-funded package of services which is available to unemployed members of the Australian community. ... Beyond this package of assistance, TPV holders are expected to take primary responsibility for their own living requirements while they are in Australia. The benefits are provided to assist refugees in settling into Australia, gain employment and participate equitably in the Australian community.<sup>99</sup>

However, the entitlements and services offered to this extremely vulnerable group of people are considerably fewer than those offered to PPV holders, whose needs more closely represent those of TPV holders than unemployed Australians.<sup>100</sup>

### 16.5.1 Housing

Secure housing is one of the most important factors affecting the general well-being of refugee children. As outlined earlier, TPV holders are generally not eligible for on-arrival housing. The precarious situation of TPV holders with regard to housing continues beyond the settlement period, with TPV holders at high risk of housing stress. A Victorian study of TPV holders found that most of the participants were still in short-term or emergency housing between six and twelve months after their release.<sup>101</sup> A Queensland study found that:

There is insufficient supply of appropriate accommodation, particularly for unaccompanied minors and single women. There is not enough short term or flexible accommodation available to TPV holders, who tend to be highly mobile, frequently changing location in search of work or community support.<sup>102</sup>

As public and community housing is administered by the States, eligibility varies between States. For example, the South Australian Government provides considerable additional housing support to TPV holders, particularly those with families. Families are provided with on-arrival accommodation, short-term (six months) access to furnished public housing, access to a grant to cover rental bond and are eligible to register for public housing waiting lists.<sup>103</sup> However, in NSW they are ineligible for such services and are forced to find accommodation in the private rental market. Accessing the private rental market can contribute to 'housing stress due to the high cost of accommodation, insecure tenure, discrimination in obtaining accommodation, and the costs and social dislocation flowing from repeatedly changing address'.<sup>104</sup> Insecure housing has a direct impact on a child's safety and well-being.

TPV holders are, however, eligible for Rent Assistance, a Commonwealth payment to assist with the cost of rental accommodation.



Drawing by a child detainee in Port Hedland.

### 16.5.2 Social security

The income security of families is another significant factor in children's wellbeing. The capacity of former detainee parents to provide for their families is compromised by the fact that they have spent months or years in detention without an income. TPV holders are eligible for income support through the Special Benefit payment from Centrelink, with payments generally made at the same rate as those for the Newstart or Youth Allowance, the most common social security payments available within Australia.<sup>105</sup> As of 14 November 2002, 4262 of 8800 TPV holders were receiving the Special Benefit.<sup>106</sup>

The conditions under which the Special Benefit is granted, however, are considerably harsher than those for comparable benefits. To be eligible for the Special Benefit, the TPV holder must have no more than \$5000 in available funds. Furthermore, the Special Benefit is reduced by one dollar for each one dollar of income earned. As argued by NCOSS, this:

approach is a strong disincentive to seek part-time or casual work, which is a common path into the labour market. In recognition of this, recipients of Newstart, for example, are entitled to earn up to \$62 per fortnight without penalty, and a higher income leads to a reduction in benefit on a scale of 50c and then 70c in the dollar.<sup>107</sup>

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TPV holders in Australia have:

claimed that special benefits from Centrelink barely covered food bills, while practically, most participants expressed urgent need for clothing for themselves and their children, for basic furniture, extra blankets, refrigerators, washing machines and cooking utensils.<sup>108</sup>

Furthermore, the Inquiry heard that '[a]s dependent children who are school students turn 16, their parents who receive a special benefit lost the family tax benefit for that child. This means their income, the family income, drops by \$70 a fortnight'.<sup>109</sup>

As of 1 January 2003, changes were made to the conditions under which TPV holders may receive the Special Benefit through the *Family and Community Services Legislation Amendment (Special Benefit Activity Test) Act 2002*. The legislation requires TPV holders to negotiate, sign and comply with an activity agreement specifying obligations (such as the number of employer contacts per fortnight) and subjects them to breaches and penalties for non-compliance.

There are some advantages in the change to the legislation, including limited access to English language classes for adults, access to the Special Benefit if the TPV holder is in full-time study and greater access to Job Search Support services. However, the Special Benefit is a discretionary payment of last resort and to impose a mutual obligation regime on Special Benefit recipients on TPVs will not hasten this group's social and economic participation in Australian society. Enforcing the activity testing of the Special Benefit will have a particular impact on refugee families and children, as the penalties for breach of activity agreements could leave families without sufficient income to meet their children's basic needs.

### 16.5.3 Employment

The TPV is really very difficult; it makes you worry about your future. Even me, I think like, if I have to go back, what's the point of study? I will have to work and collect money to get a life, because if I want to make a life, or if my Dad wants to buy the land that we sold or buy anything, it's really very expensive, much more than before. My Dad is not working because he doesn't know English, and there's no English program for adults. It's really very difficult.<sup>110</sup>

Whether or not a refugee family has access to employment has a significant impact on the well-being of children within the family, as obtaining work will contribute to both the mental health of their parents and the income of the family.

The experience of detention can affect the employability of former detainees, particularly if they were detained for a lengthy period. Long-term detainees are likely to have compromised mental health as a consequence of detention and have spent their time in detention out of the workforce. These factors limit their employability.

Furthermore, the conditions attached to the visa hinder the ability of former detainees to obtain employment. Although TPV holders have a wide variety of skills and

qualifications, they face significant impediments in securing work. TPV holders have limited access to the Job Network services. They are ineligible for the National Office of Overseas Skills Recognition loan scheme to support bridging training for overseas trained professionals. In addition, TPV holders have limited access to English language training. Finally, employer reluctance to employ people holding temporary visas creates an additional hurdle and may lead to discrimination in employment.

### **16.5.4 Findings regarding the impact of restricted services and entitlements on families**

TPV holders and their families are not automatically eligible for public housing. The conditions attached to the Special Benefit, including the strict eligibility and income tests and the activity testing regime, compromise the income security of TPV families. The restrictions on access to employment services and English language training can inhibit the employability of TPV holders. These restrictions place extra pressure on families who are already vulnerable due to long periods in detention and the restrictive conditions of the TPV.

The Inquiry finds that these restrictions on the services and entitlements available to TPV holders and their families have a detrimental impact on children.

## **16.6 What services and entitlements are provided to children in the community on bridging visas?**

Former detainee children living in the community on a bridging visa face even more limited entitlements and provision of services than children and families holding TPVs.<sup>111</sup>

As discussed earlier, there are very few unauthorised arrival detainee children released on bridging visas pending determination of their refugee status. Only one unauthorised arrival unaccompanied child, one mother with two children (the father stayed in detention), and one whole family were released on bridging visas over the period of the Inquiry. However, the Inquiry is concerned that the conditions under which such children may be released are inadequate to meet their needs.

The only bridging visa which can be granted to children who are in detention because they arrived in Australia without a visa is Bridging Visa E subclass 051. As Table 2 indicates, asylum seekers holding a Bridging Visa E in this subclass are not eligible for social security payments, nor are they eligible for the Asylum Seekers Assistance Scheme (ASAS), which is available to community-based asylum seekers on other types of bridging visas.<sup>112</sup>

Further, asylum seekers holding a Bridging Visa E 051 must demonstrate that they have a compelling need to work in order to obtain a working permit. They must also have made an application for a protection visa within 45 days of arrival in Australia in order to be granted permission to work. Those holding a Bridging Visa E 051

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because they are seeking judicial or Ministerial review will generally not be granted permission to work.<sup>113</sup> Asylum seekers holding a Bridging Visa E 051 are only eligible for Medicare if their visa allows them to work.<sup>114</sup>

The Inquiry did not receive submissions concerning the impact of the restricted conditions attached to Bridging Visa E 051, most likely because so few of these visas have been issued. However, the Inquiry received submissions on the negative impact of the conditions attached to bridging visas held by some asylum seekers in the community, which are similar to the conditions of the Bridging Visa E 051. The Hotham Mission in Victoria describes the problem facing these bridging visa holders as follows:

Very few asylum seekers in the community are eligible for any government funding, welfare payments, education or housing subsidies. The Red Cross are federally funded to provide assistance to only a small group of asylum seekers who have been waiting for their first decision for more than 6 months and who have not appealed beyond the Refugee Review Tribunal. The majority however are without such assistance. All asylum seekers who appeal to the Immigration Minister for their application to be assessed on humanitarian grounds are denied the right to work, income support or Medicare ...

Asylum seekers without support or work rights must rely completely on the support and resources of charities and welfare agencies, often church-based. This group is barred from assistance from Migrant Resource Centres and other settlement services. They are also not eligible for mainstream services like public housing or basic medical coverage. While a considerable amount of tax-payers funds are spent on immigration detention costs, almost no government funds are provided for asylum seekers living lawfully in the community, who make up the majority of all asylum seekers.<sup>115</sup>

This group of asylum seekers is especially vulnerable to homelessness and ill-health and in most cases is completely dependent on churches and over-stretched welfare agencies.

The Brisbane Refugee Health Network also highlights the difficulties faced by asylum-seeking families in the community who do not have work rights, access to Medicare, public housing, welfare, torture and trauma counselling, and no rights to education for their children (even at primary school level).<sup>116</sup>

Amnesty International outlines the problems faced by these asylum seekers:

No asylum seekers in the community [on a bridging visa] can access any Centrelink services. Further, a significant number reside on bridging visas that do not permit the right to work and as such they are not permitted access to Medicare. Also, they are not eligible for public housing, with limited emergency housing dependent on the generosity of individual state governments. School and tuition fees for children are often prohibitively expensive with administrative procedures confusing for both asylum seekers and the schools involved. With tighter restrictions and severe limitations on assistance for these asylum seekers, welfare and community groups are reporting that increasingly asylum seekers in the community are becoming

marginalised and impoverished, a situation that can last for several years while claims are assessed.<sup>117</sup>

Despite Bridging Visa E 051 being a bridging visa with significant restrictions in terms of entitlements and services, as described above, this is the only bridging visa granted to asylum seekers in detention.

### **16.6.1 Findings regarding the care of children living in the community on bridging visas**

The Inquiry finds that asylum seekers released from detention on a Bridging Visa E subclass 051 are likely to have insufficient social support in the community. They are not eligible for social security payments, or for the Asylum Seekers Assistance Scheme. They are only eligible to work if they can demonstrate a compelling need, and are only eligible for Medicare if they are granted permission to work. The Inquiry is therefore concerned that the only bridging visa available to asylum-seeking children in detention is inadequate to meet their special needs and vulnerabilities as outlined in this chapter.

## **16.7 Summary of findings regarding rights on release from detention**

The Inquiry finds that the impact on refugee children of the conditions attached to a temporary protection visa (TPV) results in a breach of articles 3(1), 6(2), 10(1), 20(1), 22(1), 24(1) and 39 of the CRC. However, the Inquiry finds no breach of articles 24(1), 27 or 28(1) regarding the services provided to families and unaccompanied children released from detention on a TPV.

Children released from detention on TPVs have fled their homes out of fear of persecution and are seeking to make a new life in Australia. The Inquiry finds that the TPV system poses substantial barriers to their successful integration into Australian society for two primary reasons.

First, their temporary status in Australia creates a great deal of uncertainty which, in turn, impacts upon the ability of a child to achieve the highest attainable mental health, maximum possible development and recovery from past torture and trauma (articles 6(2), 24(1), 39 of the CRC).

Second, the absence of the right to family reunion for the duration of the TPV (other than by the exercise of Ministerial discretion), and the effective prohibition on overseas travel means that some children may be separated from their parents and siblings for long, potentially indefinite, periods of time. The presumption against family reunion poses inherent obstacles to ensuring that any such applications are dealt with in 'a positive, humane and expeditious manner,' resulting in a breach of article 10(1). The prolonged absence of immediate family can also have a very serious impact on the mental health, development and reintegration of children from backgrounds of trauma (articles 6(2), 24(1) and 39). All these factors can compound the damage that may have been caused by long-term detention on arrival.

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Furthermore, the laws preventing TPV holders from travelling overseas and re-entering Australia without risking their visa, breach article 22(1) of the CRC. This is because they deprive children of the right to 'travel documents for the purpose of travel outside their territory' under article 28 of the Refugee Convention and paragraph 13(1) of the Schedule to that Convention.

The legislation does not create any special exceptions or considerations for unaccompanied children despite the fact that the uncertainty of the visa status, and the restrictions on family reunion and travel, have a disproportionate impact on these children. This amounts to a breach of article 20(1) of the CRC.

The Department has stated that the legislation introducing the TPV was designed to deter unauthorised boat arrivals. This purpose must be balanced against the need to ensure that the best interests of the child are a primary consideration in all actions affecting children (article 3(1)).<sup>118</sup> In the Inquiry's view the impact of the restrictions of the TPV on the rights of children, as described above, demonstrates the failure of the legislation to properly take these considerations into account.

While the laws creating the TPV itself breach the rights of children, as set out above, the Inquiry finds that the services offered to children who are granted those visas comply with a child's right to health care (article 24) and an adequate standard of living (article 27). However, while the Inquiry does not find any breach in this regard, it notes that the limited services and entitlements available to TPV families may put strain on families and may therefore have a detrimental impact on the experience of children. These include limited settlement services, including housing assistance, stringent reporting requirements in order to receive the Special Benefit, limited employment assistance programs and limited English language tuition for adults.

Similarly, the Inquiry finds no breach concerning the right to education for children on TPVs (article 28(1)) since July 2002, when primary and secondary school-aged child TPV holders became eligible for the Commonwealth-funded New Arrivals Program. However, the Inquiry remains concerned that prior to that time the provision of education varied between States. The Inquiry is also concerned that the uncertainty caused by the temporary nature of the TPV system continues to affect young peoples' capacity to access education.

Unaccompanied refugee children released from detention are generally well cared for by State agencies. The Inquiry therefore finds no breach of article 20(1). However, as noted above, the impact of uncertainty on these children is serious. In particular, it can negatively sway an unaccompanied child's decision to pursue education (rather than earn an income to take back to their country).

Since unauthorised arrival children and families are almost never released from detention on bridging visas, the Inquiry has not received any evidence regarding the experiences of these children. However, the Inquiry notes that if a child or family released on a Bridging Visa E 051 had to rely on the services provided pursuant to that visa, they would not be in a position to enjoy the right to an adequate standard of living (article 27), health care (article 24) and social security (article 26).

## Endnotes

- 1 Unless, after September 2001 they spent more than seven days in a country where they could have sought and obtained effective protection, in which case they are only eligible for TPVs.
- 2 UNHCR, *Guidelines on Reunification of Refugee Families*, Geneva, 1983, para 3(1).
- 3 UNHCR, *Guidelines on Reunification of Refugee Families*, Geneva, 1983, para 9(d).
- 4 UNHCR, *Summary Conclusions on Family Unity*, Geneva Expert Roundtable, 8-9 November, 2001, para 5.
- 5 The Schedule to the Refugee Convention outlines the specific requirements of article 28 on the issuing of travel documents and the conditions attached to those travel documents.
- 6 See also UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (UNHCR UAM Guidelines), Geneva, 1997, para 5.17.
- 7 See also UNHCR UAM Guidelines, para 5.18, which recommends that children be tracked to check on their location and care arrangements to avoid any risk of abuse taking place.
- 8 UNHCR UAM Guidelines, para 9.4. See also UNHCR, *Refugee Children: Guidelines on Protection and Care*, Geneva, 1994, ch 10.
- 9 These visa classes are also discussed further in Chapter 6 on Australia's Detention Policy. It is important to note that very few refugees in Australia have these visas, due to the Ministerial discretion needed to allow application.
- 10 *Migration Amendment Regulations 1999 (No 12)* (Cth), *Migration Amendment (Excision from Migration Zone) (Consequential Provisions Act) 2001* (Cth).
- 11 DIMIA, Fact Sheet 71, New Measures to Strengthen Border Control, at [www.immi.gov.au/facts/71border.htm](http://www.immi.gov.au/facts/71border.htm), viewed 13 February 2003. The deterrence objective is repeated several times throughout this Fact Sheet.
- 12 From September 2001, TPV holders are ineligible for a PPV if, since leaving their home country, they have resided for at least seven days in a country where they could have sought and obtained effective protection.
- 13 Inquiry, Focus group, Perth, June 2002.
- 14 See further Chapter 9 on Mental Health regarding the impact of detention on the mental health of children.
- 15 Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS), *Trauma changes adults but forms children – Protecting and healing child asylum seekers and refugees*, Discussion Paper, 2002, p17.
- 16 Queensland Program of Assistance to Survivors of Torture and Trauma (QPASTT), Transcript of Evidence, Brisbane, 6 August 2002, p69. See also, Victorian Foundation for the Survivors of Torture (VFST), Submission 184, p9.
- 17 QPASTT, Transcript of Evidence, Brisbane, 6 August 2002, pp68-69.
- 18 VFST, Submission 184, p10.
- 19 Inquiry, Focus group, Sydney, April 2002.
- 20 University of NSW Centre for Refugee Research, Transcript of Evidence, Sydney 16 July 2002, p78. See also Coalition Assisting Refugees After Detention (CARAD), Transcript of Evidence, Perth, 10 June 2002, pp24-25.
- 21 Department of Human Services Victoria, Submission 200, p12.
- 22 Inquiry, Interview with teenage TPV holder, Sydney, April 2003.
- 23 Uniting Care Burnside, Submission 172, p22.
- 24 The Department informed the Inquiry that '[t]he department is under no obligation to provide advance notice of legislative change'. DIMIA, Response to Draft Report, 10 July 2003.
- 25 The Department informed the Inquiry that 'in certain cases where it is in the public interest the Minister may exercise his discretion and grant a permanent protection visa to an applicant who may not otherwise be eligible'. DIMIA, Response to Draft Report, 10 July 2003.
- 26 See especially Chapter 4 on Australia's Human Rights Obligations, Chapter 6 on Australia's Detention Policy and Chapter 17, Major Findings and Recommendations.
- 27 Inquiry, Focus group, Sydney, October 2002.
- 28 DIMIA, Response to Draft Report, 10 July 2003.
- 29 The Inquiry did not obtain numbers of families separated in this way. Australian Democrats Senator Andrew Bartlett, who visited Nauru in July 2003, stated that at the time of his visit nine women with their children in the Nauru camp had husbands in Australia. A Bartlett, Australian Democrats

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- spokesperson for Immigration and Multicultural Affairs, *Pacific Strategy a wasteful humanitarian disaster*, Media Release, 30 July 2003.
- 30 Inquiry, detainee interview, Sydney. In detainee interviews on Christmas Island, the Inquiry also spoke to two Iraqi women with children who were detained awaiting removal to Nauru and Papua New Guinea for refugee processing. Their husbands were living in the Australian community on protection visas.
- 31 See also section 6.7.8 in Chapter 6 on Australia's Detention Policy.
- 32 Department of Human Services Victoria, Submission 200, p12.
- 33 Inquiry, Focus group, Perth, June 2002.
- 34 VFST, Submission 184, p10.
- 35 RCOA, *On Family Unity and Family Reunification Obligations in Relation to Family Unity*, August 2001, at [http://www.refugeecouncil.org.au/html/position\\_papers/FAMILY\\_UNITY.html](http://www.refugeecouncil.org.au/html/position_papers/FAMILY_UNITY.html), viewed 17 July 2003.
- 36 Western Australian Government, Submission 223, pp12-13.
- 37 R Mann, *Temporary Protection Visa Holders in Queensland*, Queensland Government, 2001, p11.
- 38 Mann, p11.
- 39 VFST, Submission 184, p12.
- 40 F Mansouri and M Bagdas, *Politics of Social Exclusion: Refugees on Temporary Protection Visa in Victoria*, Deakin University and the Victorian Arabic Social Services, 2002, p1. The local government areas are the City of Darebin, the City of Greater Dandenong, Shepparton and Mildura.
- 41 NSW Council of Social Service, Transcript of Evidence, Sydney, 15 July 2002, p52.
- 42 DIMIA, Review of Settlement Services for Migrants and Humanitarian Program Entrants, p6, at [http://www.immi.gov.au/settle/settle\\_review](http://www.immi.gov.au/settle/settle_review), viewed 17 July 2003.
- 43 DIMIA, Response to Draft Report, 10 July 2003.
- 44 NSW Council of Social Service, Submission 127a, p8.
- 45 NSW Council of Social Service, Submission 127a, p8.
- 46 Department of Human Services, South Australia (DHS), Submission 181, p47.
- 47 NSW Council of Social Service, Submission 127a, p5.
- 48 NSW Council of Social Service, Submission 127a, p6.
- 49 NSW Council of Social Service, Submission 127a, p6.
- 50 NSW Council of Social Service, Submission 127a, p6.
- 51 DIMIA, Fact Sheet 64, Temporary Protection Visas, at <http://www.immi.gov.au/facts/64protection.htm>, viewed 17 July 2003.
- 52 Brisbane Refugee Health Network, Transcript of Evidence, Brisbane, 6 August 2002, pp13-14.
- 53 Coordinator, New Arrivals Clinic, City of Port Adelaide Enfield, Transcript of Evidence, Adelaide, 1 July 2002, p11. See also section 10.4.10 in Chapter 10 on Physical Health.
- 54 Mann, p20.
- 55 Mansouri and Bagdas, p54.
- 56 Mansouri and Bagdas, p54.
- 57 VFST, Submission 184, p3.
- 58 The Department informed the Inquiry that the average number of sessions provided to clients under this program is eight. DIMIA, Response to Draft Report, 10 July 2003.
- 59 VFST, Submission 184, p12.
- 60 Mann, p22.
- 61 Maria Iadanza, Principal, Adelaide Secondary School of English, Transcript of Evidence, Adelaide, 1 July 2002, p39.
- 62 Adele Rice, Principal, Milpera State High School, Transcript of Evidence, Brisbane, 6 August 2002, p78.
- 63 South Australian Department of Education, Employment and Training, Submission 154, p5.
- 64 Western Australian Government, Submission 223, p8.
- 65 Western Australian Government, Submission 223, p8.
- 66 Inquiry, Meeting with officer from DCD, June 2002, Perth.
- 67 Maria Iadanza, Principal, Adelaide Secondary School of English, Transcript of Evidence, Adelaide, 1 July 2002, p41.
- 68 Inquiry, Focus group, Melbourne, May 2002, Afghan unaccompanied teenager.
- 69 Inquiry, Focus group, Brisbane, August 2002, unaccompanied child.
- 70 South Australian Department of Education, Transcript of Evidence, 2 July 2002, Sydney, p21.
- 71 Inquiry, Focus group, Brisbane, August 2002, unaccompanied child.

- 72 NSW Commission for Children and Young People, Submission 258, p72.
- 73 Western Australian Government, Transcript of Evidence, Perth, 10 June 2002, p56.
- 74 The Department informed the Inquiry of its view that 'services provided to people on TPVs are comparable with services provided to other temporary residents. TPV holders are not being assisted to settle permanently in Australia'. DIMIA, Response to Draft Report, 10 July 2003.
- 75 DIMIA, Submission 185, p107.
- 76 DIMIA, Submission 185, p107.
- 77 DIMIA, Submission 185, p193.
- 78 DIMIA, Submission 185, p194.
- 79 DIMIA, Submission 185, p109.
- 80 DIMIA, Submission 185, p108. UHM refers to Unaccompanied Humanitarian Minor, and includes both unaccompanied refugee children, and 'detached' refugee children, who have a relative over the age of 21, but are not part of the child's immediate family, living in Australia.
- 81 Western Australian Government, Transcript of Evidence, Perth, 10 June 2002, p33.
- 82 Department of Human Services Victoria, Submission 200, p5.
- 83 Department of Human Services Victoria, Submission 200, p6.
- 84 Western Australian Government, Submission 223, p9.
- 85 DHS, Transcript of Evidence, Adelaide, 1 July 2002, p90.
- 86 Inquiry, Meeting with Mercy Family Service, Brisbane, August 2002. The DOF are the children's legal guardians and while MFS can sign school forms and liaise with Centrelink, for legal matters or serious medical matters, DOF consent is required. MFS manage enrolment in school and medical care. MFS and DOF work together to find permanent housing. MFS employs a cultural support worker for twenty hours per week to assist meeting the children's needs.
- 87 Inquiry, Focus group, Sydney, April 2002.
- 88 Inquiry, Focus group, Sydney, April 2002.
- 89 Inquiry, Focus group, Sydney, April 2002.
- 90 DIMIA, Submission 185, p108.
- 91 Western Australian Government, Submission 223, p9.
- 92 Department of Human Services Victoria, Submission 200, p8.
- 93 Department of Human Services Victoria, Submission 200, p12.
- 94 Department of Human Services Victoria, Submission 200, p12. The Department informed the Inquiry that a new funding agreement between the Commonwealth and the South Australian Government was signed in November 2002. DIMIA, Response to Draft Report, 10 July 2003.
- 95 DIMIA, Submission 185, p111.
- 96 Inquiry, Focus group, Brisbane, August 2002.
- 97 VFST, Submission 184, p14.
- 98 VFST, Submission 184, pp9-10.
- 99 DIMIA, Unauthorised Arrivals and Detention: Information Paper, February 2002, p10, at <http://www.immi.gov.au/illegals/uad/04.htm#13>, viewed 18 July 2003.
- 100 The Department informed the Inquiry of its view that TPV holders are provided with a range of services commensurate with temporary stay in Australia. DIMIA, Response to the Draft Report, 10 July 2003.
- 101 Mansouri and Bagdas, pp53, 55.
- 102 *Temporary Protection Visa Holders in Queensland – A Year On*. Findings from a consultation held by Brisbane City Council Social Action & Equity Unity with key stakeholders, May 2002, p8.
- 103 DHS, Submission 181, p46.
- 104 NSW Council of Social Service, Submission 127a, p10.
- 105 Newstart is the general allowance for unemployed Australians, paid at \$385 per fortnight for a single person with no children; \$416.40 per fortnight for a single person with dependent children; and \$347.30 per fortnight for each partnered person. Youth Allowance is paid at a rate between \$169.70 and \$310.10 per fortnight depending on the age of the young person (without dependants) and whether or not they are living at home. Centrelink, Special Benefit Payment Rates, as at 12 November 2003.
- 106 Senate Community Affairs Legislation Committee, Report – Family and Community Services Legislation Amendment (Special Benefit Activity Test) Bill 2002, p2.
- 107 NSW Council of Social Service, Submission 127a, p16.
- 108 Mansouri and Bagdas, p59.
- 109 CARAD, Transcript of Evidence, Perth, 10 June 2002, p23.

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- 110 Inquiry, Interview with teenage TPV holder, Sydney, April 2003.
- 111 The Department informed the Inquiry that 'an asylum seeker can only be released from detention on a Bridging Visa E (subclass 051) if there is sufficient social support in the community, which is a requirement to be eligible to make an application'. DIMIA, Response to Draft Report, 10 July 2003.
- 112 ASAS provides financial assistance for basic living essentials and health care needs. The eligibility criteria for ASAS are restrictive. Eligibility is restricted to asylum seekers who meet financial hardship criteria and who have been waiting for a decision from the Department on the protection visa application for six months or more. Assistance is generally not available to persons seeking a review of their protection visa application at the Refugee Review Tribunal, or seeking judicial review. Parents with children under 18 years of age are exempt from these criteria.
- 113 DIMIA, Bridging Visas, Form 1024i.
- 114 DIMIA, Fact Sheet 62, Assistance for Asylum Seekers in Australia, available at <http://www.immi.gov.au/facts/62assistance.htm>, viewed 12 May 2003.
- 115 Hotham Mission, Submission 174, p4.
- 116 Brisbane Refugee Health Network, Submission 105, p3.
- 117 Amnesty International Australia, Fact Sheet 14 – Community Based Asylum Seekers in Australia, at <http://www.amnesty.org.au/refugees/ref-fact14.html>, viewed 12 May 2003.
- 118 The deterrent purpose of TPVs also raises the question as to whether the visa amounts to a penalty under article 31(1) of the Refugee Convention. As discussed in Chapter 4 on Australia's Human Rights Obligations, consideration of article 31 of the Refugee Convention is beyond the scope of this Inquiry.

# Chapter 17

## Major Findings and Recommendations of the Inquiry

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## 17. Major Findings and Recommendations of the Inquiry

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This chapter addresses the following issues:

- 17.1 The Inquiry's major findings
- 17.2 Reasons for the Inquiry's major findings
- 17.3 The Inquiry's recommendations
- 17.4 Reasons for the Inquiry's recommendations
- 17.5 The Department of Immigration and Multicultural and Indigenous Affairs' (the Department's) main objections to the Inquiry's recommendations
- 17.6 Action taken by the Department and Australasian Correctional Management Pty Limited (ACM) in response to the Inquiry's findings and recommendations.

### 17.1 The Inquiry's major findings

In addition to the detailed findings in each of Chapters 5-16, the Inquiry has made the following major findings in relation to Australia's mandatory immigration detention system as it applied to children who arrived in Australia without a visa (unauthorised arrivals) over the period 1999-2002.

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#### Major finding 1

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**Australia's immigration detention laws, as administered by the Commonwealth, and applied to unauthorised arrival children, create a detention system that is fundamentally inconsistent with the *Convention on the Rights of the Child* (CRC).**

**In particular, Australia's mandatory detention system fails to ensure that:**

- (a) **detention is a measure of last resort, for the shortest appropriate period of time and subject to effective independent review (CRC, article 37(b), (d))**

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- (b) the best interests of the child are a primary consideration in all actions concerning children (CRC, article 3(1))
- (c) children are treated with humanity and respect for their inherent dignity (CRC, article 37(c))
- (d) children seeking asylum receive appropriate assistance (CRC, article 22(1)) to enjoy, 'to the maximum extent possible' their right to development (CRC, article 6(2)) and their right to live in 'an environment which fosters the health, self-respect and dignity' of children in order to ensure recovery from past torture and trauma (CRC, article 39).

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### Major finding 2

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Children in immigration detention for long periods of time are at high risk of serious mental harm. The Commonwealth's failure to implement the repeated recommendations by mental health professionals that certain children be removed from the detention environment with their parents amounted to cruel, inhumane and degrading treatment of those children in detention (CRC, article 37(a) – see Chapter 9).

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### Major finding 3

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At various times between 1999 and 2002, children in immigration detention were not in a position to fully enjoy the following rights:

- (a) the right to be protected from all forms of physical or mental violence (CRC, article 19(1) – see Chapter 8)
- (b) the right to enjoy the highest attainable standard of physical and mental health (CRC, article 24(1) – see Chapters 9, 10)
- (c) the right of children with disabilities to 'enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community' (CRC, article 23(1) – see Chapter 11)
- (d) the right to an appropriate education on the basis of equal opportunity (CRC, article 28(1) – see Chapter 12)
- (e) the right of unaccompanied children to receive special protection and assistance to ensure the enjoyment of all rights under the CRC (CRC, article 20(1) – see Chapters 6, 7, 14).

## 17.2 Reasons for the Inquiry's major findings

The Inquiry finds that both the legislation that requires the immigration detention of children who arrive in Australia without a visa, and the administration of that legislation by the Commonwealth, have resulted in numerous and repeated breaches of fundamental principles of the CRC.

The Inquiry's findings in relation to particular rights of children in areas such as refugee protection, safety in detention centres, physical and mental health, care for children with disabilities, education, recreation, religion, culture and special protection for unaccompanied minors in detention, and the evidence for those findings, have been set out in detail in Chapters 7-16 of this report.

Major finding 1 draws together the Inquiry's findings in Chapter 6 on Australia's Detention Policy and the Inquiry's findings regarding the individual areas of concern in Chapters 7-15, to assess whether Australia's system of immigration detention, as a whole, breaches the rights of children under the CRC. In particular, the Inquiry's first major finding addresses the overarching rights in the CRC which are discussed in Chapter 4 on Australia's Human Rights Obligations.

The Inquiry's second and third major findings highlight specific breaches of the CRC that have been the subject of earlier chapters.

### 17.2.1 Major finding 1(a): Failure to ensure that detention of children is a measure of last resort and for the shortest appropriate period of time

As Chapter 6 on Australia's Detention Policy sets out, the provisions of the *Migration Act 1958* (Cth) (the Migration Act) and Migration Regulations create a system that is exactly the opposite of what is required by article 37(b) and (d) of the CRC, which states that detention of children should be a measure of last resort, for the shortest appropriate period of time and promptly reviewable in the courts.

The system of immigration detention established by Australia's immigration detention laws makes the detention of children who arrive in Australia without a visa mandatory, indeterminate and effectively unreviewable. The United Nations body that supervises detention regimes around the world, the Working Group on Arbitrary Detention, stated that these features make Australia's immigration detention system unique:

[T]o the knowledge of the delegation, a system combining mandatory, automatic, indiscriminate and indefinite detention without real access to court challenge is not practised by any other country in the world.<sup>1</sup>

The result of Australia's mandatory immigration detention laws is that children remain in detention for unacceptably long periods. At its worst, one child was detained for almost five and half years before being released into the community on a protection visa. Children in detention as at 26 December 2003 had spent an average of one year, eight months and 11 days in detention.<sup>2</sup>

### **17.2.2 Major finding 1(b): Failure to ensure that the best interests of the child are a primary consideration**

If the Migration Act and Migration Regulations, as applied by the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) and the Department, did not result in the automatic and long-term detention of children, not only would there be no breach of article 37(b) and (d), but most of the other breaches identified by the Inquiry would simply not occur. This fact suggests that the laws fail to ensure that the best interests of the child are a primary consideration in all decisions affecting children – including the decision to detain, the location and the manner of detention.

For example, as Chapter 6 explains, the best interests of the child are usually met by allowing children to be with their parents *and* to live without any restrictions to their liberty. The fact that Australia's detention laws, as applied by the Department, do not permit such a result demonstrates a breach of the best interests principle.

If children were not in detention centres for long periods of time they would not be suffering from the mental health and development problems caused by that environment (Chapter 9). If children were not in detention centres they would not be exposed to fires, riots, tear gas, water cannons and mass self-harm (Chapter 8). If children were not in detention centres they could seek the health care appropriate to their needs (Chapters 9, 10) and go to the same schools as other similar children in the community (Chapter 12). If children with disabilities were not in detention centres they could seek the services and support they needed in a manner that facilitated their integration into the general community (Chapter 11). If children were not in detention centres they would have greater access to lawyers for advice on their asylum claim (Chapter 7). If unaccompanied children were not in detention centres their effective guardian would be State child protection authorities, who have relevant care qualifications and can provide independent advice and support throughout the visa application process (Chapters 6, 7, 14).

Thus the evidence before the Inquiry unequivocally proves what is otherwise a common perception – detention centres are no place for children. The introduction of a mandatory detention policy that requires detention of children irrespective of their individual circumstances strongly suggests that the Commonwealth cannot have made the best interests of the child a primary consideration when enacting these laws. This is confirmed by the parliamentary debates and the explanatory memoranda relating to the introduction of mandatory detention provisions into the Migration Act, which make no mention of children.<sup>3</sup>

The Inquiry therefore finds that the introduction of laws requiring the mandatory detention of children is a breach of article 3(1) of the CRC because the best interests of children were not a consideration at all, and therefore could not have been a primary consideration. The continuation of these laws, particularly in the light of clear evidence as to the impact of detention on children, amounts to an ongoing breach.

Further, while the Inquiry recognises that the options for the release or transfer of children from detention centres are limited by the laws in place, the Minister and the Department failed to adequately use the discretion available to address the problems arising from prolonged periods in detention centres. Of particular importance is the power to make decisions regarding the location and manner of detention – this power includes the Minister's ability to declare any place in the community to be a place of detention and the power to transfer both unaccompanied children and children with their parents to those places.

The Inquiry is particularly concerned that children were not transferred into the community with their parents in response to the consistent recommendations of mental health professionals that this occur as a matter of urgency. In fact, as at December 2003, only two families had ever been transferred to a place of alternative detention in the community. The Inquiry acknowledges that the Woomera Residential Housing Project, introduced in 2001, and the housing projects that were opened in Port Hedland and Port Augusta in 2003, provide improved physical environments. However, these projects do not solve the problem because the movement of children and the autonomy of parents regarding everyday decisions like health care and education continue to be restricted. Further, this initiative does not permit children to live with their fathers.

There are other instances where the failure to promptly use the power to transfer unaccompanied children and families out of detention centres created serious human rights concerns. For example, despite the increasing tension in the remote detention centres from as early as 1999, there were no attempts to remove unaccompanied children into foster care in the community until January 2002, when some unaccompanied children became involved in hunger strikes, lip-sewing and a suicide pact. Despite overcrowding in detention centres in 2001, there was no consideration of transferring families out of the centres at that time. Children with serious disabilities remained in remote detention centres for years despite the apparent difficulties in promptly accessing the appropriate disability services in those areas. Children from particular cultural and religious groups were not transferred to facilities closer to their communities in order to increase access to relevant clergy and instruction. Children with family in the community were not transferred into the custody of that family nor were they transferred to facilities close to that family. The difficulties in providing adequate recreational opportunities within detention did not appear to be a consideration in deciding whether children should be transferred into the community.

The Department also had a discretion regarding the services provided and the policies in place within detention centres. Negotiations to ensure that children routinely went to external schools only commenced in 2002. No special procedures were in place to protect children during violent disturbances. These are just some of the many examples discussed throughout this report that demonstrate the Department's failure to make the best interests of the child a primary consideration in decisions affecting the manner in which children were detained.

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The Inquiry concludes that, as a whole, the Minister and the Department failed to administer the Migration Act and Regulations in a manner that ensured that the best interests of children were a primary consideration in all decisions impacting on them and therefore breached article 3(1) of the CRC.

### **17.2.3 Major finding 1(c): Failure to treat children with humanity and respect**

The conditions in detention centres, taken as a whole over the period of the Inquiry, also failed to ensure that children were treated with 'humanity and respect for the[ir] inherent dignity', taking into account the needs of their age, in accordance with article 37(c) of the CRC.

The conditions in remote detention centres are harsh environmentally and physically. The absence of trees and grass in some centres and the detention behind razor wire had an obvious impact on children and their parents. The pervasive environment of despair that existed in certain detention centres at various times between 1999 and 2002 was observed directly by the Inquiry and was the subject of submissions and oral evidence. However, these matters alone do not breach human rights. In finding a breach of article 37(c), the Inquiry has also carefully considered the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the JDL Rules) which set helpful standards against which to consider conditions in detention.

The following matters have been identified by the Inquiry as being inconsistent with the JDL Rules throughout this report: instances of obtrusive head count procedures; periods during which children were called by number rather than name; the absence of clear procedures to ensure the special protection of children when tear gas, water cannons and other security measures were used; the failure to make routine assessments regarding the mental health of children on arrival in order to ensure that the appropriate services were provided (for instance torture and trauma assessments); instances where detention staff used offensive language around children; the absence of specific guidelines regarding the use of medical observation rooms for children; inadequate provision of preventative and remedial dental and ophthalmological care; periods of great overcrowding; instances of unsanitary toilet facilities; the failure to promptly assess the needs of children with disabilities and provide them with the appropriate aids, adaptations and services; the failure to promptly send children to community schools and ensure education appropriate to the cultural and language needs of children in detention; and the failure to ensure an appropriate curriculum for children above the compulsory school age. Finally, there was a failure to act upon repeated recommendations from health professionals that certain children be removed from detention centres in order to protect their mental health (see Major Finding 2).

All these factors result in a breach of article 37(c) of the CRC.

### **17.2.4 Major finding 1(d): Failure to ensure appropriate assistance to asylum-seeking children to enjoy the maximum possible development and recovery from past trauma**

All the factors that contribute to a breach of articles 3(1) and 37(c) of the CRC also result in a breach of articles 6(2), 22(1) and 39 which together require that children seeking asylum receive the appropriate assistance to enjoy, 'to the maximum extent possible,' the right to development and 'an environment which fosters the health, self-respect and dignity of the child' in order to ensure recovery from past trauma. The long-term detention of children in detention centres is a long way from the nurturing environment contemplated by the CRC. The residential housing projects only offer marginal improvement on detention centres in this regard.

### **17.2.5 Major finding 2: Cruel, inhuman and degrading treatment regarding the release of children with mental health problems**

As set out in the above sections, Australia's immigration detention laws, and the manner in which they were administered between 1999 and 2002, meant that some children were in detention for long periods of time. In some cases this long-term detention has caused extremely serious mental health problems for children. Chapter 9 sets out these problems and describes examples where the Department failed to facilitate the removal of certain children and their parents from a closed detention environment in the face of repeated recommendations of mental health professionals. Major Finding 2 reiterates the finding in Chapter 9 that this behaviour constitutes cruel, inhuman and degrading conduct.

### **17.2.6 Major finding 3: Failure to ensure appropriate services and conditions in detention centres**

Major Finding 3 concerns the conditions within detention centres which are discussed in earlier chapters in this report. Those chapters set out why the Department's administration of Australia's detention centres resulted in breaches of children's rights relating to safety (Chapter 8), mental health (Chapter 9), physical health (Chapter 10), children with disabilities (Chapter 11), education (Chapter 12) and unaccompanied children (Chapter 14).

## 17.3 The Inquiry's recommendations

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### Recommendation 1

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Children in immigration detention centres and residential housing projects as at the date of the tabling of this report should be released with their parents, as soon as possible, but no later than four weeks after tabling.

The Minister and the Department can effect this recommendation within the current legislative framework by one of the following methods:

- (a) transfer into the community (home-based detention)
- (b) the exercise of Ministerial discretion to grant humanitarian visas pursuant to section 417 of the Migration Act
- (c) the grant of bridging visas (appropriate reporting conditions may be imposed).<sup>4</sup>

If one or more parents are assessed to be a high security risk, the Department should seek the urgent advice of the relevant child protection authorities regarding the best interests of the child and implement that advice.

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### Recommendation 2

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Australia's immigration detention laws should be amended, as a matter of urgency, to comply with the *Convention on the Rights of the Child*.

In particular, the new laws should incorporate the following minimum features:

- (a) There should be a presumption against the detention of children for immigration purposes.
- (b) A court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention (for example for the purposes of health, identity or security checks).
- (c) There should be prompt and periodic review by a court of the legality of continuing detention of children for immigration purposes.
- (d) All courts and independent tribunals should be guided by the following principles:
  - (i) detention of children must be a measure of last resort and for the shortest appropriate period of time
  - (ii) the best interests of the child must be a primary consideration
  - (iii) the preservation of family unity
  - (iv) special protection and assistance for unaccompanied children.

- (e) **Bridging visa regulations for unauthorised arrivals should be amended so as to provide a readily available mechanism for the release of children and their parents.**

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### **Recommendation 3**

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**An independent guardian should be appointed for unaccompanied children and they should receive appropriate support.**

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### **Recommendation 4**

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**Minimum standards of treatment for children in immigration detention should be codified in legislation.**

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### **Recommendation 5**

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**There should be a review of the impact on children of legislation that creates ‘excised offshore places’ and the ‘Pacific Solution’.**

## **17.4 Reasons for the Inquiry’s recommendations**

The Inquiry acknowledges that Australia has a legitimate interest in maintaining the integrity of its borders and its immigration system. However, as discussed in Chapter 4, Australia also has a responsibility to pursue these objectives in a manner that is consistent with the human rights of children. The current mandatory detention regime fails to meet that responsibility.

There are clearly measures that can be taken by the Department to improve the conditions and services provided to children within detention centres. Those are evident from the findings in Chapters 5-15 which have, for example, identified shortcomings in protecting the safety of children, physical and mental health care, education and recreational facilities in detention.

The Inquiry recommends that the Department carefully consider the manner in which children are detained, in light of the Inquiry’s earlier findings, in order to avoid some of the continuing breaches of human rights identified throughout this report.

However, the Inquiry does not seek to make detailed recommendations regarding each of the specific areas. This is because improvements in those areas, on their own, would not prevent ongoing breaches of the human rights of children in immigration detention. The heart of the problem is the system of mandatory detention

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itself and there must therefore be fundamental changes designed to improve the system. It is these fundamental changes to the system, rather than changes that limit the extent and seriousness of breaches of human rights within that system, that are the focus of the Inquiry's recommendations.

There have been many models of alternative detention proposed by different community groups and international organisations since the introduction of the mandatory detention legislation in Australia in 1992. However, none of those models have focussed on the detention of children and their parents.

This Inquiry does not seek to reinvent a model, nor does it seek to develop the precise structure of a new system. The Inquiry recognises that any reform of the current system will require a consultation process that takes into account a large variety of factors, including issues that have not been considered by this Inquiry. For instance there may need to be a consideration of issues relating to the detention of single males and the budgetary implications of any new system, amongst other things.

However, no matter what additional considerations may be required, a proper deliberative process must operate within a framework that embodies the features necessary to ensure that the rights of children are protected. The Inquiry therefore sets out below what should be the key features of any new laws that seek to protect the human rights of children, without attempting to prescribe the exact parameters.

The primary reference point for any new laws must be the fundamental protections in the CRC. In particular the principles that detention of children be a measure of last resort and for the shortest appropriate period of time; the best interests of the child be a primary consideration; the principle of family unity; and the principle of special protection and assistance for unaccompanied children. The following sections indicate how these principles should, as a minimum, translate into practice.

The Inquiry also extracts relevant parts of the United Nations High Commissioner for Refugees (UNHCR) *UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* (UNHCR Detention Guidelines), with which the Department states immigration detention in Australia is consistent.<sup>5</sup> Further, it refers to the practices of other nations and the proposals set out in submissions to the Inquiry which serve as useful starting points for the development of a new model.

#### **17.4.1 Recommendation 1: Children should be released from detention centres and residential housing projects within four weeks of the tabling of this report**

The amendment of laws may take some time. Those children currently in detention should not be subjected to continuing breaches of their fundamental rights while that process takes place.

The Inquiry is especially concerned that most of the children in detention at the end of 2003 have been there for more than two years and are therefore at great risk of serious mental harm. The Inquiry also recognises that some children have been detained for shorter periods – for example visa overstayers. However under the CRC all children are entitled to be detained for the shortest appropriate period of time. The Inquiry therefore calls for all children, and their parents, who are in detention centres or housing projects as at the tabling of this report to be released as soon as possible, but within four weeks as a maximum.

The Inquiry notes that while residential housing projects are an improvement on detention centres, they are still closed detention facilities. Importantly, children are separated from their fathers who must remain in detention centres (see Chapter 6 on Australia's Detention Policy).

Where children are accompanied by their parents, as is the case for most children in detention as at December 2003, parents should be released with their children in order to preserve family unity. The only exception might be where the Department has assessed one or more parents to be a high security risk. In these circumstances the Department should seek the advice of the relevant child protection authority as to the best interests of the child and implement that advice. When seeking the child protection authority advice, the Department should make it clear that it is in a position to effect release of children and their parents.

Under the current legislative framework, release of children and their parents from detention centres and housing projects is most easily achieved by transfer to a home-based place of detention in the community or the grant of a humanitarian visa (pursuant to section 417 of the Migration Act).<sup>6</sup> However, bridging visas may also be available in some circumstances.<sup>7</sup>

In the event that there are new arrivals prior to the amendment of any laws, the Minister and the Department should utilise the discretions available within the existing legal framework in order to minimise the time that children spend in detention centres. In particular, the Minister and Department should promptly and generously apply the bridging visa regulations and the facility to transfer to home-based places of detention. To this end, the Inquiry recognises the introduction of Migration Series Instructions in December 2002 which attempt to place greater priority on these alternatives for unaccompanied children in particular. However, the Inquiry notes that a year later there were still around 90 children in detention centres or housing projects – most of whom have been in detention for more than two years. Mental health experts have urged the release of some of those children (with their parents)

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to no avail. The Inquiry also recognises the creation of two new residential housing projects in late 2003, but once again cautions against the use of these compounds as an appropriate solution to the problems facing children in long-term detention.

### **17.4.2 Recommendation 2(a): Australia's laws should incorporate a presumption against the detention of children**

There should be a presumption against detention.

*UNHCR Detention Guidelines, guideline 3*

Children seeking asylum should not be kept in detention. This is particularly important in the case of unaccompanied children.

*UNHCR, Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum (UAM Guidelines), para 7.6*

[M]inors who are asylum seekers should not be detained... All appropriate alternatives to detention should be considered in the case of children accompanying their parents. Children and their primary caregivers should not be detained unless this is the only means of maintaining family unity.

*UNHCR Detention Guidelines, guideline 6*

The principle of detention as a last resort in the CRC does not mean that children can never be detained, but it does require that all alternatives to detention be fully explored prior to detaining a child. As Chapter 6 on Australia's Detention Policy sets out, Australia's mandatory detention system inherently breaches the principle of detention as a measure of last resort for children because it contains an irrebuttable presumption that all unauthorised arrival children must be detained.

Thus, in order to rectify the ongoing breach of the principle of detention as a last resort, a new model of detention should replace the current presumption that all unlawful non-citizens – whether child or adult – *must* be detained, with a presumption that children *should not* be detained.

While this would require the amendment of existing Australian laws, it is not a radical proposal. Australia's laws already incorporate an implicit presumption against the detention of all adult and child asylum seekers who arrive *with* a visa and subsequently become unlawful (authorised arrivals). Furthermore, Australia is one of the very few countries in the world that has a mandatory detention system. In terms of international practice, mandatory detention is the exception, not the rule.

The United Kingdom, Belgium, France, Germany and Norway are just a few examples of countries that provide for the *possibility* of detention but do not *require* detention of all unauthorised arrivals. Furthermore, many nations have adopted rules and regulations that strictly limit the circumstances under which children may be detained, including Canada, Sweden, Finland, Ireland, Norway, Denmark and Belgium.<sup>8</sup>

The United States, which does have a mandatory detention system, has enacted legislation providing special measures for unaccompanied children. The US *Homeland Security Act of 2002* (the Homeland Security Act) provides that 'unaccompanied alien children' be transferred into the care of the Office of Refugee Resettlement for prompt placement into the community.<sup>9</sup> Further, the *Unaccompanied Alien Child Protection Act of 2003* (the US Bill), which was before the US Senate as at December 2003, seeks to prohibit the placement of unaccompanied children in an adult detention facility or a facility housing delinquent children (except where the child exhibits violent or criminal behaviour).<sup>10</sup>

The United Kingdom has rules which prevent the detention of unaccompanied children except in the most exceptional circumstances. For instance, where they arrive outside business hours, children may be detained overnight.<sup>11</sup>

Canada recently introduced legislation – the *Immigration and Refugee Protection Act* – which explicitly 'affirm[s] as a principle that a minor child shall be detained only as a measure of last resort'.<sup>12</sup> Canada's Immigration Manual on Detention states that:

Where safety or security is not an issue, the detention of minor children is to be avoided whether unaccompanied or accompanied by a parent or legal guardian.<sup>13</sup>

For unaccompanied children in Canada:

the preferred option is to release with conditions to the care of child welfare agencies, if those organizations are able to provide an adequate guarantee that the minor child will report to the immigration authorities as requested.<sup>14</sup>

In Sweden, unaccompanied children may not be detained at all and accompanied children cannot be detained if they have a guardian or parent lawfully in the community. However, if all alternatives to detention have been explored and rejected, a child accompanied by his or her parents may be detained if an asylum claim will be decided under an accelerated procedure and it is highly probable that the case will be rejected. An accompanied child may also be detained if he or she has previously failed to comply with reporting requirements and presents a serious flight risk prior to removal. In either case, the period of detention is limited to 72 hours, with the possibility of a 72-hour extension in exceptional circumstances.<sup>15</sup>

As noted in Chapter 6 on Australia's Detention Policy, the Department has sought to make a distinction between the need to detain unaccompanied children and children who arrive with their families (although, in fact, Australia's mandatory detention legislation makes no such distinction – all must be detained). The rationale given for this distinction is that the principles of family unity and the best interests of the child require accompanied children to be detained because their parents must be detained.<sup>16</sup>

However, the principle of detention as a last resort means that the presumption against detention applies equally to all children irrespective of whether they are with their parents. Whether the circumstances of the parents, taking into account

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matters such as health, security and identity concerns, require the detention of parents, and whether or not the detention of one or more parents requires the detention of their children, needs to be determined on a case-by-case basis, as discussed below.

### **17.4.3 Recommendation 2(b): Australia's laws should require independent assessment of the need to detain children within 72 hours of any initial detention**

#### **(a) Australia's laws could permit short-term detention to conduct preliminary health, security and identity checks, subject to independent review**

The permissible exceptions to the general rule that detention should normally be avoided must be prescribed by law. In conformity with Ex[ecutive] Com[mittee] Conclusion No 44, the detention of asylum seekers may only be resorted to, if necessary:

- (i) to verify identity...
- (ii) to determine the elements on which the claim for refugee status or asylum is based...
- (iii) in cases where asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum...
- (iv) to protect national security and public order.

*UNHCR Detention Guidelines, guideline 3*

The Department rightly states that the execution of basic health, security and identity checks is an important element of maintaining a secure immigration system. Indeed, the need to conduct this process is the Department's rationale for distinguishing between the need to detain unauthorised arrivals as opposed to authorised arrivals. The Department argues that because authorised arrivals have already obtained a visa for entry, they will have undergone these preliminary checks and therefore do not need to be detained for those purposes.<sup>17</sup>

The Inquiry recognises that many unauthorised asylum seekers arrive in outlying areas of Australian territory such as Ashmore Reef. The unavailability of health and other facilities in such places makes it particularly difficult to immediately conduct these preliminary checks. While it is the Inquiry's view that many unaccompanied children and families would voluntarily submit to any transportation and other procedures necessary to conduct these preliminary checks, the Inquiry acknowledges that it may become necessary to briefly detain children who arrive without any documentation regarding identity and medical history. Many of the submissions to the Inquiry which considered alternative models of detention also agreed that detention for the purposes of preliminary health, identity and security checks was permissible.<sup>18</sup>

UNHCR characterises health, security and identity checks as 'exceptional grounds' for detention which should not be routinely applied to all asylum seekers. Thus,

according to UNHCR, detention for these reasons should only occur after an individual assessment reveals the need to detain in order to achieve those purposes.<sup>19</sup>

In Canada, while adults are rarely detained for the purpose of identity checks, if they are detained, the continuing need to detain must be reviewed within 48 hours.<sup>20</sup> It appears that under the new Canadian legislation children would not be detained even for these purposes.<sup>21</sup> Moreover, of the 338 children who were detained before the introduction of the new legislation, 75 per cent were detained for less than a day.<sup>22</sup>

Sweden also allows for the detention of adults to establish identity but limits the length of detention for identity checks to 48 hours, with the possibility for extension in exceptional circumstances. Children are not generally detained for these purposes.<sup>23</sup>

The United Kingdom does not permit detention of unaccompanied children for the purpose of preliminary checks but appears to permit detention of adults and families for the purposes of conducting assessments of identity and flight risk.<sup>24</sup> The decision to detain for these purposes must be reviewed within 24 hours.

The UNHCR Detention Guidelines also permit detention for the purposes of determining the elements of the claim in exceptional circumstances. It is important to note that this ground only justifies detention to obtain 'essential facts from the asylum seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim'.<sup>25</sup> It does not permit detention for the duration of the refugee status determination process, as currently occurs in Australia under the Migration Act.

### **(b) Independent assessment of the need to detain for these or any other purposes should occur within 72 hours**

There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention...these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved their lawful and legitimate purpose.

*UNHCR Detention Guidelines, guideline 3*

In order to comply with article 37(b) of the CRC, the need for, and period of, detention (for the purposes of health, identity or security checks, or any other purpose) must be closely supervised by an independent body. This does not mean that children can never be detained for these purposes, just that an independent body assesses whether the unaccompanied child or family must be detained while the Department completes its checks.

This process is very similar to the bail application procedures that are regularly conducted by Australia's juvenile justice system when a child is arrested. While 72

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hours is longer than the time in which most bail hearings occur,<sup>26</sup> the Inquiry has taken into account international practice regarding preliminary checks, and the fact that there may be logistical difficulties in transporting the relevant authorities to outlying areas like Ashmore Reef (or transporting the new arrivals to appropriate locations).

The unaccompanied child or children and their parents must have a right to be heard in all hearings relating to their detention. They must also be informed of the right to obtain legal representation, and have an opportunity to access such representation.

If the Department has been unable to complete its security checks within 72 hours, it might ask the tribunal or court to order continuing detention of the particular children and their parents until those checks are completed.<sup>27</sup> The principles of detention as a last resort and the best interests of the child would require the tribunal or court to consider, for example, whether appropriate reporting or residency requirements, or some form of surety, could address the Department's concerns in the case of that particular family. If the Department has health concerns then quarantine in a hospital until the disease has been cleared may be more appropriate than detention in a remote facility.

On the evidence before the Inquiry, case-by-case assessment of flight and security risks would, more likely than not, fail to rebut a presumption against detention of children. The Department has not provided any statistics or studies that suggest that unaccompanied children and families who are seeking asylum (as opposed to all other unlawful non-citizens, like visitor overstayers) represent a substantial flight risk (see section 17.5.2 below).

Furthermore, evidence before the Commonwealth Parliament Joint Standing Committee on Foreign Affairs, Defence and Trade revealed that not one asylum seeker detainee screened by the Australian Security and Intelligence Organisation (ASIO) between July 2000 and August 2002 – adult or child – was found to be a security risk.<sup>28</sup>

In any event, factors that do *not* justify detention of any child under any circumstances include: (a) the need to send a message of deterrence to potential asylum seekers, and (b) the need to finally determine an asylum claim prior to releasing children into the community.<sup>29</sup>

It is also relevant to note that even under Australia's current Migration Act, detention may take a variety of forms. Currently in Australia, for authorised arrivals, detention for the purposes of identity checks usually takes the form of being in the presence of an immigration officer – either in an airport or an immigration office – for a matter of hours. There is no apparent reason why the same circumstances could not apply to unauthorised arrivals if the only purpose of detention is to record this information. In any event, there seems to be no good reason to detain unaccompanied children and families in remote detention facilities for these purposes.

The absence of individual risk assessments in the current detention system for unauthorised arrivals has been one of the primary concerns of many organisations

making submissions to the Inquiry. This was also highlighted by the Human Rights and Equal Opportunity Commission (the Commission) in its 1998 report, *Those who've come across the seas*.<sup>30</sup>

One of the main features of the alternative model of detention proposed by Justice for Asylum Seekers (JAS) is the inclusion of an individual risk assessment. JAS has developed a comprehensive model that deals with both adults and children. Its model suggests that, on arrival, every person should undergo a 'psychosocial risk assessment' which examines the health, psychological, security and absconding risks associated with individual asylum seekers. Depending on the outcome of that assessment, individuals should either be released on a structured community release program or be kept in closed detention centres.<sup>31</sup> JAS recommends that unaccompanied children and pregnant single women receive immediate security clearance and that accompanied children and their primary carers be released from detention as soon as possible.<sup>32</sup>

### **17.4.4 Recommendation 2(c): Australia's laws should provide for prompt and periodic review of the legality of continuing detention**

If detained, asylum-seekers should be entitled to the following minimum procedural guarantees:

- (i) to receive prompt and full communication of any order of detention, together with the reasons for the order, and the rights in connection with the order in a language and in terms they understand
- (ii) to be informed of the right to legal counsel. Where possible they should receive free legal assistance
- (iii) to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuance of detention, which the asylum-seeker or his representative would have the rights to attend
- (iv) either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any finding made...

*UNHCR Detention Guidelines, guideline 5*<sup>33</sup>

In addition to a prompt individualised assessment of the need to detain in the first place (see section 17.4.3 above), article 37(d) of the CRC requires that there be an opportunity to seek review of any decision to detain in 'a court or other competent, independent and impartial authority'. The Inquiry believes that such review is most appropriately provided in the Australian context by a court.

Australian criminal law provides for such protections by permitting any child kept in custody after initial bail proceedings to reapply for bail at any time during the period of detention. By contrast, under the current immigration detention system, a child who has committed no crime at all, but who arrives in Australia without a visa to seek asylum, has no meaningful ability to challenge his or her detention (see Chapter 6 on Australia's Detention Policy).

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Laws that incorporate the features described above should therefore provide for:

1. a hearing within 72 hours before a court or independent tribunal in order to determine the need to detain unaccompanied children and children with their parents beyond that period (see section 17.4.3 above)
2. the opportunity to seek prompt judicial review should the court or tribunal decide that detention of children was necessary
3. the opportunity for periodic and ongoing judicial review.

Children must be informed of the right to obtain legal representation, and have access to representation, at all hearings relating to their detention.

Many countries that allow for the detention of asylum seekers have implemented the features set out in the UNHCR guidelines set out above, although the time limits applied vary substantially. The international practice suggests that, for adults, review should occur at least every four weeks. The Inquiry recommends that review of the detention for unaccompanied children and families be more frequent.

In Canada, a person may appeal immigration detention at any time. A senior immigration officer must immediately review an initial detention decision taken by another officer. Within 48 hours, the Immigration Review Board (IRB) – an independent administrative tribunal – must review the decision of the senior immigration officer. If detention does continue, the IRB decision must again be reviewed within seven days and then at least every 30 days.<sup>34</sup>

Under Swedish law, all detainees have a right to appeal the decision to detain at any time, but there are also provisions for automatic review. For children the review must occur within 72 hours and their detention may only be extended for another 72 hours. For adults, detention for identity checks must be reviewed within 48 hours and thereafter review must occur within two weeks unless the detention order is related to refusal-of-entry or expulsion orders, in which case review must occur within two months. If review does not take place within these periods, the detention order automatically ceases to apply.<sup>35</sup>

In Denmark, the initial decision to detain is also reviewed by a court within 72 hours. Any further detention must be reviewed every four weeks. Negative decisions may be appealed to higher courts.<sup>36</sup>

In the Netherlands, judicial review occurs within 10 days. Detained asylum applicants receive legal aid from either the private bar or from the state-funded Foundation for Legal Aid.<sup>37</sup>

In the United Kingdom, initial decisions by immigration officers to detain are reviewed automatically within 24 hours, then again after a week and thereafter monthly, but such review is undertaken by the Immigration Service, rather than an independent authority. Detainees may request a bail hearing after eight days of detention but do not have a statutory right to such a hearing. Asylum seekers are also entitled to seek judicial review or file an application for a writ of habeas corpus; however, this

is rare due to the high burden of proving that the detention is unlawful, as opposed to unnecessary, in the circumstances of the case.<sup>38</sup>

Finally, in the United States, while asylum seekers may apply for parole from detention, the application is made to the Immigration and Naturalisation Service (INS) which is the detaining authority. Changes made by a 1996 immigration law mean that refusal of parole by the INS cannot be challenged in the federal courts.<sup>39</sup>

### **17.4.5 Recommendation 2(d): Australia's laws should incorporate fundamental principles on detention to guide courts and independent tribunals**

If none of the alternatives can be applied and States do detain children, this should, in accordance with Article 37 of the Convention on the Rights of the Child, be as a measure of last resort and for the shortest period of time...

*UNHCR Detention Guidelines, guideline 6*

New laws regarding immigration detention should ensure that courts or independent tribunals assessing the need to detain children are required to have regard to the following four fundamental principles:

1. detention of children must be a measure of last resort and for the shortest appropriate period of time
2. the best interests of the child must be a primary consideration
3. the preservation of family unity
4. special protection and assistance for unaccompanied children.

#### **(a) The principle of family unity in making decisions regarding detention of children**

Amongst other things, the combination of the first three of these fundamental principles means that an independent tribunal or court must carefully consider whether it is appropriate to detain the parents of particular children, given that children should only be detained in exceptional circumstances. For example, in the event that a parent is found to be a security risk, the automatic consequence should not be that his or her children are detained – strict reporting requirements on parents may both address the risk and permit children to be at liberty with their parents. If the circumstances are so serious that parents must be detained, the court might consider detaining one parent only, leaving the other parent to look after the children in the community. While the process and decisions may not be easy, anything less would be inadequate to meet the minimum standards set out in the CRC.

Under Swedish law, where an asylum seeker child is accompanied by two parents and there are concerns about security or identity, then one parent may be detained while the rest of the family is released and required to report regularly to the authorities.<sup>40</sup> Unaccompanied children and children accompanied by one parent will usually not be detained even if that parent or guardian is deemed a flight risk, but they may be subject to strict reporting requirements.<sup>41</sup>

### **(b) Maximum time limits on the period of detention for children**

Some of the alternative models of detention proposed by Australian community groups suggest that there be a maximum permissible period for which unauthorised arrivals may be detained. For instance, in 1996 a Detention Reform Co-ordinating Committee submitted a draft alternative model to the Minister for Immigration and Multicultural Affairs which suggested a 90-day maximum period of detention. This model was endorsed in the Commission's 1998 report, *Those who've come across the seas*. The 2001 Commonwealth Parliament Joint Standing Committee on Foreign Affairs, Defence and Trade report recommended a time limit of no longer than 14 weeks for asylum seekers who have received security clearances.<sup>42</sup> The Conference of Leaders of Religious Institutes suggests an outer limit of 60 days.<sup>43</sup> The Amnesty International School's Network suggests a six-week maximum but recommends that the type of detention be secure community housing rather than a closed facility.<sup>44</sup> The Law Institute of Victoria suggests a maximum of four weeks.<sup>45</sup>

While these models suggest that processing times should be shorter for children and their parents, the Inquiry is wary of setting any acceptable time limits for the detention of children. The Inquiry is of the view that the overwhelming priority when addressing the issue of detention of children is to ensure compliance with the four fundamental principles listed above. It is the view of the Inquiry that a combination of a presumption against detention and effective and regular judicial review of any rebuttal of that presumption, as described below, is a more appropriate method of providing safeguards against long-term detention, than an outside time limit.

If, however, a new detention model were to be introduced with a maximum time limit, the Inquiry would strongly recommend that such a period be substantially shorter for children and their parents than for single adults. In the case of unaccompanied children detention should be limited to no more than a few days. The limits placed on detention of children by other countries as set out in 17.4.2 above are instructive in this regard.

### **17.4.6 Recommendation 2(e): Australia's laws should be amended so that bridging visas are readily available to families and unaccompanied children**

Alternatives to detention of an asylum seeker until status is determined should be considered. The choice of an alternative would be influenced by an individual assessment of the personal circumstances of the asylum seeker concerned and prevailing local conditions. Alternatives to detention which may be considered are as follows:

- (i) Monitoring Requirements...
- (ii) Provision of a Guarantor/Surety...
- (iii) Release on Bail...
- (iv) Open Centres...

*UNHCR Detention Guidelines, guideline 4*

In recognition of the drastic nature of the deprivation of a child's liberty, criminal justice systems have devised many different methods of keeping track of children and their parents without imprisoning them. Many groups have applied these principles to asylum seekers – who are not accused or convicted of any crimes – in order to develop various alternatives to detention.

The Migration Regulations currently provide for the issue of bridging visas which enable release into the community. Bridging visas are routinely issued to children and families who arrive in Australia with a visa and apply for asylum on arrival (authorised arrivals). Bridging visas are also available, in theory, to unauthorised arrivals. Indeed the Australian Parliament's Joint Standing Committee on Migration report of 1994, *Asylum, Border Control and Detention*, clearly envisaged that bridging visas would provide the flexibility needed to release certain unauthorised arrivals from detention. The report highlighted the Committee's particular concern about the detention of children.<sup>46</sup>

However, as Chapter 6 on Australia's Detention Policy demonstrates, the bridging visa regulations applying to unauthorised arrivals have failed, in practice, to provide the intended flexibility. Between 1999 and 2002 only one bridging visa was granted to an unauthorised arrival unaccompanied child, one to a mother and her two children (the father stayed in detention), and one to a full family. This is the result of overly strict regulations and a failure by the Department to vigorously pursue their application in the case of vulnerable individuals or family groups.

Submissions made to this Inquiry<sup>47</sup> and to the 1994 Joint Standing Committee on Migration,<sup>48</sup> as well as the alternative model proposed by the Commission in *Those who've come across the seas*, all suggest that the extension of the current bridging visa regulations to unauthorised arrivals would be an efficient mechanism to facilitate children's release from detention. This Inquiry has also found that the Migration Regulations would need to be amended to enable unauthorised arrival children and their families to qualify for a bridging visa in accordance with the requirements of the CRC. Furthermore, directions would need to be issued to Departmental officers that require them to actively pursue the grant of bridging visas.

Again, this is not a radical proposal. It simply requires the amendment of bridging visa rules so that they apply to children who are unauthorised arrivals in the same way that they currently apply to authorised arrivals.

**(a) Bridging visas can allow for conditions to be imposed on children and parents released into the community**

The Department rightly highlights its concern that asylum seekers, including children and their families, be available for refugee processing procedures and, in the event that they are unsuccessful, for removal. While the Inquiry has not received any evidence that suggests that children or families are generally a high flight risk (see section 17.5.2 below), it is clearly appropriate that the Department be able to monitor the whereabouts of people pending determination of their immigration status.

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The Inquiry received many submissions suggesting various conditions that could be placed on the release of asylum seekers in order to ensure their availability for processing and removal, without keeping children and their parents in detention centres.<sup>49</sup> Most of those submissions propose measures such as reporting, residency or surety requirements. These options closely mirror those available under the current bail laws for children accused of crimes. They are also already catered for by the current bridging visa regulations, although they have almost never been used in the case of unauthorised arrival children.

Some of the submissions to the Inquiry suggest the possibility of open hostels which could provide basic accommodation and allow free movement during the day with the option of imposing some curfew requirements. Such hostels might also make residency a condition for collecting social welfare benefits as occurs in some European reception centres. Other alternatives include release into the care of community agencies and ordinary Australian families.<sup>50</sup>

The Department itself has developed a model that allows unaccompanied children to be transferred to 'home-based detention'. These transfers to the community do not amount to release from detention, rather they create *alternative forms* of detention, and therefore the transfers are accompanied by stringent conditions in order to maintain 'immigration detention'. Nevertheless, the transfers represent a positive preliminary step towards developing *alternatives to* detention in closed facilities. The Woomera Residential Housing Project and the expansion of that project to Port Augusta and Port Hedland provide a less useful model for any investigation into alternatives to detention due to the continuing restrictions on freedom of movement.

The United States trialled an Appearance Assistance Program (AAP) which permitted a limited number of asylum seekers, who would otherwise have been mandatorily detained, to be released on parole. The program provided for a variety of tracking mechanisms depending on the characteristics of the individuals. Some of the conditions that were imposed included residency requirements and proof of community ties. If the asylum seekers did not know people in the community, the AAP sought the assistance of community groups to help establish ties. The AAP also provided a caseworker system to assist people in understanding the legal process and attend court hearings. Asylum seekers could report by phone or in person. This trial was successful in both reducing costs and increasing compliance rates.<sup>51</sup>

In Canada, the immigration authorities can negotiate with asylum seekers as to what the appropriate conditions will be, subject to the approval of an independent tribunal. The conditions may include a financial bond. However, recognising that many asylum seekers may not be able to afford a bond, the Toronto Bail Program was developed to provide supervision as an alternative.<sup>52</sup>

In Europe, the European Council on Refugees and Exiles (ECRE) issued a research paper in 1997 on the practical alternatives to the detention of asylum applicants and rejected asylum seekers.<sup>53</sup> The various options discussed in that paper include supervised release of children to local child welfare agencies, supervised release

to community organisations and individual citizens and other general restrictions on the place of residence, reporting requirements and open centres. The ECRE paper suggests that the provision of a monetary bond may not be appropriate for asylum seekers because of their likely financial situation. It is clear that bonds will almost never be appropriate for unaccompanied children.

ECRE urges that the conditions attached to these non-custodial measures be guided by the *United Nations Standard Minimum Rules for Non-Custodial Measures* (the Tokyo Rules). The guiding principle of these Rules is that the human rights of the individual should be weighed up against the overall concerns of society.<sup>54</sup>

Many European countries have implemented one or several of the options mentioned in the ECRE research paper. For example, in the United Kingdom, asylum seekers – adults and children alike – are routinely released on bail. They are also housed in open detention centres.<sup>55</sup> In Denmark, asylum seekers are first referred to reception centres run by the Danish Red Cross and later housed at accommodation centres. In both cases, people are free to leave the centre but must return in the evening.<sup>56</sup>

In Sweden, children who arrive with their families are initially taken to the Carslund Refugee Reception Centre where they can come and go freely, although they may be subject to reporting requirements. After a short period of time they are offered housing and social support in the community. They must visit the reception office (close to where they are housed) at least monthly for their allowance, news on their application and needs and risk assessments. The Swedish Migration Board assigns each asylum seeker a caseworker to make these assessments and to refer clients for medical care, counselling and other services. Unaccompanied children are housed in a supervised group home.<sup>57</sup>

Various release options were considered in *Those who've come across the seas*, as well as the model based on the *Charter of Minimum Requirements for Legislation Relating to the Detention of Asylum Seekers*, which was endorsed by the Australian Council of Churches and 16 other community and statutory organisations.<sup>58</sup> The Independent Education Union has also developed a model in its paper, *Refugee and Asylum Seeker Policy in Australia*,<sup>59</sup> as has the Conference of Leaders of Religious Institutes (NSW) in its paper, *Australia's Humanitarian Program for People Seeking Protection in Australia*.<sup>60</sup>

The JAS submission to the Inquiry draws upon the Swedish experience in particular, as well as recommendations from *Those who've come across the seas*, to suggest that whatever the conditions imposed, a caseworker ought to be appointed to each family from the moment of arrival to such time when the asylum seeker is either granted a protection visa or returned to his or her country of origin. It is the view of JAS that this feature would go a long way to addressing the risk of absconding while at the same time ensuring the proper care of children and their families.

The JAS submission describes the role of the caseworker to be:

- informing asylum seekers of their rights, compliance requirements and refugee status determination processes

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- making individual needs assessments regarding social welfare, community and health support
- providing referrals to medical specialists
- preparing people for, and informing them of, immigration outcomes, including the possibility of having to return to their country of origin.<sup>61</sup>

JAS describes the likely outcomes of such a system in Australia to include:

- assisting the Department to make informed decisions as to whether asylum seekers should remain in detention or whether they are able to be released into the community
- improved ability to track asylum seekers in the community
- ensuring continuity of care and ongoing social and welfare support
- improved outcomes on return and settlement.<sup>62</sup>

The possibility of replacing detention with bonds, sureties and community sponsorship was considered and rejected by the Commonwealth Parliament's Joint Standing Committee on Migration in 1994 (the 1994 Committee).<sup>63</sup> In the light of the evidence before this Inquiry and the other research that has been conducted since that time, it is the Inquiry's view that a fresh consideration of the issue is warranted, and is unlikely to result in the same conclusion, especially when applied to children and their parents. For instance, the 1994 Committee was concerned that absconding would be a serious problem,<sup>64</sup> but the Department has been unable to provide any evidence that children and families are a high flight risk. Moreover, a number of measures that might reduce any such risk, such as the caseworker model suggested by JAS, and now used in the United States and Sweden, were not considered by the 1994 Committee.

The 1994 Committee also expressed concern about the costs of running such a scheme. This is clearly an important question that must be the subject of serious analysis. However, the high costs of mandatory detention should not be forgotten: early research suggests that the costs of a supervised release scheme would be substantially lower than the costs of running detention facilities.<sup>65</sup> For example, a JAS-commissioned report estimates that a proposed alternative model could cost 18 per cent less than the current mandatory detention system.<sup>66</sup>

### **(b) Children released on bridging visas should be provided appropriate services in the community**

Whatever model, or combination of models, is adopted, the Commonwealth must also ensure that children are in a position to enjoy their rights once in the community. The 1994 Committee report emphasised the importance of providing appropriate support arrangements.<sup>67</sup>

Chapter 16 on Temporary Protection Visas highlights some of the Inquiry's concerns regarding the level of services provided to children post-detention. That chapter

emphasises that all of the rights under the CRC, including education, health care, mental health care and an adequate standard of living, apply to asylum-seeking children whether or not they are in detention.

Chapter 16 also finds that the services provided to the very few unauthorised arrivals released on bridging visas fall short of the levels required by the CRC. Evidence received by the Inquiry, from non-profit organisations assisting the large numbers of authorised arrival asylum seekers in the community, suggests that those children and families also face serious difficulties.

The difficulties encountered by asylum-seeking families in the community highlight the potential problems for detainee families released on bridging visas under the model proposed by the Inquiry, unless appropriate changes are made.

The Inquiry recommends that the problems faced by asylum-seeking families in the community be addressed as a matter of priority and that consultations be undertaken with experts and the community groups that assist them.

### **17.4.7 Recommendation 3: An independent guardian should be appointed for unaccompanied children and they should receive appropriate support**

Unaccompanied minors should not, as a general rule, be detained. Where possible they should be released into the care of family members who already have residency with the asylum countries. Otherwise, alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision...A legal guardian or adviser should be appointed for unaccompanied minors.

*UNHCR Detention Guidelines, guideline 6*

It is suggested that an independent and formally accredited organization be identified/established in each country, which will appoint a guardian or adviser as soon as the unaccompanied child is identified. The guardian or adviser should have the necessary expertise in the field of childcaring, so as to ensure that the interests of the child are safeguarded, and that the child's legal, social, medical and psychological needs are appropriately covered during the refugee status determination procedures until a durable solution for the child has been identified and implemented. To this end, the guardian or adviser would act as a link between the child and existing specialist agencies/individuals who would provide the continuum of care required by the child.

*UNHCR UAM Guidelines, para 5.7*

The Inquiry has addressed the heightened responsibility of the Department towards unaccompanied children throughout this report. That responsibility arises in two primary areas. First, to ensure that unaccompanied children have an independent advocate throughout the refugee status determination process (see Chapter 7). Second, to ensure the appropriate care of unaccompanied children (see Chapters 6, 14).

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Many of the problems faced by children in detention stem from the detention itself. However, a substantial number of difficulties also arise as a result of a conflict of interest in the Minister and his or her Departmental delegates as guardians for unaccompanied children. Their lack of child care qualifications has also proved to be problematic.<sup>68</sup>

The present *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act) provides that the Minister is the guardian of all unaccompanied children at all times. However, the Minister has delegated his power to Departmental officials and to officials of State child welfare authorities. As a matter of practice, Departmental officials are the effective guardian while children are in detention centres, and State child welfare authorities are the effective guardian once children are in the community. If unaccompanied children were routinely released into the community, under the current arrangements their interests would be protected by having State authorities as the effective guardian from the moment of arrival in Australia.<sup>69</sup>

However, the Inquiry recommends that Australia's laws be amended so that the Minister is no longer the legal guardian of unaccompanied children. This is the only way to ensure that the role of the Minister (and the Department) as visa decision-maker and detention authority is separated from the role of advocate for the best interests of unaccompanied children.

The Refugee Council of Australia (RCOA) submission includes a detailed proposal as to how a new guardianship arrangement might work. The RCOA suggests that guardianship be transferred from the Minister for Immigration to the Minister for Children and Youth Affairs which would engage the federal Department of Family and Community Services (FaCS) in the care of unaccompanied children. The RCOA also recommends that direct responsibility be delegated to members of a panel of advisers which would be funded by FaCS but staffed by a community organisation.<sup>70</sup> Under this model the responsibilities of the independent adviser would include:

- to act as an advocate for the minor and to ensure that all decisions made in relation to the minor are in his/her best interests;
- to ensure that the minor has suitable care, accommodation, education, language support and healthcare;
- to ensure that the minor is not placed in any situation that would place him/her at risk of psychological trauma, physical danger or sexual abuse;
- to ensure that the child has competent and child-responsive representation to deal with his/her asylum claim and/or other legal matters;
- to act as a mentor to the minor and provide guidance and support;
- to contribute to finding a durable solution in the minor's best interests;
- to provide a link between the minor and the various organizations that might provide services to him/her: DIMIA, ACM (not just centre management but also health workers, teachers and welfare staff), other Government agencies (Centrelink, community services, education, health etc) and community welfare agencies;
- to monitor any foster or care arrangements; and

- to assist the minor with family tracing and reunification.<sup>71</sup>

International practice also provides instructive models. In the United Kingdom, the Immigration Service can grant temporary (usually four years) admission to an unaccompanied child and refers him or her to the Department of Social Services (DSS) which is then bound to look after the child under the *Children's Act 1989*.<sup>72</sup>

Under the UK Children's Act, local authorities are required to provide accommodation, education, advice and assistance and other services needed by unaccompanied children in the same way as they would for any other child deprived of parental care. They may place the child in a foster home, community home or other suitable care arrangements.

In addition to the basic care of the DSS, there is a well-developed system of support for unaccompanied children through the asylum process. Within 24 hours of claiming asylum, the Home Office sends the details of all unaccompanied children to the Panel of Advisers for Unaccompanied Refugee Children at the UK Refugee Council.<sup>73</sup>

The Panel is funded by the Home Office but run by a community group. Its role is to provide independent guidance and support to unaccompanied children throughout the asylum process. The Panel does not provide legal advice but will ensure that children have suitable legal assistance. Advisers can attend interviews with the children and will explain the process to them so that they can make informed decisions. It will also help children access legal, health and social services. The Panel might also introduce the children to community groups and the Red Cross for the purposes of family tracing.<sup>74</sup>

In the United States, the Immigration and Naturalisation Service (INS) had the responsibility for the care of unaccompanied children until 2002. US organisations criticised this system on similar grounds that Australian organisations have criticised the Australian system, namely, that juvenile officers at the INS did not have child care qualifications and their status as immigration officials creates a conflict of interest.<sup>75</sup> The US Homeland Security Act transferred the responsibility for 'unaccompanied alien children' from the INS to the Office of Refugee Resettlement of the Department of Health and Human Services (the Office). The functions of the Office include:

- coordinating and implementing the care and placement of unaccompanied children
- ensuring that the interests of the child are considered in decisions relating to the care and custody of unaccompanied children
- identifying a sufficient number of qualified individuals, entities and facilities to house unaccompanied children
- reuniting unaccompanied children with their parents
- conducting investigations and inspections of facilities and other entities in which unaccompanied children reside.<sup>76</sup>

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When making placement decisions, the Office must take into account the need to ensure that unaccompanied children will appear for all hearings. The Office is encouraged to use the refugee children foster care system set up in the United States.<sup>77</sup>

The US Bill regarding Unaccompanied Alien Children, which is before the US Senate, adds that children should be transferred to the custody of the Office within 72 hours of apprehension and promptly placed in the care of a parent, legal guardian or 'state-licensed juvenile shelter, group home, or foster care program willing to accept physical custody of the child'.<sup>78</sup>

The draft legislation also requires the Office to develop regulations which ensure that unaccompanied children receive appropriate food, education, medical care, mental health services (including torture and trauma services) and access to phones, lawyers, interpreters, recreational programs, spiritual and religious services.<sup>79</sup>

In Canada, legislation and guidelines state that a designated representative should be appointed to all children as soon as possible.<sup>80</sup> The guidelines emphasise that the designated representative does not have the same role as the legal representative (to which children also have a right). The designated representative must have the following qualifications:

- be over 18 years of age
- have an appreciation of the nature of the proceedings
- not be in a conflict of interest situation with the child claimant such that the person must not act at the expense of the child's best interests and
- be willing and able to fulfil the duties of a representative and to act in the best interests of the child.

In addition, the linguistic and cultural background, age, gender and other personal characteristics of the designated representative are factors to consider.

The duties of the designated representative in the context of refugee status determination are to:

- obtain a lawyer for the child
- instruct the lawyer or to help the child to do so
- make other decisions with respect to the proceedings or to help the child make those decisions
- inform the child about the various stages and proceedings of the claim
- assist in obtaining evidence in support of the claim
- provide evidence and be a witness in the claim

- act in the best interests of the child.<sup>81</sup>

Some other useful models include those in the Netherlands, Norway, Italy and Sweden, all of which appoint independent advisers to unaccompanied children.<sup>82</sup>

### **17.4.8 Recommendation 4: Australia's laws should codify the minimum standards of treatment of children in detention centres**

States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

*Convention on the Rights of the Child, article 3(3)*

Conditions of detention for asylum seekers should be humane with respect for the inherent dignity of the person. They should be prescribed by law.

*UNHCR Detention Guidelines, guideline 10*

Where appropriate, States should incorporate the Rules [for the Protection of Juveniles Deprived of their Liberty] into their legislation or amend it accordingly and provide effective remedies for their breach, including compensation when injuries are inflicted on juveniles. States should also monitor the application of the Rules.

*JDL Rules, rule 7*

In the event that asylum-seeking children are detained, it is important to ensure transparent and effective mechanisms are in place to avoid a recurrence of the series of breaches of human rights that have been identified throughout this report.

As outlined in Chapter 5, which discusses the mechanisms for protecting children's rights in immigration detention centres, there are a variety of standards that apply, including:

- the Immigration Detention Standards (IDS) included in the contractual agreement between ACM and the Department
- ACM policy documents developed pursuant to the IDS
- internal Departmental guidelines intended to assist the Department's detention centre managers
- Memoranda of Understanding (MOUs) between the Department and State agencies
- Commonwealth and State laws.

As the preceding chapters demonstrate, this combination of standards has failed to provide adequate protection to children in immigration detention.

In the Inquiry's view, there are several reasons why this mixing pot of standards

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failed to result in compliance with the standards that Australia has agreed to under the CRC, namely:

1. Indeterminate detention of children makes the protection of children an almost impossible task.
2. The IDS were insufficiently precise to provide an adequate platform for accountability and failed to fully encapsulate the rights set out in the CRC.
3. The lack of clarity in the role, responsibility and powers of State government agencies vis-à-vis the Department has resulted in substantial gaps in the protection of the rights of child detainees. The development of MOUs in response to this uncertainty has been slow and haphazard.
4. There has been no transparency regarding accountability to the contractual standards. The performance measures attached to the IDS were withheld from the public on the basis of commercial confidentiality, as was the implementation of those measures.
5. The Department's contractual monitoring systems were developed in an ad hoc manner and the staff responsible for implementing them had no experience or training in child welfare or rights.
6. Australia's laws do not provide a remedy for detainees (either through the courts or through the Commission) upon a breach of the minimum standards set out in the IDS or CRC. This reduces the incentive for compliance.

It is unclear to the Inquiry why the Commonwealth has not approached the operation of detention centres in a more comprehensive manner. In particular, it is unsatisfactory that after more than a decade of administering a mandatory detention policy, the primary guidance from the Parliament regarding detention is the text of sections 189 and 196 of the Migration Act which simply require the detention and release of persons in specified circumstances. There is no Commonwealth legislation setting out the minimum standards of treatment of children while in detention, and no legislative guidance as to what the content of any standards should be.<sup>83</sup>

Thus, the development of standards and systems for immigration detention has been left to the internal systems of the Department. In practice, this has taken place through commercial agreements with detention services providers, ad hoc arrangements with State authorities and Departmental guidelines. As detainees are not parties to such agreements, they have no enforceable rights to be treated in accordance with the standards and have no direct remedy for a failure to meet those contractual standards.<sup>84</sup> Similarly, child detainees have no enforceable remedy for a breach of the human rights protected by the CRC or the *International Covenant on Civil and Political Rights* (ICCPR) because the Commonwealth Parliament has not enacted legislation that provide for remedies for a breach of these treaties.

In the Inquiry's view, if the Commonwealth intends to continue to detain children

and their parents, whether for short or long periods, specific legislation and regulations should be enacted which set out the rights of detainees, the responsibilities of the body administering the detention centre and the remedies available for any breach. This should apply irrespective of whether there is a private or public detention services provider.

The Inquiry acknowledges that the Department has taken a preliminary step towards codification by developing new IDS which will apply from 2004 to its new services provider (Group 4 Falck). However, any improvements in these standards will still fail to provide the accountability and remedies to which detainees are entitled upon breach of their human rights.<sup>85</sup>

Once again, the legislative codification of standards is not a radical proposal. It is already a feature of the State juvenile gaol system. In New South Wales, for example, in addition to legislation on special procedures regarding the decision to detain children, there is specific legislation regarding the services to be provided to children who are detained in juvenile detention centres.<sup>86</sup> That legislation covers such matters as the treatment of detainees, health and medical attention, and education and training. Victoria and Tasmania have incorporated statutory charters of prisoners' rights into their legislation. Other Australian States have also enacted guidelines on the treatment of child inmates.<sup>87</sup>

As a part of the process of enacting such legislation or making such regulations, the respective roles and responsibilities of the Commonwealth and the States in relation to children in immigration detention should be clearly established. For example, new legislation should clarify the role of State legislation and the jurisdiction and powers of State authorities in the areas of child protection, physical and mental health and education.

In the Inquiry's view, the content of any Commonwealth legislation regarding the minimum standards of treatment of children and remedies for breach of those standards should be closely guided by the rights set out in the CRC. Guidance should also be taken from the JDL Rules, which have already done much of the work of applying fundamental human rights to the detention environment for children.<sup>88</sup> The *UN Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), the *UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment* and the *UN Standard Minimum Rules for the Treatment of Prisoners* are also instructive. The Australasian Juvenile Justice Administrators (AJJA) *Standards for Juvenile Custodial Facilities* (1999) are informed by the Beijing Rules. The Immigration Detention Guidelines published by the Commission in March 2000 may also be a useful reference.

Any new legislation should also require that Department officials actively consider detaining children and their parents in the type of home-based detention that was

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created for unaccompanied children in 2002, rather than in closed detention facilities. The Migration Series Instructions issued by the Department in December 2002 offer a good starting point for such legislation; however, the text should be broadened to explicitly include children accompanied by their parents and incorporated into a form that permits enforcement.

### **17.4.9 Recommendation 5: Australia should review the impact of ‘Pacific Solution’ and ‘excision’ measures on children**

Although the Inquiry was not in a position to visit the detention facilities in Nauru and Papua New Guinea, the Inquiry is concerned that the application of the so-called ‘Pacific Solution’ to child asylum seekers may result in serious breaches of the CRC.

As Chapter 6 on Australia’s Detention Policy and Chapter 7 on Refugee Status Determination set out, the Inquiry is particularly concerned about the increased risk of indeterminate detention and refoulement for children detained in Australia’s ‘excised offshore places’ (e.g. Christmas Island) and for children transferred by Australian authorities to Nauru and Papua New Guinea. Moreover, as Chapter 16 on Temporary Protection Visas describes, there are also serious risks of the breach of the principle of family unity in the execution of the ‘Pacific Solution’ measures, particularly when part of a family is detained overseas and part in Australia.

The Department justifies the ‘Pacific Solution’ as an effective strategy for protecting Australia’s borders and dealing with people smugglers.<sup>89</sup> However, the Inquiry remains concerned that this strategy may be at the sacrifice of the fundamental rights of children.

The Inquiry therefore urges the Parliament to reassess the application of the ‘Pacific Solution’ and ‘excision’ measures to asylum-seeking children and their families.

## **17.5 The Department’s main objections to the Inquiry’s recommendations**

The Department’s response to the first draft of this report indicated strong disagreement with the recommendations proposed by the Inquiry.

Generally speaking, the Department’s objections are the result of a fundamental difference in perspective between the Inquiry and the Department as to what is required by international human rights law.

Briefly summarised, the Inquiry takes the view that because deprivation of liberty is such a drastic measure to impose on an individual, the need to detain must be justified in the case of each and every child. While the purposes of the Government’s policy may be a relevant factor in this assessment, it will not be determinative of the issue. The Inquiry’s view is supported by international bodies including the United Nations Human Rights Committee, the United Nations Working Group on Arbitrary Detention, the United Nations Human Rights High Commissioner’s Special

Representative who visited Australia in 2002 and many Australian experts giving written and oral evidence to the Inquiry.

The Department, on the other hand, is of the view that detention need only be justified in a general sense. The Department has stated that the fact that there are legitimate goals driving the Government's policy justifies the blanket detention of a defined group of people.<sup>90</sup>

The specific objections that arise as a result of this fundamental divergence in perspective can be grouped into the following six categories:

- 17.5.1 Introducing routine and systematic review of the need to detain in the individual circumstances of an unaccompanied child or family will clog courts and slow down visa processing
- 17.5.2 General domestic and international statistics on absconding suggest that all children must be detained to ensure availability for processing and removal
- 17.5.3 The elimination of mandatory detention may result in more children and families coming illegally to Australia
- 17.5.4 It costs too much to support children in the community during visa processing
- 17.5.5 It is too difficult to codify protections for children in detention in legislation
- 17.5.6 There is nowhere to put unauthorised arrivals.

The Inquiry does not accept that any of these objections override the fundamental human rights protection of individual liberty. Indeed, the long-term detention of children seems particularly inappropriate when one takes into account that more than 90 per cent of these children are found to be refugees and eventually end up in the community on protection visas.

The Inquiry addresses each of the Department's concerns in turn.

### **17.5.1 Introducing systematic review of the need to detain will slow down visa processing and clog courts**

The Department has argued that the introduction of mechanisms to review the need to detain will 'lead to impractical and legally and administratively complex arrangements for detention'.<sup>91</sup>

The process of protecting individual liberty need be no more complex than applying the existing criminal procedure laws to unauthorised arrivals (even though they have not committed a crime). While there may be a need to increase the number of administrative and/or judicial decision-makers to facilitate this process, additional expense does not excuse the Commonwealth from the obligation to ensure the

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protection of individual liberties.

Similarly, the fact that an individual assessment of the need to detain may slow down the visa process does not justify the blanket detention of all unauthorised arrival children. To draw another parallel, this would be the same as arguing that no person accused of a crime should be permitted to apply for bail because it interrupts the 'main business' of determining whether or not the person is guilty.

### **17.5.2 General statistics on absconding suggest that all children must be detained to ensure availability for processing**

The Department argues that if the laws were amended to include the features suggested by the Inquiry, there will be no way to ensure the availability of unauthorised arrival asylum seekers for processing and removal.

In support of this assertion, the Department cites statistics on disappearances by asylum seekers in countries that do not have detention. However, the Inquiry has not been persuaded by these figures.

First, the Department acknowledges that nations are reluctant to publish information on absconding rates and therefore relies on statistics from media sources. For example, the Department cites the paper, the *London Telegraph*, in support of the statistic that 276,000 asylum seekers have absconded in Britain over the past 12 years. Even if these statistics were reliable, they do not distinguish between unauthorised arrivals and authorised arrivals, nor do they distinguish between children and adults.

Second, despite repeated requests by the Inquiry, the Department has not been able to support its concerns about absconding in Australia, or elsewhere, with statistics that specify the rate at which child asylum seekers and their parents – as opposed to adults generally – have disappeared into the community. Indeed, the Department has told the Inquiry that its extensive statistical databases are not able to break down such figures. Despite this fact, the Commonwealth has enacted laws that presume that all children and families who arrive without a visa are a flight risk.

In the meantime, a 2003 report commissioned by JAS which considered evidence on absconding in Australia, the United Kingdom and the United States concluded that families with children are the least likely to be a flight or security risk.<sup>92</sup>

Third, the Department has provided statistics regarding absconding by those authorised arrivals who have failed their asylum process. As Chapter 3, Setting the Scene, highlights, an average of 92.8 per cent of the unauthorised arrival children who applied for a refugee protection visa between 1999 and 2003 succeeded in their asylum claims. Therefore, the risk of absconding after a failed asylum claim is not relevant to 9 out of 10 children in detention.

As genuine applicants have less incentive to abscond, it would seem that unauthorised arrival children are less likely to disappear. Thus the justification for

the detention of all unauthorised arrival children on the grounds that they will not otherwise be available for processing is unconvincing.

However, even if the Department could provide reliable statistics on the general rate of absconding by children and their families, this would not be sufficient to justify the blanket detention of *all* unauthorised arrival families, just those particular families whose individual circumstances indicate a serious risk of disappearing. Even then international law requires the Commonwealth to explore other methods of controlling flight risk prior to detaining a child or family.

This is because the protection of individual liberty is such a fundamental right that it should only be taken away if an individual's circumstances are such that there is no other choice but to detain – this is especially so in the case of children. If the basic protection of individual liberty were any less than this, a government could declare entire categories of people to be a risk to the community without any opportunity to defend their right to liberty.

Therefore, while the Inquiry acknowledges the need to ensure availability of asylum seekers for processing and removal, it has not been convinced that the only means of ensuring such availability is by the blanket detention of all unauthorised arrival children and families.

### **17.5.3 The elimination of mandatory detention may result in more children and families coming illegally to Australia**

The Department argues that a presumption against the detention of children:

could potentially result in large numbers of children and their parents seeking to enter Australia in an unauthorised fashion.<sup>93</sup>

The Inquiry understands the Department's concerns to be twofold. First, the removal of mandatory detention might result in increased numbers of unaccompanied children and families arriving in Australia by boat. Second, by giving preferences to children this will create a 'pull factor' for unaccompanied children and families to put their lives at risk by taking the dangerous sea voyage to Australia.

The Department has not provided the Inquiry with any evidence suggesting that there is a connection between Australia's mandatory detention policy and the numbers of boat arrivals. In fact, as Chapter 3, Setting the Scene, notes, the statistics on unauthorised arrivals since 1992 demonstrate that asylum seekers have continued to arrive by boat despite the existence of a mandatory detention system since that time.

However, even if there was evidence of a connection between Australia's detention policy and the decreasing numbers of arrivals, it would still be a violation of children's human rights to continue that policy. As set out in Chapter 4 on Australia's Human Rights Obligations and Chapter 6 on Australia's Detention Policy, while Australia is entitled to protect its borders, it must do so within the bounds of international human rights law. The protection against arbitrary detention means that Australia can only

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detain a child if the deprivation of liberty is a proportionate response to achieving a legitimate aim. If the purpose of Australia's system of mandatory detention is to deter, then it clearly violates children's rights because it deprives one child of freedom for the purpose of stopping another from making a journey to Australia.

The increasing number of asylum seekers is not just an issue for Australia, it is a global problem. Australia should consider the approach of nations like Canada and Sweden when determining a more appropriate response to unauthorised arrivals. Legislation in the United States regarding unaccompanied children also provides constructive guidance. Australia should also consider the advice of Australian experts, such as the members of JAS. The substance of the various models is described in section 17.4 above.

### **17.5.4 It costs too much to support children in the community**

The Department has argued that the cost of supporting asylum seeker families in the community and tracking down those who disappear, is too great to justify a change in policy. It cites the findings of the 1994 Committee report in support of this argument.

First, as set out above, there is no reliable evidence proving that absconding by children and families will be high.

Second, in making this argument the Department fails to compare the financial costs of having families in the community with the financial cost of detention. It also fails to consider the long-term social costs of keeping children in detention – both for the children themselves and for the Australian community which has to bear the responsibility of dealing with children who have been negatively affected by detention.

The Inquiry does not have sufficient information before it to express a concluded view on the relative financial costs of keeping children in detention, compared with supporting them in the community. However, studies on these issues that were completed as recently as 2003, suggest that a supervised release scheme would be substantially cheaper than detention in places like Woomera (see section 17.4.6 above). The Inquiry questions the weight that can be attached to the findings of the 1994 Committee, which are now 10-years-old, and suggests that the Department conduct a full investigation into the current relative costs of the various options outlined above.

In any event, while cost is clearly an important consideration in developing a new model, it cannot be used to justify continuing breaches of children's fundamental right to liberty.

### **17.5.5 It is too difficult to codify protections for children in detention in legislation**

In responding to the Inquiry's suggestion that there be a legislative codification of the minimum standards in detention facilities the Department states that the Inquiry:

does not acknowledge the inherent difficulties of such an approach, including identification of areas to be codified and to what minimum standard.<sup>94</sup>

The Inquiry is seriously concerned by this statement for three reasons. First, the difficulties involved in ensuring the protection of children's rights is insufficient reason to avoid the task. Second, it is of concern to the Inquiry that, ten years after the introduction of mandatory detention, the Department is still unclear as to what minimum standards should be met in running detention centres. Third, there is already similar legislation applying to State-run prisons and juvenile detention centres.

The Inquiry readily acknowledges that the protection of children's rights is a complicated task, made all the more difficult by the additional responsibilities that come with detaining children in a closed environment. However, this is all the more reason to ensure a full and frank debate in Parliament as to what standards must be met.

### **17.5.6 There is nowhere to put unauthorised arrivals**

The Department has suggested that it would not know where to put unauthorised arrivals if they were not in detention centres:

in a country as geographically large and culturally diverse as Australia, there would be issues about where children [released into the community] would be placed and with whom, health, education, financial support ...<sup>95</sup>

However, it is the Inquiry's view that Australia's geography and multicultural society makes it all the more likely that asylum seekers could be accommodated in the community. Indeed, many community groups have offered to support asylum seekers and refugees and assist them in finding accommodation. Special schools have been established to address particular issues facing new arrivals to Australia. Moreover, since more than 90 per cent of the children are eventually given protection visas and released into the community, services will eventually need to be provided to these children in any case.

In any event, the Inquiry reiterates that the existence of logistical challenges do not justify the blanket detention of all unauthorised arrival children and families.

### **17.6 Action taken by the Department and ACM in response to the Inquiry's findings and recommendations**

Pursuant to section 29(2)(e) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), the Inquiry invited the Department and ACM to advise it as to whether they have taken, or are taking, any action as a result of the findings and recommendations made by the Inquiry and, if so, the nature of that action. The Department and ACM responded on 6 February 2004. The relevant parts are extracted below.<sup>96</sup>

### 17.6.1 Action taken by the Department

The Department stated that many of the Inquiry's findings and recommendations 'relate to the legal and policy settings for immigration detention' and that 'these are matters for response by the Government'.

However, the Department also sought to address certain issues relating to its administration of the immigration detention laws. Much of the Department's response reiterates issues that have already been brought to the attention of the Inquiry. However, the Department also provided the following relevant information regarding general measures that it has taken, or will take, in order to improve the circumstances in which children are detained.

First, the Department states that it is 'continuing to seek further opportunities to manage our legal obligations in an innovative way, which responds to the evolving needs of children in immigration detention'.

The Department also states that as at 6 February 2004 there were only 17 unauthorised boat arrival children still in mainland detention centres. This figure does not include children on Christmas Island or Nauru, nor does it include children detained in residential housing projects or alternative places of detention in the community. The Department stresses that it is 'working actively to establish appropriate alternative arrangements for children'.

The Department highlights that:

- A very significant change has taken place during the past two years, as the Department has developed Residential Housing Projects, worked with community groups to establish alternative detention arrangements and to support prospective bridging visa applicants, and worked with child welfare authorities to support unaccompanied and other vulnerable minors in foster care arrangements.
- The Department is working actively to develop further options for children, including consideration of metropolitan Residential Housing Projects and a wider range of arrangements with community groups.

In response to Major Finding 1, the Department provided the following relevant information regarding its application of Australia's laws to unauthorised arrival children:

- [M]any people in immigration detention may not be eligible for consideration of a bridging visa because they do not meet the requirements of the regulations. In that context, the Department has offered all eligible women and children the opportunity to move to a Residential Housing Project. Some have declined.

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- ... Residential Housing Projects are now available in Port Augusta, Port Hedland and Woomera. Further projects are being considered in metropolitan areas.
- This focus on meeting children's individual needs was also enhanced in the development of the new Immigration Detention Standards (IDS), which form part of the contract with the detention services provider...
- A case management approach to respond to individual needs has also been introduced at the Baxter Immigration Detention Facility (IDF), with a view to expanding this at other centres. This approach will further enhance the focus on providing appropriate support to children and their families.

With respect to Major Finding 2, the Department stresses that 'mental health is a much broader and more complex issue than detention'. The Department also states that:

- Within this context, the Department and services provider have sought to ensure that, whenever possible, the effects of risk factors are minimised and protective factors are maximised or enhanced. Protective factors, to a large extent, focus on supporting parents to in turn support their children, ensuring good school environments and good physical health.
- For example, the Department has established arrangements with State education authorities for children to attend schools in the local community. The majority of school-age detainee children are now spending a large portion of their waking hours each week outside the detention facility, learning and interacting with Australian children.
- The benefits of Residential Housing Projects, described above, are also particularly relevant to this finding. Contrary to the report's description, there is clear evidence that Residential Housing Projects can assist individuals who are having difficulties coping in an immigration detention facility.
- There has been a marked increase in the proportion of long-term detainee women and children who are accommodated in alternative detention arrangements. Of this group, approximately 15% were in alternative detention in July 2003 and as at 21 January 2004, 43% were in alternative detention. The majority are in Residential Housing Projects. A small number are in community based detention arrangements, where a Housing Project is not appropriate to meet their specific needs.
- In response to emerging and evolving mental health needs, children in immigration detention are provided with a standard of mental health services that is comparable to those available in the Australian community. As described earlier, the Department works closely with the detention services provider and specialists to ensure appropriate responses to individual needs. State child welfare authorities are also closely involved in any cases involving children.

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- As in the community, individual cases can be complex and health professionals will not always agree on the best treatment plans. Where this occurs, the Department works closely with the families involved and relevant specialists to develop a treatment plan which is practical and can be implemented.

Finally, the Department states that by limiting its findings to the period 1999-2002, Major Finding 3 'focuses on a period of time that no longer bears any comparison to current immigration detention of children, families and adults'. The Department goes on to make submissions suggesting that it did the best it could in the circumstances during that period of time. Those submissions have already been considered in the body of this report.

The Department's response also mentions that many children who were the subject of Australia's detention laws over the second half of 2003 were compliance cases (for example visa overstayers) and those children spent little or no time in detention centres. As this report focuses on the laws, acts and practices regarding unauthorised arrival asylum seekers, rather than visa overstayers, the Inquiry has not extracted that material.

### 17.6.2 Action taken by ACM

ACM highlights that it will not have responsibility for the operation of immigration detention centres from the end of February 2004:

ACM therefore responds to the Inquiry's findings and recommendations in its capacity as the service provider for much of the period of this Inquiry and to the extent of its ability to implement any recommendations pertinent to ACM.

ACM also stresses that the Inquiry's findings and recommendations relate primarily to the legislative and administrative framework of detention which are not relevant to ACM. In particular:

Because [the Inquiry's] recommendations relate exclusively to legislative and policy matters that are not pertinent to ACM, ACM does not make any comment.

However, ACM does address certain aspects of the Inquiry's findings. In relation to the reasons supporting Major Finding 1(c), ACM made the following relevant comments:

#### **Instances of obtrusive head counts**

ACM procedures have been developed to ensure head counts are as unobtrusive as possible. Obtrusive head counts were only conducted during or immediately following incidents of major detainee disturbances. However ACM as service provider can and will review procedures to ensure the needs of children are better addressed in situations requiring obtrusive head counts.

#### **Periods during which children were called by number**

This practice occurred in some but not all detention centres. An instruction

was issued in 2002 to ensure detainees were not referred to by number. Detention centre managers were instructed to scrutinise compliance with the instruction.

### **The absence of clear procedures to ensure the special protection of children when tear gas, water cannons and other security measures were used**

ACM considers that the principles contained in existing procedures for security including the use of chemical agents and the use of force relates to and provides for maximum protection of all detainees, including children. It is implicit in these procedures that the use of force is proportionate to the circumstances of the incident concerned and therefore the best interests of children are inherent in the policies and their implementation.

Nonetheless, where ACM is the service provider it can and will review procedures in accordance with any Departmental policy changes or directions in relation to additional strategies for protecting children during major detainee disturbances where the use of security measures is critical to ensuring the safety of all detainees, staff and members of the public...

### **The absence of specific guidelines regarding the use of medical observation rooms for children**

It has never been routine practice to use medical observation rooms for children. In the one case relied on by the Inquiry, a medical observation room was used for a teenage boy who was assessed by professionals as highly suicidal. In this case the age and needs of the child were taken into account in practice.

However, where ACM is the service provider it can and will review procedures to codify in writing procedures specific to the use of medical observation rooms for children if required.

### **Inadequate provision of preventative and remedial dental and ophthalmological care**

ACM provided services in accordance with then current service requirements that, with hindsight, did not contemplate lengthy periods of detention for children. Where ACM is the service provider ACM will liaise with the Department to establish required service standards relevant to the length of a child's time in detention.

### **Unsanitary toilet facilities**

The maintenance of sanitary toilet facilities has been an ongoing challenge due to the combination of cultural differences in the detainee population and the infrastructure of detention centres. Daily hygiene inspections have been introduced by ACM. The provision of culturally appropriate toileting facilities is a matter not within the responsibility or control of the service provider.

### **The failure to promptly assess the needs of children with disabilities and provide them with the appropriate aids, adaptations and services**

ACM disagrees with this finding...

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ACM does acknowledge difficulties in engaging State disability organisations to provide assistance and where ACM is the service provider its policies can and will be changed to ensure immediate assistance is sought from these agencies.

### **The failure to promptly send children to community schools and ensure education appropriate to the cultural and language needs of children in detention**

ACM has complied with all agreements between DIMIA and State educational jurisdictions for children in detention to attend external schools and will continue to facilitate the attendance of children in accordance with the relevant agreements where ACM is the service provider.

ACM makes no comment on Major Finding 2. With respect to Major Finding 3, ACM limits its comments to certain specific findings in Chapters 8, 9, 10 and 11.

Regarding Chapter 8 on Safety, ACM addresses the Inquiry's concern that the security standards do not highlight the priority that should be given to the protection of children. While pointing out that there are some practical barriers to ensuring that operational policies and procedures expressly acknowledge the best interests of the child, ACM states that:

Where ACM is the service provider it could and will accommodate child specific security procedures and corresponding practices if required.

Regarding Chapter 9 on Mental Health, ACM disagrees with the Inquiry's findings that there were no routine mental health assessments of children and that there were insufficient mental health staff. ACM therefore states that it does not intend to take any action in response to those findings.

ACM notes the Inquiry's findings that there were no clear guidelines regarding the use of medical observation rooms for children and states that:

Where ACM is the service provider it can and will codify in writing procedures specific to the use of medical observation rooms for children if required.

ACM disagrees that the suicide prevention systems focussed on immediate prevention of harm rather than holistic therapeutic care.

With respect to Chapter 10 on Physical Health, ACM disagrees with the Inquiry's finding that:

[F]ood is not tailored to the needs of children and has been variable over the period. Moreover, there is no evidence that individual nutritional assessments of children were conducted over the period of time covered by the Inquiry, in order to ensure that any pre-existing nutritional deficiencies were being addressed. The provision of baby formula and special food for infants has been uneven.

ACM therefore states that it does not intend to take any action in response to that

finding.

Finally, regarding Chapter 11 on Children with Disabilities, ACM asserts that it provided the best possible services to those children taking into account the confines of detention. However:

ACM acknowledges the historical difficulties in engaging State disability organizations to provide assistance to children in detention. Where ACM is the service provider ACM policies can and will be changed to ensure immediate assistance is sought from these agencies.

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### Endnotes

- 1 UN Economic and Social Council, *Civil and Political Rights, including the question of torture and detention: Report of the Working Group on Arbitrary Detention: Visit to Australia*, 24 October 2002, E/CN.4/2003/8/Add.2. See also World Organisation Against Torture (OMCT), Press Release, 1 February 2002, 'OMCT approaches the UN concerning detained asylum seekers', available at [www.omct.org](http://www.omct.org).
- 2 DIMIA, Response to Second Draft Report, 27 January 2004. The exact figure provided is 619 days.
- 3 See in relation to the *Migration Reform Act 1992* (Cth) the parliamentary debates on 4 November 1992, House of Representatives Hansard, p2620; 11 November 1992, House of Representatives Hansard, p3141 and the Explanatory Memorandum to the *Migration Reform Bill 1992*. See also, in relation to the *Migration Legislation Amendment Act 1994* (Cth) the parliamentary debate on 24 March 1994, House of Representatives Hansard, p2166 and the Explanatory Memorandum to the *Migration Legislation Amendment Bill 1994*.
- 4 See Chapter 6 on Australia's Detention Policy for a detailed discussion of these three mechanisms for release under the current legislative framework.
- 5 DIMIA, Submission 185, p16.
- 6 The discretion under s417 of the Migration Act only applies to children who have claimed refugee status.
- 7 See further Chapter 6 on Australia's Detention Policy.
- 8 UNHCR, Submission 153, para 10.
- 9 *Homeland Security Act of 2002* (the Homeland Security Act), s462.
- 10 US Bill S1129, *Unaccompanied Alien Child Protection Act of 2003* (the US Bill), s103.
- 11 UK Home Office, Immigration and Nationality Directorate, Unaccompanied Asylum Seeking Children Information Note. The Home Office Minister reiterated this in the Standing Committee of the House of Commons (HC Standing Committee A, col 545, 3.12.92), cited in 'Representing Unaccompanied Refugee Children in the Asylum Process', Children's Legal Centre Information Sheet, *childRIGHT*, December 1994, No 112, p11.
- 12 Canada, *Immigration and Refugee Protection Act 2002*, s60. The new law was passed on 28 June 2002, at <http://www.cic.gc.ca/english/irpa/>, viewed 23 November 2003.
- 13 Citizenship and Immigration Canada, *Immigration Manual*, Chapter ENF20: Detention, cl 5.10, Detention of minor children (under 18 years of age), at <http://www.cic.gc.ca/manuals-guides/english/enf/enf20e.pdf>, viewed 23 November 2003.
- 14 Citizenship and Immigration Canada, *Immigration Manual*, Chapter ENF20: Detention, cl 5.10.
- 15 Swedish Network of Refugee and Asylum Support Groups, Submission 298, p1.
- 16 See for example, DIMIA Submission 185, p16; Minister for Immigration and Multicultural and Indigenous Affairs, Border Protection: Children in Detention, 29 April 2002, at [www.minister.immi.gov.au/borders/detention/children\\_detention.htm](http://www.minister.immi.gov.au/borders/detention/children_detention.htm), viewed 23 November 2003.
- 17 DIMIA, Submission 185, p7. Note, however, the extent of the checks conducted on visa applications varies greatly depending on the country of origin. For example, British citizens can apply for their visa online and be granted a visa on the same day, notified by email.
- 18 See, for example, International Commission of Jurists, Submission 128; Australian Lawyers for Human Rights, Submission 168; Southern Communities Advocacy Legal and Education Service (SCALES), Submission 176; Amnesty International, Submission 194; Justice for Asylum Seekers

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- (JAS), Submission 243.
- 19 UNHCR, Submission 153, p4.
  - 20 Citizenship and Immigration Canada. Backgrounder # 4: Detention Provisions Clarified, at <http://www.cic.gc.ca/english/press/01/0103-bg4.html>, viewed 23 November 2003.
  - 21 Regulations to be made pursuant to the new legislation do not list the need to pursue identity checks as one of the considerations to be taken into account. See Castan Centre, Submission 60, p10.
  - 22 Women's Commission for Refugee Women and Children, Protecting the Rights of Children: The Need for US Children's Asylum Guidelines, December 1998, p19, at <http://www.womenscommission.org/reports/> under 'United States', viewed 23 November 2003.
  - 23 Swedish Network of Refugee and Asylum Support Groups, Submission 298, p2.
  - 24 UK *Nationality, Immigration and Asylum Act 2002*.
  - 25 UNHCR, Submission 153, para 5.
  - 26 *Children (Criminal Proceedings) Act 1987* (NSW), s9 – a child must be brought before a court 'as soon as practicable' after arrest. See also, for example, *Children and Young Persons Act 1989* (Vic), s 129(1) – a child must be brought before the court within 24 hours of arrest. See further Kids in Detention Story, Submission 196, Law Section, pp37-38.
  - 27 The Department states that average time for security processing in 2001-2002 was 57 days, with the longest period being 242: DIMIA, Response to Draft Report, 14 July 2003.
  - 28 Joint Standing Committee on Foreign Affairs, Defence and Trade, Human Rights Subcommittee, Public Hearings into Aspects of the Human Rights and Equal Opportunity Commission Annual report 2000-01, 22 August 2002, Transcript of Evidence, p38, at <http://www.aph.gov.au/house/committee/jfadt/HREOC/HREOCIndex.htm>, viewed 23 November 2003.
  - 29 See further Chapter 6 on Australia's Detention Policy.
  - 30 See for example, UNHCR, Submission 153; Amnesty International, Transcript of Evidence, Sydney, 15 July 2002, p76. HREOC, *Those who've come across the seas*, 1998, pp55-56.
  - 31 JAS, Submission 243, p8.
  - 32 JAS, Submission 243, p15.
  - 33 See also UNHCR, Submission 153, para 6.
  - 34 Citizenship and Immigration Canada, *Immigration Manual*, Chapter ENF20: Detention, cl 5.10; Lawyers Committee for Human Rights, *Country by Country Review of Detention Procedures and Practices*, 2002, pp20-21, at [http://www.lchr.org/refugees/reports/cntry\\_rev\\_02/country\\_reps.htm](http://www.lchr.org/refugees/reports/cntry_rev_02/country_reps.htm), viewed 23 November 2003.
  - 35 G Mitchell, *Asylum Seekers in Sweden: an integrated approach to reception, detention, determination, integration and return*, August 2001, p7, at <http://www.fabian.org.au/NEW%20PAPERS/2001/Protocol.html>, viewed 23 November 2003.
  - 36 Uniya Jesuit Social Justice Centre, *Overview of Denmark's Asylum System*, February 2003, p3, 10, at <http://www.uniya.org.au/research/index.html>, viewed 23 November 2003.
  - 37 Uniya Jesuit Social Justice Centre, *Overview of the Netherlands' Asylum System* February 2003, p3.
  - 38 Lawyers Committee for Human Rights, *Country by Country Review of Detention Procedures and Practices*, 2002, p117.
  - 39 Lawyers Committee for Human Rights, *Country by Country Review of Detention Procedures and Practices*, 2002, p122.
  - 40 Swedish Network of Refugee and Asylum Support Groups, Submission 298, p13; Mitchell, *Asylum Seekers in Sweden*, August 2001, p8.
  - 41 Swedish Network of Refugee and Asylum Support Groups, Submission 298, p12.
  - 42 Joint Standing Committee on Foreign Affairs, Defence and Trade, *A Report on Visits to Immigration Detention Centres*, June 2001, Recommendation 10, pxii. The Committee also recommended that the Department negotiate with appropriate community groups to examine the feasibility of developing a sponsorship scheme for detainees who have not been processed within this time limit, Recommendation 12, pxiii. Recommendations available at <http://www.aph.gov.au/house/committee/jfadt/IDCVisits/IDCreccs.htm>, viewed 23 November 2003.
  - 43 Conference of Leaders of Religious Institutes, *Working Paper on Australia's Humanitarian Program for People Seeking Protection in Australia*, 17 September 2002.
  - 44 Amnesty International School's Network, Submission 284, p1.
  - 45 Law Institute of Victoria, Submission 170.
  - 46 Joint Standing Committee on Migration (JSCM), *Asylum, Border Control and Detention*, 1994, paras 4.162, 4.176-4.177, 4.181.

- 47 See for example Kids in Detention Story, Submission 196; International Commission of Jurists, Submission 128; Australian Lawyers for Human Rights, Submission 168; SCALES, Submission 176; Amnesty International, Submission 194; JAS, Submission 243; Law Institute of Victoria, Submission 170; Australian Education Union, Submission 226; Save the Children (Australia), Submission 108; Amnesty International Schools Network Queensland, Submission 284.
- 48 JSCM, *Asylum, Border Control and Detention*, 1994, paras 4.62-4.65.
- 49 See for example Kids in Detention Story, Submission 196; International Commission of Jurists, Submission 128; Australian Lawyers for Human Rights, Submission 168; SCALES, Submission 176; Amnesty International, Submission 194; JAS, Submission 243; Law Institute of Victoria, Submission 170; Australian Education Union, Submission 226; Save the Children (Australia), Submission 108; Amnesty International Schools Network Queensland, Submission 284.
- 50 See especially JAS, Submission 243.
- 51 E Sullivan, F Mottino, A Khashu, and M O'Neil, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, Vera Institute of Justice, August 2000 at [www.vera.org](http://www.vera.org), viewed 20 January 2004.; Human Rights First, *In Liberty's Shadow – US Detention of Asylum Seekers in the Era of Homeland Security*, 2004, pp41-42 at [http://www.lchr.org/asylum/libertys\\_shadow/Libertys\\_Shadow.pdf](http://www.lchr.org/asylum/libertys_shadow/Libertys_Shadow.pdf) viewed 20 January 2004. See also Stephen Columbus, Submission 287.
- 52 Lawyers Committee for Human Rights, *Country by Country Review of Detention Procedures and Practices*, 2002, p22.
- 53 ECRE, *Research Paper on Alternatives to Detention*, 1997, at [http://www.ecre.org/policy/research\\_papers.shtml](http://www.ecre.org/policy/research_papers.shtml), viewed 23 November 2003. See also, ECRE, Position Paper on the Detention of Asylum Seekers (1996), at <http://www.ecre.org/positions/detain.shtml> and ECRE, Position Paper on Refugee Children, 1996, at <http://www.ecre.org/positions/children.shtml>, viewed 23 November 2003.
- 54 ECRE, *Research Paper on Alternatives to Detention*, 1997, section D.
- 55 Lawyers Committee for Human Rights, *Country by Country Review of Detention Procedures and Practices*, 2002, p118.
- 56 Uniya Jesuit Social Justice Centre, *Overview of Denmark's Asylum System*, February 2003.
- 57 Mitchell, *Asylum Seekers in Sweden*, August 2001, p3; KIDS Submission 196, Law Section, pp68-71.
- 58 See HREOC, *Those who've come across the seas*, 1998, p247.
- 59 Independent Education Union, *Refugee and Asylum Seeker Policy in Australia*, 2002.
- 60 Conference of Leaders of Religious Institutes, *Working Paper on Australia's Humanitarian Program for People Seeking Protection in Australia*, September 2002.
- 61 JAS, Submission 243, pp21-22.
- 62 JAS, Submission 243, p22.
- 63 JSCM, *Asylum, Border Control and Detention*, 1994, paras 4.66-4.90 and 4.168-4.172.
- 64 JSCM, *Asylum, Border Control and Detention*, 1994, para 4.172.
- 65 See for example, JAS, Submission 243; Stephen Columbus, Submission 287; E Sullivan, F Mottino, A Khashu, and M O'Neil, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, Vera Institute of Justice, August 2000, ppiii, 8; ECRE, *Research Paper on Alternatives to Detention*, 1997.
- 66 The profile of the JAS model envisages asylum seekers in various stages of detention, hostel and community release accommodation options, and includes the costs of a proposed case management system. The report notes that there are significant variations within the current costs of detention and that similar variations are likely to apply in the implementation of an alternative model, depending on such factors as specific security needs. Milbur Consulting, *Improving Outcomes and Reducing Costs for Asylum Seekers*, March 2003.
- 67 JSCM, *Asylum, Border Control and Detention*, 1994, para 4.179.
- 68 See for example, UNICEF Australia, Submission 180, p9; SCALES, Submission 176, pp17-22; Refugee Council of Australia (RCOA), Submission 107; NSW Council for Civil Liberties, Submission 104, pp5-8.
- 69 Some groups have expressed concern about the ability of State authorities to fulfil that role given the inadequate funding and support. See for example, RCOA, Submission 107, p8.
- 70 This is based on the British model, where a Children's Panel provides non-legal advice to unaccompanied children. See UK Refugee Council, Support & Advice for Unaccompanied Refugee Children, <http://www.refugeecouncil.org.uk/refugeecouncil/what/what002.htm>, viewed 14 February

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- 2004.
- 71 RCOA, Submission 107, p14.
- 72 A copy of this Act may be found at [www.legislation.hmso.gov.uk](http://www.legislation.hmso.gov.uk).
- 73 UK Home Office, Immigration and Nationality Directorate, Unaccompanied Asylum Seeking Children Information Note.
- 74 UK Panel of Advisors for Unaccompanied Refugee Children, Team Standards, current May 2002.
- 75 Women's Commission for Refugee Women and Children, Hearing before the Senate Judiciary Subcommittee on Immigration on the Treatment of Children in INS Custody, 28 February 2002, at [http://www.womenscommission.org/take\\_action/testimony.html](http://www.womenscommission.org/take_action/testimony.html), viewed 23 November 2003; Presbyterian Church USA, Taking Care of Unaccompanied Foreign Born Children, at <http://www.pcusa.org/washington/issuenet/crrl-020308.htm>, viewed 23 November 2003.
- 76 Homeland Security Act, s462(b)(1).
- 77 Homeland Security Act, s462(b)(2)-(3).
- 78 US Bill S1129, *Unaccompanied Alien Child Protection Act of 2003* (the US Bill), ss101-102.
- 79 US Bill, s103. See also Human Rights First, *In Liberty's Shadow – US Detention of Asylum Seekers in the Era of Homeland Security*, 2004, p38 at [http://www.lchr.org/asylum/libertys\\_shadow/Libertys\\_Shadow.pdf](http://www.lchr.org/asylum/libertys_shadow/Libertys_Shadow.pdf) viewed 20 January 2004.
- 80 Canada, *Immigration and Refugee Protection Act 2002*, s167. The substance of this provision was also contained in s69(4) of the Canadian *Immigration Act 1985*.
- 81 Canada, Immigration and Refugee Board, *Child Refugee Claimants: Procedural and Evidentiary Issues*, Ottawa, 30 September 1996, at [http://www.cisr.gc.ca/en/about/guidelines/child\\_e.htm](http://www.cisr.gc.ca/en/about/guidelines/child_e.htm); Canadian Immigration and Refugee Board, New IRB Guidelines on Child Refugee Claimants, Press Release, 26 August 1996, at [http://www.cisr.gc.ca/en/news/press/1996/9602\\_e.htm](http://www.cisr.gc.ca/en/news/press/1996/9602_e.htm), both viewed 23 November 2003. See also SCALES, Submission 176, pp36-37.
- 82 See RCOA, Submission 107, pp8-12; SCALES, Submission 176, pp39-40.
- 83 The exception is in sections 252A-252B of the Migration Act which include special provisions regarding the strip search of children. Section 273 of the Migration Act provides that regulations may be made regarding the operation of detention centres but only one regulation has been made. That regulation concerns medical treatment for persons who refuse consent (Migration Regulations, reg 5.35)
- 84 Where such a failure constitutes a breach of human rights, there is, however, the ability to make a complaint to the Commission which can investigate and make recommendations to Parliament: see HREOC Act, ss 11(1)(f) and 29.
- 85 As the new IDS were not in force during the period covered by the Inquiry, it has not conducted a detailed analysis of the adequacy of those standards.
- 85 *Children (Detention Centres) Act 1987* (NSW), *Children (Detention Centres) Regulation 2000* (NSW).
- 87 See further, Kids in Detention Story, Submission 196, Law Section, pp35-37. Queensland has an independent visitors program to monitor the treatment of children in juvenile detention facilities.
- 88 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, rule 7: 'States should incorporate the Rules into their legislation or amend it accordingly and provide effective remedies for their breach, including compensation when injuries are inflicted on juveniles. States should also monitor the application of the Rules'.
- 89 DIMIA, Response to Draft Report, 14 July 2003.
- 90 These differences are explored in further detail in Chapter 6 on Australia's Detention Policy.
- 91 DIMIA, Response to Draft Report, 14 July 2003.
- 92 Milbur Consulting, *Improving Outcomes and Reducing Costs for Asylum Seekers*, a report commissioned by JAS, March 2003, p49, at [www.melbourne.catholic.org.au/ccjdp/pdf/ImprovingOutcomesCoverA3.pdf](http://www.melbourne.catholic.org.au/ccjdp/pdf/ImprovingOutcomesCoverA3.pdf), viewed 23 November 2003.
- 93 DIMIA, Response to Draft Report, 14 July 2003.
- 94 DIMIA, Response to Draft Report, 14 July 2003.
- 95 DIMIA, Response to Draft Report, 14 July 2003.
- 96 See Appendix 3 for the full response from the Department and Appendix 4 for the full response from ACM.

# Appendices



# Appendix 1

## List of Submissions

The Inquiry received a total of 346 submissions, 64 of which remain confidential.

Submissions are available on the Human Rights and Equal Opportunity Commission's web site: [www.humanrights.gov.au](http://www.humanrights.gov.au)

Submission	State	Submission No.
Abbott, Kirsti	WA	15
Action for Children, South Australia	SA	186
Adougjak, Jago	Vic	90
Aldenhoven, Kaye	WA	9
Alliance of Health Professionals Concerned about the Health of Asylum Seekers and their Children	NSW	109
Amnesty International Australia	NSW	194
Amnesty International's School's Network, Queensland	Qld	284
Anonymous		179, 228, 229, 245, 283, 295
Association for the Welfare of Child Health	NSW	148
Association of Children's Welfare Agencies	NSW	147
Association of Major Charitable Organisations, South Australia	SA	121
Asylum Seekers Centre	NSW	114
Austin, Jill	Vic	88
Australasian Society for Traumatic Stress Studies	Tas	145
Australian and New Zealand College of Mental Health Nurses, Queensland Branch	Qld	47
Australian Association for Infant Mental Health	SA	29
Australian Association of Social Workers, Western Australia	WA	115
Australian Capital Territory Legislative Assembly	ACT	189
Australian Catholic Migrant and Refugee Office	ACT	198
Australian Catholic Social Justice Commission	NSW	129

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Submission	State	Submission No.
Australian Catholic University, Social Policy and Advocacy Research Centre	Vic	139
Australian Church Women	WA	43
Australian Council of Deans of Education	Vic	130
Australian Early Childhood Association, NSW Branch	NSW	161
Australian Education Union	Vic	226
Australian Federation of University Women	Vic	39
Australian Human Rights Centre	NSW	160
Australian Lawyers for Human Rights	NSW	168
Australian Liquor, Hospitality and Miscellaneous Workers Union	NSW	40
Australian Nursing Federation, Victorian Branch	Vic	37
Australian Parents Council	NSW	56
Australian Psychological Society	Qld	68
Australian Reproductive Health Alliance	ACT	91
Baglow, Len	Qld	102
Bagshaw, Eryk	NSW	275
Baker, Stephanie	NSW	166
Barnardos Australia	NSW	135
Beijing Committee, Western Australian Chapter	WA	118
Bender, Lyn	Vic	206
Bilboe, Harold	NSW	268
BirBaskaBoyut Group	NSW	141
Blue Mountains Refugee Support Group	NSW	31
Bradshaw, Donna	Vic	235, 235a, 235b
Brennan, Frank (Fr)	NSW	144a
Brisbane Refugee Health Network	Qld	105
Brosnan, Katie	WA	227
Buddhist Society of the Northern Territory	NT	25
Campisi, Jackie	NSW	100
Carolan, Christine	Vic	103
Castan Centre for Human Rights Law, Monash University	Vic	60
Catholic Diocese of Parramatta	NSW	87
Catholic Education Office, Diocese of Parramatta and the Edmund Rice Centre	NSW	86
Catholic Migrant Centre	WA	202
Catholic Welfare Australia	ACT	136

Submission	State	Submission No.
Centacare Newcastle	NSW	124
Centacare Sydney	NSW	187
Centre for Multicultural Youth Issues	Vic	140
Chatswood Intensive English Centre	NSW	58
Chauvin, Anita	Qld	294
Chifley, Danielle	ACT	94
Child and Family Welfare Association of Australia	Vic	147a
ChilOut	NSW	120
Clifton, Allan	SA	251
Coalition Assisting Refugees After Detention	WA	133
Coalition for Justice for Refugees	NSW	73
Columbus, Steven	Vic	287
Commonwealth Department of Health and Ageing	ACT	285
Commonwealth Ombudsman	ACT	212
Conference of Leaders of Religious Congregations of Victoria	Vic	80
Conference of Leaders of Religious Institutes NSW	NSW	95
Council of Social Service of New South Wales	NSW	127, 127a
Cowley, Camilla	Qld	272
Crows Nest TAFE, Childcare Certificate Students	NSW	165
Cult Information and Family Support	NSW	48
d'Arville, Anais	ACT	188
Department of Immigration and Multicultural and Indigenous Affairs	ACT	185
Dietitians Association of Australia	ACT	93
Disability Action	SA	78
Diversity Directions	SA	149
Dunn, Isaac		59
Dunn, Tim	Vic	101
Equal Opportunity Commission Victoria	Vic	239
Ethnic Child Care, Family and Community Services Co-operative	NSW	76
Ethnic Communities Council of NSW	NSW	162
Ethnic Communities Council of Western Australia	WA	157
Evans, Peter	WA	21
Federation of Parents and Citizens' Associations of NSW	NSW	195
Feith, Annie	Vic	126
Fifer, Hollie	Vic	225

## A last resort?

Submission	State	Submission No.
Ford, Andrew (Rev Dr)	NSW	296
Freedom Bus		247
Fulham, Tori		256
Gallagher, Margaret	Vic	65
Gannon, Susan	Qld	6
Glennie-Infield, Edward and Jean	Vic	67
Good Shepherd Social Justice Network	Vic	79
Good Shepherd Youth and Family Service	Vic	142, 142a
Gresty, Bic	Vic	112
Hale, Christian		28
Hall, Michael	Qld	288, 288a
Hamilton-Smith, Anthony	SA	282, 282a
Hansen, Quentin	Vic	83
Hasleton, Simon	NSW	55
Health Services Australia	ACT	267
Highfield, Trish	NSW	75
Hill, Richard	Vic	8
Hocking, Barbara	Vic	159
Hoffman, Nigel	NSW	289
Hotham Mission, Asylum Seeker Project	Vic	174
Hunter Community Council	NSW	125
Huxstep, Mark	NSW	248, 248a
Iles, Bev	WA	10
International Commission of Jurists, Australian Section	NSW	128
International Commission of Jurists, Queensland Branch	Qld	297
James, Robyn	Qld	7
Jealous, Virginia	WA	12
Jesuit Refugee Service	NSW	144
Jones, Alan	NSW	23
Jones, Mona	Tas	26
Justice for Asylum Seekers Alliance	Vic	243
Kellerman, James		45
Kids in Detention Story	Vic	196, 196a
Kidsafe, Child Accident Prevention Foundation of Australia	NSW	35
Knight, Edith	Vic	57
Kushinsky, Louis	Vic	38

Submission	State	Submission No.
Law Council of Australia	ACT	218
Law Institute of Victoria	Vic	170
Law Society of New South Wales	NSW	204
Law Society of South Australia	SA	276
Laws, Kevin	Vic	22
Lazaroo, Catherine	Vic	99
Leaver, Elvira	WA	51
Lebanese Muslims Association	NSW	123
Lutheran Community Care	SA	134
M, Jesse	Vic	72
Maddock, Leith	WA	33
Mann, Tom (Dr)	SA	254, 254a, 254b, 254c
Manners, Eric	Qld	20
Mares, Sarah (Dr)	NSW	290
Marist Brothers Province of Melbourne	Vic	158
Marist Refugee Centre	NSW	259
Mayr, Terri	SA	219
McKinnon, Margaret	Vic	69
Melbourne Catholic Migrant and Refugee Office	Vic	192
Melbourne Citymission	Vic	52
Melbourne International Health and Justice Group	Vic	63
Mental Health Council of Australia	ACT	132
Mercy Refugee Service	NSW	71
Milpera State High School	Qld	274
Minogue, Craig	Vic	286
Multicultural Council of the Northern Territory	NT	27
Multicultural Disability Advocacy Association NSW	NSW	122
Muslim Women's National Network of Australia	NSW	54
National Association of Community Based Children's Services	Vic	116b
National Association of Community Based Children's Services, NSW	NSW	116a
National Catholic Education Commission	ACT	46
National Children's and Youth Law Centre	NSW	85
National Council of Churches in Australia	NSW	205
National Council of Women of Australia	ACT	32
National Ethnic Disability Alliance	NSW	210
National Investment For The Early Years	NSW	96
National Legal Aid	NSW	171

## A last resort?

Submission	State	Submission No.
Newbound, Angela	SA	238
Noonan, Stephen	SA	299
NSW Commission for Children and Young People	NSW	258
NSW Council for Civil Liberties	NSW	104
NSW Department of Education and Training	NSW	257
O'Connor, Rose	WA	230
O'Neill, Marie (Dr)	SA	252
Ogilvie, Melissa	NSW	216
Penney, Keren	Canada	13
People with Disabilities	NSW	24
Petersons, Inese	SA	220, 220a
Pfitzner, Bernice (Dr)	SA	264
Port Adelaide Enfield Council, New Arrivals Clinic	SA	234
Proctor, Nicholas (Dr)	SA	241
Prouse, June	WA	18
Public Health Association of Australia	NSW	156
Queensland Independent Education Union, Equity Committee	Qld	36
Queensland Law Society	Qld	164
Queensland Teachers' Union	Qld	44
Rae, Jennifer	NSW	97
Rajendra, Krishna	ACT	137
Refugee Advice and Casework Service	NSW	236
Refugee and Immigration Legal Centre	Vic	246
Refugee Council of Australia	NSW	107
Refugee Review Tribunal	NSW	17, 17a, 17b
Rogalla, Barbara	Vic	98
Rogers, Garry	NSW	231
Rogers, Malinda	USA	11
Roman, Prince (Dr)	NT	211
Romero Community Centre	Qld	4a
Roxon MP, Nicola	Vic	77
Royal Australasian College of Physicians, Paediatrics and Child Health Division	NSW	2
Royal College of Nursing, Australia and Australian Nursing Federation	ACT	191
Rural Australians for Refugees, Wangaratta Branch	Vic	155
Sabian Mandaean Association	NSW	260
Salvation Army, Australian Eastern Territory	NSW	42

Submission	State	Submission No.
Samaritans	NSW	92
Save the Children Australia	Vic	108
Schorel-Hlavka, G H	Vic	273, 273a
Shepherd, Marilyn	SA	3
Shields, Linda (Dr)	Qld	293
Sisters Inside	Qld	163
Smith, Claire	Qld	30
Smith, Sharon	Vic	106
Social Justice Committee of the Parish Council, Anglican Parish of West Tamar	Tas	34
Social Justice in Early Childhood Group	NSW	116
Social Responsibilities Commission, Anglican Province of Western Australia	WA	138
South Australian Coalition for Refugee Children	SA	183
South Australian Department of Education, Training and Employment	SA	154
South Australian Department of Human Services	SA	181, 181a, 181b
South Australian Department of the Premier and Cabinet, Division of Multicultural Affairs	SA	201
Southern Communities Advocacy Legal and Education Service	WA	176
St John's Regional College Dandenong, Social Justice Group	Vic	131
State of Palestine, General Palestinian Delegation, Regional Mission for Australia, New Zealand and the Pacific	ACT	1
Suicide Prevention Australia	NSW	167
Swedish Network of Refugee and Asylum Support Groups	Sweden	298
Tasmanian Government	Tas	197
Tasmanian Office of the Commissioner for Children	Tas	16, 16a, 16b, 16c
Timmermans, Liza	Vic	89
Tobin, John	Vic	146, 146a
Torbet, Sharon	SA	62, 62a
UNICEF Australia	NSW	180
United Nations Association of Australia	ACT	53
United Nations Association of Australia, Tasmania	Tas	53a
United Nations Association of Australia, Victoria	Vic	53c
United Nations Association of Australia, Western Australia	WA	53b

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Submission	State	Submission No.
United Nations High Commissioner for Refugees	ACT	153
United Nations Youth Association of Australia	NSW	152
Uniting Care Burnside	NSW	172
Uniting Church in Australia	NSW	151
University of NSW Centre for Refugee Research and Australian National Committee on Refugee Women	NSW	81
University of Western Sydney, School of Education and Early Childhood Studies	NSW	150
University of Western Sydney, Social Justice and Social Change Research Centre	NSW	222
Victorian Bar Council	Vic	224
Victorian Correctional Services Commissioner	Vic	209
Victorian Department of Human Services	Vic	200
Victorian Foundation for the Survivors of Torture	Vic	184
Waanders, Odette	Vic	64
Walsh, Monica	Vic	66
West Australians for Racial Equality	WA	182
Western Australian Department of Education	WA	223b
Western Australian Disability Services Commission	WA	223a
Western Australian Government	WA	223
Western Region Ethnic Communities Council	Vic	113
Western Young People's Independent Network and Catholic Commission for Justice Development and Peace	Vic	199
Women Barristers' Association	Vic	178
Women's Rights Action Network of Australia	Vic	169
Wood, Margaret (Dr)	Vic	111
World Vision Australia	Vic	50
Youth Advocacy Centre and Queensland Program of Assistance to Survivors of Torture and Trauma	Qld	84
Youth Justice Coalition	NSW	208
YWCA of Australia	ACT	173
Zeeher, Terry	Vic	177
CONFIDENTIAL		64 Submissions

## **Appendix 2**

# **Schedule of Public Hearings and Witness List**

The Inquiry held 61 public sessions (105 witnesses) and 24 confidential sessions (50 witnesses) between May 2002 and August 2002. Nine of the witnesses in confidential hearings (7 sessions) later agreed to make their evidence public.

Transcripts of public hearings are available on the Human Rights and Equal Opportunity Commission's web site: [www.humanrights.gov.au](http://www.humanrights.gov.au)

### **Melbourne, 30-31 May 2002**

- Alliance of Health Professionals Concerned about the Health of Asylum Seekers and their Children (Dr Jill Sewell)
- Bender, Lyn (former ACM psychologist, Woomera)
- Hotham Mission, Asylum Seeker Project (Grant Mitchell)
- Justice for Asylum Seekers Alliance (Sarina Greco, Grant Mitchell, Marc Purcell)
- Kids in Detention Story (Julian Burnside, Jacki Dillon, Catharine Hydon, John Manetta)
- Melbourne International Health and Justice Group (Dr Cate Burns, Assoc Professor Scott Phillips, Andre Renzaho, Beverley Snell)
- Refugee and Immigration Legal Centre (David Manne)
- Rogalla, Barbara (former ACM nurse, Woomera)
- Tobin, John (Senior Fellow, Faculty of Law, University of Melbourne)

### **Perth, 10 June 2002**

- Brosnan, Katie (former ACM teacher, Port Hedland)
- Carroll, Paul (Dr) (former ACM doctor, Woomera)
- Coalition Assisting Refugees After Detention (Eira Clapton, Theo Mackaay, Dr Judyth Watson)
- le Sueur, Marg (lawyer and migration agent)
- O'Connor, Rose (former ACM teacher, Port Hedland)
- Southern Communities Advocacy Legal and Education Service (Mary-Anne Kenny)

## A last resort?

- Sparrow, Annie (Dr) (former ACM doctor, Woomera)
- Western Australian Government (Margaret Banks, Judith Chernysh, Bill Curry, Maree De Lacey, David Gornall, Aaron Groves, Tara Gupta, Kerry Ross)

### Adelaide, 1-2 July 2002

- Action for Children, South Australia (Ustinia Dolgopol)
- Adelaide Secondary School of English (Maria Iadanza)
- Ali, Hadeel (former volunteer at the Middle Eastern Community Council of South Australia)
- Association of Major Charitable Organisations South Australia (Beverley Hartigan, Susan Park)
- Australian Association for Infant Mental Health (Dr Ros Powrie)
- Clifton, Allan (former ACM Operations Manager, Woomera)
- Former Department Infrastructure Manager, Woomera
- Hamilton-Smith, Anthony (former Department Manager, Woomera)
- Jureidini, Jon (Dr) (child psychiatrist)
- Lutheran Community Care (Julia Anaf, Colleen Fitzpatrick)
- Mann, Tom (Dr) (former ACM teacher, Woomera)
- Mares, Sarah (Dr) (child and family psychiatrist)
- Newbound, Angela (immunisation provider)
- O'Neill, Marie (Dr) (former ACM psychologist, Woomera)
- Petersons, Inese (former ACM teacher, Woomera)
- Port Adelaide Enfield Council, New Arrivals Clinic (Karyn Fromene)
- Procter, Nicholas (Dr) (Associate Professor in Mental Health, University of South Australia)
- South Australian Coalition for Refugee Children (Julie Redman, Rosemary Steen)
- South Australian Department of Education and Children's Services, English as a Second Language Program (John Walsh)
- South Australian Department of Human Services (Monica Leahy, Katrina McNeil)
- South Australian Department of Justice, Office of Multicultural Affairs (Joy de Leo, Janusz Mikos)
- Torbet, Sharon (former ACM Activities Officer, Woomera)

### **Sydney, 15-17 July 2002**

- Amnesty International Australia (Steven Columbus, Graham Thom)
- Asylum Seekers Centre (Jennifer Marsh, Sylvia Winton)
- Australian Human Rights Centre (John Pace)
- Bilboe, Harold (former ACM psychologist, Woomera)
- ChilOut (Johanne Gow, Heather Tyler)
- Council of Social Service of New South Wales (Ros Bragg, Alan Kirkland)
- Everitt, Jacqueline (lawyer)
- International Commission of Jurists, Australian Section (Elizabeth Biok, David Bitel)
- Jesuit Refugee Service and UNIYA (Father Frank Brennan)
- Lebanese Muslims Association (Keysar Trad)
- Legal Aid Commission of New South Wales (Elizabeth Biok, Philippa Martin)
- Marist Refugee Centre (Father Jim Carty)
- Multicultural Disability Advocacy Association NSW (Barbel Winter)
- Muslim Women's National Network of Australia (Faikah Behardien, Jamila Hussain)
- NSW Commission for Children and Young People (Gillian Calvert)
- People with Disabilities (Damian Griffis)
- Pfitzner, Bernice (Dr) (former ACM doctor, Woomera)
- Refugee Advice and Casework Service (Melissa McAdam, Alison Ryan)
- Refugee Review Tribunal (Paula Cristoffanini, Steve Karas, Mark Mantle)
- Royal Australian and New Zealand College of Psychiatrists (Dr Louise Newman)
- Sabian Mandaean Association (Esselle Hattom)
- UNICEF Australia (Gaye Phillips)
- United Nations High Commissioner for Refugees (Michel Gabaudan, Alvin Gonzaga)
- University of NSW Centre for Refugee Research and Australian National Committee on Refugee Women (Dr Eileen Pittaway)

## **A last resort?**

### **Brisbane, 5 August 2002**

- Amnesty International's School's Network, Queensland (Rebecca Ashby, Matthew Clifford, Meg Foley, Kirsten Hagan, Rory Killen)
- Brisbane Refugee Health Network (Gaby Heuft, Margot Salom, Dr Rohan Vora)
- Cowley, Camilla (Manager, Tiger 11 Soccer Team)
- Diversity in Child Care, Queensland (Jane Delaney-John)
- Hazara Ethnic Society (Hassan Ghulam)
- Huxstep, Mark (former ACM nurse, Woomera)
- Milpera State High School (Gayle Hood, Adele Rice)
- Queensland Program of Assistance to Survivors of Torture and Trauma (Ally Wakefield)
- Romero Community Centre (Sister de Lourdes Jarret, Alec Shabanz, Frederika Steen)
- United Nations Association of Australia (Professor Margaret Reynolds)
- Youth Advocacy Centre (Damian Bartholomew)

### **Hearings for the Department of Immigration and Multicultural and Indigenous Affairs (the Department) and Australasian Correctional Management Pty Limited (ACM)**

#### **Sydney, 12 September 2002, Directions Hearing**

Counsel for the Department and ACM

#### **Sydney, 2-5 December 2002**

Counsel for the Department and ACM

Department witnesses: David Frencham, Philippa Godwin, Rosemary Greaves, Robert Illingworth, Greg Kelly, Christine McPaul, Douglas Walker

ACM witness: Sarah Lumley

#### **Sydney, 19 September 2003 (ACM only)**

Counsel for ACM

## **Appendix 3**

### **Action taken by the Department**



Australian Government

Department of Immigration and Multicultural and Indigenous Affairs

Secretary

Dr Sev Ozdowski  
Human Rights Commissioner  
GPO Box 5218  
SYDNEY NSW 2000

*Sev*

Dear Dr Ozdowski

Thank you for your letter of 22 January 2004, in which you provided the Department with the final findings and recommendations of the Inquiry into children in immigration detention and child asylum seekers.

I understand that, under section 29 of the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act), in referring your final report to the Attorney-General, you are to advise of any action, to your knowledge, that the relevant party has taken or is taking as a result of the findings and recommendations of the Inquiry. Accordingly, you have asked for my advice of any intended action by the Department in response to the Inquiry and its report.

Primarily, the findings and recommendations of the report relate to the legal and policy settings for immigration detention. These are matters for response by the Government. I expect that the Government will consider your report, including its findings and recommendations, after it is tabled.

In relation to matters of administration, as advised on a number of occasions during your Inquiry, the Department has progressively and over a period of time developed a range of initiatives relating to children in immigration detention. This reflects the Department's strong focus on our duty of care for children in detention and the importance of responding to their needs. The Department is continuing to seek further opportunities to manage our legal obligations in an innovative way, which responds to the evolving needs of children in immigration detention.

In providing the Department's response to your letter, I do so in consideration of the report as a whole. I have previously made the point that it is disappointing the Inquiry has not adequately reflected the positive actions taken by the Department to date. Nor, in my view, has the Inquiry adequately recognised the complexities involved in immigration detention, particularly in relation to children. It has not, in particular, adequately noted the extreme pressures created by the sizeable numbers of unauthorised arrivals in 1999-2001.

Consistent with section 29 of the HREOC Act, please find below a table of comments against the Inquiry's major findings which outlines what action has been taken or is being taken, both during and after the period of the Inquiry.

There are some key points which need to be highlighted:

- The detention caseload consists of two broad categories: unauthorised boat arrivals, and people detained as a result of compliance activities.
- In the first category, there are currently only 17 children in mainland immigration detention centres. The Department is working actively to establish appropriate alternative arrangements for children.
- In the second category, the great majority of people who come to the Department's attention through compliance activities are not placed in a detention centre. Over the last six months of 2003, some 94% of children were dealt with in other ways, primarily by the grant of a bridging visa. Of those children who are placed in detention (principally because a judgment is made that the family is a risk of flight), the median stay for women and children who are new arrivals in detention is currently less than ten days.
- A very significant change has taken place during the past two years, as the Department has developed Residential Housing Projects, worked with community groups to establish alternative detention arrangements and to support prospective bridging visa applicants, and worked with child welfare authorities to support unaccompanied and other vulnerable minors in foster care arrangements.
- The Department is working actively to develop further options for children, including consideration of metropolitan Residential Housing Projects and a wider range of arrangements with community groups.

More detailed comments against each of the findings are provided below.

<b>Major finding 1</b>
<i>Australia's immigration detention laws, as administered by the Commonwealth, have created a detention system that is fundamentally inconsistent with the Convention on the Rights of the Child (CRC). In particular, Australia's mandatory detention system fails to ensure that:</i>
<i>a) detention is a measure of last resort, for the shortest appropriate period of time and subject to effective review</i>
<i>b) the best interests of the child are a primary consideration in all actions concerning children</i>
<i>c) children are treated with humanity and respect for their inherent dignity</i>
<i>d) children seeking asylum receive appropriate assistance to enjoy, 'to the maximum extent possible' their right to development and their right to live in 'an environment which fosters the health, self-respect and dignity' of children in order to ensure recovery from past torture and trauma.</i>
<b>Key comments</b>
<ul style="list-style-type: none"> <li>• In order to address the needs of children in detention, it is necessary to understand the profile and individual circumstances of those detained. While the report does not clearly identify this, a significant proportion of women and children in immigration detention come to the Department's attention as a result of compliance activities. These people are only detained as a last resort and generally for a very short period. This is clear from the statistics. From 1 July 2003 to 31 December 2003, of the 1,237 unlawful non-citizen children located by compliance, only 6% were detained (the majority of children were dealt with in other ways, primarily by the grant of a bridging visa). Of those women and children detained as a result of compliance activities, the median stay in detention is currently less than ten days;</li> <li>• While the Inquiry report has focussed on the average period of all children in immigration detention in making its findings, as noted by the Department during the course of the Inquiry</li> </ul>

the report has not properly drawn out the facts behind the statistics. Following the significant decline in unauthorised boat arrivals, the detention caseload has changed dramatically over the course of the Inquiry. This is not evident from the Inquiry report, which continues to provide statistics in a manner that does not clearly distinguish between the different detainee caseloads.

- Given that the purpose of immigration detention is to establish whether people have a lawful reason to remain in Australia, quite appropriately a major focus of the Department's efforts in 1999-2001 was to ensure speedy processing of applications.
- The report overlooks the intensive efforts on the part of the Department, in response to the unprecedented numbers of unauthorised arrivals, to streamline and improve processing times. As a result of Departmental efforts, by mid 2001 the time taken for the Department to process protection visa applications for 80 per cent of applicants had decreased from an average of seven and a half months to twelve and a half weeks. This improvement in processing visas was achieved in the twelve month period when around 4400 temporary protection visas were granted. By the end of 2001 the significant reduction in processing times meant there was greater throughput in detention facilities. Many detainees were in facilities for a short period and then released into the community on a visa.
- As has occurred throughout the Inquiry, all women and children in immigration detention continue to be reviewed by the Department against the criteria for the grant of a Bridging Visa. In many cases, as prescribed by the law, comprehensive care plans need to be developed to allow for individual or family release into the community.
- It needs to be properly acknowledged that many people in immigration detention may not be eligible for consideration of a bridging visa because they do not meet the requirements of the regulations. In that context, the Department has offered all eligible women and children the opportunity to move to a Residential Housing Project. Some have declined.
- Contrary to the description in the Inquiry report, the Residential Housing Projects have proven to be a particularly supportive environment for women and children, with many shared linguistic, cultural and national experiences. Residential Housing Projects are now available in Port Augusta, Port Hedland and Woomera. Further projects are being considered in metropolitan areas.
- This focus on meeting children's individual needs was also enhanced in the development of the new Immigration Detention Standards (IDS), which form part of the contract with the detention services provider. While extensive information on the new detention services contract was provided to the Inquiry, improvements in the contractual framework were not analysed or reviewed in the Inquiry report. This approach seems to overlook the current operation of the detention program and downplay the process of continuous improvement.
- A case management approach to respond to individual needs has also been introduced at the Baxter Immigration Detention Facility (IDF), with a view to expanding this at other centres. This approach will further enhance the focus on providing appropriate support to children and their families.

#### **Major finding 2**

*Children in immigration detention for long periods of time are at high risk of serious mental harm. The Department's failure to implement the repeated recommendations by mental health professionals that certain children be removed from the detention environment with their parents is cruel, inhumane and degrading treatment of those children in detention.*

#### **Key comments**

- The Department noted in its response to the draft report that mental health is a much broader and more complex issue than detention. In addition to detention, previous trauma, family violence and inadequate behaviour management are amongst the range of risk factors that may lead to mental health problems. These are factors over which the Department has little or no control.
- Within this context, the Department and services provider have sought to ensure that, whenever possible, the effects of risk factors are minimised and protective factors are maximised or enhanced. Protective factors, to a large extent, focus on supporting parents to

in turn support their children, ensuring good school environments and good physical health.

- For example, the Department has established arrangements with State education authorities for children to attend schools in the local community. The majority of school-age detainee children are now spending a large portion of their waking hours each week outside the detention facility, learning and interacting with Australian children.
- The benefits of Residential Housing Projects, described above, are also particularly relevant to this finding. Contrary to the report's description, there is clear evidence that Residential Housing Projects can assist individuals who are having difficulties coping in an immigration detention facility. Evidence of this was provided to the Inquiry by the Department but was omitted from the report.
- There has been a marked increase in the proportion of long-term detainee women and children who are accommodated in alternative detention arrangements. Of this group, approximately 15% were in alternative detention in July 2003 and as at 21 January 2004, 43% were in alternative detention. The majority are in Residential Housing Projects. A small number are in community based detention arrangements, where a Housing Project is not appropriate to meet their specific needs.
- In response to emerging and evolving mental health needs, children in immigration detention are provided with a standard of mental health services that is comparable to those available in the Australian community. As described earlier, the Department works closely with the detention services provider and specialists to ensure appropriate responses to individual needs. State child welfare authorities are also closely involved in any cases involving children.
- As in the community, individual cases can be complex and health professionals will not always agree on the best treatment plans. Where this occurs, the Department works closely with the families involved and relevant specialists to develop a treatment plan which is practical and can be implemented.
- With regard to the recommendations of professionals, as explained during the course of the Inquiry, such professionals are not necessarily familiar with or experienced in the requirements of the *Migration Act 1958*. Given this, they may make recommendations for options that are not legally available to the Department. In these circumstances, the Department works with relevant professionals to develop suitable options that focus on the needs of the individuals and take account of the legal framework.

### Major finding 3

*At various times between 1999 and 2002, children in immigration detention have not been in a position to fully enjoy the following rights:*

- a) the right to be protected from all forms of physical or mental violence*
- b) the right to enjoy the highest attainable standard of physical and mental health*
- c) the right of children with disabilities to 'enjoy a full and decent life in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community'*
- d) the right to an appropriate education on the basis of equal opportunity*
- e) the right of unaccompanied children to receive special protection and assistance*

### Key comments

- This finding of the report focuses on a period of time that no longer bears any comparison to current immigration detention of children, families and adults.
- Within that context, the information provided by the Department on the actions it took during that period does not seem to have been appropriately considered or reflected in the report in coming to the findings. This information is key to understanding the Department's actions during the period 1999 to 2002.
- During the time of sizeable numbers of arrivals from, in particular, 1999 to 2001, the Department's focus was necessarily on meeting their basic needs and on making strenuous efforts to hasten visa processing.
- There are clearly a number of practical factors to consider when dealing with such a dynamic and changing population. For example, on the issue of education alone, when there were large numbers and a high turnover of children in detention it was not practical to place

children in local schools. In September 2001, there were over 450 children at the Woomera IRPC; the local school had a student population of around seventy children. The practicalities of integrating the detainee children, many of whom moved out within a short time, would have been unmanageable.

- While the report comments on Departmental action that could have been taken during this period (such as the placement of all families in community based detention), it does so without proper consideration of the purposes of immigration detention and Government policy, and with little consideration of the practicalities and circumstances applying at the time in question. These issues were fully described by the Department during the course of the Inquiry, but appear to be minimised or dismissed by the Inquiry in coming to its findings.

In light of the Department's concerns with the manner in which evidence and information provided to the Inquiry have been extracted and summarised inappropriately, I ask that this response to the section 29 notice be included in its entirety in the final report.

Yours sincerely



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W.J. Farmer

6 February 2004

## **Appendix 4**

### **Action taken by ACM**



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6 February, 2004

**FACSIMILE: 02 9284 9797**

**PREVIOUSLY SENT BY FACSIMILE**

Dr Sev Ozdowski  
Commissioner  
Human Rights and Equal Opportunity Commission  
Level 8  
Piccadilly Tower  
133 Castlereagh Street  
SYDNEY NSW 2000

Dear Commissioner

**National Inquiry into Children in Immigration Detention**

We refer to your letter dated 22 January 2004 addressed to our client ACM and the enclosed Section 29 Notice comprising the Inquiry's findings and recommendations.

ACM acknowledges that the Commission in reporting to the Attorney-General in accordance with Section 29 must inform the Attorney-General what action ACM has taken or is taking as a result of the findings and recommendations made by the Inquiry. Accordingly, the Commission has requested that ACM inform the Commission what action it intends to take as a result of the findings and recommendations made by the Inquiry.

The requirement to confine ACM's response to the findings and recommendations made is also acknowledged.

In doing so we first ask the Commission to note that ACM will not have responsibility for the operation of the Detention Centres the subject of the Inquiry from the end of February 2004. The operation of these Detention Centres has been progressively transitioned to another service provider since December 2003. This change necessarily affects ACM's ability to take action as a result of the Inquiry's findings and recommendations.

ACM therefore responds to the Inquiry's findings and recommendations in its capacity as the service provider for much of the period of this Inquiry and to the extent of its ability to implement any recommendations pertinent to ACM.

Second, we observe that the Major Findings and Recommendations made in Chapter 17 of the Report largely concern the legislative and administrative framework for immigration detention. These matters of legislation and policy are not matters upon which ACM makes comment. Therefore, in responding to the Section 29 Notice, only those findings and recommendations pertinent to ACM are addressed.

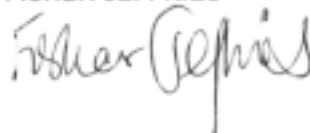
We further observe that those findings pertinent to ACM are contained in some of the detailed Chapters 5 to 16. ACM therefore responds to the Section 29 Notice in this regard by setting out in the attached table its position on the action that it intends to take as a result of the Inquiry's findings. As a general matter, in considering ACM's response, we ask the Commission to report to the Attorney-General two matters. First, that ACM does not agree with a number of the Inquiry's detailed findings pertaining to ACM for reasons that are acknowledged in some places of the Inquiry's Report and others that have previously been communicated to the Commission. Second, that many changes have already been made by ACM to practices of concern to the Commission and these changes were made continuously, often at ACM's and the Department's own initiative. ACM does not exhaustively reiterate those changes now, some of which are acknowledged in the Inquiry's Report.

Finally, we are instructed to express ACM's appreciation to the Commission for its acknowledgment in the Report of the complexities of managing detention centres and the efforts of the staff who undertook a challenging task, sometimes in difficult circumstances. It is further appreciated that the Commission has also recognised in its Report that the inappropriate behaviour of a small minority of staff does not detract from the commitment of the majority of staff working in immigration detention who treated child detainees with dignity and respect.

ACM thanks you for the opportunity to respond to the findings and recommendation of the Inquiry.

Yours faithfully

**FISHER JEFFRIES**

A handwritten signature in dark ink, appearing to read 'Fisher Jeffries', written in a cursive style.

## ACM RESPONSE TO THE FINDINGS AND RECOMMENDATIONS OF THE NATIONAL INQUIRY INTO CHILDREN IN IMMIGRATION DETENTION

### Chapter 17 - Major Findings and Recommendations of the Inquiry

#### Chapter 17 – Recommendations

##### *Recommendation 1*

Children in immigration detention centres and residential housing projects as at the day of the tabling of this report should be released with their parents as soon as possible but no later than four weeks after tabling.

##### *Recommendation 2*

Australia's immigration detention laws should be amended as a matter of urgency to comply with the Convention of the Rights of the Child.

##### *Recommendation 3*

An independent guardian should be appointed for unaccompanied children and they should receive appropriate support

##### *Recommendation 4*

Minimum standards for treatment for children in immigration detention should be codified in legislation.

##### *Recommendation 5*

There should be a review of the impact on children of legislation that creates 'excised offshore places' and the 'Pacific Solution'

#### **ACM Response:**

Because these recommendations relate exclusively to legislative and policy matters that are not pertinent to ACM, ACM does not make any comment.

#### Chapter 17 – Major Findings

##### **Major Finding 1 (c): Failure to Treat Children with Humanity and Respect**

Australia's immigration detention laws as administered by the Commonwealth have created a detention system that is fundamentally inconsistent with the Convention on the rights of the Child (CRC).

In particular, Australia's mandatory detention system fails to ensure that:

(c) children are treated with humanity and respect for their inherent dignity (article 37(c) CRC)

##### **17.2 Reasons for the Finding (17.2.3)**

The following matters have been identified by the Inquiry as being inconsistent with the JDL Rules throughout this report: instances of obtrusive head count procedures; periods during which children were called by number rather than by name; the absence of clear procedures to ensure the special protection of children when tear gas, water canons and other security

measures were used; the failure to make routine assessments regarding the mental health of children on arrival in order to ensure that the appropriate services were provided (for instance torture and trauma assessments); instances where detention staff used offensive language around children; inadequate provision of preventative and remedial dental and ophthalmological care; periods of great overcrowding; instances of unsanitary toilet facilities; the failure to promptly assess the needs of children with disabilities and provide them with the appropriate aids, adaptations and services; the failure to promptly send children to community schools and ensure education appropriate to the cultural and language needs of children in detention; and the failure to ensure an appropriate curriculum for children above the compulsory school age. Finally there was a failure to act upon repeated recommendations from health professionals that certain children be removed from detention centres in order to protect their mental health.

All these findings result in breach of article 37(c) of the CRC.

#### **ACM Response:**

Some of these findings concern the conduct and practices of ACM, some of which are past practices or concern isolated incidents not condoned by ACM management.

##### ***Instances of obtrusive head counts.***

ACM procedures have been developed to ensure head counts are as unobtrusive as possible. Obtrusive head counts were only conducted during or immediately following incidents of major detainee disturbances. However ACM as service provider can and will review procedures to ensure the needs of children are better addressed in situations requiring obtrusive head counts.

##### ***Periods during which children were called by number.***

This practice occurred in some but not all detention centres. An instruction was issued in 2002 to ensure detainees were not referred to by number. Detention centre managers were instructed to scrutinise compliance with the instruction.

##### ***The absence of clear procedures to ensure the special protection of children when tear gas, water cannons and other security measures were used.***

ACM considers that the principles contained in existing procedures for security including the use of chemical agents and the use of force relates to and provides for maximum protection of all detainees, including children. It is implicit in these procedures that the use of force is proportionate to the circumstances of the incident concerned and therefore the best interests of children are inherent in the policies and their implementation.

Nonetheless, where ACM is the service provider it can and will review procedures in accordance with any Departmental policy changes or directions in relation to additional strategies for protecting children during major detainee disturbances where the use of security measures is critical to ensuring the safety of all detainees, staff and members of the public.

##### ***The failure to make routine assessments regarding the mental health of children on arrival in order to ensure that the appropriate services were provided.***

Health assessments of children were undertaken during the admission process. Although no specific mental health screening instrument was systematically used to assess children, it must be recognised that mental health screening instruments for children are neither readily available nor culturally adapted to the diverse detainee population. Children were regularly seen by qualified doctors and nursing staff who provided ongoing health care. Indicators of mental health problems were continuously addressed as part of the ongoing health care provided to detainee children.

The provision of appropriate torture and trauma assessments and treatment is problematic because it was ACM's experience that experts in this area actually refused to provide the services while detainees remained in detention.

***Instances where detention staff used offensive language around children.***

The ACM code of conduct has been in place since it was contracted as the service provider. The use of offensive language in the work place is not accepted or condoned by ACM and disciplinary procedures apply to any contraventions of that code of conduct.

***The absence of specific guidelines regarding the use of medical observations rooms for children.***

It has never been routine practice to use medical observation rooms for children. In the one case relied on by the Inquiry, a medical observation room was used for a teenage boy who was assessed by professionals as highly suicidal. In this case the age and needs of the child were taken into account in practice.

However, where ACM is the service provider it can and will review procedures to codify in writing procedures specific to the use of medical observation rooms for children if required.

***Inadequate provision of preventative and remedial dental and ophthalmological care.***

ACM provided services in accordance with then current service requirements that, with hindsight, did not contemplate lengthy periods of detention for children. Where ACM is the service provider ACM will liaise with the Department to establish required service standards relevant to the length of a child's time in detention.

***Unsanitary toilet facilities.***

The maintenance of sanitary toilet facilities has been an ongoing challenge due to the combination of cultural differences in the detainee population and the infrastructure of detention centres. Daily hygiene inspections have been introduced by ACM. The provision of culturally appropriate toileting facilities is a matter not within the responsibility or control of the service provider.

***The failure to promptly assess the needs of children with disabilities and provide them with the appropriate aids, adaptations and services.***

ACM disagrees with this finding.

The children to whom the assessment refers (Case 1 – Port Hedland) suffered from a rare disorder. Assessments of these children commenced early in their period of detention and were undertaken by qualified internal and external medical professionals. The accurate diagnosis of their condition was eventually made despite the disorder being extremely rare in Australia and in the world. There is no evidence to suggest that an accurate diagnosis would have been made more expeditiously in the community.

In relation to the child with cerebral palsy (Case 2 - Curtin), ACM considers that within the confines of detention, the geographical location of the centres and the span of control available to the service provider, the boy was managed to the best possible standard. It is acknowledged that management strategies improved progressively across the period of his detention. Carers were employed for 24 hours, 7 days per week for this boy and all required aids were provided progressively without cost to the boy or his mother.

ACM does acknowledge difficulties in engaging State disability organisations to provide assistance and where ACM is the service provider its policies can and will be changed to ensure immediate assistance is sought from these agencies.

***The failure to promptly send children to community schools and ensure education appropriate to the cultural and language needs of children in detention.***

ACM has complied with all agreements between DIMIA and State educational jurisdictions for children in detention to attend external schools and will continue to facilitate the attendance of children in accordance with the relevant agreements where ACM is the service provider.

**Major Finding 3 (17.1):**

At various times between 1999 and 2002 children in immigration detention have not been in a position to fully enjoy the following rights:

- a) the right to be protected from all forms of physical or mental violence (article 19(1) – see Chapter 8)
- b) the right to enjoy the highest attainable standard of physical and mental health (article 24(1) – see chapter 9.10)
- c) the right of children with disabilities to ‘enjoy a full and decent life in conditions which ensure dignity promote self reliance and facilitate the child’s active participation in the community’ (article 23(1) – see chapter 11)
- d) the right to an appropriate education on the basis of equal opportunity (article 28(1) – see Chapter 12)
- e) the right of unaccompanied children to receive special protection and assistance (article 20(1) – see Chapters 6,7,14)

**Major Finding 3 (17.2.6):**

***Failure to ensure appropriate services and conditions in detention centres.***

Major finding 3 concerns the conditions within detention centres which is discussed in earlier chapters in this report. These chapters set out why the Department’s administration of Australia’s detention centres has resulted in breaches of children’s rights relating to safety (Chapter 8), mental health (Chapter 9), physical health (Chapter 10), children with disabilities (Chapter 11), education (Chapter 12) and unaccompanied children (Chapter 14)

**ACM Response:**

These findings are premised on issues identified in the respective chapters. A number of the issues relate to ACM service delivery and ACM’s response to these issues has been made in answer to the detailed findings of the respective chapters.

**Chapter 8: Safety of Children in Immigration Detention**

**Finding:**

The Inquiry does not suggest that there be no security measures in detention facilities. However the security standards, policies and procedures examined by the Inquiry are general in nature. They do not highlight the priority that should be given to the protection of children. The Inquiry finds the absence of such specificity has meant that the best interests of the child is not a primary consideration in decisions made regarding the maintenance of security in detention centres.

**ACM Response:**

The finding of the Inquiry is noted. Where ACM is the service provider it could and will accommodate child specific security procedures and corresponding practices if required. However, the Commission should note the following issues that impact on the practicality of the Commission's implicit recommendation that operational policies and procedures should expressly acknowledge the best interests of the child.

First, it is important to recognise that the Inquiry's concern arises almost exclusively from incidents during periods of major detainee unrest. In practice, establishing and implementing management strategies which are in the best interests of the children concerned is a complex task. The service provider has a limited range of options and must at times give priority to the interest of saving life and property. The accommodation of procedures with the best interests of children as the 'primary' objective would require the resolution of the inherent tensions in operational priorities manifest in times of major detainee disturbances. Implementation of these procedures would also require consideration of factors including infrastructure, Departmental policy and translation of policy into relevant performance requirements for the service provider.

**Chapter 9: Mental Health and Development of Children in Detention****Finding:**

However, the Inquiry finds that there was no routine assessment of the mental health problems facing children on arrival. There were insufficient numbers of mental health staff to deal with the problems emerging in children, and there was insufficient access to external mental health experts. No torture and trauma services were available to children who needed that specialist care.

**ACM Response:**

ACM disagrees with the findings concerning routine mental health assessments or insufficient staffing numbers.

Health assessments of children were undertaken during the admission process. Although no specific mental health screening instrument was systematically used to assess children, it must be recognised that mental health screening instruments for children are neither readily available nor culturally adapted to the diverse detainee population nor practicable for use during arrival health assessments. Children were regularly seen by qualified doctors and nursing staff who provided ongoing health care. Indicators of mental health problems were continuously addressed as part of the ongoing health care provided to detainee children. For example, the Report identifies significant numbers of children who during the course of the Inquiry, were diagnosed with mental health problems. This demonstrates that the mental health status of children was assessed during their period in detention.

ACM does not agree with the finding that there were insufficient mental health staff generally. During periods when there were high numbers of detainee admissions following the arrival of numerous boats, there were significant demands on all health services. These instances do not reflect the general or typical situation in detention centres. It must also be recognised that determining the actual level of staff that is 'sufficient' must not be subjective and must be in keeping with community standards. There is a finite number of mental health professionals available in the community and staff for detention centres can only be drawn from the available pool.

For these reasons, ACM does not intend to take any further action as a result of the Commission's implicit recommendations that detainee children should be routinely screened for mental health problems on arrival and that there should be more mental health staff employed in detention centres.

## **Chapter 9: Mental Health and Development of Children in Detention**

### **Finding:**

The Inquiry also finds that the observation systems in place to prevent self-harm were successful in preventing the death of children by suicide. However there were no clear guidelines regarding the use of medical observation rooms for children. The Inquiry notes that the suicide prevention systems focused on immediate prevention of harm rather than holistic therapeutic care.

### **ACM Response:**

These findings are noted. However, it is important for the Commission to acknowledge that the case relied upon by the Commission for its findings, related to one teenager who was considered at high risk of self-harm. Although ACM's procedure may not have expressly specified the requirement for managing a minor, the practices applied in this instance reflected the needs of the child.

ACM does not agree that the High Risk Assessment Team process is focussed on immediate prevention of harm rather than therapeutic care. The observation component of the process is for immediate prevention of self-harm. The HRAT procedure involves the operation of a high risk assessment team who implement immediate and ongoing therapeutic strategies often for considerable periods of time after the intensive observation period is completed.

Where ACM is the service provider it can and will codify in writing procedures specific to the use of medical observation rooms for children if required.

## **Chapter 10: Physical Health of Children in Detention**

### **Finding:**

The Inquiry also finds that food is not tailored to the needs of children and has been variable over the period. Moreover, there is no evidence that individual nutritional assessments of children were conducted over the period of time covered by the Inquiry, in order to ensure that any pre-existing nutritional deficiencies were being addressed. The provision of baby formula and special food for infants has been uneven.

### **ACM Response:**

ACM does not intend to take any action as a result of these findings because ACM disagrees with them for the following reasons.

The menus provided by ACM were reviewed by a qualified external nutritionist and considered suitable for adult and child detainees.

While individual nutritional assessments of children were not routinely conducted, children routinely received health checks. The weight and physical health of children were assessed and monitored and any individual anomalies were addressed as required in accordance with community standards.

Baby formula was available at all times. ACM purchased only recommended brands of baby formula however some detainees did not recognise the brand and believed the correct formula was not being provided. At no time was any detainee denied baby formula.

## Chapter 11 Children with Disabilities in Detention

### Finding:

The Inquiry therefore finds that the Department's failure to ensure a 'full and decent life' for those children 'in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community' resulted in a breach of article 23 (1) of the CRC. The Department also failed to provide special care and assistance required by these children to ensure that they had effective access to education, health care services, aids and adaptations and recreational opportunities 'in a manner conducive to the child achieving the fullest possible social integration and individual development including his or her cultural and spiritual needs' as required by article 23 (3).

### ACM Response:

While this finding expressly refers to the Department's responsibilities, the Report identifies a number of underlying factors upon which the finding is premised. ACM does not agree with the Inquiry's analysis of these factors.

For example, in relation to the case of the young boy with cerebral palsy (Case 2 – Curtin) ACM considers that within the confines of detention, the geographical location of the centres and the span of control available to the service provider, the boy was managed to the best possible standard. Management strategies improved progressively across the period of this child's detention. Carers were employed for 24 hours, 7 days per week for this boy and all required aids were provided progressively without cost to the boy or his mother.

ACM acknowledges the historical difficulties in engaging State disability organizations to provide assistance to children in detention. Where ACM is the service provider ACM policies can and will be changed to ensure immediate assistance is sought from these agencies.

# Appendix 5

## Acknowledgements

<b>Commissioner</b>	Dr Sev Ozdowski OAM
<b>Assistant Commissioners</b>	Dr Robin Sullivan, Professor Trang Thomas AM
<b>Secretary to Inquiry</b>	Vanessa Lesnie
<b>Executive Officer</b>	Dr Pauline Moore
<b>Drafting</b>	
<i>Main Report</i>	Vanessa Lesnie, Kate Temby, Alanna Sherry, Dr Pauline Moore, Susan Newell
<i>Community Guide</i>	James Iliffe, Paul Oliver
<b>Research</b>	Vanessa Lesnie, Kate Temby, Alanna Sherry, Dr Pauline Moore, Stephen Duffield, Des Hogan, Karen O'Connell, Bassina Farbenblum, Rachel Stein-Holmes, Ian Price, Linda Gibbons
<b>Legal</b>	Jonathon Hunyor, Susan Roberts, Craig Lenehan, Jenni Whelan, Natalie Sheard
<b>Counsel Assisting</b>	Jonathon Hunyor, Michael Wigney, Vanessa Lesnie
<b>Media</b>	Janine MacDonald, Paul Oliver, Jan Payne
<b>Web Site</b>	Joanna Kay, Joshua McCluskey
<b>Logistics</b>	Avril Cox, Kate Temby, Alanna Sherry, Susan Newell, Helen Bedwell, Helen Hestelow