

Chapter 5

Mechanisms to Protect the Human Rights of Children in Immigration Detention

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

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

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

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

In particular, the following questions are discussed:

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

A last resort?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.3.1 A short history of the provision of immigration detention services

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9.2 Unaccompanied Minors

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

9.3 Infants and Young Children

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

9.4 Children

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

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

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

9.5 *Expectant Mothers and Infants in Detention*

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

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

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

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

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

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

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

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

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

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

The Department describes its monitoring objectives thus:

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

The IDS provided for monitoring and reporting as follows:

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

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

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

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

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

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

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

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

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

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

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

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

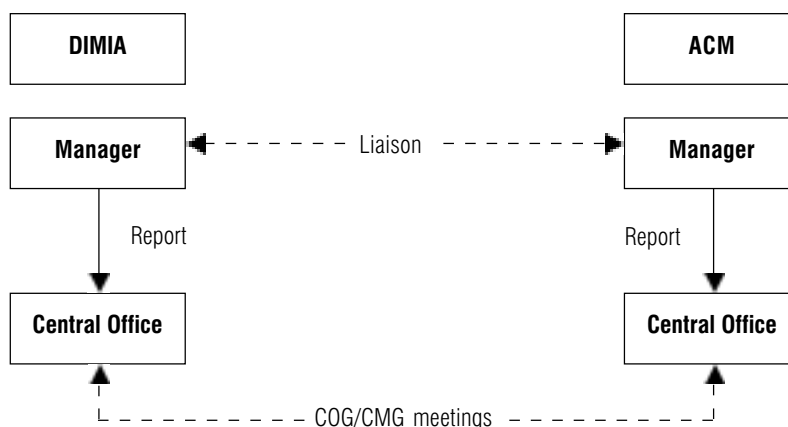
(a) General reporting

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

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

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

A last resort?



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

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

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

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

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

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

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

During the hearings the Department explained that:

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

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

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

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

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

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

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

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

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

A last resort?

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

DIMIA DEPUTY SECRETARY: Not specifically, no.³⁵

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

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

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

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

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

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

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

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

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

The Department did refer to certain measures that they have introduced to assist Department Managers, such as:

- a training program for staff in detention centres
- the Department Managers' Handbook and
- 'regular formal phone hook-ups with Centre Managers to go through particular issues, particular requirements, questions and so forth'.³⁸

The Department provided the outline of the training program it referred to, which was held in Canberra from 4-13 March 2002. That training overview included a component on the IDS but did not include any specific modules on what is meant by appropriate education, health care and recreation for children. It did refer specifically to the mandatory reporting requirements for suspected child abuse. It is unclear whether the March 2002 training session was the only one that has occurred.

The Department Managers' Handbook was also provided to the Inquiry and includes advice on a range of issues, such as 'Pregnancies and Confinement' and Memorandums of Understanding (MOUs) relating to tracing and child welfare. The index to that document includes chapters on education, unaccompanied minors and torture/trauma victims. Unfortunately, the Department had not, and has not yet written those child-specific chapters, so the Handbook was of no practical assistance on several of the issues that were most relevant to children.

The Department also referred to the Migration Act, Migration Regulations and its Migration Series Instructions (MSI) as important resources for its Department Managers.³⁹ However, while the Migration Act and Regulations may have provided guidance for immigration processing, they provided no guidance on the level of services that should have been provided to children in immigration detention. Furthermore, the first MSI that specifically related to children was issued only on 2 September 2002.⁴⁰ This MSI related to unaccompanied children and by 2 September 2002 there were only 13 unaccompanied children in detention, 12 of whom were in alternative places of detention. The MSI would have been more useful had it been issued in July 2001 when there were 121 unaccompanied children in detention. The Department explains this delay on the basis that:

The documentation is ... often finalised after the arrangements are established and, in fact, is enhanced by the practical issues that arise during its earlier implementation.⁴¹

A last resort?

While the phone hook-ups referred to by the Department may have been effective in practice, the Inquiry has been unable to assess the usefulness of that mechanism in the absence of documentation. However, as set out more fully in Chapter 14 on Unaccompanied Children, the Department did document 'Unaccompanied Minor Teleconferences'. These fortnightly meetings commenced soon after the announcement of this Inquiry, in December 2001. They appear to have been established to better monitor the needs of unaccompanied children by providing Central Office an opportunity to review the management plans created by ACM, and address any issues that may have confronted the Department Managers and Deputy Managers, as delegated guardians of the Minister. Those meetings later included discussion of children who were not unaccompanied children. This initiative was a step in the right direction in terms of ensuring that children were enjoying their rights, although there is some question as to their effectiveness, as discussed in Chapter 14 on Unaccompanied Children.

Given the difficulties facing the Department Managers it is perhaps unsurprising that their monthly reports varied in quality and detail. The Department explained that 'it may well be that a Centre Manager would view themselves as having already raised issues through the teleconference and therefore not needing to repeat them in their written report'.⁴² However, since those teleconferences were not minuted, it is the Inquiry's view that it would therefore have been appropriate to document any concerns regarding the care of children in the Manager reports. This would have facilitated closer monitoring and analysis of compliance with children's rights.

In summary, the general reporting system appears to have provided a general indication of some of the systemic problems in the delivery of services for children. However, it was not a reliable measure of whether the IDS requirements were being met or children were enjoying their rights under the CRC.

The weight to be placed on the Department Managers' reports was complicated by the fact that the Department simultaneously defended the ability of its Managers to fulfil a monitoring role and appeared to doubt their judgment. A combination of unclear requirements and performance measures in the IDS, and lack of expertise specific to the needs of children certainly raises concerns as to the ability of Department Managers to accurately monitor performance by ACM and compliance with human rights. It is unclear why the Department asked senior officials to perform this function without providing them with the specific training and guidance that would have made that monitoring more useful to the Central Office.

(b) Incident reporting

Unlike the general reporting system which was internal to the Department, the incident reporting system involved an information flow from ACM to the Department. The Department's submission states that the 'Services Provider is required to keep the Department fully informed of all aspects of service delivery through the provision of incident reports'.⁴³ Provision of incident reports was also one of the monitoring mechanisms specifically provided for in the IDS.

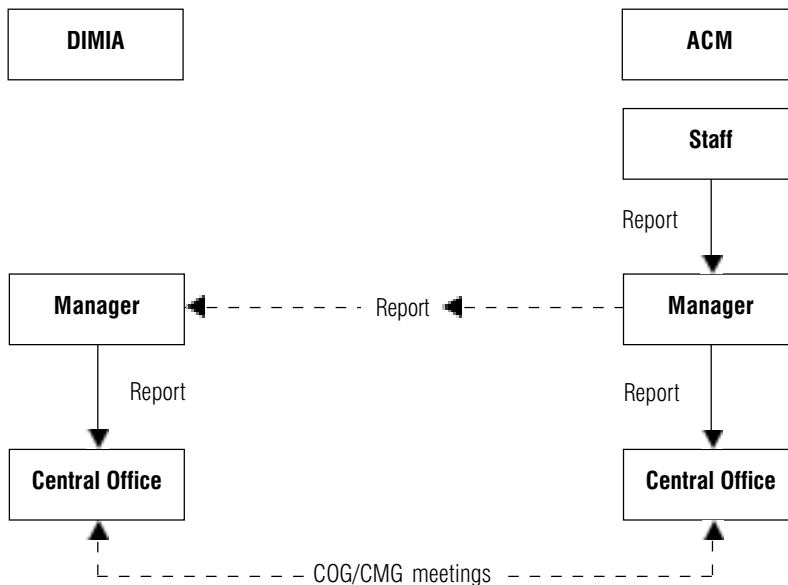
Mechanisms to Protect Human Rights

The IDS defined three types of incident that had to be reported to the Department:

- incident: variation from the ordinary day to day routine of a facility which threatens, or has the potential to threaten the good order of the facility...
- minor incident/disturbance: an incident or event which affects, but to a lesser degree than a major incident, the good order and security of the facility...
- major incident/disturbance: an incident or event which seriously affects the good order and security of the facility.

Each of the definitions listed examples and while none specifically mentioned children, they encompassed events involving children. For example, children were involved in medical emergencies, hunger strikes, self-harm and riots.

The diagram below represents the incident reporting system, with the qualification that in some instances information came directly from ACM staff or the ACM Manager to the Department Central Office, by-passing the Department's Manager.⁴⁴



The Department states that it did a monthly analysis of the incident reports in order to identify systemic issues.⁴⁵ The Department provided the Inquiry with examples of semi-annual (rather than monthly) trend analyses,⁴⁶ which noted where minors were involved in actual and attempted assault and self-harm. However, the Inquiry discovered that not all incident reports involving children were systematically tagged for special attention in the Department's record-keeping systems.

This became clear after the Inquiry issued a Notice on 18 July 2002 to the Department requiring the production of a range of incident reports that involved children.⁴⁷ In order to take account of the fact that the Department had only introduced an electronic database in 2001, the Notice was restricted to periods after that time.

A last resort?

However, the Department requested an extension of time on the basis that it could not be sure that all incidents involving children had been identified by the electronic system and it would therefore need to go through every child's individual paper file. This was because incidents involving both children and adults were not usually flagged and detention centres had 'some flexibility in classifying an incident'.⁴⁸

The Inquiry accordingly finds that, at least in early 2001 when the numbers of children in detention were very high, this document management system failed to place special priority on tracking incidents involving children.

Moreover, the Department itself has noted in its Manager reports that there were recurring problems regarding the quality and timeliness of incident reporting. Almost every Manager's report from mid-2001 until September 2002 for both Port Hedland and Woomera detention facilities raised inadequate reporting by ACM as an issue.⁴⁹ It was put to the Department that this revealed a systematic problem in relation to incident reporting that had not been properly resolved. The Department replied that on the contrary it proved that it was an important issue that they paid attention to:

Individual incident reports not provided on time or not being sufficiently comprehensive or where we've had to go back and ask for further information, those are all things that can happen and all things that we would discuss with the service provider because, as I say, we regard it as an important issue. So, as I say, the fact that it appears in numbers of Manager's reports I think simply points to the fact that this is something we have paid particular attention to.⁵⁰

Problems with incident reporting were also highlighted in the Flood Report into immigration detention procedures in February 2001.⁵¹ The Commonwealth Ombudsman has also made a number of suggestions to the Department about improving the incident reporting system in the context of investigation of complaints.

Given that many incidents involve threatened or actual violence, from the Inquiry's perspective, it is difficult to see how the Department could be confident that children were being protected in the manner to which they are entitled if the system that it relied on for information was, in Department's full knowledge, consistently faulty. The Department rejects this assertion on the basis that there were a range of other monitoring mechanisms.⁵² The Inquiry's view of the quality of those other mechanisms is discussed above, and throughout this report.

5.3.5 What mechanisms were in place to prevent and remedy breaches of children's rights?

The Department has acknowledged that there were weaknesses in the ability of the monitoring system to predict and prevent serious harm to children. The Department also acknowledges that its monitoring systems failed to predict the occurrence of certain events:

INQUIRY COUNSEL: And would you agree with this general proposition that in the past at least the Department has not been able to adequately

anticipate problems in these facilities before they arise, at least through these reports and monitoring system?

DIMIA DEPUTY SECRETARY: Well, I'm certainly aware of numbers of problems that have arisen that we didn't predict before they arose. Whether it's correct to say that it's not possible or that we were not able to in every situation I don't think – that's not, as a proposition, something I'd agree to. I think there are examples where we've sort of identified things that might happen and tried to take action and indeed the service provider has as well tried to take action to manage or ameliorate or prevent those things happening. So, as I say, I'd agree that there are times when it hasn't been possible but I think there are times when we've also identified things and looked to resolving them.⁵³

When the monitoring system did identify current or ongoing problems it was incumbent on the Department to remedy those issues immediately to avoid continuing breaches of the CRC. The contract between the Department and ACM provided for quarterly Performance Linked Fee Reports which reviewed ACM's performance against the IDS. The Department could add or deduct merit points which were then translated into a financial reward or penalty.

ACM provided copies of the Performance Linked Fee Reports from March 2000 – December 2001. As at 16 September 2002, the Department had not yet provided ACM with the Performance Linked Fee Reports for the first, second or third quarters of 2002. It is difficult to see how these reports can be an effective mechanism to protect children in detention if they were over six months behind.

In any event, the contractual relationship between ACM and the Department is only of concern to this Inquiry to the extent that the Department relied upon ACM to acquit its human rights responsibilities to children. The Inquiry takes the view that where a breach was identified, the Department's first priority should have been to ensure that circumstances were rectified so that children could enjoy their rights. If ACM failed to meet its contractual obligations the Department could and should have imposed contractual penalties. However, ongoing contractual disputes did not excuse the Department from immediately addressing situations resulting in the breach of children's rights.

For example, as is discussed in Chapter 12 on Education, in mid-2001 at Maribyrnong IDC, the Department Manager expressed serious concern about the level of education being provided to two children detained at the centre.⁵⁴

In the July 2001 report, the Department Manager stated that the children were not 'receiving educational programs appropriate to their age and abilities'⁵⁵ since their arrival at Maribyrnong in March 2001. The Manager further reported that despite the fact that the Department had arranged for the children to attend a school in Victoria, 'ACM declined to enrol the children on the basis that the cost was too great'.⁵⁶ The Department has asserted that while discussions regarding payment were going on the children could access the ACM education programs.⁵⁷ However, it is clear that the Department Manager did not believe that the internal schooling was adequate to meet the children's needs.

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Even ignoring the fact that it took from March to July 2001 for the Department Manager to report her concerns about education, it is unacceptable that the Department did not ensure that the children were receiving adequate schooling while the issue of payment was being settled. One of the children in question was released in September 2001 without having attended an external school.

International human rights law is blind to contractual disputes. However, it appears that the contract itself also failed to identify this episode as a serious problem as there were no financial penalties imposed for this event in the Performance Linked Fee Reports.

The Department urged the Inquiry to be mindful of 'the very real challenges that faced the Department when large numbers of unauthorised boat arrivals came to Australia'.⁵⁸ While the Inquiry understands that there may have been pressures on the Department, they were pressures that might have been foreseen given the ten-year history of mandatory immigration detention. Furthermore, growing numbers of detainees did not excuse the Department from implementing measures that ensured performance of the human rights obligations owed to children while in detention. It is difficult to see how the Department could have been sure of compliance in the absence of close monitoring and documentation.

5.4 How are children's rights protected by State authorities?

Immigration detention facilities are Commonwealth property and children in immigration detention are the primary responsibility of the Commonwealth. While the Department has sought to rely on State authorities for the provision of some services to children over the last three years, the Department rightfully acknowledges that, 'the involvement of relevant authorities in no way diminishes the Department's duty of care responsibilities' towards children.⁵⁹ The Department also states that 'these services strengthen the Commonwealth's ability to meet its responsibilities, particularly in the case of children in detention, by ensuring that decisions made in the facilities take account of all relevant information and advice from experts in that field'.⁶⁰

Nevertheless, the relationship between the Department and State authorities has been somewhat haphazard. On the one hand, the Department states that '[c]ooperative and collaborative relationships with relevant State/Territory authorities are essential to the effective and accountable management of detention facilities'.⁶¹ On the other hand, the Department appears to have been extremely slow to enter into memoranda of understanding that would have facilitated the provision of State-based services to children in immigration detention.

For instance, the Department acknowledges that 'State child welfare authorities have a legislative responsibility to ensure the safety and well-being of children is protected and, as required, provide expert advice and assistance'.⁶² However, the Department only commenced discussing Memoranda of Understanding (MOUs) with State authorities in early 2001, following the recommendations of the Flood Report.⁶³

While the Department has stated that the MOUs simply represent the 'formal representation of the cooperative and collaborative working arrangements', rather than the commencement of those relationships, the Flood Report made it clear that there were significant problems in those informal relationships.⁶⁴ In any event, the MOU that was eventually signed by the Department and the South Australian Department of Human Services (DHS) made it clear that DHS acts in an advisory capacity only, with the result that the Department has the discretion to disregard the advice of State authorities when it is given.

For example, DHS gave the following evidence:

MS McNEIL (DHS): ... Immediate safety recommendations are implemented on most occasions. It is the broader recommendations which include external people with expertise such as STTARS [Survivors of Torture and Trauma Assistance and Rehabilitation Service] being involved to provide counselling, the broader assessments and mental health involvement of external agencies, programming around recreation activities, vocational education, employment and training within the centre for both adults and young people to, I guess, fill their days. Again broader recommendations around parenting support and education, broader recommendations about transition into the community planning such as: this is how you apply for a job; this is how you find where a car is in the newspaper if you need to purchase one on your release; life skills ...

MR HUNYOR (INQUIRY COUNSEL ASSISTING): So if the broader recommendations that you have been giving to ... DIMIA had been followed, your evidence is that the incidence of child abuse and alleged child abuse would have decreased significantly?

DHS: Definitely.⁶⁵

This issue is discussed in greater detail in Chapter 8 on Safety and Chapter 9 on Mental Health.

5.5 Summary of findings on mechanisms to protect the human rights of children in immigration detention

Australia is required under the CRC to protect children's rights through all three arms of government: the courts, legislature and the executive.

Australia's Federal Parliament has provided for a system of mandatory immigration detention through the enactment of certain provisions of the Migration Act, Migration Regulations and the IGOC Act. The Inquiry examines those provisions throughout this report in order to assess whether they comply with the CRC and ICCPR.

The role of courts to (a) review whether the Commonwealth's administration of that legislation complies with the rights of children in detention, and (b) provide children with a remedy for any such breach is limited by a combination of two factors: first, the legislature's consistent efforts to restrict the circumstances in which review of the legality of detention may occur; second, the absence of specific legislation setting out the minimum standards of treatment for children in immigration detention.

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Similarly, this Commission's ability to enforce human rights obligations is limited. The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) does not give the Commission the power to enforce remedies upon finding breach of human rights under the CRC or ICCPR.

The Department, on behalf of the Commonwealth Executive, has the primary responsibility for ensuring that the requirement under the Migration Act to detain all unlawful non-citizens is administered in accordance with the CRC. The Department, in turn, has hired a private services provider, ACM, to assist in fulfilling those obligations.

The Department's contractual arrangements with ACM to provide services to children in immigration detention between 1998 and 2003 forms a fundamental part of the framework examined by the Inquiry. However, the Department was ultimately responsible for ensuring that ACM's performance under the contract did not breach the rights of children. Thus, in the event that the terms or performance of the contract were inadequate to ensure the protection of the rights of children, it was the responsibility of the Department, rather than ACM, to rectify the situation. It was therefore extremely important that the Department had monitoring systems focussed on identifying, preventing and remedying any breaches of children's rights under the CRC regarding children in immigration detention.

The Inquiry finds that the contractual expression of ACM's responsibility towards detainees – the IDS – did not fully encapsulate the Department's obligations towards children under the CRC. Therefore, while the contractual framework was not inconsistent with Australia's human rights obligations *per se*, in many cases even compliance with the contract may have been insufficient to satisfy the Commonwealth's human rights obligations to children.

However, even if the IDS sufficiently embodied children's rights under the CRC, the monitoring documents available to the Inquiry suggest that the neither the general nor the incident reporting mechanisms in place were a reliable measure of compliance with those contractual obligations. For example the Department Manager reports over the period of the Inquiry lacked detail and inadequately focussed on the care provided to children. There were also recurring problems regarding the quality and timeliness of incident reports. It follows that the primary written reporting mechanisms did not place the Department in a good position to identify breaches of contract or any gaps between contractual compliance and compliance with the CRC.

The Department states that much of the monitoring occurred by phone. The Inquiry is not in a position to assess the quality of that monitoring because it was not documented. The Inquiry notes, however, that given the importance of ensuring the appropriate protection of children, such monitoring mechanisms should have been more comprehensively recorded.

The Department states that it also relied on State child welfare authorities to assist in protecting the rights of children. The interactions between State authorities and the Commonwealth are more fully addressed throughout this report. However, the

Inquiry notes that formal arrangements with State authorities are still being negotiated in a variety of areas.

The following chapters examine how children's specific rights under the CRC were protected in practice taking into account the laws, executive practices and contractual arrangements described in this chapter.

Endnotes

- 1 DIMIA, Submission 185, p13.
- 2 *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J.
- 3 Kids in Detention Story, Submission 196, Law Section, pp35-37.
- 4 In the first civil court case pursued by ex-detainees, on 27 October 2003 Shayan Badraie and his parents filed proceedings in the NSW Supreme Court against the Australian Government, seeking damages for alleged physical and psychological injury arising from his immigration detention. Shayan's treatment in detention is discussed as a case study at the end of Chapter 8 on Safety.
- 5 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p40.
- 6 DIMIA, Submission 185, p21. See also DIMIA, Submission 185, p33 which acknowledges the Commonwealth's 'duty of care for each and every person in immigration detention and, beyond the individual, for ensuring the safety and welfare of all detainees in a detention facility'.
- 7 DIMIA, Submission 185, p33.
- 8 The Department disagrees that any gap might exist. DIMIA, Response to Draft Report, 19 May 2003.
- 9 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p50.
- 10 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p5.
- 11 The IDS were developed in consultation with the Commonwealth Ombudsman's office. See DIMIA, Submission 185, p34.
- 12 See generally DIMIA, Transcript of Evidence, Sydney, 2 December 2002, pp48-52.
- 13 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p51.
- 14 See also DIMIA, Submission 185, p3.
- 15 IDS, 1998, paras 9.2, 9.3, 9.4, 9.5, www.immi.gov.au/detention/det_standards.htm.
- 16 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p51.
- 17 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p50.
- 18 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p49. The Deputy Secretary of the Department also stated that the revised IDS, which will become part of the new contract, seek to be more precise in 'bringing together the various elements that I regard at the moment as being spread through various aspects' of the current contract. DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p50.
- 19 DIMIA, Submission 185, p36.
- 20 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p6. See further Chapter 14 on Unaccompanied Children which discusses the introduction of various monitoring mechanisms.
- 21 DIMIA, Submission 185, p37; DIMIA, Monitoring and Audits of Detention Service Delivery Conducted July 2001-July 2002, August 2002, (N1, Q2, F3).
- 22 DIMIA, Letter to Inquiry, 23 August 2002, p2.
- 23 On 18 July 2002, the Inquiry required the production of all reports 'created by or on behalf of the Department's Manager of the relevant Detention Centre regarding performance review and monitoring of ACM, for each Detention Centre in the period 1 January 2000 – 30 June 2002'. It then issued a subsequent Notice on 24 October 2002 to provide all reports until September 2002. The Inquiry also issued a Notice requiring the production of certain incident reports (N1, N3, N4).
- 24 See Chapter 14 on Unaccompanied Children regarding the Unaccompanied Minor Teleconferences.
- 25 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p6.
- 26 DIMIA, Submission 185, p37. See also DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p59.
- 27 DIMIA, Letter to Inquiry, 9 August 2002, Attachment 1.
- 28 These assessments are also called 'Performance Linked Fee Reports'.

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- 29 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p69.
- 30 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, pp66-67.
- 31 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, pp66-70.
- 32 DIMIA, Response to Draft Report, 19 May 2003.
- 33 DIMIA, Transcript of Evidence, Sydney, 5 December 2002, p16; DIMIA, Transcript of Evidence, Sydney, 4 December 2002, p67 and p86.
- 34 DIMIA, Transcript of Evidence, Sydney, 5 December 2002, p63.
- 35 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p54.
- 36 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p47. See also DIMIA, Response to Draft Report, 19 May 2003.
- 37 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, pp44-45.
- 38 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p54.
- 39 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p55.
- 40 DIMIA, Migration Series Instruction 357, Procedures for unaccompanied wards in immigration detention facilities, 2 September 2002.
- 41 DIMIA, Response to Draft Report, 19 May 2003. See further Chapter 6 on Australia's Detention Policy and Chapter 14 on Unaccompanied Children regarding the implementation of measures to assist unaccompanied children.
- 42 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p66.
- 43 DIMIA, Submission 185, p37.
- 44 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, pp58-59.
- 45 DIMIA, Submission 185, p37.
- 46 DIMIA, Letter to Inquiry, 29 January 2003, Attachment A. The question on notice during the Inquiry's hearings asks for copies of all trend analyses. Transcript of Evidence, Sydney, 2 December 2002, p61.
- 47 See further Chapter 2 on Methodology.
- 48 DIMIA, Response to Draft Report, 19 May 2003.
- 49 DIMIA Port Hedland, Manager Reports, July to September 2001, October 2001, November 2001, March 2002, April 2002, June 2002, May 2002, (N1, Q3a, F5), July 2002, September 2002, (N4, Q1, F1); DIMIA Woomera, Manager Reports, August 2001, September 2001, November 2001, December 2001, January 2002, February 2002, March 2002, April 2002, June 2002, (N1, Q3a, F5), July 2002, August 2002, September 2002, (N4, Q1, F1).
- 50 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p64.
- 51 Philip Flood AO, Report of Inquiry into Immigration Detention Procedures (Flood Report), February 2001, pp26, 42. The Flood inquiry was an independent inquiry set up by the Minister for Immigration and Multicultural Affairs to examine and report to the government on detention procedures, in particular the procedures followed concerning an allegation of sexual abuse of a 12-year-old boy at Woomera in March 2000. In that case Flood found that the formal provision of an incident report to the DIMA Central Office was not followed in respect of a medical report by a nurse. One of Flood's recommendations was that the Department should introduce more systematic procedures for the assessment of incident reports and take steps to address the current variation in the quality and substance of matters being reported across immigration detention centres and the coverage of follow-up action.
- 52 DIMIA, Response to Draft Report, 19 May 2003.
- 53 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, pp78-79.
- 54 See section 12.5.4 in Chapter 12 on Education.
- 55 DIMIA Maribyrnong, Manager Report, July 2001, (N1, Q3a, F5).
- 56 DIMIA Maribyrnong, Manager Report, July 2001, (N1, Q3a, F5).
- 57 DIMIA Deputy Secretary, Comments on Transcript of December 2002 Hearing, 19 March 2003.
- 58 DIMIA, Response to Draft Report, 19 May 2003.
- 59 DIMIA, Submission 185, p50
- 60 DIMIA, Submission 185, p50.
- 61 DIMIA, Submission 185, p50.
- 62 DIMIA, Submission 185, p50.
- 63 DIMIA, Submission 185, p91.
- 64 DIMIA, Submission 185, p92; Flood Report, February 2001, pp36-37.
- 65 DHS, Transcript of Evidence, Adelaide, 1 July 2002, pp81-83.