

# Chapter 2

## Inquiry Methodology

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## 2. Inquiry Methodology

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

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

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

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

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

### 2.1 How did the Inquiry gather evidence?

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

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

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

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

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

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

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

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

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

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

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

## 2.1.2 Visits to immigration detention facilities

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

Visits were conducted as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

### **2.1.3 Public submissions**

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

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

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

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

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

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

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

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

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

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

### 2.1.4 Public hearings

The timetable of public hearings was as follows:

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

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



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

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

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

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

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

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

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

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

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

### 2.1.5 Focus groups and other interviews

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

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

The following focus groups were conducted:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Inquiry also explored four case studies in some detail.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### (c) Further written submissions

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

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

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

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

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

### 2.2.1 General approach to incorporating evidence

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

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

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

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

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

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

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

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

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

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

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

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

### 2.2.3 Selection and use of case studies

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

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

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

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

### 2.2.4 Context for analysis of the evidence

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

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

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

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

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

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

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## Endnotes

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

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