ATTACHMENT A

BACKGROUND MATERIAL

Background - General

History of Inquiry

- On 28 November 2001, the Human Rights Commissioner, Dr Sev Ozdowski, announced an own motion National Inquiry into Children in Immigration Detention and Child Asylum Seekers.
- To assist HREOC with its Inquiry, a comprehensive submission was prepared by the department, covering a range of policy and operational issues relating to children in detention. The department facilitated visits to all seven immigration detention facilities. In December 2002, senior departmental officers publicly gave evidence before the Inquiry over four days of intense questioning. A huge volume of information including primary documentation and statistical material, was provided to the Inquiry.
- There has been a high level of public interest in the Inquiry with over 346 public submissions and 64 confidential submissions received, and public hearings being held in most capital cities attended by 114 witnesses.

Draft Reports

- In April and May 2003, HREOC provided the department with the first draft Report in two parts (over 700 pages) for comment. Many of the issues in the draft Report were being raised for the first time during the Inquiry. The department provided extensive comments (over 300 pages), outlining its concerns and requesting that HREOC more appropriately reflect and respond to the complexity of the issues.
- In November 2003, following requests from both the department and ACM, HREOC provided the second draft Report for comment. The second draft demonstrated little substantial difference in the key thrust of the Inquiry's argument. Despite the department's extensive comments, very little had been incorporated into the second draft, nor did the comments have any real impact on the Report's general findings and conclusions.
- In December 2003, the department responded by advising that the Report:
  - fails to grapple with the complexities of issues;
  - does not present an accurate picture of the dynamic and changing nature of the detention program;
  - criticises the department for not implementing arrangements that would have been neither appropriate nor practical during the period of unprecedented numbers of unauthorised arrivals;
  - relies on the benefit of hindsight to criticise, out to context, decisions and actions that were appropriate at the time they were taken;
  - fails to provide practical recommendations for the management of children currently in immigration detention; and
  - appears to use information and evidence in a selective way ignoring or dismissing evidence that does not support the Inquiry's conclusions.

Report Findings and Recommendations

- On 22 January 2004, HREOC provided the department with a formal notice seeking information on what action the department intended to take as a result of the Inquiry's findings and recommendations. In providing this notice, HREOC articulated three major findings and five recommendations in the Inquiry Report.
- In summary, the Report finds that:

  - Australia's immigration detention laws, as administered by the department, are in breach of the Convention on the Rights of the Child (CRC);
  - that children in detention are at high risk of serious mental harm; and
  - that at various times between 1999 and 2002, children in immigration detention have not been in a position to fully enjoy certain rights under the CRC.
- The five recommendations relate to Government law and policy, and include that :
  - all children in immigration detention centres and residential housing projects be released with their parents (an option identified as being community detention) no later than four weeks after tabling the Report,
  - Australia's laws be amended to comply with the CRC;
  - there should be an independent guardian appointed for unaccompanied minors;
  - minimum standards for the treatment of children be codified in legislation; and
  - there should be a review of the impact on children of legislation that creates 'excised offshore places' and the 'Pacific solution'.

General Response to the Inquiry Report

- Despite the time taken to conduct the Inquiry and the extensive documentation provided by the department, the Report does not present an accurate picture of the immigration detention program. Similarly, the Report does not appear to have taken that complexity into account in its evaluation of the legislative framework, the department's administration of the program, and the future management of unauthorised arrivals.
- The Report relies on the benefit of hindsight to criticise, out of context, decisions and actions that were appropriate at the time they were taken.
- Innovations and improvements, such as the Residential Housing Projects and getting children into schools in the community, acknowledged cursorily in the Report, have been progressively developed by the Government and the department. In the spirit of continuous improvement, these innovations responded to emerging needs and the practical realities of managing the program over time. The implementation of improvements should not imply that earlier arrangements were inadequate.
- A very significant change has taken place during the last two years as the department has developed residential housing projects, worked with child welfare authorities to support unaccompanied and other vulnerable minors in foster-care like arrangements, and worked with community groups to support prospective bridging visa applicants.

Process for tabling of the Report

The final printed version of the Report was formally provided to the Attorney-General (AG) on 23 April 2004. The statutory deadline for tabling the Report is 16 May. AG's have advised that tabling is anticipated to be 12 May. Consistent with routine practice the Report will be tabled after Question Time on that day. There is no requirement for the AG to make any statement to accompany the Report however draft talking points (provided by the AG's department) are at Attachment D.

Background - Main Findings and Recommendations

Findings and recommendations
The main findings of the draft Report were that Australia's detention policy breaches international obligations in that it fails to ensure that children are detained as a matter of last resort and for the shortest appropriate period of time and that rights, such as the right to mental health, education and protection from violence, are not able to be fully enjoyed by children in detention.

The primary recommendation is that the *Migration Act 1958* and Regulations be amended so as to end the current regime of mandatory detention of children, and create a system that includes certain defined features (such as a presumption against detention of children and families, regular judicial review of detention, and codification of children's rights in legislation).

The main focus of criticisms in the Report is the impact of mandatory detention on the mental health of long term detainee children, the restrictions of the current legislative framework to respond to special needs, the administration of the detention program by the Department over the past four years, and the location of detention facilities in remote areas.

The Department is of the view that the Report fails to grapple with the complexities of the detention program, and in particular the evolving policy and operational context since 1999; the Report relies heavily on the benefit of hindsight to make criticisms of the administration of the program; and the Department remains seriously concerned with the Inquiry's use and analysis of evidence.

The Department provided extensive comments on the first draft Report (more than 300 pages), outlining its concerns and requesting that HREOC more appropriately reflect and respond to the complexity of the issues. ACM raised similar concerns about the draft Report in a series of strongly worded correspondence to HREOC. ACM has been very critical of the denial of procedural fairness given the introduction into the draft Report of a significant volume of new and serious allegations, some of which are sourced from confidential submissions.

The second draft demonstrates little substantial difference in the key thrust of the Inquiry's argument. Despite the extent of the Department's comments, it has had little, if any, impact on the overall findings and conclusions. In particular:

- significant points provided have been included but incorporated in such a way that they have very little impact and in any case, do not affect the Report's overall finding;
- some information provided has been acknowledged, but often downplayed and dismissed;
- some significant comments have been ignored or taken up in a minimalist way; and
- comments have not been incorporated with the level of detail provided.

Finally, the finding of breach in each chapter of the final Report is based upon a substantial number of different articles of the CRC. Many of these articles are, when taken alone, not directly related to the issues being addressed in the chapter or, if relevant, appear to be incorrectly interpreted or not supported on the facts. The Department is of the view that, in light of the seriousness required to warrant a breach of Australia's international obligations under the CRC, the evidence to support such a breach has not been established. For reasons described earlier, the Department is of the view that the findings are heavily based on evidence that is incomplete, insufficiently analysed, often out of context and, in some cases, inconsistent.

Use of evidence

The Commission's use and analysis of evidence provided by the department is of serious concern. On a number of occasions, relevant evidence provided by the department on issues of particular concern to the Commission has not been Reported or given appropriate weight or credibility. A number of incorrect interpretations have been made of departmental evidence, notwithstanding that explanations for the issues raised have been provided to the Commission.

The Report places little weight on Departmental or services provider evidence, in contrast to that placed on the unsubstantiated statements of detainees in interviews or focus groups and the "evidence" of certain advocacy organisations. There is no apparent consideration in the Report of the possible motivations for such individuals or groups in making either inaccurate or unbalanced statements. The submissions of advocacy groups, for example, usually demonstrate that they do not have first hand experience in detention centres and are clearly ideologically opposed to detention. Such comments could not reasonably be considered evidence for the purposes of the Inquiry. Reliance on unsubstantiated material, in particular from people with no experience in detention or with a range of motives for making allegations, is questionable and should not be used to support a finding of breach of human rights obligations.

The Department's concerns regarding the use and analysis of all relevant evidence is highlighted by the fact that, in some cases, issues raised in the draft Report relate to allegations that have previously been the subject of investigation by the Commission following a complaint. While the Department acknowledges that the inquiry and complaints function of the Commission are separate, the findings of the Commission with respect to allegations should be consistent. For example, where the Commission has found that there is insufficient evidence to warrant an investigation, it is inconsistent to then rely upon that allegation to make a finding of breach in relation to this Inquiry.

Background - Mental health

Detention per se does not automatically lead to mental health problems
In essence, the basis of the claim rests on accepting that detention causes mental health problems and, thus, children should be kept out of a detention environment on mental health grounds. The department does not accept that detention per se necessarily causes mental health issues to emerge amongst relatively long-term detainees, including children. Mental health is a much broader and more complex issue than detention. There is very little empirical evidence suggesting that the impact of detention per se is greater than the impact of other risk factors (eg previous trauma) on children's mental health. A detainee's responses to risk factors such as detention depend on a range of issues, including their resilience and genealogy and the existence of a range of protective factors.

Focus on preventative factors
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 in the immigration environment. 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 arranges for children to attend schools in the local community and involve parents in their children's learning. In addition, the detention services provider provides the opportunity for the children to spend time participating in recreational and educational organised excursions. Within the facilities, the detention services provider and other community organisations provide children's programs that contribute to their development and quality of life including cultural and lifestyle classes, sporting activities and games, and art and crafts lessons.

Children at most detention centres are provided with health education that covers issues such as hygiene, nutrition, first-aid and sun protection. Visiting health professionals provide oral hygiene and immunisation education.

To support families, wherever possible, the department seeks to accommodate them in compounds that have been designed for family use and provide a more community-orientated environment. The detention services provider arranges parenting skills programs to assist parents in their role as primary care givers and to assist them to cope with change, stress and anger.

While the department can emphasise protective factors, it cannot assume responsibility for people's individual responses.

Children receive mental health services comparable with those in community
Children in detention are being provided with a standard of mental health services that is comparable to those available in the Australian community. They have access to mental health services through the facilities' mental health teams, which are able to refer detainees, including children, for additional assessments, and for consideration for admission to hospitals

where necessary. These teams draw on the expertise of qualified mental health nurses, medical practitioners, psychologists and psychiatrists.

Services to support nurture of children broadly comparable to community
Detainees have been provided with a range of services that are generally comparable to those provided by different levels of government to Australian children to promote their development and rehabilitation eg infant and child health programs, education services and recreational facilities. However at the end of the day the primary responsibility for accessing those services and nurturing and encouraging rehabilitation of children rests with their parents.

Normalcy of children in detention - A few troubled families not representative
Much of the material provided to the Inquiry focuses on major incidents and high profile cases of detainees who are deeply troubled. This information does not present a complete picture of the immigration detention environment and detainees in general. Families who were more resilient in the immigration detention facilities did not become the subject of Reports.

Removal from detention facilities on mental health grounds
The department does not agree with the suggestion that the department "almost never removed children from the detention environment on mental health grounds." The department has acted on professional advice to move several children out of detention centres on mental health grounds.

Improve balance of information between the past and now
The department requested that the Report should improve the balance between putting the past on the public record and focussing on the situation of children currently in immigration detention. While it is noted that the draft Report does occasionally summarise the current improved situation in detention facilities, this chapter is too heavily skewed to examining the past without acknowledging improvements or discussing the point in context. In relation to a range of issues covered in this chapter, several pages of the draft Report are devoted to quoting historical complaints of detainees and a few limited key sources, then follows with the briefest reference to the current situation (ie generally just a line).

Background - Children with disabilities

Best interests of the child
The arguments in the Report in relation to breaches of the CRC appear to rest on the premise that detention of disabled children of unauthorised arrivals is not in their best interests. The Report states that breaches could have been prevented if the department had "made greater efforts to ensure that children with disabilities were released or transferred to the community."

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. If, however, the department received professional advice that it would be preferable for a disabled child to be removed from their parents and placed in the community, this would be acted upon where possible.

Providing care to the disabled children of unauthorised arrivals can place increased pressure on Australia's disability services. Nevertheless, where these children do arrive on our shores, the department and detention services provider do make a significant effort to care for these children, despite the substantial costs.

Comparable standards of care
In considering the issue of comparability, the department asked the Inquiry to reflect on whether it may have inadvertently generalised 'the community' to mean communities in major metropolitan areas without taking into account rural communities. It is the department's understanding that services available at Woomera, Curtin and Port Hedland IRPCs were indeed comparable to that of the local community, and in many instances, better.

Children with obvious disabilities received whatever special needs services were considered most urgent by medical personnel. The department acknowledges that complex disabilities may, on occasion, take time to accurately diagnose. It also acknowledges that, in the context of the high influx of unauthorised arrivals that peaked in 2001, disabled children arriving at that time may not have received, at all times, the intensive attention that such cases would receive when centres were under less pressure.

In analysing disability services in immigration detention, the department urged the Inquiry to consult with a broad range of parents of disabled children. In particular, the Inquiry could have consulted with parents of children who suffer from disabilities as significant and complex as those outlined in the Report. The department is confident that many of these parents could attest that it often takes quite some time to gain an accurate diagnosis of their child's condition, despite the best intentions and efforts of medical practitioners. They could also explain the time involved in negotiating all available support services and products for their child.

Infrastructure
The department ensures that all persons with disabilities have the appropriate infrastructure in place to support them. Consistent with legislative requirements disabled access is upgraded to comply with current Building Code of Australia (BCA) requirements when major building alterations and

refurbishments are undertaken at existing centres. Otherwise special provisions for persons with a disability are made on a needs basis. All new detention facilities will comply with relevant disabled requirements.

Continuous improvement

The department rejected the repeated suggestion in the Report that improvements in services at immigration detention facilities were a direct result of the Commission's announcement of an inquiry.

The detention environment changed dramatically between late 1999 and 2001 and the level and array of services provided to detainees evolved and changed with the changing demographic of immigration detainees. In this context, the department questioned whether it is reasonable for the Inquiry to expect it to have anticipated that it would be appropriate to have in place detailed arrangements for significantly disabled children. The department acknowledges that it probably did not anticipate that parents of such children would risk a dangerous sea voyage with these children with special needs.

Background - Safety and Security

Safety of Children in Immigration Detention is given the Highest Priority
The safety and security of children in immigration detention is and has always been given the highest priority by the department. The department acknowledges its responsibility to ensure the safety and security of all people in immigration detention and its special responsibility for children. Every effort have been made and continues to be made to prevent undesirable and harmful actions occurring against children and to ensure that children in immigration detention are not exposed to such harms. The department has formalised arrangements with state child welfare agencies dealing with child abuse and neglect, developed alternative detention arrangements and better accommodation for families, women and children and provides parents with support in the immigration detention environment.

Practices and Procedures to Protect Children in Immigration Detention
The department does not accept the Inquiry's finding that the department and the detention services provider failed to have in place procedures to address the safety and security of children in immigration detention. The lack of documentary evidence of such policies and practices until 2001 does not, of itself, constitute evidence that procedures ensuring the safety and security of children where not in place and that the safety and security of children was not given the highest priority. It was the department's practice to ensure appropriate operations were established before turning to reflect those practices in documentation. In place were the Immigration Detention Standards (IDS) that form part of the contract with the detention services provider and establish standards governing safety and security of detainees in immigration detention. The IDS along with State child protection laws and the parents' primary responsibility to protect their children, adequately safeguarded children in immigration detention from violence, injury, abuse, neglect and maltreatment.

The Report by Philip Flood, 'Inquiry into Immigration Detention Procedures' which investigated allegations of child abuse between 1 December 1999 and 30 November 2000 established that appropriate procedures for Reporting concerns were in place and were followed. The department continues to review and refine its practices and procedures to protect the safety and security of all detainees in immigration detention especially children.

Cooperation with State Child Welfare Authorities
All Australian states have child protection legislation and authorities charged with implementing that legislation. The department recognises that state child protection authorities have special expertise in child welfare and relies on them to assist with the protection of children in immigration detention.

The department's procedures require that all staff of the department and detention services provider working in immigration detention facilities Report all suspected child abuse or neglect. State child welfare authorities are then able to investigate notifications made according to their legislation and procedures. The department works cooperatively with the child welfare authority during the investigation and gives considerable weight to the advice and recommendations given by the authority.

As a result of the Flood Inquiry the department sought to enter Memoranda of Understanding (MOU) with each state child welfare authority to clarify the roles and responsibilities of each party in dealing with suspected child abuse or neglect. While acknowledging the department's role in clarifying the Reporting procedures the Inquiry failed to recognise the progress made by the department and the difficulties it faced in obtaining agreement with some state governments to enter such agreements. While the department continues to negotiate and finalise MOU agreements where possible, the lack of a finalised MOU does not mean that children in immigration detention are not protect and that child abuse or neglect is not Reported and investigated.

Responsibility of Parents to Protect their Child/Children

Parents have an active and critical role in ensuring the safety and security of their children in immigration detention facilities. The department has recognised in its detention policies and practices the rights and duties of parents to protect and care for their children. Parents are in a position to shield their children during chaos and self-harm activities and where they volunteer can be moved from danger and relocated to a safer area within the facility during disturbances.

The department provides parents with support and seeks to accommodate them in compounds that have been designed for family use and which provide a more community orientated environment. Perth, Villawood and Maribyrnong immigration detention facilities all contain designated areas for women, children and family groups. Other centres make provision to accommodate family groups separate from single male detainees. Residential housing projects have also been developed to enable women and children to live outside the immigration detention facility.

The detention services provider provides parenting skills programs to assist parents in their role as primary care givers and to assist them to cope with changes, stress and anger.

Improvements to the Protection and Safety of Children in Immigration Detention

A number of innovations and improvements have been progressively developed by the department to respond to the needs of children in detention. The department's practice of continuous improvement and making improvements over time does not mean that things were done poorly prior to the improvements. Over the last two years the department has developed residential housing projects (in Port Augusta and Port Hedland), worked with state child welfare authorities to support unaccompanied and other vulnerable minors in foster care arrangements and worked with community groups to support prospective bridging visa applicants. Where possible the department has moved women and children out of immigration detention centres and continues to develop innovative alternative detention strategies for children.

Background - Education

The department rejected the Inquiry's findings that there has been a breach of Convention on the Rights of the Child (CRC). These findings are based on the assertion that, over the period of the Inquiry, detainee children were provided with education that was "significantly short of the level of education provided to children with similar needs in the community."

In describing the provision of education to detainee children over the period of the Inquiry, the Inquiry Report does not give due acknowledgment to the fact that as a result of concerted negotiations with State education authorities and non-government schools during 2002/3, the majority of school-age detainee children attend external schooling in the community. Nor does it sufficiently recognise that having arrangements in place for children to attend school in the community was not a new development.

Instead the Report has a negative focus on the perceived delays in often very complex and sensitive negotiations. The difficulty of these negotiations, including the range of concerns of State education authorities and local communities, has been overlooked or minimised. The Report does not fairly draw out the links between the changed detainee caseload and the challenges with transition into external schooling, let alone the practicalities of enrolments for large numbers of recently arrived children in local community schools, eg Woomera. As a result, a misleading impression is given of the department's responsiveness to the educational needs of detainee children over time.

The Report fails to sufficiently address the challenges of providing education to a large, highly mobile population. The department and services provider made efforts to tailor curricula to the needs of detainee children however 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 children in an immigration detention facility.

The Inquiry focuses largely on education to children above compulsory school age. Education for detainee children, both within and external to the detention facility, does not discriminate in access. Although such access may not have been utilised by some children in detention (in particular, adolescent males), the department and the services provider nevertheless actively encouraged participation in educational activities (which included adult education, if such detainees refused to attend schooling). Evidence of active encouragement was available to the Inquiry. It is incorrect to state that there was a policy of limiting such access to children over 15 years of age.

Lastly, as described in the department's general comments on all chapters of the Report, 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. The department is of the view that, taking into account the circumstances facing the changing detainee child caseload, it has met the obligations under the CRC to provide compulsory primary education, make available and accessible secondary education, information and guidance, and take measures to encourage regular attendance at schools.

Background - Unaccompanied minors

This chapter is premised on the Inquiry's view that detention of unaccompanied children is inherently a breach of their human rights and accordingly an unduly negative approach is taken to most of the department's actions relating to children in detention.

There is also an undue emphasis in the chapter on a period when the sheer, unanticipated numbers of unauthorised arrivals meant that the department's initial 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 focussing on improving facilities, amenities and services and the development of more comprehensive educational and recreational programs.

Notwithstanding these early pressures, processes were in place to ensure that unaccompanied minors were appropriately cared for, with separate accommodation areas, establishment of mentor arrangements as appropriate, and special monitoring by the services provider and departmental staff. The Inquiry was provided with such evidence but the chapter fails to give it due weight.

The draft Report seems not to acknowledge that with large numbers of arrivals during 2000 and 2001, the department made considerable efforts to hasten the protection visa process as a means of ensuring that people, and particularly children, were detained for the shortest appropriate period of time. For the considerable majority of people, this meant that their needs were met within a detention facility and, as quickly as possible, those requiring protection were released into the community on a protection visa.

It is of great concern to the department that the Report dwells on events and processes that are no longer relevant in the current detention environment, but which are analysed and critiqued as though they continue to be current practice. The many improvements in the detention environment, and more specifically the department's demonstrated efforts to continually review and improve arrangements for unaccompanied minors, are barely acknowledged.

The heavy reliance on the 'evidence' of former detainees in HREOC-sponsored focus groups is particularly questionable. While the focus groups no doubt provided an opportunity for former detainees to air their grievances about various aspects of their detention experience, it is difficult to accept their claims at face value. The Report's seeming acceptance of the claims made is perplexing, given the clear lack of balance.

There is an over-emphasis on the perceived inadequacy of case management plans for unaccompanied children, with the implication that these documents alone govern the effective management of unaccompanied children. This fails to acknowledge that such plans were a component of the overall management regime for unaccompanied minors. The department rejected the Inquiry's apparent view that better detail on individual case management plans after the

November 2001 self-harm incident could have anticipated and pre-empted participation by the children in the January 2002 incidents.

The department remains firmly of the view that there is no conflict of interest. Neither the Minister nor his departmental delegates under the IGOC Act make any decisions on Protection Visa applications lodged by unaccompanied minors or any other Protection Visa applicants. The responsibility for making the decision on a Protection Visa application by an unaccompanied minor is undertaken by other departmental officers who have that delegation under the Migration Act. This avoids the potential for any conflict of interest in the decision on a Protection Visa application. Moreover in 1999 the Federal Court found that even if there was a conflict of interest in the Minister's roles as guardian and the first instance decision-maker on an application for a visa, any such conflict was resolved by the provision of independent merits review by the Refugee Review Tribunal.

The department has noted with concern the draft Report's observations about the department's facilitation of Red Cross tracing services for unaccompanied children as well as the Report's implied criticism of that agency. The Inquiry was provided with a significant cross-section of documents that discussed facilitation by the department of Red Cross tracing services within detention facilities. In discussing Red Cross tracing services and their effectiveness, or perceived lack thereof, the Inquiry has again relied heavily on the views of former unaccompanied minors participating in focus groups. The material provided by the department to the Inquiry suggests that the criticisms raised in these focus groups are unfounded.

Finally, the department noted that international human rights instruments envisage detention of a child as a possibility and it reiterates its view that the practices and procedures in respect of unaccompanied minors in detention do not breach the 'best interests' principle of the CRC. The Inquiry was informed of the arrangements whereby all unaccompanied minors for whom the Minister is guardian will now be moved quickly to alternative place of detention or released, if eligible, on a bridging visa. Disappointingly, the draft Report dismisses the evolution of those arrangements, and their implementation, and concentrates on past practices that were not inappropriate at a time when large numbers of unauthorised arrivals, including unaccompanied minors, arrived over a relatively short period and remained in detention for a short period.

Background - Refugee Status Determination for Children in Detention

In its 1999 submission to the Senate Legal and Constitutional References Committee Inquiry into the Operation of Australia's Refugee and Humanitarian Program, the UNHCR stated that it was "entirely satisfied that existing refugee status determination procedures are sufficient to ensure that Australia's non-refoulement obligations under the Convention are met."

Judicial Review
The Australian Government's policy since 1996 has been to restrict judicial review in migration matters in all but exceptional circumstances. The Government remains firmly committed to reducing the large number of court challenges of decisions to refuse visas or cancel visas. Given the widespread access to independent merits review and the increasing cost and incidence of judicial review, the Government is concerned that many non-citizens are engaging in litigation simply to delay their removal from Australia. Australia complies fully with the UNHCR standard which requires only one avenue of review.

Ministerial Discretion
When an RRT decision is made to affirm a departmental refusal of an application for a protection visa, each case is assessed by departmental decision-makers, taking into account Australia's international obligations. If an application raises concerns, the Minister's intervention power is the means by which Australia meets its non-refoulement obligations under other international human rights instruments.

Separation detention
Separation detention is employed in the processing of unauthorised boat arrivals. Its purpose is to protect the integrity of the protection visa process and to ensure that Australia's resources are directed at those with genuine claims for protection and not those who would use the protection process in an attempt to achieve a migration outcome. Separation detention is not an intimidating environment and detainees are not in incommunicado detention.

The entry interview
The entry interview is uncomplicated and is not an assessment of the merits of a person's claims for protection. The entry interview does not prevent persons in detention from applying for protection visas. They are able to request forms and lodge applications at any time. In addition if a protection visa application is lodged they are given access to a publicly funded migration agent. In addition, if they provide information or make claims at the entry interview, that *prima facie* may engage Australia's protection obligations, they are given access to a publicly funded migration agent. If people do not provide information or make claims which *prima facie* may engage Australia's protection obligations at the entry interview, the department is under no obligation to invite them to apply for a protection visa. However, a person can be 'screened-in' at any time after the entry interview if new information or claims are made.

Immigration advice and application assistance (IAAAS)

Immigration advice and application assistance (IAAAS) is a publicly funded Scheme under which registered migration agents are contracted to provide immigration advice and application assistance to protection visa applicants in detention and to disadvantaged visa applicants in the community.

The report does not give a balanced view of access to IAAAS for children in detention. The report does not take into account the contract tender process and the unit fees tendered by IAAAS providers for all aspects of application assistance, including standards of best practice in remote detention localities.

IAAAS providers are contractually obliged to respond to queries by clients within two working days, and to provide a regular advice to their clients in relation to the progress of their case. The IAAAS contract requires that the department provide reasonable facilities and assistance, as are available at detention centres, to enable the IAAAS provider to perform the work contracted. The IAAAS contractual requirements outline standards of best practice. It is left to the IAAAS provider to determine how they meet these requirements.

The IAAAS is currently being evaluated by an External Reference Group, as part of the requirement that government programs should be evaluated every five years. The evaluation is currently assessing the appropriateness, effectiveness and efficiency of the IAAAS. As some of the issues raised in the report are potentially covered by the evaluation, it would be inappropriate to respond on some issues in greater depth until the evaluation is completed.

Special measures for unaccompanied children seeking asylum
The department reiterates that in relation to minors, the assistance of an IAAAS provider and an interpreter is provided throughout the processing of the protection visa application. The department does not accept the conclusion drawn by the Commission that unaccompanied minors are not provided with appropriate special assistance.

Interviews are conducted in a non-adversarial and sensitive manner, appropriate to the age of the child. Departmental case officers are culturally sensitive, receive specific training in the treatment of minors, and interpreters are used at all times. Particular care is taken where there is evidence, or it is suspected, that a minor has been subjected to torture and/or trauma or otherwise subjected to harm. The interview allows a child to discuss freely the elements and details of his or her claim.

Refugee status determination for 'offshore entry persons'
This chapter of the report inquires into refugee status determination outside of Australia, makes references to detention/detention facilities in Manus and Nauru, and refers to the so called 'Pacific Solution'. The department reiterates its general comments on these matters provided for chapter 2.

The Commission does not have scope, under the HREOC Act, to inquire into refugee status determination for children outside Australia.

Background – Temporary Protection Visas

Family Reunification
International law does not recognise a substantive right to family reunification. CROC does not grant a substantive right of entry for family members, or impose a positive obligation on States to facilitate reunification in its territory. Importantly, it does not preclude reunification in a third country where the child's parents and other family members continue to reside and which provides them with effective protection.

Should a temporary protection visa holder have a continuing need for protection, they will have access to a further visa, in many cases a permanent one, which will provide access to family reunion sponsorship rights. In addition, there is provision for a holder of any temporary protection or humanitarian visa to access at any time the permanent visa regime and associated entitlements where the Minister considers it to be in the public interest. Conditions that attach to temporary protection visas are commensurate with temporary stay.

Those who have been granted a temporary protection visa have been granted in recognition that they have a protection need. Under the international framework of protection, the preferred durable solution for refugees is that they be given interim protection in a safe country until they are able to return to their homeland in safety and dignity;

Provision of permanent integration into a local community is a last resort to be reserved for those cases where return is not feasible and continued stay in a country of first asylum is not sustainable.

Australia does not engage in strategies designed to separate families – the separation of refugee families is often the result of a voluntarily chosen strategy by the family members themselves. Family members who accompany a refugee are accorded the same migration status as the refugee, even if they do not individually meet the refugee definition criteria. It is important to note in this context, that while refugees have a right to protection, they do not have the right to choose the country that provides the protection. Nor do they have the right to abandon protection in one country to seek it in another.

Australia assists, to the maximum extent possible, the process of reunification of unaccompanied minors, who are seeking asylum in Australia, with their families, whether they are in detention or in the community. 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.

Travel Rights
Australia places no restrictions on the movement of TPV holders within Australia, and TPV holders are able to depart Australia should they wish to do so. Travel documents are provided by the Department of Foreign Affairs and Trade on request in accordance with Article 28 of the Refugees Convention. DIMIA has mechanisms in place to identify and deal with these on a case by case basis in line with obligations under the Refugees Convention.

The Minister can exercise his discretionary power under paragraph 866.228(b) of the Migration Regulations to allow a TPV holder to be granted a permanent protection visa at any time (subject to meeting other relevant subclass 866 criteria). The holder of a permanent protection visa can depart from and re-enter Australia.

The Uncertainty issue
Many of the concerns identified in the report are equally applicable to those who are permanently resettled under the offshore humanitarian program. The report does not substantiate its claims that these are problems unique to temporary protection visas holders because of their temporary resident status. All claims that any uncertainty surrounding temporary stay in Australia has particular psychological affects must be supported by verifiable and demonstrative evidence. The report fails to do this.

Temporary protection visa holders in Australia have access to a significant array of benefits and services consistent with their temporary stay. These include a wide range of social security payments, including special benefits, child care benefits, family tax benefits, maternity allowance, rent assistance, access to medicare, work rights, education and early health assessment and intervention which includes torture and trauma counselling.

There is no obligation to grant permanent residence to refugees under international law. Under the international framework of protection, the preferred durable solution for refugees is that they be given interim protection in a safe country until they are able to return to their homeland in safety and dignity

The provision of permanent integration into a local community is a last resort to be reserved and used at the total discretion of the host country, for those cases where return is not feasible and continued stay in a country of first asylum is not sustainable. Should a temporary protection visa holder have a continuing need for protection, they will have access to a further visa, in many cases a permanent one.

The best interests of the child
The Department takes its obligations under international agreements like CRC very seriously. This is especially the case with regard to the obligation to make the best interests of the child a primary consideration. The report fails to point to any particular incident which demonstrates that the best interests of the child were not considered.

In administering the TPV regime the Department ensures all obligations under CRC and binding standards set out in that Convention are met, this includes ensuring appropriate services and assistance is provided and children's rights are upheld.

Background - Excised Offshore Places and Pacific Strategy

The report refers to, and attempts to define, the "colloquially named Pacific Solution". It would be more correct and preferable if the text indicated that the suite of legislation, and other mechanisms introduced to prevent and disrupt unauthorised people movements to Australia, including the establishment of offshore processing centres and regional cooperation arrangements, is known as the 'Pacific Strategy'.

In addition, asylum seekers in Papua New Guinea and Nauru are not *detained* under the provisions of Australia's Migration Act. Asylum seekers who have been transferred to Nauru and PNG are accommodated in asylum seeker processing centres under the respective laws of both countries and were admitted under specific visa arrangements limiting their movement.

In respect of the Commission's jurisdiction and request to visit the offshore processing centres, the department asks that the report acknowledge, as indicated in the department's letters of 29 July 2002 and 4 October 2002, that its position on the issue of the extraterritorial effect of the HREOC Act was based on government legal advice. The report should acknowledge that the department was advised by the Australian Government Solicitor that the Parliament did not indicate that the HREOC Act was intended to have extra-territorial effect. Furthermore, relevant case law supports this interpretation.

The department also could not have determined, irrespective of the Commission's jurisdiction, entry to Nauru or Papua New Guinea as these countries are responsible for such entry decisions. It could not be assumed that such agreement would have been forthcoming as both countries independently exercise the right to determine entry. Notwithstanding the weight of legal advice, if the Commission decided to pursue such visits, it presumably could have approached the governments of Nauru and Papua New Guinea, and IOM, to request such a visit.

ATTACHMENT B

TALKING POINTS

Talking Points - General Comments

- **The Report is old.** It is two and a half years since the Inquiry was announced, and the Report largely looks at what was happening more than **three years ago**.

- **The Report is disappointing**. It does not provide practical recommendations for the improved management of children in immigration detention.

- **The Findings are no surprise**. During the course of the Inquiry, the Human Rights Commissioner made comments indicating he had already prejudged the outcome of his own investigations.

- **The Report fails to appreciate the extreme pressures and complexity** of managing sizeable numbers of people arriving without authority, without clearance and without notice. It is not as if these people booked ahead.

- **The Report looks backward. Is unbalanced and often misleading**. Where improvements are acknowledged, this seems to have little bearing on its findings.

- Not particularly interested in dissecting what happened years ago. I want to **focus on the significant changes, the continuous improvements** that have been made in the detention environment and arrangements over that time

- So what is important is that while the Inquiry has dragged on, **my department has made significant practical improvements** to the arrangements for children in detention, many of which were under development before the Inquiry was even announced.

- Good thing it did. Had we waited for the Report, the children would not have enjoyed the benefits of those improvements over these last couple of years, and would have had no joy from the Report's Recommendations.

If asked about what action the Government will be taking in response to the Recommendations:

- **It's a very thick Report**, over 900 pages, and **of course we will be further considering it** to extract what can be usefully implemented.

- My department has **already provided an extensive response to the Report's Findings and Recommendations**. This can be found in full at Appendix 3.

- In fact the **department has fully cooperated with the Inquiry at all times and provided a huge amount of material and comment which does not appear to be appropriately considered or reflected in the final Report.**

- **But, let's be clear. This government will not be unwinding border integrity.** We will not reward people for frustrating the proper visa process, for bringing out their children in leaky boats in an attempt to circumvent proper arrangements.

- **This means that sometimes children will have to be held in immigration detention**. It is our job then to ensure that the conditions of that detention are appropriate and consistent with our international obligations, and that the visa applications process is as streamlined as possible.

- **Mandatory detention of unlawful non-citizens, it is worth recalling, has bipartisan support.**

- Given the Government's very clear and consistent position on mandatory detention, it is **regrettable the Inquiry has missed an important opportunity to advise on practical actions** that could improve arrangements for children in detention.

- **The Government welcomes public scrutiny**. Immigration detention is one of the most scrutinised government programs. My department will always, and does, work with bodies such as HREOC **where that scrutiny is balanced, reasoned and constructive,** even if we disagree about whether a practice has been established as inconsistent with our human rights obligations.

- This Report is a wasted opportunity. But **let me tell you what we have done for children.**

What have we done for children?

- Instead of talking about the past I want to look at **what is happening now for children.**

- First, let's **put the issue into context**. You would think from reading this Report that there are still many children who arrived by boats behind razor wire. This just isn't so.

- As at X **May 2004** there were **only X unauthorised boat arrival children in mainland immigration detention centres.**

- There would be **less if the parents of eight** of these children had **chosen to transfer to the Residential Housing Project.**

- In total there are only **X unauthorised children who arrived by boats in immigration detention.**
  - X are living in Residential Housing Projects, foster care or other community placements;
  - X are accommodated on Christmas Island as part of an extended family group; and
  - of the X in mainland detention centres the parents of eight have opted not to participate in a Housing Project and five are not eligible to participate due to behavioural or health concerns.

- This outcome follows **vigorous efforts** by my department resulting in **visa grants and transfers** to alternative places of detention.

- **And who created the alternative detention arrangements including Residential Housing Projects and foster care arrangements? This government did.**

- **Before the Inquiry** was announced **the Government was trialling alternative detention arrangements**, such as the Residential Housing Project, for vulnerable groups including women and children.

- The initial successful trial led to the establishment **of two more housing projects at Port Augusta and Port Hedland** and we

have just announced that **Residential Housing Projects will be developed in Sydney and Perth**.

- **In January/February 2002 unaccompanied minors were moved into foster care arrangements** following negotiations with State government child welfare agencies - another example of my department pro-actively implementing alternative detention arrangements.

- In the context of addressing **protective factors for children, virtually all children** in long term detention are **attending external schooling.**

- And then there are the health services. **All children have access to health professionals 24 hours a day, 7 days a week**.

- **And if they need extra assistance, then access to specialist services is** also available including **extensive support for children with complex disabilities**.

Talking Points - Main Findings and Recommendations

- **It's a very thick Report**, over 900 pages, and **of course we will be further considering it** to extract what can be usefully implemented

- But can tell you now that the Report is **seriously flawed.** Its findings are **unbalanced and focussed on the past.**

- **The recommendations are unhelpful.** Contain no practical suggestions to allow the department to improve the management of children in immigration detention.

- My department has **already provided an extensive response to the Report's Findings and Recommendations.** See Appendix 3 of the Report.

- In fact the **department has fully cooperated with the Inquiry at all times and provided a huge amount of material and comment which does not appear to be appropriately considered or reflected in the final Report.**

- **So let's be clear. This government will not be unwinding border integrity.** We will not reward people for frustrating the proper visa process, for bringing out their children in leaky boats in an attempt to circumvent proper arrangements.

- **This means that sometimes children will have to be held in immigration detention.** It is our job then to ensure that the conditions of that detention are appropriate and consistent with our international obligations, and that the visa applications process is as streamlined as possible.

- **Mandatory detention of unlawful non-citizens, it is worth recalling, has bipartisan support.**

- Given the Government's very clear and consistent position on mandatory detention, it is **regrettable the Inquiry has missed an important opportunity to advise on practical actions** that could improve arrangements for children in detention.

- **The Government welcomes public scrutiny.** Immigration detention is one of the most scrutinised government programs. My department will always, and does, work with bodies such as

HREOC **where that scrutiny is balanced, reasoned and constructive,** even if we disagree about whether a practice has been established as inconsistent with our human rights obligations.

- After more than two years of intense activity, the Inquiry has only been able to recommend an alternative framework, when all along the Government has reiterated its commitment to maintaining mandatory detention for unauthorised arrivals. **Sadly, this Report is a wasted opportunity**

Breach of international obligations

- **I do not accept that Australia has breached its international obligations under the Convention on the Rights of the Child (CRC).**

- There is a tendency for the Report to build its case for the perceived breaches of human rights on largely untested statements or anecdotes

- Consistent with CRC, we have in place mechanisms whereby children may be released from detention on a bridging visa or transferred to an alternative place of detention.

- These mechanisms allow the 'best interests' to be a primary consideration for each individual child in detention, and appropriate arrangements to be made on a case by case basis.

Experiences of a few, not representative

- The Report derives general findings from the **experiences of a few children and families.**

- These individuals are not representative of the whole detainee population.

- The Report has also left out, or represented in a biased manner, elements of management of their cases by my department and the services provider.

- The end result is a **misleading impression of the care of people with complex needs.**

Judgements on Manus and Nauru

- I also find it **curious that the Report makes judgements on the arrangements for children currently and previously accommodated at Nauru and Manus island** because:
  - The Inquiry did not visit either of these places and comments made on the basis of second hand information.
  - The Human Rights Commissioner's legal powers of inquiry do not extend outside the territories of Australia.

Use and analysis of evidence

- **Concerned by the Inquiry's very selective approach to the use of information and evidence** in the Report

- The Report **ignores, in full or in part, the evidence of my department and the services provider,** yet **places considerable weight on unsubstantiated reports and hearsay of others,** many of whom have strong ideological opposition to detention. Not surprising that their comments would be critical.

- Tendency for the Report to ignore or dismiss information provided by my department when it does not support the Report's conclusions. Confirms the view that the Commissioner prejudged the outcome of his own Inquiry before the evidence was collected.

Summary

- Report **reflects on the past with little reference to current circumstances** or continuous improvement over time.

- It is sad to see such an opportunity wasted.

- **The Report could have been a valuable contribution** to further improve the arrangements for children in detention.

Talking Points - Mental health

- The Report again **focusses on the past**.
  - I am not interested in discussing the past.

- The Report **states that detention causes mental health problems – I do not accept this**.
  - **Mental health is a much broader and more complex issue** than detention.
  - There are a number of things that impact on mental health including social, environmental, life and biological factors.

- My department actively works to make sure that the **risk factors are minimised and protective factors maximised**.

- However the reality is that while the department can establish protective factors it **cannot assume responsibility for people's individual responses.**

- I can tell you that there is **intensive support provided to children** in detention with mental health problems.

- In fact the standard of mental health services provided is **comparable to that available in the Australian community**.

- The detention services provider draws on an **array of mental health professionals** to ensure that all detainees mental health needs are appropriately addressed.

- There are serious problems with this chapter:
  - It uses the **experiences of a few** children and families to come up with general findings - **these individuals do not represent the whole detainee population;**
  - It **misleads the reader** by not clearly separating the past from what is happening now; and
  - On occasions, **the Report has left out, or represented in a biased manner,** my department's management of their cases.

- My department has **responded to individual needs by establishing innovative detention arrangements** such as community care arrangements, Residential Housing Projects, by making arrangements for children to attend external schools and by granting bridging visas where appropriate.

Talking Points - Children with disabilities

- We need to be honest and **recognise the challenges here**.
  - With the best will of governments, health professionals and parents, **providing a high level of support to children with complex disabilities is very challenging**.
  - You ask any parent of a profoundly disabled child in the community.

- We need to **have realistic expectations**.
  - A doctor noted in her evidence to the Inquiry, disabled detainee children broadly "had what our children would have had."
  - It is unrealistic to expect the government to provide more.

- There are **specialised services available**.
  - Anybody in immigration detention with a disability receives specialised services tailored to meet their individual needs – including children.

- **These things take time**.
  - Complex services and aids cannot be provided overnight.
  - Accurate diagnosis, identification of current needs and provision of appropriate support for children with a disability takes time.
  - Ask anyone who has negotiated support services and products for a child with a disability.

- Despite the complex nature of this issue the department was still able to facilitate the accurate diagnosis of a very rare disability.
  - This was a degenerative syndrome that occurs in about 1 in every 500 000 people in Australia.
  - This condition can often take up to nine years to diagnose so diagnosing it in under a quarter of that time is considerably better than the likely community standards.

- **All detainees with disabilities, including children, are provided with appropriate treatment** and whatever special needs services are considered most urgent by medical personnel.

Talking Points - Safety and Security

- The **safety and security of everybody** in immigration detention is a **high priority**.

- Every effort is made to **prevent unsafe actions occurring** to all detainees and in particular to children.

Practices and Procedures

- There have always been **practices and procedures in place** to protect children.

- These **practices are constantly reviewed and improved** to ensure the safety and security of children in immigration detention.

- Over the time that HREOC looked at immigration detention the Flood Inquiry was also conducted. That Inquiry found that procedures for reporting concerns existed and were followed.

Formalised arrangements

- The department has made significant progress in **formalise existing arrangements with state welfare agencies**.

- **The Report fails to acknowledge the importance** of these arrangements and the complexity of these negotiations.

Responsibility of Parents

- The Report seems **to ignore that even in immigration detention parents have a duty to care for and protect their children**.

Failure to recognise improvements

- Again the Report is focussed on the past.

- **There is no doubt** that over time the **department responded to emerging needs and developed innovative detention arrangements f**or women, children and families.

- These **enhanced measures further increased the safety and security of children** in immigration detention but yet again the Report does not acknowledge these improvements.

Talking Points - Education

- **Even in the area of education for children, the Report fails to acknowledge the department's significant positive efforts and achievements.**

- **Again the Report's findings are unbalanced and disappointing.** The Report fails to appreciate the complexities.

- **You don't have to be Einstein to appreciate that trying to establish schooling arrangements for many hundreds of newly-arrived children would be difficult in most circumstances**, let alone when these children are unauthorised arrivals and need to be immigration processed, are moving through fairly quickly, have little schooling experience or English-language skills and have a range of health issues that need to be addressed including the difficult experience of their journey to Australia.

- **OK, education arrangements were not perfect for all children from the very start.** But they wouldn't be in the community either if that many children with these needs suddenly turned up.

- Of course under the circumstances of hundreds of children arriving there were challenges. **It's not as if these children booked in ahead of arrival!**

- But did we ignore the challenge, the children and their education? No! We set about making practical arrangements.

- Some **children at Curtin began attending school in the community as early as 2001, again, before the Inquiry was announced**. Children from Port Hedland commenced in early 2002, followed by children from Baxter starting at government schools early in 2003, not too long after the centre opened, and once the community had accepted the arrangement.

- **So what have we achieved?** All school-aged children in detention for more than a couple of weeks attend external schools in the community. These arrangements have been in place for sometime now, in some cases, even before the Inquiry was announced.

- Very importantly, **have agreements with state governments** to engage their co-operation with the continued access to government schools for children in detention. The system is in place!

- And let me **quote one school principal** who in September 2003, when some children from Baxter began attending the community school, reported that the children are doing fine at their classes. **"The tuition at Baxter must have been alright. There are no glaring holes in their learning."**

- And **other school highlights for detainee children:**
  - One girl topped her year 10 maths class;
  - Another was made 'head girl', captain of year 10;
  - One child was awarded a prize at the end of 2003 for his consistently high achievements in all areas;
  - A male child attended a state-wide competition in marketing strategies in a capital city;
  - Some children from a centre were chosen to represent the region in soccer competitions;
  - Others from another centre were selected to represent the school in basketball at a competition in the city.

- Children are encouraged and supported to participate in **extracurricular activities** such as school excursions, including school camps and choirs, and sports, and parents are encouraged to engage with the schools attending parent-teacher evenings etc

- **The Report wants to provide a picture of unrelieved doom and gloom. But it just isn't so**. OK. Some kids have had trouble with their education but so do some in the community. I want to show that there are achievements and successes too, just as there are in the community. This is the balance.

- **Focussed on continuous improvement**. The fact is that both the department and the services provider made considerable achievements in this area despite the challenges. Surely those arrangements, now firmly in place, are what is important

Talking Points - Unaccompanied minors

- Here is another area in which my department has **put in place positive arrangements.**

- **Even this highly critical Report acknowledges the effective arrangements that have been put in place** for unaccompanied minors.

- But that is as far as the Report goes. Disappointingly it **dwells on events and processes that are no longer relevant** and discusses them as though they are current practice when they are not.

- The fact is that **all unaccompanied minors for whom I am guardian, are moved quickly to alternative place of detention or released on a bridging visa** as appropriate.

- For example as at **May 2004 there were x unaccompanied minors and all (??)were in alternative detention arrangements.**

- There is **continual exchange of information between the department, services provider and relevant government agencies** about the welfare and arrangements for unaccompanied minors.

- When unaccompanied minors are living in foster care or community placements **documented arrangements** with agencies provide for **comprehensive monitoring, reporting and evaluation.**

- **Far more useful if the Report had** built further on these improvements by **providing practical and workable proposals**.

Talking Points – Refugee Status Determination

- Australia's refugee determination **process is fair and comprehensive.** It takes into account the claims and circumstances of each individual using comprehensive and current country information. **Persons who are owed protection receive it.**

- **In 1999** submission to the Senate Legal and Constitutional References Committee Inquiry into the Operation of Australia's Refugee and Humanitarian Program, **the UNHCR stated that it was "entirely satisfied that existing refugee status determination procedures are sufficient** to ensure that Australia's non-refoulement obligations under the Convention are met."

- **Unaccompanied minors are provided with** appropriate assistance through the Immigration Advice and Application Assistance Scheme **(IAAAS) and an interpreter** used throughout the processing of the protection visa application.

- **Particular care is taken to accommodate** the special needs of unaccompanied minors during the determination process.

Talking Points –Temporary Protection Visas

- We **take our obligations under international agreements** like CRC **very seriously**.

- This is **especially** the case with regard to the **obligation to make the best interests of the child a primary consideration**.

- The **Report fails to point to any particular incident** that demonstrates that the best interests of the child were not considered.

- There is **no obligation to grant permanent residence** to refugees under international law.

- **Temporary Protection Visas meet our refugee obligations**.

- The **preferred durable solution** for most refugees is to **give interim protection in a safe country** until they are able to return home in safety and dignity.

- There is **no obligation** under the Refugees Convention for Australia **to provide family reunion for refugees**.

- **Family members overseas can apply for visas** to enter Australia in their own right. This includes the opportunity to seek a place in Australia's extensive offshore humanitarian program.

- Where I consider it to be **in the public interest**, a TPV holder can access a permanent visa and associated family reunion entitlements.

- **TPV holders are free to depart Australia at any time** and can obtain appropriate travel documents from the Department of Foreign Affairs and Trade. TPV holders have no automatic right to re-enter Australia. Re-entry is considered on a case by case basis, in line with obligations under the Refugees Convention.

Talking Points – Excised Offshore Places and Pacific Strategy

- **The HREOC Act does not have extra-territorial effect** and does not enable the Commission to examine "acts or practices" in Offshore Processing Centres (OPCs).

- The **OPCs did not form part of the review** and no departmental submission was made in relation to OPCs.

- The **processing centres in Nauru operate under Nauruan law.**

- Given these circumstances **I cannot see how the Commission can make recommendations.**

s 22

From: s 22

Sent: Thursday, 6 May 2004 17:10

To: s 22

Cc: s 22 Irwin, Rebecca; s 22 Hall, Matt; s 22

Subject: HREOC report on children in immigration dteention

s 22

You have asked for information in relation to the international law issues raised in the HREOC report on children in immigration detention. You require it by close of business today. As discussed, I have located a paper that was prepared jointly by AGD and DIMIA in February 2002 and provided to PM&C, at its request, in preparation for the visit to Australia by the UN Working Group on Arbitrary Detention. The paper is attached. It deals comprehensively with the issues raised in the HREOC report.

From AGD's viewpoint, the only update that is required relates to 3 UN Human Rights Committee cases relating to Australia's immigration detention policies which have been decided since the paper was written. In relation to these cases, we would say:

"Since the *A* case, the Committee has found Australia in violation of our obligations under the ICCPR in relation to immigration detention in a further three cases, *C v Australia* (2002), *Baban v Australia* (2003) and *Bakhtiyari v Australia* (2003). In each of these cases, the Committee recalled its jurisprudence in the *A* case, and adopted views such as 'the State party has failed to demonstrate that those reasons justify the author's continued detention in the light of the passage of time and intervening circumstances. 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'. "

It may be that parts of the paper for which DIMIA is responsible need to be updated. For instance, it's our understanding that policies on the treatment of unaccompanied minors may have changed since the paper was written. Hence, I have copied s 22 of DIMIA into this email.

I hope that this information is helpful to you. If it is decided to prepare Talking Points or further briefing on the basis of this information, we would like to clear that material before it is used.

I will be away tomorrow. If you need further information on international law issues, I suggest that you contact my Branch Head, Rebecca Irwin s 22

Kind regards

s 22

HUMAN RIGHTS AND THE MANDATORY DETENTION OF ASYLUM SEEKERS

Advice has been requested on international human rights obligations applicable to the detention of asylum seekers.

Relevant treaties and obligations

Australia has a duty to respect and apply international human rights obligations to all individuals within its jurisdiction. Australia takes seriously its international human rights obligations and responsibilities and is conscientious in seeking to deliver on those obligations in a concrete and practical manner. Furthermore, the Australian Government has made a major contribution, over many years, to the resolution of international refugee and humanitarian problems. Every year the Australian Government accepts a substantial number of refugees and other displaced persons as part of its immigration intake.

In the context of the detention of asylum seekers (and children in particular), the principal obligations are those under the International Covenant on Civil and Political rights (ICCPR), the Convention on the Rights of the Child (CROC) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Those obligations and the manner in which Australia seeks to address them are set out in Attachment A.

The rights under human rights instruments exist in relation to individuals. A determination of whether Australia has violated any of its obligations would require an assessment of the obligation in the light of the circumstances of individual detainees. Moreover there is no fixed way to give effect to or ensure human rights obligations. Each country has a margin of appreciation in relation to the implementation of its international human rights obligations.

One of the principal obligations is that detention not be arbitrary. The UN Human Rights Committee has expressed the view that the detention of asylum seekers is not arbitrary per se. The fundamental and legitimate purpose of detention of unauthorised arrivals, whether they be adults or children is to ensure they are available for processing of any protection claims, to enable essential identity, security, character and health checks to be carried out and to ensure that they are available for removal if found not to be refugees. This is consistent with the Refugee Convention and reflects Australia's sovereign right under international law to determine which non-citizens are admitted or permitted to remain.

The implementation of human rights obligations

The rights guaranteed by human rights treaties are implemented in Australia by a combination of Commonwealth and State and Territory laws and policies and the common law. Where the implementation of treaty obligations requires a change to domestic laws, this can only occur through an Act of Parliament. The Government endeavours to ensure that all legislation passed by the Commonwealth Parliament is consistent with Australia's international human rights obligations.

Primary monitoring mechanisms for human rights obligations

Domestic monitoring

Agencies administering the mandatory detention policy are responsible for ensuring that the administration does not contravene Australia's international human rights obligations. Legal advice may be sought from time to time from the Attorney-General's Department and the Australian Government Solicitor on the implementation of those obligations. The principal body charged with general monitoring of human rights at the Commonwealth level in Australia is the Human Rights and Equal Opportunity Commission (HREOC). Its functions include the conduct of inquiries into Australia's compliance with its international human rights obligations.

International monitoring

Each of the treaties mentioned above requires Australia to make periodic reports to international monitoring committees on the implementation of Australia's obligations under that treaty. The ICCPR also gives individuals the right to lodge complaints about alleged violations of the ICCPR with the UN Human Rights Committee. Additionally, the UN High Commissioner for Refugees Regional Representative based in Canberra is able to visit any of Australia's detention centres on request.

Recent criticisms and responses to those criticisms

HREOC is conducting an inquiry into children in detention. In the course of that ongoing inquiry it recently inspected the Woomera immigration detention facilities. Following that inspection, the President of the HREOC, Professor Alice Tay, and the Human Rights Commissioner, Dr Sev Ozdowski, wrote to the Minister for Immigration and Multicultural and Indigenous Affairs about the situation at Woomera. This letter is well in advance of the report of HREOC that will result from the inquiry.

HREOC expressed the opinion that conditions at the Woomera centre place Australia in breach of its obligations under CROC, particularly, (but not restricted to) article 19(1). This article obliges State Parties to take all appropriate measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment maltreatment or exploitation, including sexual abuse. This opinion is based on what HREOC describes as an "ambience of despair" at the centre, the acts of self-harm witnessed by the children in the centre and the feelings of despair of some of those children. HREOC also questioned whether Australia was giving effect to its obligation to provide the children at the centre with an education.

Australia has legislative and administrative measures in place to protect children in detention. The management regime in place in detention centres is focussed on meeting the obligations in CROC Article 19(1). DIMIA's contract with its detention services provider requires the provision of food, shelter, clothing, bedding, health including mental health services, educational services and recreational activities both active and passive to all detainees including children. Immigration Detention Standards, developed in consultation with the Commonwealth Ombudsman, establish the standards of care and services expected of the contractor. There are financial penalties available for failure to meet standards.

DIMIA requires that all staff working in detention centres comply with relevant state or territory legislation on child neglect or abuse, including sexual abuse. DIMIA reviews the contractor's training programmes to ensure these cover the requirements of such state legislation particularly reporting of suspicions or allegations of neglect or abuse. Procedures are in place to ensure that state agencies can be called in to provide expert advice including on the psychological health and best interests of a child, when required.

The Government makes every effort to prevent undesirable and harmful actions occurring in detention centres and to ensure that children are not exposed to them. Families and children are normally accommodated in a separate part of a detention centre. Parents of detainee children also have a responsibility to keep their children from witnessing distressing behaviour by detainees.

Detention centre staff constantly monitor children particularly unaccompanied minors and if relevant state authorities advise that a child is at risk and it is in the best interest of the child to do so, the child will be moved to alternative place of detention.

In response to a communication from an individual about Australia's practice of mandatory detention for asylum seekers (*A v Australia*), the UN Human Rights Committee found that whilst the detention of asylum seekers is not arbitrary per se, detention should not continue beyond the period for which the State can provide appropriate justification. In that case, it found that the length of detention and lack of review rights meant that the detention of "*A*" was arbitrary. Australia informed the Committee that it did not accept its view that the detention of *A* was unlawful and arbitrary. It pointed out that the detention was authorised under Australian law. Also, it pointed out that the length of time that a person may spend in detention is largely dependent on the amount of time required to investigate and process claims for refugee status and to finalise any legal proceedings relating to these claims. Detention for those purposes is legitimate. It is not arbitrary.

In its observations on Australia's 3rd and 4th Periodic Report under the ICCPR (24 July 2000), the UN Human Rights Committee concluded that mandatory detention of unlawful asylum seekers raised questions about Australia's compliance with the ICCPR's prohibition against arbitrary detention. The Committee recommended that Australia adopt alternative processes, and that Australia inform all detainees of their legal rights (including the right to legal representation). Australia was not required to respond formally to the views of the Committee. However, Australia pointed out that detention of asylum seekers is not arbitrary for the reasons stated above. s 42 s 42

The Government provides legal assistance upon request pursuant to section 256 of the *Migration Act*.

Talking points

Suggested talking points are at Attachment B.

Attachment A

Australia's Human Rights Obligations and the Detention of Asylum Seekers

Detention

Article 9(1) of the ICCPR provides that "No one shall be subjected to arbitrary arrest or detention". Similarly, article 37(b) of CROC provides that "No child shall be deprived of his or her liberty unlawfully or arbitrarily." Article 37(b) provides a further level of protection, however, in that it states that "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."

In the matter of *A v Australia* discussed above, the UN Human Rights Committee expressed the view that the detention of asylum seekers is not arbitrary per se. Rather, a determination of whether detention is arbitrary will depend upon an assessment of all of the circumstances of the particular case. The Committee stated that "...detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period."

The fundamental and legitimate purpose of detention of unauthorised arrivals, whether they be adults or children is to ensure they are available for processing of any protection claims, to enable essential identity, security, character and health checks to be carried out and to ensure that they are available for removal if found not to be refugees. This is consistent with the Refugee Convention and reflects Australia's sovereign right under international law to determine which non-citizens are admitted or permitted to remain.

Children

Article 3 of CROC provides that in all actions concerning children, the best interests of the child shall be the primary consideration. 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 CROC. A determination on whether to detain a child and the conditions of that detention must involve a consideration of what is in the best interests of the child in light of rights such as the right to only be detained as a last resort and for the shortest appropriate time, the protection against discrimination, the right to be protected against physical and mental violence, the right of children to remain with their families and the right to education.

CROC and other international instruments recognise the importance of keeping families together (see below). The Government remains convinced that in all but a limited number of cases it is in the best interests of children to remain with their parents in detention rather than being separated from them in alternative arrangements. Proposals for the release from detention of all families with children ignores the fundamental purpose of detention, which is to ensure people are available for processing, and, if found not to be refugees, for removal.

With respect to unaccompanied minors, it is sometimes in the best interests of the child that they remain in detention with relatives or friends from the same cultural and linguistic background and with whom they have travelled to Australia. Unaccompanied minors may be released into fostering arrangements or moved to an alternative place of detention, on the advice of relevant state authorities advise that this is in the child's interests to do so. During the recent tensions at Woomera IRPC most unaccompanied minors were removed from the centre to alternative places of detention on the advice of the South Australian Department of Human Services.

Article 22 of CROC obliges States Parties to ensure that a child seeking refugee status or who is considered a refugee receives appropriate protection and humanitarian assistance in the enjoyment of the child's human rights. Children seeking refugee status receive appropriate protection and humanitarian assistance either in detention centres or in alternative arrangements.

Review rights

Article 9(4) of the ICCPR provides a right for anyone deprived of their liberty to take proceedings before a court to determine the legality of that detention and order the release of the person if the detention is not legal. Likewise, article 37(d) of CROC provides that "Every child deprived of his or her liberty shall have the right to prompt access to legal or other appropriate assistance, as well as the right to challenge the legality of the deprivation of liberty before a court or other competent, independent or impartial authority...".

Immigration detainees have the capacity to take proceedings before a court to determine the legality of their detention. While recent legislative changes have narrowed this capacity in the case of persons arriving in Australia through "excised offshore places", these changes do not effect the original jurisdiction of the High Court under section 75 of the Constitution to examine the lawfulness of administrative detention.

Conditions of detention

Article 10 of the ICCPR provides that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." The contract for the provision of detention services (which incorporates the immigration detention standards) requires that detainees be treated with dignity and respect. An assessment of the individual circumstances of detention would be required to determine whether article 10 has been violated.

Non-discrimination

Human rights treaties provide that States Parties must ensure the obligations created by them to all persons within the jurisdiction of the State, without distinction of any kind such as race, colour, sex language religion, political or other opinion, national and social origin, property, birth or other status (ICCPR article 2(1) and ICESCR article 2(2)). The CROC contains a similar provision but uses the word "discrimination" instead of "distinction" (article 2(1)). The ICCPR also provides a protection against discrimination on the same

grounds (article 26). A distinction will not constitute proscribed discrimination if it is based on criteria that are reasonable and objective and if the aim is to achieve a purpose that is legitimate under the relevant treaty.

Every effort is made to provide services that are comparable with those in the general community. For example the level of health services available to immigration detainees is equal to those available to the community. Due to the inherent circumstances of detention it is not always possible to replicate the level of services available in the general community which can vary considerably depending on circumstances.

Protection of the family

The treaties all recognise the family as the fundamental group of society and in need of special protection. This is recognised in Australia's detention centre policy. Families with children are accommodated together and training in parenting is available in detention centres to families experiencing difficulties. Children are only separated from their families on the advice of the relevant state or territory child welfare and protection agencies. s 42

s 42

- s 42

Protection against violence

Article 19(1) of CROC obliges State Parties to take all appropriate measures to protect children 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 parents, legal guardians or any other person. This provision applies to the Government in so far as it is responsible for the care of children in immigration detention.

Australia has legislative and administrative measures in place to protect children in detention. The management regime in place in detention centres is focussed on meeting the obligations in CROC Article 19(1). DIMIA's contract with the detention services provider requires the provision of food, shelter, clothing, bedding, health including mental health services, educational services and recreational activities both active and passive to all detainees including children. Immigration Detention Standards, developed in consultation with the Commonwealth Ombudsman, and which form part of the contract establish the

standards of care and services expected of the contractor. There are financial penalties available for failure to meet standards.

DIMIA requires that all staff working in detention centres comply with relevant state or territory legislation on child neglect or abuse, including sexual abuse. DIMIA reviews the contractor's training programmes to ensure these cover the requirements of such state legislation particularly reporting of suspicions or allegations of neglect or abuse. Procedures are in place to ensure that state agencies can be called in to provide expert advice including on the psychological health and best interests of a child, when required.

The Government makes every effort to prevent undesirable and harmful actions occurring in detention centres and to ensure that children are not exposed to them. Families and children are normally accommodated in a separate part of a detention centre. Parents of detainee children also have a responsibility to keep their children from witnessing distressing behaviour by detainees.

Detention centre staff constantly monitor children particularly unaccompanied minors and if relevant state authorities advise that a child is at risk and it is in the best interest of the child to do so, the child will be moved to alternative place of detention.

The right to education

Article 13 of the ICESCR recognises "the right of everyone to education" including compulsory and freely available primary education and "generally available" secondary education "in its different forms". Article 28(1) of CROC also provides for these obligations and imposes an additional obligation to "take measures to encourage regular attendance at schools."

All children in immigration detention have access to primary and secondary education. Children in some centres attend local primary or secondary schools. Otherwise, the detention services provider provides education services. The provision of education to immigration detainees is complicated by the fact that children are in detention for varying periods of time, come from a variety of different cultural and linguistic backgrounds and have varying levels of literacy in their own languages and in English. Detainees cannot therefore necessarily be streamed into the full Australia-based curricula. It is reasonable and in the children's interests that English language tuition be a main element of the education services provided.

While participation at the primary school level is high, it is sometimes difficult to persuade teenagers to attend at the secondary level. Every effort is made to encourage children to attend school and to take advantage of other activities, such as supervised use of computers, but we also rely on parents to encourage their children to take advantage of the programmes offered.

Educational services also depend on the physical facilities available. These have been increased in most centres recently but the situation is not helped by the targeting of education buildings by detainees in disturbances and fires such as at Woomera IRPC late last year.

The Right to Health

Article 12 (1) of the ICESCR recognises the "right to everyone to the enjoyment of the highest attainable standard of physical and mental health." A similar right is provided in article 24(1). Paragraph 24(2)(b) of CROC provides that State Parties must take the appropriate measures to ensure the provision of "necessary medical assistance and health care to all children...". In addition, article 39 of CROC creates an obligation for States Parties to take all appropriate measures to promote the physical and physiological recovery of children who have been the victim of neglect, exploitation or abuse, torture, cruel, inhuman or degrading treatment or punishment or armed conflicts. This obligation exists in relation to children in Australia, regardless of where the neglect etc occurred.

Health services available to immigration detainees are comparable those available to the general community. The ratio of health staff to population is either comparable with or exceeds that applicable in the general community. There are qualified psychologists on the staff at most centres and trauma and torture counselling is available when required.

Standard of living

Article 27 of CROC recognises the right of "every child to a standard of living adequate for the child's physical, mental spiritual, moral or social development."

As mentioned above DIMIA's contract with its services provider requires the provision of food, shelter, clothing, bedding, health including mental health services, educational services and recreational activities both active and passive to all detainees including children. Immigration Detention Standards, developed in consultation with the Commonwealth Ombudsman, and which form part of the contract establish the standards of care and services expected of the contractor.

Attachment B

Suggested Talking Points

- The government takes very seriously its international human rights obligations, including those under the Convention on the Rights of the Child, and makes conscientious efforts to ensure compliance with these obligations.

- The government does not accept that the detention of people that enter our country unlawfully is in breach of our international obligations.

- Proposals for the release of all families with children from detention ignore the fundamental purpose of detention which is to ensure that people are available for assessment of their protection claims and the completion of health, security and penal checks, and if not found to be refugees, for return to a country where they have residence rights.

- They also ignore the fact that such an approach would encourage people smuggling and potentially encourage more families to risk their children's lives in the dangerous journey to Australia.

[If required]

- It would be impossible for any country to say categorically that no breaches of its international human rights obligations are occurring because those obligations relate to the treatment of individuals and compliance will depend on the circumstances of an individual case.

cib 7/2/02.

EDUCATION PROVISION AT WOOMERA IRPC

STAFF

- There are some 12 staff employed by ACM at Woomera to provide educational and recreational activities
- These include 4 qualified teachers, an education officer, 3 activities officers and 3 staff employed to work specifically with the Unaccompanied Minors

UNDER 5 YEAR OLDS

- A structured program relevant to under 5 year olds is available for all children and for mothers
- This includes a Family Club for mothers and children in all compounds, consisting of toddler play, motherhood classes, relaxation, baby massage
- There is also a Kindergarten which operates in the Main compound from 10am to 12 noon and 2pm to 5pm every day. Children can attend as many sessions as they wish.

5 – 12 YEAR OLDS

- A structured, school based program is provided to children at a local school on a daily basis, from 9am to 12noon, and from 1.30pm to 4.30pm. The children attend one session a day, 5 days a week.
- Over 80 children participate in this program, which provides ESL, Mathematics, Art, Woodwork, and Sport
- The classes are provided by age groups, and currently 4 separate classes operate per session
- In addition, the children have access to other activities organised by the activities officers, including swimming lessons, sport, reading, music
- There is also a Family Room in the Main Compound, which provides access to books, videos, musical instruments, and games
- In addition, the children have access to the computer room, which is open from 9am to midnight every day, and operates a roster system so that children and adults of different ages can have access

OVER 12 YEAR OLDS

- There are formal classroom activities providing education programs in English and Mathematics for 12 year olds and over.

- These operate for 1 ½ hours four days a week in each compound

- These formal class room activities are supplemented by additional activities and developmental programs. These include:

- Supervised access to computers between the hours of 9.00 am and midnight.

- Discussion groups with UAM officers; eg life in Australia

- Organised activities such as soccer, volleyball, swimming, sewing etc.

- Other meaningful activities such as:

  - Participation in the sewing co-op
  - kitchen duties
  - maintenance and gardening
  - stores

FACILITIES

- At the time of the HREOC visit to Woomera, what the officers saw was necessarily limited by the destruction of facilities by detainees in December.

- This included the destruction of the Recreation and Education Rooms in 2 compounds (Mike and November), so that accommodation units are having to be used for structured programs, and there is no where for resources, such as computers, musical instruments etc to be left.

- In addition, some 17 computers were destroyed, again in 2 compounds (Mike and November), with the result that there are only 10 computers now available for detainees in Main compound.

Gib 7/2/02.

Document 5

HREOC MEDIA RELEASE ON CHILDREN IN WOOMERA

ISSUES:

HREOC MAKES A NUMBER OF ASSERTIONS ABOUT THE PSYCHOLOGICAL HEALTH AND OUTLOOK OF CHILDREN IN THE WOOMERA ENVIRONMENT.

IT SUGGESTS THAT THE SCHOOLING PROVIDED TO DETAINEE CHILDREN IS INADEQUATE.

HREOC THEREFORE FINDS THE GOVERNMENT IN BREACH OF ITS OBLIGATIONS UNDER THE CONVENTION ON THE RIGHTS OF THE CHILD (CROC).

TALKING POINTS:

- THE MEDIA RELEASE BY THE HUMAN RIGHTS COMMISSIONER DRAWS HEAVILY ON A LETTER TO ME RECEIVED WHILE I WAS OUT OF THE COUNTRY AND TO WHICH I HAVE NOT YET HAD THE OPPORTUNITY TO RESPOND. ONE OF THE PURPOSES OF THIS RESPONSE WOULD BE TO CLARIFY SOME MISINFORMATION AND CORRECT SOME INACCURACIES CONTAINED IN IT.

HEALTH AND WELFARE OF CHILDREN

- THE GOVERNMENT TAKES VERY SERIOUSLY ITS OBLIGATIONS UNDER THE CROC TO TAKE MEASURES TO PROTECT DETAINEE CHILDREN.

- THE GOVERNMENT MAKES EVERY EFFORT TO PREVENT UNDESIRABLE ACTIONS OCCURRING AND TO ENSURE THAT CHILDREN ARE NOT EXPOSED TO THEM

- THE GOVERNMENT IS NOT, HOWEVER, RESPONSIBLE FOR THE ACTIONS OF DETAINEES, INCLUDING THE PARENTS OF DETAINEE CHILDREN, WHICH CHILDREN FIND DISTRESSING ANY MORE THAN IT IS IF CHILDREN EXPERIENCE SUCH THINGS IN THE COMMUNITY.

- DIMIA AND ACM OFFICERS INCLUDING THOSE WITH RELEVANT EXPERTISE CONSTANTLY MONITOR DETAINEE CHILDREN AND PROCEDURES ARE IN PLACE TO ENSURE THAT STATE AGENCIES CAN BE CALLED TO PROVIDE EXPERT ADVICE INCLUDING ON THE PSYCHOLOGICAL HEALTH AND THE BEST INTERESTS OF A CHILD, WHEN REQUIRED.

- DURING THE RECENT WOOMERA SITUATION, SOUTH AUSTRALIAN FAMILY AND YOUTH SERVICES WERE MONITORING THE CHILDREN CLOSELY. INDEED ON FAYS ADVICE NINE OF THE UNACCOMPANIED MINORS INCLUDING ALL THOSE 14 YEARS AND UNDER WERE MOVED TO AN ALTERNATE PLACE OF DETENTION UNDER THE CARE OF THE SA DEPARTMENT OF HUMAN SERVICES.

- THE GOVERNMENT REMAINS CONVINCED THAT, IN ALL BUT A LIMITED NUMBER OF CASES, IT IS IN THE BEST INTEREST OF CHILDREN TO REMAIN WITH THEIR FAMILIES.

- WE ARE IN THE PROCESS OF EVALUATING THE TRIAL OF ALTERNATIVE DETENTION FOR WOMEN AND CHILDREN IN WOOMERA INCLUDING WHETHER IT CAN BE REPLICATED ELSEWHERE IN AUSTRALIA.

- PROPOSALS FOR THE RELEASE OF ALL FAMILIES WITH CHILDREN FROM DETENTION IGNORES THE FUNDAMENTAL PURPOSE OF DETENTION WHICH IS TO ENSURE PEOPLE ARE AVAILABLE FOR PROCESSING AND, IF FOUND NOT TO BE REFUGEES, FOR REMOVAL.

- IF SUCH AN APPROACH INADVERTENTLY LED TO PEOPLE ACHIEVING THEIR OBJECTIVES TO REMAIN IN AUSTRALIA REGARDLESS OF WHETHER OR NOT THEY WERE ULTIMATELY FOUND TO BE REFUGEES, THIS WOULD SEND A VERY STRONG SIGNAL TO PEOPLE SMUGGLERS AND POTENTIALLY ENCOURAGE MORE FAMILIES TO RISK THEIR CHILDREN'S LIVES.

EDUCATION ISSUES

- IT IS NOT TRUE THAT THERE ARE NO EDUCATION SERVICES FOR TWELVE YEAR OLDS AND ABOVE. PARTICIPATION IS VOLUNTARY AND WE RELY ON PARENTS TO ENCOURAGE THEIR CHILDREN TO TAKE ADVANTAGE OF THE PROGRAMMES OFFERED.

- IN PARTICULAR WE ARE AWARE THAT A NUMBER OF UNACCOMPANIED MINORS DO NOT PARTICIPATE BUT AS CAN BE TRUE IN THE AUSTRALIAN COMMUNITY IT IS DIFFICULT TO PERSUADE TEENAGERS WHO BELIEVE THAT THEY ARE ADULTS TO TAKE ADVANTAGE OF EDUCATION PROGRAMMES.

- THE GOVERNMENT IS AWARE THAT THERE ARE ISSUES IN THE DELIVERY OF DETENTION SERVICES AND IT WELCOMES CONSTRUCTIVE COMMENTS ON HOW TO IMPROVE THESE SERVICES. SUCH DISCUSSIONS, HOWEVER, ARE NOT AIDED BY PUBLICLY RELAYING INACCURATE INFORMATION.

- WE ACKNOWLEDGE THAT THE PROVISION OF EDUCATION SERVICES IS DIFFICULT. IT IS COMPLICATED BY THE FACT THAT CHILDREN ARE IN DETENTION FOR VARYING LENGTHS OF TIME, COME FROM A VARIETY OF DIFFERENT CULTURAL AND LINGUISTIC BACKGROUNDS AND HAVE VARYING LEVELS OF LITERACY IN THEIR OWN LANGUAGES LET ALONE IN ENGLISH. THESE ARE ALL FACTORS WHICH NEED TO BE TAKEN INTO ACCOUNT.

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- IMPROVEMENTS TO EDUCATION SERVICES ALSO DEPEND ON THE PHYSICAL FACILITIES AVAILABLE. THESE HAVE BEEN INCREASED IN WOOMERA OVER THE LAST YEAR BUT THE SITUATION IS NOT HELPED BY THE TARGETING OF EDUCATION BUILDINGS BY DETAINEES IN DISTURBANCES AND FIRES. I WOULD ADD THAT PARTICULARLY IN RURAL AUSTRALIA MIXING CHILDREN OF DIFFERENT AGES, STANDARDS AND CLASSES IS NOT UNKNOWN.

HREOC INQUIRY INTO CHILDREN IN DETENTION

- I AM CONCERNED THAT HAVING CALLED AN INQUIRY INTO CHILDREN IN DETENTION SO THAT THESE ISSUES CAN BE EXAMINED IN DEPTH, HREOC HAS ALREADY PREJUDGED THE OUTCOME OF ITS OWN INQUIRY

  - IT HAS DONE SO IN THE ABSENCE OF THE BENEFIT OF DETAILED SUBMISSIONS WHICH ARE NOT DUE TIL 15 MARCH

BACKGROUND:

Dr Ozdowski wrote to you on 1February 2002 reporting on the recent visit of his staff to the Woomera IRPC. The press release of 6 February is a slightly modified version of that letter.

The letter was received on 6 February 2002. A response is being prepared.

A paper on education services available at Woomera is attached.

Document 6

Po	Fax Note 7671	Date	# of pages ▶
To	s 22	From	s 22
Co./Dept.	PMSC	Co.	DIMIA
Phone #		Phone #	s 22
Fax #	s 22	Fax #	

CURRENT ISSUES BRIEF

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(2)

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- A FURTHER COMPLICATION IS THAT MANY TEENAGE DETAINEES DO NOT WISH TO ATTEND SCHOOL. DIMIA AND ITS SERVICES PROVIDER ACM ARE DEVELOPING STRATEGIES TO TRY AND ENCOURAGE BETTER ATTENDANCE AMONGST THESE AGE GROUPS.

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BACKGROUND:

A separate paper on education services available at Woomera has been provided separately.

BRANCH HEAD: Rosemary Greaves TELEPHONE: 3820
SECTION HEAD: [redacted] s 22 TELEPHONE: [redacted] s 22

CURRENT ISSUES BRIEF

BRANCH:	Detention Policy
SECTION:	Detention Policy & procedures
DATE:	6 Feb 2002
TIME:	06:03 PM

EDUCATION PROVISION AT WOOMERA IRPC

STAFF

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- Discussion groups with UAM officers; eg life in Australia
- Organised activities such as soccer, volleyball, swimming, sewing etc.
- Other meaningful activities such as:
  - Participation in the sewing co-op
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FACILITIES

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- In addition, some 17 computers were destroyed, again in 2 compounds (Mike and November), with the result that there are only 10 computers now available for detainees in Main compound.

Children in Detention

	ACCOMPANIED			UNACCOMPANIED			
CENTRE	Male	Female	Sub Total	Male	Female	Sub Total	TOTAL
WOOMERA IRPC	125	81	206	9	1	10	216
CURTIN IRPC	23	22	45	4	1	5	50
PORT HEDLAND IRPC	41	33	74	8	0	8	82
VILLAWOOD IDC	8	9	17	0	0	0	17
MARYBRNONG IDC	1	2	3	0	0	0	3
PERTH IDC	0	0	0	0	0	0	0
CHRISTMAS ISLAND IRPC	4	3	7	0	0	0	7
COCOS ISLAND IRPC	2	2	4	1	0	1	5
TOTAL	204	152	356	22	2	24	380

Woomera IRPC

	ACCOMPANIED			UNACCOMPANIED			
Age	Male	Female	Sub Total	Male	Female	Sub Total	TOTAL
17	6	3	9	6	0	6	15
16	5	0	5	2	1	3	8
15	4	1	5	0	0	0	5
14	4	2	6	1	0	1	7
13	6	5	11	0	0	0	11
12	6	3	9	0	0	0	9
11	6	7	13	0	0	0	13
10	8	5	13	0	0	0	13
9	13	7	20	0	0	0	20
8	8	3	11	0	0	0	11
7	7	6	13	0	0	0	13
6	7	3	10	0	0	0	10
5	8	11	19	0	0	0	19
4	7	5	12	0	0	0	12
3	13	7	20	0	0	0	20
2	5	4	9	0	0	0	9
1	1	3	4	0	0	0	4
Other	11	6	17	0	0	0	17
TOTAL	125	81	206	9	1	10	216

In addition, there are 10 **UAMs** in alternative places of detention. Details are as follows:

Age	Male	Female	Sub Total
17	0	0	0
16	2	0	2
15	2	1	3
14	2	0	2
13	0	0	0
12	1	0	1
11	1	0	1
10	0	0	0
9	0	0	0
8	1	0	1
TOTAL	9	1	10

The following displays the length of time spent in immigration detention:

Length (mths)	Number
0 - 3	6
3 - 6	156
6 - 9	32
9 - 12	16
12 - 15	16
TOTAL	226

Department of Immigration and Multicultural and Indigenous Affairs

MIGRATION SERIES INSTRUCTION

Instructions in this **Migration Series (MSIs)** relate to: the ***Migration Act 1958***; the ***Migration Regulations 1994*** and other related legislation [as amended from time to time].

MSIs are a temporary instruction format only; they are intended for ultimate incorporation into *PAM3.* It is the responsibility of the program area to ensure that the information in this MSI is up-to-date. It will be reviewed 12 months from date of issue but will remain current until formally replaced or deleted. For information on the status of this MSI see the latest **Instructions and Legislation Update** or contact Instructions and LEGEND Section (ILS).

MSI no.: 371	**File no.:**	**No. of pages:** 21
Author Section:	**Detention Framework**	
Date of issue: 2/12/02	[Refers to date of registration of the signed original instruction by Instructions and LEGEND Section (ILS).	
Title:	**ALTERNATIVE PLACES OF DETENTION**	

THIS INSTRUCTION CONTAINS THE FOLLOWING LEGISLATIVE REFERENCES

***Migration Act 1958*:**	***Migration Regulations 1994*:**	**Other legislation:**
Sections 5, 189, 192, 196, 273, 252G.	Regulations 5.35.	
Effect on other MSIs:		
Distribution: Release on LEGEND and paper distribution to overseas posts and limited outlets within Australia is managed by Information Distribution Section (IDS) and necessarily occurs after date of issue. MSIs are available for inspection and purchase at DIMIA Freedom of Information Units.		

CONTENTS

1 APPLICATION OF THIS INSTRUCTION

1.1.1 This Instruction applies to the detaining of unlawful non-citizens in alternative places of detention. Unlawful non-citizens who are detained under the *Migration Act 1958* ("the Act") are usually detained in an Immigration Detention Facility (IDF).

1.1.2 Within the framework of mandatory detention and consistent with the Act, however, certain unlawful non-citizens may be accommodated in another place approved by the Minister.

1.1.3 Moreover, some detained unlawful non-citizens may spend part of their day outside their normal place of detention at an alternative place of detention.

1.1.4 The meaning of the term ***alternative place of detention*** is discussed further in this Instruction. The matters covered by this Instruction are:

- the legal framework of immigration detention;
- the places in which an unlawful non-citizen may be detained;
- the situations in which an immigration detainee can be accommodated in an alternative place of detention, focusing particularly on residential housing projects; and
- the situations in which an immigration detainee can spend part of their day outside their normal place of detention in an alternative place of detention.

1.1.5 In particular, this instruction covers the accommodation of unlawful non-citizen women and children and other persons with special needs in alternative places of detention.

1.1.6 Unlawful non-citizen women and children who are likely to spend not short periods of time in detention (but for whom the grant of a Bridging Visa is not appropriate), should as a matter of priority be given the option of being accommodated in a Residential Housing Project (RHP) rather than in an IDF. This is subject to:

- residential housing places being available;
- health and character checks being completed and clear;
- there being no high risk of the detainee absconding; and
- any operational issues particular to the detainee and/or the smooth management of the RHP (eg. there is no high risk that the detainee will compromise the safety and security of others in the RHP).

1.1.7 Every 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.

2 LEGAL FRAMEWORK

2.1 Unlawful non-citizens

2.1.1 The most common basis for detaining a non-citizen is that a DIMIA officer knows or reasonably suspects a person to be an unlawful non-citizen – **s 189(1)** of the Act.

2.1.2 **Section 189** *obliges* an officer to detain a person if the officer knows or reasonably suspects that the person is:

- in the migration zone (other than an excised offshore place) and is an unlawful non-citizen; or

- inside Australia but outside the migration zone, is seeking to enter the migration zone (other than an excised offshore place), and on arrival in the migration zone would become an unlawful non-citizen.

2.1.3 **Section 189** also provides that an officer *may* detain a person if the officer knows or reasonably suspects that the person is:

- in an excised offshore place and is an unlawful non-citizen; or
- in Australia but outside the migration zone, is seeking to enter an excised offshore place, and on arrival in the excised offshore place would become an unlawful non-citizen.

(A person can be inside Australia but outside the migration zone if he or she is in Australian territorial waters.)

2.1.4 An unlawful non-citizen detained under **s 189** of the Act cannot be released from detention unless he or she is granted a visa (including a Bridging Visa), or is removed from Australia – **s 196(1)**.

2.2 Officers

2.2.1 The term "officer" is defined in **s 5(1)** of the Act. The following persons are "officers" for the purposes of the Act:

- DIMIA officers;
- Customs officers;
- Protective Service officers;
- Australian Federal Police or State or internal Territory police officers;
- Police officers of an external Territory;
- a person authorised by the Minister in writing; and
- a person included in a class of persons that is authorised by the Minister in writing.

2.2.2 A large number of employees of the Detention Services Provider (DSP), have been authorised by the Minister as "officers" for the purposes of the Act.

2.3 Places and manner of immigration detention

Definition of "Immigration Detention"

2.3.1 The term "immigration detention" is defined in **s.5(1)** of the Act (referred to in this MSI as "the Definition"). The Definition provides that:

"immigration detention" means:

(a) being in the company of, and restrained by:

(i) an officer; or

(ii) in relation to a particular detainee – another person directed by the Secretary to accompany and restrain the detainee; or

(b) being held by, or on behalf of, an officer:

(i) in a detention centre established under this Act; or

(ii) in a prison or remand centre of the Commonwealth, a State or a Territory; or

(iii) in a police station or watch house; or

(iv) in relation to a non-citizen who is prevented, under section 249, from leaving a vessel – on that vessel; or

(v) in another place approved by the Minister in writing;

but does not include being restrained as described in subsection 245F(8A), or being dealt with under paragraph 245F(9)(b).

Decision to detain a person in a particular place

2.3.2 The Act nowhere expressly states that an officer may choose the place of detention of a particular unlawful non-citizen.

2.3.3 The Australian Government Solicitor (AGS) has advised, however, that an officer (as defined in **s 5(1)** of the Act) *can* determine where an unlawful non-citizen is to be detained.

2.3.4 The AGS advised that "it is implicit in the definition of 'immigration detention' that an officer under the Act can determine where a detainee is to be held".

2.3.5 If the officer who detains an unlawful non-citizen cannot make an immediate decision as to where the unlawful non-citizen is to be detained, **s 189** of the Act would be unworkable.

2.3.6 It also follows that an officer has the power to transfer an unlawful non-citizen from one place of detention to another. For example, an unlawful non-citizen could be initially detained in a police station or watch-house, as permitted by **paragraph (b)(iii)** of the Definition, then transferred to an IDF.

When different kinds of detention are used

2.3.7 Where a person is required to be detained under the Act, this is usually in an IDF (referred to in **paragraph (b)(i)** of the Definition as a "detention centre"). The great majority of immigration detainees are detained in one of several IDFs.

2.3.8 The Minister's power to "establish" IDFs is found in **s 273(1)** of the Act (the term used in the Act is "detention centres").

2.3.9 Other methods and places of detention described in the Definition are usually short-term in nature. For example, detention under **s 192** (detention pending visa cancellation) would usually be under **paragraph (a)(i)** of the Definition. That is, the detainee is "in the company of and restrained by" the officer considering cancellation, usually in an environment such as an interview room in an airport or a DIMIA office.

2.3.10 Places of detention such as police stations are usually used only for unlawful non-citizens who are detected by Compliance Officers and who cannot be immediately transferred to an IDF.

2.3.11 **Paragraph (b)(v)** of the Definition gives the Minister scope to approve new places of detention as necessary or desirable.

2.3.12 The Minister, or his delegate, has used the power under **paragraph (b)(v)** in a number of circumstances where a person is an unlawful non-citizen but detention in a place specified by the Definition is impractical or inappropriate. For example, the site of the RHP at Woomera was approved under **paragraph (b)(v)** as an alternative place of detention.

2.3.13 The Minister, or his delegate, has also approved certain hospitals as places of detention for unlawful non-citizens requiring specialist medical attention.

2.3.14 Some detainees spend part of their day outside their normal place of detention, for example at an external school. The Minister, or his delegate, has approved a number of schools to be places of detention to permit unlawful non-citizen children to attend school in the community but remain in detention as required by the Act.

Persons with detention responsibilities

Person holding on behalf of an officer

2.3.15 While being in an alternative place of detention, a detainee must also be 'held by, or on behalf of, an officer' in accordance with **paragraph (b)** of the Definition.

2.3.16 Therefore, in alternative places of detention where a detainee is *not* being held by an officer, another person must be requested to hold the detainee on behalf of an officer.

2.3.17 For example, where a detainee is being held in a nursing home (and that nursing home has been approved as an alternate place of detention), nursing home staff may be requested to hold the detainee on behalf of an officer.

Directed person

2.3.18 Where the detainee is not in a place of detention, a person may also be in "immigration detention" if he or she is "accompanied and restrained" by a person directed by the Secretary to act in this capacity in accordance with **paragraph (a)(ii)** of the Definition.

2.3.19 An example of a Directed Person would be a person, not the foster carer, directed to transport a detainee child from an alternative place of detention such as a foster home to the school that the child attends.

2.3.20 Such a person is a Directed Person as they are directed by the Secretary to accompany and restrain the detainee child whilst they are outside a place of immigration detention.

Designated person

2.3.21 Although the term Designated Person is not in the definition of "immigration detention" in the Act, for the purposes of this MSI, a Designated Person means a person:

- who holds a detainee "on behalf of an officer" while the detainee is in an alternative place of detention (**paragraph (b)** of the Definition); and
- who is directed by the Secretary or his delegate to accompany and restrain a particular detainee (**paragraph (a)(ii)** of the Definition) when they are not in a place of detention.

2.3.22 Therefore, a Designated Person is a person who is both a person holding on behalf of an officer and a Directed Person.

2.3.23 As an illustration of this concept, a foster carer of a detainee whose home has been approved as an alternative place of detention would be made a Designated Person.

2.3.24 While the detainee child is within the home, the foster carer would "hold" the child in the place of detention on behalf of an officer under **paragraph (b)** of the Definition.

2.3.25 When the child goes outside the home the foster carer would accompany the child in his or her capacity as a Directed Person under **paragraph (a)(ii)** of the Definition and the child would remain in immigration detention.

2.3.26 The circumstances in which a person may be directed to act as a Designated Person vary considerably. For example, principals and teachers at schools attended by unlawful non-citizen children are made Designated Persons by the Secretary or his delegate, so that those children can remain in detention whilst at school and when they are physically outside the school grounds (for example on an excursion).

3 DUTY OF CARE

3.1.1 The Commonwealth (including DIMIA), its employees and agents have a common law duty of care with respect to all detainees. This means that officers, whether personally, or through the DSP must ensure that the day-to-day needs of detainees are met.

3.1.2 They must also take all reasonable action to ensure detainees do not suffer any physical harm or undue emotional distress while in immigration detention.

3.1.3 The standard of care required varies depending on the circumstances of each individual detainee. As a guiding principle, officers should see their duty of care as being exercised within an environment similar to any other situation where there is a supervisory duty.

3.1.4 The fact that the DSP governs most aspects of the day-to-day workings of IDFs does not relieve DIMIA of its duty of care towards detainees. DIMIA also has a duty of care for detainees held in alternative places of detention.

3.1.5 How this duty of care is discharged varies, depending on the type of alternative place of detention and the arrangements for care that have been put in place. For example, for detainee children in foster care, arrangements have been made with the relevant State or Territory child welfare authority for care of the children.

3.1.6 In other circumstances persons who are persons holding on behalf of an officer, Directed Persons or Designated Persons may also have certain responsibilities for the care and welfare of the detainees.

3.1.7 DIMIA, though, maintains a monitoring and liaison role to ensure the Commonwealth's duty of care is fulfilled.

4 ALTERNATIVE PLACES OF DETENTION

4.1 What is an alternative place of detention?

4.1.1 The term "alternative place of detention" is not used or defined in the Act. In a policy context, an "alternative place of detention" means a place where a person may be kept in immigration detention other than a place specified in **paragraphs b(i) – b(iv)** of the Definition.

4.1.2 That is, the phrase "alternative place of detention", when used in this MSI, is a reference to the other possible places of detention approved under **paragraph (b)(v)** of the Definition.

4.1.3 An alternative place of detention may be a place where detainees are accommodated or a place where they spend part of their day, for example at a school or medical facility, and then return to their normal place of detention.

4.2 Examples of alternative places of detention

4.2.1 Examples of alternative places of detention used for accommodation purposes include:

- residential housing projects;
- hospitals/nursing homes;
- mental health facilities;

- foster carer homes;
- hotels/motels; and
- community care facilities.

4.2.2 Examples of 'alternative places of detention' attended by detainees for part of the day or on an 'as required' basis include:

- schools; and
- medical facilities used for day procedures or treatment.

4.2.3 Each of these examples of 'alternative places of detention' is discussed below.

4.3 Procedures for establishing alternative places of detention

4.3.1 Determining which type of alternative place of detention to use involves a careful examination of the circumstances of detainees on a case by case basis.

4.3.2 It is important to note that the examples of alternative places of detention included in this MSI are not exhaustive, and that other alternative places may be approved as circumstances demand.

4.3.3 The Director, Detention Operations Section in Central Office or DIMIA Managers in the IDFs are usually responsible for approving alternative places of detention and persons with detention responsibilities.

4.3.4 The Detention Operations Section maintains a central register of all alternative places of detention and of all persons holding on behalf of an officer, Directed Persons and Designated Persons.

4.3.5 Once a particular place has been approved as a place of detention or a person made a person holding on behalf of an officer, a Directed Person or a Designated Person, (and this was not done by the Director, Detention Operations Section), the relevant instruments must be forwarded to the Director, Detention Operations Section.

4.3.6 Once a location has been chosen and approved as an alternative place of detention, the occupiers of the alternative place should be notified as soon as possible of that fact.

5 RESIDENTIAL HOUSING PROJECTS

5.1 Residential Housing Project

5.1.1 A RHP is a form of detention that takes place within dedicated domestic residences – that is, in "normal" residential properties rather than an IDF. For example, the Woomera RHP consists of four houses that have a common external fence.

5.1.2 The purpose of a RHP is to permit detainees to live in a more domestic environment that is less structured than an IDF, and to permit them a greater degree of autonomy over their own lives, while they remain formally in detention and available for processing and removal from Australia if necessary.

5.1.3 The DSP staff supervise detainees in the RHP. In this way, the interests of both the detainees and of DIMIA are protected. The residential properties are approved as places of detention under **paragraph (b)(v)** of the Definition.

5.1.4 This form of detention is the preferred model for unlawful non-citizens with special needs, for example women and children, who are likely to spend not short periods of time in detention.

5.1.5 Early consideration must be given to the placement of women and children in a RHP subject to individual assessments with regard to the requirements listed and discussed below.

5.2 Eligibility and decision-making process

5.2.1 Unlawful non-citizen women and children who are likely to spend not short periods of time in detention (but for whom the grant of a Bridging Visa is not appropriate), should as a matter of priority be given the option of being accommodated in a RHP rather than in a IDF. This is subject to:

- residential housing places being available;
- health and character checks being completed and clear;
- there being no high risk of the detainee absconding; and
- any operational issues particular to the detainee and/or the smooth management of the RHP (eg. there is no high risk that the detainee will compromise the safety and security of others in the RHP).

5.2.2 The use of an alternative place of detention such as a RHP is an administrative decision usually made by the DIMIA Manager at the associated IDF, in consultation with other appropriate people. Such people may include representatives of the DSP at the associated IDF, including a health and welfare specialist and staff in DIMIA Central Office as necessary.

5.2.3 Every 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.

5.2.4 Detainees for whom detention in a RHP is being considered must understand that participation is entirely voluntary. People being detained at a RHP may return to detention at an IDF at any time by alerting either the DSP or DIMIA of their wishes. Detainees can request to be detained at a RHP at any time.

5.2.5 A copy of the expression of interest form that outlines the conditions and allows detainees to express interest in participating in a RHP is at **Attachment 1**.

5.2.6 Consideration may also be given to giving other detainees, with special needs better suited to management in a housing environment, the option of residing in a RHP subject to the same conditions outlined above.

5.2.7 For example, unaccompanied minors of tender years should be considered after first being considered for other alternative detention arrangements consistent with the MSI on *Procedures for Unaccompanied Wards in Immigration Detention Facilities.*

5.2.8 In an effort to avoid unnecessary delays in placing detainees in a RHP, DIMIA staff (in the associated IDF) must create and maintain a discreet list of those detainees who have volunteered and are eligible to participate in a RHP. This is to ensure that vacancies in the RHP may be filled quickly.

5.3 Reporting requirements for residential housing projects

5.3.1 There are four levels of internal formal reporting in operation with regard to residential housing projects. Three of these levels are provided by the DSP and are as follows:

- a weekly narrative from the detention supervisor from the RHP, detailing a list of residents, a summary of key activities undertaken by the residents and some comments on any activity that was out of the ordinary;
- the weekly performance linked fee matrix report. This is a means for the DSP to report on their ability to meet the requirements of the Immigration Detention Standards (IDS); and
- individual incident reports.

5.3.2 It is important that the relevant DIMIA Manager clearly identifies to the DSP the subject areas that require regular reporting and the level of detail that needs to be observed.

5.3.3 These targeted areas should be reviewed periodically by the DIMIA Manager and the Detention Management Section to ensure their continuing relevance to the project and the DSP should be advised of the reasons for any changes.

5.3.4 The fourth formal level of reporting is where DIMIA invites residents of the RHP to complete a resident feedback report.

5.3.5 This is undertaken on a monthly basis and the reports go directly to the DIMIA Manager at the associated IDF and are copied to Detention Management Section in DIMIA Central Office. The resident feedback report form is at **Attachment 2.**

5.3.6 As in IDFs, detainees in RHPs are able to complain without hindrance or fear of reprisal about any matter relating to the conditions of detention to the DSP or to DIMIA.

5.3.7 Detainees in RHPs must be informed of the mechanisms for making such complaints and the timeframes for acknowledging and dealing with these complaints. An example of such a mechanism is a complaint box within the RHP.

5.3.8 This mechanism, whereby residents are able to lodge grievances at any time directly with the DSP or DIMIA, provides an additional layer of informal reporting.

5.3.9 As in IDFs, detainees in RHPs are also able to make complaints about any matter relating to the conditions of their detention to the Human Rights and Equal Opportunity Commission (HREOC) and the Commonwealth Ombudsman (the Ombudsman).

5.3.10 Material advising of the right to complain to the HREOC and the Ombudsman must also be displayed prominently at the RHP.

5.3.11 Complaints of which the DSP is aware, using internal and external mechanisms, should be reported as incidents.

5.3.12 These reporting mechanisms have been adapted as appropriate to reflect the unique circumstances of detainees within RHPs and are specifically for use within this alternative detention environment.

5.4 Operational matters

Legislative powers

5.4.1 It is important to note that RHPs are established as alternative places of detention under **paragraph (b)(v)** of the Definition, and as such they are not necessarily subject to the same legislation as those places established as IDFs.

5.4.2 External visits to residents of RHPs are arranged in accordance with the DSP's procedures for visits to IDFs. As the occupier of the RHP, the DSP has the right to regulate the entry of persons onto the premises and to impose particular conditions of entry as they see appropriate.

5.4.3 Visitors who choose not to comply with any requests regarding entry may be refused entry to the RHP. The provisions in the Act with regard to the screening and searching of visitors entering IDFs (**s.252G**) do not apply to RHPs.

5.4.4 Additionally **Regulation 5.35**, which refers to the authorising of medical treatment without consent of detainees being held in an IDF, also does not apply to RHPs.

Visits by RHP residents to the IDF

5.4.5 The policy with regard to residents of the RHP visiting family and friends in the IDF is one visit per day. These visits can be a mix of overnight and day visits. In addition, visits to the IDF are made for other reasons including visits to the medical centre.

5.4.6 The ability of the visiting regime to remain operational is conditional upon the good order and security of the IDF. If there are major incidents occurring in the IDF this regime may be interrupted.

Visits to the RHP by family members or other detainees residing at the IDF

5.4.7 Where family members remain in an IDF while other members of the family reside at the associated RHP, visits to the RHP by the family members or other detainees from the IDF may be arranged by the DSP.

5.4.8 This is subject to the residents of the RHP agreeing to the visit and security assessments conducted by the DSP.

Visits to the RHP by managers

5.4.9 The DIMIA Manager and the DSP Detention Manager (from the associated IDF) should ensure that they visit the RHP frequently and in such a way that will give residents and staff of the RHP the opportunity to raise any concerns they may have.

5.4.10 This will also give Managers the opportunity to make assessments with regard to the general atmosphere of the RHP.

5.5 General responsibilities of the DSP in a RHP

5.5.1 The DSP is contractually responsible for ensuring that the needs of detainees are appropriately met. The care needs of detainees and the services to address these needs are outlined in the IDS, which form part of the contract between the Commonwealth and the DSP.

5.5.2 The IDS cover a range of topics including:

- accommodation;
- food;
- clothing, footwear and bedding;
- education;
- sporting, recreational and leisure activities; and
- religious needs.

5.5.3 The IDS apply to detainees in a RHP as they do to detainees in IDFs. DIMIA Managers should, through the reporting mechanisms discussed in 5.3 above and through routine visits to the RHP, monitor the DSP's compliance with the IDS in the RHP.

5.5.4 It should be noted that in some other alternative places of detention, for example in foster care arrangements, the DSP may have no designated responsibilities.

6 ALTERNATIVE PLACES OF DETENTION (OTHER THAN A RHP) USED FOR ACCOMMODATION

6.1 Other considerations

6.1.1 Consideration may be given to accommodating unlawful non-citizens in alternative places of detention if:

- it is apparent that the needs of a particular detainee cannot be met within the environment of an IDF and it is apparent that a RHP and a Bridging Visa is not appropriate;
- it is necessary because of the condition or special needs of the detainee;
- locally available places of detention are deemed unsuitable by DIMIA; or
- there is a lack, locally, of places of detention.

6.1.2 Placement of a detainee in alternative forms of detention is subject to:

- the detainee's needs, with care given to recognise whether cultural needs can be better serviced in an alternative place of detention;
- whether the detainee has met health and character requirements;
- the risk profile of the detainee including both the risk of absconding and the risk to the security and safety of others in the alternative place of detention; and
- the availability of suitable places of alternative detention.

6.1.3 The Minister should be consulted regarding decisions to accommodate persons in alternative places of detention on a long-term basis.

6.2 Hospitals and nursing homes

6.2.1 Where a medical officer has recommended hospitalisation of a detainee outside an IDF, the hospital or nursing home in which they are to receive treatment must be declared a place of detention under **paragraph (b)(v)** of the Definition.

6.2.2 The DSP must also take all reasonable steps to ensure a person remains in immigration detention, pending their return to an IDF or alternative place of detention.

6.2.3 Depending on the security of the facility or the particular ward of the hospital or nursing home and the risk profile of each hospitalised detainee, this may often include providing a DSP officer on-site.

6.2.4 The DSP should liaise with the hospital in each case to ensure that the level of security is appropriate. The DSP should also have arrangements in place to transfer detainees back to an IDF or alternative place of detention at the conclusion of their treatment.

6.2.5 Depending on the circumstances of individual cases, it may be the case that hospital/nursing home staff are asked to hold the detainee 'on behalf of an officer' (as per paragraph (b) of the Definition) while the detainee is in the facility.

6.3 Mental health facilities

6.3.1 Similar considerations have to be taken into account in relation to mental health facilities as with hospitals (see above). Specialist medical advice should always be sought before detaining an unlawful non-citizen in an institution of this type.

6.3.2 All mental health facilities where an immigration detainee is to be placed under the relevant State or Territory mental health legislation must be declared as places of immigration detention.

6.3.3 If an officer is not accompanying the detainee at all times while he or she is held within the mental health facility, responsible persons within the facility should also be approved as persons holding on behalf of an officer.

6.3.4 The DSP must have appropriate liaison with the mental health facility to ensure that there is no likelihood that the detainee can escape from immigration detention whilst they are an in-patient.

6.3.5 The DSP should also have arrangements in place to transfer detainees back to an IDF or alternative place of detention at the conclusion of their treatment.

6.3.6 A detainee who has been admitted into a mental health facility is subject to the relevant State or Territory mental health legislation as well as the Act.

6.3.7 The patient at all times remains in immigration detention unless granted a visa, and does not cease to be in immigration detention during their treatment pursuant to the mental health legislation.

6.3.8 An apparent inconsistency between relevant State/Territory mental health legislation and the Act may occur when a detainee, who is a patient of a mental health facility, is no longer required to be held in the facility on mental health grounds.

6.3.9 In such situations, the relevant State/Territory legislation often states that the patient should be released immediately, but under the Act, the detainee must continue to remain in immigration detention.

6.3.10 In such a case, the detainee should be removed from the mental health facility and placed in a different place of detention.

6.4 Foster care

6.4.1 Alternative detention in the form of foster care relies on DIMIA coming to an agreement with the relevant State or Territory child welfare authority.

6.4.2 The nature and availability of foster care will depend on any specific agreements or Memoranda of Understanding (MOU) between DIMIA and the State or Territory Government.

6.4.3 Alternative detention in foster care is usually limited to two categories of

children:

- unaccompanied detainee minors (see the MSI on *Procedures for Unaccompanied Wards in Immigration Detention Facilities*); and
- detainee minors who are accompanied by a parent or relative but have been temporarily removed from their care in consultation with a State or Territory child welfare authority.

6.4.4 As a matter of policy, in all cases the best interests of the child should be given primacy in any consideration of alternative places of detention for children.

6.4.5 A child in detention would only be removed from the care of their parents in very limited circumstances where the relevant child welfare authority determines, or a court orders or determines that, it would be in the best interests of that child.

6.4.6 Before making arrangements for the transfer of any detainee children into foster care, the foster carer's home must be made an alternative place of detention and the foster carers made Designated Persons.

6.4.7 Detention Operations Section should either itself approve alternative places of detention and Designated Persons or be consulted prior to such approval.

6.4.8 A copy of all approval instruments should be sent to Detention Operations Section where they are maintained in a central register.

6.4.9 In the case of unaccompanied minors, when a foster carer is approved as a Designated Person, and the foster carer's residence approved as a place of detention, the delegate making the decision must inform the relevant State or Territory child welfare authority.

6.4.10 The school that detainee children in foster care are to attend also needs to be approved as an alternative place of detention and principals and teachers at the school made Designated Persons (see 7.1 below).

6.4.11 While the details of foster care may vary, broadly speaking, DIMIA's role and responsibilities include:

- approving places of immigration detention;
- ensuring that Designated Persons (eg. foster carers) are assigned to the detainees as required;
- maintaining and meeting the ultimate duty of care to all detainee minors;
- any compliance action that is required should a detainee minor abscond;
- advising the relevant child welfare authority of any change of visa status of a detainee minor;
- liaising regularly with the State or Territory authority that has responsibility for the foster care arrangements; and
- on-going monitoring of the welfare of the child to fulfil the Commonwealth's duty of care.

6.5 Hotels and motels

6.5.1 Before moving a detainee to a hotel or motel, the hotel or motel must be approved as a "place of detention", and an officer (normally of the DSP) should be assigned to hold the detainee at all times.

6.5.2 A person may be detained in a hotel or motel room in a number of situations. These include but are not limited to the following.

Pregnancy

6.5.3 Pregnant women detained in Woomera or Christmas Island IDF are detained from the 36th week of pregnancy in a hotel or motel close to a hospital. Immediate family members may also be detained along with the expectant mother.

Unaccompanied minors

6.5.4 In cases where an unaccompanied minor arrives at an IDF that does not have suitable facilities for unaccompanied minors, such minors may be detained in a hotel or motel while transfer to an IDF that does have such facilities or to another alternative place of detention is arranged.

Women and children

6.5.5 In some States/Territories there are either no detention facilities or the facilities are not suitable for detaining women and children. In these cases unlawful non-citizen women and children may be detained in a hotel or motel on a short-term basis.

Emergency Short-term Detention

6.5.6 Unlawful non-citizens may also be detained in a hotel or motel for short periods when immediate transfer to an IDF or other place of detention is impractical. For example:

- the unlawful non-citizen is an unauthorised air arrival who arrived on a late flight and there are no airport detention facilities and it is impractical to transfer them to an IDF;
- the unlawful non-citizen is detained in a town where there is no IDF (and detention in, for example, a police station is impractical); or
- the unlawful non-citizen is temporarily transferred from an IDF for a specific purpose. For example, a detainee may be detained at Baxter IDF, and transferred for one or two nights to Melbourne for the purposes of a court appearance. In such a situation, detention for one or two nights at Maribyrnong may be impractical.

6.6 Community care

6.6.1 In certain circumstances detainees may be detained under arrangements made with community organisations.

6.6.2 In these cases, the accommodation facilities used must be approved as alternative places of detention and members of the community group made, in most circumstances, Designated Persons.

6.6.3 Community care may take a number of forms. In the main arrangements for community care will be made between responsible community care organisations and DIMIA.

6.6.4 Matters covered by these arrangements include:

- the standard of care provided to the detainee;
- responsibility for the cost of detaining and meeting the day-to-day care and needs of the detainee;
- assurances by members of the organisation that the privacy of the detainee will be maintained; and
- assurances by members of the organisation that they will ensure that the detainee will be available for processing and, if necessary, removal from Australia.

7 ALTERNATIVE PLACES OF DETENTION ATTENDED BY DETAINEES FOR PART OF THE DAY

7.1 Schools

7.1.1 DIMIA acknowledges that for many detainee children in IDFs or alternative places of detention access to external schooling in the community is likely to be appropriate and beneficial, provided the requirements of the Act to detain unlawful non-citizens are met.

7.1.2 Agreement of relevant State/Territory education department, private education providers and/or external schools, public or private, will need to be negotiated before detainee children are able to access external schools.

7.1.3 DIMIA has finalised, or is currently negotiating, MOUs with a number of State Governments to this effect and DIMIA and DSP staff are required to act in accordance with any MOUs or other formal arrangements between DIMIA and State/Territory education departments or private education providers.

7.1.4 To ensure that detainee children remain "in detention" when they attend school, the school that they attend must first be approved as a place of detention, in accordance with **paragraph (b)(v)** of the Definition.

7.1.5 Further, the school must be able to provide a sufficient number of teachers to be made as Designated Persons.

7.1.6 These Designated Persons can accompany the children when they leave the school premises, for example to go on excursions, so that the detainee children can participate as much as possible in normal school activities.

7.1.7 Detention Operations Section should either itself approve schools as alternative places of detention and make school principals and teachers as Designated Persons, or should be consulted prior to these being approved or made by DIMIA officers in State offices or IDFs with the delegations to do so.

7.1.8 A copy of all approval instruments should be sent to Detention Operations Section where they are maintained in a central register.

7.1.9 It is also necessary that detainee children remain in detention while travelling to and from school. That is, detainee children must be accompanied by an officer, a Directed Person or a Designated Person while travelling between their "normal" place of detention and the school.

7.1.10 Participation of detainee children I community schooling will be based primarily on:

- the length of time a school age child has been, or may be expected to be, in detention;
- assessment of both the particular children and the individual school facility to ensure that the requirement of the Act can be met;
- assessment of the child's socialisation, capabilities and abilities, including literacy in English and numeracy; and
- assessment of the capacity of a local school to meet the needs of such a child.

7.2 Medical facilities used for day procedures or treatment

7.2.1 In certain circumstances, detainees may require a day procedure or

treatment in a medical facility. In these situations the facility does not need to be approved as an alternative place of detention.

7.2.2 The detainee, however, must be accompanied for the duration of their stay by a DSP officer or, if under the supervision of a Directed Person, by that person.

Steve Davis
First Assistant Secretary
Unauthorised Arrivals and Detention Division

ATTACHMENT 1 - EXPRESSION OF INTEREST IN PARTICIPATING IN A RESIDENTIAL HOUSING PROJECT (RHP)

Name of interested person

_____

Marital status:

Single ☐
Married ☐
Divorced ☐
Widowed ☐

Details of other family members included in this expression of interest

Name	ID Number	Age (if under 18)	Gender (m/f)

Does anyone named on this form have an ongoing medical condition?

No ☐
Yes ☐

If yes, please give their name(s):

_____

Would any family members remain in a detention facility:

No ☐
Yes ☐

If yes, please give their name(s):

_____

_____

_____

_____

_____

_____

_____

_____

Why do you want to participate in this RHP

Terms and Conditions of Participation in the RHP

I understand that by signing this form I agree to abide by the conditions associated with participation in the RHP.

These conditions are that:

- I do not leave the boundary of the property without an officer accompanying me,
- I am sensitive to the needs and wishes of other participants, and
- I behave in a responsible manner.

I understand that the RHP is not a permanent arrangement.

I also understand that participation in this RHP is entirely voluntary and I may return to detention within an immigration detention facility at any time by alerting DIMIA or the Detention Services Provider of my wishes.

I understand that any behaviour that disrupts the RHP may result in immediate return to the immigration detention facility of those named on this form.

Signed

Date

ATTACHMENT 2 - RESIDENT FEEDBACK REPORT

RESIDENTIAL HOUSING PROJECT (RHP)

DIMIA encourages all residents to provide feedback to enable the RHP be accurately assessed and for the needs of the residents to be fairly considered and implemented where appropriate.

We value your suggestions and comments that you make as residents of the RHP

The information you provide on this form will in no way affect any applications you may have before the Department.

Name of Resident	Relationship to resident 1	Centre ID	Length of Residence in the RHP
1			
2			
3			
4			
5			
6			
7			
8			

What do you like most about living in the RHP

What have you found difficult about the Housing Project?

How could any difficulties be resolved?

Are you satisfied with the amount of cultural, educational and recreational activities available to you and your family?

No ☐
Yes ☐

Could you provide some suggestions for further cultural, educational and recreational Activities.

Are you aware of the intention and location of the Complaints Box?

No ☐
Yes ☐

Do you have any further suggestions for improvement within the RHP?

Thank you for your thoughts and suggestions. They will be taken seriously and considered fairly.

Ms Davies (o/r) byr.
RR

Human Rights and Equal Opportunity Commission

The Hon Philip Ruddock MP
Minister for Immigration and Multicultural and Indigenous Affairs
Suite MF 40
Parliament House
CANBERRA ACT 2600

Dear Minister

HREOC officers have recently completed a fact finding mission to Woomera IRPC, pursuant to the current Inquiry into Children in Immigration Detention. I would like to acknowledge the assistance the officers received during their visit from DIMIA officials as well as ACM staff.

The full Commission has now met and considered the report of the officers. Their fact finding was extremely thorough, it extended over five days, and included the collection of appropriate photographic material and interviews with asylum seekers. Among those interviewed were children, children with their family, parents, single men and women; in all, eleven families were interviewed and approximately twenty children. In addition, several hours were spent speaking to asylum seekers in Oscar compound, amongst others, which as you are aware houses long-term and "difficult" detainees.

The officers also spoke with the DIMIA Business Manager, the ACM Centre Manager, as well as the following ACM staff: Director of Programs, Medical Services Co-ordinator, Medical Officer, ACM officers (including an ACM officer responsible for UAMs), Activities Officer and Psychologist.

The Commission believes that the information provided to it from the inspection was wide ranging and balanced, permitting it to form an informed assessment of current conditions at Woomera IRPC, particularly as they relate to children and by extension, children and their families. Based on the evidence provided to it, the Commission has concluded that there have been breaches of the Convention on the Rights of the Child, to which Australia is a signatory.

SUMMARY OF OFFICERS' FINDINGS

Ambience of Despair
HREOC officers report that Woomera IRPC is now enveloped in a self-reinforcing miasma of despair and desperation. Despite the difficult physical conditions of heat, harsh terrain (both within the IRPC and without) and isolation, these issues no longer form the basis of complaint

by asylum seekers. Ironically most adults seem resigned to these hardships and generally expressed only minor complaints about security staff and conditions in general.

The wide-spread sense of despair encountered by Commission officers appears instead to result from an impression that their situation is completely hopeless, due in turn to the length of processing time and concomitant uncertainty over status. Officers were advised that detainees were not kept informed of their progression through the application and appeal process and indeed poor access to media information has meant they are generally unaware of relevant international events. In this context the Commission notes with concern that average processing time at the IRPC has now deteriorated to seven months. These psychological tensions are occurring against a backdrop of the physical disturbances of last November with their associated fire and property destruction, culminating in the current round of hunger strikes and acts of self-mutilation.

This is not an appropriate environment for children.

Whilst there might be disagreement as to who should ultimately take responsibility for this state of affairs, the Government and its policy of mandatory detention or asylum seekers attempting to force the Government's hand, we believe that notwithstanding this, the Government can only gain by taking a small incremental step forward and removing children from this deeply scarifying environment.

That children are suffering psychological trauma from these experiences would seem beyond doubt. The official statistics provided to HREOC officers by ACM indicated the following occurring over a two week period:

Lip sewing	5 children (one 14 year old sewed his lips twice)
Slashing	3 children (the above child also slashed "freedom" into his forearm)
Ingestion of shampoo	2 children
Attempted hanging	1 child
Threats of self hurt	13 children

This is a significant proportion of the total child population at the Centre of 236, and would seem to indicate that, not unsurprisingly, children are responding to the atmosphere of despair in which they live. It is self-evident that manifestations such as these are likely to permanently mark the psychological outlook of these children. HREOC officers and SA Department of Family and Youth Services found no evidence of parents encouraging children to engage in acts of self harm.

Interviews by HREOC officers with children produced the following responses:

Interview 1 (12 year old girl)
"I am getting crazy, I cut my hand. I can't talk to my mother. I can't talk to anyone and I am very tired. There is no solution for me – I just have to commit suicide – there is no choice."

Interview 2 (16 year old boy)
"I here for 6 months and if I stay one month or one and a half months more I go crazy."

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In response to the question: 'How do you find living in the Centre?"
His answer: "I think we might die here."

Interview 5 (13 year old boy - quote from family member)
"We notice that while he sleeps he talks and screams: "fire, fire, fire", and jumps up from sleep in nightmares... We ask him to go and bring a book and he forgets about that and when he is walking he walks disordered and is not concentrating."

SCHOOLING OPPORTUNITIES

The HREOC officers also observed that despite ACM's efforts to provide schooling opportunities for the children, this is confined to those aged twelve and under, and is not comparable to the education received by Australian twelve year olds. For example all children, despite their first language, are taught in the one classroom. Education is provided for a total of two hours a day, four days a week. There is virtually no schooling for older children, and this is another concern.

In this regard, Article 28 of CROC states: *"State parties recognise the right of the child to education."*

CONCLUSION

Breach of CROC
Based on the evidence referred to above, the Commission is unanimously of the view that Woomera IRPC places the Commonwealth in breach of its obligations under the Convention on the Rights of the Child, particularly (but not restricted to) with regard to Article 19(1) *"State parties shall take all appropriate legislative, administrative, social and educational measures to protect the children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, whilst in the care of legal guardian(s) or any other person who has the care of the child."*

Minister, the Commission appreciates that you are aware of the Government's obligations under CROC. We are sure that you have given appropriate consideration to the Government's position concerning Articles 6(2); 22(1); 24; 27; 31; 37(c); 39 and most particularly 37(b) which states: *"..... Detention shall be used only as a measure of last resort and for the shortest appropriate period of time."* with particular emphasis to Woomera.

We realise that release from detention of children and families would have wide ranging ramifications for your policy of mandatory detention and we are prepared to work with you in an effort to ensure an orderly transition and in particular, to provide better protection for the children in your care.

It might be possible, for example, for all children presently housed at the Centre to be placed, with either their mother or father in community-based group housing in Woomera, with

regular access to family remaining in the Centre. We welcome the housing trial and your reported comments that the trial appears to have been a success and that you intend to extend it. We would also recommend that wherever possible, uncertainty for detainees (and therefore the children of detainees) be reduced by at least regularly updating applicants for refugee status of their progress.

Woomera IRPC provides the Government with an opportunity to establish a new international benchmark in promoting the future of children who have arrived on our shores.

The Commission is ready at any time to enter into discussions with you on this matter. As you would be aware, the Human Rights Commissioner fulfils a long-standing engagement to address the National Press Club on Wednesday February 6, 2002. As part of his preparation for this event, he has pre-arranged a general briefing from senior DIMIA officers to ensure that the facts included in the speech are accurate. Any response to this letter and any message concerning Woomera you feel might be appropriate will be given very careful consideration.

Yours sincerely

Alice Tay
President

Dr Sev Ozdowski OAM
Human Rights Commissioner

1 February 2002

[redacted] s 22

0202/00517

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To [redacted] s 22 | From [redacted] s 22

Co./Dept. PM&C | Co.

Phone # | Phone # [redacted] s 22

Fax # [redacted] s 22 | Fax #

Human Rights and Equal Opportunity Commission

☐ Priority B ☐ Priority C ☐ Intervention ☑ Brief to Minister ☐ Reply by Parl Sec ☐ Brief to Parl Sec ☐ Reply by COS

RECEIVED 4 FEB 2002

☐ Reply by DIMA ☐ Information ☐ Reply by PM&C ☐ Dept Action/Elec Sig

Action Area DETENTION POL.

Init 4/2/02

Date

The Hon Philip Ruddock MP
Minister for Immigration and Multicultural and Indigenous Affairs
Suite MF 40
Parliament House
CANBERRA ACT 2600

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Website: http://www.humanrights.gov.au ABN 47 996 232 602

-4 FEB 2002

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Yours sincerely

Alice Tay
President

Dr Sev Ozdowski OAM
Human Rights Commissioner

1 February 2002

IN CONFIDENCE

DRAFT

Prime Minister

HUMAN RIGHTS AND THE MANDATORY DETENTION OF ASYLUM SEEKERS

Reasons for proposed action

Advice has been requested on international human rights obligations applicable to the detention of asylum seekers.

Relevant treaties and obligations

Australia has an obligation to respect and apply to all individuals within its jurisdiction, those rights established by human rights treaties that it has ratified. In the context of the detention of asylum seekers (and children in particular), the principal obligations are those under the International Covenant on Civil and Political rights (ICCPR), the Convention on the Rights of the Child (CROC), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

The obligations established by these treaties that are most relevant to the detention of asylum seekers are set out at Attachment A. Whilst the obligations can be discussed in general terms, the rights exist in relation to individuals. A determination of whether Australia has violated any of its obligations would require an assessment of the obligation in the light of the circumstances of an individual detainee.

A principal obligation in relation to the policy of mandatory detention is the obligation to ensure that such detention is not arbitrary. [redacted s 42] [redacted s 42] Particular obligations apply to children in detention. These include importantly that in all actions the best interests of the child be a primary consideration. Also, a child must only be detained as a last resort and for the minimum period appropriate.

Australia has a margin of appreciation in relation to the implementation of its international human rights obligations. However, this margin of appreciation cannot be used to avoid Australia's obligations under international human rights law.

The implementation of human rights obligations

The rights guaranteed by human rights treaties are implemented in Australia by a combination of Commonwealth and State and Territory laws and policies and the common law. Where the implementation of treaty obligations requires a change to domestic laws, this can only occur through an Act of Parliament.

The framework for monitoring the implementation of human rights obligations

Domestic monitoring

Agencies administering the mandatory detention policy are responsible for ensuring that the administration does not contravene Australia's international law human rights obligations. Legal advice on compliance with those obligations may also be sought from time to time. Advice has previously been sought from the Australian Government Solicitor on a number of aspects of mandatory immigration detention.

The functions of the Human Rights and Equal Opportunity Commission (HREOC) include the conduct of inquiries into Australia's compliance with its international law human rights obligations. Other HREOC comments on the mandatory detention of asylum seekers are set out in Attachment B.

International monitoring

Each of the treaties mentioned above requires Australia to make periodic reports to monitoring committees on the implementation of Australia's obligations under the relevant treaties. The ICCPR and CAT also give individuals the right to lodge complaints about alleged violations of those treaties with the committee responsible for monitoring their implementation.

Committee comments relating to mandatory detention of asylum seekers are set out in Attachment B.

Recent criticisms

The President of the HREOC, Professor Alice Tay, and the Human Rights Commissioner, Dr Sev Ozdowski wrote to the Minister for Immigration and Multicultural and Indigenous Affairs on 1 February 2002, following an inspection of the Woomera immigration detention facilities. HREOC is of the opinion that the situation at Woomera places Australia in breach of its obligations under

CROC, particularly, (but not restricted to) article 19(1), which obliges State Parties to take all appropriate measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment maltreatment or exploitation, including sexual abuse. This opinion is based on what they describe as an "ambience of Despair" at the centre, the acts of self-harm witnessed by the children in the centre and the feelings of despair of some of those children.

The leader of the Australian Democrats, Senator Stott Despoja has recently provided the notes from a meeting she had with detainees at the Woomera centre to the Deputy Secretary General of the UN. These notes record detainee complaints of psychological problems caused by the length of detention and the non-processing of claims of Afghani asylum seekers, a lack of privacy, a lack of education for children, over-crowding and conditions at the centre.

DFAT to do separate paper.

In a communication about Australia's practice of mandatory detention for asylum seekers (*A v Australia*), the Human Rights Committee found that whilst the detention of asylum seekers is not arbitrary per se, detention should not continue beyond the period for which the State can provide appropriate justification. In that case, it found that the length of detention and lack of review rights meant that the detention of "*A*" was arbitrary. Australia informed the Committee that it did not accept its view that the detention of *A* was unlawful and arbitrary.

In its observations on Australia's 3rd and 4th Periodic Report under the ICCPR (24 July 2000), the Human Rights Committee the Committee concluded that mandatory detention of unlawful asylum seekers raised questions about compliance with the ICCPR's prohibition against arbitrary detention and recommended that Australia adopt alternative processes, and that Australia inform all detainees of their legal rights (including the right to legal representation). → see 256.

Suggested response

The question whether Australia is in breach of its international obligations would need to be examined in their application to individuals. Bearing in mind the general nature of the criticisms that have been made, it is proposed that the following statement be used by way of response. A similar form of response was used in relation to criticisms that the *Native Title Amendment Act* breached Australia's international obligations.

> " The Government does not accept that the detention of people that enter our country unlawfully is in breach of our international obligations. In our view it is reasonable to

detain such people pending a determination of their refugee status and the return to their country of origin of those found not to be refugees. Also it is consistent with the Refugee convention. It is particularly unfortunate that children are amongst those who arrive here unlawfully. Of course we are sensitive to the needs of these children and we are committed to ensuring their welfare consistent with our international obligations."

Attachment A

Australia's Human Rights Obligations and the Detention of Asylum Seekers

Protection against detention

Article 9(1) of the ICCPR provides that "No one shall be subjected to arbitrary arrest or detention". Similarly, article 37(b) of CROC provides that "No child shall be deprived of his or her liberty unlawfully or arbitrarily." Article 37(b) provides a further level of protection, however, in that it states that "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."

In a previous complaint about Australia's practice of detaining asylum seekers (*A v Australia*), the Human Rights Committee expressed the view that the detention of asylum seekers is not arbitrary per se. Rather, a determination of whether detention is arbitrary will depend upon an assessment of all of the circumstances of the particular case. Detention will not be arbitrary, if in the circumstances of a particular case, it is reasonable and necessary, appropriate, predictable and proportional to the ends sought. In "*A*", the Committee stated that "...detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period." The Committee found that the detention of *A* was arbitrary as Australia had not advanced any grounds to justify his continued detention. It also was of the view that the mandatory detention of asylum seekers 'raised questions of compliance' with particular articles of the ICCPR. Australia informed the Committee that it did not accept its view that the detention of *A* was unlawful and arbitrary.

s 42

s 42

s 42 [redacted]

Article 9(4) of the ICCPR provides a right for anyone deprived of their liberty to take proceedings before a court to determine the legality of that detention and order the release of the person if the detention is not legal. Likewise, article 37(d) of CROC provides that "Every child deprived of his or her liberty shall have the right to prompt access to legal or other appropriate assistance, as well as the right to challenge the legality of the deprivation of liberty before a court or other competent, independent or impartial authority...".

NEED INFORMATION FROM DIMIA ON CURRENT REVIEW PROVISIONS

Provisions dealing with the conditions of detention

Article 10 of the ICCPR provides that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

An assessment of the individual circumstances of detention would be required to determine whether article 10 has been violated. Both article 10 and article 7 of the ICCPR (see below) require proof of an additional exacerbating factor beyond the usual incidents of detention before they could be considered to be violated.

Provisions protecting against discrimination in relation to the recognition of human rights

Human rights treaties provide that States Parties must ensure the obligations created by them to all persons within the jurisdiction of the State, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national and social origin, property, birth or other status (ICCPR article 2(1) and ICESCR article 2(2)). The CROC contains a similar provision but uses the word "discrimination" instead of "distinction" (article 2(1)). The ICCPR also provides a protection against discrimination on the same grounds (article 26). A distinction will not constitute proscribed discrimination if it is based on criteria that are reasonable and objective and if the aim is to achieve a purpose that is legitimate under the relevant treaty.

s 42 [redacted]

s 42 [redacted]

Special protection for children

Article 3 of CROC provides that in all actions concerning children, the best interests of the child shall be the primary consideration. Determining what is in the best interests of the child will involve a consideration of the relevant circumstances of the child in light of the rights established by CROC. A determination on whether to detain a child and the conditions of that detention must involve a consideration of what is in the best interests of the child in light of rights such as the right to only be detained as a last resort and for the shortest appropriate time, the protection against discrimination, the right to be protected against physical and mental violence, the right of children to remain with their families, the right to education and other relevant rights.

Article 20(1) of CROC provides that a child temporarily or permanently deprived of his or her family environment shall be entitled to special protection and assistance provided by the State. Article 20(2) provides that States must ensure alternative care for such a child. Article 20(3) provides examples of alternative care. These include foster care, adoption or, if necessary, placement in an institution for the care of children.

Refugee children

Article 22 obliges States Parties to ensure that a child seeking refugee status or who is considered a refugee receive appropriate protection and humanitarian assistance in the enjoyment of the child's human rights.

Protection of the family

The treaties all recognise the family as the fundamental group of society and in need of special protection. s 42 [redacted]

s 42 [redacted]

- s 42 [redacted]

s 42

- [redacted]

Protection against violence

Article 19(1) of CROC obliges State Parties to take all appropriate measures to protect children 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 parents, legal guardians or any other person. This right is linked to the right to life and survival and development of the child in article 6.

Whilst article 19 is primarily focussed on inter-familial situations, it applies to all persons who have the care of a child and so would apply to the Government in so far as it is responsible for the care of children in immigration detention.

Protection against cruel, inhuman or degrading treatment

s 42

[redacted]

s 42 [redacted]

The right to education

Article 13 of the ICESCR recognises "the right of everyone to education" including compulsory and freely available primary education and "generally available" secondary education "in its different forms". Article 28(1) of CROC also provides for these obligations and imposes an additional obligation to "take measures to encourage regular attendance at schools."

Article 29 of CROC imposes obligations in relation to aims of education for children.

The Right to Health

Article 12 (1) of the ICESCR recognises the "right to everyone to the enjoyment of the highest attainable standard of physical and mental health." A similar right is provided in article 24(1). Paragraph 24(2)(b) of CROC provides that State Parties must take the appropriate measures to ensure the provision of "necessary medical assistance and health care to all children...". In addition, article 39 of CROC creates an obligation for States Parties to take all appropriate measures to promote the physical and physiological recovery of children who have been the victim of neglect, exploitation or abuse, torture, cruel, inhuman or degrading treatment or punishment or armed conflicts. This obligation exists in relation to children in Australia, regardless of where the neglect etc occurred.

Standard of living

Article 27 of CROC recognises the right of "every child to a standard of living adequate for the child's physical, mental spiritual, moral or social development."

Attachment B

Recent comments and criticisms of Australia's detention of asylum seekers by International Committees and HREOC

Human Rights Committee: Observations on Australia's 3rd and 4th Periodic Report under the ICCPR (24 July 2000)

- the Committee concluded that mandatory detention of unlawful asylum seekers raised questions about compliance with the ICCPR's prohibition against arbitrary detention
- the Committee recommended Australia adopt alternative processes, and that Australia inform all detainees of their legal rights (including the right to legal representation)

Committee on the Rights of the Child: Comments on Australia's First Report (October 1997)

- the Committee recommended that legislation and policy reform be introduced to guarantee that children of asylum seekers are reunified with their parents in a speedy manner, and that no child be deprived of their citizenship on any ground (regardless of the status of their parents)

Individual Complaint: Australia v A: Human Rights Committee (April 1997)

- this complaint related to alleged arbitrary detention of a Cambodian asylum seeker
- the Committee noted that there was no basis for the claim "that it is *per se* arbitrary to detain individuals requesting asylum" - however, the Committee ultimately found that the detention of the claimant in the particular circumstances violated the ICCPR

HREOC

- on 1 February 2002, HREOC wrote to Minister Ruddock and publicly on HREOC's fact-finding mission to the Woomera centre, and stated HREOC's view that the Woomera centre placed Australia in breach of its obligations under CROC

– HREOC stated: "Based on the evidence [arising from HREOC's visit to Woomera], the Commission is unanimously of the view that Woomera IRPC places the Commonwealth in breach of its obligations under the Convention on the Rights of the Child, particularly (but not restricted to) with regard to Article 19(1) "*State parties shall take all appropriate legislative, administrative, social and educational measures to protect the children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, whilst in the care of legal guardian(s) or any other person who has the care of the child*".

– HREOC cited 7 other provisions of CROC but did not indicate HREOC's view on whether those provisions had been breached

- on 28 November 2000, HREOC reported on a complaint by 2 Chinese asylum seekers in relation to the Port Hedland centre, and found that their complaints of breach of the ICCPR were established

- on 29 June 2000, HREOC reported that the treatment of the complainant (a Nigerian asylum seeker) violated the ICCPR

- on 12 May 1998, HREOC released its report on mandatory detention of unauthorised arrivals (*Those who've come across the seas: detention of unauthorised arrivals*) - HREOC concluded that the policy of mandatory detention violates international law