

# Chapter 1

## Introduction

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# 1. Introduction

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

*Father, Port Hedland, June 2002*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Terms of Reference are as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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### Endnotes

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

